

Comm'n, 159 So.2d 653 (Fla. 3d DCA 1963), which held that an employee's refusal to take a lie detector test did not constitute misconduct because the requirement that employees take lie detector tests was not in effect at the time the employee was hired.

According to section 443.101(1)(a), Florida Statutes (1993), an individual shall be disqualified for worker's compensation benefits if he voluntarily leaves his work without good cause attributable to his employing unit or has been discharged by his employing unit for misconduct connected with his work. Section 443.036(26), Florida Statutes (1993), defines misconduct as follows:

MISCONDUCT.—“Misconduct” includes, but is not limited to, the following, which shall not be construed in *pari materia* with each other:

(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Appellant argues that the more recent case of *Fowler v. Unemployment Appeals Comm'n*, 537 So.2d 162 (Fla. 5th DCA 1989), should control this issue. According to *Fowler*, citing *City of Palm Bay v. Bauman*, 475 So.2d 1322 (Fla. 5th DCA 1985), in the absence of a preset policy regarding drug testing, an employer may still require an employee to submit to a drug test if there is a “reasonable suspicion” that the employee is using illegal drugs, and failure to submit to a test, after being warned that failure to do so may result in dismissal, constitutes a deliberate disregard of the employer's interests. We agree that the holding in *Fowler* is sound, but find no record evidence to support a finding that the employer in the instant case had a reasonable suspicion to believe claimant was using illegal drugs.

Based on the record before us, it appears that at the time claimant was hired the employer had no set drug policy in place. Thus, the employer had no right to expect claimant to submit to drug testing, and such refusal to submit can not be considered a deliberate violation or disregard of the standards of behavior which the employer had the right to expect from his employee. See § 443.036(26)(a), Fla.Stat. (1993). Further, in the absence of a reasonable suspicion of drug use there is no evidence to support a reversal because the failure to take the test can not be considered a willful and wanton disregard of the employer's interests. See § 443.036(26)(a), Fla.Stat. (1993). Therefore, because the record as presented does not indicate misconduct on the part of claimant, we find no error in the decision of the Unemployment Appeals Commission.

AFFIRMED.

GUNTHER and WARNER, JJ., concur.



COHEN, SCHERER & COHEN, P.A.,
a/k/a Cohen, Scherer, Cohn & Silverman,
P.A., and Fred C. Cohen, Appellant,

v.

PACIFIC EMPLOYERS INSURANCE
COMPANY, Appellee.

No. 94-1324.

District Court of Appeal of Florida,
Fourth District.

May 3, 1995.

Malpractice insurer brought action against insured law firm to collect policy deductible which insurer had paid in settlement of malpractice claim against insured, and insured brought counterclaim, alleging that insurer had breached its obligation to properly defend insured. The Circuit Court,

Palm Beach County, Roger B. Colton, J., dismissed counterclaim, and insured appealed. The District Court of Appeal, Klein, J., held that appeal was premature, as insurer's claim was still pending and was interrelated with counterclaim.

Appeal dismissed.

Appeal and Error ⇄337(3)

Insured law firm's appeal of dismissal of its counterclaim was premature, in malpractice insurer's action to collect insured's policy deductible which insurer had paid in settlement of malpractice claim against insured, where insurer's claim was still pending, and the counterclaim, which alleged that insurer had breached its obligation to properly defend insured, was interrelated with insurer's claim in that they both arose out of the underlying malpractice claim and the parties' obligations under the policy in regard thereto.

Robert M. Weinberger of Cohen, Chernay, Norris, Morici, Weinberger & Harris, North Palm Beach, for appellants.

James C. Sawran, Douglas M. McIntosh and Karina P. Gonzalez of McIntosh, Sawran & Craven, P.A., Fort Lauderdale, for appellee.

KLEIN, Judge.

The court, sua sponte, dismisses this appeal of an order dismissing a counterclaim with prejudice but leaving the main claim pending.

Appellee/insurer settled a legal malpractice case brought against its insured, appellant/law firm, and paid the \$50,000 deductible which the law firm was obligated to pay under the policy. Insurer then brought this suit against the law firm to collect the \$50,000 deductible, and the law firm counterclaimed, alleging that the insurer breached its obligations under the policy to properly defend the law firm. The trial court dismissed the counterclaim with prejudice because it failed to state a cause of action.

Since the main claim is still pending, and since the main claim and the counterclaim

are interrelated in that they both arise out of the malpractice claim and the obligations of the parties under the insurance policy in regard to the malpractice claim, this appeal is premature under *S.L.T. Warehouse Co. v. Webb*, 304 So.2d 97 (Fla.1974). See also *City of Haines v. Allen*, 509 So.2d 982 (Fla. 2d DCA 1987) (an order disposing of a compulsory counterclaim cannot be appealed until disposition of the main claim).

This appeal is therefore dismissed without prejudice to appellant's right to appeal the dismissal of the counterclaim after final determination of the main claim.

POLEN and STEVENSON, JJ., concur.



The CITY OF COOPER CITY, Appellant,

v.

SUNSHINE WIRELESS COMPANY,
INC., a Florida corporation,
Appellee.

No. 94-2120.

District Court of Appeal of Florida,
Fourth District.

May 3, 1995.

Action for breach of annexation agreement and rescission was brought. The Circuit Court, Broward County, Leroy H. Moe, J., found that city had breached contract and ordered rescission. City appealed. The District Court of Appeal held that city did not receive notice that issues of breach of contract and related entitlement to rescission would be addressed.

Reversed and remanded.