IN THE SUPREME COURT OF FLORIDA

CASE NO. **74,339**
DCA CASE NO. **88-1783**

GULF COUNTY SCHOOL BOARD,

Petitioner,

vs.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION and ERNEST S. WASHINGTON,

Respondents.

APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS

CERTIFIED TO BE IN DIRECT CONFLICT

INITIAL BRIEF OF PETITIONER

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TOPICAL INDEX TO BRIEF

CITATION OF AUTHORITIES

DESIGNATION OF THE PARTIES AND RECORD

The Appellant, GULF COUNTY SCHOOL BOARD, will be referred to as "School Board", and the Appellee, ERNEST WASHINGTON, will be referred to as **"Washington".**

The following symbols will be used:

"R - ___" = Record on Appeal

"U.C." = Unemployment Compensation

"U.A.C." = Unemployment Appeals Commission

STATEMENT OF THE CASE

WASHINGTON filed a claim for U. C. on August 25, **1987** claiming that he was employed by the School Board as a teacher and was not re-employed for the upcoming school year because his teacher certification expired. (R-1) School Board protested payment of U.C. benefits on the grounds that WASHINGTON was not eligible for employment for the **1987-88** school year because he failed to maintain his certification to teach as a pre-requisite to teach in the Florida public schools. (R-5) The Claims Examiner of the Florida Department of Labor and Employment Security, Division of Unemployment Compensation ruled on March 11, **1988** that benefits were payable because: **"The** discharge was for reason other than misconduct connected with the work." (R-6) School Board requested a hearing, which was held before Wade C.

Pierce, Esquire, Appeals Referee, on April 5, 1988 and his decision was rendered on April 8, 1988 affirming the determination of the Claims Examiner. (R-60, 61) School Board filed its application for review before the Unemployment Appeals Commission on April 14, 1988. (R-62) On June 14, 1988 the U.A.C. entered its Order affirming the decision of the Appeals Referee. (R-66) On July 8, 1988 School Board filed its Notice of Administrative Appeal to the First District Court of Appeal of Florida. (R-67) On May 25, 1989 the First DCA affirmed the determination of the claims examiner, however, the panel certified their decision to be in direct conflict with decisions of other district courts of appeal. On June 14, 1989 SCHOOL BOARD filed its notice to invoke discretionary jurisdiction to the Supreme Court of Florida.

STATEMENT OF THE FACTS

WASHINGTON was employed by School Board in August, 1984 as a teacher under a temporary certificate for the 1984-85 school year. (R-55) He was informed at the time that he must maintain certification with the State Board of Education in order to be eligible to continue to teach which would require that he pass the Florida Teachers' Certification Examination. (R-23, 24, 52) He failed the test (R-24) and received another temporary certificate for the 1985-86 school year (R-54) and taught under this temporary certificate that year. He again failed the test

(R-24), and applied for and received a third temporary certificate for the 1986-87 school year with the certificate ending on June 30, 1987. (R-53) In March, 1987 he failed the test again. (R-27, 28) He did not apply for or receive another temporary certificate or regular teacher's certificate. (R-37) His last day of employment with School Board was May, 1987. (R-25, 26) He applied for U.C. on August 25, 1987 giving as his reason that he was not employed because his certificate expired. (R-1)

The Superintendent of Schools testified that according to the Department of Education, Certification Division, it would not have been possible for WASHINGTON to have obtained another temporary certificate. (R-43) WASHINGTON was aware of the legal requirements that he pass the certification test before he would be allowed to teach in any school system in Florida. (R-22, 24, 26, 42, 44) WASHINGTON's testimony was vague as to the dates when he had taken tests for certification. A careful analysis of his testimony will reveal at the time he testified on the hearing date of April 5, 1988 he had taken and failed all tests that were available to him for certification prior to the time he was notified that he could not be employed in the Gulf County School System. The following questions and answers on Page 28 are pertinent:

"Referee: And when were you scheduled to take it?

Washington: I can't recall the date, in fact I've already rescheduled another test, which I'm supposed to take the 24th of March. I can't remember the exact dates.

Referee: Do you remember approximately when you were scheduled to take it?

