IN THE OHIO SUPREME COURT

KEITH LAWRENCE Plaintiff-Appellant vs. CITY OF YOUNGSTOWN Defendant-Appellee	)	CASE NO. 2011-0621 REPLY BRIEF OF APPELLANT KEITH LAWRENCE

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ON APPEAL FROM THE SEVENTH DISTRICT COURT OF APPEALS

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I. THE APPELLEE MISTATES THE FACTUAL RECORD OF THIS CASE.

The Appellee's statement of facts contains several erroneous, misleading or otherwise incorrect assertions that are material to the determination of the court in this case. The decision of the trial court was made upon Appellee's motion for summary judgment. The well-known rule of summary judgment jurisprudence is that all of the facts must be construed most strongly in favor of the non-moving party. Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, Ohio Civ. R. 56(C). Decisions granting summary judgment are to be reviewed de novo. Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Thus, upon this court's review of this matter, all of the facts must be construed most strongly in favor of the Appellant, Keith Lawrence. This court must not give credence to the erroneous factual statements of the Appellee.

First, the Appellee contends that pursuant to the written employment agreement signed upon Lawrence's return to work for the City of Youngstown on July 5, 2006, "Lawrence was also required to obtain a valid CDL license during his first 90 days of the probationary period **and maintain his license thereafter**." (Brief of Appellee at pp. 5-6, emphasis added) In actuality, the agreement stated, "The employee agrees that he has or will obtain, during the first ninety days of his probationary period, a valid CDL license." (R.D. 16, Exhibit F.) The agreement did not state that Lawrence had to "maintain his license thereafter," and there is no evidence in the record that Lawrence failed to obtain a valid CDL during the first 90 days of his probationary period. However, the record does contain substantial evidence that numerous street department employees had their driver's licenses suspended during their employment but were not disciplined and/or discharged. The record shows that Johnny Cox, Terry Carter, Tony Shade, James Cerimele, Dwayne Pixley, and E. Hill were employees whose driver's licenses were

suspended while they were employed by the street department and were not subjected to discharge. (R.D. 20, Lard Affidavit Paragraph 4, R.D. 16, Defendant's Exhibit G, McKinney Affidavit, Paragraph 14, R.D. 17, Lawrence Depo. pp. 104-105.) In the case of Johnny Cox, it was specifically found that he failed to report the suspension of his license, but he was not discharged. (R.D. 16, Defendant's Exhibit G McKinney Affidavit Paragraph 14.) Thus, it is not true that maintaining a CDL was an express condition of Lawrence's continued employment.

Next, the Appellee contends that, "A Notice of Termination **was mailed** to Lawrence on January 9, 2007, which terminated Lawrence effective on that date pursuant to the terms of the agreement." (Brief of the Appellee at pp. 6-7, emphasis added). In fact, there is no evidence in the record of anyone claiming to have placed the Notice of Termination in the mail on January 9, 2007 or on any other date. The record does contain two references to the discharge decision. The affidavit of Sean McKinney, Commissioner of Building and Grounds for the City of Youngstown states, "**On or about** January 9, 2007 I advised the Mayor and Law Director of the City of Youngstown of my findings, and I recommended that Keith Lawrence be terminated from his position with the City of Youngstown." (R.D. 16, Exhibit G, emphasis added) McKinney makes no claim to have served notice of any decision on Lawrence. The affidavit of Youngstown Mayor Jay Williams states, "**On or about** January 9, 2007, upon advise (sic) from the City Law Department, and at the recommendation of the Commissioner of Building and Grounds, I terminated Keith Lawrence from his position with the City of Youngstown." (R.D. 16, Exhibit E, emphasis added) Mayor Williams makes no claim to have placed the "Notice of Termination" in the mail or to have communicated the decision to Lawrence in any other manner.

The only evidence of delivery of the "Notice of Termination" contained in the record is supplied by the Appellant, who stated that he did not receive the "Notice of Termination until February 19, 2007, when it was delivered to him by the "guy secretary" at the street department offices. Lawrence expressly denied receiving the "Notice of Termination" at his home. (R.D. 17, Lawrence Depo. p. 134.)

