

ORIGINAL

IN THE SUPREME COURT OF OHIO

CLAUDIA BERNARD

Appellant,

-vs-

UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION

and

WAKEMAN TRUST

Appellees.

12-0717

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

Court Of Appeals
Case No.: 11 CA 00016

AMENDED REPLY BRIEF OF APPELLANT CLAUDIA BERNARD

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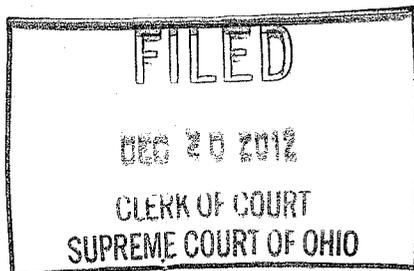


TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES iv

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. iv

STATEMENT OF FACTS1

I. APPELLANT’S REPLY TO BRIEF OF APPELLEE WAKEMAN EDUCATIONAL
FOUNDATION3

**Wakeman’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 3**

II. APPELLANT’S REPLY TO BRIEF OF OHIO DEPARTMENT OF JOB AND FAMILY
SERVICES8

**ODJFS’S Propostion of Law No.: 1: Remuneration placed in a tax-advantaged medical
flexible-spending arrangement is not part of an employee’s “average weekly wage” for
purposes of determining eligibility for unemployment-compensation payments. 8**

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

<i>Bernard v. Unemployment Review Comm'n, Miami Cnty App.</i> , Case No.: 2011-CA-16, 2012-Ohio-958, ¶ 4	3, 4, 6
<i>Bowman v. Adm., Ohio Bureau of Employment Services</i> , (1987), 30 Ohio St. 3d 87	10
<i>Braselton v. Ohio Dept. of Job & Family Servs</i> , Montgomery App., Case No.: 21828, 2008-Ohio-751, ¶ 14	6
<i>Shepherd v. Wearever-Proctor Silex, Inc.</i> , (Pike App, 1991), 75 Ohio App.3d 414.....	9
<i>State ex rel. Asti v. Ohio Dep't of Youth Servs.</i> , Franklin App., Case No.: 03AP-998, 2004-Ohio-6832, ¶6.....	3, 4

Statutes

26 USCS § 125	7
26 USCS § 125(f)	6
26 USCS § 3306	5
26 USCS §§ 1 et seq.....	6
26 USCS §§3606 and 3121.....	7
26 USCS §125	5
26 USCS §3306(b) <i>Wages</i>	7
26 USCS 3606(b)(5)(G)	7
3306	10
4141.01(H)(1)	10
O.R.C. § 1.51	6
O.R.C. § 4141.46	6
O.R.C. §§ 4141.01 through 4141.46.....	6
O.R.C. §4141.01	5
ORC § 4141.01	9
ORC § 4141.46	5, 9, 11
ORC 4141.01(H)(1)(a)	10
ORC Section 4141.01(H)(1)(a)	10

Other Authorities

ODJFSn Brief	1, 9, 10, 11
ODJFS Brief	1, 11
Transcript, p. 23	5

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. Similarly, Appellant Claudia Bernard (“Bernard”) takes exception to the statement of facts presented by Appellee Unemployment Compensation Review Commission (“UCRC,” “ODJFS,” or “Agency”), wherein it cites statements in paragraphs 1 and 2 of that section regarding the Wakeman Educational Foundation (“Wakeman”) and the citation to “facts” in only set forth in Wakeman’s Brief that were not part of the record below.¹ These alleged “facts” should be stricken.

This matter deals with a poverty-level blue collar employee with significant medical expenses for Type 1 diabetes, who took advantage of a voluntary program allowing contribution of income to help pay those medical expenses.² UCRC’s frequent use of the work “shelter” connotes that Bernard participated in an off-shore tax shelter for the super-rich, which is hardly

¹ ODJFS Brief, p. 2.

