

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY H. WILLIAMS,)
)
Plaintiff-Appellee,)
)
v.)
)
DIRECTOR, OHIO DEPARTMENT OF)
FAMILY SERVICES, et al.,)
)
Defendant-Appellee.)

10-1166

**On Appeal From the Cuyahoga
County Court of Appeals,
Eighth Appellate District**

**Court of Appeals
Case No. CA 09 93594**

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF DEFENDANT-APPELLANT BRIDGEWAY, INC.**

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR
GREAT GENERAL INTEREST**

This is an issue of first impression for this Honorable Court involving whether an employee who fails to obtain a license or certification that was a condition of employment, as verified by the letter of appointment signed by the employee at the time of hire, is discharged for just cause in connection with work within the meaning of Ohio Revised Code Section 4141.29(D)(2)(a).

In this case, the court of appeals held that such failure is not a bar to entitlement of unemployment compensation benefits. This judgment of the court of appeals directly conflicts with the prior precedent established in *Tzangas, Plakas & Mannos v. Ohio Bur. Of Emp. Servs.* (1995), 73 Ohio St.3d 694, which confirmed the standard of “fault” applicable to Ohio unemployment compensation claims. The judgment of the court of appeals is also in conflict with a prior decision of the Fourth Appellate District in *Williams v. Security Armored Cars Serv., Inc.* (July 12, 1985), 4th Dist. No. 1531, 1985 W.L. 9390 (attached hereto).

The judgment of the court of appeals below adversely impacts the holding of the *Tzangas* case, in that the court of appeals compared the claimant at issue to two fellow employees, and reasoned that the policy of requiring the claimant to obtain an LISW license was not fairly applied because the other employees were not required to obtain this license as a condition of their employment. However, these two fellow employees were hired prior to the claimant, and did not have the same requirement as the claimant of obtaining an LISW license within a certain time period after their respective hire dates.

In contrast, the claimant’s letter of appointment to her position as a Program Manager with Appellant Bridgeway specifically required her to obtain an LISW license within a certain

period of time of her hire date. This was a condition of employment which the claimant failed to meet, and consequently her employment was terminated.

By comparing the claimant's employment requirement to two fellow employees who did not have this same requirement, the court of appeals concluded that the employer's policy was not fairly applied. However, the court of appeals did not need to delve into this analysis, because the case could have been decided by finding that fault was established when the claimant did not obtain or procure her license or certification.

By ignoring the fault of the claimant in this case and by unnecessarily comparing her job requirements to fellow employees, the court of appeals has created the possibility for a continued conflict within the Eighth District and also within other Ohio appellate districts whenever this type of issue is raised.

The only comparison that could have equitably been drawn by the court of appeals would have been between the claimant and others like her who were hired when this requirement was made a condition of employment and who also failed to comply with this requirement. Instead, the court of appeals chose to make an invalid comparison between the claimant and the two fellow employees, and in doing so failed to apply the proper standard of fault provided by the *Tzangas* case.

Hence, the court of appeals has in effect created a new standard which looks at alleged "disparate treatment" by a comparison to other employees who did not even have the same requirement or condition of employment. This type of standard is irrelevant and inapplicable to unemployment compensation cases.

The decision of the court of appeals has broad implications and may impact many future unemployment cases in Ohio, because the standard used by the court of appeals can lead to

inconsistent and/or improper results. This result will definitely occur if future Ohio courts choose to make a comparison to the claimant in their particular case to other fellow employees who do not even have the same or similar conditions of employment. This type of analysis will lead to numerous conflicting decisions by the various Ohio appellate districts and the common pleas courts within those districts. This is why it is so important for this Honorable Court to accept this case and to provide clarity and the proper rule in this area.

The judgment of the court of appeals is contrary to both the *Tzangas* case and the standard of “just cause” that has been previously adopted and employed for many years in Ohio unemployment cases. As explained above, the decision of the court of appeals also sets a dangerous precedent that will likely lead to mixed and/or conflicting decisions in future cases. Therefore, the underlying objective of the Ohio Unemployment Compensation Act would be severely compromised or undermined if the court of appeals judgment below is allowed to stand. This judgment is directly contrary to the current case law, the rules pronounced in the *Tzangas* case, and the stated purpose of the Act.

In short, the issue in the present case concerns all Ohio employers who adopt certain conditions or requirements of employment for their employees. Due to the possibility of inconsistent Ohio court decisions and the need to provide clarity to all Ohio employers and employees in these type of issues, Appellant Bridgeway urges this Honorable Court to grant jurisdiction to hear this case and to review the erroneous and potentially dangerous judgment of the court of appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from the unemployment compensation claim of Appellee Mary Williams (Claimant), who was previously employed with Appellant Bridgeway, Inc. Claimant was

originally hired by Bridgeway on October 30, 2006 as a Residential Social Worker. Thereafter, she was promoted to Residential Program Manager in January 2007. Her letter of appointment dated January 17, 2007 was signed by her and confirms her understanding that she will be required to complete an LISW licensure within fifteen months, which was expressly stated as a requirement for this position. Claimant signed the letter acknowledging she had read the position description and accepted the terms and conditions of employment as stated. Claimant then took the LISW test in early June 2008, and received a failing grade. She was not eligible to re-take the test for at least 90 days. After Claimant failed the test, she was discharged on June 20, 2008, due to her failure to satisfy the condition of her employment.

Two other Bridgeway program managers who were hired prior to Claimant had performed their duties without an LISW certification. These employees did not have the same condition or requirement of employment to obtain an LISW certification within a certain period of time.

