

OCT 30 2013

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CUYAHOGA COUNTY
CLERK OF COURTS
By *Williams* Deputy

CLEVELAND CLINIC FOUNDATION, :

Appellant, :

vs. :

DIRECTOR, OHIO DEPARTMENT OF :
JOB AND FAMILY SERVICES, ET AL., :

Appellees. :

CASE NO. CV-12-790188

JUDGE ROBERT C. MCCLELLAND

FINAL JUDGMENT ENTRY OF REMAND

This case came on for consideration as a statutory unemployment appeal that was filed by Appellant, Cleveland Clinic Foundation (CCF), under R.C. 4141.282. CCF appeals from the *Decision* of the Unemployment Compensation Review Commission (UCRC) dated August 16, 2012 that held that Appellee Charisse Swift (Swift) was eligible for unemployment benefits under R.C. 4141.29 with respect to her employment at CCF.

According to the evidence in the certified record, Swift voluntarily elected to be employed as a p.r.n. nurse at CCF (instead of a part-time nurse or full-time nurse) in order to retain the flexibility to select her work shifts from the hundreds of work shifts that are published daily on the CCF Shift Wise website.¹ According to the evidence in the certified record, Swift was trained by CCF on the CCF Shift Wise website and understood that she was required to access the CCF Shift Wise website to sign up for available shifts as a mandatory condition of her employment.

In the final *Decision* of the UCRC dated August 16, 2012, the UCRC held that Swift was eligible for unemployment benefits on the basis that she was unemployed due to an alleged "lack of work" under R.C. 4141.29 even though Swift was still employed by CCF and failed to access the CCF Shift Wise website to sign up for any available shifts as a mandatory condition of her employment at CCF. In this case, CCF argues that Swift was ineligible for unemployment benefits under R.C. 4141.29 because: 1) Swift was not unemployed due to a "lack of work" at CCF under R.C. 4141.29; 2) Swift refused to accept an offer of suitable work in violation of R.C. 4141.29(D)(2)(b); and/or 3) Swift was not *available for and actively seeking suitable work as*

¹ According to the evidence in the certified record, "p.r.n." is an acronym for the phrase *pro re nata*, a Latin phrase that has been defined as follows: "as circumstances require" or "as needed". According to the evidence in the certified record, a p.r.n. nurse at CCF is not required to work a specific schedule and retains the flexibility to select any available work shifts from the CCF Shift Wise website.

required by R.C. 4141.29(A)(4)(a) because she declined full-time employment at CCF and failed to access the CCF Shift Wise website to sign up for (*actively seek*) any available shifts as a mandatory condition of her employment at CCF. See *In re Claim of Kerr v. Cleveland Clinic Foundation, Ohio Unemployment Compensation Review Commission, Docket No. H-2013000668 (March 20, 2013)* (See EXHIBIT 1); *Barry v. Baldwin County Hospital*, 241 Ga. App. 119 (1999)(See EXHIBIT 2); *ODJFS New Fact-Finding Questions for "Still Employed" Issues* (See EXHIBIT 3); R.C. 4141.29(D)(2)(b); R.C. 4141.29(A)(4)(a).

According to the *Decision* of the UCRC dated August 16, 2012, it appears that the UCRC did not examine the issue of whether Swift was ineligible for unemployment benefits because she was not available for and actively seeking suitable work under R.C. 4141.29(A)(4)(a) on the alleged basis that she declined full-time employment at CCF and failed to access the CCF Shift Wise website to sign up for (*actively seek*) available work shifts as a mandatory condition of her employment at CCF. See R.C. 4141.29(A)(4)(a).