² Wakeman and ODJFS allude to obtaining a second bite at the apple by now asserting that Bernard’s termination was for just cause. Requiring Bernard to again pursue her claim will result in great and unjustifiable harm.

the case. The decision penalizes Bernard further because of the ambiguity in definition and the confusion of multiple and inconsistent statutory references. Wakeman provided no medical coverage, but rather allowed Bernard to take care of her basic medical needs from the minimal wages paid

**I. APPELLANT’S REPLY TO BRIEF OF APPELLEE WAKEMAN
EDUCATIONAL FOUNDATION**

**Wakeman’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**

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.”³

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.⁴ Notwithstanding, it is noted that Courts give deference to the Agencies in promulgating

³ *Bernard v. Unemployment Comp. Review Comm’n*, Miami App., Case No.: 2011-CA-16, 2012-Ohio-958, ¶ 1. (emphasis added).

⁴ *State ex rel. Asti v. Ohio Dep’t of Youth Servs.*, Franklin App., Case No.: 03AP-998, 2004-

and interpreting rules where gaps are statutory gaps, but that is not the case here.⁵

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.”⁶

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.”⁷

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.”⁸

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

Ohio-6832, ¶6.

⁵ *Id.*, at ¶ 5

⁶ Bernard, 2012-Ohio-958, ¶ 4. (emphasis added).

⁷ *Id.*, at ¶ 8 – 9. (emphasis added).

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.⁹ 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.”¹⁰

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

⁸ Transcript, p. 23.

⁹ ORC § 4141.46: Liberal construction of statutes.

¹⁰ *Bernard*, 2012-Ohio-958, ¶ 15 – 19. (citations omitted).

UCRC was reasonable in its interpretation leading to the exclusion of benefits from Bernard. 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.”¹¹

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

¹¹ *Braselton v. Ohio Dept. of Job & Family Servs*, Montgomery App., Case No.: 21828, 2008-Ohio-751, ¶ 14

his beneficiary [] (G) under a cafeteria plan (within the meaning of section 125 [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....*¹²

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."¹³ 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

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

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

to her MFSA would have been treated as “pre-tax income,” “wages,” “compensation,” or “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.

II. APPELLANT’S REPLY TO BRIEF OF OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

ODJFS’S Proposition of Law No. 1: Remuneration placed in a tax-advantaged medical flexible-spending arrangement is not part of an employee’s “average weekly wage” for purposes of determining eligibility for unemployment-compensation payments.

The position of ODJFS may be most simply stated as an add-on to the definition of “wages”: “compensation” is not “remuneration” and “remuneration” is not “wages,” if the “remuneration” is placed in a tax-advantaged medical flexible spending arrangement. There is no statutory requirement that “wages” or “remuneration” be taxable in order to qualify as

“average weekly wage” for purposes of calculating unemployment compensation. The decision to exclude that portion of an employee’s wages voluntarily contributed to a medical flexible savings account (“MFSA”) from remuneration was arbitrarily made by the Agency.

The crux of the issue is set out: “Bernard made \$333 per week if her voluntary contributions to the tax-advantaged health spending arrangement are included in her ‘remuneration’ and \$125 per week if they are not.”¹⁴ In order for this Court to decide the issue, it must first determine whether the language of the relevant statute is ambiguous and the deference to be given to ODJFS. ODJFS claims “[t]he statute is straightforward and no interpretation—including the agency-deference or liberal-construction canons—is needed.”¹⁵ Notwithstanding its claim that the statute is clear and unambiguous, it was compelled to attach nearly 150 pages of exhibits interpreting the statute.

ODJFS takes a “we have always done it this way” attitude toward whether the Agency’s interpretation of the statute is correct. However, the Agency does not always correctly interpret statutes. In *Shepherd v. Wearever-Proctor Silex, Inc.*, the Court was faced with determining whether the UCRC’s interpretation of ORC § 4141.01(H)(1) as excluding from remuneration disability income received by the aggrieved employee.¹⁶ The court in *Shepherd*, cited to ORC § 4141.46 and its dictate that “...unemployment compensation statutes shall be ‘liberally construed’ in favor of the person to be benefitted.”¹⁷ The *Shepherd* court determined that the Agency’s interpretation of the statute was improper stating “[i]n essence, the board’s definition

¹⁴ Brief of ODJFS, p. 4.