The Review Commission found that Claimant was discharged from her employment for just cause and denied the claim. Upon Claimant's appeal to the court of common pleas, the trial court affirmed the Review Commission's decision and found that Claimant "chose to take the LISW examination at the end of the required term and unfortunately failed the exam and lacked sufficient time to re-take it to obtain her licensure." The trial court held that under the applicable standard of review, the Review Commission's decision was not unlawful, unreasonable or against the manifest weight of the evidence.

In so doing, the trial court found that Claimant became unsuitable for her position under the *Tzangas* test. The trial court addressed the issue of the fellow employees and confirmed the Review Commission's reasoning that it is not uncommon for employers to increase the

educational requirements in order to be hired or maintain employment, and also noted that Claimant knew she had fifteen months to obtain the certification but failed to do so without justification.

Claimant then appealed to the Cuyahoga County Court of Appeals, which reversed and remanded. The court of appeals concluded that Claimant did not do anything that should deprive her of unemployment compensation benefits, and that Claimant had performed the requirements of her position without the licensure. Moreover, the court of appeals found that a comparison to the two fellow employees showed that they had served in that same capacity for several years without being required to obtain a LISW license.

It must be noted that Appellant Bridgeway has filed with the court of appeals a motion for consideration *en banc* and a separate motion to certify a conflict. As of the time of preparation of this memorandum, the court of appeals has not ruled on these motions. Hence, to preserve its appeal rights, Bridgeway is filing a notice of appeal and this memorandum in support of jurisdiction.

Bridgeway's motion for consideration *en banc* emphasizes that the Eighth District's decision in the present case conflicts with its own prior decision in the case of *Robertson v. Ohio Dept. of Job & Fam. Serv.* (June 29, 2006), 8th Dist. No. 86898, 2006-Ohio-3349 (attached hereto). Although the court of appeals attempted to distinguish *Robertson* in its opinion, this is an invalid distinction because the court of appeals did not need to proceed into an analysis with two fellow employees who did not have the same condition or requirement of employment.

Bridgeway maintains that the court of appeals erred in reversing and remanding the Review Commission's decision. The court of appeals failed to recognize and apply the proper standard pronounced in the *Tzangas* case. Instead, the court of appeals departed from the

Tzangas standard of “fault” and from the standard of review established in R.C. 4141.28. In addition, the court of appeals improperly embarked upon an analysis regarding the two fellow employees, neither of whom had the same requirement or condition of employment. Finally, the court of appeals adopted a new type of standard of fault involving a comparison to other employees, which has not been previously authorized or approved by this Honorable Court.

In support of its position on these issues, Bridgeway presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: An employee who fails to obtain a license or certification that was a condition of employment, as verified by the letter of appointment signed by the employee at the time of hire, is discharged for just cause in connection with work within the meaning of Ohio Revised Code Section 4141.29(D)(2)(a).

As explained in the *Tzangas* case, fault is the essential element of a just cause termination. Under long-standing prior case precedent, if an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause. In just cause determinations, a reviewing court may not substitute its own judgment for that of the hearing officer in considering whether the just cause finding was unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, the hearing officer’s finding should be affirmed if it is supported by some evidence in the record. *Irvine v. Unemployment Comp. Bd. Of Review* (1985), 19 Ohio St.3d 15.

In the present case, Claimant was discharged for just cause due to her failure to obtain the license or certification within a certain period of time, as spelled out in the letter of appointment which she signed. The court of appeals needed to go no further than the letter of termination in the record, which provided the evidence of fault supporting the Claimant’s termination for just cause. Simply stated, Claimant’s failure to comply with the express condition of her

employment constitutes fault on her part which supplies just cause for her termination. Ohio employers must be able to provide and reply upon reasonable conditions of employment such as the licensing and certification requirements in the present case, and here Claimant's failure to comply with such a requirement rendered her discharge to be disqualifying under the Act.

Proposition of Law No. 2: Unsuitability for position constitutes "fault" sufficient to support a "just cause" determination, barring entitlement to unemployment compensation benefits. (Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs. (1995), 73 Ohio St.3d 694, approved and followed.)

The *Tzangas* opinion discussed the concept that "unsuitability" for a position constitutes the necessary fault sufficient to support a just cause termination. In the present case, as the trial court ruled, Claimant became unsuitable for her position when she failed to obtain her LISW license or certification, where such a requirement is reasonable for the position and where she was given more than sufficient time to obtain this license.

The court of appeals erred by departing from the analysis in *Tzangas* and by focusing its analysis upon two fellow employees who did not have the same requirement or condition of employment. Under the law, the focus of the analysis should be on the *claimant*. Here, if that focus had been properly applied, the prior decisions of the trial court and the Review Commission should have been affirmed.

Moreover, as indicated by both the trial court and the Review Commission, Bridgeway has the right to update the requirements and/or conditions of employment for various positions, and this is common amongst Ohio employers. Employers should be free to adopt new requirements to meet the demands and issues of a changing society. The present case speaks to this type of issue, which is of interest to all Ohio employers and employees.

CONCLUSION

For the reasons provided above, this case involves a matter of public and great general interest. Therefore, Appellant Bridgeway requests that this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits, and all Ohio employers and Ohio employees will have the appropriate guidance and decision from this Honorable Court on these issues going forward.

