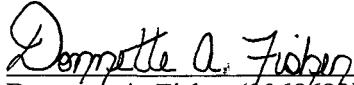




Entry prepared by counsel for the City of Franklin, as directed by the Magistrate's Amended Decision.



Donnette A. Fisher (0068693)

Director of Law

City of Franklin, Ohio

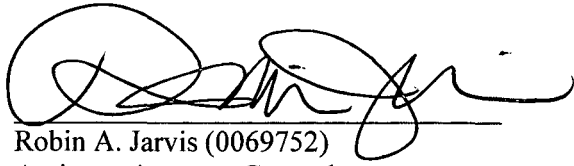
1 Benjamin Franklin Way

Franklin, OH 45005

937-746-9921 ext. 1301 office

937-746-1136 fax

dfisher@franklinohio.org



Robin A. Jarvis (0069752)

Assistant Attorney General

Health & Human Services Section

441 Vine Street

1600 Carew Tower

Cincinnati, OH 45202

COMMON PLEAS COURT  
WARREN COUNTY, OHIO  
2012 JUN 27 AM 11:12  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS  
COUNTY OF WARREN, STATE OF OHIO

CITY OF FRANKLIN,	)	
	)	
	)	
Appellant,	)	CASE NO. 11CV80612
	)	
-vs-	)	
	)	
OHIO UNEMPLOYMENT	)	
COMPENSATION REVIEW	)	
COMMISSION, et al.,	)	<u>AMENDED</u>
	)	<u>MAGISTRATE'S DECISION</u>
	)	
Appellees.	)	

The City of Franklin brings the above-referenced administrative appeal of a decision of the Ohio Unemployment Compensation Review Commission which found that a charge of \$11,206.00 should remain assessed to the City's unemployment compensation account.

I. PROCEDURAL POSTURE

The Claimant, Lester M. Miller, a former employee of the City, filed an application for unemployment compensation benefits on May 7, 2007, following the termination of his employment with Wal-Mart Associates, Inc. Neither Claimant nor Wal-Mart are parties to the instant appeal. On May 23, 2007, Ohio Department of Job and Family Services made an initial determination that Claimant was entitled to benefits. Because the City was a base period employer of Claimant, the City's "reimbursing employer" account was assessed a potential charge of \$11,206.00. The City appealed this determination on June 14, 2007.

On June 15, 2007, ODJFS issued a redetermination that Claimant's separation from his employment with the City was disqualifying and ordered that the \$11,206.00 previously assessed to the City's account be assessed to the mutualized account. This redetermination was vacated, and a new redetermination issued on July 3, 2007, holding that the City's assessment could not be charged to the mutualized account. The City appealed this redetermination on July 24, 2007.

It was not until April 28, 2011 that ODJFS transferred this matter to the UCRC. A telephonic hearing was held on May 16, 2011, before an UCRC hearing officer who issued a decision on May 27, 2011, affirming the July 3, 2007 redetermination.

On June 17, 2011, the City sought further review, which the UCRC disallowed by decision dated September 1, 2011. On September 28, 2011, the City filed a timely notice of appeal to this Court.

## II. THE RECORD ON APPEAL

Following claimant's application for unemployment compensation benefits, Wal-Mart responded that Claimant was discharged due to excessive absenteeism and tardiness, but provided no further information. On May 23, 2007, ODJFS issued the following determination:

The Ohio Department of Job and Family Services has ALLOWED the claimant's application for unemployment compensation benefits with a benefit year that begins 05/06/2007. During this one-year benefit period, the claimant's benefits rights are as follows:

Weekly Benefit Amount is: \$431.00  
Dependency Class is: B  
Total Benefits Payable Amount is: \$11,206.00

The claimant's employment during the base period, 01/01/2006, to 12/31/2006, met the weeks and wages eligibility requirement. The chart below shows the claimant's Total Base Period Wages and Total Qualifying Weeks with each base period employer.