Washington: I can't--well, I, in fact, I took it, but I can't recall the date it was.

Referee: Was it before the beginning of August?

Washington: Yes, it was before August.

Referee: Okay, what were the results of that test?

Washington: I failed."

Also on Page 31 the following testimony is pertinent:

"Referee: Okay, the next test that you scheduled was it-- were you able to schedule it before school started last year?

Washington: No.

Referee: Okay, do you recall when that test was?

Washington: I can't recall exactly when it was, but I took it before school started. I--1 think it was --

Referee: Okay, and you say that you failed that test also? Did you tell Mr. Williams about failing that test?

Washington: Right. I did.

Referee: Did he have any instructions for you then?

Washington: There's no instructions he could have given me and that would be to any help I don't think it would.

Referee: Did he tell you, you were fired?

Washington: Did he say--well, tell me I was fired, well, automatically you know, after I didn't pass it I--he told me well, you know, I couldn't be rehired and I knew this, that, you know, he didn't have to tell me."

The last temporary certificate that WASHINGTON had from the State Department of Education covered that period of time from July 1, **1986** though June **30**, **1987**. (R-37) The last day of WASHINGTON's employment with Gulf County School System was May, **1987**. (R-41) WASHINGTON had only three temporary certificates

covering the years 1984-85, 1985-86 and 1986-87. His temporary certificates covered Guidance and Social Studies. (R-52, 53, 54, 55)

SUMMARY OF ARGUMENT

SCHOOL BOARD contends that WASHINGTON, who taught Guidance and Social Studies in the Gulf County School System under temporary certificates issued by the State Board of Education for the school years **1984-85, 1985-86** and **1986-87,** with his employment ending on June 30, **1987** because he had failed to pass the teachers' certification examination and could not secure a certificate for the school year **1987-88,** commencing in August, **1987,** was wrongfully granted U. C. benefits to be charged against SCHOOL BOARD. WASHINGTON understood that he must maintain certification to teach as required by Florida Statutes as a condition of his employment as a teacher with the Gulf County School System. Although WASHINGTON failed the test for certification on three occasions he was permitted to teach under temporary certificates for three consecutive years, **1984-85, 1985-86** and **1986-87,** with the understanding that he could only be issued a maximum of three temporary certificates, according to Florida law, and would thus have to successfully complete the teachers' certification examination to be eligible for employment during the **1987-88** school year. That as of the commencement of the **1987-88** school year WASHINGTON had not passed the certification test nor did he have a temporary teachers' certificate for that year. WASHINGTON's inability to meet the required conditions for employment was not caused by the SCHOOL BOARD, nor could the SCHOOL BOARD be considered morally or legally blameful therefor. **As** a result of WASHINGTON's failure

to meet these known and accepted conditions he has voluntarily left his employment without good cause attributable to his employer and is thus barred from claiming unemployment compensation benefits pursuant to Section 443.101 (1)(a), Florida Statutes 1987 regardless of his apparent good faith efforts to meet such conditions of his employment.

POINT ON APPEAL

WHETHER A PUBLIC SCHOOL TEACHER, WHO KNEW, UNDERSTOOD, AND ACCEPTED, AS A CONDITION OF EMPLOYMENT, THE REQUIREMENT THAT HE MAINTAIN THE REQUIRED STATE CERTIFICATION, AND WHO, THROUGH NO FAULT OF HIS EMPLOYER, FAILED TO MAINTAIN SUCH CERTIFICATION, AND WAS SUBSEQUENTLY NOT RE-EMPLOYED ON THE GROUNDS OF HIS FAILURE TO MAINTAIN SUCH CERTIFICATION, IS DEEMED TO HAVE VOLUNTARILY LEFT HIS EMPLOYMENT WITHOUT GOOD CAUSE ATTRIBUTABLE TO HIS EMPLOYER REGARDLESS OF WHETHER HE RESIGNED OR WAS DISCHARGED AND REGARDLESS OF WHETHER HE MADE GOOD FAITH EFFORTS TO MEET SUCH CONDITIONS OF EMPLOYMENT.

