

JAMIE P. KUNIS, Plaintiff, v. CHRIS C. KUNIS, Defendant  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Domestic Relations Section  
2002-335

*Child support, modification, effect of unemployment compensation on income calculation*

1. The amount of child support shall be determined in accordance with the support guidelines and there shall be a rebuttable presumption that this amount is the correct amount.
2. To determine support, a court is authorized to calculate a spouse's income potential or earning capacity, rather than their actual income.
3. Defendant-Father's eligibility for unemployment compensation in Florida does not bind the court to a determination that he did not quit voluntarily or that he was not fired for cause.
4. Defendant-Father is not entitled to a modification of his monthly support when he had sufficient assets available during his period of unemployment to pay his support payments fully and on time, in addition to paying his other expenses.
5. Defendant-Father is not entitled to a modification of his monthly support amount for either his reduced income due to unemployment or his out-of-pocket expenses for medical malpractice insurance during his period of unemployment when he was unemployed for 112 days and he did not experience a substantial decrease in income.

Appearances:

Eric J. Weisbrod, Esq., *Counsel for Plaintiff*

Barbara B. Townsend, Esq., *Counsel for Defendant*

OPINION

Walsh, J., October 25, 2004

Background

The Modified Order of Court dated April 29, 2004 requires Defendant-Father to pay Plaintiff-Mother \$2,450.17 per month representing child support for three minor children. The Order has an effective date of March 29, 2004, and it set arrears at \$2,074.13 as of April 29, 2004.

On or about May 20, 2004, Defendant-Father filed an appeal to the Court Order of April 22, 2004 [sic] for the following reasons:

1. He pays \$8,000.00 annually (\$667.00 per month) for medical malpractice insurance. This expense is necessary for the maintenance of his employment. The Domestic Relations Hearing Officer did not consider it.

2. He was unemployed from December 9, 2003 to March 29, 2004, during which time he received only \$275.00 per week in unemployment benefits. The Domestic Relations Hearing Officer did not consider his loss of income during this 17-week period.

3. He paid \$2,500.00 in malpractice premiums during his 17 weeks of unemployment. He has not and will not be reimbursed for this expense by his new employer. He could not have been hired without medical malpractice insurance. The Domestic Relations Hearing Officer did not consider this expense.

On or about June 22, 2004, Defendant-Father petitioned the Court for a Special Hearing, which the Court set for September 3, 2004. Based on the evidence presented at that hearing, the parties' subsequent memoranda, and the applicable law, we make the following:

#### Findings of Fact

1. The parties are the parents of three minor children, who reside primarily with Plaintiff-Mother and who are the subjects of Modified Order of Court dated April 29, 2004.

2. Plaintiff-Mother is currently unemployed. Based on a net monthly income from prior employment, she was assigned an earning capacity of \$1,728.04.

3. Defendant-Father is a specialist in internal medicine currently employed with Micro Spine, located in Defuniak Springs, Florida, under a contract paying him \$160,000.00 per year in gross salary. Defendant-Father began this employment on or about March 29, 2004.

4. At the time of the calculation of the current support amount, Defendant-Father was employed with Gulfcoast Orthopedic, located in Hudson, Florida, at a contract rate of \$160,000.00 gross per year. Defendant-Father began his employment there on or about October 1, 2002.

5. As a result of the application of the Support Guidelines using the above-listed incomes of the parties, Defendant-Father was ordered to pay support in the amount of \$2,450.17 per month to Plaintiff-Mother.

6. On or about December 8, 2003, Defendant-Father's employment with Gulfcoast ended.

7. Defendant-Father testified that his employment with Gulfcoast ended over a difference of opinion between himself and his employer. According to his testimony, his employer intended to move the business to a new location in the Panhandle of Florida and Defendant-Father thought this was a bad business decision.

8. On direct examination, Defendant-Father testified that he was terminated from his employment with Gulfcoast because of the above-mentioned difference of opinion. However, on cross-examination, Defendant-Father was not able to testify directly that he was fired from his employment or that he was told he did not have a job with Gulfcoast at its new location. The credible evidence is not that Father was terminated by his employer with Gulfcoast, but that he voluntarily left that position because he strongly disagreed with his employer's business judgment.

9. Defendant-Father's current employer, Micro Spine, is located in the Panhandle of Florida.

10. By and through his attorney, Barbara Townsend, Esquire, Defendant-Father filed a Petition to Modify his support on or about January 26, 2004, alleging that he was involuntarily terminated from his employment at Gulfcoast and that he would be seeking unemployment compensation.

11. Defendant-Father was awarded unemployment compensation in the amount of \$275.00 gross per week for the period of his unemployment, which was 112 days (from December 8, 2003 through March 29, 2004).