Respectfully submitted,



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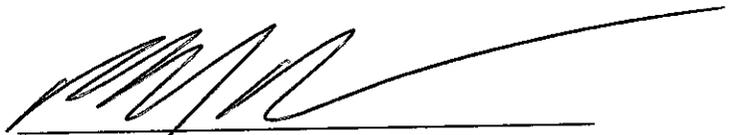
PROOF OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary

U.S. mail this 2nd day of July, 2010 to:

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93594

MARY H. WILLIAMS

PLAINTIFF-APPELLANT

vs.

**DIRECTOR, OHIO DEPARTMENT OF JOB AND
FAMILY SERVICES, ET AL.**

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-681453

BEFORE: McMonagle, J., Kilbane, P.J., and Jones, J.

RELEASED: May 20, 2010

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ANNOUNCEMENT OF DECISION
PER APP.R. 22(B) AND 26(A)
RECEIVED

MAY 20 2010

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY G. Fuerst DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

COPIES MAILED TO COUNSEL FOR
APPELLANT AND APPELLEE PARTIES

CHRISTINE T. McMONAGLE, J.:

Plaintiff-appellant Mary H. Williams appeals the trial court's judgment affirming the Review Commission's decision in this administrative appeal after finding that the Commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence. We reverse and remand.

In October 2006, Williams began working for defendant-appellee Bridgeway, Inc. as a residential social worker. In January 2007, Williams was promoted to a residential program manager. The promotion was conditioned upon Williams becoming a licensed independent social worker ("LISW") within 15 months of the promotion, or by May 2008. Williams signed a letter of appointment, which included the licensing requirement.

Williams was scheduled to sit for the exam in April 2008, but because of a health issue she received an extension until June 2008 to take the exam. She did not pass the exam, however,¹ and was terminated from Bridgeway for failing to become a LISW within 15 months.

Williams filed for unemployment compensation. The Director disallowed her claim, finding that she had been discharged for just cause. Williams appealed, and on redetermination, the Director affirmed the initial

¹She was not eligible to take the test again for 90 days.

determination. Williams appealed again and the case was transferred to the Review Commission.

A hearing officer from the Commission affirmed the Director. The officer found that under the letter of appointment, Williams stipulated that she was required to pass a LISW exam within 15 months, and that passing the exam was a term and condition of employment. The officer further noted that Williams had taken the exam at the end of the 15-month term, failed it, and did not have sufficient time to retake it. Moreover, the officer noted, in response to Williams's claim that she was treated differently from two other residential program managers who did not have the LISW certification, that one had been in the position for 13 years and the other for 5 years. The officer justified the differing requirements stating that, "[i]t is not uncommon to have employers increase the educational pre-requisites in order to be hired or maintain employment."

Williams filed a request for review before the Unemployment Compensation Review Commission, but the request was denied and she appealed to the common pleas court. The court found that the decision of the Commission was not unlawful, unreasonable or against the manifest weight, and affirmed the Commission's decision. She now raises two assignments of error for our review.

In her first assignment, Williams contends that the Review Commission's decision was unlawful, unreasonable, or against the manifest weight of the evidence. In the second assignment, she contends that the Review Commission's was against the manifest weight of the evidence because Bridgeway's licensing requirement was not fairly applied. We consider these two interrelated assignments of error together.

R.C. 4141.282(H) sets forth the scope of review in unemployment compensation cases. Pursuant to this section, the trial court may only reverse the Review Commission's decision if it is "unlawful, unreasonable, or against the manifest weight of the evidence." *Id.*; see, also, *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 696, 653 N.E.2d 1207. When we review the trial court's decision, we apply the same standard. *Id.* The Ohio Supreme Court has explained that the resolution of factual questions is chiefly within the Review Commission's scope of review. *Id.*, citing *Irvine v. Unemployment Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587, 590. If the reviewing court finds evidence in the record to support the findings, then the court cannot substitute its judgment for that of the Review Commission. *Durgan v. Ohio Bur. of Emp. Servs.* (1996), 110 Ohio App.3d 545, 551, 674 N.E.2d 1208, citing *Wilson v. Unemployment Comp. Bd. of Rev.* (1984), 14 Ohio App.3d 309, 310, 471 N.E.2d 168.

The purpose of the Unemployment Compensation Act is to provide financial assistance to persons without employment through no fault of their own. *Salzl v. Gibson Greeting Cards, Inc.* (1980), 61 Ohio St.2d 35, 39, 399 N.E.2d 76. R.C. 4141.29 establishes the criteria for eligibility for unemployment compensation benefits. Pursuant to R.C. 4141.46, this provision must be liberally construed. Under R.C. 4141.29(D)(2)(a), no individual may be paid benefits if the individual has been discharged for just cause in connection with the individual's work.

“Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Irvine*, supra at 17. The determination of whether “just cause” exists depends upon the unique considerations of each particular case and each case must be considered on its particular merits. *Id.*

Some courts have recognized that “[t]here is a distinction between the violation of a company rule or policy, which may warrant discharge of an employee, and ‘the further degree of misconduct or fault required on the part of the employee to justify a denial of unemployment benefits.’” *James v. Ohio State Unemployment Rev. Comm.*, Franklin App. No. 08AP-976, 2009-Ohio-5120, ¶12, quoting *Adams v. Harding Machine Co., Inc.* (1989), 56 Ohio App.3d 150, 155, 565 N.E.2d 858. In *Adams*, the Third Appellate District recognized the

distinction made by the review board between the “cause’ necessary for discharge of the plaintiff under the (implied) employment contract in the case * * * and the ‘just cause’ necessary to determine eligibility for unemployment compensation benefits[.]” The court cited to the review board’s decision, which found that, although the employer had the right to discharge the claimant, the action was excessive and the claimant was “discharged without just cause in connection with work within the meaning of * * * [R.C. 4141.29(D)(2)(a)].” *Id.* at 155-56.²

