SUPREME COURT OF FLORIDA

JOHN J. MACHULES,

Appellant,

vs. Case No. 70,311

DEPARTMENT OF ADMINISTRATION,

Appellee.

_____/

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Appellee accepts the statement of the case and facts contained in the principal brief of appellant, with the following exception:

Appellant states that no alternative appeal procedure was utilized because Article VI, Section 5 of the Master Contract between the State of Florida and Florida Public Employees Council 79, AFSCME, prohibits dual proceedings. Appellee objects to this interpretation of the terms of the collective bargaining agreement. The union contract is not part of the record before this Court and is not a proper subject for judicial notice. No reference is made in any part of the record to Article VI, Section 5, of the Master Contract, and it certainly cannot be inferred that this provision was the reason no alternative procedure was used. Nor does appellee agree that this provision prevented appellant from filing a petition for administrative review simultaneously with his grievance. Since the contract is not in the record, this issue is not susceptible to determination by the Court.

SUMMARY OF ARGUMENT

THE DOCTRINE OF EQUITABLE TOLLING SHOULD NOT BE USED IN FLORIDA TO TOLL THE TIME FOR SEEKING REVIEW OF AN ADMINISTRATIVE DETERMINATION BY AN EMPLOYING AGENCY THAT AN EMPLOYEE HAS ABANDONED HIS POSITION OF EMPLOYMENT WHERE THE EMPLOYEE HAS FAILED TO SHOW AFFIRMATIVE DECEPTION OR MISCONDUCT, MISLEADING ACT, AMBIGUOUS NOTICE OR OTHER BASIS FOR EMPLOYMENT OF THAT DOCTRINE.

No circumstances exist in the present case which would justify application of the equitable tolling doctrine to expand the time for filing a petition under Rule 22A-7.10(2)(b), F.A.C. (now 22A-7.010(2)(b)). The doctrine is employed where affirmative misconduct by a defendant has lulled the claimant into inaction, where a claimant receives ambiguous notice of time limitations, or where a claimant is misled by the court.

In the present case, the Department of Insurance gave appellant unambigous notice of his right to review, the time limitations for requesting review, and the address to which his petition should be sent. He was clearly afforded a clear point of entry to administrative proceedings. Appellant and his union representative chose to ignore these instructions and proceed with a grievance under the collective bargaining agreement. They were not induced to do so by any act of the Department of Insurance or Department of Administration.

Appellant does not rely on any affirmative misconduct, or even any affirmative act, of appellee or the Department of Insurance. Rather, he relies on the failure of the Department of Insurance to inform him that determinations of abandonment of

position are not susceptible to resolution through the union grievance process. This reliance is misplaced since the equitable tolling doctrine cannot be applied based upon inaction, particularly where there is no duty to act. Further the tolling doctrine has not been employed where, as in the present case, the claimant has been provided unambiguous notice of his review rights and the time limitations for requesting review.

The circumstances do not provide a basis for affording equitable relief.

ARGUMENT

THE DOCTRINE OF EQUITABLE TOLLING SHOULD NOT BE USED IN FLORIDA TO TOLL THE TIME FOR SEEKING REVIEW OF AN ADMINISTRATIVE DETERMINATION BY AN EMPLOYING AGENCY THAT AN EMPLOYEE HAS ABANDONED HIS POSITION OF EMPLOYMENT WHERE THE EMPLOYEE HAS FAILED TO SHOW AFFIRMATIVE DECEPTION OR MISCONDUCT, MISLEADING ACT, AMBIGUOUS NOTICE OR OTHER BASIS FOR EMPLOYMENT OF THAT DOCTRINE.

Appellant asserts that the Department of Administration is inequitable in "mechanistically" applying the time limits established by Rule 22A-7.10(2)(b), F.A.C., for petitioning for administrative review. The Department, like appellant, is concerned with achieving justice and fairness. For that reason, appellee cannot set aside time limitations established by rule unless there is a legally and factually adequate reason for doing so. Procedural requirements are not to be disregarded out of a vague sympathy for particular litigants. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984). As the Court points out in Baldwin County, supra, at 1726:

> ...experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

This is equally true of procedural requirements established by rule.

The federal doctrine of equitable tolling has been applied to toll time limitations where a plaintiff has been misled by active deception or lulled into inaction by a past employer,

government agency or court. The facts presented here provide no basis for invoking the tolling doctrine. Further, the inequities which the federal doctrine has been designed to protect against are prevented by the notice and due process provisions of the Administrative Procedures Act, Chapter 120, Fla. Stat., as it has been applied by Florida Courts, including Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982).

