

IN THE SUPREME COURT OF OHIO

CLAUDIA BERNARD	:	Supreme Court Case No. 12-0717
	:	
Appellant,	:	
	:	On Appeal From The Miami County
vs.	:	Court of Appeals
	:	Second Appellate District
UNEMPLOYMENT COMPENSATION	:	
REVIEW COMMISSION	:	
	:	Court of Appeals
and	:	Case No.: 11 CA 00016
	:	
WAKEMAN EDUCATIONAL FOUNDATION	:	
	:	
Appellees.	:	

**MEMORANDUM IN OPPOSITION TO REQUEST FOR JURISDICTION
OF APPELLEE WAKEMAN EDUCATIONAL FOUNDATION**

Robert Guehl (Counsel of Record)
 Tony M. Alexander
 Burton Law LLC
 70 Birch Alley, Suite 240
 Beavercreek, OH 45440
 Telephone: (937) 610-0444
 Email: rguehl@burton-law.com
 Email: taxalexander@burton-law.com
Counsel for Appellant Claudia Bernard

Robin Jarvis (Counsel of Record)
 Ohio Attorney General
 1600 Carew Tower
 441 Vine Street
 Cincinnati, OH 45202
 Telephone: (513) 852-3497
*Counsel for Appellee Ohio Department of
 Jobs & Family Services*

W. Roger Fry (Counsel of Record)
 William H. Fry
 Rendigs, Fry, Kiely & Dennis, LLP
 One West Fourth Street, Suite 900
 Cincinnati, OH 45202
 Telephone: (513) 381-9200
 Fax: (513) 381-9206
 Email: wrf@rendigs.com, wwf@rendigs.com
*Counsel for Appellee Wakeman Educational
 Foundation*

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THIS CASE DOES NOT INVOLVE ANY ISSUE OF PUBLIC OR GREAT INTEREST

The multiple decisions rejecting the Appellant's bid for unemployment compensation arise from a highly individualized factual scenario with little or no application to other Ohio employees or employers. The appellant in this case had over 60% of her pre-tax compensation being paid into a flexible savings account, at her request. Appellant requested that so that she could avoid earning a taxable income that was over a specific level, which would have caused her to have to pay for her otherwise "free" healthcare.

The pre-tax funds diverted to the flexible savings account were not subject to federal or state unemployment compensation taxes, and therefore were not counted towards the average weekly wage calculation, the sum total of which was insufficient for Appellant to be eligible for unemployment compensation.

It is not likely that these facts will ever be repeated, given that the vast majority of employees do not place anywhere near 60% of their compensation into a flexible savings account ("FSA").¹ In the absence of such a high percentage of diverted funds, it is probable that the average employee would meet and exceed the qualifying average weekly wage calculation and thus be eligible for unemployment compensation, notwithstanding any such FSA contribution.

Despite how unusual this particular scenario is, the general concept of not making an unfunded award is well reasoned, and should be upheld. The unemployment compensation fund requires a specific level of taxed compensation to be paid on behalf of an employee before they can be awarded unemployment. To permit otherwise would create a drain on the system

¹ Referred to as both "FSA" and "flex savings account" herein.

that is normally paid in advance by taxes. Accordingly, the decision of the state agency charged with carrying out and enforcing the law should be upheld.

STATEMENT OF FACTS AND PROCEDURAL CONTEXT

The Wakeman Educational Foundation is an Ohio non-profit institution that is incurring significant litigation expenses due to this case and an earlier related matter. To place this in context for the Court, the Appellant Claudia Bernard made financial demands upon the Foundation, such as four weeks paid vacation, an overall increase in compensation, 10 dollars per hour overtime above her earnings, and a written employment contract. (Record, Q & A on discharge). The non-profit Foundation was unable to meet these demands financially.

In addition, both before and at the time of her discharge, Claudia Bernard became very difficult for the Foundation Director Patricia Wakeman to work with. (Record, Q & A on discharge). Patricia Wakeman and Claudia Bernard went so far as to attend counseling sessions with a third party counselor in an attempt to resolve these issues, but were unsuccessful. (Record, Q & A on discharge). Ultimately, due to the personality conflicts and failure to perform as requested, Patricia Wakeman terminated Claudia Bernard's employment because "we had reached a point where Ms. Bernard no longer responded to me as her supervisor or as Director of the Wakeman Foundation." (Record, Q & A on discharge).

Thereafter, Claudia Bernard attempted to secure her job back. Despite several attempts to do so, she was unsuccessful, and the Foundation refused to re-hire her. Claudia Bernard therefore filed an Ohio Civil Rights Complaint against the Foundation. The appellant's allegations, though ultimately determined to be meritless, cost the Foundation significantly to defend. Those claims ranged from allegations of sex and age discrimination – by a woman

Claudia Bernard against an older woman Patricia Wakeman, to hostile work conditions, in spite of the fact that Ms. Bernard attempted to be rehired.

