

Third District Court of Appeal

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

Opinion filed February 17, 2010.

Not final until disposition of timely filed motion for rehearing.

No. 3D09-2259

Lower Tribunal No. 09-8677

Sonia Gonzalez,
Appellant,

vs.

Florida Unemployment Appeals Commission, et al.,
Appellees.

An Appeal from Florida Unemployment Appeals Commission.

Sonia Gonzalez in proper person.

M. Elaine Howard, for appellees.

Before WELLS, CORTIÑAS, and SALTER, JJ.

SALTER, J.

Sonia Gonzalez, a non-lawyer representing herself in this matter, appeals an order of the Florida Unemployment Appeals Commission (FUAC) dismissing as

untimely her appeal of an adverse decision by an appeals referee with the Agency for Workforce Innovation. Because certain written notices issued by the Agency's Office of Appeals during the period in which a request to re-open her hearing or a notice of appeal would have been timely (a) indicated that evidentiary hearings were still underway and (b) did not include any Spanish-language explanation that those hearings related only to the issue of whether benefits paid to Ms. Gonzalez would be charged to the employment record of her employer, we find that Ms. Gonzalez's confusion as to the deadline was "occasioned by actions of the Commission" and warrants reversal and remand. Assam v. Fla. Unemployment Appeals Comm'n, 871 So. 2d 978, 980 (Fla. 3d DCA 2004).

Background

Ms. Gonzalez worked for over 10 years for the employer, a day care center. In January 2009, Ms. Gonzalez and the employer vigorously disagree whether she was told by a representative of the employer that she was terminated (without further explanation) or was confronted about an alleged (though unspecified) cash discrepancy and then voluntarily walked out.

Her claim for unemployment benefits was allowed by the Agency, but the employer appealed. The Office of Appeals set a telephonic hearing regarding the claim, docket number "2009-15311U," for March 25, 2009, but Ms. Gonzalez subsequently signed a sworn statement that she never received the notice. A

review of the recorded hearing of March 25th indicates that the referee attempted unsuccessfully to call Ms. Gonzalez and then proceeded with the hearing. Based solely on the testimony provided by the employer's designees, and unsurprisingly, the referee issued a decision the following day in favor of the employer and discontinuing benefits. On March 26, 2009, that decision was mailed to the parties. However, because that document contained a typographical error regarding the date upon which Ms. Gonzalez was determined to be disqualified to receive benefits, a corrected decision was certified to have been mailed by a deputy clerk of the Office of Appeals on April 7, 2009. Under applicable law and rule, a written request for reopening, or a notice of further appeal to FUAC,¹ by Ms. Gonzalez ordinarily would be required to be filed on or before April 27, 2009.

Meanwhile, however, the Office of Appeals had been issuing additional notices, each on a form nearly identical to the notices issued in docket number "2009-15311U," and each addressed to Ms. Gonzalez and the employer and bearing Ms. Gonzalez's Social Security number. These were issued under docket number "2009-14775E." A notice issued on March 18, 2009 (12 days after the notice of hearing Ms. Gonzalez said she never received in the companion case)

¹ As the Agency's "Appeals Information" brochure, AWI Form Bulletin 6E (Rev. 08/07), describes, a claimant who has missed a hearing for non-notice or other compelling reason "may request re-opening within twenty calendar days after the decision was mailed." That request is sent to the Office of Appeals, not FUAC. During the same period, the claimant can appeal the referee's findings and decision, but that notice is to be sent to FUAC.

advised Ms. Gonzalez that a telephonic hearing would be conducted on April 2, 2009, before a different appeals referee than the one who conducted the employer-only telephonic hearing on March 25th. The March 18 notice included Ms. Gonzalez's correct telephone number and instructed her (in English only) that "you are responsible for removing any telephone service that could block the hearing officer's telephone call." The same notice also stated a few paragraphs below (also in English only) that:

Claimant: This hearing pertains only to the employer's tax account and will not affect your qualification for unemployment compensation benefits.