Accordingly, after due consideration, the Court hereby ORDERS that this case shall be REMANDED to the UCRC under R.C. 4141.282(H) for an in-person *de novo* evidentiary hearing to be held by the UCRC in the claim under R.C. 4141.281 on the specific issues set forth below to decide whether Swift was ineligible for unemployment benefits under R.C. 4141.29 because:

- 1) she was not unemployed due to a "*lack of work*" at CCF under R.C. 4141.29; or
- 2) she refused to accept an offer of suitable work in violation of R.C. 4141.29(D)(2)(b) on the alleged basis that she failed to access the CCF Shift Wise website to sign up for available work shifts as a mandatory condition of her employment at CCF; or
- 3) she was not available for and actively seeking suitable work as required by R.C. 4141.29(A)(4)(a) on the alleged basis that she declined full-time employment at CCF and failed to access the CCF Shift Wise website to sign up for (*actively seek*) available work shifts as a mandatory condition of her employment at CCF.

See *In re Claim of Kerr v. Cleveland Clinic Foundation, Unemployment Compensation Review Commission, Docket No. H-2013000668 (March 20, 2013)* (See EXHIBIT 1); *Barry v. Baldwin County Hospital*, 241 Ga. App. 119 (1999)(See EXHIBIT 2); *ODJFS New Fact-Finding Questions for "Still Employed" Issues* (See EXHIBIT 3); R.C. 4141.29; R.C. 4141.29(D)(2)(b); R.C. 4141.29(A)(4)(a). Costs to Appellant CCF.

RECEIVED FOR FILING

OCT 30 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By *Williams* Deputy



JUDGE ROBERT C. MCCLELLAND

NOTICE TO THE CLERK OF COURTS

Pursuant to Civ. R. 58(B), the Clerk of Courts shall serve notice of this *Final Judgment Entry* and its date of entry on the Journal upon all parties and/or counsel of record.

APPROVED BY:

Stephanie Hathaway, Esq.
Reminger Co., L.P.A.
101 West Prospect Avenue, Suite 1400
Cleveland, Ohio 44115
Attorney for Appellant Cleveland Clinic Foundation

Patrick MacQueeney, Esq.
Assistant Attorney General
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615 W. Superior Avenue, 11th Floor
Cleveland, OH 44113-1899
Attorney for Appellee ODJFS



State of Ohio
Unemployment Compensation Review Commission
P.O. Box 182299
Columbus, Ohio 43218-2299

Docket No: H-2013000668

DECISION

In re claim of:
Gwendolyn R. Kerr - Appellant

Employer:
Cleveland Clinic Foundation
UCO No.: 0830183000-0002

CASE HISTORY

The claimant, Gwendolyn R. Kerr, filed an Application for Determination of Benefit Rights for a benefit year beginning June 17, 2012.

On December 18, 2012, the Director issued a Redetermination that disallowed claims for the weeks ending September 22, 2012, and September 29, 2012. The Redetermination also disallowed the claims for the weeks ending October 13, 2012, through December 8, 2012. The claims were disallowed because the claimant was neither totally nor partially unemployed during said weeks. The Redetermination also found that claimant had been overpaid benefits of \$3286.00.

On January 7, 2013, an appeal from the Redetermination was filed by claimant.

On January 08, 2013, the Ohio Department of Job and Family Services transferred jurisdiction to the Unemployment Compensation Review Commission.

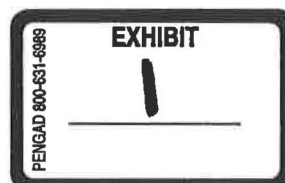
On March 19, 2013, a hearing was held before Hearing Officer Charles Kohler by telephone. Claimant appeared and testified. Linda Green represented the employer. Margaret Duffy, Director of Staffing Resources, testified on behalf of the employer.

FINDINGS OF FACT

Claimant worked for the Cleveland Clinic Foundation as a full-time medical-surgical nurse from 2000 to 2008. In 2008, she voluntarily changed her status from full-time to PRN because she obtained a full-time teaching position with a public school district. Her rate of pay as a PRN employee was \$33.60 per hour.

An employee in PRN status does not have a regular work schedule. Instead, the employer makes various shifts of work available to the employee. PRN employees have access to a website that lists all available shifts of work. The employer consistently has multiple shifts of work available for medical-surgical nurses.

A PRN employee is able to retain seniority as long as the employee works at least one shift every 60 days. From the time that the claimant changed her status in 2008, she worked one or two shifts every 60 days.



