

IN THE SUPREME COURT OF OHIO

Danny Chenault,	:	On Appeal from the
	:	Franklin County Court of Appeals
Appellant,	:	10 <sup>th</sup> Appellate District
	:	
v.	:	Case No.: 10AP-1113
	:	
Ohio Department of Jobs and	:	
Family Services, et al.,	:	
	:	
Appellee.	:	

11-1492

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT DANNY CHENAULT

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**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT  
GENERAL INTEREST**

This cause presents critical issues for the future of workers in Ohio who after being laid off from their employer are eligible for federal benefits administered by the Ohio Department of Job and Family Services (“ODJFS”) but are rendered ineligible to receive said benefits due to negligent actions or inaction by ODJFS employees.

In its erroneous decision, the Tenth District Court of Appeals held that Appellant should have appealed to the Court of Common Pleas because it could possibly have reversed the administrative decision on timeliness as being unreasonable if it found the delay to be the result of negligence on the part of ODJFS employees. The critical flaw in this decision is that there is no provision to appeal based on the timeliness of obtaining a waiver for in 19 U.S.C. § 2291. The Court of Common Pleas is limited in its review to statutorily defined remedies. There is no provision in the Revised Code for appealing the timeliness of an application or waiver for federal Trade Readjustment Allowance (“TRA”) benefits, only the incorporation of the federal statute which has no right of appeal or remedy for timeliness. When the uncontroverted facts establish that the application for waiver was untimely, there was only one conclusion the Court of Common Pleas could reach.

Even assuming, arguendo, that the Court of Common Pleas could find the decision unreasonable, it has no power to remedy the situation. The court is limited to its statutory authority to craft a remedy, and nowhere under state law or the incorporated federal statutes is the power for the Court to reverse the decision and declare Appellant’s waiver as timely.

There is a public interest in unemployed workers having a fair process by which to obtain federal and state benefits, including the appeal of adverse decisions. It is not in the public interest to require such workers to expend resources to go through the motions on unnecessary and unwinnable appeals to courts having no power to remedy any injustices suffered by those workers.

For these reasons, Appellant respectfully requests that this Court review the facts and the application of these facts to Ohio law. The case presents a matter of “great public interest” to all unemployed Ohioans who are eligible for federal benefits administered by the ODJFS.

## STATEMENT OF THE CASE

Appellant Danny Chenault worked for Delphi Corporation until laid off in November 2007. He was eligible to apply for benefits under the under Ohio law, federal TAA (Trade Adjustment Assistance) programs and federal TRA (Trade Readjustment Allowances).

On November 2, 2007, Plaintiff applied for benefits with the Defendant ODJFS. In October of 2006, ODJFS Inter-Office communications had been issued instructing the Appellee ODJFS Agency employees that claimants separated from Delphi must be advised about benefits and services available under Ohio law, federal TAA (Trade Adjustment Assistance) programs and federal TRA (Trade Readjustment Allowances). The Appellant had to undergo enrollment in an approved TRA training Program or obtain a waiver. The waiver must be obtained within 16 weeks and an applicable extension time period of 45 days if timely requested. Appellee ODJFS determined Appellant was eligible to be issued a waiver in an approved TRA training Program. Appellee ODJFS is responsible for filling out the form to request a waiver so that an eligible employee may immediately begin to receive benefits.

Appellant, and also Appellant's wife, Linda McCreary, made inquiries about the waiver throughout Appellant's eligibility period of 16 weeks. The 16 week provisions of 19 U.S.C. § 2291 for the enrollment in an approved TRA training Program had expired on Sunday, February 24, 2008, that being the last day of the 16th week from Plaintiff's total separation from his employer on Friday, November 2, 2007. Appellant could have been issued an extension of the 16 weeks waiver In December 2007 and January 2008. Appellant made calls regarding his rights to benefits. Not having a response or notice that

he was approved for benefits, Appellant telephoned ODJFS on Monday, February 25, 2008. He was not told by Ms. Lim of ODJFS of the expiration of his 16-week eligibility period nor the availability of a 45-day extension to get his waiver.

