IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC04-1429

PETITION FOR DISCRETIONARY REVIEW OF
A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT
874 SO.2D 43

DANIEL C. COSTARELL,

PETITIONER,

V.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION,

RESPONDENT.

ANSWER BRIEF ON THE MERITS OF RESPONDENT FLORIDA UNEMPLOYMENT APPEALS COMMISSION

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STATEMENT OF THE CASE AND THE FACTS

Petitioner seeks review of an opinion of the Second District Court of Appeal that affirmed an administrative order of Respondent Florida Unemployment Appeals Commission. The Second DCA also certified that its opinion was in conflict with an opinion of the Third District Court of Appeal. Compare Costarell v. Unemployment Appeals Commission, 874 So.2d 43 (Fla. 2d DCA 2004) with Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999). The Second DCA summarized the controversy before it as follows:

> Costarell challenges the decision of the Unemployment Appeals Commission (UAC) affirming the appeals referee's decision that he was not entitled to benefits for a portion of the time he was unemployed. The sole basis for the UAC's affirmance is that Costarell failed to continue claiming unemployment benefits as required by *section 443.091(1)(a), Florida Statutes* (2002), during the pendency of his appeal from the appeals referee's determination that he was ineligible for benefits. We affirm.

874 So.2d at 44.

The Commission's order affirmed a decision of an unemployment compensation appeals referee that held Daniel C. Costarell (the claimant) ineligible to receive unemployment benefits from October 13, 2002 through November 30, 2002 because he failed to continue reporting on his claim. (R.28-29,32-33. The Commission's order adopted the findings of fact made by the appeals referee. Those findings are as follows:

> The claimant filed a claim for unemployment benefits effective June 2, 2002. (R.16). He printed the instructions for filing his claim from the Internet. (R.17). The claims adjudicator issued a determination holding the claimant entitled to benefits. (R.19). The employer appealed this determination and a hearing was held. The appeals referee issued a decision reversing the determination and holding the claimant disqualified. (R.19). The claimant filed an appeal to the Unemployment Appeals Commission. (R.23). He continued claiming his weeks over the telephone every two weeks after he was disqualified and had filed his appeal. (R.21). The written instructions advise: "If unemployed, you must continue reporting on your claim until all redeterminations/appeals are resolved." (R.20). A fraud investigator contacted the claimant by telephone and informed him that he had been overpaid unemployment benefits and was required to repay these monies. (R.19). He also threatened that the claimant could be prosecuted. (R.19). The claimant last filed for the weeks ending October 5, and October 12, 2002. He stopped reporting at that time due to the information that he had been overpaid. (R.21-22). The appeals referee's decision was subsequently reversed in the claimant's favor and the claimant was compensated for the weeks he had claimed through October 12, 2002. On January 28, 2003, the claimant requested compensation for the period from October 13, 2002, through November 30, 2002. (R.2-3,8).

(R.28). In the portion of the decision designated "Conclusions of Law," the referee stated, in part:

> The regulations of the Division provide that when a claimant fails to report as scheduled, the Division will accept a late report only if the claimant files such report within 14 days of the scheduled report date. If the report is not made within 14 days of the scheduled report, the claim shall be reopened effective the first day of the week in which the report is made.

> The facts in this case show that the claimant did not file a claim for unemployment benefits during the period from October 13, 2002, through November 30, 2002, until January 28, 2003. Consideration was given to the claimant's testimony that he was disqualified during the period. However, the claimant claimed several weeks after he was disqualified. Further, the written instructions advise that the claimant must continue reporting during a pending appeal. Consequently, the claimant shall remain ineligible.

(R.28-29).

The appeals referee concluded that the claimant was ineligible to receive benefits during the six-week period of time because he failed to file claims for benefits for those weeks. (R.29). The Commission affirmed the decision of the appeals referee. (R.31-33). The claimant appealed the Commission's order to the Second District Court of Appeal. The Second DCA affirmed the Commission's order and certified that its opinion was in conflict with an opinion of the Third DCA, Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999. See Costarell v. Unemployment Appeals Commission, 874 So.2d 43 (Fla. 2d DCA 2004).