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The claimant was laid off from her teaching position at the end of the 2011-2012 school year. She did not notify the employer of her layoff. The claimant could have changed her status from PRN to full-time. She did not change her status because she hoped to obtain another teaching position.

During the weeks in issue in this case, the employer had work available for the claimant that the claimant did not accept. The employer had a sufficient number of shifts available so that the claimant could have worked 40 or more hours per week. During some of the weeks that issue, claimant had earnings that exceeded her weekly benefit amount. In other weeks, she had no earnings or earnings less than her weekly benefit amount. During each of the weeks in issue, the employer had a sufficient amount of work available so that claimant could have had earnings in excess of her weekly benefit amount.

ISSUE 1

Was claimant totally or partially unemployed during the weeks in issue?

LAW

"An individual is "totally unemployed" in any week during which the individual performs no services and with respect to such week no remuneration is payable to the individual." [Ohio Revised Code Section 4141.01 (M)]

An individual is "partially unemployed" in any week if, due to involuntary loss of work, the total remuneration payable to the individual for such week is less than the individual's weekly benefit amount. [Ohio Revised Code Section 4141.01 (N)]

"Each eligible individual shall receive benefits as compensation for loss of remuneration due to involuntary total or partial unemployment in the amounts and subject to the conditions stipulated in this chapter." [Ohio Revised Code Section 4141.29]

REASONING

The purpose of unemployment compensation benefits is to provide temporary relief to individuals who become involuntarily unemployed due to adverse business and/or economic conditions. "The act was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own." *Salzl v. Gibson Greeting Cards* (1980), 61 Ohio St.2d 35, 39, 399 N.E.2d 76.

In order to be eligible for unemployment compensation benefits, a claimant must have a loss of remuneration due to involuntary unemployment. Voluntary unemployment is not compensable under the Ohio Unemployment Compensation Law. In this case, the employer has presented testimonial and documentary evidence establishing that claimant did not accept all work that was available to her during the weeks in issue.

Claimant testified that she did not accept all of the work because she preferred to work at hospitals that were closer to her home. However, the evidence shows that the employer had work available in multiple hospitals in the Greater Cleveland area. Claimant resides in the Greater Cleveland labor market area. None of the hospitals was located an excessive distance from claimant's residence.

Claimant also stated that she did not want to work for certain hospitals because they charged for parking. Many employees are required to pay for their own parking in order to work. The fact that the employer did not provide free parking is not a valid reason for failing to accept suitable work.

During the weeks in issue, claimant did not meet the eligibility requirements set forth in the Ohio Revised Code. Therefore, the claims for the weeks in issue must be disallowed.

The claimant also contends that the Cleveland Clinic Foundation should be excluded from her claim because her primary base period employer was the Cleveland Hts. Board of Education. However, the claimant was also employed by the Cleveland Clinic Foundation. The Cleveland Clinic Foundation is therefore interested party to this claim. There is no provision in Ohio law that would allow the claimant to exclude an employer from her claim.

ISSUE 2

Was claimant overpaid benefits of \$3286.00?

LAW

An individual who within three years of the end of the individual's benefit year or within six months after the determination under which the individual was credited with a waiting period or paid benefits, whichever is later, has been paid benefits, or credited with a waiting week to which the individual was not entitled, shall have the claim canceled. Benefits that are overpaid shall be repaid to the department, or withheld from future benefits, unless the overpayment results from a clerical error in a decision, or an error in an employer's report. 4141.35 (B) O.R.C.

REASONING

When an individual is paid benefits to which he or she is not entitled, Ohio Revised Code Section 4141.35 (B) requires that those benefits be repaid. In this case, the evidence shows that the claimant was not eligible for benefits for the weeks ending September 22, 2012, and September 29, 2012, and for the weeks ending October 13, 2012, through December 8, 2012. Claimant was paid benefits with respect to these weeks. Since claimant was not eligible for these benefits, she is required to repay the benefits to the Ohio Department of Job and Family Services.

