[Cite as *Sammons v. Cherryhill Mgt. Inc.*, 2018-Ohio-3403.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

ROBERT SAMMONS	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 27760
	:	
v.	:	Trial Court Case No. 2017-CV-1069
	:	
CHERRYHILL MANAGEMENT, INC., et al.	:	(Civil Appeal from Common Pleas Court)
	:	
Defendants-Appellees	:	

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O P I N I O N

Rendered on the 24th day of August, 2018.

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WELBAUM, P.J.

{¶ 1} In this case, Plaintiff-Appellant, Robert Sammons, appeals from a judgment affirming the decision of the Unemployment Compensation Review Commission ("UCRC"), which denied unemployment benefits to Sammons. The UCRC found that Sammons had been discharged for just cause because he failed to put his employer on notice of his inability to work and failed to provide medical documentation to support his need to be absent from work.

{¶ 2} According to Sammons, the trial court erred in holding that UCRC's decision was supported by competent, credible evidence. Sammons contends that the UCRC's decision, instead, was unlawful, unreasonable, and against the manifest weight of the evidence.

{¶ 3} We conclude that this matter must be reversed and remanded so that the UCRC can determine whether Sammons violated Cherryhill's No Call policy, and whether unusual circumstances under 29 C.F.R. 825.302(d) justified Sammons's failure to comply.

I. Facts and Course of Proceedings

{¶ 4} On March 2, 2017, Sammons filed a notice of administrative appeal from a decision that the UCRC had issued on February 8, 2017. Sammons contended in the notice of appeal that the UCRC had erred in finding that he was discharged for just cause. Sammons also contended that the UCRC had erred in finding that his employer, Defendant-Appellee Cherryhill Management, Inc. ("Cherryhill"), acted reasonably by terminating him for "no-call/no shows," when Cherryhill was aware or should have been aware that he was taking approved leave in accordance with the Family Medical Leave

Act ("FMLA") and for a bona-fide illness.

{¶ 5} After the administrative record of the UCRC was filed with the trial court on March 23, 2017, the court established a briefing schedule. Sammons, Cherryhill, and the Director of the Department of Ohio Jobs and Family Services (ODJFS) filed briefs, and Sammons then filed a reply brief.

{¶ 6} According to the administrative record, which includes a transcript of the administrative hearing, Cherryhill employed Sammons as a driver from November 13, 2006, until October 1, 2016. On Monday and Tuesday, September 26 and 27, 2016, Sammons was on medical leave pursuant to a note from his doctor. He was scheduled to return to work on Wednesday, September 28, 2016. According to Michael Walsh, Cherryhill's vice-president, Sammons came to work on Wednesday, "saw what his route was and decided he didn't want to do the work, claimed FMLA and walked out the door." Transcript of December 22, 2016 UCRC Hearing ("Tr."), p. 9.

{¶ 7} Walsh stated that Cherryhill has a two-day no call/no show rule that is contained in its handbook. Employees are required to call a supervisor each day, and if they do not call off each day, they are automatically terminated. Tr. at p. 7. Therefore, each day, Sammons would have been required to call either his direct supervisor, Judy Negrete, or one of the managers at the Valley Thrift Store in Kettering, Ohio. Sammons did not call on either day, and Cherryhill did not have a medical excuse for Sammons for these days. As a result, Cherryhill sent Sammons a letter on October 1, 2016, terminating his employment.

{¶ 8} Sammons testified that he was absent from work on September 26 and 27, 2016, due to a colonoscopy. When he came to work on September 28, 2016, he went

to get his route and truck, and he started having anxiety and a panic attack. Sammons indicated that he suffered from anxiety and depression and had been off work for three months during the past year for these conditions. He stated that he went into the office and told his supervisor, Negrete, that "I'm having a panic attack. I'm taking my FMLA and I'm going to my doctor." Tr. at p. 12. Sammons was unable to get an appointment with his doctor that day, but went to the doctor on the following day, September 29, 2016. He obtained a doctor's note excusing him from work from September 28 to October 24, 2016.

