

IN THE SUPREME COURT OF FLORIDA

UNEMPLOYMENT APPEALS COMMISSION

Petitioner,

vs.

Case No. 68,145

ZACHARY S. COMER

Respondent.

UNEMPLOYMENT APPEALS COMMISSION

Petitioner,

vs.

Case No. 68,442

PIERRE J. RENELUS

Respondent.

_____/

Petition for Discretionary Review of Decisions
of the District Court of Appeal of the Third District of Florida

INITIAL BRIEF ON THE MERITS

OF

PETITIONER

UNEMPLOYMENT APPEALS COMMISSION

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STATEMENT OF THE CASE AND THE FACTS

COMER CASE

Respondent Zachary Comer filed a claim for unemployment compensation benefits on May 22, 1984. (Comer R.4). He was initially determined qualified for benefits. (Comer R.5). His former employer appealed the determination and a formal administrative hearing was held. (Comer R.6). The hearing officer rendered a decision reversing the initial determination and holding Comer disqualified for benefits. (Comer R.7-9). Comer did not further appeal the determination. As a result of the finality of the disqualification decision, an overpayment determination was issued. (Comer R.11). Comer timely appealed the determination and a formal administrative hearing was held. (Comer R.12-14). The hearing officer upheld the overpayment determination and further held that recovery of it could not be waived. (Comer R.15-16). Comer timely appealed the hearing officer's decision. (Comer R.17). The Commission was unable to review the hearing officer's decision because of a defective record. Consequently, the cause was remanded for hearing de novo. (Comer R.18). At the conclusion of the second hearing, the hearing officer again rendered a decision upholding the overpayment determination and holding that recovery could not be waived. (Comer R.41-44). On appeal

the Unemployment Appeals Commission affirmed the hearing officer's decision. (Comer R.44).

Comer appealed the Commission's order to the Third District Court of Appeal. The Third District Court of Appeal reversed the Commission's order and certified that its decision expressly and directly conflicted with Sheppard v. State Department of Labor and Employment Security, 442 So.2d 1114 (Fla. 4th DCA 1983). (Comer R.47-48).

The Commission timely invoked the court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

RENELUS CASE

Respondent Pierre J. Renelus was initially determined qualified for benefits. (Renelus R.1). The employer's agent timely appealed the determination. (Renelus R.2). On September 7, 1984, after a formal hearing, an unemployment compensation hearing officer reversed the initial determination and held Renelus disqualified for having been discharged from employment for misconduct. (Renelus R.3-4). Renelus attempted to appeal the decision, but his appeal was out of time. (Renelus R.6, 8).

As a result of the decision disqualifying Renelus and his failure to timely appeal it, an overpayment determination was issued on October 23, 1984. (Renelus R.7). Counsel for Renelus filed a timely appeal to the overpayment determination.

(Renelus R.9). Pursuant to Renelus' appeal, a formal administrative hearing was held on April 17, 1985. (Renelus R.13-87). The unemployment compensation hearing officer affirmed the overpayment determination and held that recovery of the overpayment could not be waived. (Renelus R.88-89). Renelus appealed to the Unemployment Appeals Commission without success. (Renelus R.90-91).

Renelus appealed the Commission's order to the Third District Court of Appeal. (Renelus R.92). The Third District Court of Appeal reversed the Commission's order and certified that its decision expressly and directly conflicted with Sheppard v. State Department of Labor and Employment Security, 442 So.2d 1114 (Fla. 4th DCA 1983).

The Commission invoked the court's discretionary review jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). Pursuant to the Unemployment Appeals Commission's motion, the court consolidated the Renelus case with the Comer case.

SUMMARY OF ARGUMENT

Unemployment compensation overpayments occur when initial determinations favorable to claimants are reversed on appeal. Section 443.151(6)(b), Florida Statutes (1983), requires recipients of overpayments to repay them. The Division of Unemployment Compensation, at its discretion, may demand direct repayment of the overpayment or may recover it by recouping it from future benefits that may become available to the overpayment recipient. Id. Section 443.151(6)(c), provides that the Division of Unemployment Compensation cannot recover overpayments by recoupment from future benefits when certain circumstances are present. No similar provision is contained in the statute which would permit waiver of recovery of the overpayment altogether.

