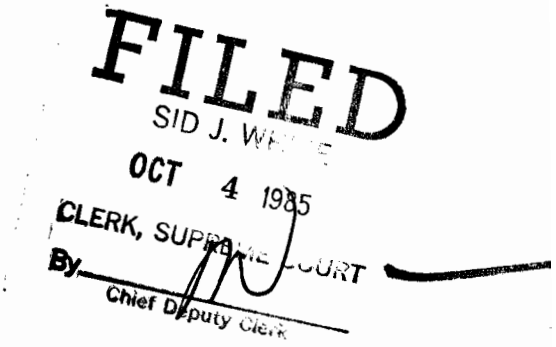
IN THE SUPREME COURT

STATE OF FLORIDA



TALLAHASSEE HOUSING AUTHORITY,

Employer/Appellant,

vs. CASE NO.: 66,663

FLORIDA UNEMPLOYMENT APPEALS COMMISSION and CONNELL BARRON,

Claimant/Appellees.

_____/

AMICUS BRIEF

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PRELIMINARY STATEMENT

Amicus files this brief in support of the position of Appellees, Florida Unemployment Compensation Appeals Commission and Connell Barron.

STATEMENT OF FACTS

Amicus accepts the statement of the case and facts submitted by Appellee.

In addition, Amicus would disagree with Appellant's characterization of the total hours of absence at issue. Amicus contends that only the alleged unexcused hours of absence are relevant to the issue of misconduct.

ISSUE

WHETHER OR NOT THE FIRST DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE APPELLANT/EMPLOYER FAILED TO MEET HIS BURDEN OF SHOWING THAT THE EMPLOYEE'S CONDUCT CONSTITUTED AN INTENTIONAL DISREGARD OF THE EMPLOYER'S INTEREST.

SUMMARY OF ARGUMENT

Before there can be a finding of misconduct, an employer has the burden to show that the employee's conduct constituted an intentional disregard of the employer's interest. The pertinent Florida Statutes, and prevalent case law mandate such a showing.

The Appellant/Employer proposes a per se test of misconduct which is not grounded in Florida Statutes or in case law.

The purpose of the Florida Unemployment Compensation Law is to help unemployed workers. The Appellant's per se test is contrary to this very purpose.

ARGUMENT

IN ORDER TO DETERMINE MISCONDUCT, AN EMPLOYER MUST SHOW THAT THE EMPLOYEE'S CONDUCT CONSTITUTED AN INTENTIONAL DISREGARD OF THE EMPLOYER'S INTEREST.

The purpose of the Florida Unemployment Compensation Law is to help an unemployed worker return to work. It provides a financial cushion against the crisis of unemployment. The Declaration of Public Policy, Section 443.021, Florida Statutes reads:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state... [the purpose of this legislation is] to prevent its unemployment spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family.

This Public Policy is the guiding light for interpreting the Florida Unemployment Compensation Law.

The Appellant/Employer wishes to take away the financial cushion from the unemployed worker. The Appellant/Employer claims that the Appellee/Connell Barron should be disqualified from benefits based on "misconduct". Section 443.101, Florida Statutes provides:

> An individual shall be disqualified from benefits: (1)(a) for the week...in which he has been discharged by his employing unit for misconduct connected with his work, if so found by the division....

> (2) disqualification for being discharged for misconduct connected with his work shall continue for the full period of unemployment next ensuing after having been discharged and until such individual has become reemployed and has earned wages not less than 17 times his weekly benefit amount and for not more than 52 weeks which immediately follow such week, as determined by the division in each case according to the circumstances in each case or the seriousness of misconduct, pursuant to rules of the division enacted for determinations for disqualification for benefits for misconduct.

Because the purpose of the Unemployment Compensation Law is to help unemployed workers, the District Courts have consistently held that the disqualifying provisions are to be narrowly construed in order to achieve the law's purpose. In other words, the Unemployment Compensation Law should be construed in favor of the unemployed worker. Baeza v. Pan American/National Airlines, Inc., 392 So.2d 920 (Fla. 3d DCA 1980); Langley v. Unemployment Appeals Commisson, 444 So.2d 518, 520 (Fla. 1st DCA 1984).

In the case at bar, Tallahassee Housing Authority v. Florida Unemployment Appeals Commission and Connell Barron, 463 So.2d 1216 (Fla. 1st DCA 1985), the First District Court of Appeal affirmed the Unemployment Appeals Commission decision in favor of Appellee/Connell Barron and found that the Employer failed to meet its burden of showing misconduct. The First

District Court of Appeal held:

> In our view, although excessive absenteeism or tardiness may constitute misconduct which justifies termination of employment and therefore precludes collection of unemployment compensation benefits, an employer has the burden under Section 443.036(24), Florida Statutes, to show misconduct with a preponderance of proof that the absences were indeed unexcusable and in detriment to the employer's interest. [Emphasis Added].

