SUPREME COURT OF FLORIDA

TIMOTHY MASON, SR.,	)	
	)	
Petitioner,	)	Case No. 93,356
	)	
vs.	)	District Court of Appeal
	)	1st District - No. 97-2754
LOAD KING MANUFACTURING COMPANY, and UNEMPLOYMENT APPEALS COMMISSION,	)	
	)	
Respondents.	)	
	)	

PETITIONER'S INITIAL BRIEF ON THE MERITS

Appeal taken from the final decision of the First District Court of Appeal which conflicts with a decision rendered by the Fifth District Court of Appeal in Blumetti v. Unemployment Appeals Commission, 675 So. 2d 689 (Fla. 5th DCA 1996).

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STATEMENT OF THE CASE

TIMOTHY MASON, SR., seeks reversal of the ruling of the First District Court of Appeals affirming the Florida Unemployment Appeals Commission (UAC) and the Appeals Referee's decision denying his unemployment compensation benefits. [R.88].

On February 20, 1997, Mr. Mason filed an initial claim for

unemployment compensation benefits against Load King Manufacturing Co. [R.1]. In a Notice of Claims Determination dated March 13, 1997, Mr. Mason was found to be disqualified for benefits because of misconduct connected with his work. [R.9].

Mr. Mason timely appealed the decision of the claims adjudicator on March 17, 1997. [R.10].

A hearing was held on April 14, 1997, before Appeals Referee Tracy E. Coleman. [R.13-63]. In her April 15, 1997 decision, the Appeals Referee affirmed the decision of the claims adjudicator. [R.82-84]. Mr. Mason then filed an appeal to the Unemployment Appeals Commission on May 5, 1997. [R.85].

The Unemployment Appeals Commission affirmed the Appeals Referee's decision on June 12, 1997. [R.87]. On April, 15, 1998 the First District Court of Appeals rendered a decision which is in direct conflict with the decision rendered by the Fifth District Court of Appeal in Blumetti v. Unemployment Appeals Commission, 675 So. 2d 689 (Fla. 5th DCA 1996). Whereupon, the petitioner filed his timely notice requesting this honorable court to accept jurisdiction of this matter in order to resolve the conflict.

STATEMENT OF THE FACTS

Mr. Mason was employed by Load King Manufacturing Company

from September 27, 1996 until February 13, 1997 as a Shear Operator. [R.20]. Mr. Mason was scheduled to work Monday through Saturday from 6:00 a.m. until 3:30 or 4:30 p.m. [R.20-21]. At the time of his separation, his rate of pay was $7.00 per hour. [R.21].

Mr. Mason's immediate supervisor was William Cromity. [R.2, 13]. Only two witnesses testified at the hearing, Mr. Cromity and Mr. Mason, the claimant. [R.13].

A summary of the testimony of Mr. Cromity is as follows:

Mr. Cromity testified he discharged Mr. Mason in February, 1997, for excessive points. [R.21]. The decision to discharge Mr. Mason was made by Greg Edwards, the plant manager. [R.22]. Mr. Cromity did not personally play any role in the decision to discharge Mr. Mason. [R.22]. Mr. Cromity alleged that Mr. Mason violated the point system of the company. [R.22].

According to the attendance policy, employees get points for reporting late to work, being absent, leaving early or clocking in or out for another associate. [R. 23]. He further testified that Mr. Mason was aware of the point system because he signed off on it. [R.23].

Time card reports are generated through a time system computer. [R.24]. Mr. Cromity did not generate the reports; however, they were done by his department. [R.24]. According to

the time report Mr. Mason was late reporting to work on December

16, 1996, December 18, 1996 and December 20, 1996. [R. 24, 25, 26]. Mr. Mason was absent from work on December 30, 1996, January 27, 1997 and January 29, 1997. [R.27, 28, 29]. Mr. Cromity was unable to give the reason for Mr. Mason being late or absent. [R.24, 25, 26, 28, 29].