This court has also recognized the distinction. For example, in *Case W. Res. Univ. v. Director, Ohio Dept. of Job & Family Servs.*, Cuyahoga App. No. 80593, 2002-Ohio-4021, this court, in addressing “just cause” under the unemployment compensation benefits statute, stated that “[t]he relevant Ohio statute provides that no individual may be paid benefits when that individual

²See, also, *Coey v. Burwell Nurseries* (1965), 2 Ohio App.2d 102, 105, 206 N.E.2d 577 (the court determined the employer had the right to discharge the claimant, but also determined the claimant did nothing to deprive himself of the benefits of unemployment compensation, and thus, there was no “just cause” within the meaning of the law to deny unemployment compensation benefits); *Knowles v. Roberts* (App.1952), 117 N.E.2d 173, 66 Ohio L.Abs. 345 (“[t]he discharge was justifiable under the contract. But this fact does not prevent the employee from receiving the benefits to which he is entitled under the [unemployment compensation] law and which must be liberally construed.”); *Dean v. Miami Valley Hosp.* (Feb. 22, 1988), 2nd Dist. No. CA 10391 (“the ‘just cause’ sufficient to justify the discharge of an employee need not be as grave as the ‘just cause’ required to disqualify a discharged employee from receiving unemployment compensation under R.C. 4141.29.”).

'has been discharged for just cause *in connection with the individual's work.*' (Emphasis sic.) Id. at ¶21, citing R.C. 4141.29(D)(2)(a). In *Case*, the employee was terminated for (1) the keeping of bullets at his work station, which the university deemed as possession of a weapon, "endangering life or property," and "disruptive behavior and poor judgment," (2) failing to disclose prior criminal convictions on his original employment application and, (3) for committing criminal offenses after being hired by the university.

This court noted, however, that none of the grounds for the employee's termination cited by the university supported a finding that the employee was terminated "in connection with" his work. Id. at ¶24. This court, therefore, upheld the review commission's decision that the university had terminated the employee without just cause and that he was therefore eligible for unemployment compensation.

The issue in this case is not whether Bridgeway wrongfully terminated Williams. Rather, the issue is whether Williams has the right to unemployment compensation benefits, or put another way, whether she did something, in connection with her work, that should deprive her of unemployment compensation benefits. We find she did not.

The evidence at the administrative level demonstrated that Williams had been performing the duties expected of her as a residential program manager

during the time period that she held the position. The only function that she was not able to do, because of her lack of licensure, was sign off on her clinical treatment plans. Another program manager therefore had to sign off on her plans. But that same program manager had also been signing off on another program manager's clinical plans for over 13 years because the latter did not have her LISW license. The evidence further showed that another program manager had served in that capacity for five or six years without a LISW license and did not obtain her license for 20 months after being promoted to residential program director.

We recognize this court's decision in *Robertson v. Director, Ohio Dept. of Job & Family Servs.*, Cuyahoga App. No. 86898, 2006-Ohio-3349. There, this court affirmed the review commission's decision that the claimant was discharged for just cause because, by failing to provide court documents relative to her past criminal history, she failed to obtain the security officer license required by her employer. Bridgeway and the Department of Job and Family Services contend that *Robertson* controls this case. There is a distinction between *Robertson* and this case, however. Namely, there was no evidence in *Robertson*, as there is here, that the claimant was treated differently from other employees.

“A termination pursuant to company policy will constitute just cause only if the policy is fair, and fairly applied. This court’s review of the fairness of a company policy is necessarily limited to a determination of whether the employee received notice of the policy; whether the policy could be understood by the average person; and whether there was a rational basis for the policy. The issue of whether the policy was fairly applied relates to whether the policy was applied to some individuals but not others.” (Citation omitted.) *Shaffer v. Am. Sickle Cell Anemia Assn.* (June 12, 1986), Cuyahoga App. No. 50127; see, also, *Apex Paper Box Co. v. Adm., Ohio Bur. of Emp. Servs.* (May 11, 2000), Cuyahoga App. No. 77423.

Here, it is undisputed that Williams was aware of the licensing requirement and understood it. Even assuming that there is a rational basis for the policy,³ it was not fairly applied. Another Bridgeway employee had been working as a program manager for over 13 years without her LISW license. And another program manager had served in that capacity for five or six years without a LISW license and did not obtain her license for 20 months after being promoted to residential program director.

³Williams’s supervisor testified that in addition to allowing a program manager to sign off on his or her treatment plans, a LISW license gives a person “a certain expertise” in providing their service.

The officer justified the differing requirements for the licensing of the program managers, stating that “[i]t is not uncommon to have employers increase the educational pre-requisites in order to be hired or maintain employment.” But Bridgeway’s representative who testified at the hearing stated twice that she did not know of *any* policy of the agency requiring program managers to have a LISW license and did not know if any employees had been hired as program managers on the condition of obtaining a license, as Williams had been. She further testified that there was no governmental requirement that program managers have a LISW licence. None of the other evidence in the record shows the existence of such a Bridgeway policy.

On this record, the requirement imposed on Williams was not fairly applied to other program managers and therefore her assignments of error are sustained.

Judgment reversed and remanded.