The claimant, pro se, filed a "notice of appeal" of the Second DCA's opinion in this Court. The Court treated the filing as a Petition to Invoke the Court's Discretionary Jurisdiction and appointed counsel to represent the claimant. The Court has postponed its decision on the question of jurisdiction and directed counsel to submit briefs on the merits.

SUMMARY OF ARGUMENT

Florida's unemployment compensation program provides economic assistance to certain unemployed persons, but it is not intended to subsidize unemployment. Persons claiming benefits must demonstrate, among other things, that they are actively seeking employment. See §443.091(1)(c)1., Fla. Stat. (2002); Fla. Admin. Code R. 60BB-3.021. To monitor the activities of claimants, the agency requires them to regularly report on their claims, either in person, by mail or telephone. See §§443.091(1)(a), 443.111(1)(b), Fla. Stat. (2002). Claimants who fail to report for more than fourteen days are ineligible to receive benefits for the weeks that claims were not made. Id. See Fla. Admin. Code R. 60BB-3.015(3)(b).

The claimant in this case received an adverse decision of an appeals referee. He appealed the decision to the Unemployment Appeals Commission. The appeal resulted in a decision favorable to the claimant. Since the claimant continued to report on his claim for two weeks after being disqualified, he was paid for those two weeks, but thereafter he was ineligible because he ceased reporting.

Upon review pursuant to the claimant’s appeal, the Second DCA affirmed the Commission’s order denying benefits for the period in question. The court also certified that its opinion conflicted with Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999). Dines held that

the statutory requirement applied by the Commission and affirmed by the Second DCA was not mandatory and could not serve to deny benefits to a claimant who failed to report on his claim during the pendency of an appeal. Dines held that the "failure to make the claims was an entirely harmless technicality." 730 So.2d at 379. Dines stated that the statute and rule amounted to a "prohibited requirement of performing a series of useless acts" and was "advisory or directory only." Id. Finally, the court described the statutory requirement as "only a non-essential mode of proceeding." Id. The Second DCA expressly disagreed. It held that the statute was clear and unambiguous and must be enforced.

The claimant argues that Dines should be upheld and Costarell v. Unemployment Appeals Commission should be quashed. The claimant, however, does not address the real conflict between the two decisions. Dines held that the statutory and rule requirements were applicable to Dines situation, but were unenforceable. Instead, the claimant argues here that the language of the statute and the rule do not apply to his factual situation. The claimant's factual situation, however, is the same as that of the claimant in Dines. The issue to be resolved here is not whether the statute and rule are applicable to the facts of this case. Both the Second DCA and the Third DCA agree on that point. The conflict in opinions is whether the statute and rule are

mandatory and enforceable as found by the Second DCA or merely advisory and unenforceable as found by the Third DCA. The Court's jurisdiction is needed to resolve this conflict.

The claimant also argues that the Second DCA was impermissibly influenced by a recent amendment to the applicable statute that occurred after the case before it arose. The Second DCA, however, acknowledged what it was doing and cited to legal authorities permitting such action. No error was committed.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL CORRECTLY RULED THAT THE CLAIMANT IS INELIGIBLE FOR BENEFITS BECAUSE HE FAILED TO REPORT ON HIS CLAIM AS REQUIRED BY LAW. THE CONFLICTING RULING BY THE THIRD DCA WAS WRONG AND MUST BE DISAPPROVED.

The claimant filed for unemployment benefits effective June 2, 2002. He was initially determined qualified and began collecting benefits. His former employer, however, protested the claim and requested a hearing. Unemployment determinations and hearing notices routinely advise claimants to continue filing claims during the pendency of appeal proceedings. (R.4,7,12). At the conclusion of the hearing held pursuant to the employer's appeal in this case, the appeals referee rendered a decision that disqualified the claimant. The claimant appealed the decision to the Unemployment Appeals Commission and continued reporting for two weeks, but stopped. After the appeal to the Commission resulted in a favorable decision, the claimant sought benefits for the weeks that he failed to claim. Those benefits were denied.