{¶ 9} Sammons testified that he did not call in to work on September 29 or 30, 2016, because he was on heavy medication. He said that he did call in on October 1, 2016, but there was no response. On October 3, 2016, Sammons left a text message notifying Negrete about the fact that he would be off work until October 24, 2016. However, he received no response to the text. Sammons then received the termination letter on October 3, 2016. He indicated at the hearing that he did not bring his doctor's note into the office after that because he had been fired.

{¶ 10} The doctor's note, which is part of the administrative record, is dated September 29, 2016, at 12:13 p.m., and asks for Sammons to be excused from work from September 28, 2016 to October 24, 2016, due to anxiety and depression. This is consistent with Sammons's testimony at the hearing.

{¶ 11} Another medical document, labeled "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) (U.S. Department of Labor)" ("Certification"), is in the administrative record as well. This document, which is dated August 16, 2016, stated that Sammons had been treated since

2014 for the medical condition of depression and anxiety and that the condition's duration was "lifetime."

{¶ 12} The Certification further indicated that Sammons would be incapacitated for a period of time from August 12, 2016 to August 14, 2016, that the condition would cause periodic flare-ups preventing Sammons from doing his job, that he would be unable to work when he had a flare-up, and that the flare-ups would occur two to three times a month for two days per episode. There is no dispute about the fact that Cherryhill certified Sammons for intermittent leave under the FMLA.

{¶ 13} Cherryhill's employee handbook, which includes provisions for employee attendance, is also in the administrative record. The first such provision sets up an attendance program, in which employees are given warning slips and points for failures to provide sufficient excuses for absences. The second provision establishes a "Two Day No Call, No Show" policy. These provisions, in pertinent part, state as follows:

> Attendance Program
>
> Reliable attendance and punctuality by our Employees is an important and vital requirement for the Company to operate efficiently and productively. When an Employee unexpectedly fails to report when scheduled, it creates a business hardship and a hardship for the Employer's co-workers. Therefore, we have developed a program which addresses the issues of absenteeism and tardiness.
>
> This policy does not apply to employees on approved leave such as Family Medical Leave.
>
> Employees must contact their immediate supervisor concerning

events causing missed days from work and tardiness and give their expected return to work date. Failure to call your supervisor one (1) hour prior to your scheduled start time each day will result in additional disciplinary action besides that set forth in this attendance program.

* * *

Two Day No Call, No Show

Any Employee who misses two (2) scheduled work days in a row without calling in one (1) hour prior to absence shall be terminated. When calling in, the employee must speak with a supervisor or store manager when calling off or work. You may NOT leave a voice mail message.

The Company reserves the right to waive discipline in exceptional or emergency situations and further, reserves the right to modify this policy at any time. Any modifications will be communicated to employees in a timely manner.

Cherryhill Employee Handbook ("Handbook"), pp. 1-2.

{¶ 14} In addition, the Handbook contains provisions concerning Emergency and Family Medical Leave. As relevant, these provisions state that:

Emergency and Family Medical Leave

All employees who have worked for the Company for at least one (1) year and have worked at least 1,250 hours over the prior twelve (12) months shall be entitled to up to twelve (12) weeks of unpaid leave during any twelve (12) month period for one or more of the following reasons:

* * *

> 3. To take medical leave when the employee is unable to work because of a serious health condition. A serious health condition means an illness, injury, impairment or a physical or mental condition that involves any period of incapacity or treatment connected with in-patient care in a hospital, hospice, or any residential medical facility.
>
> * * *
>
> When forseeable, the employee must give the Company thirty (30) days[’] notice prior to the leave. When the leave is not forseeable, the employee must notify the Company as soon as possible. The Company strives to maintain a work force that is suited to its current needs. Hence, extended absence may force the Company to terminate your employment after extended absence and to hire a replacement. Any employee who is not in violation of any other Company policy and is forced to miss more than twelve (12) weeks of work will no longer be guaranteed a return to work from the Company. Former employees who seek to return to work for the Company after a period of absence or more than twelve (12) weeks will be treated as a new applicant.

