

In the  
**Supreme Court of Ohio**

CLAUDIA BERNARD,

Appellant,

vs.

UNEMPLOYMENT COMPENSATION  
 REVIEW COMMISSION, et al.,

Appellees.

Case No. 2012-0717

On Appeal from the Miami County  
 Court of Appeals,  
 Second Appellate District

Court of Appeals Case No. 2011-CA-16

**APPELLEE, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES'  
 MEMORANDUM OPPOSING JURISDICTION**

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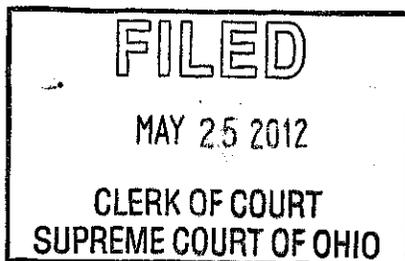
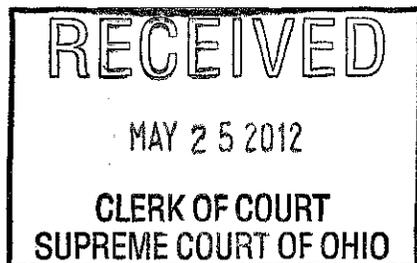
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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... i

INTRODUCTION..... 1

STATEMENT OF THE CASE AND FACTS ..... 2

THIS IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST ..... 4

ARGUMENT ..... 4

Appellee ODJFS' Proposition of Law ..... 7

*The statutory provision requiring courts to liberally construe provisions of the Unemployment Compensation Tax Act does not govern the interpretation of other state or federal laws or apply to clear and unambiguous provisions of the Unemployment Compensation Tax Act, such as the provision excluding funds diverted to a flexible spending account from the calculation of an applicant's wages* ..... 7

CONCLUSION ..... 11

CERTIFICATE OF SERVICE ..... 12

## INTRODUCTION

In an attempt to salvage her unsuccessful unemployment compensation application and pique the Court's interest, Appellant Claudia Bernard asserts a broad proposition of law about the statutory presumption to liberally construe Ohio unemployment compensation laws in favor of applicants. See R.C. 4141.46. Her attempt fails for three reasons, each of which independently counsels against the Court accepting jurisdiction over this appeal.

First, the liberal construction standard of R.C. 4141.46 does not require clarification. Courts regularly apply the General Assembly's directive to liberally construe Ohio's unemployment compensation laws in favor of applicants without difficulty. Revised Code 4141.46 applies only where a statute is unclear or ambiguous; not, as here, where the statute being interpreted is clear and has been reasonably interpreted by the agency charged with its application. Further, the liberal construction requirement applies only to "Sections 4141.01 to 4141.46, inclusive, of the Revised Code," R.C. 4141.46, not to judicial construction of other state or federal laws or regulations. Accordingly, Bernard's proposition of law is incorrect on these facts.

Second, there is no merit to the statutory claim underlying Bernard's appeal. As the agency, the common pleas court, and the appeals court all properly concluded, contributions to a cafeteria plan (a flexible spending account ("FSA")) are not "remuneration" for purposes of calculating an unemployment applicant's base period wage. Employers contribute to an employee's cafeteria plan in exchange for the employee's agreement to a salary reduction. These contributions are exempt from federal and state taxes—including Ohio unemployment taxes—and therefore are not

part of an employee's base period wage. The fact that other state and federal laws define compensation more broadly, and may include contributions to cafeteria plans, does not change this fact, as much as Bernard would like it to.

Finally, this case does not merit review because it involves the rare situation where an applicant's initial application is denied because she did not earn a sufficient average weekly wage during her base period due to her decision to have her employer direct the majority of money she could have received into a nontaxed FSA in her name. This situation is highly unusual for two reasons. First, the initial step of the administrative process—determining whether an application for unemployment is valid—is rarely litigated. The vast majority of unemployment litigation involves the second step of the administrative process, when the Ohio Department of Job and Family Services (“ODJFS”) determines an applicant's benefit eligibility. Second, it is highly unusual that contributions to a cafeteria plan, or another FSA, would—if considered part of an employee's average weekly wage—tip the scales so that an applicant who is otherwise ineligible to apply for unemployment benefits becomes eligible to do so.