Chapter 443, Florida Statutes, and Florida Administrative Code Rule Chapters 60BB-2 through 60BB-7 govern claims for unemployment compensation benefits. Section 443.091(1)(a), Florida Statutes (2002), applies to this case and provides:

> **Benefit eligibility conditions.--**
> (1) An unemployed individual shall be eligible to receive benefits with respect to any week only if the division finds that:

> (a) She or he has made a claim for benefits with respect to such week in accordance with such rules as the division may prescribe.

In addition, Section 443.111(1)(b), Florida Statutes (2002), provides:

> **Payment of Benefits**
>
> (1) MANNER OF PAYMENT.--Benefits shall be payable from the fund in accordance with such rules as the division may prescribe, subject to the following requirements:
>
> . . . .
>
> (b) Each claimant shall report in the manner prescribed by the division to certify for benefits which are paid and shall continue to report at least biweekly to receive unemployment benefits and to attest to the fact that she or he is able and available for work, has not refused suitable work, and is seeking work and, if she or he has worked, to report earnings from such work.

As a result of a governmental reorganization, the Division of Unemployment Compensation was replaced by the Agency for Workforce Innovation. Rules promulgated by the Agency for Workforce Innovation provide that claimants may report on their claims in-person, by mail or by electronic means, such as telephone. See Fla. Admin. Code R. 60BB-3.015. The agency will accept late reports, provided they are filed within 14 days of the scheduled reporting date. Florida Administrative Code Rule 60BB-3.015(3)(b) provides:

> (b) Late Reports. If a report is not made within 14 days following the scheduled report date, as

> designated by the Agency, the claim shall be reopened effective the first day of the week in which the report is made.

Although the claimant had been given written instructions that he needed to continue reporting during the pendency of the appeal (R.4,7,12), he did not report on his claim between October 13, 2002 and November 30, 2002.

In its brief to the Second DCA, the Commission advised the court of a case that reached an opposite result from that being advocated there. Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999), also involved a claimant who ceased reporting on his claim while an appeal was pending. The court acknowledged and quoted the statutory and rule authorities discussed above, but nonetheless held the claimant Dines to be eligible for benefits during the period he failed to file claims. The court offered the following explanation for its extraordinary ruling:

> We now hold, as we did in dictum in Savage v. Macy's East, Inc., 719 So.2d 1208, 1209-10 (Fla. 3d DCA 1998), review denied, (Fla. Feb. 11, 1999), that the denial of benefits on this ground is entirely erroneous both because ordering continuing claims to a tribunal which has already rejected the claimant's eligibility amounts to the prohibited requirement of performing a series of useless acts, . . . and because the failure formally to make the claims was an entirely harmless technicality in light of indisputable evidence of Ms. Savage's eligibility for those benefits. . . . Because no rights are at stake, . . . and only a non-essential mode of proceeding is prescribed, . . . it is apparent that, in this context, the statutory requirement for the filing of weekly reports must be deemed to be advisory or directory only. . . .

> In the admitted absence of any prejudice to the Commission or the employer, therefore, the failure to make them cannot result in the forfeiture of benefits to which the unemployed applicant is otherwise entitled by law.

Dines, 730 So.2d at 379), quoting Savage v. Macy's East, Inc., 719 So.2d 1208, 1209-10 (Fla. 3d DCA 1998), review denied, (Fla. Feb. 11, 1999), (citations omitted). The court did not rule the legislation unconstitutional, but it did render it meaningless.

The Second DCA recognized that Dines was contrary to the clear meaning of the statutory requirement that claimants must continue to file in order to be eligible. The Second DCA rejected the notion that the statutory requirement was "advisory or directory only," or that it required claimants to "perform [] a series of useless acts." Costarell, 874 So.2d at 44, quoting Dines, 730 So.2d at 379.

The claimant apparently agrees that the language of the statute is clear and unambiguous. Initial Brief at 16-17. The claimant argues, however, that the statutory requirement does not apply to his situation. The argument is without merit. The statute and rule require all claimants to report on their claims. Late reports are not accepted if more than fourteen days late. The claimant argues that an exception should be created for him when none exists. Dines was in the same situation as the claimant when he failed to report on his claim. The Third DCA did not deny that the statutory requirement was applicable to Dines, but tried to render it

meaningless for claimants in his situation who have appeals pending. That argument was soundly rejected by the Second DCA. The claimant's situation is no different from Dines. Unless the Court is willing to agree that the statutory requirement is meaningless and unenforceable, it must disapprove of Dines. The opinion of the Second DCA under review was correctly decided and must be affirmed.