In Sagaert v. State Department of Labor and Employment Security, 418 So.2d 1228 (Fla. 3d DCA 1982), the Third District Court of Appeal held that the statutory scheme was illogical and absurd and refused to follow it. The court held that the Division must completely waive recovery of overpayments when attendant circumstances preclude recoupment of the overpayment from benefits which might become available to the recipient of the overpayment.

In Sheppard v. State Department of Labor and Employment Security, 442 So.2d 1114 (Fla. 4th DCA 1983), the Fourth District Court of Appeal expressly disagreed with Sagaert and

held that the Third District exceeded its authority by judicially amending the statute.

The Third District Court of Appeal followed Sagaert in Garcia v. Department of Labor and Employment Security, 426 So.2d 1171 (Fla. 3rd DCA 1983). In Comer v. State Unemployment Appeals Commission, 481 So.2d 67 (Fla. 3rd DCA 1985), and Renelus v. Florida Unemployment Appeals Commission, No. 85-1556 (Fla. 3rd DCA Mar. 4, 1986), the Third District Court of Appeal reaffirmed Sagaert and Garcia and certified its decisions as expressly and directly conflicting with Sheppard.

The following discussion will demonstrate that the Fourth District Court of Appeal correctly observed that the statute does not provide for outright waiver of recovery of overpayments and such relief cannot constitutionally be legislated by the courts of the State of Florida. The decisions of the Third District Court of Appeal holding to the contrary must be overturned.

ARGUMENT

ISSUE I

SECTION 443.151(6), FLORIDA STATUTES
(1983), DOES NOT PROVIDE FOR WAIVER OF
RECOVERY OF UNEMPLOYMENT COMPENSATION
OVERPAYMENTS.

The unemployment compensation program is a cooperative federal-state effort to provide financial assistance to certain unemployed workers. Federal regulations require prompt payment of benefits to eligible applicants. 20 C.F.R. §640.5 (1980). The states cannot suspend payment of benefits pending the outcome of appeal proceedings. California Department of Human Resources Development v. Java, 402 U.S. 121 (1971); 42 U.S.C. §503(b)(2). Accordingly, Section 443.151(5)(a), Florida Statutes (1983), provides:

(5) PAYMENT OF BENEFITS. --

(a) Benefits shall be promptly paid in accordance with a determination or redetermination regardless of any appeal or pending appeal.

* * *

Overpayments inevitably result when initial determinations favorable to claimants are overturned on appeal.

The overpayments in these cases occurred when unemployment compensation hearing officers reversed initial determinations favorable to Comer and Renelus and the hearing officers' decisions became final.

The liability of overpayment recipients to make restitution in nonfraudulent cases is found at Section 443.151(6)(b), Florida Statutes (1983):

(b) If any person, other than by reason of his fraud, has received any sum as benefits under this chapter to which, under a redetermination or decision pursuant to this section, he has been found not entitled, he shall be liable to repay such sum to the division for and on behalf of the trust fund or, in the discretion of the division, shall have such sum deducted from any future benefits payable to him under this chapter. No such recovery or recoupment of such sum may be effected after two years from the date of such redetermination or decision.

The provision does not permit the Division to waive recovery of overpayments. Section 443.151(6)(d), Florida Statutes (1983), authorizes the Division to resort to civil action to recover overpayments.

The statute also permits the Division, at its discretion, to recover the overpayment by recouping it from future benefits to which an overpaid claimant may become entitled. When the Division elects to recover the overpayment by recoupment from future benefits, Section 443.151(6)(c), Florida Statutes (1983), provides:

(c) No recoupment from future benefits shall be had if such sum was received by such person without fault on his part and such recoupment would defeat the purpose of this chapter or would be against equity and good conscience.

