

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

MATTHEW J FLEISHER,

CASE NO. 2010 CV 01246

Petitioner-Appellant,

JUDGE STEVEN K. DANKOF

-vs-

**ORDER OVERRULING PETITIONER'S
APPLICATION FOR ATTORNEY FEES
AND EXPENSES**

OHIO UNEMPLOYMENT COMPENSATION
REVIEW COMMISSION, et al,

Respondents-Appellees.

This matter is before the Court on Petitioner Matthew J. Fleisher's ("Fleisher") November 3, 2011 Application for Attorney Fees and Expenses ("Fleisher's Motion"). On November 15, 2011, Respondent Director, Ohio Department of Job and Family Services ("ODJFS") filed its Memorandum in Opposition to Fleisher's Motion. On November 22, 2011, Fleisher filed his Reply.¹

Fleisher seeks award of attorney fees and expenses pursuant to 28 U.S.C.S. 2412 and R.C. 2335.39. Fleisher's argument is not well-taken.

First, there is no express provision in R.C. 4141.282 permitting the award of attorney's fees, and typically "an award of attorney fees *must be* predicated upon statutory authority" (emphasis added).² Further, an unemployment compensation appeal pursuant to R.C. 4141.282 is a "special statutory proceeding" for which Ohio's Rules of Civil Procedure³ do not apply.⁴

¹ On December 21, 2011, the Court required an additional brief from ODJFS, which was filed on January 9, 2012. On January 11, 2012, Fleisher filed an additional Reply

² *Collyer v. Broadview Dev. Ctr.*, 81 Ohio App.3d 445, 611 N.E.2d 390 (10th Dist. 1992), citing *State ex. rel. Gallucci v. Brown*, 10th Dist. No. 91AP-453, 1991 Ohio App. LEXIS 4569.

³ And the attorney's fees provisions therein.

⁴ Ohio Civ. R. 1 (C)(7). See Also *Nicoll v. Ohio Dep't of Job & Family Servs.*, 2nd Dist. Montgomery No. 24509, 2011-Ohio-5207.

Second, 28 U.S.C.S. 2412, commonly referred to as the Equal Justice Act, is inapplicable to this administrative appeal brought pursuant to R.C. 4141.282.⁵

R.C. 2335.39 provides a mechanism for prevailing parties in *civil actions* against the state to recover attorney fees. Predictably, “Civil action” is not defined in the Revised Code, but R.C. 2307.01 defines *action* as “An ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense.”⁶ The Court is not persuaded that an administrative appeal is a “civil action” for purposes of R.C. 2335.39,⁷ and clearly the appeal of a denial of unemployment compensation benefits does not fall under R.C. 119.12.⁸

Even were R.C. Chapter 119 applicable to appeal of the denial of unemployment compensation benefits concerning unemployment compensation benefits, R.C.2335.39(F)(3)(a) *expressly* disallows compensation of attorney’s fees “if the adjudication hearing was conducted for the purpose of determining the eligibility or entitlement of any individual to benefits.”⁹ Clearly, the instant case concerned the denial of Fleisher’s trade readjustment allowance benefits.¹⁰

Lastly, R.C. 2335.39, “Ohio’s version of the Equal Access to Justice Act”,¹¹ was enacted for a remedial purpose: “to censure *frivolous* government action which coerces a party to resort to courts to protect his or her rights” (emphasis added).¹² Even were R.C. 2335.39 apposite and Fleisher otherwise eligible to recover fees, he could not recover here because the Court *expressly* finds that the *State was substantially justified* in initiating the matter in controversy.¹³ And there is simply no evidence before the Court otherwise.¹⁴

⁵ The Court’s independent search for case law supporting a contrary result revealed nothing supporting Fleisher’s application here. Further, the analysis herein to determine “substantial justification” would be identical, and equally unsuccessful as discussed below.

⁶ R.C. 2307.01.

⁷ Rather, the Court has determined the opposite is true.

⁸ R.C. 2335.39 (B)(1).

⁹ R.C. 119.092(F)(2).

¹⁰ See Court’s October 5, 2011 Decision Entry and Order.

¹¹ *Collyer, supra*.

¹² *Collyer, supra*, citing *Malik v. State Medical Bd.*, 10th Dist. No. 88AP-741, 1989 Ohio App. LEXIS 3770.

¹³ The Court is assuming that the denial of benefits can constitute “initiating the matter in controversy” for purposes of this analysis.

Therefore, the Court hereby **OVERRULES** Fleisher's Application for Attorney Fees and Expenses.

SO ORDERED:

JUDGE STEVEN K. DANKOF

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JAMES P FLEISHER
(937) 223-3277
Attorney for Matthew J Fleisher

YVONNE TERTEL
(614) 466-8600
Attorney for Director, Ohio Dept. Of Job Family Services

Copies of this document were sent to all parties listed below by ordinary mail:

OHIO UNEMPLOYMENT COMPENSATION REVIEW COMMISSION
145 SOUTH FRONT STREET
P.O. BOX 182299
COLUMBUS, OH 43218-2299
Defendant

ELIZABETH HALL, Bailiff (937) 225-4409

¹⁴ ODJFS properly points out costs may not be assessed against the State absent a finding of bad faith. *State, ex. rel. Crockett v. Robinson*, 67 Ohio St.2d 33 (1981), citing *Sorin v. Bd. Of Edn.*, 46 Ohio St.2d 177 (1976).



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: MATTHEW J FLEISHER vs OHIO UNEMPLOYMENT
COMPENSATION REVIEW COMMISSION
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Type: Order:

So Ordered

A handwritten signature in black ink, appearing to read "Steven K. Dankof". The signature is stylized with a large, sweeping flourish that extends upwards and to the right.

Steven K. Dankof