

JUN 16 2014

MARY L. SWAIN
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

STEVEN M. TERRY, et al.,

Case No. CV2014 04 1025

Plaintiff

(Charles L. Pater, Judge)

vs.

HJ HAULING SERVICES, INC., et al.,

ORDER DENYING MOTION TO
DISMISS OF DEFENDANTS HJ
HAULING SERVICES, INC. AND
PAUL J. BOWMAN, JR.

Defendant

ORDER GRANTING MOTION OF
DIRECTOR, OHIO DEPARTMENT OF
JOB AND FAMILY SERVICES TO
REMAND UNEMPLOYMENT
COMPENSATION CASE

ORDER DENYING MOTION TO STRIKE
INSUFFICIENT CLAIM OF DEFENDANTS
HJ HAULING SERVICES, INC. AND
PAUL J. BOWMAN, JR.

ORDER DENYING MOTION TO
BIFURCATE OF DEFENDANTS HJ
HAULING SERVICES, INC. AND
PAUL J. BOWMAN, JR.

ORDER GRANTING MOTION TO
DISMISS BASED UPON IMPROPER
VENUE AND TO TRANSFER CASE TO
HAMILTON COUNTY COURT OF
COMMON PLEAS

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

This matter is before the court on the following motions:

1. The motion to dismiss the administrative appeal of plaintiff Steven M. Terry filed by defendants HJ Hauling Services, Inc. and Paul J. Bowman, Jr.;

2. The motion to remand the unemployment compensation portion of this case to the Ohio Unemployment Compensation Review Commission, filed by the Director, Ohio Department of Job and Family Services ("ODJFS");
3. The motion to strike an insufficient claim, filed by defendants HJ Hauling Services, Inc. and Paul J. Bowman, Jr.;
4. The motion to bifurcate the unemployment compensation portion of this case from the remainder of the claims, filed by defendants HJ Hauling Services, Inc. and Paul J. Bowman, Jr.;
5. The motion to dismiss the non-unemployment compensation claims based upon improper venue and to transfer the case to the Hamilton County Court of Common Pleas, filed by defendants HJ Hauling Services, Inc. and Paul J. Bowman, Jr.;
6. The motion to order a more definite statement, filed by defendants HJ Hauling Services, Inc. and Paul J. Bowman, Jr.; and
7. The motion for attorney fees filed by defendants HJ Hauling Services, Inc. and Paul J. Bowman, Jr.

Based upon the pleadings and the other matters of record herein, the motion to dismiss the administrative appeal is DENIED; the motion to remand the unemployment compensation portion of this case is GRANTED; the motion to strike an insufficient claim is DENIED; the motion to bifurcate the unemployment compensation portion of this case is DENIED; the motion to dismiss the non-unemployment compensation claims and to transfer the case to Hamilton County is GRANTED; and the motion for attorney fees is DENIED. The motion to order a more

definite statement is reserved for the Hamilton County Court of Common Pleas to rule on after the case is transferred.

The motion to dismiss the administrative appeal of plaintiff Steven M. Terry.

This case involves three claims. In the first, an administrative appeal pursuant to R.C. 4141.282, Terry has appealed from the decision of the Ohio Unemployment Compensation Review Commission, which held that he was discharged by HJ Hauling for just cause. In the second claim, Terry and plaintiff Clarence Darryl Wallace contend that they were employed by defendants HJ Hauling and Bowman, and that these defendants failed to pay them wages for all hours they worked in a timely and appropriate manner pursuant to R.C. 4113.15(A). The final claim, on behalf of Terry only, is a defamation claim against Bowman.

In their motion to dismiss, HJ Hauling and Bowman contend that Terry's notice of appeal from the decision of the Review Commission was defective because it fails to designate any party as an "appellee" and, therefore, this court lacks jurisdiction to consider that appeal. The court disagrees.

Where a statute confers a right of appeal, such appeal may be perfected only by compliance with the mandatory statutory requirements. *Zier v. Bureau of Unemployment Compensation*, 151 Ohio St. 123, 125, 84 N.E.2d 746 (1949). "Compliance with these specific and mandatory requirements governing the filing of such notice is essential to invoke jurisdiction of the Court of Common Pleas." *Id.*, at syl. par. 2.

R.C. 4141.282 concerns appeals from final decisions of the Unemployment Compensation Review Commission, and provides the following:

(A) THIRTY-DAY DEADLINE FOR APPEAL

Any interested party, within thirty days after written notice of the final decision of the unemployment compensation review commission was sent to all interested parties, may appeal the decision of the commission to the court of common pleas.