Although the statute itself was not ambiguous, Dines created concerns that led to legislative clarification. See Ch. 2003-36, §§ 23, 25, Laws of Fla. (claimants must continue to report regardless of any appeal pending relating to eligibility or disqualification). The Second DCA declared that the statutory requirement to report was clear, but cited to the recent amendment that was enacted after the case before the court arose as reinforcement for its conclusion. The principle supporting the court's consideration of the amendment was expressed as follows:

> When . . . an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.

Lowry v. Parole and Probation Commission, 473 So.2d 1248, 1250 (Fla. 1985). See also Finley v. Scott, 707 So.2d 1112, 1116-17 (Fla. 1998); Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788, 790 (Fla. 1952). This controversy over the

interpretation of Section 443.091(1)(a), Florida Statutes (2002), arose on March 4, 2003, when the claimant appealed the determination denying him benefits for the unclaimed weeks of his claim. (R.4-5). Chapter 2003-36, Laws of Florida, was approved by the Governor on May 23, 2003, and became effective October 1, 2003. The Second DCA did not err by noting that its interpretation of the statute was reinforced by the recent amendment to the statute. The amendment did not add new rights or obligations. It merely clarified an old one that had been derogated by the Dines opinion. Accordingly, the claimant's reliance on Hassen v. State Farm Mutual Automobile Insurance Co., 674 So.2d 106 (Fla.1996), is misplaced. In Hassen, a significant substantive change in insurance coverage was created by a statutory amendment that the court refused to apply retroactively. In this case, as conceded by the claimant, the statute was amended solely to repudiate the Third DCA's opinions in Dines and Savage. Initial Brief at 14-15). Neither the agency nor the Legislature intended to change the statute by the enactment. They sought to clarify the Legislature's original intent that had been clouded by Dines and Savage.

This Court's standard of appellate review under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi) is, by definition, discretionary. In cases of this nature, however, where a district court of appeal has pronounced a rule of law that is totally erroneous and another district court of appeal

has declared that to be the case, public policy and sound jurisprudence urge the Court to exercise its jurisdiction and eliminate the discord caused by the conflict.

The standard of appellate court review of an agency's expertise in the interpretation and application of the provisions of its organic laws requires judicial recognition and deference. See Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985); Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287 (Fla. 5th DCA 1996). When the legislature delegates to an administrative agency the responsibility for an area of law, the courts cannot overturn the agency's interpretation of that law unless the agency's interpretation is clearly erroneous. See Department of Insurance v. Volusia Hospital District, 438 So.2d 815, 820 (Fla. 1983), appeal dismissed, 466 U.S. 901 (1984); Brooks v. Unemployment Appeals Commission, 695 So.2d 879 (Fla. 5th DCA 1997). The Commission’s interpretation of its statute in this case is not clearly erroneous. The interpretation of the Third DCA is clearly erroneous. This Court alone has the authority to disapprove of Dines and Savage and resolve the conflicting opinions. The Commission urges the Court to exercise it jurisdiction in this case to eliminate any confusion as to which opinion is correct.

CONCLUSION

Costarell v. Unemployment Appeals Commission, 874 So.2d 43 (Fla. 2d DCA 2004), correctly applied the unemployment compensation statute. The opinion certifies conflict with Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999). Costarell was correctly decided on the basis of sound legal principles. Dines was wrongly decided on the basis of faulty legal premises. Costarell permissibly acknowledged that the statute was amended after the case arose in an attempt to repudiate Dines.

The irreconcilable conflict between the two decisions urges the Court to accept jurisdiction and resolve this controversy. Costarell v. Unemployment Appeals Commission, 874 So.2d 43 (Fla. 2d DCA 2004), must be affirmed. Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999, (Fla. 3d DCA 1998), must be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was furnished by regular U.S. Mail to: HARVEY J. SEPLER, ESQ., 3389 Sheridan Street #450, Hollywood, FL 33021, on this 18th day of January 2005.

CERTIFICATE OF TYPEFACE COMPLIANCE

I also certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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