

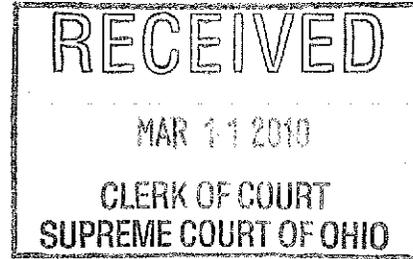
ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel.)
 MARIA MARRERO,)
)
 Appellant,)
 vs.)
)
 INDUSTRIAL COMMISSION OF OHIO)
)
 and)
)
 LIFE CARE CENTERS OF AMERICA,)
 INC.,)
)
 Appellees.)

Case No. 2009-1666

On Appeal from the Franklin
County Court of Appeals, Case No.
08AP-922



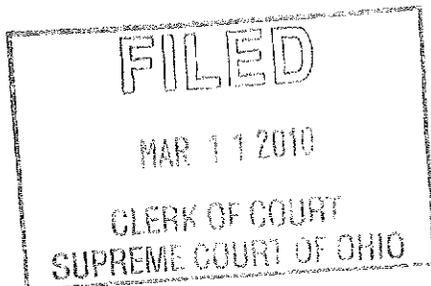
**REPLY BRIEF IN REPOSE TO MERIT BRIEFS OF APPELLEES INDUSTRIAL
 COMMISSION OF OHIO AND LIFE CARE CENTERS OF AMERICA, INC.**

Leah P. VanderKaay (0073772)
 Daniel L. Shapiro (0059584)
 Shapiro, Shapiro & Shapiro Co., L.P.A.
 4469 Renaissance Pkwy
 Warrensville Hts., OH 44128
 Phone: (216) 927-2030
 Fax: (216) 763-2620

**Attorneys for Appellant
 Maria Marrero**

Deborah Sesak (0023528)
 1089 N. Medina Line Rd.
 Akron, OH 44333
 Phone: (330) 328-3821
 Fax: (330) 666-6741

**Attorney for Appellee
 Life Care Centers of America, Inc.**



Elise Porter (0055548)
 Assistant Attorney General
 Workers' Compensation Section
 150 E. Gay St., 22nd Floor
 Columbus, OH 43215
 Phone: (614) 466-6730
 Fax: (614) 727-9535

**Attorney for Appellee
 Industrial Commission of Ohio**

ARGUMENT

Having already submitted Briefs on this matter, we will not reiterate points already made. However, we feel the need to file this Reply as there are two assertions made in Respondents' Briefs that are misleading. First, it is asserted that there is "no evidence" in the record to support Marrero's contention that her hours were purposefully limited. There is a myriad of supportive evidence to this effect contained in the stipulation of evidence. Second, it was asserted that it is Marrero's position that her deterrent to find alternate work is her need to work third shift. This is simply not true. Marrero's deterrent to a job search was the unpredictability the Employer caused in her schedule when they took her off the schedule and/or sent her home early. More importantly however is the position that a job search isn't required because Marrero already had a job. Appellees ignore the question why a person who has been offered full time light duty work needs to go look for work elsewhere?

The Brief filed by Life Care Centers alleges that there is "no evidence" to support Marrero's contention that the Employer continually took her off of the work schedule. Similarly, the Brief filed on behalf of the Commission is replete with references to this alleged "lack of evidence" presented by Marrero.

There is considerable evidence to support Marrero's facts. The Stipulation of Evidence, filed with the Court of Appeals as part of the Original Action in Mandamus, provides evidence that Marrero was repeatedly taken off of the work schedule and sent home early. This evidence is uncontested. Page 1 of the Stipulation of Evidence is a June 5, 2007 letter from the Employer regarding days worked by Marrero. It indicates that she was off of work due to her injury from December 10, 2006 through January 3, 2007, but then returned to work in a light duty capacity on January 4, 2007. She was placed on the schedule for the single day of January 4, 2007, and not again until January 15. She next worked January 15, then not again until January 26 through March 1. This letter from the Employer then states that

Marrero was off of work from March 2 through March 12, and off of work again from March 29 through April 26. Marrero did not take herself off of work, her employer did. This is an uncontested undisputed fact.