On Monday, January 27, 1997 Mr. Mason was given two points for being absent. On January 29, 1997 he was given three points for being absent. [R.29, 30]. Mr. Mason did not call in to report that he would be absent on Monday, January 27, 1997. However, he did call in to report that he would be absent on Wednesday, January 29, 1997. [R.30]. Mr. Mason was suspended for two days - Tuesday, February 4, 1997 and Wednesday, February 5, 1997, for an accumulation of points. [R.30, 32]. He was suspended by Mr. Cromity. [R.30]. At that time Mr. Cromity warned Mr. Mason that his job was in jeopardy. [R.31].

Mr. Cromity testified that he believed that he had counseled Mr. Mason prior to January 1, 1997 regarding his attendance. [R.31]. Mr. Cromity testified that the counselling Mr. Mason received on January 29, 1997 was just a written warning and did not lead to his suspension. [R.32].

Following Mr. Mason's suspension he left work early on

February 8, 1997. [R.32]. Mr. Cromity testified that when an employee wants to leave work early they must request permission from the person in charge - either the lead person or the supervisor. [R.33]. He did not personally give Mr. Mason permission to leave early and he did not have any personal

knowledge as to whether Mr. Mason requested permission from the lead person. [R.33].

According to Mr. Cromity when he discharged Mr. Mason for leaving work early, Mr. Mason told him that he left work early because he had been in an argument with his wife. [R.34]. After February 8, 1997, Mr. Mason was not late on any other occasions nor did he accumulate any other points. [R.34]. Mr. Mason was not discharged until February 13, 1997, because that was the earliest date he could get an appointment for Mr. Mason to talk with the manager. [R.34].

Mr. Cromity testified that Mr. Mason's signature did not appear on the two documents that he submitted because Mr. Mason was upset and stated he wanted to see Greg Edwards about the final document. [R.35,36]. After cross examination by Mr. Mason, Mr. Cromity changed his testimony regarding the suspension. He then testified that Mr. Mason was suspended on Monday, February 3, 1997 and Tuesday, February 4, 1997, not Tuesday, February 4, 1997 and

Wednesday, February 5, 1997 as he had previously testified. [R. 36, 37.

Mr. Cromity testified that the lead person, who did not testify at the hearing, told him that he was sitting in the car when Mr. Mason came in indicating that he did not feel well and wanted to go home. The lead person told Mr. Mason to try to work since he was there. Mr. Mason worked for about ten minutes then asked the lead man if that was enough before he left work. [R.37]. After further cross examination by Mr. Mason, Mr. Cromity testified

that Mr. Mason clocked in at 5:40 a.m. and he left at 6:12 a.m. [R.38]. Mr. Cromity testified that Mr. Mason would not have received any points if he had been given permission to leave work early. [R.60].

A summary of Mr. Mason's testimony is as follows:

Mr. Mason testified that he was employed by Load King Manufacturing Company from September 27 or 30, 1996, as a shear operator. [R.39]. He was scheduled to work Monday through Saturday from 6:00 or 7:00 a.m. until 3:30 or 4:30 p.m. At the time of his separation he was earning $8.32 per hour. He was discharged by his immediate supervisor Bill Cromity. [R.40]. Mr. Cromity did not tell him why he was being discharged. Mr. Mason

testified that when he asked Mr. Cromity why he was being discharged he was informed that Greg Edwards, the warehouse manager instructed him to do so. [R.41]. Mr. Mason waited in Mr. Edward's office for about 30 to 45 minutes, however, he turned in his time card and left the premises after Mr. Edwards never arrived. [R.41].

Mr. Mason testified that he was aware of the company's attendance policy which was based on a point system for being absent and tardy. After every 30 days the points would fall off of an employee's record. [R.41]. Whenever an employee was unable to report to work they were to notify the immediate supervisor and provide the reason for the absence or lateness. [R.42].