Employer Name	Total Base Period Wages	Total Qualifying Weeks
City of Franklin Auditor	\$64,154.29	51

An issue regarding the claimant's reason for separation, affecting benefits beginning on 03/22/2007, was adjudicated as follows. In accordance with Section 4141.29 of the Ohio Revised Code this

agency finds that the claimant is totally unemployed from WAL-MART ASSOCIATES INC due to a lack of work.

Interested      CITY OF FRANKLIN AUDITOR  
Parties:        WAL-MART ASSOCIATES INC

The City appealed this determination on the grounds that Claimant voluntarily resigned his job with the City pending disciplinary proceedings for possessing a weapon and theft. The City submitted a statement signed by Claimant on January 10, 2007 stating that, effective that day, he voluntarily resigns/retires.

On June 15, 2007, ODJFS issued the following redetermination:

Determination 214379616-1 assessed a potential amount chargeable of \$11,206.00 to the above identified employer's account. A timely appeal of this determination was filed by this employer. Available facts establish the claimant's separation from this employer to be disqualifying. The employer's account will be relieved of potential charges. In accordance with Section 4141.29(H) of the Ohio Revised Code, any benefits that may become payable to the claimant will not be charged to the employer's account.

On July 3, 2007, ODJFS vacated the above redetermination, and issued the following:

Determination 214379616-1 assessed a potential amount chargeable of \$11,206.00 to the above identified employer's account. A timely appeal of this determination was filed by this employer. This agency has determined this employer to be a public and/or nonprofit employer who does not pay Ohio Unemployment tax. In accordance with Section 4141.241 (B)(1)(b) of the Ohio Law and Section 4141.24 and 4141.25 of the Ohio Revised Code this employer cannot be relieved of potential charges even when it is determined that claimant's separation from their employ to be disqualifying.

In appealing the July 3, 2007 redetermination to the UCRC, the City enclosed a copy of Claimant's January 10, 2007 resignation, a well as a time stamped January 15, 2007 pre-trial

statement, signed by Claimant, in *State v. Lester Miller*, Franklin Municipal Court Case No. 07-01-CRB-0168, wherein Claimant agreed to enter a guilty plea to unauthorized use of property, a misdemeanor of the fourth degree.

Subsequent to transfer, the UCRC issued a notice to the City, stating the following issue to be determined:

Was the claimant's separation from employment disqualifying such that the potential amount chargeable to the employer should be transferred to the mutualized account?

Section 4141.29(H) O.R.C. provides that charges to a contributory employer will be assessed to the mutualized account when: The individual quits without just cause. The individual is discharged for just cause in connection with work. The individual quits to marry or because of a martial, parental, filial, or domestic obligation. The individual becomes unemployed because of a commitment to a penal institution. The individual quit to enter the United States armed forces. The individual quit to accept a recall from a prior employer, or to accept employment, or leaves concurrent employment.

Additional issues may be considered which fall within the purview of Ohio Administrative Code Rule 4146-5-03.

At the May 16, 2011 telephonic hearing, only counsel for the City appeared, and what transpired was essentially a legal argument. It was, and remains, the City's position that Claimant's separation from employment with the City was disqualifying, and no portion of his unemployment benefits should be chargeable to the City.

The May 27, 2011 decision of the UCRC hearing officer states, in pertinent part,

#### FINDINGS OF FACT

The City of Franklin previously employed claimant. *He voluntarily resigned from employment with this employer in order to avoid a pre-disciplinary hearing.*

Following his separation from the City of Franklin, claimant had subsequent employment with Wal-Mart Associates, Inc. During this subsequent employment, he worked in more than six weeks of employment subject to an unemployment compensation law and he earned more than the requalifying amount of \$1,200.00.

The City of Franklin has elected to be a reimbursing employer. The unemployment compensation account number for this employer is 0803822004.

#### ISSUE

May the potential charge of \$11,206.00 assessed to the account of City of Franklin be transferred to the mutualized account?