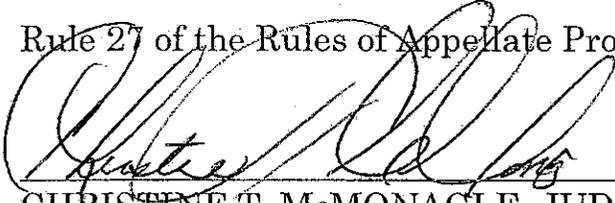
It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

A handwritten signature in cursive script, appearing to read "Christine T. McMonagle", is written over a horizontal line.

CHRISTINE T. McMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR

Not Reported in N.E.2d, 1985 WL 9390 (Ohio App. 4 Dist.)
(Cite as: 1985 WL 9390 (Ohio App. 4 Dist.))

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Fourth District, Scioto
County.

BRET A. WILLIAMS, Plaintiff-Appellant

v.

SECURITY ARMORED CAR SERVICES, INC.,
ET AL., Defendant-Appellees

CASE NO. 1531.

1531

July 12, 1985.

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OPINION & JUDGMENT ENTRY

ABELE, J.

*1 This is an appeal from a Scioto County Common Pleas Court judgment affirming a decision of the Ohio Unemployment Compensation Board of Review. Appellant originally filed an application for benefits beginning December 19, 1982. He filed an additional application for benefits beginning September 3, 1983, after his employment with Appellee Security Armored Car Services of St. Louis, Missouri ended.

Appellant worked for the company from July 1, 1983, through August 26, 1983, as a truck driver. When he was hired, the company told him to obtain a Missouri chauffer's license. Appellant claims he made every reasonable effort to obtain the license,

but failed due to his financial circumstances and inability to procure a car to use during the driving test. Appellant admits both the company's insurance carrier and Missouri law require a chauffeur's license for the job.

The Board of Review Referee found in pertinent part:

"Claimant's failure to obtain said license was not in the best interests of his employer. Therefore, the Referee must conclude that claimant was discharged by Security Armored Car Services for just cause in connection with work."

The Court below rejected Appellant's argument that "the correct test for discharge for "just cause" or "misconduct" is whether the claimant was discharged due to his/her own culpability rather than circumstances beyond his/her control." The Court held the question is not whether Appellant acted reasonably, the question is whether the employer acted reasonably.

We affirm.

ASSIGNMENT OF ERROR I

"THE COURT OF COMMON PLEAS ERRED IN FAILING TO RULE THAT THE CORRECT TEST FOR DISCHARGE WAS NOT USED BY THE REFEREE IN THIS CASE."

Ohio Revised Code Section 4141.29 (D)(2)(a) provides in pertinent part:

(D) ...no individual may...be paid benefits under the following conditions:

(2) ...

(a) He quit his work without just cause or has been discharged for just cause in connection with his work..."

Section 4141.29 (D)(2)(a) contains two "just cause" phrases. The first phrase "He quit his work without

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just cause" refers to "just cause" from the employee's perspective. The second phrase "(He) has been discharged for just cause" refers to "just cause" from the employer's perspective.

In Peyton v. Sun T.V. (1975) 44 O.App. 2d 10, the Court wrote:

"There is, of course, not a slide rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act."

Peyton involved an employee who quit his work. The Peyton Court had to decide whether the employee acted as an "ordinarily intelligent person" when deciding to quit his work.

The case at bar, however, involves an employer who discharged an employee. The Board of Review's Referee had to decide whether the employer acted as an "ordinarily intelligent person" when deciding to discharge Appellant. Section 4141.29 (D)(2)(a) protects employers by forbidding benefits to those employees who, due to circumstances beyond the control of the employer, are unable to meet obligations of the job. Appellant's difficulties do not excuse his failure to obtain a Missouri chauffeur's license as required by his employer, his employer's insurance carrier, and Missouri law.

*2 We have reviewed the record below and find the Board of Review's decision was not unlawful, unreasonable, or against the manifest weight of the evidence.

Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE COURT OF COMMON PLEAS ERRED IN FAILING TO RULE THAT THE DENIAL BY THE BOARD OF APPELLANT'S CLAIM FOR UNEMPLOYMENT BENEFITS WAS UNLAWFUL, UNREASONABLE, AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. (O.R.C. 4141.28 (O))."

Appellant contends the Court applied the Ohio Revised Code Section 119.12 standard when reviewing the case. While the Court referred to both Section 119.12 and Section 4141.28 in its decision, the judgment entry clearly reflects the Court used the Section 4141.28(O) standard of review. Section 4141.28 (O) provides in pertinent part:

"If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision."

The Court wrote "the decision was not unlawful, unreasonable, or contrary to the manifest weight of the evidence."

Appellant's second assignment of error is overruled.

JUDGMENT AFFIRMED

Grey, J.: Concur in Judgment & Opinion
Stephenson, P.J.: Concur in Judgment with opinion.
It is ordered that (appellee) recover of (appellant) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Stephenson, P.J., - Concurring In Judgment Only:

While I concur in the judgment of affirmance under

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the facts of this case, I dissent from the opinion insofar as it holds employee fault irrelevant in a discharge for just cause adjudication. See Sellers v Board of Review (1981), 1 Ohio App. 3d 161.