(B) WHERE TO FILE THE APPEAL

An appellant shall file the appeal with the court of common pleas of the county where the appellant, if an employee, is a resident or was last employed or, if an employer, is a resident or has a principal place of business in this state. If an appellant is not a resident of or last employed in a county in this state or does not have a principal place of business in this state, then an appellant shall file the appeal with the court of common pleas of Franklin County.

(C) PERFECTING THE APPEAL

The timely filing of the notice of appeal shall be the only act required to perfect the appeal and vest jurisdiction in the court. The notice of appeal shall identify the decision appealed from.

(D) INTERESTED PARTIES

The commission shall provide on its final decision the names and addresses of all interested parties. The appellant shall name all interested parties as appellees in the notice of appeal. The director of job and family services is always an interested party and shall be named as an appellee in the notice of appeal.

Terry, a resident of Butler County, Ohio, timely filed his notice of appeal with the appropriate court, and HJ Hauling and Bowman do not dispute this. Instead, they argue that because he failed to use the word "appellee" to describe both them and defendant Director, Ohio Department of Job and Family Services ("ODJFS"), his

notice of appeal is defective. However, this argument asks the court to put form over substance to find a jurisdictional defect, which the court will not do.

Contrary to Terry's argument, however, the requirements of paragraphs (C) and (D) above must be read together to determine whether a court has subject matter jurisdiction of the appeal. See, *Mattice v. Ohio Department of Job & Family Services*, 2nd Dist. No 25718, 2013-Ohio-3941. It is not only the timely filing of the notice of appeal that is jurisdictional. As the First District Court of Appeals recently stated, "Were [the] court to read R.C. 4141.282(C) to merely require that the notice of appeal be filed within 30 days to vest the common pleas court with subject-matter jurisdiction over the appeal, it would render R.C. 4141.282(D) meaningless." *Dikong v. Ohio Supports, Inc.*, 2013-Ohio-33, 985 N.E.2d 949 (1st Dist.), par. 21. However, Terry has, in fact, complied with both paragraphs.

Both interested parties named in the Commission's final decision are parties to this appeal: Terry's employer, HJ Hauling, and the Director, ODJFS. The fact that Terry did not put the word "appellee" after their names in the caption of his complaint is immaterial and does not alter the fact that they are named parties. This is not a case where the appellant failed to actually name the employer or the Director, ODJFS in his appeal. In those situations, the court does not have jurisdiction to proceed because all interested parties are not before it. See, *Mattice v. Ohio Department of Job & Family Services*, supra (employer not named and case dismissed for lack of subject matter jurisdiction); *Dikong v. Ohio Supports, Inc.*, supra (Director, ODJFS not named and case dismissed for lack of subject matter jurisdiction). Here, instead, all interested parties are named and, since HJ Hauling and the Director, ODJFS did not

file the appeal, they are, in fact appellees. The failure to label them as such does not affect the fact that they are, nor affect the jurisdiction of this court to hear the appeal. The motion to dismiss of HJ hauling and Bowman is not well-taken.

The motion to remand the unemployment compensation portion of this case.

In the first claim for relief set forth in the complaint, Terry appeals from the decision of the Ohio Unemployment Compensation Review Commission, which held that he was discharged by HJ Hauling for just cause. R.C. 4141.282(F)(1) provides that when a party appeals the final decision of the Review Commission to a common pleas court, the commission "shall file with the clerk a certified transcript of the record of the proceedings at issue before the commission." In turn, pursuant to R.C. 4141.282(H), "[t]he court shall hear the appeal on the certified record provided by the commission." The certified transcript of the record should include a transcript of the hearing before the Review Commission. In this case, the Review Commission is unable to provide a certified transcript because the hearing before the Review Commission hearing officer was not recorded due to technical problems with the hearing officer's recorder.

R.C. 4141.282(F)(2) provides, in pertinent part:

If the commission cannot file the certified transcript of the record of proceedings . . . then the court shall remand the matter to the commission for additional proceedings in order to complete the record on appeal. The additional proceedings may include a new hearing before the commission or a designated hearing officer.

Where, as here, the Review Commission can not file the transcript, it is mandatory that the case be remanded. Therefore, plaintiffs' first claim, Terry's administrative

appeal, must be dismissed and remanded to the Review Commission for further proceedings.

HJ Hauling and Bowman have filed a memorandum opposing the motion to remand. Their objection is based on the argument that this court lacks subject matter jurisdiction because Terry's notice of appeal from the Review Commission was defective. However, they also acknowledge that if the court denies the motion to dismiss, which it has done, the correct procedure would be to remand the case to the Review Commission. Terry has also agreed that, under the circumstances, the proper procedure is to remand the unemployment appeal to the Review Commission.