Due to the entire process being controlled by the ODJFS and negligence of the ODJFS staff, Appellant was unable to file a timely request for a waiver. Appellant appealed the decision to the Appellee UCRC. The hearing officer denied the appeal as untimely because Appellant had not obtained a waiver within the applicable time limits, including the 45-day extension time period.

Appellant did everything required of him by the Appellees, including attending appointments and assessments for benefits. The Appellant lost out on his benefits because none of the persons working for the Appellees ever told Appellant Chenault about the expiration of his first 16 weeks; that he could get an extension; that they had forms for getting an extension; and that they would fill them out for him. The Appellees were negligent causing Appellant to lose his benefits.

When Appellant appealed to the Appellee UCRC, the hearing officer denied the appeal for the sole reason that the Appellant had not obtained a waiver of training in a timely manner. Because there is no provision to appeal based on the timeliness of obtaining a waiver under U.S.C. §2291, Appellant did not appeal to the Court of Common Pleas. Because there was no remedy available through the Court of Common Pleas, Appellant then brought the action for negligence against the Appellees in the Court of Claims. The Appellant was not attempting to circumvent the Court of Common Pleas nor have the Court of Claims act as an appellate adjudicator for the issue of timeliness.

There is no authority for the Court of Common Pleas or the Court of Claims to remedy a failure to timely file for a waiver of training under 19 U.S.C. §2291.

After Appellants claims were dismissed by the Court of Claims, he next appealed to the Franklin County Court of Appeals, Tenth Appellate District. That court upheld the dismissal by the Court of Claims for lack of jurisdiction and did not address the dismissal for failure to state a claim, considering it moot. Appellant now petitions this Court to review the Court of Appeals decision on the basis that it erred in finding that Appellant had any recourse through appeal to the Court of Common Pleas.

### **STATEMENT OF THE FACTS**

In October of 2006, ODJFS Inter-Office communications were issued instructing Agency employees that claimants separated from Delphi must be advised about benefits and services available under both Ohio law, federal TAA (Trade Adjustment Assistance) programs and federal TRA (Trade Readjustment Allowances) They were to be advised that TRA were available to provide weekly cash payments that are paid after a separated employee has exhausted all state and federal unemployment compensation benefits. To receive TRA weekly benefits, the Appellant was required by operation of federal law applicable to the State of Ohio that he be enrolled in approved training by the last day of the week, 16 weeks after separation or the last day of the week, or 8 weeks after certification (whichever is the later date).

In November of 2007, Appellant, a Delphi employee, was laid off and became eligible to apply for work transition benefits under the TAA Program. On November 2, 2007, Appellant applied for benefits with the Appellee ODJFS.

On November 9, 2007, Appellees ODJFS mailed a notice to the Appellant that he was scheduled for a meeting, called a Benefit Right Information (BRI) session, November 26, 2007 at 2:30 P.M. This was “[T]o discuss potential services and file your [emphasis in the original] TAA application.” Because Appellant received this notice only a few days prior to Thanksgiving 2007 and because he already had family plans to be out of town on November 26, 2007, Appellant was unable to attend that meeting.

Upon his return to his residence after November 26, 2007, Appellant was provided another notice by ODJFS to attend a meeting set for January 3, 2008 at 1111 E. Broad Street. This notice should have been for a BRI session, not for an assessment for reemployment and training services available to Appellant. Per the notice, Appellant attended the January 3, 2008 meeting as required by Ms. Linda Taylor, an ODJFS employee. Ms. Taylor conducted the assessment and found no barriers for the Appellant (for reemployment services and training). On January 3, 2008 when Ms. Taylor determined that Appellant had marketable skills, he was entitled to a waiver to obtain benefits. Ms. Taylor was negligent for not issuing a waiver at that time. As of January 3, 2008, at the time of Taylor’s assessment, Appellant was still eligible for, and had not been denied TAA/TRA benefits. Appellant was eligible for and was being paid benefits for his unemployment claim as of January 10, 2008. Had Ms. Taylor exercised a duty of care toward Appellant pursuant to following 19 U.S.C. §2291, she would have discovered that Appellant he had not been denied TAA/TRA benefits; was eligible for TAA/TRA benefits; that he could still have timely applied.

