IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. SC09-451

Petition for Discretionary Review of
A Decision of the District Court of Appeal of Florida
First District
1D08-63

Florida Unemployment Appeals Commission,

Petitioner,

v.

Shirley Porter,

Respondent.

INITIAL BRIEF ON THE MERITS OF PETITIONER FLORIDA UNEMPLOYMENT APPEALS COMMISSION

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STATEMENT OF THE CASE AND THE FACTS

This is a petition for discretionary review pursuant to Florida Rules of Appellate Procedure 9.030(a)(2)(A) and 9.120 of Porter v. Florida Unemployment Appeals Commission, 1 So.3d 1101 (Fla. 1st DCA 2009), reh. denied, Feb. 20, 2009, that reversed a final order of the Unemployment Appeals Commission. The Commission seeks the Court's review of the decision because it expressly and directly conflicts with decisions of the Second District Court of Appeal on the same rule of law.

The case originated with the unemployment compensation claim of Shirley Porter (the claimant). Porter's claim was denied because she voluntarily left her employment without good cause attributable to the employer. (R.2) See §443.101(1)(a), Fla. Stat. The claimant appealed the determination and requested a hearing. (R.3). At the conclusion of the hearing, the appeals referee rendered a decision that affirmed the initial determination and held the claimant disqualified. (R.10-11). The claimant appealed the decision to the Unemployment Appeals Commission, which also affirmed the disqualification. (R.12-15)

The claimant appealed the Commission's order to the First District Court of Appeal. (R.16-17). In Porter v. Florida Unemployment Appeals Commission, the court erroneously stated

that the case was one of first impression in Florida and was controlled by a line of cases from other jurisdictions. The court ruled that, although the claimant had tendered a resignation, she did not voluntarily leave her employment because the employer declined to allow her to finish the notice period she had given at the time of the resignation. The court concluded that the claimant was entitled to benefits despite the resignation.

The Commission has petitioned the Florida Supreme Court for review of the decision of the First District Court of Appeal because it expressly and directly conflicts with decisions of the Second District Court of Appeal and it unduly burdens employers by forcing them to retain potentially disgruntled employees or be charged with their unemployment claims.

SUMMARY OF ARGUMENT

Florida's unemployment compensation statute provides that claimants who become unemployed voluntarily are generally disqualified from receiving benefits. See §443.101(1)(a), Fla. Stat. The intent of the statute is to assist persons who are temporarily unemployed through no fault of their own. See §443.031, Fla. Stat. The claimant in this case tendered a resignation, giving her employer two-weeks' notice. Before the conclusion of the two weeks, however, the employer hired a replacement and notified the claimant that she was no longer needed. On two occasions, the Second District Court of Appeal was presented with identical situations. On both occasions, the court ruled that the claimant should be disqualified because he or she voluntarily left the employment by tendering the resignation. See Nelson v. Unemployment Appeals Commission, 927 So.2d 190 (Fla. 2d DCA 2006); Duran Insurance Co. v. Florida Department of Commerce, 260 So.2d 873 (Fla. 2d DCA 1972).

In this case, however, the First District Court of Appeal held that the claimant was not disqualified because, subsequent to tendering the resignation, the employer did not allow her to complete working the two-week notice period. The

court’s ruling in this case expressly and directly conflicts with Nelson and Duran Insurance Co.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE HELD THAT, WHEN AN EMPLOYEE TENDERS A RESIGNATION WITH NOTICE AND THE EMPLOYER DECLINES TO ALLOW THE EMPLOYEE TO WORK THE NOTICE PERIOD, THE EMPLOYEE DOES NOT QUIT VOLUNTARILY AND IS NOT DISQUALIFIED FOR UNEMPLOYMENT BENEFITS. THE SECOND DISTRICT HELD THAT, WHEN AN EMPLOYEE TENDERS A RESIGNATION WITH A NOTICE PERIOD THE EMPLOYEE HAS VOLUNTARILY LEFT THE EMPLOYMENT, EVEN IF THE EMPLOYER DOES NOT PERMIT THE EMPLOYEE TO FINISH WORKING THE NOTICE PERIOD. CITING OUT-OF-STATE AUTHORITIES, THE FIRST DISTRICT ERRONEOUSLY HELD THAT THE EMPLOYER'S FAILURE TO PERMIT THE EMPLOYEE TO WORK THE NOTICE PERIOD NEGATES A FINDING THAT THE EMPLOYEE LEFT THE EMPLOYMENT VOLUNTARILY.

After approximately two months of employment, Shirley Porter, the claimant/respondent, submitted a letter of resignation, giving two weeks notice. The letter did not cite any specific complaint about the employer, simply stating that "[t]hings just weren't going right." The letter was submitted on July 27, 2007. The claimant's last day of work was to be August 10, 2007. On August 7, however, the employer hired a replacement for the claimant and advised that her services were no long needed. When the claimant filed a claim for unemployment benefits, it was denied at all administrative levels because the applicable statute disqualifies workers who voluntarily leave their employment, except under circumstances not present here. See §443.101(1)(a), Fla. Stat.

