

IN THE SUPREME COURT OF OHIO

12-0717

CLAUDIA BERNARD

Appellant,

-vs-

**UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION**

and

WAKEMAN TRUST

Appellees.

On Appeal From The Miami
County Court of Appeals
Second Appellate District

Court Of Appeals
Case No.: 11 CA 00016

REPLY BRIEF OF APPELLANT CLAUDIA BERNARD

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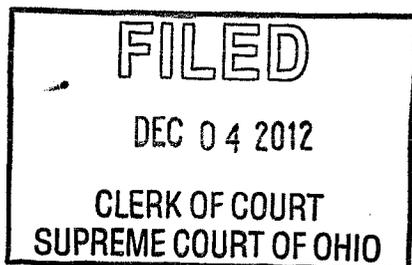


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STATEMENT OF ISSUES

WHETHER 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.

STATEMENT OF FACTS

Appellant, Claudia Bernard (“Bernard”) states that the facts set forth in the Brief of Appellee, Wakeman Educational Foundation (“Wakeman”), in Section III.1, should be stricken. The recitation of facts presented by Wakeman are an alternative set of facts that are being raised for the first time in order to support its argument that Bernard was terminated for “just cause.” The “just cause” termination issue was not raised below and cannot be introduced for the first time before this Court. The lack of citation to the record for Wakeman’s statement of facts is telling. Absent a showing by Wakeman that its “facts” are part of the record, this Court should ignore its “Statement of Facts” in its entirety and rely upon the statement of facts set forth in Bernard’s Brief.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

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

Wakeman's first and second argument opposing the above Proposition of Law argues that Bernard's contributions to her medical flexible spending account ("MFSA") should not be included as wages arguing that the Unemployment Compensation Review Commission ("Agency") correctly interpreted the relevant statutes. In opposing the proposition of law, Wakeman confuses the deference a reviewing court must show when reviewing issues of fact supporting the agency's decision and deference to be shown to an agency's interpretation of a statute. It is only the latter that is at issue in this appeal. As the analysis by the Court of Appeals reveals, the sole issue is whether the Agency has correctly interpreted the statutes at issue to warrant exclusion of Bernard's \$900 per month contribution to her MFSA from wages in establishing her base weekly pay.

The issue before this court, as stated by the Court of Appeals in *Bernard*, is clear:

*"The issue presented here is whether the amount of pretax pay that an employee elects to place in a flexible spending account (FSA) for qualifying medical expenses constitutes "remuneration" under Ohio's unemployment compensation law."*¹

This is not a finding of fact by the Hearing Officer, but rather, a matter of statutory interpretation engaged in by the Agency. The province of statutory interpretation is with the Courts, not the agency.² Notwithstanding, it is noted that Courts give deference to the Agencies in promulgating

¹ *Bernard v. Unemployment Comp. Review Comm'n*, Miami App., Case No.: 2011-CA-16, 2012-Ohio-958, ¶ 1. (emphasis added).

² *State ex rel. Asti v. Ohio Dep't of Youth Servs.*, Franklin App., Case No.: 03AP-998, 2004-Ohio-6832, ¶6.

and interpreting rules where gaps are statutory gaps, but that is not the case here.³

The Court of Appeals in Bernard laid out the process:

“The plan set up for Bernard by the Foundation was intended to qualify as a section 125 cafeteria plan. *Bernard paid for this benefit with pretax pay—the Foundation contributed nothing.* So instead of receiving \$900 each month in cash, this amount was put into the FSA. The benefit to Bernard of this arrangement was that she did not need to pay federal income or employment taxes on FSA amounts, nor did she pay taxes on the payments that she received from the FSA as reimbursements for qualified medical expenses.”⁴

Further, the Court of Appeals set forth the ambiguity in determining the varying definitions of

“pay,” “remuneration,” “wages,” or “compensation” as follows:

