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.
_____/

EMPLOYER/APPELLANT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE

Connell Barron was hired June 1, 1981 as a maintenance aide (painter) with the Tallahassee Housing Authority. (R. at 25.) Mr. Barron was fired January 31, 1984 for excessive absenteeism. (R. at 65.) Mr. Barron filed for unemployment compensation benefits on February 10, 1984. (R. at 4.) After investigating the reasons for Mr. Barron's discharge by the Tallahassee Housing Authority, a claims adjudicator for unemployment compensation determined that Mr. Barron was not entitled to benefits because he had been fired for misconduct within the meaning of the law. (R. at 13.) Mr. Barron filed an appeal of this determination on March 5, 1984. (R. at 14.) A hearing was held before claims referee William T. Moore on March 21, 1984. (R. at 15.) Mr. Barron was present at this hearing and the Tallahassee Housing Authority sent Mary Kathryn Lewis, the person responsible for maintaining employee time and attendance records to represent them. (R. at 6.) On March 21, 1984, the claims referee determined that the claims adjudicator had correctly determined that Mr. Barron was not entitled to unemployment compensation as he had been fired for "misconduct connected with work", i.e., excessive absenteeism. (R. at 66-68.) Mr. Barron appealed the decision of the claims referee to the Unemployment Appeals Commission on April 3, 1984. (R. at 69.) The Unemployment Appeals Commission in its Order of August 1, 1984, reversed the claims referee stating that his decision was based entirely on hearsay evidence. (R. at 70-72.) The

Tallahassee Housing Authority filed an appeal to the First District Court of Appeal on August 24, 1984. (R. at 73.)

The District Court of Appeal, leaving the evidentiary issue unresolved, affirmed the decision of the Unemployment Appeals Commission stating that the Tallahassee Housing Authority had failed to prove that Mr. Barron's 298 hours of absences had been a detriment to them. (A. at 4.)

The Tallahassee Housing Authority respectfully submits that the decision of the District Court of Appeal is in direct conflict with City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979) which held that excessive absenteeism is misconduct per se. (A. at 8.)

Tallahassee Housing Authority asserts that this court has jurisdiction to resolve this inter-district conflict pursuant to the Florida Constitution and Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv).

STATEMENT OF THE FACTS

Mr. Barron was fired by the Tallahassee Housing Authority for excessive absenteeism. (R. at 65.) Pursuant to the Tallahassee Housing Authority's own employee disciplinary policy, Mr. Barron was given a pre-termination hearing at which he was represented by counsel. Before the hearing, Mr. Barron was given notice of the evidence that would be considered at this hearing. (R. at 65.) A review of the payroll records for the 6 months prior to the pre-termination hearing indicated that Mr. Barron had received a check for less than 40 hours of work on at least 7 different occasions. (R. at 65.) Counsel for

Mr. Barron presented no documentation, witnesses or other evidence to refute the Tallahassee Housing Authority's charges of excessive absenteeism. (Id.)

Subsequently, when Mr. Barron applied for unemployment compensation, a claims adjudicator for the Unemployment Commission investigated the reason Mr. Barron had been fired by the Tallahassee Housing Authority and determined that he was not eligible for unemployment compensation benefits. (R. at 24.) Mr. Barron appealed this denial of benefits to the claims referee and an evidentiary hearing was held on March 21, 1984. (R. at 13.) Although both Mr. Barron and the Tallahassee Housing Authority had the right to be represented by counsel at this hearing before the claims referee, neither side was represented by counsel at this stage of the proceedings. Mr. Barron represented himself and the Tallahassee Housing Authority was represented by Mary Kathryn Lewis, an administrative assistant responsible for maintaining employee time records and attendance sheets. (R. at 9.) Mary Kathryn Lewis personally researched all time cards, daily attendance logs and payroll record sheets for the calendar year 1983 and compiled a detailed 4 page summary of Mr. Barron's absences. (R. at 27.) Miss Lewis testified that these records were kept in the ordinary course of business and that they were maintained by her personally as an employee for the Housing Authority. (R. at 28.) Mr. Barron was supplied a copy of this summary (R. at 28.) and, of course, had reviewed the same information at the pre-termination hearing when he was represented by counsel. (R. at 26.)

