IN THE SUPREME COURT OF FLORIDA

Case No. SC-04-591

MARK TETZLAFF
Petitioner,

vs.

FLORIDA UNEMPLOYMENT APPEALS COMM'N
Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, FIFTH DISTRICT

PETITIONER'S AMENDED JURISDICTIONAL BRIEF

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IN THE SUPREME COURT OF FLORIDA

Mark Tetzlaff	)	Supreme Ct. No. SC-04-591
Petitioner,	)	
	)	
-vs-	)	5th DCA Case No. 5D03-250
	)	Case No. 02-09990
Florida Unemployment	)	(Alan O. Forst, Chairman)
Appeals Comm'n,	)	
Respondent.	)	
_____/		

PRELIMINARY STATEMENT

The following designations apply: Florida Unemployment Appeals Commission ("UAC"); Agency for Workforce Innovation ("AWI"). The record: Conformed copy of the Fifth District Court of Appeals' January 23, 2004 decision ("Fla. 5th Dist. Dec., Jan. 23, 2004"); conformed copy of the Fifth District Court of Appeals' March 1, 2004 order ("Fla. 5th Dist. Dec., March. 1, 2004").

CERTIFICATE OF INTERESTED PERSONS

Mike Jorgensen	Petitioner's appellate counsel
John D. Maher	Respondent's appellate counsel
Mark Tetzlaff	Petitioner
Fla. Unemp. Appeals Comm'n	Respondent
Alan O. Forst	Chairman, Fla. Unemp. Appeals Comm'n
Hon. David A. Monaco	5th District Court of Appeals Appellate Panel
Hon. Emerson R. Thompson, Jr.	
Hon. William D. Palmer	

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STATEMENT OF THE CASE AND FACTS

The Petitioner filed a request for unemployment benefits with the AWI on January, 21, 2002. Fla. 5th Dist. Dec., Jan. 23, 2004 at 1. The AWI granted the Petitioner benefits for the time period between February 13, 2002 and March 23, 2002, but it denied him benefits for the time period between March 24, 2002 and August 10, 2002, claiming he did not continue filing weekly claim reports as he had previously. Id. at 2. This was the AWI's sole basis for denying benefits. Id.

Specifically, the AWI denied the Petitioner's claims alleging that he did not comply with Fla. Stat. §§ 443.091(1)(a) and (b)(2002), and Fla. Admin. Code, R.R. 3.013 and 3.015 (2002). Id. at 2. The Petitioner appealed the ruling to the UAC, but upon review, the UAC affirmed the AWI's decision. Id. The Petitioner then filed a timely appeal with the Fifth District Court on January 27, 2003. Case Docket, Fla. 5th Dist. Ct., No. 5D03-250 (2003).

Pro se, the Petitioner argued that the UAC erred in denying his claim for benefits, stating that the AWI could not preclude him from receiving unemployment compensation benefits simply because the Petitioner failed to file weekly claim reports. Fla. 5th Dist. Dec., Jan. 23, 2004 at 3. The Petitioner cited the Third District Court's decision in Dines v. Florida

Unemployment Appeals Comm'n, 730 So.2d at 378 (Fla. 3d Dist. Ct. App. 1999), as persuasive authority to support his claim that said weekly reports were unnecessary. Id.

In Dines, the court held that § 443.091(1)(b) was "advisory or directory only" and that " . . . the failure to make weekly reports cannot result in the forfeiture of benefits which . . . the claimant is otherwise entitled to by law." Id. Section 443.091(1)(b) requires claimants to file weekly reports in order to prove continued eligibility. Id. Thereafter, the Third District Court reversed the UAC's order and remanded with directions to pay benefits for the time period at issue. Id.

Contrary to Dines, the Fifth District Court affirmed the UAC's decision on grounds that the Petitioner also needed to comply with Fla. Stat. § 443.111(1)(b) (2002) in addition to § 443.091(1)(b). Fla. 5th Dist. Dec., Jan. 23, 2004 at 3. Section 443.111(1)(b) requires a claimant to show that he is able and available for work, has not refused suitable work, is actively seeking work, and, if he had worked, to report any earnings from the work. Id.

The Fifth District Court determined that the Petitioner had failed to supply an adequate transcript from which it could verify compliance. Id. The court cited Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979) for the proposition that an appellate court must affirm the lower tribunal's decision if it found a record deficient. Id. at 1152; *accord* Fla. R. App. P. 9.200(e)(2002). In reaching its decision to affirm the UAC's decision, the court failed to address the appropriateness of the Dines

decision under the applicable statutes. Id.

