

ORIGINAL

In the  
Supreme Court of Ohio

MARY H. WILLIAMS,	:	Case No. 2010-1166
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
DIRECTOR, OHIO DEPARTMENT OF	:	
JOB AND FAMILY SERVICES, et al.,	:	Court of Appeals Case
	:	No. CA 09 93594
Defendant-Appellant.	:	

**MERIT BRIEF OF *AMICUS CURIAE***  
**OHIO DEPARTMENT OF JOB AND FAMILY SERVICES IN SUPPORT OF**  
**DEFENDANT-APPELLANT BRIDGEWAY, INC.**

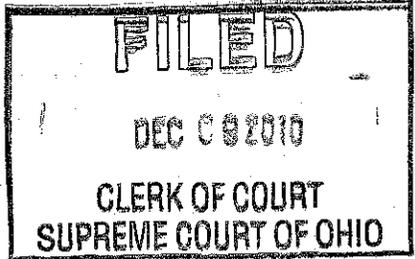
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**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF AMICUS INTEREST .....	2
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT.....	5
 <b><u>Amicus Curiae Ohio Department of Job and Family Service’s Proposition of Law:</u></b>	
<i>Whether an employer “fairly applied” a condition of employment is irrelevant to determining if an employee was discharged for just cause within the meaning of R.C. 4141.29(D)(2)(a).....</i>	
A. When determining whether an employee was discharged for just cause, the focus should be solely on the individual employee’s fault, not on that employee’s performance in relation to that of other employees. ....	5
B. The Eighth District’s reasoning is not sound.....	10
C. Even if comparisons between employees are relevant to a just cause determination, the Eighth District should not have disturbed the Commission’s decision because Williams failed to prove selective enforcement.....	12
CONCLUSION.....	14
CERTIFICATE OF SERVICE .....	unnumbered

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Apex Paper Box v. Ohio Bureau of Employment Servs</i> (8th Dist. May 11, 2000), 2000 Ohio App. Lexis 2038.....	11
<i>Bickers v. W. &amp; S. Life Ins. Co.</i> , 2007-Ohio-6751.....	1
<i>Harp v. Admin., Bureau of Unemployment Comp.</i> (Hamilton County C.P. Ct. 1967), 12 Ohio Misc. 34 .....	11
<i>Hord v. Dir., Ohio Dept. of Job &amp; Family Servs</i> , 2006-Ohio-4382 (7th Dist.) .....	10
<i>Irvine v. Unemployment Comp. Bd. of Review</i> (1985), 19 Ohio St. 3d 15 .....	1, 9, 12
<i>Ohio Civil Rights Comm'n v. David Richard Ingram, D.C., Inc.</i> (1994), 69 Ohio St. 3d 89 .....	9
<i>Salzl v. Gibson Greeting Cards</i> (1980), 61 Ohio St. 2d 35 .....	5
<i>Shaffer v. Am. Sickle Cell Anemia Ass'n</i> (8th Dist. June 12, 1986), 1986 Ohio App. Lexis 7116.....	10, 11
<i>Thurman v. Yellow Freight Sys.</i> (6th Cir. 1996), 90 F.3d 1160 .....	8
<i>Tzangas, Plakas &amp; Mannos v. Admin., Ohio Bureau of Employment Servs</i> (1995), 73 Ohio St. 3d 694 .....	<i>passim</i>
<i>Youghiogheny &amp; Ohio Coal Co. v. Oszust</i> (1986), 23 Ohio St. 3d 39 .....	1, 9
<b>Statutes, Rules and Constitutional Provisions</b>	
R.C. 4112 .....	1
R.C. 4141.04 .....	2
R.C. 4141.28(A).....	3
R.C. 4141.28(D).....	3
R.C. 4141.281(B).....	3

R.C. 4141.281(C).....	3
R.C. 4141.281(D).....	9
R.C. 4141.282.....	4
R.C. 4141.29(D)(2)(a).....	1, 3, 5

## INTRODUCTION

Ohio's Unemployment Compensation Act has one overarching purpose: To "protect [workers] from economic forces over which they have no control" by providing short-term subsistence to those "unemployed by adverse business and industrial conditions." *Tzangas, Plakas & Mannos v. Admin., Ohio Bureau of Employment Servs* (1995), 73 Ohio St. 3d 694, 697 (quotations and citations omitted). In light of this purpose, the Act's benefits are distinct from other employment-related compensation. The Act does not award damages for discharge in violation of a collective bargaining agreement or public policy; an action for wrongful discharge does. See e.g., *Youghioghney & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St. 3d 39, 41-42; *Bickers v. W. & S. Life Ins. Co.*, 2007-Ohio-6751 ¶ 16 n.3. Nor does the Act remedy unlawful discrimination; the civil rights statutes do. See, e.g., R.C. 4112. Unlike these other employment laws, unemployment benefits do not right a wrong, compensate for an injury, or punish an errant employer. Rather, unemployment benefits are "humanitarian" in purpose: they allow "unfortunate employees" who are "involuntarily unemployed" "to subsist on a reasonably decent level." *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St. 3d 15, 17.

The distinct character of unemployment benefits is matched by a distinct set of eligibility criteria. A worker discharged for "just cause in connection with the individual's work" falls outside the protection of the Act and cannot receive benefits. R.C. 4141.29(D)(2)(a). With an eye toward separating employees discharged through no fault of their own (who are eligible for benefits) from those "directly responsible for [their] own predicament" (who are not), this Court has emphasized that the "just cause" determination focuses on whether the employee bears fault for the discharge. *Tzangas*, 73 Ohio St. 3d at 698. To that end, the Court considers four factors when determining whether an employee's failure to meet her employer's expectations "constitutes fault sufficient to support a just cause termination," each of which focuses on the

individual employee: her performance, her awareness of the employer's expectations, the reasonableness of those expectations, and whether those expectations remained constant since her original hiring. *Id.* at 698-99.