It is important to note that the First District Court of Appeal states that excessive absenteeism may constitute misconduct. However, it is not necessarily misconduct.

The Appellant claims that the First District Court of Appeal misinterpreted the law on misconduct. Without analyzing the statutory definition of misconduct, the Appellant proposes a mechanical, automatic, per se test for determining misconduct: "Absenteeism is misconduct per se." Appellant's Initial Brief, page 8. The Appellant argues that absenteeism by its very nature is necessarily and factually detrimental to the employer.

The Appellant's per se test violates the clear language of the statutory definition of misconduct and cuts against the grain of the purpose of the Unemployment Compensation Law. As stated, the purpose of this law is to help unemployed workers, not to disqualify as many unemployed workers as possible. The case law mandates that disqualification provisions be construed narrowly to benefit the unemployed. In violation of this mandate, the per

se test expands the disqualification of misconduct. Under Appellant's per se test, an employer is not required to show disregard of its interest but need only show mere absenteeism.

The proposed per se test fails, because it is not grounded on the statutory definition of misconduct. Section 443.036(24) Florida Statutes defines misconduct. Florida Statutes, Section 443.036(24) reads:

> "Misconduct.--"Misconduct" includes, but is not limited to the following, which shall not be construed in pari materia with each other.
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. [Emphasis Added]

Both paragraphs (a) and (b) require an intentional disregard of the employer's interest in order to find misconduct. The above statutory definition uses strong language: "Willful or wanton disregard of an employer's interest", "evil design", "an intentional and substantial disregard of the employer's interest." By statutory definition, if an employee's conduct is not in disregard of the employer's interest, such conduct does

not constitute misconduct. The statutory definition of misconduct clearly requires the employer to show disregard or other culpable intent. No per se test is statutorily authorized.

The District Courts of Appeal have consistently interpreted Section 443.036(24) ("misconduct") to mandate that the employer show an intentional disregard of an employer's interest. In Langley v. Unemployment Appeals Commission, 444 So.2d 518 (Fla. 1st DCA 1984), the First District Court of Appeal found that there was insufficient evidence of "intentional and substantial disregard of the employer's interest" to find misconduct.

In Woskoff v. Desta Enterprises, Inc, 187 So.2d 101 (Fla. 3d DCA 1966), the Third District Court of Appeal held that a worker's demand for pay for a Memorial Day holiday was not misconduct. The Third District Court of Appeal stated:

> We cannot agree that the Petitioner's conduct in demanding pay for a Memorial Day holiday was 'tantamount to an intentional disregard of an employer's interest'. See Spaulding v. Florida Industrial Commission, 154 So.2d 334 (Fla. 3d DCA 1963).

Id at 103.

In Howlett v. South Broward Hospital Tax District, 451 So.2d 976 (Fla. 4th DCA 1984), the Fourth District Court of Appeal found that there was no "willful and wanton disregard of the employer's interest" and reversed the Commission's decision

of misconduct. Id. at 977. See Jeck v. Board of Review, 377 So.2d 812, (Fla. 4th DCA 1979).

In Lamb v. Unemployment Appeals Commission, 424 So.2d 197, (Fla. 5th DCA 1983), an employee was disqualified for misconduct after he was absent for only one day and had been unable to contact his employer. The Fifth District Court of Appeal reversed and stated:

> In our opinion the actions for which Lamb was fired do not amount to a willful and wanton disregard of his employer's rules, and as such do not constitute misconduct.

Id at 198.

The Appellant rejects the overwhelming precedent that requires an employer show an intentional disregard of its business interest. Instead, Appellant proposes that the employer, in the context of absenteeism, has to show only that the employee was on unauthorized leave. In support of this proposition, the Appellant cites dicta in the following three decisions: City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979); Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2d DCA 1971); and Hillsborough County Department of Emergency Medical Services v. Unemployment Appeals Commission, 433 So.2d 24 (Fla. 2d DCA 1983). Although each of the three decisions used

the phrase "per se", in fact, each of these decisions follow the overwhelming precedent and require the employer to show an intentional disregard of the employer's interest.

In City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979), an employee failed to report to work on March 9, 1977. The employer had "instructed the employee by certified mail and verbally by telephone to return to work on March 9, 1977." Id. at 1008. The court found that the employer met his burden of showing that the employee's actions were in disregard of the employer's interests. The Fourth District Court of Appeal states:

> The City [employer] through its personnel director and utilities billing supervisor, justifies its refusal of additional vacation time on the basis that late request made it difficult to get replacements and otherwise plan for her absence.