The Petitioner filed a timely Motion for Rehearing on February 24, 2003. Case Docket, No. 5D03-250 (2003). Contrary to the Fifth District Court's finding that the Petitioner had not supplied an adequate transcript under Barnett Bank, *accord* Fla. R. App. P. 9.200(e)(2002), Fla. 5th Dist. Dec., Jan. 23, 2004 at 3, the Petitioner argued that the court docket reflected that a transcript was indeed filed with the court on May 19, 2003. Id. Pet'r. Am. Mot. for Rehearing at 4.

Alternatively, the Petitioner argued that Fla. R. App. P. 9.200(f)(2)(2002) required the court to give him an opportunity to supplement the record by providing another copy of the transcript. Pet'r. Am. Mot. for Rehearing at 2.

Rule 9.200(f)(2) prevents a court from reaching a decision until it has given the appellant an opportunity to supplement the record. Id. Fla. R. App. P. 9.200(f)

(2)(2002).

Nevertheless, the Fifth District Court did not acknowledge that an adequate transcript had been filed with the court under Barnett Bank; *accord*, Fla. R. App. P. 9.200(e). Fla. 5th Dist. Dec., March 1, 2004 at 1. Moreover, the court also did not allow the Petitioner an opportunity to supplement the record under Rule 9.200(f)(2). Id. Accordingly, the Fifth District Court denied the Petitioner's Amended Motion for Rehearing. Id.

SUMMARY OF ARGUMENT

The Petitioner presents three issues for this Court to review under Art. V § 3(b)(3) Fla. Const. (2002). First, the Fifth District Court of Appeals' decision expressly and directly conflicts with the Third District Court's decision in Dines v. Florida Unemployment Appeals Comm'n, 730 So.2d 378 (Fla. 3d Dist. Ct. App. 1999). Contrary to Dines, the Petitioner argues that the Fifth District Court misconstrued Fla. Stat. §§ 443.111(1)(b) and 443.091(1)(b).

Specifically, the Petitioner argues that the Fifth District Court erred when it required him to show independent proof that he complied with § 443.111(1)(b). By contrast, the Third District Court did not reach as far in its decision. Unlike the Fifth District Court, which found § 443.111(1)(b) compliance necessary, the Third District Court disregarded the § 443.111(1)(b) requirement altogether when
it held § 443.091(1)(b) as inapplicable.

The Petitioner alleges that a conflict in decisions exists because the Fifth District Court concluded that §§ 443.091(1)(b) and 443.111(1)(b) are mutually exclusive, and thus, are "independent" requirements, whereas the Third District Court apparently concluded that both statutes are not mutually inclusive. Like the Third District Court, the Petitioner argues that both statutes are inseparably linked, and thus, are "interdependent" requirements.

Second, the Fifth District Court of Appeals' decision expressly and directly conflicts with this Court's decision in Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979). Contrary to Barnett Bank, *accord* Fla. R. App. P. 9.200(e), the Petitioner met his burden by supplying an

adequate transcript under Fla. R. App. P. 9.200(e). The transcript contained the information at issue on AWI Form UCB-206 from which the Petitioner argues the court should have found compliance with § 443.111(1)(b).

Third, and alternatively, the Fifth District Court of Appeals' decision expressly and directly conflicts with the Fourth District Court's decision in Kauffmann v. Baker, 392 So.2d 13 (Fla. 4th Dist. Ct. App. 1980). Contrary to Kauffmann, *accord* Fla. R. App. P. 9.200(f)(2), the Fifth District Court did not allow the Petitioner an opportunity to supplement the record, even though it determined that a transcript was missing.

ARGUMENT

I)The 5th District Court of Appeals' decision expressly and directly conflicts with the Third District Court's decision in Dines v. Florida Unemployment Appeals Comm'n, 730 So.2d 378 (Fla. 3d Dist Ct. App. 1999) as it misconstrued Fla. Stat. §§ 443.091(1)(b) and 443.111(1)(b).

In Dines v. Florida Unemployment Appeals Comm'n, 730 So.2d 378 (Fla. 5th Dist. Ct. App. 1999), the appellant filed for unemployment benefits. Although the AWI originally denied his application, Dines appealed, and the UAC affirmed an order awarding him benefits. Id. However, the UAC denied benefits during a certain time period because Dines did not file weekly claim reports as he did previously under Fla. Stat. § 443.091(1)(b)(2002). Id. This was UAC's sole basis for denying benefits. Id.

