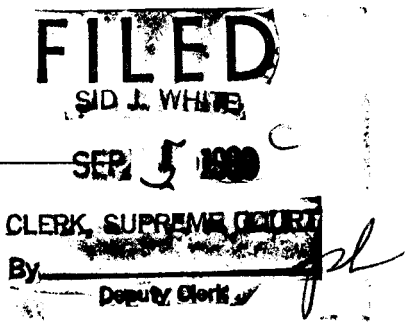
IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF PETITIONER

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PARAPHRASED POINT ON APPEAL

AN EMPLOYEE WHO IS DISCHARGED FOR FAILURE TO MEET KNOWN, UNDERSTOOD AND ACCEPTED CONDITIONS OF EMPLOYMENT IS CONSIDERED TO HAVE VOLUNTARILY LEFT HIS EMPLOYMENT WITHIN THE MEANING OF SECTION 443.101 (1)(a), F. S.; AND HAVING VOLUNTARILY LEFT HIS EMPLOYMENT, CANNOT ARGUE GOOD FAITH EFFORT AS AN EXCUSE IN AN ATTEMPT TO COLLECT UNEMPLOYMENT COMPENSATION BENEFITS AGAINST THE OBJECTION OF AN INNOCENT EMPLOYER WHO CANNOT BE ATTRIBUTED WITH THE EMPLOYEE'S FAILURE TO MEET SUCH CONDITIONS OF EMPLOYMENT.

ARGUMENT

SCHOOL BOARD takes issue with the First DCA factual finding that WASHINGTON was able to teach in Florida for three years while holding temporary certificates for the reason that he was licensed to teach in another state. A careful review of the record would reveal that WASHINGTON's three expired certificates (R-52, 53, 54) were issued by the State of Florida for the purposes of allowing him to teach on a temporary basis within the Florida public school systems during all relevant times mentioned in this brief, however, SCHOOL BOARD does not think this factual dispute is of any significance in application of Florida Unemployment Compensation Law.

SCHOOL BOARD agrees that the declared public purpose of Florida Unemployment Compensation Law, Chapter 443, Florida Statutes, is to provide financial assistance to persons unemployed through no fault of their own, Section 443.021,

Florida Statutes, subject, however, to certain enumerated statutory exceptions designed to narrow eligibility, one of which being Section 443.101 (1)(a), F. S. which Appellee would have the Court overlook. Section 443.101 (1)(a), F. S. (1987) states that an individual shall be disqualified for benefits:

> "for the week in which he has voluntarily left his employment without good cause attributable to his employer . . ."

Good cause is defined by the statute as:

> "'Good Cause' as used in this subsection shall include only such cause as is attributable to the employer or which consists of illness or disability of the individual requiring separation from his employment.'' (Section 443.101 [1] [a][1])

Appellee argues that the Employer's fault or lack of fault should have no direct bearing on a claimant's entitlement to benefits. This argument is without merit. Clearly, by limiting the definition of "good cause" to include only such cause as is attributable to the employer, the statute lends itself to no other interpretation than to exclude employees who leave work for reasons not attributable to their employers.

In Adain v. Unemployment Appeals Commission, 523 So.2d 175 (3 DCA 1988), the court discussed the legislative history of Section 443.101 (1)(a), F. S., as follows:

> "The history of this section is quite clear in portraying the legislator's intent in passing a law. Prior to 1963, the law did not require the employee to show that he left his work for a good cause attributable to the employer. The employee needed only to show that he was voluntarily leaving for a good reason. Under that version of the statute, for example, this court interpreted good cause to include familial obligations. (Citing Yordamlis v. Florida Industry Commission, 158 So.2d

791 [Fla. 3 DCA 1963), Williams v. Florida Industrial Commission, 135 So.2d 435 [Fla. 3 DCA 19611) However, in 1963, the Legislature amended the law, then Section 443.06 (1), to require the good cause for voluntary termination to be 'attributable to the employer'. See Chapter 63-327, Section 1, Laws of Florida. Clearly then, by this change the Legislature intended to narrow eligibility for unemployment compensation. (See Beard v. State, Department of Commerce, Division of Employment Securities, 369 So.2d 382 [Fla. 2 DCA 1979])"

Appellee has argued that the case of St. Joe Paper Company v. Gautreaux, 180 So.2d 668 (1 DCA 1965) should be controlling. This case involved an employee who was forced to retire on a pension pursuant to the provisions of a pension plan in a collective bargaining agreement, at the age of 65, when the employee desired to continue his work. The court held that Gautreaux left his employment because he had no alternative but to submit to the employer's retirement policy, regardless of how it originated and therefore his leaving in compliance with that policy was involuntary for the purpose of the unemployment compensation statute. There is a distinction in the cases involving pension plans and the instant case in that pension plans are initiated or formulated by the employer, and the employee has no alternative except to submit to the employer's retirement policy. In other words the employment mandate was "attributable to the employer", at least in part, while the mandate which requires a teacher to be certified by the State Board of Education before teaching in the public schools of Florida is a pre-requisite to employment.

