

ORIGINAL

In the
Supreme Court of Ohio

CLAUDIA BERNARD	:	Case No. 2012-0717
	:	
Appellant,	:	
	:	On Appeal from the Miami County
v.	:	Court of Appeals, Second Appellate
	:	District
	:	
UNEMPLOYMENT COMPENSATION REVIEW	:	Court of Appeals Case
COMISSION, <i>et. al.</i>	:	No. 11 CA 00016
	:	

WAKEMAN EDUCATIONAL FOUNDATION'S MEMORANDUM IN
OPPOSITION TO BRIEF OF APPELLANT CLAUDIA BERNARD

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A. Table of Authorities

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B. Statement of Issues

Appellant Bernard's Proposition of Law Number 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"

Wakeman Educational Foundation's Memorandum in Opposition

I. Standard of Review

"A reviewing court can only reverse the Unemployment Compensation Review Commission's decision if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Astro Shapes, Inc. v. Sevi*, 2010-Ohio-750, ¶ 13 (10th Dist.2010). If the opinion is not unlawful, unreasonable, or against the manifest weight of the evidence, then "the court shall affirm the decision of the commission." R.C. § 4141.282(H). In addition, it is well settled that "courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency..." *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, ¶ 26 (2004).

While the unemployment statute is to be liberally construed pursuant to R.C. § 4141.46, courts "must give deference to the commission in its role as finder of fact." *Marinch v. Lumpkin*, 2012-Ohio-4526 at ¶ 19 (12th Dist.2012). Accordingly, the decision of a state agency, no matter whether it decided for or against the claimant, is entitled to deference.

II. Statement of the Case

The Appellant Claudia Bernard applied for unemployment compensation after she was discharged from the Wakeman Education Foundation. Her application for unemployment compensation was considered and disallowed by way of order from the Ohio Department of Jobs and Family Services in January 2010. The basis for the disallowance was that Bernard did not have sufficient qualifying weeks at the required "average weekly wage," which is calculated by dividing the total amount of remuneration received during the base period, by the total qualifying weeks. At that time the average weekly wage pre-requisite was set at \$213.00 per

week and Bernard's average was \$125.00. The Appellant Bernard sought a re-determination of that Order, which reviewed her position and then upheld the disallowance of the claim.

Bernard appealed to the Unemployment Compensation Review Commission. A hearing was held and the Commission confirmed the disallowance of Appellant Bernard's unemployment compensation claim. Specifically, the examiner determined that the statutory provisions for calculating the "average weekly wage" excluded all remuneration that was placed into Bernard's pre-tax, flex savings account. Bernard had been placing \$900.00 per month into a flex savings account, and the money contributed was "not considered wages" under the statute, and therefore was not counted towards calculating the average weekly wage. (Decision of Compensation Review Commission).

Thereafter the claim was appealed to both the Miami County Court of Common Pleas and the Second District of Ohio. Both courts affirmed the disallowance of the unemployment compensation claim.

All reviewing courts and examiners have ruled against the Appellant Bernard on her unemployment compensation claim, as failing to satisfy the average weekly wage threshold requirement.

III. Statement of Facts

The non-profit Wakeman Educational Foundation was established by Co-Founders Barry and Patricia Wakeman to educate both children and adults alike, regarding:

- sustainable and experimental agricultural practices;
- exposure to and demonstrations of humane and sustainable domestic farm practices and care;
- experience-based nature programs;

- promotion of self sustaining, environmentally responsible lifestyles; and,
- the rescue, shelter, and ultimately adoption of abandoned animals.

The foundation employed Claudia Bernard, an at-will employee, as a care-taker living on the property for around two years.