After waiting for a response Appellant believed was to occur regarding his TAA/TRA benefits, and having received no correspondence from ODJFS, Appellant

telephoned ODJFS on Monday, February 25, 2008. Appellant spoke to an ODJFS employee, Ms. Sokuntheary (Teri) Lim. Appellant told her he needed to schedule a BRI (Benefits Rights Interview). Ms. Lim said she would call Appellant back. The provisions of 19 U.S.C. §2291 for the enrollment in an approved TRA training Program had expired on Sunday, February 24, 2008, that being the last day of the 16th week from Appellant's total separation from his employer on Friday, November 2, 2007. Ms. Lim failed to discover that Appellant's 16-week eligibility period had expired. Ms. Lim failed to notify Appellant of the expiration of his 16-week eligibility period.

Even though Appellant's 16-week eligibility period had expired pursuant to the Federal Act, there is an additional provision providing for an extension of an additional 45 days beyond the 16 week eligibility period if the Secretary (DOL) determined there were extenuating circumstances justifying the extension of the enrollment. Appellant's time to request an extension had not expired as of February 25, 2008. ODJFS failed to discover and to notify Appellant on February 25, 2008 that Appellant could request an extension of 45 days to enroll in an approved TRA Training Program. 19 U.S.C. §2291 a(1)(5A)(ii)(III)

The 45-day extension of enrollment period expired on Monday, April 7, 2008. ODJFS had scheduled a BRI session by ODJFS on April 23, 2008. ODJFS took nearly four months even though the Waiver form reads "This section to be completed for the initial waiver only. Please circle 8th, 16th, or 45 days." None is circled on this sheet by ODJFS staff. Again, ODJFS failed to discover and to notify Appellant that Appellant could still request an extension to enroll in an approved TRA Training Program during the time period to be circled on the form.

The ODJFS is charged with knowing the application of all the benefits laws applicable to the Appellant under the federal TAA/TRA. The ODJFS is required to provide any notices to the Claimant (Appellant) by either US mail or electronically at <http://unemployment.ohio.gov>. Despite these requirements, ODJFS communicated to Appellant by telephone and failed to maintain a record of all notices as required by law and failed substantively to notify Appellant of his eligibility rights in a timely fashion.

As a result of the failure of ODJFS to provide Appellant required notices, monitor the time limits to fulfill their duty to enroll Appellant in an approved TRA Training Program and to inform Appellant of his rights to request an extension, the UCRC decided the appeal of the Claimant (Appellant) for TRA benefits was untimely and disallowed the claim for TRA benefits.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. 1: The remedy for of any issue of untimeliness is beyond the scope of review of Court of Common Pleas pursuant to federal statute 19 U.S.C. § 2291.**

The authority for the Court of Common Pleas to hear appeals from the Unemployment Compensation Review Commission (UCRC) derives from R.C. §4141.282 *Appeal to court*. The scope of review is defined at R.C. §4141.282 (H) REVIEW BY THE COURT OF COMMON PLEAS:

“The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.”

Purely factual determinations are primarily within the province of the hearing officer and commission. *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15,17.

The court of common pleas hears the appeal based upon the certified record of the commission. R.C. § 4141.282(H). Thus, the court's scope for the appeal is limited as it cannot make factual determinations or substitute its judgment for that of the commission. *Id.* at 18. If the commission could reasonably rule either way, the courts cannot change the commission's decision. *Id.* Unable to make factual findings or determine the credibility of witnesses, the courts are left with the duty to make sure the record contains evidence to support the commission's decision. *Tzangas, Plakas & Mannos v. Ohio Bur. of Empl. Servs.* (1995), 73 Ohio St.3d 694, 696.

Thus the court of common pleas would have been restricted to considering the record and determining whether there was evidence to support the commission's finding that Appellant had not timely enrolled or obtained a waiver. It is uncontroverted that this did not occur. The court of common pleas had no authority to grant any relief or craft a remedy for Appellant's complaints that his failure to be timely enrolled or obtain a waiver was due to the negligence of ODJFS.