Handbook at pp. 3-4.

{¶ 15} After being fired, Sammons applied for unemployment compensation benefits with ODJFS and was approved for benefits on October 27, 2016. The initial finding was that Sammons had been discharged without just cause. He was not given benefits from September 25, 2016, through October 29, 2016, because he was physically unable to work during that time period. On November 4, 2016, Cherryhill appealed from

the decision granting benefits to Sammons. However, on November 21, 2016, the decision was affirmed after redetermination.

{¶ 16} Cherryhill again appealed, and ODJFS transferred jurisdiction over the appeal to the UCRC, which scheduled a telephone hearing for December 22, 2016. At that time, a hearing officer heard testimony from Walsh, Cherryhill's vice-president, and from Sammons. Walsh testified that Sammons was fired for violating Cherryhill's Two Day No Call, No Show policy. The remaining facts disclosed at the hearing are as related above. In addition, Sammons testified that he had been on FMLA leave the previous year for three months, told Cherryhill then that he did not know how long he would be off, and provided Cherryhill with a medical excuse when he came back. Sammons also stated at the hearing that when he requested FMLA leave on September 28, 2016, Cherryhill was required to give him 15 days to supply information. Instead of giving Sammons the 15-day allotted time, Cherryhill fired him in two days.

{¶ 17} Subsequently, the hearing officer issued a decision concluding that Sammons had been discharged for just cause. The hearing officer concluded that even though Sammons suffered from a bona fide illness, he failed to put his employer on notice of his inability to work. The hearing officer further concluded that Sammons had the ability to provide medical documentation to Cherryhill, but failed to do so. Sammons's benefits, therefore, were suspended, and he was ordered to repay the benefits that had already been paid.

{¶ 18} Sammons filed a request for reconsideration on January 26. 2017, arguing that Cherryhill's actions violated the FMLA. On February 8, 2017, the UCRC mailed a decision disallowing Sammons's request for review. Sammons then filed a notice of

administrative appeal with the common pleas court on March 2, 2017.

{¶ 19} After considering the parties' briefs, the trial court affirmed the denial of Sammons's unemployment compensation benefits. The court concluded that sufficient competent and credible evidence supported the UCRC's denial of benefits. Sammons now appeals from the trial court's decision.

II. Sufficiency of Evidence Supporting the UCRC Decision

{¶ 20} Sammons's sole assignment of error states that:

> The lower court erred in holding that the Unemployment Compensation Review Commission's Decision Was Supported by Competent, Credible Evidence; the Decision of the Unemployment Compensation Review Commission Was Unlawful, Unreasonable, and Against the Manifest Weight of the Evidence.

{¶ 21} Under this assignment of error, Sammons presents two issues for review. The first issue concerns Sammons's contention that employees cannot be terminated for "just cause" when the termination violates federal law. According to Sammons, his return to work was protected by the FMLA, and he gave Cherryhill sufficient notice by expressly stating that he was taking FMLA leave. Sammons, therefore, contends that Cherryhill improperly interfered with his FMLA rights by failing to notify him of a need to provide further documentation.

{¶ 22} ODJFS has filed a brief, and argues that Sammons was discharged for just cause because he violated the No Call, No Show policy.[1] ODJFS also contends that

[1] Cherryhill filed a brief, but we struck the brief on January 23, 2018, because it had not

Cherryhill did not violate the FMLA because Sammons's intermittent FMLA leave had already been approved, and there is no evidence that Cherryhill wanted further certification documents; instead, Cherryhill simply asked for what any employer would want – some type of communication indicating an employee's intentions

{¶ 23} Before addressing these issues, we will briefly discuss the standard of review. R.C. 4141.282(H) outlines the standard of review in unemployment compensation cases, and provides that if the common pleas "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." Appellate courts use the same standard of review, which the Supreme Court of Ohio has described as "limited." *Williams v. Ohio Dept. of Job & Family Servs*., 129 Ohio St.3d 332, 2011-Ohio-2897, 951 N.E.2d 1031, ¶ 20. As a result, reviewing courts cannot make factual findings or decide witness credibility; instead, they "must affirm the commission's finding if some competent, credible evidence in the record supports it." *Id*.