#### LAW

Ohio Revised Code Section 4141.29

§4141.29 Eligibility and qualification for benefits

(H) If a claimant is disqualified under division (D)(2)(a), (c), or (d) of this section or found to be qualified under the exceptions provided in division (D)(2)(a)(i), (iii), or (iv) of this section or division (A)(2) of section 4141.291 [4141.29.1] of the Revised Code, then benefits that may become payable to such claimant, which are chargeable to the account of the employer from whom the individual was separated under such conditions, shall be charged to the mutualized account provided in section 4141.25 of the Revised Code, *provided that no charge shall be made to the mutualized account for benefits chargeable to a reimbursing employer except as provided in division (D)(2) of section 4141.24 of the Revised Code.* In the case of a reimbursing employer, the director shall refund or credit to the account of the reimbursing employer any over-paid benefits that are recovered under division (B) of section 4141.35 of the Revised Code. Amounts chargeable to other states, the United States, or Canada that are subject to agreements and arrangements that are established pursuant to

section 4141.43 of the Revised Code shall be credited or reimbursed according to the agreements and arrangements to which the chargeable amounts are subject.

#### REASONING

The evidence demonstrates that the City of Franklin has elected to be a reimbursing employer. Consequently, this employer does not pay the Ohio Unemployment Tax, and it has never contributed to the mutualized account. Therefore, the potential charge assessed to the account of this employer may not be transferred to the mutualized account.

The employer contends that claimant should not be eligible to receive benefits because of his disqualifying separation from the City of Franklin. The Hearing Officer disagrees. Following his separation from the City of Franklin, claimant had subsequent employment with Wal-Mart Associates, Inc. During the subsequent employment, he worked in more than six weeks of employment subject to an unemployment compensation law and he earned more than the requalifying amount of \$1,200.00. *Consequently, it is claimant's separation from Wal-Mart Associates, Inc., which controls his eligibility to receive benefits, not his separation from the City of Franklin.*

#### DECISION

The Director's Redetermination, issued July 3, 2007, is hereby affirmed.

The potential charge of \$11,206.00 remains assessed to the account of the City of Franklin. This employer has elected to be a reimbursing employer and, accordingly, it does not pay the Ohio Unemployment Tax. Consequently, this employer cannot be relieved of potential charges even if claimant's separation from this employer was disqualifying.

(emphasis added).



In its application for further review by the UCRC, the City included a notice of claimant's predisciplinary conference, a Franklin Police Department Ohio Uniform Incident Report, a police officer's narrative supplement and a witness statement, all tending to demonstrate that the City had just cause to terminate claimant's employment.

### III. ASSIGNMENTS OF ERROR

The City sets forth two assignments of error:

#### FIRST ASSIGNMENT OF ERROR

THE DECISION OF APPELLEES THAT CLAIMANT'S SUBSEQUENT EMPLOYMENT WITH WAL-MART ENTITLED HIM TO UNEMPLOYMENT COMPENSATION BENEFITS IS UNLAWFUL, UNREASONABLE AND AGAINST THE MANIFEST WEIGHT OF EVIDENCE.

#### Issues Presented for Review and Argument

1. There is no evidence in the record to support the Hearing Officer's finding that the claimant worked six weeks in his subsequent employment with Wal-Mart and earned the required monetary amount of \$1,200.
2. The evidence in the record shows that claimant was not otherwise eligible for unemployment compensation benefits because he was terminated from his subsequent employment with Wal-Mart for just cause.

#### SECOND ASSIGNMENT OF ERROR

THE DECISION OF THE APPELLEES THAT THE CITY WAS RESPONSIBLE FOR A PROPORTIONAL SHARE OF THE CLAIMANT'S UNEMPLOYMENT COMPENSATION BENEFITS IS UNLAWFUL, UNREASONABLE AND AGAINST THE MANIFEST WEIGHT OF EVIDENCE.