1. The Discharge

Ms. Bernard was discharged for just cause at the end of November 2009 from the Educational Foundation. Ms. Bernard's employment was terminated because of her unwillingness to follow Director Patricia Wakeman's instructions, respond to Ms. Wakeman as her supervisor, attend to her care-taking responsibilities, as well as her demand for 4 weeks of paid vacation per year, among other issues. (See Record, fact findings reasons for discharge, questions and answers). The non-profit Educational Foundation was unable to meet Appellant Bernard's employment demands or continue to work with her because of the referenced problems. (See Record, fact finding reasons for discharge, questions and answers).

This is not to say that the Foundation did not attempt to correct these issues with its employee Claudia Bernard. It did. Patricia Wakeman and Claudia Bernard even went so far as to attend an employer-employee therapy session with a counselor.

The counseling session was unsuccessful and Ms. Bernard was discharged a short time later. After her termination, Claudia Bernard attempted to be re-hired, professing in writing through her counsel how much she loved the care-taker job and that she desired it back. When she was unsuccessful in getting re-hired, she attempted to raise wrongful termination claims against the Foundation, and attempted to collect a demanded severance payment. When the

Foundation refused to pay any severance, Ms. Bernard instituted an Ohio Civil Rights Commission complaint.

Appellant Bernard alleged in her civil rights complaint that she was fired because of age and sex discrimination, as well as a myriad of other alleged illegalities. The complaint was investigated by the Civil Rights Commission and dismissed in full, as meritless.

If this Court reverses every single decision below it, and agrees with Bernard, it is important to state here that Appellant will still have to prove upon remand that she was fired *without just cause* in order to be eligible for compensation. R.C. § 4141.29(D)(2)(a). The administrator never made any findings regarding the nature of the discharge, because it never went that far.

Appellant Bernard failed to meet the primary pre-condition for unemployment compensation, sufficient qualifying weeks at the required average weekly wage. As is set forth below, Ms. Bernard's compensation was not sufficient to satisfy the preliminary requirements in order to collect unemployment compensation.

IV. Appellant Bernard's Proposition of Law Number 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"

1. Wakeman Educational Foundation's Argument in Opposition

A. Bernard Seeks to Extinguish Existing Common Law by Modifying the Court's Role When Reviewing State Agency Decisions, But Only Where the Agency Decision is Adverse to the Employee

Bernard wishes to modify the statutory construction principles and create a divisive and conflicting standard between the state agency and the reviewing court. Appellant Bernard seeks a rule whereby all reviewing courts must defer to the "affected party," and "against the state agency charged with enforcement of the Statutory/Regulatory scheme," but only where the decision itself was adverse to the employee. (See Bernard's Proposition of Law Number 1).

This proposed rule of law would create a common law presumption that the state agency charged with the enforcement of the regulatory scheme was incorrect or not entitled to be upheld, but only in those instances, such as in this case, where the state agency barred the requested relief. Conversely, this would also lead to a presumption that the state agency opinion was entitled to be upheld only in those cases where it ruled in favor of the employee.

Procedurally, the Appellant Bernard's version of the law would be applied in an outcome-determinative manner. Under Bernard's interpretation, only an outcome in favor of the employee would be entitled to be upheld whereas an outcome in favor of the employer would normally be reversed.

Bernard's legal posture would overturn existing legal standards on the subject. Ohio courts interpreting such regulatory statutes do so in an outcome-neutral manner in that they

“must give due deference to [the] administrative interpretation...” itself. *Maitland*, 103 Ohio St.3d at ¶ 26. In other words, no matter which way the agency decides, for or against the employee, interpretive courts give “due deference” to the decision itself, not the outcome.

It would be inappropriate for a court to review a state agency decision in a manner that is totally dependent on which way the agency ruled. This is because these decisions are “formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command.” *Maitland* at ¶ 26.

Giving deference to the hearing examiner’s opinion, regardless of which way it rules, is logical because the examiner is especially well qualified to evaluate the evidence, law, and make determinations as to compensation eligibility.