{¶ 24} However, on appeal, reviewing courts may decide questions of statutory construction and other legal issues de novo. *Lang v. Dir., Ohio Dept. of Job & Family Servs*., 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶ 12; *Senco Brands, Inc. v. Ohio Dept. of Job & Family Servs.*, 2016-Ohio-4769, 70 N.E.3d 117, ¶ 13 (10th Dist.); *Unemp. Comp. Rev. Comm. v. Blue Machine*, *LLC*, 10th Dist. Franklin No. 17AP-176, 2017-Ohio-7495, ¶ 4. With these standards in mind, we will consider Sammons's arguments.

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been timely filed. As a result, we have considered only ODJFS's brief.

{¶ 25} R.C. 4141.29(D)(2) provides that individuals may not be paid benefits for the duration of their unemployment if the director finds that "(a) [t]he individual quit work without just cause or has been discharged for just cause in connection with the individual's work * * *." The Supreme Court of Ohio has defined "just cause" as " ' "that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." ' " *Williams* at ¶ 22, quoting *Irvine v. State Unemp. Comp. Bd. of Rev*., 19 Ohio St.3d 15, 16, 482 N.E.2d 587 (1985), which, in turn, quotes *Peyton v. Sun T.V. & Appliances*, 44 Ohio App.2d 10, 12, 335 N.E.2d 751 (10th Dist.1975). Whether just cause exists "depends on the factual circumstances of each case." *Williams* at ¶ 22.

{¶ 26} During the proceedings before the UCRC, Sammons alleged that he had been discharged in violation of the FMLA. This is a threshold question, but the UCRC did not specifically address the issue. The trial court also did not mention the FMLA, but simply found that the UCRC's decision was supported by sufficient evidence. In view of these omissions, this case must be reversed and remanded to the UCRC so that the UCRC can make further factual findings on Cherryhill's No Call, No Show policy as it relates to the FMLA.

{¶ 27} Courts have held that employees are not discharged for good cause where the basis for their discharge is conduct protected by the United States Constitution or federal labor law. *See Vacuform Industries, Inc. v. Unemp. Comp. Rev. Comm*., 10th Dist. Franklin No. 08AP-100, 2008-Ohio-4895, ¶ 15 (termination was without just cause where employer violated the FMLA by failing to provide employee with necessary FMLA customized notice); *Giles v. Willis*, 2 Ohio App.3d 335, 337, 442 N.E.2d 101 (8th Dist.1981) (employees were not discharged for just cause where they were discharged

for conduct protected by the United States Constitution or federal labor law).

{¶ 28} According to the factual record before us, Sammons notified Cherryhill of his status when he took FMLA leave for three consecutive months in 2015. Cherryhill also knew that Sammons's condition was subject to flare-ups that were expected to prevent him from performing his job for approximately two days. In addition, Cherryhill accepted, without challenge, the medical certification for intermittent FMLA leave for Sammons's serious health conditions for three days – September 28, 29, and 30, 2016.

{¶ 29} Prior to September 28, 2016, Sammons was absent and was excused from work on September 26 and 27, 2016, for unrelated medical reasons. He returned to work on Wednesday, September 28, 2016, and then left the workplace, stating that he was taking FMLA leave because of a panic attack. On September 29 and 30, 2016, Sammons did not show up for work and did not call Cherryhill in accordance with the No Call, No Show policy. Sammons did call Cherryhill on October 1, 2016, after the termination letter had been mailed. He also sent a text message to his supervisor on October 3, 2016.

{¶ 30} Sammons admitted he did not call Cherryhill during the first three days he was absent. In addition, Cherryhill admitted that Sammons was on FMLA leave for the first three days, during which Cherryhill terminated Sammons for violation of the No Call, No Show rule. In view of these facts, the UCRC must decide whether Cherryhill's discharge of Sammons under the No Call, No Show policy violated the FMLA. This is a fact-sensitive question that the UCRC must resolve.

