

Third District Court of Appeal

State of Florida, January Term, A.D. 2010

Opinion filed May 26, 2010.

Not final until disposition of timely filed motion for rehearing.

No. 3D09-963

Lower Tribunal No. 09-245

Essie R. Baker,
Appellant,

vs.

Florida Unemployment Appeals Commission, et al.,
Appellees.

An Appeal from Florida Unemployment Appeals Commission.

Essie R. Baker, in proper person.

M. Elaine Howard, Senior Attorney, for appellees.

Before SUAREZ, CORTIÑAS, and SALTER, JJ.

SALTER, J.

Essie Baker, a non-lawyer representing herself, appeals a final order of the Florida Unemployment Appeals Commission (FUAC) affirming two decisions

issued by a referee in the Office of Appeals of the Agency for Workforce Innovation (Agency). We reverse.

I. Facts and Procedural History

Baker commenced working for the TLC Christian Academy in 2006. On October 18, 2007, she faxed a cover note and a letter from her cardiologist to the owner and director of the Academy.¹ The doctor advised a medical leave for one week, October 19, 2007 through October 26, 2007. Her employer made no objection at the time. Upon returning to work on October 26, Baker found the Academy closed. Baker asserts that she made numerous calls to both the director's secretary and the director on the 26th, but did not receive a clear answer as to what had happened. According to Baker's testimony, she drove by the school on Monday, October 29, 2007, and saw the director and other individuals packing boxes and loading them into vehicles. Baker did not stop at the Academy, but contacted the director, who told her that the school was going through some difficulties, but would be reopening soon.² Baker filed for unemployment compensation and received a favorable determination for benefits on October 30.

¹ The owner and director of the Academy acknowledged receipt of both of these communications in a later letter provided to the referee.

² Baker eventually found out that the Academy had been closed down by the health department.

Neither the record nor the FUAC answer brief explains when or how the Academy obtained a reversal of the favorable determination,³ but about seven months after the initial determination Baker's benefits stopped and she received an adverse redetermination from the Agency. The record copy of that notice is a computer-generated document unsigned by any human being. It includes "issue codes," which we are unable to decipher, an entry "DATE MAILED: 05/28/08," and a notice of determination that included these findings:

THE CLAIMANT DID NOT REPORT TO WORK AND WAS NOT ON LEAVE STATUS. THE CLAIMANT IS CONSIDERED TO HAVE ABANDONED THE JOB.

* * *

THIS DETERMINATION CREATED AN OVERPAYMENT OF \$5,225.00. PLEASE SEND REPAYMENT TO BENEFIT PAYMENT CONTROL, [ADDRESS IN TALLAHASSEE].

The notice also included a description of appeal rights requiring that a request for reconsideration or an appeal be filed "within 20 calendar days⁴ after the

³ In an ordinary case such as this, and in which fraud is not alleged, the Agency may reconsider a determination "when it finds an error or when new evidence or information pertinent to the determination is discovered after a prior determination" for up to a year after the end of the benefit year. § (443.151(3)(c)1, Fla. Stat.(2008).

⁴ The Legislature established the time to appeal in Section 443.151(4)(b)1.: "within 20 days after the date of mailing of the notice [of determination]." The Agency promulgated rules in accordance with that limitation; Rules 60BB-5.005 and .006, Florida Administrative Code. Unlike Florida's judicially-established rules of procedure, no provisions are made for (a) an allowance of additional days when a document is mailed or (b) a written and signed certificate of service

mailing date of this determination.” Those instructions regarding an appeal also specify, “[i]f mailed, the postmark date is the filing date.”

It is undisputed that Baker filed an appeal online on June 19, 2008. The appeal recounted her medical leave, the cardiologist’s documentation of that leave, her return to an empty school building, her inquiries, and her unequivocal denial of the employer’s apparent argument that she had abandoned her job.

