IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC04-591

PETITION FOR DISCRETIONARY REVIEW OF
A DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT
866 SO.2D 730

MARK TETZLAFF

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

This is a petition for discretionary review of Tetzlaff v. Unemployment Appeals Commission, 866 So.2d 730 (Fla. 5th DCA 2004) pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A) and 9.120. Tetzlaff affirmed a final administrative order of the Unemployment Appeals Commission. Petitioner here was the appellant before the Commission. Petitioner seeks the Court's review of the Fifth DCA's decision on the grounds that it expressly and directly conflicts with decisions of this Court in Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1980), the Fourth DCA's decision in Kauffmann v. Baker, 392 So.2d 13 (Fla. 4th DCA 1980), and the Third DCA's decision in Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999).

The case originated with the unemployment compensation claim of Mark Tetzlaff (hereinafter referred to as the claimant). The claimant was initially held disqualified for benefits; he appealed the decision and requested a hearing before an unemployment compensation appeals referee. The claimant was advised by the February 21, 2002 disqualifying determination:

> IF UNEMPLOYED YOU MUST CONTINUE REPORTING ON YOUR CLAIM UNTIL ALL REDETERMINATIONS/APPEALS ARE RESOLVED.

(Appendix Exhibit A.). The March 22, 2002 hearing notice also instructed:

> **Claimants should continue filing claims as instructed while the appeal is pending.**

(Appendix Exhibit B). For reasons unrelated to this proceeding, the appeal was dismissed, but later reinstated. The claimant's appeal was eventually heard and a decision was rendered in his favor. The claimant then learned that he was entitled to benefits only for the period he had continued to file on his claim as instructed. He again appealed and attended a hearing. At the conclusion of the hearing, the Referee rendered a decision. The decision contains the following findings of fact:

> The claimant was unemployed and filed a claim for benefits effective January 27, 2002. The claimant was provided with reporting instructions. The claimant reported on his claim by telephone until March 27, 2002. The claimant was unable to access the system after that date. The claimant received an adverse decision on his claim, filed an appeal to the decision, and discontinued claiming weeks pending the outcome of the hearing. A hearing date was scheduled for the claimant and he was instructed to continue reporting on his claim while the appeal was pending. The claimant, at some time, was mailed continued claim forms for the weeks he had not reported. The claimant returned the documents to claim weeks for payment for the weeks he had not

previously claimed after receiving a positive outcome from his hearing held on August 8, 2002.

(R.56) (Appendix Ex. C).

In the portion of the decision designated "Conclusions of Law," the referee stated:

> 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 record reflects that the claimant failed to report on his claim as instructed and did not report within the fourteen days of the scheduled report date. Accordingly, the claimant is ineligible for benefits from March 24, 2002 through August 10, 2002 when his claim was reopened.
>
> Consideration was given to the claimant's contention that he should receive payments for the additional weeks requested because he could not claim the weeks by telephone. The claimant's own testimony reflects he was aware he could claim weeks using another method but choose not to do so because it could be considered a waste of time if the appeals decision was not in his favor. Consideration was also given to the claimant's contention that he followed the agency's instruction when reporting on his claim, however the claimant's testimony reflects that he was originally told to report weekly. For these reasons the claimant's contentions are respectfully not accepted.

(Appendix Exhibit C).

The claimant was granted benefits for only the period of time between February 2002 and March 23, 2002. Benefits for

the period of time between March 24, 2002 and August 10, 2002 (the period of time during which the appeal was pending) were denied because the claimant failed to continue reporting on his claim as he had been repeatedly instructed. Upon review to the Unemployment Appeals Commission, the Commission affirmed the referee's decision denying the additional benefits.

The claimant appealed the Commission's order to the Fifth District Court of Appeal. The Unemployment Appeals Commission is a statutory respondent to appeals taken from its orders to the district courts of appeal. See §443.151(4)(e), Fla. Stat. The Commission participated in the appeal by filing a brief on behalf of the Commission. In Tetzlaff v. Unemployment Appeals Commission, 866 So.2d 730 (Fla. 5th DCA 2004), the Fifth DCA affirmed the Commission's denial of additional benefits. The court also professed to distinguish the issue before it from the issue decided in Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999). The parties, however, agree that the decision of the Fifth District Court of Appeal expressly and directly conflicts with Dines.

The claimant, in proper person, filed an appeal from the Fifth District Court of Appeal. The Court treated the claimant's appeal as a Notice to Invoke Discretionary

Jurisdiction. The claimant is now represented by counsel. The parties have submitted briefs on jurisdiction. The Court has entered an order accepting jurisdiction and dispensing with oral argument. This Answer Brief on the Merits is being filed in response to the claimant/petitioner's Initial Brief 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 determination on his claim. He appealed to a Referee and eventually presented his case at a hearing that resulted in a favorable decision. The claimant, however, disregarded instructions to continue reporting on his claim. Consequently, the claimant was ruled ineligible for benefits during the weeks he failed to claim. The claimant appealed that ruling, but it was affirmed by the Unemployment Appeals Commission.

Upon review pursuant to the claimant's appeal, the Fifth DCA in Tetzlaff v. Unemployment Appeals Commission, 866 So.2d 730 (Fla. 5th DCA 2004), affirmed the Commission's order denying

benefits for the period in question. The parties agree that the court's opinion conflicts 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 in the instant case and affirmed by the Fifth 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 Fifth DCA disagreed and applied the statutory penalty.

The claimant argues that Dines should be approved and Tetzlaff should be quashed. The claimant argues that Dines and Savage v. Macy's East, Inc., 719 So.2d 1208 (Fla. 3d DCA 1998), on which it relies, were based on a determination that Section 443.091(1)(b), Florida Statutes (1997) & (2002), were ambiguous. (Initial Brief at 16). The cited pages of the opinions do not support that argument. Both Dines and Savage demonstrate that the requirements of the statute are unambiguous. Both decisions simply and clearly expressed disagreement with the wisdom of the statute and they refused to enforce its plain meaning.