**Proposition of Law No. 2: An appeal to the Court of Common Pleas for of any issue of untimeliness of a TRA waiver is limited only to the remedies available under 19 U.S.C. § 2311(d) Review.**

The only recourse for a person suffering an adverse and incorrect administrative decision is to appeal through the methods outlined in the relevant statute. Had Appellant appealed the decision on timeliness to the court of common pleas, it would have been

bound to uphold the commission's decision. Appellant, however, did not challenge the decision regarding timeliness in the Court of Claims. The time for obtaining a waiver had run out in its entirety. All possible extensions are statutorily listed at 19 U.S.C.

§2291. *Qualifying requirements for workers*. An extension may only be granted by the Secretary of Labor pursuant to federal statute. *Qualifying requirements for workers* 19 U.S.C. §2291 5(A)(i)(I), (II) and (III), or 19 U.S.C. §2291 (2)(B)(c)(1)(F)(3)(A)

“Issuance by cooperating States Pursuant to an agreement under section 2311 (19 U.S.C. §2311) of this title, the Secretary may authorize a cooperating State to issue waivers as described in paragraph (1).”

The Court of Common Pleas can only review the timeliness issue by application of State law pursuant to the above 19 U.S.C. §2291 5(A)(i)(I), (II) and (III) or 19 U.S.C. §2291 (2)(B)(c)(1)(F)(3)(A) by application of 19 U.S.C. §2311 (d) Review:

“A determination by a cooperating State agency with respect to entitlement to program benefits under an agreement is subject to review in the same manner and to the same extent as determinations under the applicable State law and only in that manner and to that extent.”

Ohio law holds “The court may not substitute its judgment for that of the board; it may not reverse simply because it interprets the evidence differently than did the board.” *Angelkovski v. Buckeye Potato Chips Co., Inc.*, 11 Ohio App.3d 159, 161 (Ohio App. 10 Dist. 1983). The Common Pleas Court was limited only to determining whether Chenault's appeal to the Unemployment Compensation Review Commission was timely. It was not. The Court of Common Pleas had no jurisdiction over 19 U.S.C. §2291 to remedy the untimeliness.

**Proposition of Law No. 3: The authority of the Common Pleas Court to review the appeal of a Unemployment Compensation Review Commission (UCRC) hearing officer's decision is limited strictly to R.C. §4141.282 (H).**

The authority for the Court of Common Pleas to hear appeals from the Unemployment Compensation Review Commission (UCRC) derives from R.C. §4141.282 *Appeal to court*. The scope of review is defined at R.C. §4141.282 (H)

**REVIEW BY THE COURT OF COMMON PLEAS:**

“The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.”

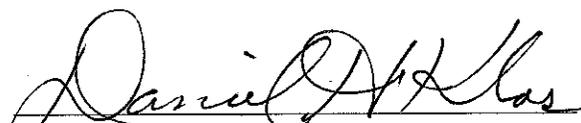
The Court of Common Pleas can only find that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence. Because the facts were uncontroverted that Chenault's waiver form had been filed outside of the extension time authorized by federal statute, the Court of Common Pleas would not have found the decision unlawful or unreasonable or against the manifest weight of the evidence for that same reason. However, assuming, arguendo, that it did find one of the threshold elements to be met, the Court is restricted to reverse, vacate, or modify the decision, or remand to the commission. Again, the undisputed facts dispositively preclude a reversal, vacation or remand. The only remaining power of the Court would be to modify the decision. The power to modify a TRA timeliness issue is founded in 19 U.S.C. §2311 (d) Review *supra*. If modified it must be consistent with and in the same manner as state law. First, There is no state law that authorizes extensions for TRA

benefits, Secondly, the State incorporates the federal law regarding extensions and there is only one 45-day period allowed, beyond which there is no statutory authority to appeal.

### CONCLUSION

For the reasons discussed above, this case involves matter of public and great general interest. Appellant requests that this Court accept jurisdiction in this case so that the important issues presented herein will be reviewed on the merits.