The Third District Court reversed the UAC's decision and awarded Dines benefits for the period at issue. Id. Section 443.091(1)(b) requires a claimant to file weekly claim reports in order to receive unemployment benefits. Fla. Stat. § 443.091(1)(b)(2002). The Third District Court concluded that § 443.091(1)(b) was "'advisory or directory' only and, . . . [that] failure to make weekly reports cannot result in the forfeiture of benefits to which [Dines] was otherwise entitled [to] by law."

Like Dines, the Petitioner also filed for unemployment benefits. Fla. 5th Dist. Dec., Jan. 23, 2004 at 1. Although originally denied, the AWI later awarded benefits to the Petitioner after he appealed to the UAC. Id. However, while the UAC affirmed the AWI's decision to award some benefits, it denied others since the Petitioner did not file weekly reports for a certain time period. Id. The Petitioner appealed, but the UAC reaffirmed the AWI's decision. Id.

Unlike the UAC's decision, however, the Fifth District Court determined that the Petitioner also had to comply with § 443.111(1)(b). Fla. 5th Dist. Dec., Jan. 23, 2004 at 1. The court then affirmed the UAC's decision on grounds that the Petitioner did not furnish an adequate transcript under Barnett Bank. Id. at 3. The Petitioner argues that the Fifth District Court's decision misconstrued §§ 443.019(1)(b) and 443.111(1)(b).

Specifically, the Petitioner contends that § 443.111(1)(b) is a component part of § 443.091(1)(b) and therefore depends on §

443.091(1)(b) for its raison d'etre. Apparently, this was the Third District Court's interpretation as well since it did not separately addressed the two statutes together in the Dines decision. See Dines, 730 So.2d at 378.

When the Fifth District Court interpreted §§ 443.091(1)(b) and 443.111(1)(b) as mutually exclusive requirements, it created a conflict between itself and the Third District Court's decision in Dines. The Petitioner alleges that the Third District Court's decision is the correct interpretation. Accordingly, this Court may take jurisdiction in this case to resolve the differences in interpretation.

II) The 5th District Court of Appeals' decision expressly and directly conflicts with the Third District Court's decision in Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), *accord* Fla. R. App. P. 9.200(e), as it improperly denied the Petitioner's Motion for Rehearing.

In Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979), the issue was whether Barnett Bank's lien was superior to the Applegate's lien. Unfortunately for Barnett Bank, there was no court reporter present during trial nor anything in the judge's order to support its claim. Id. The trial court determined that the Applegate's lien was superior, but the First District Court disagreed, and reversed the trial court's decision. Id.

This Court reversed the First District Court's decision, holding that Barnett Bank did not furnish an adequate transcript from which the trial court could

ascertain the underlying facts necessary to support its claim. Id. (Fla. R. App. P. 9.200(e)(2002) essentially codifies this Court's decision in Barnett Bank). This Court cited Fla. R. App. P. 9.200(b)(3) as a basis for its decision since Barnett Bank did not provide a suitable substitute for a trial transcript. Id.

Similarly, the Fifth District Court also found no evidence to prove that the Petitioner furnished the court with an adequate transcript. 5th Dist. Dec., Jan. 23, 2004 at 3. Citing Barnett Bank, the court affirmed the UAC's decision to deny the Petitioner benefits. Id. However, unlike Barnett Bank, which required affirming the lower court's decision due to a missing transcript, the Fifth District Court's decision erred when it failed to take notice that the Petitioner had filed an adequate transcript with the court. Case Docket, No. 5D03-250 (2003).

The Petitioner asserts that the Fifth District Court's decision was a misapplication of this Court's holding in Barnett Bank, and as such, should have been a basis for granting the Petitioner a rehearing. The Petitioner addressed the issue of the allegedly missing transcript in his Motion for Rehearing. Pet'r. Am. Mot. for Rehearing at 4. Nevertheless, the Fifth District Court denied his motion. Fla. 5th Dist. Dec., March. 1, 2004 at 1.

III) The 5th District Court of Appeals' decision expressly and directly conflicts with the Third District Court's decision in Kauffmann v. Baker, 392 So.2d 13 (Fla. 4th Dist. Ct. App. 1980), *accord* Fla. R. App. P. 9.200(f)(2), as it improperly denied the Petitioner's Motion for Rehearing.