{¶ 31} Cherryhill's No Call, No Show rule does not necessarily conflict with the FMLA regulations. The FMLA and its regulations recognize an employer's need to know,

to the extent possible, what employees' situations are, possibly for scheduling and other legitimate business reasons. Even communications from employees indicating that they do not know when they will return to work provide valuable information justifying a no call, no show policy. *See, e.g.*, *Gilliam v. United Parcel Serv., Inc.*, 233 F.3d 969, 971-972 (7th Cir. 2000) (interpreting former 29 C.F.R. 825.302(d)).

{¶ 32} Sammons relies heavily on *Wallace v. FedEx Corp.*, 764 F.3d 571 (6th Cir.2014) and its progeny. However, *Wallace* is distinguishable. *Wallace* dealt with the issues surrounding the employer's notification and communication responsibilities where an employee who had ostensible FMLA protection failed to provide adequate medical certification to either per se trigger or prolong the protected period. *Id*. at 580. *Wallace* did not deal with the discharge of a certified FMLA-protected employee through enforcement of an employer's no call, no show policy.

{¶ 33} Furthermore, *Wallace* does not apply because Cherryhill did not need nor did it request additional FMLA-related medical certification. Sammons gave Cherryhill notice of the commencement of the unforeseen intermittent leave "as soon as practicable" as required by Cherryhill's FMLA policy and 29 C.F.R. 825.302(a). Cherryhill recognized that Sammons was protected by the FMLA for the intermittent leave, but discharged Sammons by enforcing its No Call, No Show policy.

{¶ 34} Where the parties agree that the employee was on FMLA leave and violated a no call, no show policy, the question becomes whether application of the policy comports with the FMLA. This turns on the question of whether "unusual circumstances" justify the employee's failure to comply. In this regard, 29 C.F.R. 825.302(d) provides, in pertinent part, that:

> Complying with employer policy. An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. * * * Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

{¶ 35} The regulation does not restrict "unusual circumstances" solely to the listed items. As a result, there may be other situations that excuse an employee's failure to comply with the employer's notice requirements.

{¶ 36} In *Srouder v. Dana Light Axle Mfg., LLC*, 725 F.3d 608 (6th Cir.2013), the Sixth Circuit Court of Appeals concluded that an employer was justified in terminating an employee who claimed that he was on FMLA leave. The termination was based on the employee's failure to follow the employer's call-in attendance policy. *Id*. at 615. The court noted that "[t]he question confronting us is whether an employer may impose and enforce its own internal notice requirements, even if those requirements go beyond the bare minimum that would generally be sufficient under the FMLA to constitute proper notice." *Id*. at 613.

{¶ 37} Under the language of a former version of 29 C.F.R. 825.302(d), the Sixth

Circuit had previously held that " 'the FMLA does not permit an employer to limit his employee's FMLA rights by denying them whenever an employee fails to comply with internal procedural requirements that are more strict than those contemplated by the FMLA.' " *Srouder* at 613-614, quoting *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 720 (6th Cir.2003). However, in *Srouder*, the Sixth Circuit noted that 29 C.F.R. 825.302(d) had been materially altered by revisions that became effective in 2009. The court commented, that as a result, 29 C.F.R. 825.302(d) now permitted "employers to condition FMLA-protected leave upon an employee's compliance with the employer's usual notice and procedural requirements, absent unusual circumstances." *Id*. at 614. The court then concluded that:

> Thus, in light of the revisions to § 825.302(d), we hold that an employer may enforce its usual and customary notice and procedural requirements against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with the employer's requirements. Here, White [the employee] has produced no evidence demonstrating the type of "unusual circumstances" that would have justified his failure to follow the call-in requirements of Dana's [his employer's] attendance policy. Furthermore, despite White's personal impression, there is no evidence that Dana waived its call-in requirements for White during his October absences. Therefore, we hold that regardless of whether White provided sufficient FMLA notice to Dana during the September 30 meeting, Dana was nevertheless justified in terminating White's employment for his failure to follow the call-in requirements of

Dana's attendance policy.