Respectfully Submitted,



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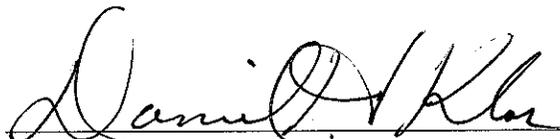
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### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of this Notice of Appeal was sent by Ordinary U.S. Mail to attorney for Appellee, Velda K. Hofacker, Assistant Attorney General, 150 East Gay Street, 18<sup>th</sup> Floor, Columbus, Ohio 43215, on this 1st day of September, 2011.



Daniel H. Klos (0031294)

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
TENTH APPELLATE DISTRICT  
2011 JUL 19 PM 1:56  
CLERK OF COURTS

Danny Chenault,

Plaintiff-Appellant,

v.

Ohio Department of Job and Family  
Services et al.,

Defendants-Appellees.

No. 10AP-1113

(C.C. No. 2009-07938)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on July 19, 2011, and having overruled plaintiff's first and second assignments of error, rendering moot plaintiff's third assignment of error, it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed. Costs assessed to plaintiff.

BRYANT, P.J., TYACK & CONNOR, JJ.

By   
Judge Peggy Bryant

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FILED  
COURT OF APPEALS  
FRONT VIEW OHIO

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

2011 JUL 19 PM 12:35  
CLERK OF COURTS

Danny Chenault,  
Plaintiff-Appellant,  
v.  
Ohio Department of Job and Family  
Services et al.,  
Defendants-Appellees.

*Trovie*  
No. 10AP-1113  
(C.C. No. 2009-07938)  
(REGULAR CALENDAR)

DECISION

Rendered on July 19, 2011

*Daniel H. Klos*, for appellant.

*Michael DeWine*, Attorney General, *Velda K. Hofacker* and  
*Jennifer A. Adair*, for appellees.

APPEAL from the Ohio Court of Claims.

BRYANT, P.J.

{¶1} Plaintiff-appellant, Danny Chenault, appeals from a judgment of the Ohio Court of Claims that both granted the Civ.R. 12(C) motion for judgment on the pleadings of defendants-appellees, Ohio Department of Job and Family Services ("ODJFS") and Ohio Unemployment Compensation Review Commission ("the commission"), and dismissed plaintiff's complaint. Because the Court of Claims did not err in determining it lacked subject matter jurisdiction over plaintiff's claim, we affirm.

## **I. Facts and Procedural History**

{¶2} The factual allegations of plaintiff's amended complaint assert plaintiff was an employee of Delphi who, in November 2007, was laid off from his position of employment. According to plaintiff, ODJFS issued an internal memorandum sometime in October 2006 instructing its employees to specifically advise claimants separated from Delphi of benefits available under Ohio law and under federal Trade Adjustment Assistance ("TAA") and Trade Readjustment Allowances ("TRA") programs. On November 2, 2007, plaintiff applied for benefits with ODJFS.

{¶3} Plaintiff's complaint asserts that on November 9, 2007, ODJFS mailed a notice to plaintiff, advising that ODJFS scheduled plaintiff for a Benefit Right Information ("BRI") session on November 26, 2007, apparently a prerequisite to being able to receive federal benefits. The letter stated that one purpose of the meeting was to discuss plaintiff's TAA application. Plaintiff did not attend the BRI session because he already had plans to be out of town for the Thanksgiving holiday.

{¶4} Plaintiff's complaint states plaintiff received a second notice, dated December 19, 2007, from ODJFS informing plaintiff of another meeting scheduled for January 3, 2008. The January meeting was not a BRI session but an assessment for reemployment and training services available to plaintiff. Plaintiff attended the January meeting where an ODJFS employee, Linda Taylor, conducted the assessment and determined plaintiff had no barriers to reemployment that would require services or training.