“While it is true that if Bernard had not elected to put \$900 each month into the FSA, she would have received it as cash compensation, it is not technically correct to say that the payments Bernard received from the FSA were compensation. The payments that Bernard received from the FSA were to reimburse her for medical expenses. Still, it may reasonably be argued that reimbursements were, in essence, compensation—after all, it was Bernard’s pay that went into the FSA each month.”⁵

During the hearing before the Hearing Officer, Wakeman did not contest the application for benefits. Counsel for the employer also confirmed on behalf of the employer in his letter to the agency dated April 2009 that “...Ms. Bernard also received *other compensation* pursuant to a Health FSA-125 account, in the amount of \$10,800.00.” The argument by counsel for Wakeman at the Hearing also did not contest that the FSA payments were “compensation.”⁶

Wakeman argues that a finding in favor of Bernard would “modify the statutory construction principles and create a divisive and conflicting standard...[and] would overturn existing legal standards...”[Wakeman Response Brief, p. 5], when in fact Bernard requests this

³ *Id.*, at ¶ 5

⁴ Bernard, 2012-Ohio-958, ¶ 4. (emphasis added).

⁵ *Id.*, at ¶ 8 – 9. (emphasis added).

⁶ Transcript, p. 23.

court to enforce long-standing rules of statutory construction. The Unemployment Compensation system must give the benefit of the doubt to the employee in a situation where interpretation is ambiguous or unclear.⁷ The true question before this Court is whether the Unemployment Compensation Board may disregard the “deference” set out in the governing statute.

Judge Fain’s dissent, from the Court of Appeals’ decision, states the correct rationale:

“Fain, J. Dissent:

[T]he proper interpretation of the statutory definition of remuneration as it applies to the flexible spending account in this case is anything but clear and unambiguous. The principle that a court should give deference to an administrative agency’s interpretation of the legislative enactment that it is charged to administer is a general principle of statutory interpretation employed by courts. This principle finds statutory support in R.C. 1.49(F). The principle that Ohio’s Unemployment Compensation Law shall be construed liberally in favor of the applicant is a specific rule of construction set forth in the Unemployment Compensation Law, itself, at R.C. 4141.46. It is another principle of statutory construction that a special or local provision shall prevail as an exception to a general provision, where the two provisions are in conflict. This principle is codified at R.C. 1.51. Given the specific legislative commandment, in R.C. 4141.46, that the Ohio Unemployment Compensation Law should be liberally construed in favor of applicants for compensation, ... the statute [should be construed] in Bernard’s favor and find her eligible to receive benefits. She earned the moneys that were paid into a flexible spending account for her benefit, through her labor in her employer’s behalf. ...interpreting those moneys as remuneration for purposes of determining her eligibility does not unduly stretch the bounds of the requisite liberal construction of the statute; in my view, that interpretation lies within a reasonable, liberal construction of the statute in her favor.”⁸

The majority opinion by the Court of Appeals dissects the language of O.R.C. §4141.01, 26 USCS §125 and 26 USCS § 3306, but comes to the wrong conclusion. The aforementioned statutes lay out a set of definitions that the Court of Appeals relied upon to determine that the UCRC was reasonable in its interpretation leading to the exclusion of benefits from Bernard.

⁷ ORC § 4141.46: Liberal construction of statutes.

However, the interpretation is not reasonable and is contrary to Ohio law and specific rules of statutory construction.

With regard to statutory construction O.R.C. § 1.51 provides “If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provisions prevail.” As Judge Fain noted in his dissent, the rule that deference be given to agency interpretations of a statute is a general rule; whereas, the O.R.C. § 4141.46 is specific to interpretation of the unemployment compensation statutes. In discussing O.R.C. §§ 4141.01 through 4141.46, the *Braselton* court stated “[a]ll of the above statutory and code provisions “shall be liberally construed” in favor of the applicant for benefits.”⁹

As part of the definitions relied upon by the Court of Appeals, 26 USCS § 125(f) provides: For purposes of this section-- (1) In general. The term “qualified benefit” means any benefit which, with the application of subsection (a), is not includible in the gross income of the employee by reason of an express provision of this chapter [26 USCS §§ 1 et seq.] (other than section 106(b), 117, 127, or 132 [26 USCS § 106(b), 117, 127, or 132]).” Similarly the Court of Appeals cited 26 USCS §3306(b) Wages:

“For purposes of this chapter [26 USCS §§ 3301 et seq.], the term “wages” means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; except that such term 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

⁸ *Bernard*, 2012-Ohio-958, ¶ 15 – 19. (citations omitted).