Based on the foregoing, the motion to remand of the Director, ODJFS is well-taken, and the unemployment compensation portion of this case is remanded to the Ohio Unemployment Compensation Review Commission.

The motion to strike an insufficient claim.

HJ Hauling and Bowman have asked the court to strike plaintiffs' first claim, the unemployment compensation appeal claim, on the basis that the claim only seeks to invoke the jurisdiction of this court over the administrative decision of the Review Commission. However, since the court has granted the motion to remand the unemployment appeal, this motion is moot and, therefore, must be denied.

The motion to bifurcate the unemployment compensation portion of this case.

HJ Hauling and Bowman have asked the court to bifurcate the unemployment compensation appeal claim from the other claims. However, since the court has

granted the motion to remand the unemployment appeal, effectively bifurcating that claim, this motion is also moot and, therefore, must be denied.

The motion to dismiss the non-unemployment compensation claims based upon improper venue and to transfer the case.

Venue means the locality where an action should be heard. *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972). The question of venue is one of convenience and asks in which court, among all those with jurisdiction, to best bring a claim. *Cheap Escape Co., Inc. v. Haddox*, 10th Dist. No. 06-AP1107, 2007-Ohio-4410, par. 11. Generally, venue is proper when a plaintiff chooses a court located in any county described in the first nine provisions of Rule 3(B) of the Ohio Rules of Civil Procedure. *Soloman v. Excel Marketing, Inc.*, 114 Ohio App.3d 20, 25, 682 N.E.2d 724 (2nd Dist. 1996). These nine provisions have equal status, and a plaintiff may choose among them with "unfettered discretion." *Morrison v. Steiner*, supra at 89; *Glover v. Glover*, 66 Ohio App.3d 724, 728, 586 N.E.2d 159 (12th Dist. 1990). If a plaintiff has chosen a proper forum from among the options provided in Rule 3(B), that choice may not be disturbed. *Soloman v. Excel Marketing, Inc.*, supra.

Terry and plaintiff Clarence Darryl Wallace acknowledge that their basis for filing this case in the Butler County Court of Common Pleas was R.C. 4141.282, which provides venue of Terry's administrative appeal in the county where Terry resides. However, that appeal has been remanded to the Review Commission and the first claim has been dismissed. After reviewing the remaining claims, the court agrees with HJ Hauling and Bowman that venue is no longer proper in this county.

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio

In their second claim, Terry and Wallace contend that they were employed by defendants HJ Hauling and Bowman, and that these defendants failed to pay them wages for all hours they worked in a timely and appropriate manner pursuant to R.C. 4113.15(A). The final claim, on behalf of Terry only, is a defamation claim against Bowman. HJ Hauling has its principle place of business in Hamilton County, and Bowman resides in Hamilton County, all of the activity that gives rise to the second and third claims occurred in Hamilton County, and both claims arose there. Therefore, pursuant to the venue requirements of Civ.R. 3(B), venue is not proper in Butler County, but is only proper now in Hamilton County.

Civ.R. 3(C)(1) provides that when an action has been commenced in a county other than stated to be proper in division (B) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12, the court shall transfer the action to a county stated to be proper in division (B) of this rule. Therefore, this court will transfer the second and third claims for relief to the Hamilton County Court of Common Pleas.

The motion for attorney fees.

HJ Hauling and Bowman have asked the court for an award of attorney fees pursuant to Civ.R. 3(C)(2). That section of the rule provides that when a court finds that an action has been commenced in a county that is not proper venue, and the action is then transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (B) of this

rule. Here, the court declines to award attorney fees to HJ Hauling and Bowman. This case was properly commenced in the Butler County Court of Common Pleas. Venue in this county is only improper now because Terry's unemployment compensation appeal is being remanded due to the inability of the Review Commission to file a transcript of the hearing before its hearing officer, not through some fault on the part of Terry. Therefore, the motion for attorney fees is not well-taken.

Finally, because the second and third claims are being transferred to the Hamilton County Court of Common Pleas, this court declines to rule upon the remaining motion of HJ Hauling and Bowman, to order a more definite statement. That motion is more properly considered by the Hamilton County Court of Common Pleas.

ENTER


Charles L. Pater, Judge

cc: Mary E. Lentz, Esq.
Daniel A. Niehaus, Esq.
Robin A. Jarvis, Esq.

Judge
Charles L. Pater
Common Pleas Court
Butler County, Ohio