Claimant: This hearing will not affect your qualification for benefits. Your participation is not required.

On April 2, 2009, Ms. Gonzalez was sent a "Notice of Continuance" advising her that "[t]he hearing for this case, which was to be held on April 2, 2009, has been postponed. When the hearing is rescheduled, a Notice of Hearing will be mailed to all parties." This notice was also issued under docket number 2009-14775E, but it also bore Ms. Gonzalez's name and address as "claimant/appellee," her Social Security number, and the name and address of the "employer/appellant." Significantly, this notice carried no legend (in any language) indicating that it had nothing to do with Ms. Gonzalez's pending opposition to her employer's appeal to revoke her benefits.

On April 20, 2009, the Office of Appeals sent yet another “Notice of Unemployment Compensation Telephone Hearing” to Ms. Gonzalez for April 30th.² The notice, again carrying docket number 2009-14775E, also carried her name and address as “claimant/appellee,” her Social Security number, the name and address of her employer as “employer/appellant,” and directives to Ms. Gonzalez:

FAILURE TO KEEP A TELEPHONE LINE OPEN MAY RESULT
IN AN UNFAVORABLE DECISION.

Claimant telephone number: [Ms. Gonzalez’s correct telephone number]. You are responsible for removing any telephone service that could block the hearing officer’s telephone call.

Several paragraphs below this directive on the April 20 notice there appeared the two English-only notices to the claimant that had appeared on the March 18 notice and quoted earlier, to the effect that the hearing would only pertain to the employer’s tax account, would not affect Ms. Gonzalez’s qualification for benefits, and did not require her participation. Strangely, however, the very next line stated, in English, Spanish, and Creole, that “A translator has been scheduled for the claimant only.”

On May 5, 2009, Ms. Gonzalez went to the South Florida office of the Agency. From that office she faxed a summary of what she believed had occurred

² The date for this scheduled hearing was three days after FUAC maintains Ms. Gonzalez’s time to re-open or appeal had expired in docket number 2009-15311U.

and asking that her case be re-opened so that she could present her evidence (hand written, and in Spanish) to the deputy clerk of the Office of Appeals. On May 12, 2009, she sent a further request for her case to be re-opened to the same deputy clerk (again, hand written and in Spanish). The Office of Appeals and FUAC rejected these submissions as untimely, but furnished her with the form for an English-language “Affidavit of Filing of Appeal” with the English-only instruction to “explain circumstances surrounding the late appeal” in “CASE 2009/15311)” Ms. Gonzalez, representing herself, filled the one and one-half inch space provided on the FUAC form to state under oath:

I, Sonia Gonzalez, with [Social Security number], hereby request to REOPEN MY CASE and allow me a hearing since the State has disqualified me to receive unemployment benefits for not being present at a hearing on the 25 day of March 2009. I NEVER received a notice for that date and that is the reason why I didn't appear.

In a sworn statement attached to the affidavit, she also proffered evidence to explain that she had not voluntarily left the job (rather, she asserted she had been fired by an employee who did not testify on behalf of the employer during the March 25 hearing in docket 2009-15311 or during the April 2 hearing in docket 2009-14775E).

FUAC considered these submissions and entered an order determining that Ms. Gonzalez's appeal from the referee's decision³ was not filed within 20 days, found that it lacked jurisdiction to consider her attempts to appeal, and dismissed the case. Ms. Gonzalez then appealed to this Court.

Analysis

Although we have routinely upheld the:

iron-clad principle that untimely appeals to the Unemployment Compensation Commission are generally barred. Having said that, we sympathize here with the appellant's position that had the Commission not mailed out two separate letters creating two different twenty day periods, there would not have been confusion as to the appeal deadline. Florida courts under similar circumstances have excused untimeliness when occasioned by the actions of the Commission.

Assam, 871 So. 2d at 980.