For these reasons and those explained below, the Court should decline jurisdiction over Bernard's appeal.

### **STATEMENT OF THE CASE AND FACTS**

Bernard worked for Appellee, The Barry and Patricia Wakeman Educational Foundation (“Foundation”) as a caretaker. Bernard was discharged from employment and applied for unemployment compensation benefits with ODJFS. ODJFS disallowed Bernard's application for benefits because Bernard did not earn an average weekly

wage of at least \$213 during her base period as required by R.C. 4141.01(R)(1). (ODJFS Det. No. 219804351-1).

During the relevant base period (January 1, 2009 to December 31, 2009), Bernard received a tax form 1099-MISC from the Foundation for work that occurred from January 1, 2009 until April 30, 2009. Transcript of the Hearing, Oct. 25, 2010 ("Tr.") at 10. The 1099 had \$2,000.00 in nonemployee compensation. (See 1099). For the remainder of 2009, Bernard received a W2 that showed \$3,520.00 of "wages" in box one and \$10,800.00 as "other" in box 14. Box 14 has the notation "Health FSA 125." (See W2). Bernard also received a \$1,000 Christmas bonus. Tr. at 10. In addition, the Foundation deposited \$900 a month in a FSA for Bernard. Tr. at 10. The FSA was set up as a cafeteria plan under section 125 of the Internal Revenue Code. (See plan documents). The account was used for medical expenses and was not subject to any tax for Appellant. Tr. at 10.

The hearing officer for the Ohio Unemployment Compensation Review Commission ("Review Commission") determined that Bernard was an employee at all times and she received \$6,520.00 total wages in 2009. (Decision December 3, 2010). This figure includes the amount from the 1099, the W2, and the Christmas Bonus. The hearing officer determined that the funds diverted to the FSA were not considered wages. *Id.*

Bernard could not qualify for a valid application for determination of benefit rights if Bernard did not work in twenty qualifying weeks of covered employment in her base period and if she did not average at least \$213.00 in wages in the base period. R.C. 4141.01(R)(1). The hearing officer held that Bernard failed to file a valid

application for benefits since she did not earn an average weekly wage of at least \$213.00. (Decision, December 3, 2012). Bernard did not meet the first step of the administrative process for obtaining benefits by filing a valid application for benefits.

Bernard appealed the Review Commission's decision to the Miami County Court of Common Pleas. The trial court affirmed, relying on the definitions of "wages" and "remuneration" in R.C. 4141.01(G) and R.C. 4141.01(H)(1) of the Ohio Unemployment Compensation Act ("Act") and the exclusions from wages divisions (b)(2) to (b)(16) of section 3306 of the Federal Unemployment Tax Act ("FUTA"), 84 Stat. 703, 26 U.S.C.A. 3301 to 3311 as amended. R.C. 4101.01(H)(1)(a). The trial court found that the Review Commission's interpretation of the statutes was reasonable, concluding that payments to an FSA are not wages for purposes of calculating an applicant's average weekly wage. (Com. Pl. Op. p. 4).

Bernard appealed to the Second District Court of Appeals. Bernard argued that pretax diversions from wages made during the base period must be considered wages and that the Unemployment Compensation system must give the benefit of the doubt to Bernard where the statute is ambiguous or unclear. The appeals court analyzed the exclusions to "remuneration" under FUTA and found that the Review Commission's interpretation of "remuneration" under the Act was reasonable.