Federal decisions applying the doctrine of equitable tolling primarily arise from employment discrimination suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. s.2000e-5, and the Age Discrimination in Employment Act of 1967, 29 U.S.C. s.626(d). Such suits frequently, as in the case at bar, involve pro se litigants, whose rights the courts have been diligent in protecting. See Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984). Nevertheless, a survey of decisions of federal courts, in which the doctrine was developed, indicates clearly that the equitable tolling doctrine would not be employed by those courts under the circumstances of the present case. Equitable tolling has been invoked when the plaintiff relied on a misleading court order or letter from the court clerk regarding time limitations. Carlile v. South Routt School District Re3-J, 652 F.2d 981 (10th Cir. 1981); Gonzalez - Aller v. GTE Lenkurt, Inc., 702 F.2d 857 (10th Cir. 1983). Tolling is also appropriate where the plaintiff's employer has concealed the existance of a cause of action by giving her false information concerning the reasons for her dismissal. Reeb v.

Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975). Equitable tolling has also been invoked where a government agency advised the plaintiff to pursue her claim in the incorrect forum. Miller v. Marsh, 766 F.2d 490 (11th Cir. 1985). Each case cited relies for application of the doctrine upon a deceptive or misleading act or misconduct of an agency, employer or court.

In the present case, petitioner was correctly advised by the Department of Insurance of his review rights and time limits for petitioning for review. The Department of Insurance did not induce appellant to proceed with a union grievance. Appellant does not rely upon any positive act by the Department of Insurance or the Department of Administration. Instead, Appellant relies upon the failure of the Department of Insurance to advise him that job abandonment determinations are not subject to resolution through grievance proceedings. In short, appellant would place upon the Department of Insurance a duty to provide him with legal advice, although that agency had already given him explicit instructions for obtaining review.

This invocation of the equitable tolling doctrine based upon inaction is not supported by the case law. Only in Burnett v. New York Central Railroad Company, 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), was a statute of limitations tolled in the absence of a deceptive or misleading act by a defendant, agency or court. In Burnett, supra, the factual circumstances and issues were quite different from those in the instant appeal. In Burnett, supra, the plaintiff filed an action under

the Federal Employer's Liability Act in the wrong forum, and his subsequent suit in the federal district court was barred by the statutory limitations period. The period was deemed to be tolled in order to preserve uniformity between states having transfer or "savings" statutes, which would preserve actions filed in an improper venue, and states without such provisions. However, Burnett, was distinguished in International Union of Electrical Workers v. Robbins & Meyer, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976), where the circumstances more closely approximate those in the present appeal. In Robbins & Meyer, supra, the plaintiff pursued to conclusion a grievance for racial discrimination under a collective bargaining contract before filing an untimely complaint with the Equal Employment Opportunity Commission (hereinafter called EEOC). The Court declined to hold that the time limitations should be tolled during the pendency of the grievance procedure. Burnett, supra, was distinguished in that the plaintiff in Robbins & Meyers, supra, was not asserting the same claim in a different forum, but was asserting a different claim based upon a contract right. The court found that the Title VII statutory right and contract rights stem from different sources and are independent of each other. It is clear, then, that petitioner did not select an incorrect venue or forum, as in Burnett, supra. He selected an incorrect remedy.

It is true that in Robbins & Meyer, supra, the plaintiff was not prevented from proceeding with both a grievance and an

EEOC complaint. However, it is difficult to see how the holding in Robbins & Meyer, supra, could be changed for a new plaintiff whose particular union contract precludes filing both a grievance and an EEOC complaint. If, as appellant asserts in the present case (although this is not supported by the record), the collective bargaining agreement precludes members of the bargaining unit from pursuing both remedies, the same provision of the contract would also prevent those members from pursuing a grievance where they have filed an EEOC complaint, or any other administrative or judicial action. The argument that the remedies are mutually exclusive might have some validity if they were made exclusive by rule or statute, rather than by the contract. However, the validity of procedural requirements established by rule or legislative enactment cannot be made to turn on the peculiarities of a particular collective bargaining agreement.

Many of the federal cases involve the timeliness of an initial complaint to the EEOC. Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975); International Union of Electrical Workers v. Robbins & Meyer, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976) In those situations the plaintiffs, unlike appellant, have not been notified by their employers of their rights to complain to the appropriate state or federal agencies. The employer has no duty to provide individual notice but must post a general notice regarding Title VII rights in a conspicuous place in the work place. Even so, the employer's inaction in failing to comply with this duty does not require

equitable tolling unless it is shown that the employer's failure to do so directly contributed to the plaintiff's failure to file. Wilkerson v. Siegfried Insurance Agency, Inc., 683 F.2d 344 (10th Cir. 1982). In the present case, the employer, Department of Insurance, was under a duty to inform appellant of his appeal rights and time limitations, and did so. The Department of Insurance was under no duty to make a preliminary determination of the appropriateness of appellant's grievance and advise appellant whether he was proceeding in the correct forum. The Department of Insurance properly processed the grievance as it would any other grievance. This inaction by the agency cannot be characterized as the active deception or misconduct which is required to invoke equitable tolling. Further, record does not reflect whether the Department of Insurance was aware, while considering appellant's grievance, that appellant had failed to timely petition to the Department of Administration. Nor does it appear that appellant would have heeded such advice if it had been provided. Even after appellant was advised by the Department of Insurance that his Step II grievance was denied and that his proper remedy was to petition the Department of Administration for review, appellant proceeded to file a Step III grievance.