I would also note that the opinion of the trial court erroneously adopts the R.C. 119.12 standard of review, i.e., whether there was reliable, probative and substantial evidence to support the Board order. The reason application of such standard is error is that a R.C. 119.12 appeal is hybrid and is neither strictly one of law or law and fact. In unemployment compensation appeals the appeal is solely one of law with the standard of review being whether the decision was unlawful, unreasonable or against the manifest weight of the evidence. Even though the court's opinion applies the wrong standard the judgment entry, apparently prepared by counsel, applies the correct standard. Hence, my concurrence in the judgment.

Ohio App., 1985.
Williams v. Security Armored Car Services, Inc
Not Reported in N.E.2d, 1985 WL 9390 (Ohio App.
4 Dist.)

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(Cite as: 2006 WL 2243136 (Ohio App. 8 Dist.))

C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
Marika ROBERTSON, Plaintiff-Appellant

v.

Dir., OHIO DEPT. JOB & FAMILY SERVICES, et al., Defendants-Appellees.
No. 86898.

Decided June 29, 2006.

Background: Unemployment compensation claimant sought benefits. The Ohio Unemployment Compensation Review Commission denied benefits. Claimant appealed. The Court of Common Pleas, Cuyahoga County, No. CV-550802, affirmed. Claimant appealed.

Holding: The Court of Appeals, Ann Dyke, J., held that credible evidence supported the Review Commission's determination that claimant was discharged for just cause.
Affirmed.

Sean C. Gallagher, J., filed a concurring opinion.

Mary Eileen Kilbane, J., filed a dissenting opinion.

West Headnotes

Unemployment Compensation 392T ↪ 413

392T Unemployment Compensation

392TVIII Proceedings

392TVIII(G) Weight and Sufficiency of Evidence

392Tk412 Fault or Misconduct

392Tk413 k. In General. Most Cited

Cases

Credible evidence supported the Unemployment

Compensation Review Commission's determination that claimant was discharged for just cause; claimant failed to obtain a security officer license necessary to maintain her employment by failing to provide court documents requested by licensing agency. R.C. §§ 4141.282(H), 4141.29(D)(2)(a).

Civil appeal from the Court of Common Pleas Case No. CV-550802. Herman Edward Gregory, Esq., Cleveland, OH, for Plaintiff-Appellant.

Patrick Macqueoney, Esq. Asst. Attorney General, Cleveland, OH, for Defendants-Appellees.

JOURNAL ENTRY AND OPINION

ANN DYKE, A.J.

*1 ¶ 1 Plaintiff-Appellant, Marika Robertson ("Plaintiff"), appeals the trial court's affirmance of the Ohio Unemployment Compensation Review Commission's decision denying her unemployment benefits. For the following reasons, we affirm.

¶ 2 Appellant was employed as a security officer by Inter-Con Security Systems Holding Corporation ("ICSS") from May 15, 2003 until April 19, 2004. At the time she was hired, she was aware that she needed to obtain a security officer license in order to continue her employment with ICSS.

¶ 3 On January 16, 2004, the Ohio Department of Commerce ("ODC") sent ICSS a letter stating in part:

¶ 4 "The Division of Real Estate and Professional Licensing has begun its review of the registration application submitted by Marika Robertson. The Division has obtained a report from the Ohio Bureau of Criminal Identification and Investigation ("BCII") which states that the registration applicant was discharged with felonious assault, Arrest number(s) 200321078, Ohio Revised Code Chapter(s) 2903.11, on June 12, 2003, in Cuyahoga County, Ohio. The BCII report, however, does not indicate the final disposition of the charge(s). In order to complete its review of the registration application,

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the Division must determine whether or not the registration applicant has been convicted on a felony charge within the last twenty (20) years.

{¶ 5} “The Division requires that final dispositions not stated on the rap sheets must be on the record. *The Division also requires final disposition for all misdemeanor charges.* Please make note that misdemeanor charges can be heard in both Courts, Municipal and Common Pleas. Felony charges are only heard in Common Pleas Court. At least one charge listed above is a felony charge.

{¶ 6} “*A copy of the official Certified Journal Entry from the Clerk of Courts Office of the county in which the charge(s) was filed with the final disposition stated, along with the signature of the presiding Judge is required.* Any other document from the Court with the signature of the Judge and final disposition of the charge(s) in question stated on it will also be acceptable. If the documents is not signed by a Judge, it is not acceptable.” (Emphasis in original.)

{¶ 7} Appellant provided ICSS with the following documents: a case Disposition Request Form from the Cleveland Municipal Clerk of Courts dated February 12, 2004 that indicated that there was no information on file regarding the June 13, 2004 arrest for felonious assault; a Cleveland Division of Police General Records Division form dated February 12, 2004 indicating “6-12-2003-Released-Felonious assault”; and two Cleveland Municipal Court Journals showing the final disposition of two criminal cases, none of which dealt with Appellant's alleged felonious assault charge. Appellant, however, did not provide ICSS with documents from the Cuyahoga County Court of Common Pleas. ICSS, nevertheless, forwarded the documents provided by Appellant to the ODC.

*2 {¶ 8} On March 5, 2004, the ODC sent another letter to ICSS stating that the documents provided were insufficient. The letter stated in part:

{¶ 9} “ * * * *We still need the following information:*

{¶ 10} “A copy of the official Certified Journal Entry for the felonious assault charge dated June 12, 2003

in Cleveland, Ohio. The documentation you submitted is not sufficient.

{¶ 11} “In cases where you are unable to locate any record of the stated charge(s), you must provide a letter from the clerk of courts office that specifically states ‘no record found’.” (Emphasis in original).

{¶ 12} The letter further provided that failure to provide such documentation within ten days would result in the ODC denying the Appellant's registration for the security license.

