IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1429

DANIEL C. COSTARELL,

Petitioner,

-vs-

FLORIDA UNEMPLOYMENT APPEALS COMMISSION,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This is the Petitioner's reply brief on the merits. The initial merits brief was filed on December 23, 2004 and the merits brief of the respondent was filed on January 19, 2005.

STATEMENT OF THE CASE AND FACTS

The Petitioner relies on the facts discussed in the initial brief on the merits.

QUESTION PRESENTED

WHETHER THE SECOND DISTRICT COURT OF APPEAL CORRECTLY CONSTRUED FLORIDA'S UNEMPLOYMENT COMPENSATION SCHEME WHEN IT HELD THAT CLAIMANTS WHO DO NOT CONTINUE FILING CLAIMS WHILE THE CASE IS ON APPEAL ARE FORECLOSED FROM RECOVERING BENEFITS FOR THAT TIME?

SUMMARY OF THE ARGUMENT

The Petitioner reasserts all of the arguments raised in the initial brief on the merits. After considering the position taken in the respondent's brief, the Petitioner adds the following perspective: this case is not just about statutory construction. It's about the degree to which the unemployment compensation process honors and facilitates claims. It's about whether the law makes sense – that is, even if the statute requires continued reporting (which we believe it doesn't), is it fair to require someone to do a futile act, when doing it or not doing it has no affect on the claimant's substantial rights. Unquestionably, the State of Florida should not allowed to hide behind vague, non-specific statutory language to deny that to which an unemployed claimant is entitled.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL INCORRECTLY CONSTRUED FLORIDA'S UNEMPLOYMENT COMPENSATION SCHEME WHEN IT HELD THAT CLAIMANTS WHO DO NOT CONTINUE FILING CLAIMS WHILE THE CASE IS ON APPEAL ARE FORECLOSED FROM RECOVERING BENEFITS FOR THAT TIME.

Just after the Petitioner lost his job, he began filing unemployment compensation claims; the claims adjudicator found the Petitioner eligible to receive compensation and checks soon were sent to him on a regular basis. Accompanying those checks were claims forms to be used when filing new claims. The Petitioner used these forms when filing subsequent bi-weekly claims for benefits.

An appeals referee reversed the adjudicator's determination and denied him benefits. The Petitioner then appealed the referee's finding to the Unemployment Appeals Commission. At some point during this appeal, the Petitioner stopped filing claims. There was no reason to continue: his benefits had already been denied and he had no reason to think that continuing to file claims would make him any more eligible for benefits than had the prior (now rejected) claims; the cessation of blank claims forms signaled that new claims weren't necessary; and he'd been frightened away from filing new claims by an unemployment compensation investigator who threatened to hold him liable for fraud with each new form he filed.

Ultimately, the Petitioner found work; when he requested compensation for the time his case was on appeal, the respondent denied him relief. The stated reason was that by not filing new claims, he voluntarily withdrew his eligibility for benefits. This same argument pervades the respondent's brief to this Court.

It is not an insignificant fact that the Petitioner proceeded *pro se* all the way along this process; most claimants in this context probably do. To demand the level of sophistication in working through the compensation statutes and administrative processes that we might demand of, say, a representative of the Unemployment Appeals Commission is unreasonable and unrealistic.

In our initial merits brief, we argued that the compensation statutes do *not* clearly prescribe that a claimant must file claims during the appeals process in order to be eligible for benefits during that period. No statutes say this and the mere requirement that claims be filed in order for a person to be eligible for benefits does not directly and sufficiently explain that even though your claims were denied, you've got to keep filing them.

The respondent's position is that the statutes are clear, that continuing to file – even in the face of a formal denial of benefits – is essential, that these directives are not advisory and that the failure to adhere to them is not merely harmless.

This case presents a very significant issue: should we expect claimants, most

of whom are traveling *pro se*, to "read between the lines" and to do that which is contrary to common sense and whose only purpose is for administrative convenience, rather than the creation of a new substantive right.

Indeed, nowhere in the Respondent's brief does it argue that the Petitioner is not entitled to the benefits as a matter of substantive right or that the Unemployment Appeals Commission or the State of Florida would be prejudiced by awarding benefits in this case. Its only argument is that because the Petitioner failed to say "may I" he's not eligible for benefits.

Numerous Florida appellate courts have struggled with Unemployment Compensation procedures that, at best, thwart the attempts of the legally unsophisticated to secure benefits they are otherwise entitled to, but are denied on non-substantive grounds. *See, e.g., Savage v. Macy's East, Inc.*, 719 So. 2d 391, 1209 n. 2 (Fla. 1999) and cases cited therein.

In *Allied Fidelity Ins. Co. v. State*, 415 So. 2d 109 (Fla. 1982), the third district analyzed the effect of non-compliance with a filing requirement whose only purpose is for administrative convenience. In that case, a bail bond surety was not timely advised that the defendants they insured failed to appear in court. Section 903.26 (1), Fla. Stat., prescribes that the clerk of court must give written notice to sureties that a defendant is scheduled to appear and that this written notice must be given at least 72

hours in advance of the scheduled time. When the defendants in *Allied* failed to appear, the court ordered the bail bonds forfeited. 415 So. 2d at 110.

The clerk of court finally sent Allied written notice 4 to 6 days after the forfeiture and Allied challenged the forfeiture on the basis of non-compliance with the 72-hour requirement.

The district court reasoned that because Allied did not show how the time requirement affected the "deprivation of [Allied's] substantial right[s]," involved a legislative-intended penalty, or otherwise affected a "public benefit", the untimely notice was simply a "non-essential mode of proceeding" and not something that implicates the party's substantial rights. 415 So. 2d at 111.

The same logic applies here. This record is devoid of any evidence or argument that the Petitioner is not otherwise entitled to benefits during the appeals period. There is no argument that the filing requirement serves anything other than a purely administrative function. Surely, the department knew that the Petitioner had been claiming benefits for some time (it honored them, then it dishonored them); it knew he was appealing the denial of benefits (it actively participated in the appeal); and it knew the Petitioner's status hadn't changed (and when the status changed, it was

immediately notified).[1] There is no suggestion that anyone's substantive rights were affected at all.

This is an important case because it not only asks this Court to decide whether the statute is clear on its face, whether the filing requirements (in this context) are mandatory or advisory, whether the department scrupulously and earnestly honors legitimate claims and, most importantly, whether the compensation process, as a whole, is "claimant friendly" and accessible to needy and often-unrepresented citizens of Florida.

[1] This is markedly different than if the Petitioner hadn't initiated an appeal and the department didn't know if the Petitioner still wanted benefits or was otherwise eligible for them.

CONCLUSION

For the foregoing reasons, the Petitioner submits that the decision of the Second District Court of Appeal should be quashed and unemployment compensation benefits for the time the Petitioner's case was on appeal should be awarded.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE

The undersigned certifies that this brief uses only the Times New Roman 14-point type size.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to John D. Maher, Deputy General Counsel, Unemployment Appeals Commission, Webster Building, Suite 300, 2671 Executive Center Circle, W., Tallahassee, Florida 32399-0681, this __ day of February, 2005.

_____
HARVEY J. SEPLER