#### **THIS IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST**

This case is not a case of public or great general interest because the provision requiring courts to liberally construe unemployment compensation laws in favor of applicants is already clearly established and does not merit the Court's review. Moreover, even a cursory look beneath the surface of this interpretive question confirms

that ODFJS and both lower courts correctly applied Ohio law when they concluded that Bernard's application for unemployment benefits was invalid. Because this situation is unlikely to occur again, there is no reason for the Court to expend its limited resources either to clarify a standard that is already clear or to confirm that three tribunals have already reached the correct outcome in this case.

Bernard's proposition of law is not worthy of the Court's attention because the liberal construction standard of R.C. 4141.46 does not require clarification. Under R.C. 4141.46, "Sections 4141.01 to 4141.06, inclusive, of the Revised Code shall be liberally construed." Courts regularly apply this directive without difficulty. See, e.g., *Johnson v. Ohio Bur. of Emp. Serv.*, 48 Ohio St.3d 67, 549 N.E.2d 153 (1990); *Bowman v. Ohio Bur. Emp. Serv.*, 30 Ohio St.3d 87; 507 N.E.2d 342 (1987). Revised Code 4141.46 applies only where a statute is unclear. *Fegatelli v. Ohio Bur. Emp. Serv.*, 146 Ohio App.3d 275, 765 N.E.2d 961 (2001). Here, R.C. 4141.01(H)(1)(a), is clear. To the extent Bernard can identify any ambiguity, she does so only by reference to other state and federal laws. But these provisions are not subject to the liberal construction requirement. Therefore, Bernard's attempts to manufacture ambiguity by invoking alternative definitions of "wages" and "compensation" are not enough to put R.C. 4141.46 into play. The liberal construction standard is clear, and this case does not raise any legitimate questions about its application.

Further, this case does not merit review because ODJFS correctly interpreted and applied the Act to evaluate Bernard's application. When ODJFS receives an application for unemployment compensation, ODJFS must determine whether the application is valid before reaching the merits of the application. As part of this initial

evaluation, ODJFS must calculate an applicant's average weekly wage during a particular base period to determine whether she earned sufficient wages to be eligible for a valid application for unemployment. Here, Bernard's eligibility to apply turned on whether the Foundation's contributions to Bernard's cafeteria plan count toward her wages during the base period. ODFJS applied R.C. 4141.01(H)(1)(a), which expressly excludes contributions to a qualifying cafeteria plan, under Section 125 of the Internal Revenue Code, from the calculation of average weekly wages. Because Bernard's cafeteria plan clearly falls under Section 125, ODJFS properly excluded the cafeteria plan contributions from the wage calculation and found that Bernard was not eligible for a valid application. The statutory provision is clear and unambiguous, ODJFS's interpretation of the provision was reasonable, and the trial court and the appeals court properly deferred to the agency's reasonable interpretation. Accordingly, R.C. 4141.46's liberal construction standard is not even relevant to this case.

Finally, this case does not rise to the level of public or general interest for the simple reason that the facts are unlikely to recur. It is unusual for the determination of an applicant's eligibility to apply for unemployment benefits to hinge on whether FSA contributions are included in the calculation of the applicant's average weekly wage. And this question is even more unlikely to recur because only a small percentage of unemployment insurance litigation involves an initial administrative determination about whether an individual is eligible for a valid application. Most unemployment litigation involves the second stage of administrative review—benefits determinations. This Court would be hard-pressed to find one case where an applicant for unemployment compensation benefits is similarly situated with Bernard.

To the extent Bernard attempts to invoke the Court's sympathy as a reason for review, her claims are unfounded. Bernard directed the Foundation to divert approximately sixty percent of her would-be income to a FSA, in exchange for a salary reduction. In exchange, she did not have to pay state and federal income taxes on those amounts and also was able to pay for medical expenses with pretax dollars. Now Bernard wants to have it both ways: She did not want these amounts to count as wages for tax purposes, but she does want them to count as wages for purposes of unemployment compensation. Bernard received the benefit of her bargain, and cannot now undo it.

For these reasons, the Court should decline jurisdiction over Bernard's appeal.