### Issues Presented for Review and Argument

1. Under Ohio Revised Code Section 4141.29 (D)(2)(e), the claimant is not entitled to unemployment compensation benefits based on his employment with the City as the claimant became unemployed from the City because of dishonesty.
2. Under Ohio Revised Code Section 4141.29 (D)(2)(e), the City cannot be charged any proportional share of unemployment compensation benefits for this claimant, as the claimant became unemployed from the City because of dishonesty.

### IV. SCOPE OF THE COURT'S REVIEW

The jurisdiction of the Court of Common Pleas in an unemployment compensation case is provided by statute. Specifically, R.C.4141.282 (H) states:

The court shall hear the appeal on the certified record provided by the commission. If the court finds that the decision of the commission was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse, vacate, or modify the decision, or remand the matter to the commission. Otherwise, the court shall affirm the decision of the commission.

Thus, the role of the Court upon an appeal from a decision of the Unemployment Compensation Review Commission is limited to determining whether the Review Commission's decision is supported by evidence in the record. *Verizon North, Inc. v. Ohio Dep't of Job & Family Services* (2007), 170 Ohio App.3d 42, 48. The Court may only reverse a decision of the Review Commission if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Kelly v. Lamda Research, Inc.* (Jan. 11, 2002), Hamilton App. No. C-010253, 2002 Ohio 24, 2002 Ohio App. LEXIS 69 at ¶15; *Piazza v. Ohio Bur. of Employment*

*Services* (1991), 72 Ohio App.3d 353, 356; *Jones v. Unemployment Compensation Bd. of Rev.* (1989), 61 Ohio App.3d 272, 275.

In reviewing a decision of the Review Commission, a court must adhere to the principal that decisions of purely factual questions are primarily within the purview of the Review Commission. *Verizon North, Inc., supra.*; *Guy v. City of Steubenville* (2002), 147 Ohio App.3d 142, 148; *Lombardo v. Ohio Bur. of Employment Services* (1997), 119 Ohio App.3d 217, 222; *Irvine v. Unemployment Compensation Bd. of Rev.* (1983), 19 Ohio St.3d 15, 19. The Court does not make factual findings or determine the credibility of witnesses who appeared before the Review Commission. *McCarthy v. Connectronics Corp.* (July 10, 2009), Lucas App. No. L-08-1293, 2009 Ohio 3392, 2009 Ohio App. LEXIS 2923 at ¶10; *Becka v. Unemployment Compensation Bd. of Rev.* (March 22, 2002), Lake App. No. 2001-L-037, 2002 Ohio 1361, 2009 Ohio App. LEXIS 2933 at ¶10; *Gaston v. Bd. of Rev.* (1983), 17 Ohio App.3d 12, 13. The Court may not weigh the evidence or substitute its judgment for that of the hearing officer as it pertains to factual determinations. *Lombardo, supra.* The fact that reasonable minds might reach different conclusions about the evidence in the record is not a basis for reversal of a decision of the Unemployment Compensation Review Commission. *Tzangas, Plakas & Mannos v. Ohio Bur. of Employment Services* (1995), 73 Ohio St.3d 694, 697; *Irvine, supra* at 18; *Guy, supra*; *Fredon Corp. v. Zelenak* (1997), 124 Ohio App.3d 103, 109.

However, while courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have a duty to determine whether the unemployment board's decision is supported by the evidence in the record. *Fuller v. Semma Enterprises, Inc.* (April 7, 2008), Butler App. No. CA2006-11-292, 2008 Ohio 1664, 2008 Ohio App. LEXIS 1434 at ¶ 9; *Warren County Auditor v. Sexton* (Dec. 28, 2007), Warren App. No. CA2006-10-124, 2007 Ohio 7081, 2007 Ohio App. LEXIS 6150 at ¶ 25.

## V. ANALYSIS

This Magistrate addresses the City's assignments of error in reverse order.

R.C.4141.29 (D) sates, in relevant part,

D. Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:

\*\*\*

(2) For the duration of the individual's unemployment if the director finds that:

(a) The individual quit work without just cause or has been discharged for just cause in connection with the individual's work...

