

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
John D. McLeod, Administrative Law Judge

Unpublished Op. No. 2013-UP-056 (S.C. Ct. App. filed Jan. 30, 2013)

Appellate Case No.: 2013-000686

William Lippincott,

Petitioner,

v.

South Carolina
Department of
Employment and
Workforce and Wal-
Mart Associates, Inc.,

Respondents.

RETURN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Debra S. Tedeschi
S.C. Bar # 15307
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395
Attorney for Respondent SC DEW

Other Counsel of Record:
Susan J. Firimonte
S.C. Legal Services
320 S. Coit Street
Florence, South Carolina 29501
(843) 413-9500
Attorney for Petitioner

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S.C. SUPREME COURT

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PETITIONER'S QUESTIONS PRESENTED:

1. Did the Court of Appeals err in failing to find that Petitioner was denied a fair hearing when the burden of proof was shifted to Petitioner to prove he was not discharged for cause?
2. Did the Court of Appeals err in failing to find it a violation of due process to allow employer's statements and documents to be made part of the record in this matter when said documents were never provided to Petitioner or even entered into the record at the hearing?
3. Did the Court of Appeals err in failing to find that a denial of unemployment benefits on the basis of an employee's entrance into a PTI program alone was in violation of the statute requiring that the alleged conduct be related to work?

RESPONDENT'S COUNTER-STATEMENT OF QUESTIONS PRESENTED:

1. Did the Court of Appeals correctly find that Petitioner was not denied a fair hearing and was not deprived of due process?
2. Did the Court of Appeals correctly find the substantial evidence supports SCDEW's decision that Petitioner was discharged for cause connected to employment because it was undisputed that Wal-Mart discharged Petitioner after he was criminally charged with accessory before the fact to theft and entered into a PTI program as a result of the criminal charge?

INTRODUCTION

Respondent, the South Carolina Department of Employment and Workforce (SCDEW) opposes Petitioner's Petition for a Writ of Certiorari from the Court of Appeals' Unpublished Opinion, *Lippincott v. SCDEW*, No. 2013-UP-056 (S.C. Ct. App. filed Jan. 30, 2013).

In its Unpublished Opinion, the Court of Appeals affirmed an Order of the Administrative Law Court (ALC) which upheld SCDEW's final administrative decision disqualifying Petitioner from receiving 14 weeks of unemployment benefits.

No "special or important reasons" exist to support granting the Petition for a Writ of Certiorari. Rule 242(b), SCACR. The Court of Appeals addressed the questions raised by Petitioner and rejected Petitioner's claims that: (1) he was denied a fair hearing because the burden of proof was shifted to him; (2) the ALC's decision was based solely on improper hearsay evidence; and (3) the substantial evidence did not support the decision that he was discharged for cause connected to employment.

Both the ALC and the Court of Appeals have found substantial evidence supports the SCDEW's decision that Petitioner was discharged for cause. Certiorari should not be granted solely for the purpose of reviewing the sufficiency of the evidence yet again by this Court.

The issues raised by Petitioner fail to meet the standards for granting a Writ of Certiorari pursuant to Rule 242(b), SCACR. For example, there is **no**: novel question of law; dissent in the decision of the Court of Appeals; conflict with a prior decision of the Supreme Court; or substantial constitutional issue directly involved in this case. *Id.*

Both the ALC and the Court of Appeals have ruled correctly that the SCDEW Appellate Panel's decision is supported by substantial evidence and there are no errors of law. Therefore, this Court should deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The salient facts in this matter, as the Court of Appeals noted, are undisputed.

Respondent Wal-Mart Associates, Inc. (Wal-Mart) employed Petitioner as a sales associate. Wal-Mart terminated Petitioner in January 2011 after management became aware of his criminal arrest for accessory before the fact to theft and his enrollment in a pre-trial intervention (PTI) program. At the hearing before SCDEW's Appeal Tribunal, Petitioner admitted he drove two people to "steal some copper."¹ (R.p.33). Wal-Mart had an "Arrests and Convictions" policy which provided for termination upon an employee's entrance into a deferred prosecution program, such as PTI. (R.p.46). This policy applied when the criminal conduct was considered job-related, i.e., if the conduct indicated that the sales associate is "unfit to continue working in his/her position."

After his termination, Petitioner filed for unemployment benefits. SCDEW found he was disqualified from receiving benefits for 14 weeks because he had been discharged for cause pursuant to S.C. Code Ann. § 41-35-120(2). The Appeal Tribunal affirmed this finding, and the Appellate Panel likewise affirmed the 14-week disqualification. (R.pp.14-16, 21-22). The Appellate Panel specifically stated the following:

A careful reading of the employer's policy shows that the [criminal] arrest does not have to occur on the job or in the performance of an associate's duties. The connection to the work is that the nature of the crime is such that it could possibly jeopardize the employer's business if an individual had participated in a crime where like behavior could manifest itself in the workplace. The employer's policy gives theft as an example. Such a proposition is the nexus between the arrest and the workplace.... [T]his Appellate Panel finds the policy reasonable. [Petitioner's] actions demonstrated a disregard for the standard of behavior the

¹ Petitioner was on vacation at the time.

employer had the right to expect of him. Therefore, we find the claimant was discharged for cause connected with the employment.