On December 16, 1996 he was scheduled to report to work at 7:00 a.m. He did not arrive to work until 7:24 a.m. due to car

trouble. On December 18, 1996, he was given permission to be late by his lead man Melvin Crosby because he had to go to his son's school. [R.43]. Mr. Mason testified that he reported to work on time on December 27, 1996. [R.45]. He did not recall whether he was absent on December 30, 1996. [R.46]. He was also unable to recall whether or not he was absent on January 27, 1997. [R.50]. Mr. Mason testified he was absent on January 29, 1997 after he had been given permission to be off work, by either Bill Cromity or

Melvin Crosby. [R.50, 51]. He requested permission to have the day off so that he could find a place to live. [R.50] He was given a warning notice for being absent on January 29, 1997. [R. 51]. The warning was given to him by Melvin Crosby for absenteeism. [R. 51].

Mr. Mason testified he was suspended two days in February, but he could not recall the dates. [R.51, 52]. Someone told him that he was suspended for not coming to work on the Saturday before February 3, 1997. [R.52]. He had been absent on February 1, 1997, because he had been sick that day. [R. 52]. He testified that he was never warned that his job was in jeopardy when he was suspended. [R.53]. On February 8, 1997, he left work early after he was given permission to do so by Melvin Crosby. [R.53]. He had eaten breakfast that morning at Kystal which caused him to have an upset stomach. [R.53]. He had told Melvin Crosby that his stomach was bothering him and he wanted to go home. Mr. Crosby told him to try to work and he did from 5:40 until 6:12 a.m. [R.53]. At that point he advised Mr. Crosby that he was too sick to work and

Mr. Crosby told him he could go home. [R.53].

Mr. Mason testified that he had never seen a copy of the written counseling that the employer submitted to the record. [R.35]. Mr. Mason disputed Mr. Cromity's comment that he was upset

and wanted to see Mr. Edwards about the final document. [R.35, 36].

Mr. Mason testified that every time an employee is given a counseling it is read to the employee and they are required to sign the document. [R.54]. He never saw the document dated February 13, 1997. [R.54]. Mr. Mason testified he had never told Mr. Cromity that he had been in an argument with his wife on February 8, 1997. [R.54]. He was terminated for absenteeism points even though he had not missed any other days after his suspension. [R.56]. He was terminated on February 13, 1997, although all of the points against him for lateness had fallen from his record. [R.57].

Mr. Mason testified that he was late to work on February 13, 1997, because his ride did not pick him up. He called Mr. Cromity and told him he would have to walk to work. [R. 57]. Every time Mr. Mason missed a day from work he called in to report his absence to the employer. [R.59]. Additionally, he called to report any tardiness. [R.59].

Mr. Mason's time records [R.64-71] and the company's discipline point system for absenteeism were included as exhibits. [R.77]. The time records noted points received prior to Mr. Mason's suspension. There are no points reflected for February 8, 1997 or February 13, 1997. [R.64-71]. The point system provided

as follows: When an associate reached 4 points - written warning; 6 points - meet with Production Manager and Direct Supervisor; 8 points - Decision Making Day (two days off without pay); 10 points - four days suspension without pay, up to and including termination for repeat offenders within a 12 month period. [R.77].

Upon review of the record and evidence of this case, the Appeals Referee, in pertinent part, made the following findings of fact:

> FINDINGS OF FACT: The claimant was employed as a shear operator from September 27, 1996, until February 13, 1997. The employer has a progressive disciplinary policy, and known employer policy prohibits excessive absenteeism and lateness reporting for work. On December 16, 1996, the claimant was late reporting for work for unspecified reasons. The claimant was late reporting for work on December 18, 1996, with the approval of his immediate supervisor, because he had to go to school with his son. The claimant was late reporting for work on December 20, 1996, for unspecified reasons. The claimant had car trouble on occasion which would cause him to be late. On December 30, 1996, the claimant was absent for unspecified reasons. The claimant had previously been absent due to marital problems. The claimant was absent on January 27, 1997, for unspecified reasons. The claimant was absent on January 29, 1997, because he was trying to find a place to live, and was counselled about his attendance and given a written warning. The claimant was suspended on February 3 and 4, 1997, due to his attendance, and warned that his job was in jeopardy. The claimant left before the end of his shift on February 8, 1997, due to personal illness, with the approval of his immediate supervisor. The claimant was late reporting for work on February 13, 1997, because the individual with whom he rode to work did not pick him up and he

had to walk. The claimant was discharged on February 13, 1997, due to his attendance. [R.82-83].

