IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOSEPH LOGALBO,

Appellant,

v.

FLORIDA UNEMPLOYMENT APPEALS COMMISSION and COLLIER COUNTY BOCC,

Appellees.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-3441

Opinion filed February 23, 2012.

An appeal from the Unemployment Appeals Commission.

Douglas L. Wilson of The Wilson Law Firm, Naples, for Appellant.

Louis A. Gutierrez, Senior Attorney, Unemployment Appeals Commission, Tallahassee, for Appellee.

PER CURIAM.

Joseph Logalbo, claimant, appeals an order of the Unemployment Appeals Commission (UAC), denying him unemployment benefits. Claimant argues the UAC's order should be reversed because he did not commit misconduct as defined by section 443.036(30), Florida Statutes (2011). The issue is whether claimant committed misconduct because of "excessive unauthorized absenteeism," and

whether claimant attempted to comply with the employer's directives to supply documentation in accordance with the Family Medical Leave Act (FMLA). Because the appeals referee and the UAC failed specifically to address the reasonableness of claimant's attempts to comply, we reverse and remand with directions to address this issue.

Misconduct is presumed when the employer establishes excessive unauthorized absenteeism by a claimant. See Mason v. Load King Mfg. Co., 758 So. 2d 649, 654 (Fla. 2000); Tallahassee Housing Auth. v. UAC, 483 So. 2d 413, 414 (Fla. 1986). The claimant has the burden to overcome the presumption. Id.

In Blodgett v. Florida Unemployment Appeals Commission, 880 So. 2d 814 (Fla. 1st DCA 2004), we addressed a claimant's attempt to overcome the presumption of misconduct by presenting evidence that she attempted to comply with the employer's directive to provide documentation concerning the absences. We held where there were reasonable attempts to comply with the directives of the employer, the "conduct did not rise to the level of willful or deliberate disregard of her employer's interests." Id. at 815.

In Florida State University v. Florida Unemployment Appeals Commission, 548 So. 2d 768, 770-71 (Fla. 1st DCA 1989), another case dealing with a claimant's attempt to provide documentation concerning absences, we reversed and remanded the denial of benefits because there was no specific finding

concerning the claimant's "good faith effort to comply with the conditions of employment."

In light of these cases, we find the appeals referee must make a specific factual determination concerning the reasonableness of a claimant's effort to comply. Here, the focus of the appeals referee's order was whether claimant was properly advised on how to comply with the FMLA and whether he actually complied. There is no specific determination concerning the reasonableness of claimant's efforts to comply. In light of Blodgett and Florida State University, where a claimant presents evidence concerning an attempt to comply, such a specific finding is required. We, therefore, remand for the appeals referee to address this issue.

We also feel it is incumbent upon us to address the issue of attorney's fees. Claimant's attorney has moved for fees pursuant to section 443.041(2)(b), Florida Statutes (2011), which provides:

> An attorney at law representing a claimant for benefits in any district court of appeal of this state or in the Supreme Court of Florida is entitled to counsel fees payable by the department as set by the court if the petition for review or appeal is initiated by the claimant and results in a decision awarding more benefits than provided in the decision from which appeal was taken. The amount of the fee may not exceed 50 percent of the total amount of regular benefits permitted under s. 443.111(5)(b) during the benefit year.

The UAC concedes that if claimant prevails and is awarded more benefits than he would have received under the decision below, attorney's fees should be granted.

Although there appears to be no case from this court outlining the procedure for awarding attorney's fees in unemployment cases, the Second and Third Districts have different methods by which they proceed. In Riveras v. Unemployment Appeals Commission, 884 So. 2d 1143, 1146 (Fla. 2d DCA 2004), the court directed that if the parties could stipulate to an amount of fees, they should file their stipulation with the court. If not, the appeals referee would hold an evidentiary hearing and file a recommended order with the court consistent with the principles announced in Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985). Id.

However, the Third District in Cheung v. Executive China Doral, Inc., 638 So. 2d 82, 84-85 (Fla. 3d DCA 1994), noted the statute directs the court to set a fee. The court found it would, by a separate order, appoint a commissioner to hear evidence, make findings under Rowe, and render a recommendation regarding attorney's fee orders. Id. We find in light of the fact that the appeals referee has already heard this case, the procedure adopted by the Second District in Riveras promotes judicial efficiency. Therefore, if claimant is ultimately successful in obtaining benefits, and the parties cannot reach an agreement as to fees, the appeals referee shall hold an evidentiary hearing and file a recommended order with this court regarding fees.

REVERSED and REMANDED.

WOLF and CLARK, JJ., CONCUR; WETHERELL, J., DISSENTS WITH OPINION.

WETHERELL, J., dissenting.