(R.p.15).

Petitioner thereafter appealed to the ALC, and the ALC affirmed. The ALC found that Wal-Mart “has an interest in employing Sales Associates who refrain from helping other attempt to steal.” (R.p.7).

Petitioner appealed yet again. After oral argument, the Court of Appeals affirmed in an unpublished decision. The Court of Appeals specifically ruled on **all** the issues Petitioner has raised in his request for certiorari. The Court of Appeals denied Petitioner’s request for rehearing.

ARGUMENT

1. THE COURT OF APPEALS CORRECTLY RULED THAT PETITIONER WAS NOT DENIED A FAIR HEARING AND WAS NOT DEPRIVED OF DUE PROCESS.

Petitioner contends the ALC shifted the burden of proof to him to show he was not discharged for cause. The Court of Appeals, however, accurately noted that there is no dispute in this record as to the salient facts of the case, and therefore no burden was shifted. Moreover, the Court of Appeals properly relied on *Hyman v. S.C. Emp't Sec. Comm'n*, 234 S.C. 369, 373, 108 S.E.2d 554, 556 (1959). In *Hyman*, this Court stated that “[w]here a claimant files an application for unemployment compensation benefits, the burden is upon such claimant to show that he has met the benefit eligibility conditions.” Pursuant to statute, unemployment eligibility requirements include that a claimant must show he was separated from his employment “through no fault of his own.” S.C. Code Ann. § 41-35-110(5) (Supp. 2012).

Petitioner also maintains he was deprived due process when the ALC relied on evidence “never entered into the record.” However, the Court of Appeals correctly held that: (1) the ALC did not solely rely on the document for its ruling; and (2) pursuant to S.C. Code Ann. Regs. § 47-51, the record includes “all records of [SCDEW] that are material to the issues.”

In any event, Petitioner was not deprived of due process. He was properly given notice and an opportunity to be heard. He had an evidentiary hearing, an Appellate Panel review within SCDEW, and thereafter judicial review by both the ALC and the Court of Appeals. This clearly meets the explicit requirements under South Carolina law for due process in administrative law cases. *Garris v. Governing Bd. of S.C. Reins. Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (under the South Carolina Constitution, due process is met where notice, an opportunity

to be heard, an impartial adjudicator, and judicial review are provided). Therefore, there is no merit to Petitioner's claim he was denied due process.

2. THE COURT OF APPEALS CORRECTLY FOUND THE SUBSTANTIAL EVIDENCE SUPPORTS SCDEW'S DECISION THAT PETITIONER WAS DISCHARGED FOR CAUSE CONNECTED TO EMPLOYMENT BECAUSE IT WAS UNDISPUTED THAT WAL-MART DISCHARGED PETITIONER AFTER HE WAS CRIMINALLY CHARGED WITH ACCESSORY BEFORE THE FACT TO THEFT AND ENTERED INTO A PTI PROGRAM AS A RESULT OF THE CRIMINAL CHARGE.

Petitioner's true argument is not about the burden of proof or a fair hearing, but largely a difference of opinion as to whether his actions were "connected to work."

Substantial evidence is "evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." *Friends of Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). Under this standard of review, SCDEW's findings "are presumed correct and will be set aside only if unsupported by substantial evidence." *Kearse v. State Health & Human Services Fin. Comm'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not mean SCDEW's conclusion is unsupported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996).

The Court of Appeals and the ALC correctly ruled there is substantial evidence to support SCDEW's finding that Petitioner was discharged for cause connected with work. Therefore, there is no reason for this Court to also review this case. In other words, no "special or important reasons" exist to support granting the Petition for a Writ of Certiorari. Rule 242(b), SCACR.

In his petition, Petitioner also suggests that Wal-Mart's company policy on criminal arrests and convictions unreasonably allows termination based on entry into a PTI program. The

Appellate Panel and the ALC found the policy reasonable, and the Court of Appeals held that “this ruling was supported by substantial evidence.”

Accordingly, the Court should deny Petitioner’s request for a writ of certiorari.

CONCLUSION

The Court of Appeals and the ALC both have correctly addressed the same issues raised by Petitioner and found substantial evidence supports SCDEW's decision that Petitioner was discharged for cause.

Accordingly, the Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,



Debra S. Tedeschi, S.C. Bar # 15307
Deputy General Counsel
Post Office Box 8597
Columbia, South Carolina 29202
(803) 737-0395

Attorney for Respondent SCDEW

May 1, 2013

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PROOF OF SERVICE

I certify that I have served the Return in Opposition to Petition for a Writ of Certiorari of the Respondent on the parties in this case by depositing a copy of it in the United States Mail, postage prepaid, on May 1, 2013, addressed to the parties at their addresses of record:

Susan J. Firimonte, Esq.
320 S. Coit Street
Florence, SC 29501

May 1, 2013



Jessica Chesley
Administrative Legal Assistant
SC Dept of Employment and Workforce
Post Office Box 8597
Columbia, South Carolina 29202