It is well established that quitting work to avoid being discharged for just cause constitutes quitting work without just cause, since an employee cannot avoid the inevitable consequences of his own wrongdoing by resigning. *Stallings v. VanGuard Joint Vocational School* (July 21, 1995), Wood App. No. WD-94-114, 1995 Ohio App. LEXIS 3051 at \*5-6. See also *Mosley v. Bd. of Review* (Jan. 15, 1987), Cuyahoga App. No. 51405, 1987 Ohio App. LEXIS 5516 at \*9-10; *Noelker v. Great Oaks Joint Vocational School Dist.* (1982), 8 Ohio App.3d 327, 328; *Watters v. City of Upper Arlington* (March 16, 1982), Franklin App. No. 81AP-778, 1982 Ohio App. LEXIS 12580 at \*13-14.

In the present case, the "available evidence" indicates that Claimant voluntarily resigned his job with the City in anticipation of being discharged, and the UCRC hearing officer found as much. Thus, the circumstances under which Claimant left his position were disqualifying, as the June 15, 2007 ODJFS redetermination found. It appears that the July 3, 2007 order vacating the previous redetermination, as well as the hearing officer's decision, were based solely upon R.C.4141.29 (H), and R.C.4141.241 (B)(1)(b), which do not permit assessments made to a reimbursing employer to be charged to the mutualized account.

R.C.4141.29 (H) states:

*(H) If a claimant is disqualified under division (D)(2)(a), (c), or (d), of this section or found to be qualified under the exceptions provided in division (D)(2)(a)(i), (iii), or (iv) of this section or division (A)(2) of section 4141.291 [4141.29.1] of the Revised Code, then benefits that may become payable to such claimant, which are chargeable to the account of the employer from whom the individual was separated under such conditions, shall be charged to the mutualized account provided in section 4141.25 of the Revised Code, provided that no charge shall be made to the mutualized account for benefits chargeable to a reimbursing employer, except as provided in division (D)(2) of section*

*4141.24 of the Revised Code.* In the case of a reimbursing employer, the director shall refund or credit to the account of the reimbursing employer any overpaid benefits that are recovered under division (B) of section 4141.35 of the Revised Code. Amounts chargeable to other states, the United States, or Canada that are subject to agreements and arrangements that are established pursuant to section 4141.43 of the Revised Code shall be credited or reimbursed according to the agreements and arrangements to which the chargeable amounts are subject.

(emphasis added).

R.C.4141.241 (B)(1)(b) states:

(b) In the computation of the amount of benefits to be charged to employers liable for payments in lieu of contributions, all benefits attributable to service described in division (B)(1)(a) of this section shall be computed and charged to such organization as described in division (D) of section 4141.24 of the Revised Code, and, *except as provided in division (D)(2) of section 4141.24 of the Revised Code*, no portion of the amount may be charged to the mutualized account established by division (B) of section 4141.25 of the Revised Code.

(emphasis added).

Notably absent from both the ODJFS redetermination of July 3, 2007, and the UCRC hearing officer's decision, is any discussion of R.C.4141.24 (D)(2), which states:

(D)(1) For the purposes of this section and sections 4141.241 [4141.24.1] and 4141.242 [4141.24.2] of the Revised Code, an employer's account shall be charged only for benefits based on remuneration paid by such employer. Benefits paid to an *eligible individual* shall be charged against the account of each employer within the claimant's base period in the proportion to which wages attributable to each employer with whom the claimant is

employed part-time at the time the claimant's application for a determination of benefits rights is filed shall be charged to the mutualized account when all of the following conditions are met:

- (a) The claimant also worked part-time for the employer during the base period of the claim.
- (b) The claimant is unemployed due to loss of other employment.
- (c) The employer is not a reimbursing employer under section 4141.241 [4141.24.1] or 4141.242 [4141.24.2] of the revised code.