ARGUMENT

Section 231.02, F.S., in substance, requires that a person employed in an instructional capacity in a school system shall hold a certificate issued under the rules of the State Board of Education. Section 231.17 (2)(a) provides, in substance, that each applicant for initial professional certification shall demonstrate, in a comprehensive written examination or through such other procedure as may be specified by the State Board of Education, mastery of certain essential requirements and competencies to obtain a professional certificate. Section 231.17 (2 (d), Florida Statutes 1987, provides in part that:

> "A person who meets all certification requirements which have been established by law or rule, other than the passing of the written examination may be issued an initial temporary certificate for the first year of employment in a public school district in this state."

In addition, Section 231.17 (2)(e), Florida Statutes 1987,

provides that:

> "An additional temporary certificate may be issued under rules of the State Board to a person who has passed the reading, writing and mathematics portions of the required examination but who has not passed the professional section. A maximum of two temporary certificates may be issued to a person under the provisions of this paragraph."

In the instant case WASHINGTON was issued three temporary certificates with the last certificate expiring June 30, 1987. (R-53) No further temporary certificates were available to WASHINGTON according to Superintendent Wilder. (R-43) A review of the record (R-24) reveals that WASHINGTON failed the professional section of the examination on each examination attempt and thus was limited by statute to a maximum of two additional certificates covering the 1985-86 and 1986-87 school years.

Although his testimony is somewhat vague, a careful analysis of the testimony of WASHINGTON discloses that he had taken and failed his last test in March, 1987 and knew that he had no certificate to teach for the school year 1987-88. He likewise knew that he could not teach school without this certificate. When the 1987-88 school year commenced in August, 1987, WASHINGTON was not eligible for employment. Although the record, (R-4), indicates that WASHINGTON may have scheduled a fourth test to be taken March 2, 1988, he had no teacher's certificate at the commencement at the 1987-88 school year.

In School Board of Lee County V. Florida Unemployment Appeals Commission, 500 So.2d 253 (1 DCA 1986) this Court was

confronted with a very similar situation except the teacher in that case only took the examination once and failed. The Appeals Referee awarded compensation benefits to her finding that she did not quit but was separated due to lack of work at the end of a term. The Unemployment Appeals Commission affirmed and this Court reversed.

On page 254 of its decision, the Court stated:

> "* * * Ms. Randall had no reasonable assurance of employment for the successive academic year, since she failed the Teacher Certification Exam and her temporary certificate had expired.
>
> * * * the reason Ms. Randall had no assurance of further employment with the Lee County School Board is that she failed to maintain her certification to teach. (emphasis supplied)
>
> Certainly, certification is a known and accepted condition of a public school teacher's employment. Failure to meet or maintain known and accepted conditions of employment results in a finding that the employee voluntarily left her employment without good cause attributable to her employer regardless of whether the employee resigns or is discharged.
>
> * * *
>
> Under the unemployment compensation law, Section 443.101 (1)(a), Florida Statutes, an individual is disqualified from receiving benefits if [he] voluntarily left [his] employment without good cause attributable to her employer."
> (citing authorities)

In School Board of Lee County, supra, the same principle of law stated by this Court is applicable in the instant case. In that case the Court stated that the teacher had no assurance of further employment with the Lee County School Board because she failed to maintain her certification to teach and this was

equivalent to voluntarily leaving her employment without good cause attributable to her employer, and it did not matter whether she resigned or was discharged. Although WASHINGTON did not quit he was told by his principal that he could not be rehired and WASHINGTON acknowledged that he knew that fact and that his principal did not have to tell him. (R-31)

SCHOOL BOARD had no control over WASHINGTON'S ability to pass the written examination specified by the State Board of Education which is a known and accepted condition of a public school teacher's employment: nor did SCHOOL BOARD have the legal authority to re-employ WASHINGTON for the upcoming 1987-88 school year without his obtaining a certificate from the State Board of Education to authorize his employment in an instructional capacity in a school system. He had exhausted his temporary certificates, and was not entitled to certification by the State Board because of his failure to pass the written examination, an essential requirement for certification.