(Footnote omitted.) *Srouder*, 725 F.3d at 615.

{¶ 38} The Seventh Circuit Court of Appeals explained the rationale behind this inquiry when it stated that:

> "An employer may . . . require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave." 29 C.F.R. § 825.302(d). One of those "usual and customary" requirements at UPS [the employer] is that the employee let his supervisor know, no later than the beginning of the third working day of leave, how much more time will elapse before the employee returns to work. Although § 825.302(d) adds that an employer's rules may not be used to delay FMLA leave if the employee gives notice that is otherwise timely, this means only that an employer may not insist on more than 30 days' notice, which UPS did not do. Nothing in the FMLA or the implementing regulations prevents an employer from enforcing a rule requiring employees on FMLA leave to keep the employer informed about the employee's plans. [The employee's] discharge therefore did not violate federal law.

Gilliam, 233 F.3d 969, at 971-972, citing former 29 C.F.R. 825.302(d).

{¶ 39} Another example can be found in *Bacon v. Hennepin Cty. Med. Ctr.*, 550 F.3d 711 (8th Cir.2008). In that case, the Eighth Circuit Court of Appeals was presented with a situation where an employee called in every day during her FMLA leave in accordance with the employer's call-in policy. However, at some point, the employee stopped calling in because her supervisor allegedly told her that she was exempt while

she was on FMLA leave. The supervisor denied making this statement. *Id*. at 713.

{¶ 40} The court of appeals held that the employer did not interfere with the employee's FMLA rights. In this vein, the court noted that because the employee "was terminated for failing to comply with [the employer's] call-in policy, and she would have been terminated for doing so irrespective of whether these absences were related to FMLA leave, the district court correctly held she did not state an interference claim under the FMLA." *Id*. at 714.

{¶ 41} These cases illustrate that the UCRC must determine whether Sammons violated Cherryhill's No Call, No Show policy, and whether unusual circumstances justified Sammons's failure to comply. 29 C.F.R. 825.302(d); *Srouder*, 725 F.3d at 614-615; *Allen v. STHS Heart, LLC*, M.D. Tenn. No. 3:09-0455, 2010 WL 2133901, *10 (May 21, 2010) (holding that employer's call-in policy was reasonable, did not discourage employees from taking FMLA leave, and did not conflict with the FMLA).

{¶ 42} Admittedly, these cases deal with whether employers violated FMLA requirements. However, as was noted, employees are not discharged for just cause where they are discharged for conduct that is protected under federal law. *Vacuform Industries,* 10th Dist. Franklin No. 08AP-100, 2008-Ohio-4895, at ¶ 15; *Giles*, 2 Ohio App.3d at 337, 442 N.E.2d 101.

{¶ 43} We further note that under 29 C.F.R. 825.300(c)(1), which is part of a section entitled "Rights and responsibilities notice," employers are required to "provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations." This is an "individual, written notice to affected employees * * *." *Vannoy v. Fed. Res. Bank of*

Richmond, 827 F.3d 296, 301 (4th Cir.2016). *See also Vacuform Industries* at ¶ 14 (referencing this as a "customized notice" requirement).

{¶ 44} Various items, like a statement of an employee's right to be restored to the same or equivalent job, must be included in the 29 C.F.R. 825.300(c)(1) notice. *Vannoy* at 301, citing 29 C.F.R. 825.300(c)(1)(vi). However, 29 C.F.R. 825.300(c)(2) also states that "[t]he notice of rights and responsibilities *may* include other information – e.g., whether the employer will require periodic reports of the employee's status and intent to return to work – *but is not required* to do so." (Emphasis added.) Again, this permissive provision is consistent with the idea that employers are not required to forego their right to enforce no call, no show policies during an employee's FMLA leave.