Indeed, there are numerous cases upholding benefits claimants' rights of fundamental due process,⁴ and FUAC has correctly acknowledged that the rationale is similar to the doctrine of equitable tolling, citing Machules v. Department of Administration, 523 So. 2d 1132 (Fla. 1988). In that case, an

³ The FUAC order does not specify whether it counted 20 days from the original decision of March 26 or from the corrected decision of April 7, 2009, but Ms. Gonzalez's appeal and request to re-open was faxed May 5, 2009 and would be late if either date controlled.

⁴ See Frederick v. Fla. Unemployment Appeals Comm'n, 834 So. 2d 957, 958 (Fla. 3d DCA 2003), and the cases cited there.

employee was terminated by the Florida Department of Insurance for abandonment (missing three consecutive workdays). The employee had the right to appeal to the Department of Administration within twenty days. The employee took the notice to his union, which filed a grievance under the applicable labor agreement. The employer then set a hearing date for the grievance. Following the hearing, the grievance was denied on the basis that the employee's claim could not be asserted under the collective bargaining agreement, but instead only by appeal to the Department of Administration within the twenty days allowed by the Florida Administrative Code. The union then filed an appeal on behalf of the employee, but by that time the appeal period had expired. Our Supreme Court applied the equitable tolling doctrine, observing that the employer had "countenanced and acquiesced in the [employee's] error by participating in the grievance process until after the appeal period had run." Id. at 1134. The Court also noted the significance of the fact that the claimant was a lay person acting without counsel.

In this case, a reasonable person would think that the continuing notices of telephonic hearings meant that her case was continuing and that she was being afforded additional opportunities to provide her testimony (and that of the other employee she maintains is the witness with actual knowledge of what occurred). In docket number 2009-15311U, the first decision was replaced by a second. The second was followed by notices in English, albeit in docket number 2009-14775E,

indicating that additional evidentiary hearings would be forthcoming through and after the re-opening/appeal period. Not until Ms. Gonzalez's visit to the Agency's office on May 5th did she apparently sort out the need to file a notice seeking re-opening or review. On that very date she faxed her request to re-open the hearing to the Office of Appeals. Here, as in Machules, the employer benefiting from the time limitation was not prejudiced by the employee's delay (in Ms. Gonzalez's case, eight days) in asking that the case be re-opened. Id. at 1137.

There is another factor involved in this case. Section 443.151(8), Florida Statutes (2009), "Bilingual Requirements," specifies that the Agency must provide printed "bilingual instructional and educational materials in the appropriate language in those counties in which 5 percent or more of the households in the county are classified as a single-language minority." The county in which Ms. Gonzalez resides is such a county. See Garcia v. Fla. Unemployment Appeals Comm'n, 979 So. 2d 1174, 1177 (Fla. 3d DCA 2008). The notices sent to Ms. Gonzalez are confusing enough in English—to a lay person whose primary language is Spanish and who does not read English well, the effect can only be more pronounced.

FUAC's notices and instructional brochure do not explain in Spanish that the claimant must differentiate between the two docket numbers. Considered from the perspective of a reasonable claimant, the later notices are directed to the claimant

and employer, they indicate that additional hearings are being conducted (including a hearing scheduled for April 30, 2009), and they offer the prospect that the claimant's telephone number will be called for the taking of additional evidence. There is no indication that the two docket numbers are not intertwined; both pertain to a single cessation of employment on the same date and involving the same employer and claimant.⁵

On this particular record, Ms. Gonzalez has not had an opportunity to present her evidence and has not been afforded fundamental due process. Additionally, the notices and explanations sent to her did not establish that the decision in docket number 2009-15311U of April 7, 2009, would be the final word from the Office of Appeals and would trigger her twenty-day period within which to seek to re-open or appeal the referee's decision. As late as April 30, 2009, she could reasonably have believed that her former employer's appeal was still under consideration. By May 5, 2009, only five days later, she faxed a request to re-open the employer's appeal to the Office of Appeals. FUAC's notices and instructional

⁵ If, as FUAC contends, the employer tax account case is a completely separate matter, wholly unrelated to the claimant's claim to retain the initially-awarded benefits, two questions need answers: (1) why send the notices in docket number 2009-14775E to the claimant at all, and (2) why not include (and in this case, in the Spanish-language instructions as well) an explanation that the later notices have nothing to do with the referee's decision in the other docket number or with the time for appeal? Neither question has been answered in this case.

materials did not explain the two-docket problem in Spanish so as to comply with section 443.151(8) and thereby eliminate confusion.