The Appellee's Brief also erroneously cites the Decision of the State of Ohio Unemployment Compensation Review Commission in an attempt to establish both the date of discharge and that there was "just cause" for Lawrence's termination. (Brief of Appellee at p. 8.) This evidence is inadmissible as Ohio law specifically prohibits use of the records of the Review Commission as evidence in any other case. Ohio Revised Code Section 4141.21 states:

> Except as provided in section 4141.162 of the Revised Code, and subject to section 4141.43 of the Revised Code, the information maintained by the director of job and family services or furnished to the director by employers or employees pursuant to this chapter is for the exclusive use and information of the department of job and family services in the discharge of its duties and shall not be open to the public **or be used in any court in any action or proceeding pending therein, or be admissible in evidence in any action, other than one arising under this chapter or section 5733.42 of the Revised Code.** (emphasis added)
>
> Further, O.R.C. Section 4141.281 states:
>
> (8) COLLATERAL ESTOPPEL
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> No finding of fact or law, decision, or order of the director, hearing officer, the commission, or a reviewing court under this section or section 4141.28 of the Revised Code shall be given collateral estoppel or res judicata effect in any separate or subsequent judicial, administrative, or arbitration proceeding, other than a proceeding arising under this chapter.

The use of the unemployment compensation decision was specifically objected to by counsel for Lawrence when offered by counsel by the City of Youngstown at Lawrence's deposition. (R.D. 17, Lawrence Depo. Pp. 114-115.) Counsel for the Appellee stated at that

time, "And I guess without knowing the ultimate determination on the admissibility of the evidence, I'll have it marked as an exhibit for the purpose of this deposition only, and subject to the court's determination of the nature of Mr. Hume's, Attorney Hume's objection." (R.D. 17, Lawrence Depo. P. 115.) The unemployment decision is clearly inadmissible and cannot be used in this proceeding. Barilla v. Patella (2001), 144 Ohio App.3d 524, 760 N.E.2d 898.

When only the admissible evidence, construed most strongly in favor of Lawrence is considered, it is clear that Lawrence's notice to the City of Youngstown of his potential claim of wrongful discharge in retaliation against him for pursuing workers' compensation claims was timely delivered.

II. THE TERM "DISCHARGE" AS USED IN O.R.C 4123.90 IS, AT A MINIMUM, AMBIGUOUS.

Lawrence contends that the term "discharge" as used in O.R.C. 4123.90 is not ambiguous. Discharge occurs when the employee has been informed of his termination and performs no further services for the employer. Bonham v. Dresser Industries Inc., (C.A. 3 1978), 569 F. 2d 187, certiori denied, (1978), 439 U.S. 821. This simple, direct, and clear definition of "discharge" should be adopted by this court.

However, at a minimum, the term is ambiguous. "Ambiguous" is defined as "open to or having several different meanings." (www.Dictionary.com) Alternatively, "ambiguous is defined as, "capable of being understood in two or more possible senses or ways." (www.miriamwebsters.com).

The fact that this case is before the Ohio Supreme Court upon a certification of a conflict between two or more Court of Appeals districts, that have interpreted the term "discharge" as used in Ohio Revised Code Section 4123.90, differently, proves that the term "discharge" is open

to or has several different meanings, and is capable of being understood in two or more possible ways. "Discharge" could mean the date an employee is informed of the termination of his employment. Mechling v. K-Mart Corporation (1989), 62 Ohio App. 3d 46. It also could mean the date the employee stops working for an employer. Oker v. Ameritech Corp. (2000), 89 Ohio St. 3d 223. Or it could mean the date the employer determines the discharge is effective. (citations omitted). The point is, it is capable of more than one meaning and it is therefore, at a minimum, ambiguous.

The Seventh District Court of Appeals found that the statute was unambiguous and that in order to be interpreted in the manner advocated by Lawrence, the court would have to add the words "notice of" in front of discharge. However, the court could have just as easily found that in order to be interpreted in the manner advocated by the City of Youngstown, the court would have to add the words "the employer's effective date of" in front of discharge. The statute itself does not state that "discharge" means when the employee receives notice of termination, when the employee ceases to work for the employer, or the date the employer sets as the effective date of the discharge. Thus, the term "discharge" as used in O.R.C. Section 4123.90 is ambiguous, and therefore the liberal construction rules must be applied to determine its meaning in this case.