Appellee has argued that an employee who is fired cannot

be considered to have left voluntarily and that by finding such, the courts (Youth Fund, supra), has created a fiction in other to disqualify claimants merely because the employer is without fault. If **"voluntary"** is read out of the context of the statute, it is easy to understand how WASHINGTON, as well as the claimant in each case cited in Appellant's initial brief could argue nothing was voluntary about their job termination; however, when read in the context of the statute, the term voluntary has a "precise legal meaning". "Within the statute it functions as a preliminary test to determine whether the employee became unable to meet a known, understood and accepted condition of employment." Adain, supra, at page 177. It should be noted that in every case cited in Appellant's main brief and Amici's main brief, the courts have held that an employee who becomes unable to meet known, understood and accepted conditions of employment is considered to have voluntarily left employment regardless of whether the employee resigns or is discharged.

It is obvious that Appellee's argument centers on the premise that WASHINGTON's termination was not voluntary within the meaning of Section 443.101 (1)(a) in that it was in no sense welcomed. Even assuming such argument was valid, no serious contention can be made that WASHINGTON's good faith or lack thereof is an element or factor to be considered in application of the statute. Good faith or lack thereof cannot be reconciled with application of Section 443.101 (1)(a), F. S., under the standard rules of statutory construction. While good faith

effort or lack thereof may have some conceivable value in determining whether or not the termination was voluntary, it is just as conceivable or even more so that one who has put forth no effort could convincingly argue that termination was involuntary. For instance, in Lee County, supra, the claimant, who resigned rather than accept inevitable discharge, could have very well forced her employer to discharge her. Clearly she could argue that there was nothing voluntary about her termination and if Appellee's reasoning is applied she would be entitled to unemployment compensation benefits. To take the analysis a step further, suppose WASHINGTON resigned after expiration of the school term in which his final certificate expired rather than face inevitable discharge. Surely parting with his employment by either means would not be welcomed by him or voluntary from his perspective. In short it simply makes no difference whether an employee resigns or is discharged when he has failed to meet known, understood and accepted conditions of employment.

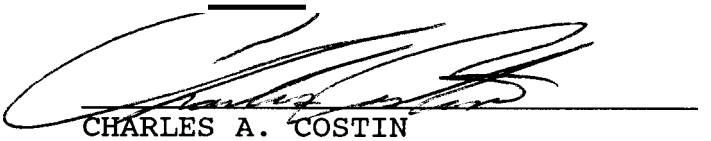
Even more critical is such analysis to SCHOOL BOARD who, unlike the hiring authorities in Youth Fund, supra, Paschal, supra, Adain, supra and Neller, supra, is required by law to employ only those personnel who maintain state certification and who likewise have no choice but to terminate employment when such certification is not maintained. Should SCHOOL BOARD refrain from employing that majority class of applicants possessing only temporary certificates in order to avoid the risk of later becoming liable for unemployment compensation benefits to those

who become unable to maintain certification? To the contrary, (and as noted by the panel in the order appealed from), the Legislature expressed a policy intended to encourage the application and employment of persons pending passage of the certification exam by providing for the issuance of temporary certificates. Should the order as rendered stand affirmed, this policy surely will be discouraged.

CONCLUSION

The First DCA, through judicial activism, has attempted to fashion a good faith exception to a clear and unambiguous statute in an effort to broaden eligibility for unemployment compensation benefits and in the process has rejected long standing interpretations from every district court of appeal. The effort must fail in that the legislative history underlying Section 443.101 (1)(a) shows a clear intent on the part of the legislature to narrow eligibility for benefits by requiring that cause for termination be attributable to employers. Further no effort has been made to show the court how such an exception can be reconciled with Section 443.101 (1)(a), F. S. under the standard rules of statutory construction. For reasons so stated the order appealed from must be reversed.

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-Hazelson, 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 1st day of September, 1989.

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