In Sagaert the Third District Court of Appeal refused to apply the statute as written. The court stated:

We can discern no logical reason for granting the Section 443.151(6)(c), supra, defenses of statutory purpose and equity and good conscience to someone who will still be receiving benefits, while withholding these defenses from someone whose benefits are terminated and who is required to repay sums to the Division. (footnotes omitted).

418 So.2d at 1230. The court further held that the statute as written would create "an illogical or absurd result." Id. The court did not, however, strike the statute as unconstitutional.

In Sheppard, the Fourth District Court of Appeal criticized the Sagaert opinion as follows:

We respectfully believe the foregoing interpretation is an inappropriate invasion by the judiciary into the legislative arena, contrary to the constitutional mandate which separates the two respective governmental powers. The language in paragraph (b) does not compel the division to exercise its discretion by seeking recoupment rather than repayment. It plainly enables the division to proceed with efforts to effect payment or, in the alternative, deduct sums already received from future benefits which may become available.

442 So.2d at 1116. The Sheppard court noted that its opinion directly conflicted with Sagaert.

In Comer and Renelus, the Third District Court of Appeal reaffirmed its decision in Sagaert and certified its decisions as expressly and directly conflicting with Sheppard.

The decision of the Fourth District Court of Appeal in Sheppard is consistent with the fundamental principle of American jurisprudence that the making, amending, and repealing of laws are matters exclusively delegated to the legislative branch and cannot constitutionally be assumed by the judicial branch of government. In Flagler v. Flagler, 94 So.2d 592 (Fla. 1957), the Florida Supreme Court reviewed a decision of a lower court which refused to follow a law allowing a wealthy parent to disinherit a penniless minor child. The court stated:

[W]e cannot agree that courts of equity have any right or power under the law of Florida to issue such order as it considers to be in the best interest of "social justice" at the particular moment without regard to established law. This court has no authority to change the law simply because the law seems to us to be inadequate in some particular case.

Id. at 594.

The same proposition was held applicable when the party burdened by the legislative act was a municipality. In State v. Fort Pierce, 88 So.2d 135 (Fla. 1956), the court held:

It is not the province of this Court to rewrite the acts of the Legislature.

Relief from restrictive provisions must necessarily come from the legislative rather than the judicial branch of the government.

Id. at 137.

The rationale underlying the Florida Supreme Court's refusal to tolerate judicial encroachment into legislative matters was most strongly expressed in Pepper v. Pepper, 66 So.2d 280 (Fla. 1953):

The tendency to reach out and grasp for power in the sphere of governmental activity; for one branch of Government to encroach upon, or absorb, the powers of another, is the means by which free governments are destroyed. * * * It is the duty of the Judicial Department, more than any other, to maintain and preserve those provisions of the organic law for the separation of the three great departments of Government.

Id. at 284.

Contrary to the doctrine of separation of governmental powers, the Third District Court of Appeal judicially amended Section 443.151(6)(c), Florida Statutes (1983). The Third District's judicial decree was not based upon any provision of the United States Constitution or the Constitution of the State of Florida. It was based upon sheer judicial power. Such unauthorized exercise of judicial power cannot be left unrestrained. It must be quashed.

ARGUMENT

ISSUE II

SECTION 443.151(6), FLORIDA STATUTES
(1983), DOES NOT VIOLATE THE SUPREMACY
CLAUSE OF THE UNITED STATES CONSTITUTION.¹

Respondent Renelus argued below that paragraph (c) of the statute is preempted by federal law. Article 6, Section 2 of the United States Constitution prohibits the states from enacting legislation which is repugnant to laws enacted by Congress. McCulloch v. Maryland, 4 Wheat. 316, 436 (1819). In order for a state law to be preempted by a federal law, however, there must be a direct and positive conflict between the two that prevents them from being reconciled. Sligh v. Kirkwood, 65 Fla. 123, 61 So. 185, aff'd 237 U.S. 52 (1913). To create such a conflict, the state law and the federal law must address the same subject matter. It is not sufficient that they address similar subjects. Id.