III. THERE IS A DIFFERENCE BETWEEN ENGRAFTING A DISCOVERY RULE ON A CAUSE OF ACTION AND DETERMINING WHEN AN EMPLOYEE HAS BEEN DISCHARGED.

Appellee argues that this court should not engraft a discovery rule on claims made pursuant to the Ohio Workers' Compensation Anti-Retaliation Statute absent the express direction of the legislature to do so. While strong policy arguments can be made that as a remedial statute, claims made pursuant to Ohio's Workers' Compensation statute should be

subject to a discovery rule to determine when the cause of action accrues, the court need not reach that question in this case. The reason the court need not do so is that there is a substantive difference between an employee who knows he has been discharged but only later learns that the reasons for the discharge were discriminatory, and an employee who does not know that he has been discharged at all.

Where there is no notice of the discharge, it is impossible for an employee to know he should take action to challenge the decision. Thus, the cause of action for discriminatory discharge does not arise until notice is received and the employee is actually discharged. On the other hand, where an employee knows he has been discharged, but does not know all of the reasons, at least the employee is on notice that he has suffered an injury. There is a huge difference between holding that a cause of action accrues only when an individual is aware of all of the elements of the claim, as would be the case where a true discovery rule applies, and holding that a cause of action accrues before the individual is aware of any harm at all, as the Seventh District Court of Appeals did in this case. Adoption of the proposition of law advocated by the Appellant, that an employee is discharged for the purposes of O.R.C. 4123.90, when the employee has been informed of his termination and performs no further services for the employer, does not require this court to engraft a discovery rule on claims made pursuant to O.R.C. 4123.90.

IV. APPELLEE'S CONCERNS ABOUT NEGATIVE EFFECTS ON EMPLOYERS ARE MISPLACED.

Appellee argues that adopting the rule advocated by Lawrence will have negative effects on employers and is impractical to apply. Appellee argues that, "How much notice is "unequivocal" notice and when exactly does the employee cease to render services to the

employer are all questions of fact that would inevitably create a myriad of interpretations for courts that go well beyond the plain language of ORC 4123.90..." (Appellee's Brief at p. 29).

Well established legal principles can be applied to determine the sufficiency of notice. For example, the "mailbox rule" provides that there is a presumption that a notice placed in the mail will be received. Weiss v.Ferro Corporation (1989), 44 Ohio St.3d 178, 542 N.E.2d 340. The presumption is rebuttable by producing evidence of non-receipt.

In the present case, the mailbox rule does not apply because there is no evidence of mailing in the record. However, if there was, the burden would then fall on Lawrence to overcome the presumption of receipt. Courts have been making determinations of this type for hundreds of years. Is it not better to ensure that employees are given some opportunity to contest an unlawful discriminatory termination from employment than to potentially allow employers to fraudulently extinguish employee's rights before the employee is even aware of any injury?

Determining the date when services are no longer performed by an employee for an employer would not be difficult to establish. This court, in the case of Oker v. Ameritech Corp. (2000), 89 Ohio St. 3d 223, has already held that where an employee is advised of an employer's intent to discharge him, but the employee continues to work in his same position, the date to bring a claim does not begin to run until the employee's actual date of termination from that position. This is neither a difficult, confusing, nor uncertain standard.

V. THIS COURT SHOULD NOT BE SWAYED BY SPURIOUS ARGUMENTS OF THE APPELLEE.

Appellee's Brief makes several spurious arguments in support of its position. For example, the Appellee argues that, "Lawrence's advocacy for the commencement date to be the "receipt of notice of discharge" as of February 19, 2007, is even less persuasive given the fact

that on the next day when Lawrence filed his charge of discrimination with the OCRC on February 20, 2007, he did not include an ORC 4123.90 worker's compensation claim in his filing." (Brief of Appellee at p. 17)

First, the OCRC does not have jurisdiction over claims of violation of ORC 4123.90 and there would be no reason for Lawrence to file such a claim with the OCRC, even if he was aware of it at the time. Secondly, Ohio's workers' compensation retaliation statute, ORC 4123.90 gives employees ninety (90) days, not one (1) day to give notice of a claim to employers. Filing a claim of racial discrimination with the OCRC demonstrates that Lawrence knew his discharge was unfair, and cannot be construed as a waiver of his right to pursue a claim under Ohio's workers' compensation statute.

