

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

UNEMPLOYMENT COMPENSATION ST OF OH, CASE NO.: 2011 CV 03816

Plaintiff(s),

JUDGE DENNIS J. LANGER

-vs-

LYNDIA L NICHOLSON,

Defendant(s).

**FINAL AND APPEALALBE DECISION,
ORDER, AND ENTRY SUSTAINING
MOTION TO DISMISS**

This matter is before the Court on Appellee, Unemployment Compensation Review Commission's ("Commission"), *Motion to Dismiss*, filed on June 16, 2011. Appellant, Lyndia L. Nicholson, filed *Respond to Motion to Dismiss and Motion to Add ODJFS as a Party and Plaintiff* ("Response") on June 27, 2011. *Ohio Department of Job and Family Services' Reply to Plaintiff's Opposition to Motion to Dismiss* ("Reply") was filed on July 5, 2011. This matter is now properly before the Court.

I. PROCEDURAL HISTORY AND FACTS

On May 27, 2011, Lyndia Nicholson ("Appellant") filed a "Notice of Administrative Appeal" ("Notice of Appeal"), appealing a decision from the Commission finding she was discharged from Dayton Osteopathic Hospital, Inc. for just cause.¹ Appellant's appeal is filed pursuant to R.C. 4141.282. The Appellant's Notice of Appeal names "Unemployment Compensation Review Commission, State of Ohio" as "Plaintiff", and Appellant as "Defendant." See Notice of Appeal at p. 1. The *Motion to Dismiss* was filed by the Commission, by and through Counsel. See *Motion to Dismiss*. By and through same Counsel, the Ohio Department of Job and Family Services ("ODJFS") filed the *Reply*. See *Reply*.

¹ The decision denying unemployment compensation based on the finding of termination for just cause was issued by a Hearing Officer from the Commission. A request for review by the full Commission was filed, but disallowed in a

II. LAW AND ANALYSIS

1. Standard for Civ. R. 12(B)(1) Motions to Dismiss for Lack of Subject Matter Jurisdiction

Civ. R. 12(B) provides, in pertinent part, that “[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter[.]” Civ. R. 12(B)(1). In the event a court lacks subject matter jurisdiction, “the court shall dismiss the action.” Civ. R. 12(H)(3).

The standard to apply for a dismissal pursuant to Civ. R. 12(B)(1), lack of jurisdiction over the subject matter, is whether the plaintiff has alleged any cause of action that the court has authority to decide. *McHenry v. Indus. Comm.* (1990), 68 Ohio App.3d 56, 62 (citing *Avco Financial Serv. Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65). However, in determining whether plaintiff has alleged a cause of action sufficient to withstand a Civ. R. 12(B)(1) motion to dismiss, “[a] trial court has authority to consider any pertinent evidentiary materials when determining its own jurisdiction.” *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St. 3d 109, 111 n.3 (citing *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.* (1976), 48 Ohio St.2d 211, paragraph one of the syllabus); *McHenry*, 68 Ohio App.3d at 62. “[A] court may dismiss a complaint for lack of jurisdiction over subject matter on the basis of ‘(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.’” *Jenkins v. Eberhart* (1991), 71 Ohio App.3d 351, 355 (quoting *Williamson v. Tucker* (5th Cir. 1981), 645 F.2d 404, 413).

“[I]n the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction and a party challenging that jurisdiction has an adequate remedy by appeal.” *State v. Lewis*, 99 Ohio St. 3d 97, 2003 Ohio 2476, ¶ 19 (quoting *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002 Ohio 4907, ¶ 18). However, “[i]n the absence of subject-matter jurisdiction, a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss.” *Kelley v. Wilson*, 2004Ohio 4883, ¶ 6 (quoting *Pratts v. Hurley*, 2004 Ohio 1980, ¶ 21); see also *Forest Hills Local Sch. Dist. Bd. of Educ. v. Huegel*, 2003 Ohio 3444, ¶ 8; Civ. R. 12(H)(3).

Decision mailed April 27, 2011, such that the decision of the Hearing Officer became final pursuant to R.C. 4141.282(C)(3).

2. Unemployment Compensation

R.C. 4141.282 grants a court of common pleas jurisdiction to hear an appeal from the Commission, i.e. grants a court of common pleas jurisdiction over the subject matter. R.C. 4141.282(A); see *Hansford v. Steinbacher*, 33 Ohio St.3d 72 (1987). “[W]here a right of appeal is conferred by statute, the appeal can only be perfected in the mode prescribe by that statute.” *Hansford*, at 72. “R.C. 4141.282 sets forth the procedures by which a party whose claim for unemployment compensation benefits is denied may appeal to the court of common pleas[,]” and states, in pertinent part:

(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.