The First DCA distinguished the **Lee** case from the instant case on the grounds that WASHINGTON, unlike the claimant in **Lee**, supra, made a good faith effort to meet employment conditions by preparing to sit for a fourth examination, after three unsuccessful attempts, rather than voluntarily resigning as did the teacher in **Lee**, supra. The panel in the instant case stated:

> "Because the teacher there [Lee] after once failing the teacher exam made no good faith effort to perform the known and accepted condition of employment - passing the exam. Instead she chose to resign her employment. In contrast, appellee at bar has made a good faith effort to perform - he

> sat for the examination three times. Furthermore, there is record evidence to support the conclusion that he was preparing to sit for the examination a fourth time when he was notified that his employment would be terminated."

Notwithstanding these factual distinctions a comparison of the **Lee**, supra, case to the instant case reveals no differences in the principles of law involved. According to **Lee**, supra, when unemployment is based on the teacher's failure to meet known and accepted conditions of employment, then whether termination of employment is by voluntary resignation or by involuntary discharge by the employer is of no significance. The failure to meet the known and accepted conditions of employment simply "results in a finding that the employee voluntarily left [his] employment without good cause attributable to [his] employer regardless of whether the employee resigns or is discharged". See **Lee**, supra, at **241**. While WASHINGTON did not resign as noted by the First DCA in the instant case, and the teacher in Lee, supra, did resign, it would appear that any resignation by the teacher in **Lee**, supra, as well as WASHINGTON, would be an empty act without legal significance because neither could resign from a position for which they were prohibited by law from holding unless it be from teaching under a temporary certificate for the permitted time listed on the certificate. An examination of WASHINGTON's temporary certificates **(R-53, 54, 55)** reveals that they are granted specifically for a time period of one year before expiration. The teacher in **Lee**, supra, taught for one year and her temporary certificate expired. Thus in actuality

she did not resign from any position.

Nor is WASHINGTON's good faith yet unsuccessful attempt to comply with such conditions a significant factor distinguishing the instant case from **Lee**, supra. In retrospect the majority concluded that WASHINGTON's three unsuccessful attempts to pass the exam and his preparation for the fourth attempt evidenced a good faith effort distinguishing the case from the Lee County, supra, case wherein the claimant voluntarily resigned. A careful reading of the **Lee**, supra, case would reveal that whether or not the Claimant's efforts to perform known and accepted conditions were made in good faith is of no significance. The benchmark or deciding factor is simply whether or not the claimant has met these known and accepted conditions of employment. Failure to meet these known and accepted conditions of employment "results in a finding that the employee voluntarily left [his] employment without good cause attributable to [his] employer....". See **Lee**, supra, at 241. Nonetheless, the panel in the instant case retreats from their previous holding in **Lee**, supra, distinguishing the later from WASHINGTON on the basis of WASHINGTON's good faith in continuing to attempt to pass the teacher certification test.

In Florida Sheriffs Youth Fund v. Department of Labor and Employment Security, 436 So.2d 332 (2 DCA 1983), involving an employee who was hired as a part of a team with her husband for the purpose of creating a family environment in a home for dependent girls. A known and accepted condition of the

employment was that each member of the team had to perform satisfactorily and that upon the resignation or discharge of one of the team, the other would likewise be discharged. The Second DCA, in reversing the compensation awarded to the wife (who had satisfactorily performed her job) of a man discharged for misconduct, held that the wife (voluntarily) left her employment. The court in Youth Fund, held:

> "Whether or not this failure (to meet a known condition of employment) was the employee's fault * * * was immaterial; the issue was whether (her) * * * failure to meet (her) * * * job requirements was due to good cause attributable to (her) * * * employer." i.d. at page 334

The court in Youth Fund, supra, goes further:

> "We therefore hold that where, as here, an employee becomes unable to meet a known, understood, and accepted condition of employment, and where, as here, that inability cannot be considered to be the fault (in the sense of blameworthiness) of the employer, the employee will be considered to have voluntarily left his employment without good case attributable to his employer, regardless of whether the employee resigns or is discharged and regardless of whether the employee's inability was reasonably avoidable or is reasonably remediable by the employee. We see no justifiable basis for transferring the economic misfortune of one innocent party onto a second innocent party over that second party's objection."