Similarly, Appellee tries to cite the fact that Lawrence gave notice of his claim to the City of Youngstown less than 90 days after he learned of his discharge and filed his claim in court less than 180 days after January 9, 2007, as evidence that the term "discharge" should be interpreted in the manner advocated by Appellee. (Brief of Appellee at p. 17) The ninety (90) and one hundred eighty (180) day time periods for taking action under O.R.C. 4123.90 are the outer limits provided under the law. There is absolutely no legal basis to argue that because a claimant did not wait until the end of the allowed period to pursue his claim he has somehow admitted that a shorter period limitations should be applied.

Appellee also cites cases such as Lesko v. Riverside Methodist Hospital (2005) 2005-Ohio-3152, for the proposition that the pendency of a grievance procedure following a discharge decision does not extend the time for providing notice of a claim. No similar circumstance is involved in the present case. Here, there was no grievance filed by Lawrence. Lawrence was

unaware that he had been discharged at all. Thus, the holding of Lesko and similar cases are inapplicable to the facts of the present case.

Finally, Appellee argues that despite the lack of timely notice to Lawrence, he still had forty-nine (49) days to get the notice letter to the City of Youngstown. (Brief of Appellee at p. 27) The problem with Appellee's argument is that the legislature has expressly determined that employees who are discharged in retaliation for filing workers' compensation claims should have ninety (90) days, not forty-nine (49) days to provide notice to their employers. There is no reason for this court to adopt a rule interpreting the term "discharge" in a way that shortens the time available for an employee to vindicate his rights and contravenes the legislative intent expressed in the statute.

CONCLUSION

For the reasons stated herein, the Appellant, Keith Lawrence, respectfully requests that the decision of the Seventh District Court of Appeals be reversed and that this matter remanded to the Mahoning County Court of Common Pleas for trial of Lawrence's claim of unlawful retaliatory discharge pursuant to O.R.C. Section 4123.90.

Respectfully Submitted,

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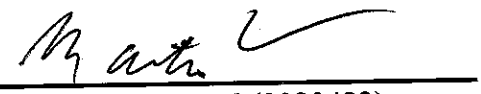
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of the Appellant, Keith Lawrence was served this 5th day of November, 2011 by regular U.S. mail upon Neil D Schor, Harrington, Hoppe, and Mitchell, Ltd., 26 Market Street, Ste. 1200, P.O. Box 6077, Youngstown, OH 44503, Attorney for Defendant-Appellee, City of Youngstown, and Frederick M. Gittes and Jeffrey P. Vardaro, The Gittes Law Group, 723 Oak Street, Columbus, OH 43205, Attorneys for Amicus Curae Ohio Employment Lawyers Association.



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C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLI. Labor and Industry
Chapter 4141. Unemployment Compensation (Refs & Annos)
Furnishing Information
→→ 4141.21 Information furnished administrator not open to public

Except as provided in section 4141.162 of the Revised Code, and subject to section 4141.43 of the Revised Code , the information maintained by the director of job and family services or furnished to the director by employers or employees pursuant to this chapter is for the exclusive use and information of the department of job and family services in the discharge of its duties and shall not be open to the public or be used in any court in any action or proceeding pending therein, or be admissible in evidence in any action, other than one arising under this chapter or section 5733.42 of the Revised Code. All of the information and records necessary or useful in the determination of any particular claim for benefits or necessary in verifying any charge to an employer's account under sections 4141.23 to 4141.26 of the Revised Code shall be available for examination and use by the employer and the employee involved or their authorized representatives in the hearing of such cases, and that information may be tabulated and published in statistical form for the use and information of the state departments and the public.