The instant case for unemployment compensation lingers on, despite having been examined, argued, and rejected at every level of review thus far. This includes the original application for compensation, which was affirmed by the ODJFS, as well as the independent board review of that decision, the examination by the Trial Court, and the determination by the Court of Appeals.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW

Appellant's Proposition of Law No. 1: Courts Must Interpret Statutes and Regulations With Deference to The Affected Party and Against the State Agency Charged With Enforcement of the Statutory/Regulatory Scheme

The ODJFS correctly denied the Appellant's unemployment compensation request. There is no basis to state that the Trial Court did not construe the statute liberally or reasonably. Even the dissenting opinion of Judge Fain admits that the "court lays out the intricacies of the interpretation of the statute with reference to the circumstances of this case with admirable skill..." *Bernard v. Unemployment Compensation Review Commission*, 2012-Ohio-958 at ¶ 15 (2nd Dist.2012).

As stated previously, Appellant requested that over 60% of her compensation be diverted, pre-tax, into a flexible savings account.² None of the diverted funds were subject to federal or state unemployment tax. *Bernard*, 2012-Ohio-958 at ¶ 11.

² Appellant's total compensation for the year 2009 was \$17,320 and of that she requested \$10,800 be diverted to the FSA.

Because of that, “neither the federal or the state unemployment compensation system sets aside money to compensate unemployed individuals for their FSA contributions.” *Bernard* at ¶ 11.

The Court of Appeals was correct in upholding the logical decision of the administrative agency, stating that where no taxes are set aside for the FSA contributions, then those contributions should “not be considered for calculating whether the employee is eligible for unemployment benefits.” *Bernard* at ¶ 11.

Although it is unlikely that this situation will occur again, in that most people do not divert anything close to 60% of their compensation into a FSA, the rule set forth of not awarding unfunded compensation is legitimate and should be upheld. None of the funds diverted into the FSA are defined as “remuneration,” which is utilized to calculate the average weekly wage to determine eligibility for unemployment compensation. *Bernard* at ¶ 11.

The Appellant is seeking to have this Court create a common law rule providing for unfunded unemployment compensation to be awarded. If the Appellant’s position were adopted it could open the state unemployment compensation fund to unanticipated losses. This would be detrimental to the long term viability of the fund and be inconsistent with the purpose of the eligibility requirements. If the Appellant’s proposed rule were applied to other state funds, it could open them up to similar unfunded losses.

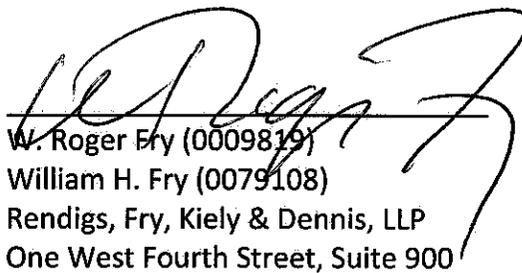
CONCLUSION

As stated by the Second District, “The legislature has placed the responsibility to oversee and administer Ohio’s unemployment compensation with the ODJFS ... And its interpretation of ‘remuneration’ under this legislative scheme is reasonable.” *Bernard* at ¶ 9.

While the Appellant's specific situation is unlikely to be repeated, the overall concept of protecting state funds from an unfunded burden is commendable and appropriate.

The multiple decisions of the administrative agencies and lower courts denying the Appellant's relief are well reasoned and do not require any further review by this Court.

Respectfully submitted,



W. Roger Fry (0009819)

William H. Fry (0079108)

Rendigs, Fry, Kiely & Dennis, LLP

One West Fourth Street, Suite 900

Cincinnati, OH 45202

Telephone: (513) 381-9200

Fax: (513) 381-9206

Email: wrf@rendigs.com, whf@rendigs.com

*Attorneys for Appellee Wakeman Educational
Foundation*

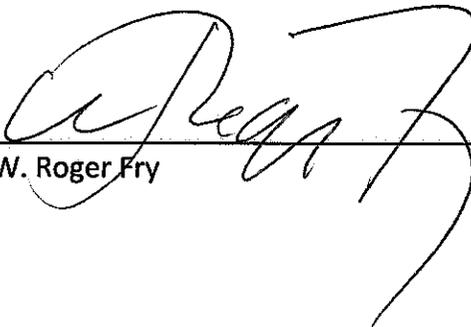
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served upon the following via regular U.S. mail, postage pre-paid on this 23rd day of May,

2012:

Robert Guehl (counsel of record)
Tony Alexander
Burton Law LLC
70 Birch Alley, Suite 240
Beavercreek, OH 45440

Robin Jarvis (counsel of record)
Ohio Attorney General
1600 Carew Tower
441 Vine Street
Cincinnati, OH 45202


W. Roger Fry