(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.*

R.C. 4141.282(A), (D) (emphasis added); *Anderson v. Interface Elec., Inc.*, 2003 Ohio 7031, ¶16 (10th Dist., 2003). With respect to service of a notice of appeal filed pursuant to R.C. 4141.282, Division (E) directs the clerk of court to serve a copy of the same upon all “appellees,” and the director of the ODJFS *if* the director is included within the group of appellees:

(E) SERVICE OF THE NOTICE OF APPEAL

Upon filing the notice of appeal with the clerk of the court, the clerk shall serve a copy of the notice of appeal upon all *appellees, including the director.*

R.C. 4141.282(E) (emphasis added).

Appellee-Commission argues that the Court lacks subject matter jurisdiction over the instant appeal, because Appellant’s Notice of Appeal does not comply with the statutory requirement that the ODJFS be named as a party-appellee. *Motion to Dismiss* at pp. 2-4. The Commission argues that the Notice of Appeal is invalid as a result, and thus, a legally valid notice of appeal has not been properly filed within the deadline. *Id.* The Commission further argues that because the thirty day period has passed, Appellant is barred from filing an appeal. *Id.* The Commission moves for dismissal, accordingly. *Id.*

In support, the Commission cites the Eleventh District case of *Sydenstricker v. Donato’s Pizzeria*, 2010 Ohio 2953 (11th Dist., June 25, 2010), where an appeal was dismissed on the grounds argued above.

Motion to Dismiss at p. 4. *Sydenstricker* was based primarily on two controlling Ohio Supreme Court cases, *Zier v. Bur. of Unemployment Comp.*, 151 Ohio St. 123, 84 N.E.2d 746 (1949), and *In re Claim of King*, 62 Ohio St.2d 87, 403 N.E.2d 200, which relied on *Zier*. *Sydenstricker*, 2010 Ohio 2953, ¶¶13-16.

In paragraph one of the syllabus, *Zier* held “[a]n appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements.” *Zier*, ¶1 syllabus. Accordingly, the issue before the Ohio Supreme Court in *Zier* was whether the appellant had complied with the requirements of the statute that was in place at the time as to invoke jurisdiction of the common pleas court to review the decision of the Board of Review.² *Zier*, 151 Ohio St. at 125. The statutory provision at issue in *Zier*, General Code 1346-4, stated, in pertinent part, as follows:

“Any interested party * * * may * * * within thirty days * * * appeal from the decision of the board of review * * *. Such appeal shall be taken by the filing by appellant of a notice of appeal with the clerk of such court and with the board of review. *Such notice of appeal shall set forth the decision appealed from and the errors therein complained of.* Proof of the filing of such notice with the board of review shall be filed with the clerk of such court. All other parties before the board of review * * * shall be made appellees. The appellant shall serve notice of the appeal upon all appellees by registered mail or actual delivery to his last known post office address unless such notice is waived.”

Zier, 151 Ohio St. at 126-127 (emphasis added). Specifically at issue in *Zier* was whether the following notice of appeal, in its entirety, properly “set forth” the decision appealed from and the errors therein complained of:

The undersigned claimant hereby gives notice of appeal from the decision of the board of review denying the right to compensation, in accordance with his right to appeal under Section 1346-4 of the General Code.

Zier, 151 Ohio St. at 123. The Ohio Supreme Court held that the above language did not sufficiently comply with the requirement at issue. *Id.* at 127.

In re Claim of King involved a notice of appeal from a Board of Review decision denying unemployment compensation that did not name the administrator of the Ohio Bureau of Employment Services (now director, ODJFS pursuant to R.C. 121.02(H)), nor was the same served with a copy of the notice of appeal. *King*, 62 Ohio St.2d at 87. In fact, the appellant only named himself, and while he did serve a copy to the Board of Review and the employer, he did not do so with respect to the administrator of

the Ohio Bureau of Employment Services. *Id.* At that time, the statute at issue in *Zier* had been replaced with R.C. 4141.28(O) which required that a notice of appeal name all interested parties before the board, and required the same to be filed with those parties. *Id.* at 88. The precise issue before the Supreme Court in *King* was whether the requirement that a copy of the notice of appeal be filed with all interested parties was a mandatory jurisdictional requirement. *Id.* at 87-88. Applying the holding in *Zier*, the Court held that failure to comply with the above statutory requirements was a jurisdictional defect, and reversed the lower rulings which were made on the merits of entitlement to unemployment compensation. *Id.* at 87, 88-89. In other words, the Supreme Court in *King* held that failure to name and serve the administrator, as required by statute, prevented the court of common pleas from exercising jurisdiction over the subject matter of the appeal, stating “where a statute confers a right of appeal, as in the instant cause, strict adherence to the statutory conditions is essential for the enjoyment of that right.” *Id.* at 88.