{¶ 45} As an example perhaps relating to the concept of "unusual circumstances," Sammons testified that he was unable to call Cherryhill during the two-day period because he was heavily medicated on September 29 and 30, 2016. Tr. at p. 13. The UCRC could consider the credibility of this assertion in light of Sammons's calling his physician for an appointment on September 28, 2016, but not being able to get in, and then travelling to his physician's office (with his wife driving) the next day for an examination. Tr. at p. 12. The UCRC should also determine whether Sammons's call on October 1, 2016, violated Cherryhill's No Call, No Show policy, considering whether there were "unusual circumstances" that would excuse noncompliance with the rule under the pertinent FMLA regulations.

{¶ 46} Sammons also cites *Clark v. Cherryhill Mgt. Inc.*, S.D. Ohio No 3:17-cv-074 (Dec. 20, 2017), which was submitted to us pursuant to a notice of supplemental authority. *Clark* is a pending civil federal trial court action for violations of the FMLA that arise from

the same operative facts as this unemployment appeal. The decision in that case supports the need for a remand here. *Clark* involved FMLA claims against Cherryhill by Sammons and another employee, Brittany Clark, both of whom were terminated under similar circumstances. *Id*. at p. 2.

{¶ 47} In his decision overruling Cherryhill's Fed.R. 12(b)(6) motion, the federal district judge quoted a comment that had been made in *Wallace*. *Id*. at p. 8, quoting *Wallace*, 764 F.3d at 585. The comment was that " '[i]f the employer can show that it had a legitimate reason unrelated to the exercise of FMLA rights for engaging in the challenged conduct, no violation exists under the FMLA.' "

{¶ 48} The federal district judge returned again to the subject when he commented on Cherryhill's assertion that the findings of the UCRC (that Clark and Sammons were terminated for just cause) should be given preclusive effect in the federal court action. *Clark* at pp. 9-10. In responding to this assertion, the court stated that: "Cherryhill may prove correct; it may prevail if it turns out that Plaintiffs were able to inform the company about their continued need for FMLA leave and did not. However, at this time, Plaintiffs' complaint will not be dismissed." *Id*. at p. 10. The judge's observations are consistent with our conclusion that the case before us should be remanded to the UCRC for further proceedings, rather than simply being reversed. Remands are permitted for this purpose. *See LaChapelle v. Ohio Dept. of Job & Family Servs.*, 184 Ohio App.3d 166, 2009-Ohio-3399, 920 N.E.2d 155, ¶ 17 (6th Dist.).

{¶ 49} As a final matter, we note that a statement in Cherryhill's handbook indicates that the attendance program policy "does not apply to employees who are on approved leave such as Family Medical Leave." Handbook at p. 1. Sammons

mentioned this policy at the administrative hearing. Tr. at pp. 13 and 17.

{¶ 50} However, this statement is contained in a section of the Handbook that is titled "Attendance Program" and provides a progressive disciplinary system for absences and situations when an employee is tardy or leaves early. The preamble to the Attendance Program section also focuses on hardship created when employees "unexpectedly" fail to report to work. *Id.* An employee on known FMLA leave would not unexpectedly fail to report to work.

{¶ 51} In contrast, the provisions relating to the No Call, No Show policy are contained in a different section of the employee Handbook that is entitled "Two Day No Call, No Show." Handbook at p. 2. As a result, the FMLA statement in the Attendance Program section does not apply to this case. However, even if it did apply, it would, at a minimum, create an ambiguity that the UCRC should address and resolve.

{¶ 52} In view of the preceding discussion, we conclude that this matter should be reversed and remanded to the UCRC for further findings on the application of the FMLA. In light of this conclusion, Sammons's second issue, which contends that he was unjustly terminated for a bona fide illness, is moot.

{¶ 53} Accordingly, Sammons's sole assignment of error is sustained (although for slightly different reasons than asserted), and this matter will be reversed and remanded to the UCRC for further consideration.

III. Conclusion

{¶ 54} Sammons's sole assignment of error having been sustained, the judgment of the trial court is reversed, and this cause is remanded to the UCRC for further

proceedings consistent with this opinion.

. . . . . .

HALL, J., concurs.

DONOVAN, J., concurring in judgment only.

Copies mailed to:

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Hon. Steven K. Dankof