In that regard the “duty or authority of the courts is to determine whether the decision of the board is supported by evidence in the record.” *Brown v. Sysco Food Services of Cincinnati*, 2009-Ohio-5536, ¶ 19 (4th Dist.2009) citing *Irvine v. Unemp. Comp. Bd. of Review*, 19 Ohio St.3d 15, 18 (1985). Furthermore, the “fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board’s decision.” *Brown*, 2009-Ohio-5536 at ¶19 citing *Irvine*, 19 Ohio St.3d at 18.

Importantly, “our statutes on appeals from such decisions [of the board] are so designed and worded as to leave undisturbed the board’s decision on close questions.” *Brown* at ¶ 19 (emphasis added) citing *Irvine* at 18. In light of the multiple and numerous decisions denying the requested relief, the Educational Foundation does not believe this is a “close” question.

However, even if it were a “close” question, Ohio case law requires deference to the board’s determination on the issue, which barred the requested relief.

B. Appellant Bernard is Not Entitled to Unemployment Compensation Because She did Not Meet the Minimum Average Weekly Wage Requirements

Bernard is not entitled to unemployment compensation under these facts. While Appellant Bernard was still an employee of the Educational Foundation, she specifically requested it set up a flex savings account (FSA) on her behalf so she could place pre-tax dollars into it. The Foundation set up the FSA pursuant to the federal rule permitting such “cafeteria plans,” under the Federal Unemployment Tax Act, 26 U.S.C. § 125, and spent approximately \$4,000 of its own money to implement it. Bernard does not dispute that the FSA is a qualified plan under the federal statute (See Bernard Appellate Brief at fn. 1).

After the FSA was created, Appellant Bernard elected to place over 60% of her pre-tax income into the account, which precluded her from qualifying for the applicable minimum average weekly wage. *Bernard v. Unemployment Compensation*, 2012-Ohio-958, ¶ 3 (2nd Dist.2012). Appellant Bernard sought this so that she could keep her taxable income lower than a specific threshold so that she could continue to receive “free” medical services.

Bernard’s argument that the Hearing Officer “failed to consider” the \$900 per month that was placed directly into her FSA, is inaccurate. The Hearing Officer did consider the \$900, and specifically excluded it from the average weekly wage tally, because those amounts were not considered wages for the purposes of calculating the average weekly wage. *Bernard*, 2012-Ohio-958 at ¶ 11.

Claudia Bernard's testimony indicates that she fully understood that the money being diverted into the FSA was "pre-taxed money" and that the amounts paid into the FSA were separate and apart from her "wages":

Q: So that [money] was going into your flexible spending account from your wages?

A: No, it's separate from wages. (Transcript of Record, 10/25/10 at p. 10).

Thereafter and with some prodding from her Counsel, Bernard testified that although she considered the contributions into the FSA part of her compensation, the principal difference was that "wages are of course um, I pay income taxes on that, I don't have to pay income tax on the FSA." (Transcript of Record, 10/25/10 at p. 10).

The hearing examiner thereafter made the determination that "The flexible spending account payments are not considered wages." (Decision of Compensation Review Commission). For the relevant time period, Bernard needed to earn an "average weekly wage" of \$213 in order to be eligible for unemployment compensation. *Bernard* at ¶ 3. To calculate the "average weekly wage," it is necessary to tally the amount of "remuneration" received by Bernard for the base period and divide it by the total amount of qualifying weeks. *Bernard* at ¶ 3 citing R.C. § 4141.01(O)(2). The term "remuneration" means "all compensation for personal services, including commissions and bonus and the cash value of compensation in any medium other than cash." R.C. § 4141.01(H)(1). However, the Ohio definition of " 'remuneration' does not include: Payments provided in divisions (b)(2) to (b)(16) of section 3306 of the 'Federal Unemployment Tax Act' ... 26 U.S.C.A. 3301-3311 ..." R.C. § 4141.01(H)(1)(a).