The same basic factual situation presented here was addressed by the Second District Court of Appeal in Nelson v. Unemployment Appeals Commission, 927 So.2d 190 (Fla. 2d DCA

2006), which involved an estimator for a painting contractor who was unhappy when the employer presented a noncompetition agreement for him to sign. The estimator advised his supervisor that he would not sign the agreement and was quitting, but was willing to stay for two weeks to a month to permit the employer to find a replacement. The president of the company, however, decided to have the estimator leave immediately rather than remain for at least two more weeks. The appeals referee held the estimator disqualified for unemployment benefits because he voluntarily left his employment. The Commission and the Second District Court of Appeal affirmed. Neither the Commission nor the Second DCA attributed any legal significance in the fact that the employer declined the employee's offer to continue working for at least two more weeks after he announced he was quitting. Nelson cannot be distinguished from this case. The material findings are the same. The same result should have been reached, but was not.

The same situation had been previously addressed by the Second District Court of Appeal in Duran Insurance Co. v. Florida Department of Commerce, 260 So.2d 873 (Fla. 2d DCA 1972). A man thought to be the newly wedded husband of an employee submitted a resignation for her, giving two weeks' notice. On the following day, the employer accepted the resignation effective at the conclusion of that day. After the employee learned of this, she accepted her final earnings

and vacation pay, and did not contest the resignation or attempt to continue her employment. When she filed a claim for unemployment benefits, it was denied on the theory that she voluntarily left the employment when she ratified the resignation tendered by her putative spouse. The Second District Court of Appeal adopted the decision of the appeals referee that she was disqualified from receiving unemployment benefits because she voluntarily left her employment. The court attributed no significance to the fact that the employer declined the employee's offer to work a two-week notice period.

In contrast, the First District Court of Appeal in this case, reversed the administrative rulings and held that the claimant was not disqualified because she did not voluntarily leave her employment because the employer would not allow her to work the last three days of her notice period. The court overlooked that the claimant initiated and was the efficient cause of the termination of her employment. The claimant's involuntary unemployment was only the last three days of her notice period. Since the claimant voluntarily left employment, she is disqualified from receiving benefits. See §443.101(1)(a), Fla. Stat.

Instead of disqualifying the claimant, the First District Court of Appeal's opinion states:

> We have found no Florida case addressing an unemployment compensation claimant's entitlement to benefits when, after submitting a notice of

> resignation that specifies an effective date, the claimant is discharged prior to the date the resignation takes effect.

Porter, at 1102 So.3d. Not only did the court overlook Nelson and Duran, but also Johnston v. Florida Department of Commerce, 340 So.2d 1229 (Fla. 4th DCA 1976). Johnston involved an employee who was given two weeks' notice that she was being discharged because she was not sufficiently qualified for the job. Believing that it would be an uncomfortable situation, the employee chose not to work the notice period and filed a claim for unemployment benefits which were denied. The court reversed, with the following analysis:

> In such a situation the employer has fired the employee; the employee has not discharged himself, but rather, being faced with the inevitable, has decided to leave before what might be called the notice period is up. In a case of that kind, the period of voluntary unemployment is that portion of the notice period (the notice period being the time, if any, between notice of discharge and actual discharge) during which the employee chooses not to work. The employee is ineligible to receive unemployment benefits during the notice period, for he could continue on the job if he wished. The period of involuntary unemployment begins with the date which the employer designated as the termination date when it gave the employee notice. If the employee is otherwise eligible for unemployment compensation benefits, his leaving work after he was given definite notice will not deprive him of those benefits during the period of involuntary unemployment.

Johnston, 340 So.2d at 1230. Although the facts of Johnston differ from this case, the same principle applies to both. The party initiating the severance of an employment relationship causes the relationship to end and must bear the consequences of that act when claiming unemployment benefits. In Johnston that was the employer. In this case, it was the claimant. It must be noted that the Commission has followed Johnston with respect to cases where a claimant who has been discharged chooses to leave his/her job prior to the discharge date; the claimant is ineligible for benefits during the "notice period" and is not disqualified as of the date that had been announced as the discharge date. A recent amendment to the statute clarified a claimant's status during the notice period, but left intact the penalty for voluntarily leaving employment. See Ch.09-99, §6, Laws of Fla. The Commission has also applied Johnston to cases such as the instant case, where a claimant announces a resignation date and the employer refuses to let the claimant work out the full notice period.

Not only is the First District Court of Appeal's rationale undermined by the fact that there are Florida court opinions on point, but the court's disposition is also contrary to the statute and common sense. Once an employee tenders a resignation, that employee has voluntarily left the employment and is subject to the statutory penalty. If the employer is uncomfortable with having the employee remain on the job, it should be able to remove the employee from the

workpace without suffering a penalty greater the duration of the notice period.

CONCLUSION

Porter v. Florida Unemployment Appeals Commission was wrongfully decided and expressly and directly conflicts with Nelson and Duran Insurance Co., which were correctly decided. Since the Unemployment Appeals Commission must uniformly apply the unemployment statute statewide, the Commission petitions the Court to exercise its discretionary jurisdiction to resolve the conflict.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to the following persons on this **18th day of November 2009**: **Shirley A. Porter**, 12309 Mastin Cove Road, Jacksonville, FL 32225; and **Allen Children Centers Inc.,** 2201 Riverside Avenue, Jacksonville, FL 32204.

CERTIFICATE OF TYPEFACE COMPLIANCE

I ALSO CERTIFY that this brief was computer generated using the MS Courier New 12-point font which complies with Florida Rule of Appellate Procedure 9.210(a)(2).

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