DECISION

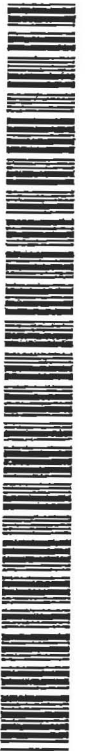
The Director's Redetermination, issued December 18, 2012, is hereby affirmed. Claimant was neither totally nor partially unemployed during the weeks ending September 22, 2012, and September 29, 2012, and the weeks ending October 13, 2012, through December 8, 2012. The claims for these weeks remain disallowed.

Claimant was overpaid benefits of \$3286.00. Claimant is required to repay these benefits to the Ohio Department of Job and Family Services.

This decision rules only on the issue(s) set forth above.

Charles Kohler, Hearing Officer

CWK



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NOTICE OF OVERPAYMENT

Claimant is advised that because of this decision an overpayment of benefits already received now exists. An order of repayment will be issued by the Director of the Ohio Department of Job and Family Services. Balances are due immediately upon receipt. Overpayments not paid in full within forty-five days of a decision becoming final may be referred to Ohio's Attorney General for further collection efforts. If the overpayment is a result of fraudulent misrepresentation and not repaid within thirty days, interest on the outstanding balance will accrue at an annual rate of fourteen percent, compounded monthly. When all overpaid benefits are repaid according to an approved repayment plan, the Director may cancel interest accrued during the period of the repayment plan. In addition, the Director may take action to recover fraudulent overpayments, including, but not limited to, attachment and/or garnishment proceedings as well as subsequent charges and court costs. Any outstanding balances not repaid or recovered through collection efforts will be recovered by the withholding of any future benefits to which claimant is or may become entitled.

Payment may be made by check or money order to P O Box 182059, Ohio Department of Job and Family Services, Columbus, Ohio 43218-2059. To ensure proper credit to claimant's account, be sure to include the claimant's social security number on the check or money order. If claimant is unable to remit the full overpayment amount, but wishes to enter into a repayment agreement, he/she should contact the Attorney General's office at 1-800-282-0515.

OJI Determination #: 225284241

[RCX Temp: BlankHistory]

APPEAL RIGHTS

This decision was mailed on : March 20, 2013

A Request for Review before the U.C. Review Commission may be filed by any interested party within twenty-one calendar days after this decision is mailed. Said twenty-one day period is calculated to end on April 10, 2013.

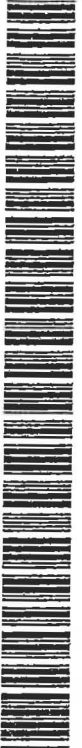
The Request for Review must be in writing and signed by the appealing party or an authorized representative. The request should set forth the reasons why the appellant disagrees with the Hearing Officer's decision. You may file your Request for Review by mailing it to the U.C. Review Commission, PO Box 182299, Columbus, Ohio 43218-2299, or by faxing it to (614) 387-3694.

This decision was sent to the following:

Gwendolyn R. Kerr
2610 MAYFIELD RD
CLEVELAND HTS, OH 44106-5525
Via Email

Cleveland Clinic Foundation
3050 SCIENCE PK DR
BEACHWOOD, OH 44122

Attn: Cleveland Clinic Foundation
CENTER FOR HEALTH AFFAIRS
1226 Huron Rd E
Cleveland, OH 44115-1712



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241 Ga. App. 119, *; 526 S.E.2d 153, **;
1999 Ga. App. LEXIS 1566, ***; 2000 Fulton County D. Rep. 54



DEPARTMENT OF LABOR v. BALDWIN COUNTY HOSPITAL AUTHORITY et al. BARRY v. BALDWIN COUNTY HOSPITAL AUTHORITY et al.

A99A1616. A99A1617.

COURT OF APPEALS OF GEORGIA

**241 Ga. App. 119; 526 S.E.2d 153; 1999 Ga. App. LEXIS 1566;
2000 Fulton County D. Rep. 54; Unemployment Ins. Rep. (CCH) P8368**

November 24, 1999

SUBSEQUENT HISTORY: Certiorari Applied for. Petition for Certiorari Denied March 10, 2000, Reported at: 2000 Ga. LEXIS 270. Petition for Certiorari Denied March 10, 2000, Reported at: 2000 Ga. LEXIS 269.