{¶ 13} ICSS informed Appellant of the letter and indicated that she should go to the Common Pleas Court to obtain the necessary documentation regarding the alleged felony charge. Appellant failed to comply with ICSS's and ODC's request to provide documentation for the Common Pleas Court, and instead, provided another letter dated March 18, 2004 from the Cleveland Municipal Clerk of Courts indicating that Appellant had no record of a charge for felonious assault in that court, as well as a document from the Cleveland Police Department not mentioning any charges of felonious assault being filed against Appellant. As a result, Appellant was discharged when the ODC denied her application for a security officer license as a result of her inability to produce the requested documents.

{¶ 14} Following her discharge, Appellant filed an application for unemployment compensation benefits on April 19, 2004. The Director of the Ohio Department of Jobs and Family Services (“Director”) determined Appellant was discharged from ICSS without just cause in connection with work and allowed her claim for unemployment compensation for the week ending April 24, 2004.

{¶ 15} ICSS timely appealed the Director's determination and on June 10, 2004, the Director issued a Redetermination which affirmed the original determination.

{¶ 16} ICSS appealed the Redetermination on July 1, 2004 and the case was transferred to the Ohio Unemployment Compensation Review Commission (“the Commission”). On September 27, 2004, a telephone hearing was held and Appellant failed to appear, claiming difficulties with her telephone service. The

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Commission reversed the Director's Redetermination on October 22, 2004 and determined that, as a result of Appellant's failure to provide the requested documentation from the Common Pleas Court, she was terminated with just cause and not entitled to unemployment compensation benefits.

{¶ 17} Appellant timely appealed the Commission's decision. In her appeal, Appellant explained the steps she took to comply with ICSS's and ODC's request for documentation regarding her felony record, as well as provided her reasons for her absence at the September 27, 2004 telephone hearing. The Commission issued its Decision Disallowing Request for Review on December 2, 2004.

*3 {¶ 18} Appellant timely appealed to the Cuyahoga County Court of Common Pleas, which affirmed the Commission's Decision. Appellant now appeals to this court, asserting only one assignment of error for our review. Her sole assignment of error states:

{¶ 19} "The court of common pleas erred in affirming the decision of the Unemployment Compensation Review Commission whose decision to reverse the Ohio Department of Job and Family Services Director's allowance of unemployment compensation benefits to Marika Robertson, was unlawful, unreasonable and against the manifest weight of the evidence pursuant to R.C. 4141.282(H). (Judgment Entry filed July 22, 2005)."

{¶ 20} Appellant appeals the trial court's affirmance of the Commission's decision denying her unemployment benefits. Finding no merit to this appeal, we affirm.

{¶ 21} A reviewing court may only reverse a decision of the unemployment compensation board of review if the decision is unlawful, unreasonable or against the manifest weight of the evidence. R.C. 4141.282(H); Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv., 73 Ohio St.3d 694, 1995-Ohio-206, 653 N.E.2d 1207, paragraph one of syllabus; Irvine v. Unemp. Comp. Bd. of Rev. (1985), 19 Ohio St.3d 15, 482 N.E.2d 587. Thus, this court is not permitted to make factual findings or determine the credibility of witnesses. Tzangas, supra; Irvine, supra. We may only determine whether the Commission's decision is supported by the evidence in the

record. *Id.* "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision. * * * Where the board might reasonably decide either way, the courts have no authority to upset the board's decision." *Irvine*, supra at 18. Consequently, if the evidence is supported by competent, credible evidence, we must affirm the Commission's decision. MacMillan v. Flow Polymers, Inc., Cuyahoga App. Nos. 83197, 83203, 2004-Ohio-1252.

{¶ 22} Pursuant to R.C. 4141.29(D)(2)(a), a claimant is not eligible for unemployment compensation benefits if the claimant quit without just cause, or if the claimant was discharged for just cause. "Just cause" means "that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine*, supra at 17. Just cause determinations must be consistent with the legislative purpose of the Unemployment Compensation Act, to provide financial assistance to individuals who become unemployed through no fault of their own. *Id.*

{¶ 23} In the instant action, a review of the record reveals that there existed competent, credible evidence from which the Commission could determine that Appellant was discharged for just cause. In making its determination, the Commission found that Appellant failed to provide her employer with the requested and necessary documentation regarding her reported felony charge. The Commission noted that Appellant had provided her employer with documentation from the Municipal Court stating that the court had no record of any felony charges associated with Appellant. She, however, had failed to present the documentation from the Common Pleas court even after her employer had indicated to Appellant to go to the Common Pleas Court, not the Municipal Court, to get the necessary documentation regarding the reported felony charge. Therefore, since Appellant admittedly has failed to acquire documentation from the Common Pleas Court stating that it had no record of any felony charges associated with Appellant after her employer informed her to do so, Appellant was at fault for not obtaining her security license that she knew she needed to continue her employment with ICSS. Accordingly, we find that there was competent, credible evidence to support the Commission's conclusion that Appellant was discharged for just cause. Appellant's sole assignment of error is without merit.

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Judgment affirmed.

*4 It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, J., concurs.

MARY EILEEN KILBANE, J., dissents.

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, J., concurring:

CONCURRING OPINION

{¶ 24} I concur with the majority analysis and opinion. I am sensitive to the views expressed by Judge Kilbane in her thoughtful dissent outlining the good faith effort of Robertson to obtain a simple public document. Robertson's efforts, unfortunately, do not invalidate the trial court's finding that she was discharged for just cause.