In his Conclusions of Law, the Appeals Referee found in

pertinent part:

> CONCLUSIONS OF LAW: The law provides that a claimant who has been discharged for misconduct connected with work shall be disqualified from receiving benefits. "Misconduct connected with work" means a willful or wanton act or course of conduct in violation of the worker's duties and obligations to the employer. The record reflects that the claimant was discharged due to his attendance. Employers have a right to expect employees to report to work as scheduled unless the employee properly reports the absence and provides a compelling reason for it. The claimant was late on February 13, 1997, because he had to walk to work when his ride to work did not pick him up. The claimant's lateness was for a compelling reason. However, accumulated violations of the employer's interests over the course of the claimant's employment can show misconduct, even if the final incident leading to the discharge was not misconduct. C. F. Industries, Inc., v. Long, 364 So.2d 864 (Fla. 2d DCA 1978). By his own testimony, the claimant was late on occasion due to car trouble, or for unspecified reasons, and he had been absent due to marital problems, or because he was trying to find a place to live. The claimant had been counselled about his attendance and warned that his job was in jeopardy. The claimant's refusal to report to work as scheduled for reasons of a non-compelling nature, evidences a deliberate disregard of his duties and obligations to the employer, and constitutes misconduct connected with work. Accordingly, the claimant is not qualified to receive unemployment compensation benefits. At the

> hearing, conflicting testimony was presented regarding whether the claimant was late or absent, whether he was warned that his job was in jeopardy, and whether he knew about the employer's attendance policy. Based on the more consistent testimony of the employer's witness, compared to the less specific testimony of the claimant, conflict is resolved in favor of the employer. [R.83-84].

SUMMARY

The First District Court of Appeals incorrectly determined that Mr. Mason should be disqualified from receipt of unemployment compensation benefits because his conduct did not amount to

misconduct within the meaning of the unemployment compensation statute. In the Appeals Referee finding of fact and conclusions of law, she determined that the last two incidences prior to Mr. Mason's separation were justified.

The First District Court of Appeals was wrong to reject the ruling set forth in Blumetti v. Unemployment Appeals Commission, 675 So. 2d 689 (Fla. 5th DCA 1996), where the court found that in order to disqualify a former employee from receipt of unemployment compensation benefits there must be competent substantial evidence in the record that the employee was guilty of having committed "conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation of disregard of standards of behavior which the employer has the right to expect of

his employee." Moreover, that in order to justify a finding of misconduct the employer must prove that the tardiness or absence was inexcusable and detrimental to the employer's interest. Blumetti, id

Accordingly, Mr. Mason should be awarded unemployment compensation benefits.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEALS WAS WRONG TO DENY MR. MASON UNEMPLOYMENT COMPENSATION BENEFITS FOR EXCESSIVE ATTENDANCE PROBLEMS WHERE HE WAS DETERMINED NOT GUILTY OF MISCONDUCT FOR THE LAST TWO OCCURRENCES THAT CAUSED HIS DISCHARGE.