⁹ *Braselton v. Ohio Dept. of Job & Family Servs*, Montgomery App., Case No.: 21828, 2008-Ohio-751, ¶ 14

[26 USCS § 125] if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that (if section 125 [26 USCS § 125] applied for purposes of this section) section 125 [26 USCS § 125] would not treat any wages as constructively received....”¹⁰

It is undisputed that Bernard paid into a cafeteria plan as described in 26 USCS § 125.

Where the Court of Appeals erred is that it deferred to the administrative agency in determining that the aforementioned statutes exclude from the definition of wages Bernard’s MFSA contributions. However, this is a misinterpretation of the statute. The plain language of 26 USCS 3606(b)(5)(G) is written such that to exclude the salary deduction from the wages the payment made to Bernard “would not be treated as wages without regard to such plan and it is reasonable to believe that [] section 125 would not treat any wages as constructively received.”¹¹ The statute sets forth a two-pronged test for excluding contributions from the definition of wages. First, remuneration is only excluded from wages where the remuneration would not be treated as wages without regard to the plan. Second, remuneration is excluded from wages when it is reasonable to believe that [] section 125 would not treat any wages as constructively received.” Bernard concedes that 26 USCS § 125 would not treat her MFSA payments as constructively received. However, the amount received by Bernard (that she voluntarily contributed to her MFSA) would be treated as wages, but for the plan. This is the part of the 26 USCS §§3606 and 3121 that the Court of Appeals failed to address. In order to exclude Bernard’s MFSA contributions from the definition of wages, the amount contributed could not be treated as wages even if there were not cafeteria plan. This is simply not the case.

It is clear that if no plan were in place, then the \$900 per month that Bernard contributed to her MFSA would have been treated as “pre-tax income,” “wages,” “compensation,” or

¹⁰ 26 USCS §3306(b) *Wages*. (emphasis added).

“remuneration.” It is error for the Court of Appeals to interpret the statute in favor of the UCRC when there is a conflict in interpretations. Where such conflict exists, the agency and the Court of Appeals must interpret the statute liberally in favor of Bernard. Thus, the decision of the Court of Appeals should be overturned and the UCRC should interpret the statutes at issue, in accordance with long-standing statutory construction rules, in favor of Bernard and other similarly situated employees.

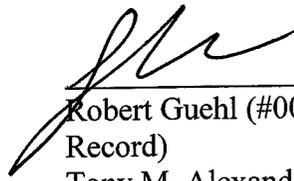
In Wakeman’s third argument opposing Bernard’s proposition of law, it trots out the parade of horrors. Wakeman argues that interpreting the statute to include MFSA contributions as wages will destabilize the fund. Wakeman is seeing unicorns, where there is only a horse. Once the Agency properly interprets the statute, it will then collect contributions to the fund. In the interim it is speculative, at best, to argue that there will be many other instances where the exclusion of MFSA contributions will cause a person to fall below the base salary calculation. It should be noted, that no other case with similar facts could be located.

CONCLUSION

For the reasons stated above, this Court must overturn the decision of the Court of Appeals and determine that its interpretation of the relevant statutes is in error. This Court must determine that Bernard and other similarly situated Ohio employees should not suffer a denial of benefits simply because they were ill enough that they elected to fund a MFSA.

¹¹ 26 USCS 3606(b)(5)(G) (emphasis added).

Respectfully submitted,



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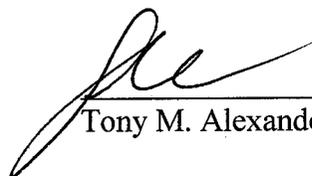
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CERTIFICATE OF SERVICE

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 4th, day of December, 2012:

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