More apposite, then, are cases involving untimely filing in the United States district courts after receipt by the plaintiff of a "right to sue" letter following a determination by the EEOC. In such cases, the plaintiff is notified of his right to file suit and the time limitations for doing so. Such notice is

directly comparable to the notice requirement of Rule 22A-7.10(2)(b), F.A.C. Where notice to the employee is unambigous, federal courts have refused to apply the equitable tolling doctrine. Cottrell v. Newspaper Agency Corporation, 590 F.2d 836 (10th Cir. 1979). In Cottrell, supra, the EEOC determination and notice stated that substantial weight had been given to the state agency findings. Since further state agency proceedings were pending, plaintiff believed the Title VII time limits would not apply until the state proceedings were concluded. The court held plaintiff's misunderstanding did not entitle him to equitable relief. Since the language of the notice was clear, the fact that the plaintiff was subjectively misled was not reasonably predictable from the face of the notice and cannot be grounds for tolling the filing period. Cottrell, supra, at page 839. In the present case, appellant was given notice of his review rights in unambiguous terms and was clearly not misled by the notice. The fact that he and his union representative subjectively believed they could ignore the notice and proceed with a union grievance does not furnish grounds for equitable tolling. Appellant asserts that the January 30, 1985, notice was characterized in a grievance proceeding as a "preliminary determination". In doing so Appellant, again, resorts to matters which are outside the record. Nevertheless, this asserted characterization is not pertinent. It is plain on the face of the notice that it is a final notice of a completed action.

Appellant argues that he did not sleep on his rights but

diligently pursued them through the union grievance process. Diligent efforts of a plaintiff are a factor sometimes considered by the courts in applying the equitable tolling doctrine. However, diligent efforts alone are insufficient to support equitable tolling. Baldwin County Welcome Center v. Brown, 466 U.S. 147, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984).

Similarly, appellant's argument that neither the Department of Insurance nor the Department of Administration would be prejudiced by tolling of the time limitation is insufficient. Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply, once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine. Baldwin County Welcome Center v. Brown, supra, at 1726. Further, the asserted lack of prejudice is unsupported. The purpose of Rule 22A-7.10(2), F.A.C., is to provide a point at which an agency may determine that an absent employee is not returning and refill the vacant position. Cook v. Division of Personnel, Department of Administration, 356 So.2d 356 (Fla. 1st DCA 1978). The state and public have an interest in replacing public employees who do not work. Hadley v. Department Of Administration, 411 So.2d 184 (Fla. 1982). Clearly, the Department of Insurance which has an interest in quickly replacing absent employees has, for the same reason, an equal interest in assuring that appeals from such actions are made on a timely basis.

Finally, appellant argues that the Department of

Administration should have provided appellant with a hearing on the timeliness of his petition. The workers compensation cases cited in support of this proposition are not pertinent to the present case, however. In Vayvoski v. Unemployment Appeals Commission, 443 So.2d 145 (Fla. 5th DCA 1984), Waldron v. City of Arcadia, 409 So.2d 1138 (Fla. 2d DCA 1982), and Teater v. Department of Commerce Board of Review, 370 So.2d 847 (Fla. 3d DCA 1979), factual issues were raised regarding mailing and receipt of the notices of agency action. The difference lies not in the receipt versus the sufficiency of the notice. The crux in Vayvoski, Waldron, and Teater, supra, is in the existence of unresolved questions of fact. In the present case, there were no factual issues requiring resolution. The Department of Administration's initial Order on Receipt of Petition and Notice of Intended Disposition found that the facts established in the letter from appellant's union representative did not provide a factual or legal basis for extending the time limit. Appellant was given thirty days in which to submit evidence, argument or objections to the intended dismissal. This the appellant failed to do, since his submitted evidence went to the merits rather than the timeliness of his petition. Hence, an evidentiary hearing would have served no purpose.

CONCLUSION

The federal doctrine of equitable tolling is applied where a claimant has received inadequate notice, has been misled by the court, or has been lulled into inaction by the active deception or misconduct of a defendant. No such circumstances exist in the present case which would justify application of the equitable tolling doctrine, and the decision of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee was furnished by United States Mail, postage prepaid, to Ben R. Patterson, Esquire, Post Office Box 4289, Tallahassee, Florida 32315, this 15th day of May, 1987.

Pamela Miles