In Paschal v. Florida Department of Labor and Employment Security, 405 So.2d 1020 (3 DCA 1981), review denied 412 So.2d 468 (Fla. 1982), cert. denied 456 U.S. 981, 102 Sup. Ct. 2251, 72 L.Ed.2d 857 (1982), the claimant was employed by the County in a occupation which required the use of a personal or privately owned vehicle. Claimant was terminated from his job after his automobile was repossessed and he did not secure another vehicle.

The Third **DCA** determined that claimant was disqualified because he left his employment without good cause attributable to his employer.

In Neller V. Unemployment Appeals Commission, **510** So.2d 652 **(5 DCA** 1987), the claimant was employed as a pizza deliverer, an occupation which required use of a personal automobile. Claimant's job was terminated when her automobile became disabled. The Fifth **DCA** held:

> "The use of the employee's personal vehicle was a known, understood, and accepted condition of her employment. It was not the employer's fault that the employee's car became disabled. Therefore, the employee is considered to have voluntarily left her employment without good cause attributable to her employer."

In each case cited above the courts adhere to the principle of law that where the employer establishes conditions of employment for all employees and the conditions were known and understood by the employee at the time of his application for employment, then the employee holds the key to his employment by complying with these standards and conditions. What Lee, supra, Youth Fund, supra, Paschal, supra, and Neller, supra, provide is a workable objective standard in which the right to unemployment compensation benefits is based solely upon whether the known and accepted conditions of employment are met, and not the motivation or lack thereof, underlying the claimant's failure to meet such conditions. Should the claimant's motivation underlying the unsuccessful attempt become a factor, then undoubtedly inquiry would have to be had as to each claimant's "subjective" frame of

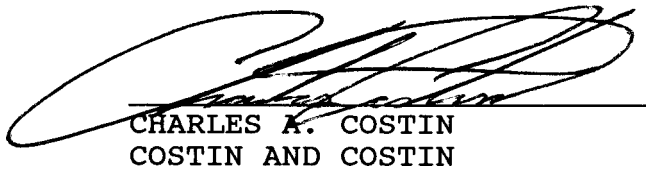
mind in attempting to meet such conditions. In Paschal, supra, inquiry would be had concerning the attempts, if any, of the claimant to secure another automobile for use in employment. Likewise in Neller, supra, an issue would be whether claimant made a good faith effort to maintain her vehicle so that it would be operable. In the instant case inquiry would have to be had as to whether WASHINGTON diligently prepared for each unsuccessful attempt at passing the teachers' certification exam.

Indeed, Section **443.031**, Florida Statutes **1987** provides that Chapter **443** is to be "liberally construed" to accomplish its purpose, which includes the providing for "the payment of compensation to individuals with respect to their **unemployment"**, however, the underlying theme behind the establishment of unemployment compensation by the legislature is to provide benefits for **"persons** unemployed through no fault of their **own".** See Section **443.021**, Florida Statutes **1987.** The economic burden should not be transferred to an employer where an employee fails to meet an essential and reasonable condition of his employment unless the employer either caused the employee's default or could be considered morally or legally blameful therefore. Such is not the case when the SCHOOL BOARD is prohibited by law from re-employing WASHINGTON. It would be an unreasonable burden upon the SCHOOL BOARD to be required to pay, from the school funds, unemployment compensation benefits to those who cannot meet known and accepted conditions of employment through no fault of the SCHOOL BOARD.

CONCLUSION

In conclusion, SCHOOL BOARD prays that this court will reverse the FLORIDA UNEMPLOYMENT APPEALS COMMISSION and the First DCA which affirmed the Appeal Referee's holding that WASHINGTON was entitled to unemployment compensation benefits and remand the cause to the Commissioner with instructions to rule that WASHINGTON left his employment without good cause attributable to the SCHOOL BOARD and therefore is not entitled to unemployment compensation benefits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Ernest Washington, **312** Ferndale Place, Oxon Hill, Maryland, **20745**, Geri Atkinson-Hazelton, Esquire, Suite **221**, Ashley Building, **1321** Executive Center Drive, East, Tallahassee, Florida, **32399-0681** and John D. Maher, Esquire, **221** Ashley Building, **1321** Executive Center Drive, East, Tallahassee, Florida, **32399-0681**, this 21 day of July, **1989**.

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