I respectfully dissent from the decision to remand this case to the appeals referee for additional fact-finding. I would affirm the denial of Claimant's request for unemployment compensation benefits because the referee's decision includes more than enough findings to support the conclusion that Claimant was discharged for misconduct connected with work and, thus, is disqualified from receiving unemployment compensation benefits.

Claimant was absent from work for six weeks[1] on the basis of an undocumented medical condition that allegedly precluded him from working.[2]

[1] On December 8, 2010 (the day after he failed a drug test required as part of his employment), Claimant left his supervisor a voicemail stating that he was not coming into work and that he intended to take FMLA leave. Claimant did not return to work until January 21, 2011. The record reflects that had Claimant not been fired for his extended unauthorized absence, he would have been suspended for two weeks upon his return to work based on the failed drug test.

[2] Claimant claimed that at least a portion of his absence was based on a "flare-up" of his multiple sclerosis (MS), for which he had previously taken FMLA leave. In support of this claim, Claimant referred to an undated document from Dr. Novak stating that Claimant's MS is a "lifelong" condition and that significant flare-ups of the condition "may" require Claimant to miss work or affect his ability to perform his job. However, as the employer's witness explained at the hearing, there is nothing in this document indicating that any portion of Claimant's six-week absence from work was, in fact, related to a flare-up of his MS. Moreover, Claimant testified that another physician determined that his condition was actually the result of panic attacks, and not a flare up of his MS. However, none of the documentation presented to support this claim stated that the panic attacks required

The employer did not believe that Claimant was medically unable to work,[3] nor, it appears, did the appeals referee because she resolved all conflicts in the evidence in favor of the employer. The referee found that that Claimant failed to document his alleged medical inability to work even though he was familiar with the requirements of the employer's FMLA policy, as evidenced by his past compliance with the policy. The record fully supports these findings, which in turn, support the referee's conclusions that Claimant's actions "were not in the best interest of the employer" and "arose to the level of misconduct."

There is no need to remand for additional fact-finding; the omitted finding deemed necessary by the majority is subsumed in the affirmative determination of misconduct and in the ultimate determination that Claimant was disqualified from receiving unemployment compensation benefits. Indeed, under the Mason and Tallahassee Housing Authority cases cited by the majority, the only way the referee could have found Claimant eligible for benefits after rejecting the claim that his extended absence was implicitly authorized by his employer was if the referee affirmatively found that Claimant rebutted the presumption of misconduct arising from his excessive unauthorized absenteeism. Because the referee's decision contains no such finding, it follows that Claimant did not rebut the

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the extended leave from work taken by Claimant.

[3] This is not the first time Claimant failed to document his alleged inability to work due to a medical condition. The record reflects that Claimant was disciplined in 2008 for failing to provide a doctor's note for a day that he claimed to be sick.

presumption that he was discharged for misconduct.

The other cases cited by the majority do not support reversal here. The Florida State University case is distinguishable because it was a "voluntary quit" case, not a "misconduct" case based on excessive unauthorized absenteeism. Blodgett was an excessive unauthorized absenteeism case, but it is factually distinguishable from this case.

In Blodgett, the employee's extended absence was expected due to her pregnancy and, thus, her failure to submit the required leave forms was merely an "inconvenience" to the employer, see 880 So. 2d at 816; by contrast, in this case, there was no evidence that Claimant's extended absence was expected by the employer when he left his supervisor a voicemail stating that he intended to take FMLA leave without giving any indication of how long the leave might last, and the referee found that Claimant's actions "were not in the best interest of the employer." Also, in Blodgett, the court noted that there was no evidence of dishonesty or malingering by the employee, see id.; by contrast, in this case there was no evidence other than Claimant's self-serving testimony (which was rejected by the referee) that Claimant was actually medically unable to work or under the care of a physician at any point during his absence.

In sum, because the record fully supports the findings made by the appeals referee and because those findings support the referee's legal conclusions and

ultimate determination that Claimant is disqualified from receiving unemployment compensation benefits, I would affirm the order on appeal. Moreover, because the remand mandated by the majority will serve no meaningful purpose except to give Claimant a second opportunity to establish entitlement to benefits that he is clearly disqualified from receiving due to his excessive unauthorized absenteeism, I respectfully dissent.[4]

[4] Although I disagree with the majority's disposition of this case on the merits, I agree based on this disposition that Claimant's motion for appellate attorney's fees should be granted. I also agree that the motion should be remanded to the referee for consideration in accordance with the procedure set forth in Riveras. It should be noted that the motion is only provisionally granted because it is possible that on remand the referee and the UAC may again determine that Claimant is not entitled to unemployment compensation benefits, and under those circumstances, Claimant will not be entitled to any attorney's fees for this appeal. See § 443.041(2)(b), Fla. Stat. (providing for an award of fees only if the appeal "results in a decision awarding more benefits than provided in the decision from which appeal was taken").