{¶5} The complaint notes federal law set forth in 19 U.S.C. 2291 includes a 16-week deadline from the time of separation from employment to enroll in an approved TRA

training program, or obtain a waiver; plaintiff's deadline expired on February 24, 2008. According to his complaint, plaintiff telephoned ODJFS on February 25, 2008 to inquire about TAA and TRA benefits. An ODJFS employee, Sokuntheary Lim, informed plaintiff he needed to schedule a BRI session but did not inform plaintiff his 16-week eligibility period expired. Plaintiff further alleges no one at ODJFS informed him he could have sought a 45-day extension to enroll in a training program and thus remain eligible for benefits. Both the 16-week deadline and the 45-day extension period expired, so that when plaintiff eventually sought TRA benefits, his request was denied as untimely. Plaintiff appealed the denial of TRA benefits to the commission, which disallowed plaintiff's claim as untimely.

{¶6} Rather than appeal to the common pleas court under the applicable statutory provisions, plaintiff filed a complaint on September 29, 2009, in the Court of Claims against ODJFS and the commission, followed by an amended complaint on October 9, 2009, asserting a single count of negligence against defendants. Plaintiff alleged ODJFS was negligent in failing to investigate his status and to advise him to seek an extension of time. Plaintiff further alleged that, as a result of the commission's denying his claim for benefits, plaintiff "suffered damages in the form of lost income, lost employment training[,] lost employment opportunities, injury to his creditworthiness and suffered embarrassment, humiliation and emotional distress." (Amended Complaint, ¶19.) Defendants answered on November 12, 2009, asserting, among other defenses, the Court of Claims lacked jurisdiction to hear plaintiff's claims and plaintiff failed to state a claim upon which relief can be granted.

{¶7} On September 13, 2010, defendants filed a motion for judgment on the pleadings pursuant to Civ.R. 12(C), which plaintiff opposed. The Court of Claims journalized an entry of dismissal on November 3, 2010, granting defendants' motion for judgment on the pleadings and dismissing plaintiff's complaint. The Court of Claims concluded it was without subject matter jurisdiction to hear plaintiff's complaint because plaintiff's complaint essentially challenges the commission's decision denying him unemployment benefits, a matter properly pursued through an administrative appeal rather than through an independent action in the Court of Claims. The court further concluded that, even if plaintiff's claim sounded in ordinary negligence, plaintiff failed to state a claim upon which relief can be granted because of the economic loss rule.

## **II. Assignments of Error**

{¶8} Plaintiff timely appeals, assigning the following errors:

- I. The Court erred when it determined the Plaintiff attempted to circumvent the appeal to an administrative agency to avoid statutory jurisdictional requirements governing administrative appeals[.]
- II. The Court erred when it determined the Plaintiff had a statutory right to appeal a determination by the Unemployment Compensation Review Commission that his request for a waiver was untimely under the TRA by appealing to the Court of Common Pleas[.]
- III. The Court erred when it determined that Appellant failed to state a claim because Plaintiff's complaint sounded only in pure economic loss[.]

Because plaintiff's first and second assignments of error are interrelated, we address them jointly.

### III. Standard of Review

{¶9} A Civ.R. 12(C) motion for judgment on the pleadings is specifically for resolving questions of law. *State ex rel. Montgomery v. Purchase Plus Buyer's Group, Inc.*, 10th Dist. No. 01AP-1073, 2002-Ohio-2014, citing *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 570, 1996-Ohio-459. In ruling on the motion, the trial court is permitted to consider both the complaint and answer, but must construe as true all of the material allegations of the complaint, drawing all reasonable inferences in favor of the nonmoving party. *Id.*; *Whaley v. Franklin Cty. Bd. of Commrs.*, 92 Ohio St.3d 574, 581, 2001-Ohio-1287. In order to grant the motion, the court must find beyond doubt that the nonmoving party can prove no set of facts that would entitle him or her to relief. *McClelland v. First Energy*, 9th Dist. No. 22582, 2005-Ohio-4940, ¶6. We review de novo the appropriateness of a decision granting judgment on the pleadings. *Fontbank, Inc. v. CompuServe, Inc.* (2000), 138 Ohio App.3d 801, 807.