The relevant section of the Federal Unemployment Tax Act (FUTA) excludes from its definitions of "wages" all "remuneration" ... "made to, or on behalf of, an employee ... under a

cafeteria plan...” FUTA, 26 U.S.C. 3306 (b)(5)(G). The Ohio Unemployment Compensation statute and FUTA expressly provide that payments made to or under a “cafeteria plan” are excluded for the purposes of calculating the average weekly wage and tallying the “remuneration” received. *Bernard* at ¶ 5 citing R.C. 4141.01(H)(1)(a) and FUTA, 26 U.S.C. 3306 (b)(5)(G).

The statutes expressly exclude FSA payments from the calculation. But even if they were not express, and this Court were relying on the legislative intent, in that case, Ohio courts “may rely on the expertise of the state agency to which the legislature has delegated to the scheme’s enforcement.” *Bernard* at ¶ 9 citing *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St.3d 269, ¶ 13 (2008). The hearing officer reviewed the law and facts and correctly determined the amounts placed in the FSA were not “remuneration.” *Bernard* at ¶ 5.

C. Allowing Unfunded Compensation Payments Would Likely Destabilize the Fund

The \$900 that Appellant Bernard set aside each month into the FSA never created any unemployment tax obligations to fund the underlying system. Federal and state regulations provide that an “employee’s contributions to an FSA are not subject to federal unemployment taxes. Nor are they subject to Ohio unemployment compensation taxes.” *Bernard* at ¶ 11. In that regard, “neither the federal or the state unemployment compensation system sets aside money to compensate unemployed individuals for their FSA contributions.” *Bernard* at ¶ 11. As found by the appellate court, “It makes logical sense that if money placed in the cafeteria plan is not subject to unemployment tax, then that amount should not be considered for calculating whether the employee is eligible for unemployment benefits.” *Bernard* at ¶ 11 (emphasis added).

Stated differently, if this Court adopts Bernard's position, it would open the state unemployment compensation fund to unanticipated and un-funded losses. This would be detrimental to the long term viability of the fund and be inconsistent with the purpose of the eligibility requirements. If Bernard's proposed rule were adopted it could also open other state funds to similar un-funded losses.

V. Conclusion

In conclusion, the Appellant Bernard wishes to modify long-standing precedent regarding how courts interpret state agency opinions. Presently, courts defer to the state agency decision without regard to whether the decision is for or against the claimant. Rather than interpret the decision the same way no matter what the result, Appellant Bernard believes that Courts should interpret the decision "against" the regulatory agency and with "deference" to the claimant.

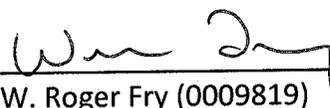
This will create a presumption that the regulatory agency is only correct if it ruled in favor the claimant. That outcome would be wrong -- Ohio Courts should continue to analyze and interpret state agency decisions without consideration to which way the agency ruled.

Furthermore, the agency was correct when it determined that the "average weekly wage" calculation did not include monies paid into a FSA for the purposes of determining unemployment eligibility. The claimant Bernard even testified that she did not consider the amounts placed into her FSA as "wages." (Transcript of Record, 10/25/10) at p. 10). The Ohio statute and FUTA also exclude from their definition of "remuneration" those amounts placed into a FSA, and therefore claimant is not eligible for unemployment compensation.

Last, from a public policy perspective, it is understandable that the Ohio unemployment compensation system should not be burdened by un-funded pay outs. This may be the reason that there is an "average weekly wage" eligibility requirement in Ohio, to ensure that the compensation being paid out is funded up front. To hold otherwise would open this fund and other funds to similar losses.

In conclusion, the Appellant Bernard's requested relief should be denied.

Respectfully submitted,



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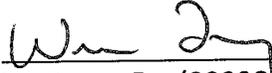
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Certificate of Service

I certify that a copy of the foregoing Brief of Appellee, Wakeman Educational Foundation was served by U.S. mail this 15th day of November, 2012, upon the following counsel:

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