¹⁵ Brief of ODJFS, p. 3.

¹⁶ *Shepherd v. Wearever-Proctor Silex, Inc.*, (Pike App, 1991), 75 Ohio App.3d 414, 417.

¹⁷ *Id.*

of remuneration presented a question of law which it *incorrectly* answered.”¹⁸ The determination of the correct interpretation of statutory language is the province of the courts.¹⁹

The Agency trots out ORC 4141.01(H)(1)(a) to claim that wages paid to Bernard should be excluded from remuneration in order to avoid payment of unemployment benefits. The Agency claims the statute “excludes compensation placed in tax-advantaged flexible-spending arrangements.”²⁰ ORC Section 4141.01(H)(1) provides, in pertinent part:

“Remuneration” means all compensation for personal services, including commissions and bonuses and the cash value of all compensation in any medium other than cash, except that in the case of agricultural or domestic service, “remuneration” includes only cash remuneration. Gratuities customarily received by an individual in the course of the individual’s employment from persons other than the individual’s employer and which are accounted for by such individual to the individual’s employer are taxable wages.

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....*”²¹

The tax exempt status is meant to protect payments from being taxed as income, rather than to penalize the employee.

The Agency’s analysis on pages 4 through 6 of its Brief actually work against it. The Agency concedes in propositions 3 and 4²² that the portion of Bernard’s wages contributed to the MFSA would be considered part of the qualifying wages if she had not elected to contribute to the plan. Thus, the “but for” analysis ODJFS attacks is proven. If Bernard elected to accept the

¹⁸ *Id.*, at 419 (emphasis added).

¹⁹ *Bowman v. Adm., Ohio Bureau of Employment Services*, (1987), 30 Ohio St. 3d 87, 90-91 (Court reversed lower court decision upholding agency interpretation of word “postmark” set forth in the administrative code).

²⁰ Brief of ODJFS, p. 3.

²¹ ORC Section 4141.01(H)(1)(a) (emphasis added).

full amount of her pay as wages, then she would have qualified for unemployment compensation. So, “but for” her decision to contribute to the plan she would qualify and her wages would be subject to Federal Income Tax. The drafting of the federal statutes at issue was done, presumably, to implement a “tax free” benefit to employees and to devise a way in which the wages paid could be construed as income for tax purposes.²³

The analysis ODJFS goes through in its Brief undermines its position that the statute is clear and unambiguous. The sheer number of statutes, codes, rulings, and materials cited do not support clarity. If anything, it bolsters the argument that the statute is anything but clear. Where the statute is unclear and ambiguous and the terms are defined, there is no deference owed to the agency interpretation and, pursuant to ORC § 4141.46, the statute must be liberally construed in favor of benefitting the employee.

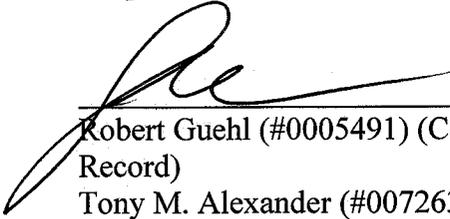
CONCLUSION

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.

²² ODJFS Brief, pp. 4-6.

²³ Left out of this analysis is any discussion of how minimum wage requirements are met if, in fact, the gross amount of pay to Bernard is not considered wages. It would appear inconsistent to count the amount for purposes of meeting minimum wage requirements, but not counting it for purposes of satisfying the qualifying weekly wage requirement.

Respectfully submitted,



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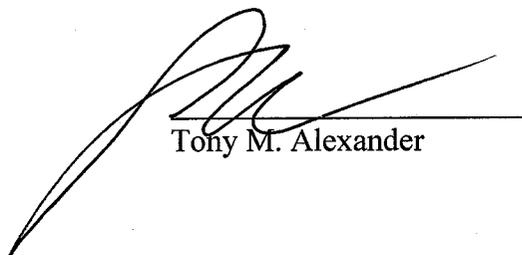
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CERTIFICATE OF SERVICE

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 ~~20th~~ day of December, 2012:

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