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LUCAS COUNTY

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COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

UNIVERSITY OF TOLEDO,
Appellant

vs.

SHARON D. KLING, ET AL.,
Appellees.

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Case No. G-4801-CI-201201913-000

OPINION AND JUDGMENT ENTRY

JUDGE GARY G. COOK

This matter is before the Court upon the Administrative Appeal filed by Appellant, University of Toledo ("UT") of the Unemployment Compensation Review Commission's January 5, 2012, final decision affirming allowance of unemployment benefits for Sharon D. Kling ("Kling"). On April 4, 2012, the Unemployment Compensation Review Commission ("the Commission") submitted the certified transcript of the record. On June 15, 2012, UT filed its Brief in Support of Appeal from the Decision of the Unemployment Compensation Review Commission. On July 13, 2012, the Director of the Ohio Department of Job and Family Services ("the Director") filed the Brief of Appellee. On July 31, 2012, UT filed its Reply brief. On August 10, 2012, the Director filed a surreply, with leave of Court. The matter is now decisional.

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This is an employer appeal of the decision by the Commission, allowing unemployment benefits for UT's employee, Kling.¹ On July 19, 2011, the Director allowed Kling's application for unemployment benefits, finding Kling was unemployed due to lack of work.² UT appealed, and on August 18, 2011, the Director affirmed the decision, allowing benefits, finding that "review of the original facts plus those submitted in the appeal does not support a change in the initial determination."³ Specifically, the Director found that Kling was a "year round employee" prior to her unemployment, and that in May, 2011, UT changed the terms of her employment from year round to a reduced term, based on the academic year.⁴

On September 6, 2011, UT appealed this decision to the Commission. On January 3, 2012, the Commission held a hearing, with Kling and UT participating.⁵ At hearing, UT testified, through its representative Joseph Klep, that Kling was employed as a full-time clerical specialist, working year round, from 2002 until May of 2011.⁶ In the spring of 2011, UT changed Kling's position from a year round term to a 40-week term, "to coincide with the academic calendar[.]" with the changes to "take effect during the summer of 2011."⁷ Klep further testified that Kling

¹The right to appeal is statutory, and pursuant to R.C. 4141.282(A), an appeal must be perfected within thirty days of an adverse decision, after written notice. UT perfected its appeal of the Commission's January 25, 2012 decision, disallowing review, on February 24, 2012. Therefore, UT filed a timely appeal, and this Court has jurisdiction to consider the appeal.

²Record (Apr. 4, 2011), Director's File, Initial Determination, 7/19/11.

³Directors' File, Director's Redetermination, 8/18/11.

⁴Director's File, Fact Finding Information.

⁵Review Commission File, Transcript of Testimony.

⁶Transcript, 7.

⁷Id.

"was on a 52-week assignment up until May of 2011."⁸ UT informed Kling that she would return to her position, but with a 40-week term, in August of 2011.⁹

On January 5, 2012, the Commission affirmed the Director's determination, allowing Kling's claim for unemployment benefits. The Commission found that Kling was hired for a year round position, and worked a year round position during the 2010-2011 academic year. In May, 2011, Kling was unemployed do to lack of work, with reassurance of returning to work in August, 2011 to begin employment as a 40-week employee. In affirming the Director's determination, allowing benefits, the Commission also found that UT did not provide reassurance of "*the same or similar work* for the next academic year."¹⁰

On January 20, 2012, UT filed a request for review. On January 25, 2012, the Commission disallowed review, and the present appeal followed.

The issue before this Court, upon appeal, is whether Kling is entitled to the unemployment compensation benefits she received during the summer of 2011. The Review Commission upheld the initial determination by the Director, allowing the claim, finding Kling was a year round employee discharged for lack of work. UT, however, argues that the vacation exception under R.C. 4141.29(I)(1)(b) applies, and that Kling is not entitled to benefits for the period "between academic terms," as UT assured Kling that she would be employed the following academic year.

In reviewing the decision of the Commission, the Court defers to the factual findings of

⁸Transcript, 7.

⁹Id., 10.

¹⁰Review Commission File, Decision, 1/5/12 (emphasis sic.)

the Commission. *Irvine v. State, Unemployment Compensation Bd. of Review*, 19 Ohio St. 3d 15, 18, 482 N.E.2d 587, (1985). The Court must limit its inquiry into whether there is evidence in the record supporting the Commission's decision. *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St. 3d 694, 653, 653 N.E.2d 1207 (1995). Even if reasonable minds might reach different conclusions, this may not be a basis for this Court to reverse the Commission's decision. *Irvine*, 18, citing *Craig v. Bur. of Unemp. Comp.*, 83 Ohio App. 247, 260, 83 N.E.2d 628 (1st Dist. 1948). "Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Irvine* at 18, quoting *Charles Livingston & Sons, Inc. v. Constance*, 115 Ohio App. 437, 438, 185 N.E.2d 655 (7th Dist. 1961).