The Eleventh District in *Sydenstricker* addressed a set of facts almost identical to the case at bar, and the only distinctions work against the Appellant. In *Sydenstricker*, the appellant only named the employer. *Sydenstricker*, ¶4. However, the notice of appeal included a certificate of service that indicated that the employer, “Administrator, the Ohio Bureau of Employment Services³,” and the Unemployment Compensation Review Commission. *Id.* The Eleventh District took the trouble to note that the ODJFS had not been named as a party-appellee, nor was there an indication, pursuant to the certificate of service, that the director of ODJFS had been served with the notice. *Id.* at ¶9. Also, as in the instant case, the ODJFS appeared in the context of a motion to dismiss for lack of subject matter jurisdiction based in the failure to comply with R.C. 4141.282(D). *Id.* ¶¶5-7. Applying *Zier* and *King*, the Eleventh District upheld the trial court’s dismissal of the case for lack of subject matter jurisdiction. See *id.*, ¶¶17-25.

Here, while Appellant’s Notice of Appeal was filed within thirty (30) days, it does not comply with the statutory requirement that all interested parties be named. Although not specifically designated as “interested parties,” the Decision Disallowing Request for Review from the Commission lists the Appellant, the employer, and the director ODJFS in the heading of the same, and indicates that the same was sent to all three. Arguably, there may have been some confusion as to who or what constituted an “interested party”

² The Board of Review, as it existed at the time of *Zier*, has since been replaced with the Unemployment Compensation Review Commission pursuant to R.C. 4141.06.

pursuant to statute. However, the lower decision, under a section entitled "Appeal Rights" specifically included the director ODJFS as an interested party to be named in a notice of appeal. More importantly, the statute specifically states that the director ODJFS is "always an interested party and shall be named as an appellee in the notice of appeal." R.C. 4141.282(D).

Furthermore, unlike the notice of appeal at issue in *Sydenstricker*, the Notice of Appeal in the instant case bears no certificate of service, and the docket indicates that Appellant only instructed the clerk to serve the Commission. In accordance with said instructions and R.C. 4141.282(E), the clerk served only the Commission.

Moreover, now that the thirty day appeal period has expired, Appellant may not now cure the defects in her current Notice of Appeal, as she is time barred from doing so pursuant to R.C. 4141.282(A).

Appellant argues that she did not know she needed to name the ODJFS in her appeal, and notes that she does not have adequate legal resources. *Response*. Appellant asks the Court to overlook the defect, and asks for leave to amend her notice of appeal. *Id*. However, it is well settled that not knowing the law is never a defense. *State v. Johnson*, 128 Ohio St.3d 107, 2010 Ohio 6301, ¶51 (December 28, 2010); *Charvat v. Ryan*, 116 Ohio St.3d 394, 2007 Ohio 6833, ¶17 (December 27, 2007). It is further well settled that "pro se litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard litigants who are represented by counsel." *Sabouri v. ODJFS*, 145 Ohio App.3d 651, 654 (9th Dist., 2001). Therefore, Appellant's arguments cannot be well taken.

III. CONCLUSION

For the foregoing reasons, the instant appeal is hereby dismissed for lack of subject matter jurisdiction.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST CAUSE FOR DELAY FOR PURPOSES OF CIV. R. 54. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE DENNIS J. LANGER

³ This was an incorrect designation, as the party to be named and served was the direct of the ODJFS.

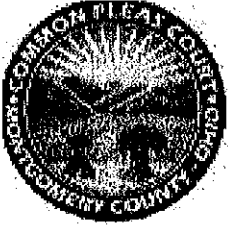
This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

ROBIN A JARVIS
(513) 852-3497
Attorney for Plaintiff, Unemployment Compensation St Of Oh

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

LYNDIA L NICHOLSON
11 HAWTHORN ST
DAYTON, OH 45402
Defendant, Pro Se.

JULENE POWERS, Bailiff (937) 225-4055 powersj@montcourt.org



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

Case Title: UNEMPLOYMENT COMPENSATION ST OF OH vs
LYNDIA L NICHOLSON
Case Number: 2011 CV 03816
Type: Decision

So Ordered

A handwritten signature in black ink, appearing to read "Dennis J. Langer".

Dennis J. Langer