There is a conflict between the First District Court of Appeals and the Fifth district court of appeals as to whether a

claimant should be entitled to receive unemployment compensation benefits, where the final attendance incident leading to discharge is deemed not to be misconduct, but the claimant has had a history of attendance violations which would be tantamount to misconduct. In Mason v. Load King Manufacturing Company, 715 So. 2d 279 (Fla. 1st DCA 1998), the First District Court of Appeals affirmed the decision of the Unemployment Appeals Commission and the Appeals Referee denying Mr. Mason unemployment compensation benefits. The First District Court of Appeals made this determination even though the Appeals Referee concluded that the last two incidences of

attendance prior to his discharge were for a compelling reason. [R.83]. According to the Appeals Referee's finding of fact, Mr. Mason was terminated on February 13, 1997 due to his attendance. In her conclusion of law she relied on C.F. Industries, Inc. v. Long, 364 So. 2d 864 (Fla. 2d DCA 1978), in determining that accumulated violations of the employer's interests over the course of the claimant's employment can show misconduct, even if the final incident leading to the discharge was not misconduct.

The First District Court of Appeals was wrong to affirm the decision of the Appeals Referee. Section 443.036(26), Fla. Stat., defines "misconduct" justifying disqualification from receipt of unemployment compensation benefits in the following terms:

> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer.

In the case at bar, Mr. Mason's conduct did not amount to misconduct within the meaning of the unemployment compensation statute. It becomes blatantly clear that the denial of Mr. Mason's

benefits was in error upon consideration of the Appeals Referee's finding of fact that the last two incidences prior to his separation were justified. The Appeals Referee stated: (1) "The claimant left before the end of his shift on February 8, 1997, due to personal illness, with the approval of his immediate supervisor." [R.83]. (2) " The claimant was late on February 13, 1997, because he had to walk to work when his ride to work did not pick him up. The claimant's lateness was for a compelling reason." [R.83].

In Blumetti v. Unemployment Appeals Commission, 675 So. 2d 689 (Fla. 5th DCA 1996), the Appeals Referee denied the claimant unemployment compensation benefits because of Blumetti's excessive tardiness. The Unemployment Appeals Commission affirmed the decision. After reviewing the referee's findings and the transcript of the hearing the Fifth District Court of Appeal reversed the decision and awarded the claimant benefits. The Court stated:

> In order to disqualify a former employee from receipt of unemployment compensation benefits there must be competent substantial evidence in the record [See Lewis v. Unemployment Appeals Commission, 498

> So. 2d 608, 610 (Fla. 5th DCA 1986); Hines v. Department of Labor & Employment Security, 455 So. 2d 1104, 1106 (Fla. 3d DCA 1984)] that the employee was guilty of having committed "conduct evincing such willful or wanton disregard of an employer's

> interest as is found in deliberate violation of disregard of standards of behavior which the employer has the right to expect of his employee." §443.036(26), Fla. Stat. (1995).

Blumetti, id went further to say that in order to justify a finding of misconduct the employer must prove that the tardiness or absence was inexcusable and detrimental to the employer's interest. Citing Tallahassee Housing Authority v. Florida Unemployment Appeals Commission, 483 So. 2d 413 (Fla.1986).

The First District Court of Appeals rejected the decision in Blumetti, concluding that the employer's burden in establishing misconduct does not require a showing that the conduct immediately preceding the employees termination was inexcusable, but can meet such burden of proof by showing that the claimant's entire work history is tantamount to misconduct.

The court in Mason, supra, criticized the Fifth District for relying on Tallahassee Housing Authority, 483 So.2d 414 (Fla. 1983), where the First District Court of Appeals was reversed by the Supreme Court for ruling that the employer must establish in addition to excessive absences "that the absences were indeed unexcusable and in detriment to the employer's interests."

In Tallahassee Housing Authority, id, this Court stated:

> We reject the reasoning of the district court in the instant case. In our view, excessive unauthorized absenteeism presumptively hampers the operation of a business and is inherently detrimental to an employer. We hold, therefore, that a finding of

> misconduct under section 443.036(24) is justified when an employer presents substantial competent evidence of an employee's excessive unauthorized absenteeism. Once excessive unauthorized absenteeism is established, the burden is on the employee to rebut the presumption that his absenteeism can be characterized as misconduct within the meaning of the statute.