The claims referee and Mr. Barron scrutinized this summary of absences together, item by item and page by page. (R. at 41-49.) Mr. Barron admitted that he took 95 hours of annual leave. (R. at 43.) He also admitted that he took 85 hours of sick leave. (R. at 43.) He further admitted that he took 118 hours of leave without pay, although stating that he felt he had the time accrued but his supervisor wouldn't approve the time as the supervisor was treating him unfairly. (R. at 44.) In fact, Mr. Barron admitted the truth of each and every page of the summary, with the exception of one item which he admitted was true but felt there were justifying reasons for his absence which should be added to the explanation on the summary, (R. at 48-49), and another item which he disputed as being totally untrue, which, on examination, is merely a question of interpreting Mr. Barron's actions. (R. at 47.) In sum, the claims referee had before him as witnesses the woman whose duty it was to keep the employee's records in the normal course of business with the Tallahassee Housing Authority and who had personally compiled the summary of Mr. Barron's absences. He also had Mr. Barron who admitted the truth of each of the items on the summary and offered not a single piece of evidence of any kind to refute the summary or the testimony of Miss Lewis. (R. at 51.) The claims referee also had the opportunity to observe the demeanor and weigh the credibility of each witness. In the face of this evidence, the claims referee affirmed the decision of the claims adjudicator that Mr. Barron was not entitled to unemployment compensation benefits.

Mr. Barron then appealed the decision of the claims referee to the Unemployment Compensation Appeals Commission. The Appeals Commission reviewed the evidence on which the claims referee had based his determination and held that the determination of the claims referee was not supported by substantial competent evidence, characterizing all evidence before the claims referee as hearsay. The Tallahassee Housing Authority then appealed that decision to the First District Court of Appeal. That court, leaving the evidentiary issue undecided, affirmed the decision of the Unemployment Appeals Commission holding that the Tallahassee Housing Authority had not proven that Mr. Barron's 298 hours of absences were "misconduct," unexcusable and a detriment to the employer. This appeal followed.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal in this case is in direct conflict with City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979). In the instant case the court held that the Appellee's 298 hours away from the job, 118 of these hours leave without pay, did not constitute misconduct sufficient to deny Appellee's claim for unemployment compensation benefits without showing that the absenteeism resulted in some detriment to the employer. City of Riviera Beach, on which the court relies in reaching this conclusion, specifically finds that absenteeism is misconduct per se. The District Court of Appeal has applied the wrong rule of law to the facts of this case.

ARGUMENT

AN EMPLOYEE'S EXCESSIVE ABSENTEEISM IS INHERENTLY DETRIMENTAL TO HIS EMPLOYER.

Citing City of Riviera Beach v. Florida Department of Commerce, Division of Employment Security, 372 So.2d 1007 (Fla. 4th DCA 1979), the First District Court of Appeal affirmed the decision of the Unemployment Appeals Commission granting Mr. Barron unemployment benefits. Mr. Barron was fired for excessive absenteeism. The District Court stated:

> In our view, although excessive absenteeism or tardiness may constitute misconduct which justifies termination of employment and therefore precludes collection of unemployment compensation benefits,[1] 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 interests.

(A. at 8, footnote omitted.) City of Riviera Beach holds:

> 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 interests, and of the employee's duties, and amounts to misconduct per se, Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2nd DCA 1971).

Id. at 1008. The First District majority reads this paragraph to require a showing that the absenteeism constitutes a detriment to the employer. The dissent, and case law from other districts, reads this paragraph to mean that excessive absenteeism by its very nature hampers the operation of a business; absenteeism is misconduct per se. In Hillsborough County, Department of Engineering Medical Services v. Unemployment Appeals Commission,

433 So.2d 24 (Fla. 2d DCA 1983), the court stated that absenteeism amounts to misconduct per se. Then, in a separate paragraph it mentions that the failure of the claimant to come to work hampered the operation of the business. See also, Sanchez v. Department and Employment Security, 44 So.2d 313 (Fla. 3d DCA 1982).

The use of "per se" and "hampering" language in the same opinions has caused a significant confusion in exactly what proof is required of an employer who feels that a fired employee is not entitled to unemployment compensation benefits. Indeed, the First District had previously stated, in Alterman Transport Lines, Inc. v. Unemployment Appeals Commission, 410 So.2d 568, 569 (1982) that an employer need only establish a prima facie case of misconduct, then the burden shifts to the employee to show proof of the propriety of that conduct. In the instant case, the First District would require the employer to prove its case by a preponderance of the evidence.