Respondent Renelus has argued that Section 443.151(6)(c), Florida Statutes, is preempted by Title II, Section 204 of the Social Security Act (42 U.S.C. §404). The subject matter of Title II of the Social Security Act is reflected by its

^{1/} Although the decisions below were not decided on constitutional grounds, Respondent Renelus raised constitutional issues before the court below. Similar constitutional attacks were made on the statute in Sheppard, but were rejected. 442 So.2d at 1115-16.

title: "Federal Old-Age, Survivors, and Disability Insurance Benefits." Title II has no application to the unemployment compensation insurance program. Respondent Renelus' statement that Section 204 of Title II is applicable to all general welfare benefit programs contained in the Social Security Act is erroneous. By its own terms, the provision is applicable only to persons receiving overpayments under Title II.

Title III (42 U.S.C. §§501-03), Title IX (42 U.S.C. §§1101-1109), and Title XII (42 U.S.C. §§1321-24) of the Social Security Act and Chapter 23 of the Internal Revenue Code (26 U.S.C. §§3301-11) are the federal laws governing unemployment compensation, none of which address the question of overpayments. Such a provision was necessary for the Old-Age, Survivors, and Disability Insurance Benefits Program because the program is administered exclusively by the federal government. In contrast, administration of the unemployment compensation programs has been delegated by Congress to the states. In New York Telephone Company v. New York State Department of Labor, 440 U.S. 519 (1979) the Supreme Court held:

The voluminous history of the Social Security Act made it abundantly clear that Congress intended that the several States to have broad freedom in setting up the types of unemployment compensation that they wish. We further noted that when Congress wished to impose or forbid a

condition of compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the States' freedom to legislate in this area. (footnotes omitted).

Id. at 537-38.

Since the issue is governed by statutory, not common law, an exhaustive survey and analysis of how the other states' unemployment compensation programs address the overpayment issue would not be profitable. A random sampling of other jurisdictions does demonstrate, however, that the legislatures of the various states have adopted a variety of approaches to the issue. For example, where, as is true in these cases, fraud is not present, Louisiana vests almost unbridled discretion in its agency to waive overpayments. La. Rev. Stat. §1713(c). Maine's statute permits waiver if the recipient of the overpayment is without fault and recovery would defeat the purpose of the statute or would be against equity and good conscience. Me. Rev. Stat., Tit. 26, §1051(5). Ohio permits waiver only in those instances where the overpayment is the result of the agency's correction of a typographical error in the original determination allowing benefits. Ohio Rev. Code §4141.35 (B)(1) (1969). Kentucky and South Carolina statutes contain no overpayment waiver provisions. Ky. Rev. Stat. §341.415; S.C. Code §41-41-40.

These provisions of other states are not cited for the proposition that Florida's statute represents either the majority or the minority view on the subject. If constitutionally permissible, the Florida Legislature's approach to the problem must be upheld even if it places the State of Florida in a minority of one. The variety of treatments of the issue by the various jurisdictions does demonstrate, however, that Congress has not decreed a uniform national treatment of the subject and thereby preempted the states from adopting their own solutions.

ARGUMENT

ISSUE III

SECTION 443.151(6), FLORIDA STATUTES (1983), DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

Respondent Renelus argued before the Third District Court of Appeal that there is no rational basis for Section 443.151.(6). In Florida High School Activity Association, Inc. v. Thomas, 434 So.2d 306 (Fla. 1983), relied upon by Renelus, the Supreme Court of Florida held:

Under a "rational basis" standard of review a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose. * * * The burden is on the party challenging the statute or regulation to show that there is no conceivable, factual predicate which would rationally support the classification under attack. Where the challenging party fails to meet this difficult burden, the statute or regulation must be sustained. (citations omitted).

Id. at 308. Renelus has failed to meet that burden in this case.