12. Defendant-Father testified that throughout his 112 days of unemployment he relied on certain assets to meet his expenses. Primarily, he relied on a checking account with a starting balance of \$42,000.00. According to Defendant-Father, this money came mainly from his share of the equitable distribution proceeds he received pursuant to the parties' divorce.

13. In addition to the above-mentioned checking account, Defendant-Father's other assets during his 112 days of unemployment consisted of a 1995 Jeep Grand Cherokee and an IRA worth approximately \$58,000.00. During his 112 days of unemployment, Defendant-Father did not withdraw any funds from the IRA.

14. During the thirteen months Defendant-Father was employed by Gulfcoast, his expenses included a \$1,200.00 monthly lease payment for a two-bedroom condominium and \$639.91 per month towards his medical malpractice insurance premium.

15. During the thirteen months Defendant-Father was employed by Gulfcoast, his net monthly

income was \$10,037.77, excluding child support and dental insurance.

16. After Defendant-Father paid those expenses to which he testified, which included \$639.91 per month towards his medical malpractice insurance, a \$1,200.00 monthly lease payment for a two-bedroom condominium, \$2,398.22 monthly in child support, and \$49.98 per month for dental insurance, Defendant-Father had available to him a disposable income of \$5,749.66 per month during his thirteen months of employment at Gulfcoast.

17. During his 112 days of unemployment, Defendant-Father was able to, and did, make his full support payments.

18. Defendant-Father testified that during his period of unemployment he was required to pay the entire amount of his monthly premium for his medical malpractice insurance, which was \$2,417.55, in order to maintain employability. However, Defendant-Father could only substantiate payments for January and February of 2004.

### Discussion

The amount of child support shall be determined in accordance with the support guidelines. Pa.R.Civ.P. 1910.16-1(b). "If it has been determined that there is an obligation to pay support, there shall be a rebuttable presumption that the amount of the award determined from the guidelines is the correct amount of support to be awarded." Pa.R.Civ.P. 1910.16-1(d). In order to deviate from the guideline amount, a trier of fact must consider the factors listed in Pennsylvania Rule of Civil Procedure 1910.16-5(b). In the instant case, we found no evidence to persuade us to deviate from the guideline amount.

Defendant-Father's testimony that he was involuntarily terminated from his employment at Gulfcoast is not credible. On cross-examination, he was unable to testify directly that he was fired from his employment or that he was told he did not have a job with Gulfcoast at its new location. In addition, Defendant-Father's current employment is located in the Florida Panhandle. Defendant-Father's eligibility for unemployment compensation in Florida is neither dispositive of this matter nor binding on this Court. Ewing v. Ewing, 843 A.2d 1282 (Pa.Super. 2004). "A party will ordinarily not be relieved of a support obligation by voluntarily quitting work or by being fired for cause." Pa. R.Civ.P.1910.16-2(d)(1). To determine support, a court is authorized to calculate a spouse's income potential or earning capacity, rather than their actual income. Neil v. Neil, 731 A.2d 156 (Pa.Super. 1999).

Further, Defendant-Father is not entitled to a modification of his monthly support because he had sufficient assets available during his period of unemployment to pay his other expenses and his support payments, according to his own testimony. In fact, Defendant-Father paid his total support amount for the 112 days in which he was unemployed.

In addition, Defendant-Father is not entitled to a modification of his monthly support amount for either his reduced income due to unemployment or his out-of-pocket expenses for medical malpractice insurance during his period of unemployment. "No adjustments in support payments will be made for normal fluctuations in earnings. However, appropriate adjustments will be made for substantial continuing involuntary decreases in income." Pa.R.Civ.P. 1910-2(d)(2). Defendant-Father's 112-day period of unemployment is not continuing for purposes of this Rule. Furthermore, Defendant-Father did not experience a substantial decrease in income. A modification may only be based upon facts appearing in the record, which show such permanent change in circumstances as to require such modification. Commonwealth ex rel. Stone v. Stone, 439 A.2d 185 (Pa. Super. 1981), Commonwealth ex rel. Caswell v. Caswell, 421 A.2d 762 (Pa. Super. 1980).

In light of the above, we make the following:

### Conclusions

The amount of child support shall be determined in accordance with the support guidelines and there shall be a rebuttable presumption that this amount is the correct amount. In order to deviate from the guideline amount, a trier of fact must consider the factors listed in Pennsylvania Rule of Civil Procedure 1910.16-5(b). Here, there is no evidence to persuade us to deviate from the guideline amount. Defendant-Father voluntarily terminated his employment, he was able to pay his child support in full during his period of unemployment, and he did not suffer a substantial continuing involuntary decrease in income. Therefore, we will not modify Defendant-Father's child support obligation.

### ORDER OF COURT

October 25, 2004, this matter having come before the Court on Defendant's Demand for Hearing and upon consideration of the record, the arguments of counsel and the law, it is hereby ordered that the Modified

Support Order, dated April 29, 2004 remains in full force and effect.