SUPREME COURT OF FLORIDA

JOHN J. MACHULES,

Appellant,

Case No. 70,311

vs.

DEPARTMENT OF ADMINISTRATION,

Appellee.
_____/

REPLY BRIEF OF APPELLANT
ON APPEAL FROM FIRST DISTRICT COURT OF APPEAL

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ARGUMENT

I.

The Doctrine of Equitable Tolling may 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 without being in conflict with the decision in Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982).

The Department of Administration, in its brief, apparently concedes there are circumstances where the Doctrine of Equitable Tolling should be utilized. It appears to argue, however, that the instant case it is inappropriate to invoke the Doctrine so as to permit Mr. Machules an opportunity to have some substantive hearing on his petition against abandonment.

The Department concedes that in Burnett v. New York Central Railroad Co., 380 U.S. 424, 85 S.Ct. 1050, 13 L.Ed.2d 941 (1965), that the Doctrine of Equitable Tolling was used to permit a plaintiff who had filed his action in the wrong form to thereafter file his action in the appropriate form despite the applicable statutes of limitations.

The situation in Burnett is akin to the situation at hand. In Burnett the plaintiff filed his action, initially in the wrong form. Here, the Appellant initially pursued his appeal against abandonment by a filing with the Department of Insurance rather than the Department of Administration.

In Burnett, the plaintiff's action in the wrong form was dismissed after the limitations period had passed. In this case Mr. Machules' appeal against abandonment which was filed with the

Department of Insurance was denied after the time had passed to make a filing with the Department of Administration.

In Burnett, the plaintiff was permitted to make a filing despite the passage of limitations period in the appropriate forms. There are compelling reasons that Mr. Machules' filing with the Department of Administration should now be allowed.

The State of Florida has a centralized personnel system. All employees of the various departments and agencies of the State of Florida, with few exceptions, are participants in the Career Service System. The Career Service System is administered by the Department of Administration.

Under the provisions of Chapter 447, Florida Statutes, the Governor of the State of Florida is the public employer for all the employees of the State of Florida regardless of the agency in which they are located. He designated through Executive Order 74-41 that the day-to-day responsibilities of the public employer be executed by the State of Florida Department of Administration. Similarly the day-to-day responsibilities of the administration of the Career Service System are vested in the Department of Administration by the provisions of Chapter 110 of the Florida Statutes.

Page 44 of the appendix submitted by the Appellant which showed that the contract between the Union and the State of Florida was signed by the Secretary of the Department of Administration, then Nevin Smith. Similarly, the State Labor Relations Director, Conleyy M. Kennison, signed the agreement and, it is the State Labor Relations Director, within the

Department of Administration, who is the central focus of any grievance that has not been resolved between the State agencies and the Union. See, page 37 of the Appellant's appendix.

Under this centralized system and in the situation now there would seem to be a greater argument for the application of the Doctrine of Equitable Tolling then existed in the scenario described in Burnett.

CONCLUSION

The Department of Administration notes that Mr. Machules was, for the most part, a pro se litigant. See page 5 of the Appellee's brief. He was, of course, assisted by the Union but he had no representation by any lawyer. It is understandable that he was confused as to the appropriate method for challenging his dismissal. He now seeks no more than a hearing on the merits on his petition against abandonment. He has sought, consistently, such a hearing. There appears to be no reason to deny him such a substantive hearing. He has not been sitting on his rights. He has, from the time of the notification of dismissal given to him by the Department of Insurance, sought a meaningful hearing. He respectfully submits to this Court that he should be permitted a hearing on the substance of his claim. The Court should countenance the invocation of the Doctrine of Equitable tolling in the instant case so that his petition

against abandonment filed with the Department of Administration would be considered timely filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by pre-paid United States postal service to Pamela Miles, Assistant General Counsel, Department of Administration, 530 Carlton Building, Tallahassee, Florida 32399-1550 this 9th day of June, 1987.

BEN R. PATTERSON