However, the facts in Tallahassee Housing Authority, id, were different than the facts in the case at bar. In that case the claimant failed to rebut the evidence establish by the employer regarding whether his absences were excused. In the instant case Mr. Mason met his burden and proved that the last two incidences prior to his discharge were not misconduct.

The Mason, id, decision does not comport with well established unemployment compensation law that the statute should be liberally construed in favor of the claimant. See, Roberts v. Diehl, 707 So. 2d 869 (Fla. 2d DCA 1998); Baptiste v. Waste Management, Inc., 701 So. 2d 386 (Fla. 3d DCA 1997); Gilbert v. Department of Corrections, 696 So. 2d 416 Fla. 1st DCA 1997); Foote v. Unemployment Appeals Commission, 659 So. 2d 1232 (Fla. 1st DCA 1995).

The evidence in this case does not support a finding that Mr. Mason is guilty of misconduct connected to work. The employer's witness testified that according to the attendance

policy, employees get points for reporting late to work, being absent, leaving early or clocking in or out for another associate. [R.23]. The employer submitted a copy of the attendance record into evidence, which provided that an associate that reaches 10

points can receive a four day suspension without pay up to and including termination for repeat offenders with a 12 month period. [R.77].

The evidence is uncontroverted that Mr. Mason was suspended for accumulation of attendance points in February 1997. [R. 30, 51, 52]. Further, there is no conflict as to the fact that Mr. Mason only had two attendance problems following his suspension, both of which the Appeals Referee determined to be justified.

According to the employer's own policy, Mr. Mason had already been punished for his attendance prior to February 8, 1997, by his suspension. [R.30,77]. There was absolutely no evidence presented by the employer that Mr. Mason accumulated any points after February 4, 1997. A review of Mr. Mason's time records show that while the employer noted points received on other days, there are no points reflected for February 8, 1997, nor February 13, 1997. [R.64-71].

The employer further failed to show that the absences that

occurred prior to the suspension were due to misconduct because the employer witness was unable to remember why Mr. Mason was late or absent. [R.24, 25, 26, 28, 29].

The Supreme Court of North Carolina was faced with a similar situation in Doyle v. Southeastern Glass Laminates, Inc, 409 S.E. 2d 732 (N.C. 1992). The court there reversed the lower court finding that the claimant could not be properly disqualified from receipt of unemployment compensation benefits where he had not committed any attendance infractions after he had been suspended.

Based upon the evidence and testimony presented in the instant case the Appeals Referee was wrong to deny Mr. Mason benefits as a result of his attendance record prior to his suspension. [R.83]. Had Mr. Mason been terminated following an unexcused and unjustified occurrence her decision may have been justified. However, the last two occurrences on February 8, 1997 and February 13, 1997 are crucial in establishing wanton or gross misconduct on Mr. Mason's part. Blumetti, supra. The Appeals Referee's finding of fact found no misconduct in these two incidences, consequently, the affirmation of her decision by the First District Court of Appeals should be reversed and Mr. Mason should be awarded unemployment compensation benefits.

CONCLUSION

The decision of the First District Court of Appeals affirming the decision of the Appeals Referee disqualifying Mr. Mason from receipt of unemployment compensation of benefits should be reversed. Mr. Mason did not have conduct evincing such willful or wanton conduct which is necessary to determine misconduct. The last two incidences prior to his discharge were found to be justified by the Appeals Referee. Consequently, Mr. Mason should be awarded unemployment compensation benefits.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above was furnished to Geri Atkinson-Hazelton, General Counsel, Unemployment Appeals Commission, Suite 300, Webster Building, 2671 Executive Center Drive, West, Tallahassee, Florida 32399-0681; and Load King Manufacturing Company, Attn: Personnel, 1357 West Beaver Street, Jacksonville, Florida 32205 by U.S. Mail this 29th day of November, 1998.

ATTORNEY