Conflict exists on this issue among the districts (Hillsborough County, 2d DCA; City of Riviera Beach, 4th DCA; Tallahassee Housing Authority, 1st DCA), within a single district (Alterman and Tallahassee Housing Authority), and even between the majority and dissent on the instant case (both rely on City of Riviera Beach). Mr. Barron was employed by a public housing authority. This court should grant review to determine whether the taxpayers must pay Mr. Barron's unemployment compensation benefits or whether excessive absenteeism is misconduct per se.

The problem of determining what constitutes "misconduct" might be analogized to determining when an expert witness is required in a malpractice action. When a doctor amputates the wrong leg, or leaves yards of gauze sewn into a wound, no expert witness is required for the finder of fact to recognize malpractice. Compare, Atkins v. Humes, 110 So.2d 663, 667 (Fla. 1959) with Sims v. Helms, 345 So.2d 721 (Fla. 1977). Similarly, when an employee misses 298 hours of work an employer need not prove that he suffered some detriment for the finder of fact to recognize "misconduct". Common sense, the very soul of reasonableness, says that amputating the wrong leg is contrary to the very essence of "doctoring". So, too, an employee who doesn't come to work is inherently in conflict with the essence of being an employee.

Mr. Barron conceded that he had been absent 118 unauthorized hours. He offered not one shred of evidence that his absences were anything other than a willful disregard for his employer's interests. See, Section 443.036(24), F. S. Absenteeism, even tardiness, is "misconduct" sufficient to deny unemployment compensation benefits. In Sanchez v. Department of Labor and Employment Security, et al, 411 So.2d 313, 314 (Fla. 3d DCA 1982), Sanchez failed to work a full forty hour week in a four month period. He also failed to come to work without authorization for his leave in order to undergo elective surgery. The court, in affirming Sanchez's denial of unemployment benefits quoted Chapman v. Division of Employment Security of the Department of

Labor, a case concerning an employee who had been tardy on three consecutive days, stating:

> From time immemorial, promptness in reporting to work has been regarded as essential to the proper conduct of an employer's business, and tardiness has been accepted as sufficient grounds for termination of employer-employee relationship.

104 So.2d 203-204 (La. App. 1958).

If Sanchez's failure to work forty-hour weeks and Chapman's three days of tardiness are sufficient to deny unemployment compensation benefits, then surely Mr. Barron's admissions of 118 hours of unauthorized leave -- nearly three weeks time -- in addition to 95 hours of annual leave and 85 hours of sick leave is substantial competent evidence sufficient to substantiate "misconduct" that would disqualify him for unemployment compensation benefits. See also, Hillsborough County Department of Emergency Medical Services v. Unemployment Appeals Commission, 433 So.2d 25 (Fla. 2d DCA 1983) (Continued absenteeism caused by personal problems for which an employee bears culpability amounts to misconduct per se for purposes of Section 443.101(1)(a).)

The Fourth District Court of Appeal was faced with a similar straining at gnats in Co-Tran, Florida Transit Management, Inc. v. Goodman, 415 So.2d 155, 156 (1982). There, a bus driver for the transit company had had his license revoked for driving in Georgia while intoxicated. The Unemployment Appeals Commission granted the dismissed bus driver unemployment compensation benefits stating that his license had not been revoked for misconduct connected with work. Reversing the Appeals Commission, the District Court stated:

> If under these circumstances the employer has to pay, then when can an employer discharge, without being obligated to pay for benefits, an employee whose repeated rules violations vitiate the basic requirements of his employment and render him useless to his employer?

An employee who does not come to work is useless to his employer. The employee in the instant case, Mr. Barron, did not come to work for 298 hours in 1983. The District Court's holding that this does not constitute misconduct per se is in conflict with City of Riviera Beach. We respectfully seek the jurisdiction of this court to resolve this inter-district conflict.

CONCLUSION

In conclusion, the decision of the District Court of Appeal, First District in Tallahassee Housing Authority v. Florida Employment Appeals Commission, and Connell Barron, opinion filed February 11, 1985, is in conflict with City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979). The jurisdiction of this court is sought to resolve this inter-district conflict.

Respectfully submitted,

Paula L. Walborsky

PAULA L. WALBORSKY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by U. S. Mail this 11 day of March, 1984 to: Mrs. Geri Atkinson-Hazelton, General Counsel, Unemployment Appeals Commission, 1321 Executive Center Drive East, 221 Ashley Building, Tallahassee, FL 32301-8247 and James C. Conner, Jr., Esq., 325-F John Knox Road, Suite 120, Tallahassee, FL 32303.

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