Conclusion

For these reasons, we reverse FUAC's order of dismissal and we remand this matter with instructions that the relevant appeal, docket number 2009-15311, be reopened for a further evidentiary hearing at which Ms. Gonzalez may present her own testimony and any other evidence she may wish to offer. We express no opinion on the merits of either parties' claims regarding the unemployment benefits in question.

Reversed and remanded.

CORTIÑAS, J., concurs.

Wells, J., dissents.

Sonia Gonzalez appeals from a final order of the Unemployment Appeals Commission (“Commission”) dismissing her appeal from an appeals referee’s ruling as untimely. Because Ms. Gonzalez does not dispute that she was sent the referee’s ruling and informed of the steps necessary to appeal that determination, and yet failed to timely appeal, I cannot agree with the majority’s conclusion that other notices sent to Ms. Gonzalez were so confusing as to justify reversing dismissal of her appeal.

Additionally, I feel compelled to address that portion of the majority opinion which suggests that section 443.151(8) of the Florida Statutes either requires notices in languages other than English or that such notices were not provided in this case.

Section 443.151(8), in pertinent part states:

BILINGUAL REQUIREMENTS. –

(a) The Agency for workforce Innovation shall provide printed bilingual *instructional and educational* materials in the appropriate language in those counties in which 5 percent or more of the households in the county are classified as a single-language minority.

§ 443.151(8)(a), Fla. Stat. (2009) (emphasis added).

Without doubt, this provision mandates that bilingual instructional and educational materials be afforded to Miami-Dade County residents who seek unemployment benefits. As the record confirms, however, the materials mandated by this provision (in both English and Spanish) were provided to Ms. Gonzalez, and under the clear and unambiguous language of this provision, nothing more was or is required.

In this case, each of the critical notices and decisions provided to Ms. Gonzalez included advisories in Spanish. On March 6, 2009, the Agency for Workforce Innovation sent a notice of hearing to Ms. Gonzalez and her employer notifying them that a telephonic hearing on the employer's appeal from the initial determination of entitlement to benefits would be held on March 25, 2009. Although this notice was mailed to Ms. Gonzalez' correct address, she did not appear for the hearing and a determination was entered in her employer's favor.

Notification of this determination was sent to her, again at her correct address, on March 26, 2009. This determination bore docket number 2009-15311U, the same docket number as did the notice of hearing in this matter. Set off in a box at the top of the first page of this determination, immediately under the seal of the State of Florida, the following appears in English, Spanish, and Creole:

IMPORTANT: For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.

In addition, the determination states, again in English, Spanish and Creole, (1) that an appeal from the determination must be filed within 20 days; (2) *that other related determinations may be made; and* (3) *that the time to seek appellate review from the instant determination would not be delayed by any other determinations, decisions or orders:*

IMPORTANT – APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20th day is a Saturday, Sunday or holiday . . . filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Agency and set forth in a separate overpayment determination. *However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.*

(Emphasis added).

Because this determination contained a typographical error (disqualifying Ms. Gonzalez from benefits from January 4, 2008 rather than from January 4, 2009), a corrected decision was provided to her (again under docket number 2009-15311U and again at her correct address) on April 7, 2007. This determination, like the last, notified Ms. Gonzalez in both English and Spanish that free translation services were available; that “there is a limited time to appeal”; that she had only 20 days to appeal; that there might be other determinations related to her

case; and that these determinations would not affect the time she had to appeal the current decision.