The statute makes all recipients of overpayments liable to make restitution to the Division. It further provides that the Division may resort to civil action to collect

overpayments from all recipients. It finally provides that the Division in its discretion may elect to recover overpayments by recouping them from future benefits which become available to the overpayment recipient. The statute contains no provision for outright waiver of overpayments. It does provide, however, that recoupment from future benefits shall not be effected if the overpayment was received without fault on the claimant's part and recoupment would defeat the purpose of the chapter or would be against equity and good conscience. §443.151(6)(c), Fla. Stat. (1983). The statute does not discriminate with respect to which overpayment recipients must make restitution. It merely discriminates with respect to the type of assets which may be attached by the Division. A distinction is made between unemployment compensation benefits payable to a claimant and all other assets of the claimant. The distinction is obviously founded upon the principle expressed in Section 443.051(2), Florida Statutes (1983), which provides:

BENEFITS NOT ALIENABLE. -- Except as provided in subsection (3), benefits due under this chapter shall not be assigned, pledged, encumbered, released, or commuted and shall, except as otherwise provided in this chapter, be exempt from all claims of creditors and from levy, execution, or attachment, or other remedy for recovery or collection of a debt, which exemption may not be waived.

With two exceptions, unemployment compensation benefits are absolutely protected from all creditors of the claimant. The exceptions are child support obligations provided for in Section 443.051(3), Florida Statutes (1983), and unemployment compensation overpayments provided in Section 443.151(6), Florida Statutes (1983). Since the legislature has absolutely protected unemployment benefits from virtually all other creditors, it stands to reason that such benefits would be accessible to the Division for recovery of overpayments only under certain circumstances.

Superficially it could be argued that discrimination between persons currently entitled to receive benefits and those who are not currently entitled to benefits is justified because the overall statutory scheme is designed to assist those unemployed workers who are qualified to receive benefits. §443.021, Fla. Stat (1983). The claimants in these cases are not eligible for benefits. Comer was disqualified for voluntarily leaving employment without good cause. Renelus was discharged for misconduct connected with work. There is an obvious rational basis for a statutory scheme designed to assist persons unemployed through no fault of their own to discriminate in favor of persons eligible to receive benefits, at least to the extent of those benefits, and against persons who are disqualified from receiving benefits.

It must be stressed, however, that the statute discriminates on the basis of the assets being attached, not the morality or the ability of the overpayment recipient to pay the indebtedness. Since need is not a consideration used to determine eligibility for benefits, some eligible claimants may have substantial financial assets. Such assets are subject to attachment by the Division. Similarly, some individuals who are ineligible for benefits may be penniless. Their financial position may make them "judgment proof," but it does not provide them a defense to their indebtedness. See e.g., Carson v. Jarnham, 119 Fla. 1, 160 So. 520 (1935).

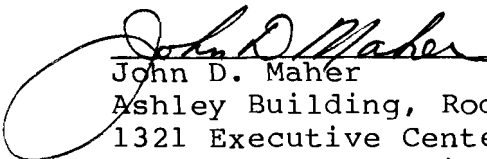
In sum, the statute absolutely protects unemployment compensation benefits from attachment by claimants' creditors. It also places a limited restriction on the ability of the Division to recover overpayments by attachment of benefits which a claimant is currently receiving. It places no restriction, however, on the Division's authority and responsibility to recover overpayments from any other assets of an overpayment recipient regardless of whether the recipient is or is not currently receiving benefits. The distinction contained in the statute is rational. It does not violate the equal protection clauses of the United States Constitution or the Constitution of the State of Florida.

CONCLUSION

The Third District Court of Appeal in Sagaert, Garcia, Comer and Renelus exceeded its authority. The court's amendment of the statute contrary to the words contained in the statute violates the doctrine of separation of governmental powers. The only basis for a court to overturn a statute is a determination that it violates a provision of the Florida Constitution or the United States Constitution. The Third District Court of Appeal made no such determination. Moreover, no such determination can be made because the statute violates neither.

The Comer and Renelus decisions must be quashed. Sagaert and Garcia must be overruled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to John R. Greenwood, Esq., Haitian American Community Association of Dade County (HACAD), Inc., 5901 N. W. 2nd Avenue, Miami, Florida 33127 and to Zachary Comer, pro se, 5920 S. W. 44th Terrace, Miami, Florida 33155 on this 7th day of April, 1986.



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