## **ARGUMENT**

### **Appellee ODJFS' Proposition of Law**

*The statutory provision requiring courts to liberally construe provisions of the Unemployment Compensation Tax Act does not govern the interpretation of other state or federal laws or apply to clear and unambiguous provisions of the Unemployment Compensation Tax Act, such as the provision excluding funds diverted to a flexible spending account from the calculation of an applicant's wages.*

The Unemployment Compensation Tax Act contains specific provisions to determine wages. There is no need for this Court to interpret a multitude of unrelated statutes outside of the Act liberally to determine whether Bernard's diversions to the FSA under the cafeteria plan are wages. Bernard contends that Ohio tax law contemplates that payments to a FSA are wages. Memo Sup. Jur. p. 4. To support her contention Bernard cited definitions contained in R.C. 5747.01 (Income tax definitions), R.C. 4113.11 (Miscellaneous Labor Provisions), language from the 2009 Ohio Income Tax Form, Ohio Adm. Code 145 (Ohio Public Employees Retirement System), and

various sections of the plan document contained in the certified record of Review Commission. Memo. Sup. Jur. at 4-7. Bernard ignores provisions of the Act that describe wages and then quotes to the section of the Act that asks courts to construe the Act liberally in favor of benefits. Revised Code 4141.46 states that sections 4141.01 to 4141.46 shall be liberally construed not every state and federal law relating to wages.

In order to be eligible to receive unemployment compensation benefits under Ohio law, an applicant must first file a valid application for determination of benefit rights. Revised Code 4141.01(R)(1) requires an individual to work twenty qualifying weeks and to earn a minimum average weekly wage in order to be eligible for benefits. The statewide average weekly wage for 2010 was at least \$213.00. (Decision December 3, 2010). Under the Act, "wages" means remuneration *paid to an employee* by each of the employee's employers with respect to employment..."

R.C. 4141.01(G)(1). Remuneration is defined as follows:

(H)(1) "Remuneration" means all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash...

The reasonable cash value of compensation paid in any medium other than cash shall be estimated and determined in accordance with rules prescribed by the director, provided that "remuneration" does not include:

(a) Payments as provided in divisions (b)(2) to (b)(16) of section 3306 of the "Federal Unemployment Tax Act," 84 Stat. 713, 26 U.S.C.A. 3301 to 3311, as amended. R.C. 4141.01(H)(1)(a).

Section 3306 of the FUTA, subsection (b)(5)(G) states that wages shall not include:

(5) any payment made to, or on behalf of, an employee or his beneficiary

(G) under a cafeteria plan (within the meaning of section 125) if such payment would not be treated as wages without regard to such plans and it is reasonable to believe that (if section 125 applied for purposes of this section) section 125 would not treat any wages as constructively received.

Thus, R.C. 4141.01 requires that in order to be eligible for unemployment compensation benefits, an applicant must earn a certain average weekly wage. In calculating that wage, the statute prohibits the inclusion of payments an employer has made to cafeteria plans for their employees pursuant to 26 U.S.C. 125. Section 125 (d)(1) defines cafeteria plans as “[a] written plan under which—(A) all participants are employees, and (B) the participants may choose among 2 or more benefits consisting of cash and qualified benefits.” 26 U.S.C. 125(d)(1) (Other requirements for cafeteria plans are the employer maintains the plan for the benefits of the employees, participants are offered an election between at least one permitted taxable benefit and at least one qualified benefit, and the benefits don’t offer deferred compensation). See 33A Am. Jur. 2d Federal Taxation § 7235 (2011). After a plan qualifies under Section 125, Section 3306 also requires that the payments are not treated as wages without regard to the plan and Section 125 wouldn’t treat the payments as constructively received.