PROCEDURAL POSTURE: Appellant nurse appealed the judgment of the Baldwin Superior Court (Georgia) denying his claim for unemployment compensation benefits in favor of appellee hospital.

OUTCOME: The judgment was affirmed; appellant was not entitled to unemployment benefits because he voluntarily chose part-time, intermittent employment that allowed him to retain control over the number of hours that he worked at the hospital.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN1] The "any evidence" standard applies to the appellate court's review of the Department of Labor's factual findings, though it reviews its legal conclusions.

Labor & Employment Law > Unemployment Compensation > Benefit Entitlements

Labor & Employment Law > Unemployment Compensation > Eligibility > General Overview

[HN2] In order to qualify for unemployment benefits according to the Employment Security Act, an employee must be "unemployed." An individual is deemed unemployed in any week during which the individual performs no services and with respect to which no wages are payable to him or her or in any week of less than full-time work if his or her deductible earnings do not equal or exceed his or her weekly benefit amount. Ga. Code Ann. § 34-8-47.

Labor & Employment Law > Unemployment Compensation > Eligibility > General Overview

[HN3] The award of benefits for deliberate part-time-only work would be contrary to the basic purpose of the law as stated in Ga. Code Ann. § 34-8-2, which is to enhance stable employment and lighten the burden of involuntary unemployment. The individual who of his own choice opts for part-time employment of a highly unstable nature would hardly appear to be involuntarily unemployed during the obviously contemplated intervals between calls.



COUNSEL: Thurbert E. Baker, Attorney General, Dennis R. Dunn, Deputy Attorney General, Susan L. Rutherford, Senior Assistant Attorney General, Kimberly B. Lewis, Assistant Attorney General, for appellant (case no. A99A1616).

Howard G. Sokol, Phyllis J. Holmen, Lisa J. Krisher, Mary I. Dickerson, for appellant (case no. A99A1617).

Jones, Cork & Miller, William T. Prescott, W. Warren Plowden, Jr., W. Kerry Howell, for appellees.

JUDGES: ELLINGTON, Judge. Andrews, P. J., and Ruffin, J., concur.

OPINION

ELLINGTON, Judge.

In January 1993, William Barry began employment as a "PRN," an on-call, as-needed nurse, at Oconee Regional Hospital. Barry filed a claim for unemployment compensation benefits in July 1997 which was denied by the claim examiner. Barry appealed that decision, and a hearing was held in September 1997. The hearing officer reversed the claim examiner's decision and awarded Barry benefits. The Board of Review, with one member dissenting, upheld that determination on appeal. In December 1997, the hospital appealed the board's decision to superior court. The court reversed the award of benefits. We granted applications for discretionary appeal of the Georgia Department of Labor and Barry to determine whether an as-needed nurse is entitled to unemployment benefits under Georgia's Employment Security Law. The cases have been consolidated for this opinion. For the following reasons, we affirm the denial of benefits.

[HN1] The "any evidence" standard applies to our review of the Department of Labor's factual findings, though we review its legal conclusions. *Holstein v. North Chem. Co.*, 194 Ga. App. 546, 547- 548 (3) (390 S.E.2d 910) (1990).

[HN2] In order to qualify for unemployment benefits according to the Employment Security Act, an employee must be "unemployed." An individual is deemed unemployed "in any week during which the individual performs no services and with respect to which no wages are payable to him or her or in any week of less than full-time work if his or her deductible earnings do not equal or exceed his or her weekly benefit amount." O.C.G.A. § 34-8-47.