CREDIT(S)

(2000 S 287, eff. 12-21-00; 2000 H 509, eff. 9-21-00; 1999 H 470, eff. 7-1-00; 1997 H 478, eff. 11-26-97; 1994 H 715, § 1, eff. 7-22-94; 1994 H 715, § 17, eff. 4-22-94 (Per Secretary of State Memorandum); 1993 H 152, § 167, eff. 7-1-93; 1989 H 431, § 1, 3; 1986 H 242; 1985 H 298; 1981 H 593; 1969 H 1; 1953 H 1; GC 1345-20)

UNCODIFIED LAW

1999 H 470, § 13, eff. 3-14-00, reads:

Effective July 1, 2000:

(A) No person shall disclose any information that was maintained by the former Administrator of the Bureau of Employment Services or furnished to the former Administrator by employers or employees pursuant to Chapter 4141. of the Revised Code, unless disclosure is permitted under section 4141.21 of the Revised Code.

(B) No person who was in the employ of the former Administrator of the Bureau of Employment Services shall divulge to any person information maintained by or furnished to the former Administrator under Chapter 4141. of the Revised Code and secured by the person while so employed, in respect to the transactions, property, busi-

APPENDIX "A"

C

Baldwin's Ohio Revised Code Annotated Currentness
Title XLI. Labor and Industry
Chapter 4141. Unemployment Compensation (Refs & Annos)
Benefits
→→ 4141.281 Appeal of determination of benefit rights or claim for benefits determination; redetermination; hearings

APPEALS

(A) APPEAL FILED

Any party notified of a determination of benefit rights or a claim for benefits determination may appeal within twenty-one calendar days after the written determination was sent to the party or within an extended period as provided under division (D)(9) of this section.

(B) REDETERMINATION

Within twenty-one days after receipt of the appeal, the director of job and family services shall issue a redetermination or transfer the appeal to the unemployment compensation review commission. A redetermination under this section is appealable in the same manner as an initial determination by the director.

(C) REVIEW COMMISSION

(1) JURISDICTION

The commission shall provide an opportunity for a fair hearing to the interested parties of appeals over which the commission has jurisdiction. The commission has jurisdiction over an appeal on transfer or on direct appeal to the commission. If the commission concludes that a pending appeal does not warrant a hearing, the commission may remand the appeal to the director for redetermination. The commission retains jurisdiction until the appeal is remanded to the director or a final decision is issued and appealed to court, or the time to request a review or to appeal a decision of a hearing officer or the commission is expired.

(2) CONDUCT OF HEARINGS

Hearings before the commission are held at the hearing officer level and the review level. Unless otherwise

APPENDIX "B"

provided in this chapter, initial hearings involving claims for compensation and other unemployment compensation issues are conducted at the hearing officer level by hearing officers appointed by the commission. Hearings at the review level are conducted by hearing officers appointed by the commission, by members of the commission acting either individually or collectively, and by members of the commission and hearing officers acting jointly. In all hearings conducted at the review level, the commission shall designate the hearing officer or officers who are to conduct the hearing. When the term "hearing officer" is used in reference to hearings conducted at the review level, the term includes members of the commission. All decisions issued at the review level are issued by the commission.

Provisions contained in the remainder of this paragraph apply to hearings at both the hearing officer level and the review level. The principles of due process in administrative hearings shall be applied to all hearings conducted under the authority of the commission. In conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record. Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure. No person shall impose upon the claimant or the employer any burden of proof as is required in a court of law. The proceedings at hearings shall be recorded by mechanical means or otherwise as may be prescribed by the commission. In the absence of further proceedings, the record need not be transcribed. After considering all of the evidence, a hearing officer shall issue a written decision that sets forth the facts as the hearing officer finds them to be, cites the applicable law, and gives the reasoning for the decision.

(3) HEARING OFFICER LEVEL

When an appeal is transferred to the commission by the director, the commission shall notify all interested parties of the time and place of the hearing and assign the appeal for a hearing by a hearing officer. The hearings shall be de novo, except that the director's file pertaining to a case shall be included in the record to be considered.

Following a hearing, the hearing officer shall affirm, modify, or reverse the determination of the director in the manner that appears just and proper. The hearing officer's written decision shall be sent to all interested parties. The decision shall state the right of an interested party to request a review by the commission.

A request for review shall be filed within twenty-one days after the decision was sent to the party, or within an extended period as provided under division (D)(9) of this section. The hearing officer's decision shall become final unless a request for review is filed and allowed or the commission removes the appeal to itself within twenty-one days after the hearing officer's decision is sent.