Id at 1008.

Based on the finding that the employee's conduct was detrimental to the employer's interest, the Fourth District Court of Appeal held that the employee's conduct constituted misconduct.

In contrast to the City of Riviera Beach, in the instant case, the employer failed to show that the employee's conduct was in disregard of the employer's operation. In the case at bar, the First District Court of Appeal stated:

> [T]he summary provided no clue as to any criteria used by appellant in approving or disapproving leave. At the times when most of Barron's leave was not approved, Barron had sufficient accrued vacation and sick leave days to cover the leave taken. Although certain of the entries in the summary allude to reasons for a leave being unapproved, the reasons are not clear nor are they consistent with the fact that other approved leave was taken by appellant for similar reasons. The record contains no evidence that Barron was given any specific warning concerning his excessive absenteeism prior to his notice of a pretermination hearing that was held immediately before his discharge.

Id at 1217.

It is clear from the First District Court of Appeal's factual analysis that Appellee/Connell Barron had no reason to foresee that his absences would be detrimental to his employer. Further, the key point is that in City of Riviera Beach, the employer showed detriment; whereas in the instant case, the employer failed to show detriment.

In City of Riviera Beach, the Fourth District Court of Appeal never used a per se test to determine misconduct. The Fourth District Court of Appeal stated:

> An employer has a right to expect reasonable work habits from an employee. Continued absenteeism, which hampers the operation of a business, constitutes an intentional disregard of the employer's vital interest, and of the employee's duties, and amounts to misconduct per se, Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2d DCA 1971). [Emphasis Added]

Id at 1008.

The Court uses the phrase "which hampers the operation of a business" to qualify "continued absenteeism". By this qualification, the Fourth District Court of Appeal is pointing out that not all absenteeism is misconduct, rather only absenteeism that hampers the employer's operation may constitute misconduct.

In Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2d DCA 1971), the Second District Court of Appeal applied the statutory definition of misconduct. The employee was fired because of several absences from work. The court found that the employer had showed that the employee's conduct was harming the employer's business. The Second District Court of Appeal states:

> The fact remains that Castillo's continued absenteeism was severely hampering the employer in carrying the work load of the plant. Castillo knew that the successful operation of the box company depended upon his presence, which was pointed out to him by Mr. List, but he continued to be absent because of 'personal problems'. [Emphasis Added]

Because the employer met its statutory burden of showing disregard, the Second District Court of Appeal found misconduct.

In Hillsborough County v. Unemployment Appeals Commission, 433 So.2d 24 (Fla. 2d DCA 1983) the Second District Court of Appeal did not use a per se test to determine misconduct. In Hillsborough County, the employee was absent from work, because of incarceration for not paying child support. The court found

that the employer met its burden of showing disregard of its business operation. The Second District Court of Appeal stated:

> Mr. Jackson's unavailability for work not only hampered operation of the employer's business but also was a <u>forseeable</u> consequence of his failure to pay court ordered child support. [Emphasis Added]

Because the employer had made the necessary showing, the Second District Court of Appeal found misconduct.

After examining the three cases cited by the Appellant for the proposition that absenteeism is per se misconduct, it is obvious that not one of these cases apply a per se test to determine misconduct. In each case, the employer met his burden of showing misconduct by showing an intentional disregard for the employer's interests. In contrast to the above three cases, the employer, in the instant case, has clearly failed to show either an intentional disregard or a detriment to its business resulting from the absenteeism.

CONCLUSION

The purpose of the Florida Unemployment Compensation Law is to help unemployed workers, not to deprive as many workers as possible from their hard-earned unemployment insurance benefits. The Appellant proposes a mechanical test which would increase the number of persons who would be deprived from benefits during a crisis of unemployment. This per se test lacks a foundation in Florida Statutes. Based on the clear language of the pertinent Florida Statutes, the overwhelming precedent of the District Courts of Appeal, and the underlying purpose of the Unemployment Compensation Law, this Court should affirm the First District Court of Appeal decision in Tallahassee Housing Authority v. Florida Unemployment Appeals Commission and Connell Barron, 463 So.2d 1216 (Fla. 1st DCA 1985).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to Paula L. Walborsky, Edgar C. Booth, P.A., 324 East Virginia Street, Tallahassee, Florida, 32301, James C. Conner, Jr., 325-F John Knox Road, Suite 120, Tallahassee, Florida, 32303, John D. Maher, Ashley Building, Suite 221, 1321 Executive Center Drive, East, Tallahassee, Florida, 32301-8247, and to Connell Barron, 2502 Holton Street, Apartment 135, Building F, Tallahassee, Florida, 32304, on this 4th day of Oct, 1985.

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