Bernard’s argument concerns Section 3306(b)(5)(G) of FUTA. Bernard contends that the language, “if such payment would not be treated as wages without regard to such plan” means that if the \$900 had not gone into the FSA each month, it would have been “wages for employment” under 26 U.S.C. 3306(b). This argument lacks merit. Subsection (b)(5)(G) describes payments “made to, or on behalf of, an employee or his beneficiary,” (Subsection (b)(5)), “under a cafeteria plan,” (Subsection (b)(5)(G)). In other words, these are payments made *from* a cafeteria plan to an employee (or on behalf of the employee to his beneficiary) not payments *to* a cafeteria plan. This becomes clear when other subdivisions under Subsection (b)(5) are considered that

describe payments made not only “under” but “under or to.” See e.g., Section 3306(b)(5)(B); 3306(b)(5)(D) (“under or to an annuity contract”); see also, Section 3306(b)(5)(C) (describing payments, similar to division (b)(5)(G), “under a simplified employee pension”). While it is true that if Bernard had not elected to put \$900 each month into the FSA, she would have received it as wages, it is not correct to say that the payments made from the FSA were wages.

Bernard’s wages fall well below the amount established under R.C. 4141.01(R). Appellant received \$2,000.00 in wages from January to April 2009 and \$3,520.00 in wages as a W2 employee from May to December 2009. Tr. at 8, 10. She also received a \$1,000.00 Christmas bonus. *Id.* Thus, Bernard earned \$6,520.00 in wages for 2009. Bernard’s average weekly wage for 2009 was \$125.00, far below the Unemployment Compensation requirement of \$213.00. (Decision December 3, 2010). Bernard also stated that she was given a payment of \$900.00 a month by the Foundation for her medical flexible spending account in 2009. T.d. 8, Tr. p. 10. The FSA that the Foundation created for Bernard was intended to qualify as a “Cafeteria Plan” within the meaning of Section 125 of the Internal Revenue Code. FSA p. 4, ¶ 2. Bernard did not have to pay taxes on the money that the Foundation puts into this account. *Id.*

The payments the Foundation made to Bernard’s FSA are not considered wages for unemployment purposes. Ohio specifically excludes the inclusion of payments made to a qualifying cafeteria plan under Section 125 for the calculation of wages for unemployment compensation. R.C. 4141.01(H)(1)(a). As specified in Section 3306, the payments made to a cafeteria plan must qualify under 26 U.S.C. 125, Cafeteria Plans. The Foundation’s plan clearly meets Section 125 requirements for cafeteria plans. The

plan is written, all the participants are employees, and employees can chose among two or more benefits. (See Summary Plan Description).

Bernard implicitly seeks a change in the Ohio Unemployment Compensation System. The Ohio Unemployment Compensation system is funded by an excise tax on employers. Employers are required to file wage reports with ODJFS indicating gross wages paid to employees for each quarter. These reported wages are subject to the unemployment tax. The Act contemplates that these reported wages are those available to the employee. Ohio Adm. Code 4141-9-01 states: “[W]ages shall be reported for the calendar quarter in which any payday occurs. A payday occurs when the payment is credited to or set apart for the employee and is available to such employee on demand.”

Further, the Act defines “wages” as “remuneration *paid to an employee* by each of the employee’s employers with respect to employment ...” R.C. 4141.01(G)(1) (emphasis added).

The entire system is set up to allow employers to report and pay a tax on gross wages paid by them directly to their employees. Bernard advocates for a new system taxing employers for wages not forwarded to an employee, which is contrary to the plain language of Act and the unemployment compensation scheme. The unemployment compensation system should remain unchanged unless the legislature decides that the system should be changed.

### **CONCLUSION**

For the above reasons, ODJFS urges the Court to deny jurisdiction.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

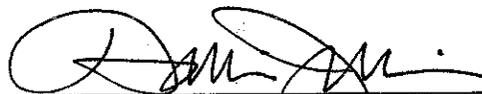
I certify a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, Ohio Department of Job and Family Services was served by U.S. mail this 23<sup>rd</sup> day of May, 2012 upon the following:

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