*(2) Notwithstanding division (D)(1) of this section, charges to the account of any employer, including any reimbursing employer, shall be charged to the mutualized account if it finally is determined by a court on appeal that the employer's account is not chargeable for the benefits.*

(emphasis added).

This Magistrate has not been able to locate any case law that discusses R.C.4141.24 (D)(2), and upon what grounds a court may determine whether "the employer's account is not chargeable for the benefits."<sup>1</sup> However, it strikes this Magistrate as absurd that a base period reimbursing employer be required to have its account assessed for a disqualified employee, simply because that employee, who was terminated for just cause (or quit without just cause) moves on to another job, and then loses it. There appears no logical reason why the reimbursing employer, under these circumstances, should have its account assessed, when, had the

<sup>1</sup> *Lorain County Auditor v. Unemployment Compensation Review Comm'n.* (July 7, 2004), Lorain App. No. 03CA008372, 2004 Ohio 3564, 2004 Ohio App. LEXIS 3225, a case cited by Appellee, similarly does not discuss R.C.4141.24 (D)(2). While it would seem to be an all fours with the instant appeal, the Court of Appeals for Lorain County appears to suggest that a reimbursing employer's remedy is the "accounting procedure" provided under R.C.4141.29 (H), that is, the ODJFS director shall refund or credit to the account of the reimbursing employer any *over-paid benefits* that are *recovered*. In the instant case, it does not appear that ODJFS ever determined that Claimant was "over-paid" any benefits," (notwithstanding evidence that his separation was disqualifying), let alone undertook any efforts to recover such. Given the inordinate and unexplained delay in getting this case before the UCRC, the City cannot reasonably anticipate ODJFS will ever do so. Thus, for the City, R.C.4141.29 (H) provides no remedy at all.

employee had not moved on to a new job, he would obviously not be given the benefit of tapping the reimbursing employer's account. This Magistrate cannot fathom that the Ohio General Assembly intended such an anomalous result, which contradicts the fundamental purposes underlying Ohio's unemployment compensation system.

Accordingly, this Magistrate determines that Claimant quit his job in anticipation of discharge for just cause, which was a disqualifying event insofar as his employment with the City is concerned, and pursuant to R.C.4141.24 (D)(2), the City's account should not have been charged \$11,206.00, and said amount shall be charged to the mutualized account, including any penalties and interest imposed by ODJFS. The City's second assignment of error is *sustained*.

Turning now to the City's first assignment of error, whether Claimant's discharge from Wal-Mart occurred for just cause or for lack of work is a factual determination made by ODJFS in the first instance, which was not appealed by Wal-Mart, and is not now properly before this Court. Moreover, it does not appear that the City has standing to raise the issue. The City's first assignment of error is *overruled*.

#### VI. MAGISTRATE'S DECISION

The May 27, 2011 decision of the Ohio Unemployment Compensation Review Commission in the within matter is *reversed*, and Ohio Department of Job and Family Services is *ordered* to relieve the City of Franklin's account number 0803822004 of the previously imposed charge of \$11,206.00, and any penalties or interest thereon and impose such charge upon the mutualized account pursuant to R.C.4141.24 (D)(2).

Counsel for the City of Franklin shall prepare and present an appropriate final judgment entry for the Court's signature upon its adoption of this decision.

Costs to be assessed to Ohio Department of Job and Family Services.

CERTIFIED COPY  
JAMES L. SPAETH, CLERK  
WARREN COUNTY, OHIO  
COMMON PLEAS COURT  
BY Alan K. Higgins  
DEPUTY

  
MAGISTRATE ANDREW HASSELBACH

**NOTICE TO PARTIES**

The parties shall take notice that this decision may be adopted by the Court unless objections are filed within fourteen (14) days of the filing hereof in accordance with Civil Rule 53 (D)(3)(b).

A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R.53 (D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R.53 (D)(3)(b).

  
MAGISTRATE ANDREW HASSELBACH

C: Attorney Robin Jarvis  
Attorney Donnette Fisher