The claimant does not address the real conflict between the two decisions. The conflict in opinions is whether the statute and rule are mandatory and enforceable as found by the Fifth DCA or merely advisory and unenforceable as found by the Third DCA. The Court‘s jurisdiction is needed to resolve this conflict.

ARGUMENT ISSUE I

THE FIFTH 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.

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), Florida Statutes (2002), applies to this case and provides, in pertinent part:

> **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.
>
> (b) She or he has registered for work at, and thereafter continued to report at, the division, which shall be responsible for notification of the Agency for Workforce Innovation in accordance with such rules as the division may prescribe; except that the division may, by rule not inconsistent with the purposes of this law, waive or alter either or both of the requirements of this subsection as to individuals attached to regular jobs; but no such rule shall conflict with s. 443.111(1).

In addition, Section 443.111(1), 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, he did not report on his claim between March 24, 2002 and August 10, 2002.

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, 729 So.2d 391 (Fla. 1999), (citations omitted). The court did not

rule the legislation unconstitutional, but it did treat it as meaningless.

The Fifth DCA acknowledged Dines, but did not follow its rationale. Instead, the court affirmed the agency's ruling that the claimant Tetzlaff was ineligible during the period he failed to report on his claim. The court's ruling directly conflicts with Dines' ruling that the agency requirements were "advisory or directory only," or that they required claimants to "perform [] a series of useless acts." Dines, 730 So.2d at 379. Although the court stated that Dines was distinguishable from the case before it, it did not clearly explain why. Moreover, this case and Dines involved the same legal issues and factual circumstances.

The claimant argues that, at least when Dines was decided, the statutory requirement was ambiguous. 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. There is no ambiguity. Moreover, The Third DCA did not express any concern about ambiguity. In Dines and Savage v. Macy's East, Inc., 719 So.2d 1208, 1209-10 (Fla. 3d DCA 1998), review denied, 729 So.2d 391 (Fla. 1999), which it quoted, the Third DCA expressed a thorough understanding of what the statute purported to require of claimants. The court simply and emphatically disagreed with the wisdom of the legislation. The court refused to enforce the legislature's obvious intent.

The Dines rationale was effectively rejected by the Fifth 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 Fifth DCA under review was correctly decided and must be affirmed.

Shortly after the Fifth DCA entered its decision in this case, the Second DCA decided Costarell v. Unemployment Appeals Commission, 874 So.2d 43 (Fla. 2d DCA 2004), pet. for rev., No. SC04-1429 (Fla. July 19, 2004). Costarell involved the same factual circumstances and legal issues that are involved in this case and Dines. Like this case, Costarell, affirmed the order of the Unemployment Appeals Commission denying benefits to an unemployment compensation claimant who ceased reporting on his claimant while an appeal was pending. Costarell, however, went further than this case. It not only declined to follow Dines, but also expressly disagreed with it and certified the conflict to this Court. Briefing has been completed in Costarell. A motion requesting oral argument is pending

Although the statute itself was not ambiguous, Dines created concerns that led to legislation. See Ch. 2003-36, §§23, 25, Laws of Fla. (claimants must continue to report regardless of any appeal pending relating to eligibility or disqualifications 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. The statute was amended solely to repudiate the Third DCA's opinions in Dines and Savage. Neither the agency nor the Legislature intended to change the statute by the enactment. They sought to restore 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) 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 other district courts of appeal have 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.

ARGUMENT ISSUE II

THE COURT'S JURISDICTION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(iv) DOES NOT ENCOMPASS A DETERMINATION OF WHETHER THE DECISION BELOW IS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

ARGUMENT ISSUE III

SINCE THE DECISION BELOW DID NOT EXPRESSLY CONFLICT WITH APPLEGATE V. BARNETT BANK OF TALLAHASSEE, 377 SO.2D 1150 (FLA. 1979), IT IS ASSUMED THAT THE BASIS FOR THE COURT'S ACCEPTANCE OF JURISDICTION WAS CONFLICT BETWEEN THE DECISION BELOW AND DINES.

ARGUMENT ISSUE IV

THE DECISION BELOW DID NOT CITE TO KAUFFMANN V. BAKER, 392 SO.2D 23 (FLA.4TH DCA 1980), NOR DID IT EXPRESS AN OPINION THAT CONFLICTS WITH THE HOLDING OF THAT OPINION.

ARGUMENT ISSUE V

THE COURT'S JURISDICTION PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.030(a)(2)(A)(iv) DOES NOT ENCOMPASS A DETERMINATION OF WHETHER THE DECISION BELOW CONTAINS AN ERRONEOUS STATEMENT REGARDING WHETHER A TRANSCRIPT OF THE ADMINISTRATIVE HEARING HAD BEEN FILED IN COURT BELOW.

CONCLUSION

Tetzlaff v. Unemployment Appeals Commission, 866 So.2d 730 (Fla. 5th DCA 2004) correctly applied the unemployment compensation statute. The opinion conflicts with Dines v. Florida Unemployment Appeals Commission, 730 So.2d 378 (Fla. 3d DCA 1999). Tetzlaff was correctly decided on the basis of sound legal principles. Dines was wrongly decided on the basis of faulty legal premises.

The irreconcilable conflict between the two decisions urges the Court to exercise its jurisdiction and resolve this controversy. Tetzlaff v. Unemployment Appeals Commission, 866 So.2d 730 (Fla. 5th 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: **Mike Jorgensen**, ESQ., 7555 Beach Blvd. Jacksonville, FL 32216, on this 18th day of March 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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