Ms. Gonzalez does not claim that she did not receive either of these determinations, yet she did not timely appeal from either determination. Rather, on May 12, 2009, under docket number 2009-15311U, she filed a notice of appeal stating that she wanted to reopen her case, claiming that while she had not received notice of the March 25 hearing, she had received notice of a hearing set for April 2, which had been continued to April 30. In her brief filed herein, she claims only that she did not get notice of the March 25 hearing and, although she did get notice of a hearing on April 2, she did not have an opportunity to present evidence on whether she was terminated or voluntarily left her employment. This makes perfect sense, however, as the April 2 hearing went to the entirely different case, docket number 2009-14775E .

While this and other courts have reversed Commission orders dismissing appeals where the party seeking unemployment benefits has received no notice or a belated notice of proceedings or the right to appeal, I know of no case relieving a litigant—whether or not English speaking—of the obligation to timely appeal because of a litigant’s confusion over differing docket numbers.⁶ Nor should this

⁶ There is, no doubt, a line of cases creating an exception to untimely appeals based on due process concerns. See Talavera v. Royal Am. Mills, Inc., 35 Fla. L. Weekly D24, D24 (Fla. 3d DCA Dec. 23, 2009) (“Florida courts have created an

case provide an exception to the general rule. Notices of determination provided to Ms. Gonzalez expressly advised her in both English and Spanish that other decisions relating to her case might be made and that those decisions (and papers relating to them) would not delay her obligation to appeal in twenty days. The

exception to untimely appeals based on due process concerns. E.g., Stanley v. Florida Unemployment Appeals Comm'n, 864 So. 2d 1160 (Fla. 4th DCA 2004) (holding that an appeal was timely filed where the claimant attempted to timely fax her appeal but was unsuccessful); Francois v. Florida Unemployment Appeals Comm'n, 852 So. 2d 953 (Fla. 4th DCA 2003) (reversing a Commission finding that an appeal was untimely where the claimant timely complied with the agency representative's instruction to fax her appeal to an Orlando office for forwarding to the appeals office.); see Guerrero v. Florida Unemployment Appeals Comm'n, 855 So. 2d 266, 268-69 (Fla. 3d DCA 2003) (“Under section 443.151(4)(b)3 of the Florida Statutes, an aggrieved party has twenty days after mailing or delivery of a referee's decision to initiate an appeal with the UAC. Failure to perfect an appeal within twenty days subjects a claim to dismissal under Florida Administrative Code Rule 60BB-7.006. There are no good cause exceptions to this dismissal rule. See Espinosa v. Cableoptics, Inc., 807 So. 2d 195, 196 (Fla. 3d DCA 2002); Creech v. Orlando Leasing Sys., 765 So. 2d 223 (Fla. 2d DCA 2000); Linderman v. K.B. Beach Suites, Ltd. PTR, 751 So. 2d 1262 (Fla. 3d DCA 2000); Delgado v. Concentrated Chem. Co., 644 So. 2d 173 (Fla. 3d DCA 1994); Florida State University v. Jenkins, 323 So. 2d 597 (Fla. 1st DCA 1975). Where, however, a party claims that a referee's decision was either untimely mailed or not received, appellate courts have held, on due process grounds, that the claimant was entitled to an evidentiary hearing on the timeliness issue. Applegate v. National Health Care Affiliates, Inc., 667 So. 2d 332 (Fla. 1st DCA 1995) (remanding on due process grounds for an evidentiary hearing on whether a decision was timely mailed and received); Landrum v. James Rummer Timber Harvesting, Inc., 645 So. 2d 577 (Fla. 2d DCA 1994) (remanding on due process grounds for an evidentiary hearing on whether claimant timely received a referee's decision); Robinson v. Morrison, Inc., 501 So. 2d 1323 (Fla. 4th DCA 1986) (remanding for a hearing to determine whether claimant received notice of a decision).”).

notices that she received in the “other” decision—and on which the majority relies to find confusion mandating reversal—bear an entirely different docket number (2009-14775E), and again advise that free translation services will, on request, be provided. Therefore, I cannot agree that any denial of due process occurred in this case. Moreover, I conclude that section 443.151(8) was complied with and compels no different result.

In sum, to my way of thinking, the failure to timely appeal mandates affirming the order under review.