### IV. First and Second Assignments of Error – Jurisdiction

{¶10} Plaintiff's first assignment of error asserts the Court of Claims erred in concluding plaintiff attempted to circumvent the administrative appeals process; his second assignment of error contends the Court of Claims erred in determining plaintiff had a statutory right to pursue an administrative appeal of his denial of benefits rather than an original action in the Court of Claims. Taken together, plaintiff's first two assignments of error maintain the Court of Claims erred in determining it lacked subject matter jurisdiction over plaintiff's claim.

{¶11} An applicant seeking unemployment benefits applies for benefits and submits information to ODJFS to support his or her claim. *McGee v. Ohio Dept. of Job &*

*Family Servs.*, 10th Dist. No. 09AP-680, 2010-Ohio-673, ¶9. Initially, the director of ODFJS makes findings of fact and conclusions of law as to whether a discharged employee is entitled to unemployment benefits. *Id.*, citing R.C. 4141.28(B). The director's decision is subject to an appeal to the commission for a de novo hearing. *Id.*, citing R.C. 4141.281(C)(1) and (3). If a party is unsatisfied with the commission's final determination, the party may appeal that decision to the appropriate court of common pleas. *Id.* at ¶10, citing R.C. 4141.282(H).

{¶12} Plaintiff does not dispute he was entitled to and received an appeal to the commission regarding the director's decision denying him benefits, as a result of which the commission affirmed the denial of benefits because plaintiff's claim was untimely. (Amended Complaint, ¶18.) Plaintiff also does not dispute that a party unsatisfied with a decision of the commission ordinarily should appeal the decision to the common pleas court. Plaintiff instead argues that because the factual record indisputably shows that plaintiff untimely made his claims for unemployment benefits, any reviewing court would be compelled to affirm the denial of benefits due to what plaintiff characterizes as the limited review those courts statutorily conduct. Because of the perceived inadequacy in the administrative appeals process, plaintiff argues that pursuing the administrative review process would have been futile.

#### A. The Claims Review Process

{¶13} To support his contentions, plaintiff notes the claims review process under Ohio law. Purely factual determinations are primarily within the province of the hearing officer and commission. *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17. The claimant has the burden of proving his or her entitlement to unemployment

compensation benefits under the law. *Id.* Upon appeal to the court of common pleas, "[t]he court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission." R.C. 4141.282(H). An appellate court applies the same standard of review as the common pleas court. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 696, 1995-Ohio-206.

{¶14} The courts' scope of review thus is limited. A court may not make factual determinations or substitute its judgment for that of the commission. *Irvine* at 18. Where the commission might reasonably decide either way, the courts have no authority to change the commission's decision. *Id.* Although appellate courts are not permitted to make factual findings or determine the credibility of witnesses, they have the duty to determine whether the record contains evidence to support the commission's decision. *Tzangas* at 696.

{¶15} Given those restrictions, plaintiff argues that had he followed the proper procedure and appealed the commission's decision to the common pleas court, the common pleas court would have had no choice but to affirm the commission's decision denying his benefits because, as plaintiff acknowledges, he was untimely in his request for benefits.

#### B. Applied to Plaintiff

{¶16} Plaintiff's argument under his first two assignments of error stems from his failure to appreciate the common pleas court's scope of review of an administrative

decision. Although a common pleas court may not make its own factual findings, the common pleas court has a duty to determine whether the decision of the commission was unreasonable. R.C. 4141.282(H). Plaintiff could have argued first to the director and commission, and then to the common pleas court and appellate court, that ODJFS was negligent in informing him of the deadlines for his applications and in handling his overall claim. Defendants, as well as the reviewing courts, properly could have considered those arguments in determining whether the commission's denial of benefits was reasonable. See *Bungard v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 07AP-447, 2007-Ohio-6280, ¶21 (concluding that where the plaintiffs "had the opportunity to challenge the child support determinations at issue through an appellate process that is set forth in both statutes and administrative rules," a process that is "broad and encompasses the [negligence] issues raised in plaintiffs' complaint," the plaintiffs could not maintain a cause of action for negligence in the Court of Claims against ODJFS). Thus, plaintiff's argument that the statutory administrative appeals process did not provide an effective remedy is unpersuasive.