Baker testified in a later telephonic hearing that she received the notice of redetermination “on or about” May 28,⁵ although she did not report a postmark date or identify the day of receipt. She also said that she thought, based on advice from an employee at an Agency office, that the twenty days were business days, not calendar days (despite a smaller-font notice in the “appeal rights” section stating clearly that the period was measured in calendar days). If the notice was in fact “mailed” on or after May 30, a Friday, Baker’s online appeal was timely. If it was indeed “mailed” on May 28, 2008, the Agency’s Office of Appeals and FUAC assert that the appeal was two days late, a jurisdictional infirmity precluding consideration of the merits of the appeal.

establishing the identity of a person who assured that the notice of determination was properly stamped and delivered to the postal authorities on the day of service.

⁵ Baker did not volunteer this date. The referee asked, six months later and after asking her to look at the notice (not the envelope in which it was mailed), whether she had received the notice “on or about May 28th of 2008.” Baker answered, “Yes ma’am, I did receive that,” but did not identify the date of receipt.

Following Baker's June 19 appeal, the Agency's Office of Appeals docketed the case for further proceedings.

1. On July 25, 2008, the Office of Appeals mailed⁶ Baker a notice of telephonic hearing. The hearing was scheduled for August 8, 2008.

2. On or about August 11, 2008, three days after the date set for the hearing, the Agency mailed Baker a notice of continuance advising her that the August 8 hearing would be rescheduled. After additional problems with scheduling, the telephonic hearing was reset for November 18, 2008. The hearing was to address whether Baker was discharged for misconduct connected with work or left work without good cause, and whether her appeal from the redetermination was timely.

3. At the hearing before the appeals referee on November 18, Baker acknowledged receipt of the adverse redetermination notice and testified that the Academy was closed by the health department during the week she was on medical leave. Importantly, the employer (the Academy) did not provide contact information, did not appear for the telephonic hearing, and has not controverted Baker's documents and testimony.

⁶ Unlike the notice of adverse redetermination itself, communications from the Office of Appeals include a dated certificate of mailing identifying, and signed by, the Clerk or a Deputy Clerk.

4. On December 9, 2008, the Office of Appeals referee issued a “Dismissal of Appeal Due to Lack of Jurisdiction.” The findings of fact were short:

The determination of the adjudicator was mailed to the appellant’s address of record on May 28, 2008, and was **timely** received. The appeal was filed on **October 2, 2008**.

(Emphasis added). As FUAC properly concedes, this was erroneous, because Baker’s appeal was filed June 19, 2008, not in October.

5. On December 26, 2008, a “corrected” decision was issued, although FUAC concedes that this decision also contained two errors. The previous findings of fact were modified as follows:

The determination of the adjudicator was mailed to the appellant’s address of record on May 28, 2008, and was **untimely** received. The appeal was filed on **June 19, 2008**.

(Emphasis added). This time the date of Baker’s appeal was correct, but FUAC advises us that the referee actually meant to conclude that the redetermination was “timely” received by Baker. The corrected decision found good cause for Baker’s non-appearance for a September 12 telephonic hearing, but mistakenly transposed the dates in the referee’s description of the problem:

On or about September 12, 2008, the claimant was issued a notice to appear for a telephone hearing **scheduled on August 29, 2008**. The claimant did not receive the notice.

(Emphasis supplied). The referee apparently intended to recite that the notice was August 29th for a telephone hearing two weeks later.

6. This “corrected decision” was then affirmed by FUAC in February 2009, without specific findings or analysis (and ostensibly based on the untimeliness of her appeal from the redetermination dated May 28), following a further appeal by Baker.

Baker’s appeal to this Court followed.

II. Analysis

The Agency’s redetermination and its dismissal of Baker’s appeal not only cut off the modest weekly benefits that Baker had been receiving for seven months without incident; those rulings also demanded that she return the \$5225 paid to her. On this record, it is also clear that the employer mounted no defense to Baker’s appeal from the redetermination. The only issue is the jurisdictional question regarding the mailing date of the Agency’s notice of redetermination. We decide that issue in favor of Baker for three reasons.

First, FUAC asks us to ignore as harmless the typographical errors in the original and “corrected” decisions, and yet to accept without questioning and without testimony the computer-generated “mailed date” entry on the Agency’s redetermination notice. The Office of Appeals requires a postmark for a mailing or an online confirmation number for an appeal by the employee, but holds itself to

no such standard. It could, but does not, obtain an official U.S. Postal System record establishing the mailing date. That position is not reciprocal and is unfair to claimants.

