IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 93,356

Petition for Discretionary Review of
A Decision of the District Court of Appeal of Florida
First District

Timothy Mason, Sr.

Petitioner,

v.

Load King Manufacturing Company, and
Florida Unemployment Appeals Commission,

Respondents.

BRIEF ON THE MERITS OF RESPONDENT

UNEMPLOYMENT APPEALS COMMISSION

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PREFACE

The following reference words and symbols may be used in this brief:

"Claimant" will designate Petitioner, Timothy Mason, Sr.

"Employer" will designate Respondent, Load King Manufacturing Company.

"Commission" will designate Respondent, Unemployment Appeals Commission.

"Florida Statutes" unless otherwise indicated will designate Florida Statutes (1997).

"R" will designate the Record.

STATEMENT OF THE CASE AND THE FACTS

Pursuant to Florida Rule of Appellate Procedure 9.210(c), Respondent Florida Unemployment Appeals Commission submits the following statement of the case and the facts.

Petitioner invokes the jurisdiction of the Florida Supreme Court to review a decision of the First District Court of Appeal which conflicts with a decision of the Fifth District Court of Appeal. In Mason v. Load King Manufacturing Company, 715 So.2d 279 (Fla. 1st DCA 1998), the court affirmed an administrative determination that Petitioner Timothy Mason, Sr., was not entitled to unemployment compensation benefits because he had been discharged from employment for misconduct connected with work. The First District Court of Appeal's decision expressed the following facts giving rise to this case:

> Mason worked as a shear operator for the employer, Load King Manufacturing Co., from September 26, 1996, until his discharge for repeated attendance violations on February 13, 1997. The employer has a progressive disciplinary policy which prohibits excessive absenteeism and tardiness. Pursuant to the policy, the employer applies a point system to each employee's attendance record. If, for example, an employee has accumulated a total of 10 points within a 12-month work period, he or she may be subjected to a four-day suspension without pay, or termination as a repeat offender.
>
> As of February 1, 1997, Mason had received 11 points, resulting from numerous absences and late arrivals. Although Load King could have validly terminated him pursuant to company policy, it instead suspended him from work on February 3-4, and warned that his job was in jeopardy. Thereafter, two more events occurred which impacted his employment record. The referee found that

> Mason had left work before the end of his shift on February 8 because of illness, with the approval of his immediate supervisor, for which he was given one additional point. The referee further found that on the date of his discharge, February 13, Mason reported late for work in that the person with whom he had scheduled transportation to work had failed to pick him up and he was forced to walk.

Mason, 715 So.2d at 279-80.

The administrative agency determined that Mason's repeated instances of tardiness and absenteeism after warning constituted misconduct connected with work which disqualified him from receiving unemployment compensation. In response to the agency's determination, Mason asserted that culpability had not been shown for the last two incidents preceding his discharge. Citing Blumetti v. Unemployment Appeals Commission, 675 So.2d 689 (Fla. 5th DCA 1996), he argued that he should be qualified for benefits. The First District Court of Appeal affirmed the denial of benefits and expressed disapproval of Blumetti. Mason also held that Blumetti was based on an incorrect interpretation of Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The supreme court has jurisdiction to resolve the conflict and has accepted the case for briefing on the merits. Fla. R. App. P. 9.030(a)(2)(A)(iv).

SUMMARY OF ARGUMENT

The supreme court has accepted for review Mason v. Load King Manufacturing Company, 715 So.2d 279 (Fla. 1st DCA 1998), which affirms an administrative order holding an unemployment compensation claimant disqualified from receiving benefits because he was discharged from employment for misconduct connected with work. The decision of the district court directly conflicts with Blumetti v. Unemployment Appeals Commission, 675 So.2d 689 (Fla. 5th DCA 1996), which held a claimant who had been discharged under similar circumstances to be qualified for benefits. In both cases, the discharges resulted from excessive tardiness despite warnings. Also in both cases, the final occurrences precipitating the discharges were somewhat excusable by the attendant circumstances.

In Blumetti, the district court cited Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986), for the proposition that a disqualification in such cases requires the employer to show by a preponderance of the evidence that the employee's tardiness was inexcusable and detrimental to the employer's interests. Since that standard had not been met for the final incidents leading to the Blumetti's termination, the district court concluded that he was qualified to receive unemployment benefits.

In Mason, the district court expressly disagreed with Blumetti because Blumetti was based on an erroneous interpretation of the supreme court's ruling in Tallahassee

Housing Authority. The supreme court in Tallahassee Housing Authority specifically rejected the standard of proof applied by the district court in Blumetti. Mason held that the accumulation of offenses during Mason's employment history amounted to misconduct even if the events immediately preceding the discharge were excusable.