(4) REVIEW LEVEL

At the review level, the commission may affirm, modify, or reverse previous determinations by the director or at

the hearing officer level. At the review level, the commission may affirm, modify, or reverse a hearing officer's decision or remand the decision to the hearing officer level for further hearing. The commission shall consider an appeal at the review level under the following circumstances: when an appeal is required to be heard initially at the review level under this chapter; when the commission on its own motion removes an appeal to itself within twenty-one days after the hearing officer's decision is sent; when the assigned hearing officer refers an appeal to the commission before the hearing officer's decision is sent; or when an interested party files a request for review with the commission within twenty-one days after the hearing officer's decision is sent.

(5) COMMISSION EXAMINATION

The commission shall consider a request for review by an interested party, including the reasons for the request. The commission may adopt rules prescribing the methods for requesting a review. The commission may allow or disallow the request for review. The disallowance of a request for review constitutes a final decision by the commission.

(6) REVIEW PROCEDURE

If the commission allows a request for review, the commission shall notify all interested parties of that fact and provide a reasonable period of time, as the commission defines by rule, in which interested parties may file a response. After that period of time, the commission, based on the record before it, may do one of the following: affirm the decision of the hearing officer; provide for the appeal to be heard or reheard at the hearing officer or review level; provide for the appeal to be heard at the review level as a potential precedential decision; or provide for the decision to be rewritten without further hearing at the review level. When a further hearing is provided or the decision is rewritten, the commission may affirm, modify, or reverse the previous decision.

(7) NOTICES

The commission shall send written notice to all interested parties when it orders an appeal to be heard or reheard. The notice shall include the reasons for the hearing or rehearing.

(8) PRECEDENTIAL

An appeal the commission identifies as potentially precedential shall be heard at the review level. In the notice for that type of hearing, the commission shall notify the director, all interested parties, and any other parties, as the commission determines appropriate, that the appeal is designated as potentially precedential. After the hearing, parties shall be given the opportunity to submit briefs on the issue or issues involved. The commission may designate a decision as precedential after issuing the decision or at any point in the appeal process, even if the commission does not initially identify the appeal as potentially precedential.

(9) MASS APPEALS

When the commission determines that it has five appeals pending that have common facts or common issues, the commission may transfer the appeals to the review level on its own motion to be heard as a mass appeal, including appeals from claimants separated due to a labor dispute, on the condition that there are fewer than twenty-five claimants involved.

To facilitate a mass hearing, the commission may allow an authorized agent to accept notice of hearing on behalf of claimants. An authorized agent may waive this notice of hearing and also the sending of decisions to individual claimants represented by the agent.

(D) SPECIAL PROVISIONS

(1) TIMELINESS OF APPEALS

The date of the mailing provided by the director or the commission is sufficient evidence upon which to conclude that a determination, redetermination, or decision was sent to the party on that date. Appeals may be filed with the director, commission, with an employee of another state or federal agency charged with the duty of accepting claims, or with the unemployment insurance commission of Canada. Any timely written notice by an interested party indicating a desire to appeal shall be accepted.

The director, commission, or authorized agent must receive the appeal within the specified appeal period in order for the appeal to be deemed timely filed, except that: if the United States postal service is used as the means of delivery, the enclosing envelope must have a postmark date or postal meter postmark that is on or before the last day of the specified appeal period; and where the postmark is illegible or missing, the appeal is timely filed if received not later than the end of the fifth calendar day following the last day of the specified appeal period.

The director and the commission may adopt rules pertaining to alternate methods of filing appeals under this section.

(2) WAIVER

Interested parties may waive, in writing, a hearing at either the hearing officer or review level. If the parties waive a hearing, the hearing officer shall issue a decision based on the evidence of record.

(3) TELEPHONE HEARINGS

Hearing officers may conduct hearings at either the hearing officer or review level in person or by telephone. The commission shall adopt rules that designate the circumstances under which hearing officers may conduct a hearing by telephone or grant a party to the hearing the opportunity to object to a hearing by telephone. An interested party whose hearing would be by telephone may elect to have an in-person hearing, provided that the party agrees to have the hearing at the time and place the commission determines pursuant to rule.

(4) EVENING HEARINGS

Where a party requests that a hearing at either the hearing officer or review level be scheduled in the evening because the party is employed during the day, the commission shall schedule the hearing during hours that the party is not employed. If a conflict concerning a request for an evening hearing and an in-person hearing arises, the commission shall schedule the hearing by telephone during evening hours.