Neither party disputes the factual findings of the Commission. The disputed issue in this appeal concerns the correct application of R.C. 4141.29(I), the exception for unemployment compensation eligibility for employees of educational institutions. "With specific concern for intermittent employees, an additional restriction on eligibility for employees of academic institutions is contained in R.C. 4141.29(I), which limits eligibility for employees in the periods between academic terms." *Lorain County Auditor v. Ohio Unemployment Comp. Review Commn.*, 113 Ohio St. 3d 124, 128, 2007-Ohio-1247, 863 N.E.2d 133, ¶15.

R.C. 4141.29(I)(1)(b) provides:

"Benefits based on service for an educational institution or an institution of higher education in other than an instructional, research, or principal administrative capacity, shall not be paid to any individual for any week of unemployment which begins *during the period between two successive academic years or terms* of the employing educational institution or institution of higher education, provided the individual performed those services for the educational

institution or institution of higher education during the first such academic year or term and, there is a reasonable assurance that such individual will perform those services for any educational institution or institution of higher education in the second of such academic years or terms." R.C. 4141.29 (D)(1)(b) (emphasis added.)

"The protections of an employee under R.C. 4141.29 are to be liberally construed. Thus, the exceptions to R.C. 4141.29 should be narrowly construed." *Lorain County Auditor, 2007-Ohio-1247, ¶31*. Here, UT argues, and the Director concedes, that the Commission cited to incorrect law in its reasoning. In affirming the Director's decision, the Commission found that UT's assurance to Kling that she would return to work in August, 2011, was not for the same or similar work. The statute does not require same or similar work, instead referencing services.

In its appeal, UT focuses on this misstatement of law, and ignores the findings within the record that Kling was a year round employee prior to May, 2011, and returned to work as an intermittent employee, with her 40-week per year employment beginning in August, 2011. The Director, in reaching its initial determination, reasoned that the terms of Kling's employment changed in May, 2011, from a year round employee to an intermittent, academic year employee, and that therefore the claim should be allowed for the summer months of 2011.¹¹

Additionally, UT argues that the Director may not now argue a different application of the law, as he waived such argument by not raising it in the appeal before the Commission. A party may not raise an issue for the first time in an appeal to a court of common pleas, as permitting a party to do so "would frustrate the statutory system for having issues raised and decided through

¹¹Director's File, Fact Finding Information.

the administrative process." *Roberts v. Hayes*, 9th Dist. No. 21550, 2003-Ohio-5903, ¶23, quoting *Kallenbach v. Mayfield*, 4th Dist. No. 89-CA10, 1990 Ohio App. LEXIS 1634 (Apr. 27, 1990). As the Director argues, however, he was not a party before the Commission, and the issue of whether R.C. 4141.29(I) applied to exclude Kling's claim was raised below, and is argued in this appeal.

The Commission found, as a factual matter, that Kling was employed by UT for the calendar year, and not an academic year, prior to May, 2011. Testimony offered by UT's witness supports this finding. Furthermore, the statute applies to the period between two successive academic terms. "An academic year is generally recognized to consist of the fall, winter and spring sessions of an educational institution." *Univ. of Toledo v. Heiny*, 30 Ohio St. 3d 143, 146, 507 N.E.2d 1130, (1987).

In arguing that the statutory exception under R.C. 4141.29(I) applies, UT relies on the fact that it gave Kling notice she would be unemployed at the end of the academic term, and ignores the fact that Kling was not an academic term employee when she became unemployed. The exception to eligibility under R.C. 4141.29(I) applies to "intermittent employees" of an academic institution. *Lorain County Auditor*, ¶15. Furthermore, the policy underlying the exception does not apply to Kling's circumstances. Unemployment compensation legislation "was not enacted to 'subsidize the vacation periods of those who know well in advance that they may be laid off for certain specified periods.'" *Heiny*, 30 Ohio St. 3d at 146, quoting *Davis v. Commonwealth*, 39 Pa. Commw. 146, 147, 394 A. 2d 1320, 1321 (1978). Here, Kling worked year round up until May, 2011, and was not employed as a 40-week employee prior to August, 2011. Moreover, Kling could not have known "well in advance" that she would be unemployed

during the summer months, as UT gave Kling notice in May 2011.¹²

The language in the statute is clear and unambiguous, excluding benefits to an employee who is not employed between two successive academic terms. The Commission determined that Kling was a yearly employee from her hiring in 2002 until May, 2011, and subsequently was called back to work as a 40-week employee.

Upon review of the record, it is clear that there is sufficient, credible evidence supporting the Commission's decision. Furthermore, R.C. 4141.29(I) does not bar Klings's eligibility for benefits, as her period of unemployment did not fall within two successive academic terms, but instead fell between a period comprised of several years and an academic term. Therefore, there is nothing before the Court meriting reversal of the Commission's decision.

JUDGMENT ENTRY

It is therefore ORDERED that the Unemployment Compensation Review Commission's January 5, 2012, final decision affirming allowance of unemployment benefits for Sharon D. Kling is AFFIRMED.


JUDGE GARY G. COOK

¹²See Transcript, 8-9. The academic term ended May 6, 2011. Transcript, 8. UT gave Kling notice on May 10, 2011 that "her assignment was going to convert * * * from a full-time 52-week to a * * * more in line with the academic * * * calendar." Id. at 9.