Pages 15-20 of the Stipulation of Evidence is documentation by Marrero herself reflecting the days she was either taken off of the work schedule or sent home early. Page 15 shows that after she was offered a full-time, light duty position on January 4, she worked 5 days in January. Page 16 of the Evidence shows that Marrero worked 5 days in March. The Employer sent her home early on March 2 and March 5, and was taken off the schedule entirely on March 6, 7, 9, 10 & 12. She then took a vacation week from March 18-27. Page 17 of the Evidence shows that she was off of the work schedule for nearly the entire month of April, with the exception of April 27, 28 & 29. Pages 18, 19 & 20 of the Stipulation of Evidence indicate that Marrero was given full-time, light-duty work beginning in May through July, but then the Employer began cutting her hours again in August of 2007.

Pages 21, 22 & 23 of the Stipulation of Evidence is an attendance chart kept and submitted by Employer Life Care Centers for the period of time from July, 2007 through October, 2007. It documents the reduction in days and hours worked.

Despite what Respondents Life Care Centers and the Commission state in their Briefs, the record contains ample evidence that the Employer acted in bad faith in randomly adjusting Marrero's work schedule. Marrero was promised full-time, light-duty work however she was taken off of the schedule or sent home early without predictability.

We don't agree that Marrero even needed to look for alternate work. However, for the sake of argument, if she did; it was this unpredictability that made it impossible for her to perform a "good faith" job search for alternate work.

The Commission's Brief asserted that the biggest deterrent to Marrero's ability to search for comparable work was her "need" to work third shift due to a "lifestyle choice." This assertion is incorrect and a misstatement of Marrero's position. The fact is that it was the total unpredictability of if and when she would be working for Life Care Centers that created her inability to search for alternate employment if even necessary.

To summarize, Marrero has provided considerable "evidence" to support her position that the Employer acted in bad faith when it repeatedly took her off the work schedule. The Stipulation of Evidence is replete with "evidence" of Employer's actions. This evidence can't be ignored. In addition, Marrero wasn't required to look for a job elsewhere. She had already been offered, and she accepted, a full time light-duty position with this employer. The contention that Marrero's "lifestyle choice" was the main deterrent to the absurd requirement that she look for work elsewhere is a misstatement of her position. Her position, stated clearly in her Supreme Court Brief, is that she isn't required to look for work when she has already been offered a full time position with the same employer. However, if she is required to look for work, she couldn't because of the unpredictability of the work schedule created by the Employer. The employer's actions alone created the inability to search for alternate work.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Daniel L. Shapiro", written over a horizontal line.

Daniel L. Shapiro (0059584)
Leah P. VanderKaay (0073772)

CERTIFICATE OF SERVICE

A copy of the foregoing **REPLY BRIEF IN REPOSE TO MERIT BRIEFS OF APPELLEES INDUSTRIAL COMMISSION OF OHIO AND LIFE CARE CENTERS OF AMERICA, INC.** has been sent via regular U.S. Mail to the following parties:

Deborah Sesak (0023528)
1089 N. Medina Line Rd.
Akron, OH 44333
Phone: (330) 328-3821
Fax: (330) 666-6741

**Attorney for Appellee
Life Care Centers of America, Inc.**

Elise Porter (0055548)
Assistant Attorney General
Workers' Compensation Section
150 E. Gay St., 22nd Floor
Columbus, OH 43215
Phone: (614) 466-6730
Fax: (614) 727-9535

**Attorney for Appellee
Industrial Commission of Ohio**

 3/10/2010

Daniel L. Shapiro
Leah P. VanderKaay