{¶17} Indeed, this court previously considered similar scenarios and determined the Court of Claims lacks subject matter jurisdiction where the thrust of the complaint is review of a state agency's administrative determination. In *Bungard*, the plaintiffs brought suit against ODJFS in the Court of Claims, alleging causes of action for negligence, negligence per se, breach of contract, breach of fiduciary duty, and violations of Ohio's Consumer Sales Practices Act. The crux of the claims was "that ODJFS failed to adequately execute its duties to establish and regulate the child support enforcement agencies, and consequently failed to ensure the proper collection, enforcement, and

distribution of child support monies" as applicable statutes required. *Id.* at ¶7. After noting that "no individual can bring a lawsuit against the state or one of its agencies unless the General Assembly has permitted the lawsuit," we concluded the Court of Claims lacked subject matter jurisdiction over the plaintiffs' complaint because the plaintiffs did "not cite to any statute that gives aggrieved individuals a private claim for relief against ODJFS." *Id.* at ¶5, 7.

{¶18} Similarly, in *George v. Ohio Dept. of Human Servs.*, 10th Dist. No. 04AP-351, 2005-Ohio-2292, a class of plaintiffs brought suit against the Ohio Department of Human Services, alleging "ODHS improperly denied them Medicaid benefits" stemming from "ODHS' disregard for the Ohio Administrative Code provisions enacted to implement the Medicare Catastrophic Coverage Act of 1988." *Id.* at ¶2. We concluded that although the plaintiffs in *George* crafted their complaint as an action for monetary damages, "plaintiffs' action is in reality an appeal of the ODHS' Medicaid eligibility determinations." *Id.* at ¶31.

{¶19} In reaching that decision, we noted "the right to dispute the validity of an administrative decision is only conferred by statute and, if such a statutory right exists, the party aggrieved by the administrative decision can only seek an appeal via the method articulated in the statute." *Id.* at ¶32. Accordingly, we determined both Ohio statute and administrative rules provided the appellate process available to challenge ODHS' eligibility determinations. *Id.* Reiterating that "[a]n action in the Court of Claims cannot become a substitute for a statutorily created right of appeal [of an administrative decision] in a different court," we concluded the Court of Claims lacked subject matter jurisdiction to

hear the plaintiffs' action. *Id.* at ¶35, quoting *Swaney v. Bur. of Workers' Comp.* (Nov. 10, 1998), 10th Dist. No. 98AP-299.

{¶20} Here, although plaintiff asserts his claim is one for damages, he actually seeks review and reversal of the commission's decision to deny him certain unemployment benefits. Under R.C. 4141.282, plaintiff was required to perfect his appeal of the commission's decision by filing a notice of appeal in the common pleas court. Creative pleading cannot overcome the general rule that "[w]hen a statute confers the right to appeal, the statutory provisions solely govern perfecting such an appeal." *Calo v. Ohio Real Estate Comm.*, 10th Dist. No. 10AP-595, 2011-Ohio-2413, ¶35, citing *Hansford v. Steinbacher* (1987), 33 Ohio St.3d 72. See also *Bailey v. Ohio Dept. of Admin. Servs.*, 10th Dist. No. 01AP-1062, 2002-Ohio-877 (concluding that "regardless of how plaintiff characterizes his claim against [the administrative agency], plaintiff is seeking a determination that [the administrative agency] wrongly denied him disability benefits," so plaintiff could and should have raised any errors in an administrative appeal to the common pleas court as "the Court of Claims lacks appellate jurisdiction to review [administrative] decisions").

{¶21} The Court of Claims did not err in determining it lacked subject matter jurisdiction to hear plaintiff's complaint. Plaintiff's first and second assignments of error are overruled, rendering plaintiff's third assignment of error moot.

## V. Disposition

{¶22} In summation, the Court of Claims did not err in determining it lacked subject matter jurisdiction to hear plaintiff's complaint and in dismissing plaintiff's negligence claim against defendants. Accordingly, we overrule plaintiff's first and second

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assignments of error, rendering moot plaintiff's third assignment of error, and affirm the judgment of the Ohio Court of Claims.

*Judgment affirmed.*

TYACK and CONNOR, JJ., concur.

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