This Court has not interpreted the Employment Security Act as it relates to as-needed nurses, but has interpreted the Act in a case involving similar facts concerning substitute teachers in *Campbell v. Poythress*, 216 Ga. App. 834 (456 S.E.2d 110) (1995). The Court concluded that [HN3] the award of benefits for deliberate part-time-only work would be contrary to the basic purpose of the law as stated in O.C.G.A. § 34-8-2, which is to enhance stable employment and lighten the burden of involuntary unemployment. *Id.* at 835. The individual who of his own choice opts for part-time employment of a highly unstable nature would hardly appear to be involuntarily unemployed during the obviously contemplated intervals between calls. *Id.*

There are many similarities between this case and *Campbell*. Both cases involve an employee who was called only on an as-needed basis. There was no contractual duty on behalf of the employers to guarantee a certain number of hours, or any hours at all. There was no duty on behalf of the employee to work a certain number of hours. In both cases the employee could accept or reject the hours offered and accept work from another employer at his option. As in *Campbell*, the record in this case indicates that Barry did reject work hours.

241 Ga. App. 119, *; 526 S.E.2d 153, **;
1999 Ga. App. LEXIS 1566, ***; 2000 Fulton County D. Rep. 54

The trial court determined that the rule of *Campbell* applied to the facts of this case. We agree. Barry voluntarily chose part-time, intermittent employment which allowed him to retain complete control over the number of hours that he worked at the hospital, if he chose to work at all. He cannot now claim that he is entitled to unemployment benefits during times when no work is offered. It would be contrary to the purpose of the Act as stated in O.C.G.A. § 34-8-2 to find Barry involuntarily unemployed.

Judgment affirmed. Andrews, P. J., and Ruffin, J., concur.

NEW FACT-FINDING QUESTIONS FOR "STILL EMPLOYED" ISSUES

Applies to sub-types "hours reduced" and "working part-time (no change in hours)"

Claimant

1. Did you complete the last work assignment/shift that you accepted from this employer?

If No, please explain.

2. How do you obtain work assignments/shifts from this employer? (Please select from below.)
 - a. Employer schedules me and notifies me of the schedule? Please explain.
 - b. Employer contacts me and offers assignments/shifts? Please explain.
 - c. I contact the employer for assignments/shifts? Please explain.
 - d. I review assignments/shifts that are available and sign up for them? Please explain.
 - e. Other method? Please explain.

3. If the employer contacted you to offer an assignment/shift at the end of (or after) your last assignment, did you refuse the assignment?

If the assignment was refused, please explain why.

4. If you contact the employer for assignments/shifts, is that requirement part of an employment agreement between you and the employer of record?
5. If you contact the employer for assignments/shifts, did you contact the employer since the conclusion of your last assignment?

If you did contact the employer for assignments/shifts, were you advised that there was no work available?

6. If you review available assignments/shifts and then sign up for assignments/shifts, did you look for further assignments/shifts from the employer during each week for which you are claiming unemployment benefits?
7. Please provide any additional information about this issue.
8. Do you want this agency to issue a determination based on the information you have provided in this response? If no, any further information that you wish to provide must be received by your processing center by the deadline date on this notice.



Employer

1. Did claimant complete his/her last work assignment/shift?

If No, please explain.

2. How does the claimant obtain work assignments/shifts? (Please select from below.)
 - a. You schedule claimant and notify him/her of the schedule? Please explain.
 - b. You contact claimant and offer assignments/shifts? Please explain.
 - c. Claimant contacts you for assignments/shifts? Please explain.
 - d. Claimant reviews available assignments/shifts and signs up for them? Please explain.
 - e. Other method? Please explain.

3. If you contacted claimant to offer an assignment/shift, did he/she refuse the assignment?

If the assignment was refused, please explain why.

4. If the claimant contacts you for assignments/shifts, is such contact a requirement of the employment agreement between you and the claimant?

5. If claimant contacts you for assignments/shifts, did he/she contact you since the conclusion of the last assignment?

If Yes, was claimant advised that there was work available? Please explain.

6. If claimant reviews available assignments/shifts and then signs up for assignments/shifts, do you know whether he/she looked for further assignments/shifts during each week since the last assignment/shift?

If Yes, please explain.

7. Please provide any additional information about this issue.

8. Do you want this agency to issue a determination based on the information you have provided in this response? If no, any further information that you wish to provide must be received by your processing center by the deadline date on this notice.