Second, we have previously declined to give presumptive validity to an unsigned determination setting forth a “date mailed.” In Teater v. Department of Commerce Board of Review, 370 So. 2d 847, 848 (Fla. 3d DCA 1979), we held that a referee’s reliance on that date was not supported by competent substantial evidence, noting (among other factors):

[T]he absence of direct evidence of actual mailing of the determination to the claimant; the lack of evidence as to the customary procedures employed for mailings of this nature; and the fact that the certificate or statement of mailing went unsigned; all taken together served to create such uncertainty in the matter that, in our view, the ends of justice will best be served by acceptance of the appeal.

In Ms. Baker’s case, the Agency did not provide any competent evidence to establish that the computer-generated notice of redetermination was placed in a stamped, addressed envelope, delivered to the postal authorities, and postmarked⁷ before May 30, 2008.

⁷ The rules of procedure regarding service by mail in judicial proceedings typically provide (or have been interpreted to mean) that service is effective on the day the envelope containing the pleading is deposited in an official mail box rather than the sometimes-later date of the postmark. These rules, however, also allow extra days to compensate for the fact that the pleading has been mailed rather than hand-delivered. In the cases in which timeliness is an issue, the actual postmark on an envelope in which a notice of redetermination is mailed seems to be the proper

Third, section 443.031, Florida Statutes (2008), captioned “Rule of liberal construction,” directs that “[t]his chapter shall be liberally construed in favor of a claimant of unemployment benefits who is unemployed through no fault of his or her own.” The record in this case establishes that Ms. Baker was unemployed through no fault of her own. The Legislature clearly recognized that these appeals (to the Agency, to FUAC, and to this Court) are frequently prosecuted by employee/claimants who are not lawyers and are representing themselves, and that the weekly payments in question are a “safety net” for the recently-unemployed claimant, often providing the only source of money for food and shelter. In close cases such as this, a tie goes to the runner.

III. Conclusion

We regularly accord deference to an administrative agency’s findings and interpretations of law within its legislatively-defined scope of authority and expertise. Pub. Employees Relations Comm’n v. Dade County Police Benevolent Ass’n, 467 So. 2d 987 (Fla. 1985). We also recognize that the Agency, its Office of Appeals, and FUAC have themselves experienced both an enormous surge in the number of cases (the result of the dismal statewide and national economies of

date to rely upon, taking into account (a) the fact that no extra days are allowed when a notice is mailed versus a hand-delivered notice, (b) the Legislature’s rule of liberal construction in favor of the employee, and (c) the fact that the Agency itself specifies that the postmark date will establish the date upon which a notice of appeal is “mailed.”

the past two years) and a reduction, not an increase, in fiscal and human resources to process these cases. The judicial branch has also experienced this pain.

But for the reasons articulated, we decline to accord deference to an unsigned, computer-generated notice bearing a date that may or may not have been the actual day the notice of redetermination began its journey to Ms. Baker in a stamped, postmarked envelope. In the absence of competent evidence establishing that date, we reverse and remand for the reinstatement of Ms. Baker's appeal and her benefits.

Reversed.

SUAREZ, J., concurring.

I join in the decision and write solely to emphasize one point so that there is no misunderstanding. The only issue on appeal was whether or not the record contains substantial competent evidence to support the appeals referee's decision that the appeal was not timely filed. The notice of determination specifically informs the claimant that any appeal must be filed within twenty calendar days after the mailing date of the determination. Section 443.151(3) allows for only the twenty days. Nowhere in the Florida Rules of Civil Procedure is there an allocation for an additional five days if the notice is mailed. The problem in this case was that there was not substantial competent evidence in the record to support the Unemployment Appeals Commission's argument that the notice was mailed on May 28. There was only the printed date on the Determination stating that it was mailed on that date. There was no evidence as to actual mailing or mailing procedure, as required by this Court in Teater v. Dep't of Commerce Bd. of Review, 370 So. 2d 847, 848 (Fla. 3d DCA 1979).