{¶ 25} The trial court's determination was predicated on Robertson's failure to secure a license. It was not based on the failure of various administrative agencies to provide Robertson the record she requested. The license was a prerequisite to her further employment.

{¶ 26} An appellate court cannot substitute its judgment for that of the common pleas court except within its limited statutory scope of review and is to determine only if the common pleas court abused its discretion. Henley v. Youngstown Bd. of Zoning Appeals, 90 Ohio St.3d 142, 147, 735 N.E.2d 433, 2000-Ohio-493, quoting Kisil v. Sandusky (1984), 12 Ohio St.3d 30, 34, 465 N.E.2d 848.

{¶ 27} Where administrative appeals are concerned, an appellate court must affirm the decision of the common pleas court unless it finds, as a matter of law, that the decision is not supported by a preponderance of reliable, probative, and substantial evidence. In this instance, Robertson did not have a license and, thus, she was discharged for good cause.

{¶ 28} This action is not a review of the failure of certain public agencies to provide Robertson with the appropriate documentation relating to her arrest. Had this been a mandamus action to compel the governmental agencies to act, the result might well have been different.

MARY EILEEN KILBANE, J., dissenting:

DISSENTING OPINION

{¶ 29} I respectfully dissent from the majority's opinion as to the single assignment of error as I believe the decision of the Unemployment Compensation Review Commission ("UCRC") disallowing unemployment compensation benefits to Marika Robertson ("Robertson") was unlawful, unreasonable, and against the manifest weight of the evidence pursuant to R.C. 4141.282(H).

*5 {¶ 30} As the majority opinion correctly states, "[p]ursuant to R.C. 4141.29(D)(2)(a), a claimant is not eligible for unemployment compensation benefits if the claimant quit without just cause, or if the claimant was discharged for just cause. 'Just cause' means 'that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act.'" Irvine, supra; Tzangas, Plakas & Manos, v. Administrator, Ohio Bureau of Employment Servs., 73 Ohio St.3d 694, 653 N.E.2d 1207, 1995-Ohio-206; Warrensville Heights v. Jennings, (1991), 58 Ohio St.3d 206, 569 N.E.2d 489; Shephard v. Dir., Ohio Dep't of Job & Family Servs. (May 11,

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2006), Cuyahoga App. No. 86518, 2006-Ohio-2313. In the present case, I find that no competent, credible evidence exists to support the UCRC's decision that Robertson was fired for just cause.

{¶ 31} The evidence in the record contained numerous statements from Robertson as well as numerous court documents from the Cleveland Municipal Clerk of Court's office, the Cleveland Police Department, and the Cuyahoga County Sheriff's Office, all stating that no felony record exists. Robertson clearly enunciated in her letters contained in the record, that she attempted to locate the required certified journal entry in both the Cleveland Municipal Court Clerk's office as well as the Cuyahoga County Clerk of Court's office. Robertson explained that when she attempted to get the required documents from the Common Pleas Clerk of Court's office she was informed that she was not in their system and that there was nothing they could give her to prove this.

{¶ 32} Accordingly, Robertson made an extreme good faith effort to comply with the demands of her employer, Inter-Con Security Systems Holding Corporation, as well as the requirements of the Ohio Department of Commerce. Robertson cannot be expected to prove something that does not exist.

{¶ 33} Cleveland Police arrested Robertson on June 12, 2003 for contempt of court and felonious assault. However, no charges were ever filed concerning the arrest for felonious assault. As stated by Robertson in her appellate brief, even if a complaint for felonious assault has been filed by the arresting officer, her initial appearance would have occurred in Cleveland Municipal Court, not the Court of Common Pleas. Moreover, no Cleveland Municipal Court conducted a preliminary hearing, Robertson never waived a preliminary hearing, and no court ever bound Robertson over to Cuyahoga County Court of Common Pleas. Accordingly, the court with proper jurisdiction over the felonious assault arrest was the Cleveland Municipal Court. Therefore, Robertson complied with the Ohio Department of Commerce's request when she provided a letter from the Clerk of Court's office stating "no record found."

{¶ 34} Moreover, when this matter was initially heard by the Department of Job and Family Services, the hearing officer determined that there was not

enough fault on Robertson's part and found in her favor. The employer appealed but the Director's Re-determination affirmed the original determination in Robertson's favor.

*6 {¶ 35} I find the Ohio Department of Commerce's instructions regarding where felony and misdemeanor records are located to be misleading. Though true on their face, as illustrated above, when an individual is arrested for a felony but never charged, no record will exist in the Common Pleas Clerk of Courts as that individual would never have been bound over to the Court of Common Pleas.

{¶ 36} Based on the above, I find that Robertson made a good faith effort to comply with requirements of her employer and the Ohio Department of Commerce. Robertson made numerous attempts to acquire a document that did not exist and all the while, provided the parties with documentation showing that she does not have a felony conviction. An ordinary, intelligent person in the same situation as Robertson would be justified in conducting himself or herself in the same manner. Therefore, Robertson should not be to blame for the Ohio Department of Commerce's failure to issue her a private security license. Because Robertson should not be blamed for failing to obtain a license, I believe that her employer had no just cause for her termination. Accordingly, I find that the UCRC's decision to disallow Robertson's unemployment compensation benefits is unlawful, unreasonable and against the manifest weight of the evidence.

{¶ 37} For the abovementioned reasons, I would reverse the decision of the trial court and remand for actions consistent with this opinion.

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