In Kauffmann v. Baker, 392 So.2d 13 (Fla. 4th Dist. Ct. App. 1980), the issue was whether both parties were guilty of unclean hands by inflating the

purchase price of a home in order to obtain financing. Like Barnett Bank, there was no record of a trial transcript, but there was an attempt to reconstruct the record under Fla. R. App. P. 9.200(b)(3)(2002). Rule 9.200(b)(3) provides: "If a transcript is unavailable, an appellant may prepare a statement of the evidence from the best available means and then serve them on the appellee." Id.

However, if the court cannot reconstruct the record, Fla. R. App. P 9.200(f)(2)(2002) requires the court to allow an appellant the opportunity to supplement the record. Rule 9.200(f)(2) provides: "No proceeding shall be determined because of an incomplete record until an opportunity to supplement the record has been given." Id. Under Rule 9.200(f)(2), the court cannot reach a decision based on an insufficient record. Id.

The Fourth District Court denied Kauffmann a second opportunity to supplement the record since he was aware of the missing transcript. Id. The Fourth District Court held that "[u]nder these circumstances, where the record deficiencies are apparent and the record itself reflects appellant's awareness of them, we find no need to award a second opportunity to supplement the record. Id.

Contrary to Kauffmann, the Fifth District Court never indicated to the Petitioner that a transcript was missing from the record. 5th Dist. Dec., Jan. 23 at 4. By admitting that the record was incomplete, the court should have provided the Petitioner an opportunity to supplement the record. *See also*, Hill v. Hill, 778 So.2d 967 (Fla. 2001); Trans-Continental Finance Corp. v. Baxter, 402 So.2d 1289 (Fla. 5th Dist. Ct. App. 1981); and Cook v. City of Winter Haven Police Dept., 837

So.2d 492 (Fla. 2d Dist. Ct. App. 2003), *case dismissed*, 844 So.2d 645 (Fla. Apr. 3, 2003).

The Petitioner believes that the Fifth District Court's decision to ignore Rule 9.200(f)(2) and deny him a rehearing in lieu of Kauffmann (and the cases of other jurisdictions) was improper and should be reversed by this Court. The Fifth District Court's decision significantly conflicts with the decisions of other jurisdictions. Such a decision warrants this Court's attention regarding the interpretation of Fla. R. App. P. 9.200(f)(2).

CONCLUSION

This Court should accept this case for the following reasons: First, the Fifth District Court's decision misconstrues Fla. Stat. §§ 443.091(b) and 443.111(b). The Fifth District Court's decision conflicts with the Third District Court's decision in Dines. Therefore, a clarification by this Court on the matter of the interpretation of §§ 443.091(b) and 443.111(b) is important since it may affect a significant number of eligible unemployment claimants in the future.

Second, the court docket shows that the Petitioner supplied an adequate record in conformity with the Barnett Bank decision and Fla. R. App. P. 9.200(e). Had the Fifth District Court taken notice that the Petitioner had filed an adequate transcript, the court's decision would have materially affected the outcome of the Petitioner's case.

Finally, the Fifth District Court's decision determined that the Petitioner had failed to provide an adequate transcript. Such a finding required the court to allow the Petitioner an opportunity to supplement the record under Fla. R. App. P. 9.200(f)(2). A decision by this Court to reverse the Fifth District Court's decision

under Rules 9.200(e) or 9.200(f)(2) is critical since a significant conflict exists between this Court's decision in Barnett Bank and those of other jurisdictions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and authentic copy of this Amended Jurisdictional Brief has been furnished via facsimile [(850) 488-2123] to John D. Maher, Unemployment Appeals Commission, Webster Building, Suite 300, 2671 Executive Center Circle W, Tallahassee, Florida, 32399-0681 on this, the 22nd day of July, 22, 2004.

_____

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CERTIFICATE OF FONT TYPE

I HEREBY CERTIFY that this Amended Jurisdictional Brief complies with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. It is typed in 14-point Times New Roman font in WordPerfect 11 and Windows XP proportionality format.

By: _____

MIKE JORGENSEN

APPENDIX

1. Conformed copy of the 5th District Court of Appeals' decision, dated January 23, 2004.
2. Conformed copy of the 5th District Court of Appeals' order denying rehearing, dated March 1, 2004.