ARGUMENT

THE FIRST DISTRICT COURT OF APPEAL CORRECTLY HELD THAT AN UNEMPLOYMENT COMPENSATION CLAIMANT MAY BE DENIED BENEFITS AS THE RESULT OF DISCHARGE FOR EXCESSIVE ABSENTEEISM OR TARDINESS EVEN IF THE FINAL INSTANCES OF SUCH CONDUCT COULD BE EXCUSED.

Timothy Mason was discharged from his employment with Load King Manufacturing Company. When he applied for unemployment compensation benefits, his claim was denied based upon a ruling that he had been discharged from his employment for misconduct connected with work. See §443.101(1)(a), Fla. Stat. Misconduct is defined by the unemployment compensation statutes as:

> MISCONDUCT. -- "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (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 or her 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 interests or of the employee's duties and obligations to his or her employer.

§443.036(26), Fla. Stat.

Mason's misconduct consisted of a pattern of unauthorized absences and tardiness that persisted despite the employer's disciplinary actions. The only factor tending to detract from imposition of the disqualification was a finding by the referee that the circumstances surrounding the last two incidents may have made them excusable. Despite this finding,

however, the referee upheld the disqualification for misconduct. The referee's decision was affirmed by the Unemployment Appeals Commission. In Mason v. Load King Manufacturing Company, 715 So.2d 279 (Fla. 1st DCA 1998), the court summarized the administrative ruling as follows:

> [A]lthough the precipitating cause for Mason's termination from employment was not tantamount to misconduct that would disqualify him from receiving unemployment compensation benefits, the employer could properly deny him benefits based upon the totality of Mason's prior violations of employment policy.

The court affirmed the agency's denial of benefits.

Blumetti v. Unemployment Appeals Commission, 675 So.2d 689 (Fla. 5th DCA 1996), was raised by Mason as authority for finding of no misconduct. Blumetti had been discharged for being late six times in June and August and for leaving work early in July. The agency denied benefits on the grounds that the discharge was for misconduct. The court concluded that it would have upheld the agency's denial of benefits if Blumetti had been discharged prior to the final two events. However, since mitigating factors tending to excuse Blumetti's conduct were present on the last two occasions, the court held Blumetti qualified. The court stated:

> [T]he employer in such cases must establish by a preponderance of the evidence that the former employee's tardiness was inexcusable and detrimental to the employer's interest.

Blumetti, 675 So.2d at 690 & n.2, citing Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986).

Mason pointed out that the rationale quoted above from Blumetti is based on a false premise. Tallahassee Housing Authority actually stands for the opposite proposition for which it was cited in Blumetti. Tallahassee Housing Authority involved a claimant who had been discharged for excessive absenteeism. The First District Court of Appeal ruled in the claimant's favor because the record failed to show by a preponderance of the evidence that the claimant's absences were unexcused and detrimental to the employer's interests. The Florida Supreme Court rejected the reasoning of the First District Court of Appeal and stated:

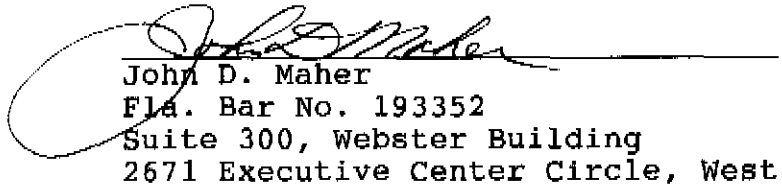
> In our view, excessive unauthorized absenteeism presumptively hampers the operation of a business and is inherently detrimental to an employer. We hold, therefore, that a finding of misconduct under section 443.036(24) is justified when an employer presents substantial competent evidence of an employee's 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.

Tallahassee Housing Authority, 483 So.2d at 414. A correct application of the supreme court's opinion dictates affirmance of Mason and disapproval of Blumetti. When Mason's history of poor attendance despite repeated warnings is taken into consideration without the additional burden of proof improperly imposed in Blumetti, it must be concluded that Mason is guilty of misconduct as defined by the statute. See C. F. Industries, Inc. v. Long, 364 So.2d 864 (Fla. 2d DCA 1978).

CONCLUSION

The decision of the district court in Mason v. Load King Manufacturing Company, 715 So.2d 279 (Fla. 1st DCA 1998), should be affirmed. To the extent that it is in conflict with Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986), Blumetti v. Unemployment Appeals Commission, 675 So.2d 689 (Fla. 5th DCA 1996), should be disapproved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to the below listed persons on this 23rd day of December 1998:

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December 23, 1998

Honorable Sid J. White, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-0125

Re: Timothy Mason, Sr., v. Load King Manufacturing Company and Florida Unemployment Appeals Commission, No. 93,356 (DCA No. 97-2754).

Dear Mr. White:

Enclosed for filing in the referenced case are the original and seven (7) copies of Respondent Unemployment Appeals Commission's Brief on the Merits. We regret that we cannot provide a copy of the brief on a diskette.

Sincerely,

John D. Maher
Senior Attorney

Enclosures
cc: Leatrice Williams Walton, Esq.
Load King Manufacturing Co.