(5) NO APPEARANCE ---- APPELLANT

For hearings at either the hearing officer or review level, if the appealing party fails to appear at the hearing, the hearing officer shall dismiss the appeal. The commission shall vacate the dismissal upon a showing that written notice of the hearing was not sent to that party's last known address, or good cause for the appellant's failure to appear is shown to the commission within fourteen days after the hearing date.

If the commission finds that the appealing party's reason for failing to appear does not constitute good cause for failing to appear, the commission shall send written notice of that finding, and the appealing party may request a hearing to present testimony on the issue of good cause for failing to appear. The appealing party shall file a request for a hearing on the issue of good cause for failing to appear within ten days after the commission sends written notice indicating a finding of no good cause for failing to appear.

(6) NO APPEARANCE ---- APPELLEE

For hearings at either the hearing officer or review level, if the appellee fails to appear at the hearing, the hearing officer shall proceed with the hearing and shall issue a decision based on the evidence of record. The commission shall vacate the decision upon a showing that written notice of the hearing was not sent to the appellee's last known address, or good cause for the appellee's failure to appear is shown to the commission within fourteen days after the hearing date.

(7) AGENT

Any appeal or request for review may be executed on behalf of any party or any group of claimants by an agent.

(8) COLLATERAL ESTOPPEL

No finding of fact or law, decision, or order of the director, hearing officer, the commission, or a reviewing court under this section or section 4141.28 of the Revised Code shall be given collateral estoppel or res judicata effect in any separate or subsequent judicial, administrative, or arbitration proceeding, other than a proceeding arising under this chapter.

(9) EXTENSION OF APPEAL PERIODS

The time for filing an appeal or a request for review under this section or a court appeal under section 4141.282 of the Revised Code shall be extended in the manner described in the following four sentences. When the last day of an appeal period is a Saturday, Sunday, or legal holiday, the appeal period is extended to the next work day after the Saturday, Sunday, or legal holiday. When an interested party provides certified medical evidence stating that the interested party's physical condition or mental capacity prevented the interested party from filing an appeal or request for review under this section within the appropriate twenty-one-day period, the appeal period is extended to twenty-one days after the end of the physical or mental condition, and the appeal or request for review is considered timely filed if filed within that extended period. When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive the determination or decision within the applicable appeal period under this section, and the director or the commission finds that the interested party did not actually receive the determination or decision within the applicable appeal period, then the appeal period is extended to twenty-one days after the interested party actually receives the determination or decision. When an interested party provides evidence, which evidence may consist of testimony from the interested party, that is sufficient to establish that the party did not actually receive a decision within the thirty-day appeal period provided in section 4141.282 of the Revised Code, and a court of common pleas finds that the interested party did not actually receive the decision within that thirty-day appeal period, then the appeal period is extended to thirty days after the interested party actually receives the decision.

CREDIT(S)

(2003 S 92, eff. 12-23-03; 2001 S 99, eff. 10-31-01)

HISTORICAL AND STATUTORY NOTES

Ed. Note: Former 4141.281 amended and recodified as 4141.283 by 2001 S 99, eff. 10-31-01; 2000 H 509, eff. 9-21-00.

Amendment Note: 2003 S 92 deleted "or" before "the commission" and inserted ", or a reviewing court" in division (D)(8).

OHIO ADMINISTRATIVE CODE REFERENCES

Requests for redetermination and appeal, see OAC 4141-27-09

LIBRARY REFERENCES

Unemployment Compensation ⚿ 310 to 328.
Westlaw Topic No. 392T.

C

Baldwin's Ohio Revised Code Annotated Currentness
Rules of Civil Procedure (Refs & Annos)
Title VII. Judgment
Civ R 56 Summary judgment

(A) For party seeking affirmative relief

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly be-

APPENDIX "C"

fore it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CREDIT(S)

(Adopted eff. 7-1-70; amended eff. 7-1-76, 7-1-97, 7-1-99)

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-99 amendment made nonsubstantive grammatical changes to division (C).

Amendment Note: The 7-1-97 amendment substituted "move with or without supporting affidavits for a sum-