The Eighth District strayed from this focus on the individual employee, overriding the Unemployment Compensation Review Commission's fault-based judgment with a standard all its own. Finding that an employee's failure to meet a condition of her employment does not supply just cause for discharge if other employees do not have to satisfy that same condition, the appellate court injected a new—and impermissible—inquiry into the just cause determination: a comparison between the discharged employee and her former co-workers. Comparative analysis is of course appropriate in some employment cases, such as those alleging discrimination or wrongful discharge. But it has no place in a just cause determination under Ohio's Unemployment Compensation Act, where the goal is simply to determine whether the individual employee bore responsibility for her own discharge. Because the Eighth District's novel test conflicts with both the Act's focus on individual fault and this Court's instructions on determining just cause, the Court should reverse.

#### **STATEMENT OF AMICUS INTEREST**

The Ohio Department of Job and Family Services is responsible for administering Ohio's unemployment compensation system and accordingly has a strong interest in ensuring that the Unemployment Compensation Act is properly applied. See R.C. 4141.04. While ODJFS was a named party at the Eighth District, it did not file a jurisdictional memorandum in this Court. The agency now participates as *amicus curiae* to defend its administrative decision.

## STATEMENT OF THE CASE AND FACTS

In October 2006, Mary Williams began working at Bridgeway, Inc., a community mental health center. Hr’g Tr. 8, 10. Several months later, Bridgeway promoted Williams to the position of Residential Program Manager. Hr’g Tr. 10-11, 20. Williams signed a letter of appointment in late January 2007, acknowledging that, by accepting the promotion, she “[would] be required to complete [her] [Licensed Independent Social Worker] licensure within fifteen months”—“by May 2008.” Hr’g Off. Op. 2. The letter emphasized that obtaining LISW certification was “a requirement for th[e] position.” Hr’g Off. Op. 2.

Williams did not take the LISW test until June 2008. Hr’g Tr. 20. She received a failing grade. Hr’g Tr. 20, 23. Ineligible to re-take the test for at least ninety days, Hr’g Tr. 14, Williams was discharged later that month for failure to satisfy a condition of her position. Hr’g Tr. 12.

Williams filed an application for a determination of unemployment compensation benefits with the Director of the Ohio Department of Job and Family Services. See R.C. 4141.28(A). Several weeks later, the Director issued an initial determination, which found Williams ineligible for benefits. See R.C. 4141.28(D). The Director found that Bridgeway discharged Williams “for just cause in connection with . . . work,” a statutory bar to receiving benefits under the Unemployment Compensation Act. See R.C. 4141.29(D)(2)(a). The Director reaffirmed that decision in a redetermination issued several weeks later. See R.C. 4141.281(B).

Williams appealed to the Unemployment Compensation Review Commission. See R.C. 4141.281(C). At the review hearing, Williams argued that two other employees with her job title—one who had been in the position for thirteen years, the other for six years—had not obtained LISW certification within fifteen months of assuming their posts and had not been fired. Hr’g Tr. 27-28. But she did not put on evidence to show that those employees, like her,

had agreed to obtain LISW certification as a condition of their employment as Residential Program Managers.

The Review Commission affirmed the Director's finding that Williams was discharged for just cause. Williams, the Commission found, "clearly knew that she was required, as a condition of employment, to pass the test to receive her LISW certification within fifteen months." Hr'g Off. Op. 2. The Commission concluded that the fault for Williams's discharge rested with Williams, who "waited to the last moment and failed the test with insufficient time remaining to retake the test." *Id.* As for Williams's suggestion that two other Residential Program Managers had not been held to the same licensure requirement, the Commission noted that they had held their positions far longer than Williams, and reasoned that "[i]t is not uncommon to have employers increase the educational pre-requisites in order to be hired or maintain employment." *Id.* The Commission disallowed Williams's request for further review. Review Comm'n Op. (Dec. 10, 2008).

Williams appealed to the Cuyahoga County Common Pleas Court. See R.C. 4141.282. The court affirmed the Commission's decision, finding that it "was not unlawful, unreasonable or against the manifest weight of the evidence." *Williams v. Director, Ohio Dept. of Family Servs* ("Trial Op.") (June 10, 2009), Case No. 09 681453 at 5.

The Eighth District reversed. *Williams v. Director, Ohio Dept. of Job and Family Servs.*, ("App. Op.") (8th Dist.) 2010-Ohio-2222. "Even assuming" that the licensure requirement had a "rational basis," the court reasoned, it could not supply "just cause" for Williams's discharge because the requirement "was not fairly applied." App. Op. ¶ 18. The court concluded that the evidence that Williams "was treated differently from other employees" set her case apart from

other cases in which failure to meet an employer's expectations amounted to just cause for discharge. App. Op. ¶ 16. This Court accepted Bridgeway's petition for discretionary review.

## ARGUMENT

### **Amicus Curiae Ohio Department of Job and Family Service's Proposition of Law:**

*Whether an employer "fairly applied" a condition of employment is irrelevant to determining if an employee was discharged for just cause within the meaning of R.C. 4141.29(D)(2)(a).*

The Eighth District's novel comparative test for determining whether an employee was discharged for just cause cannot be reconciled with this Court's fault-based approach. By holding that failure to meet a condition of employment is not just cause for discharge if the employer does not require other employees to meet that same condition, the appellate court allowed a comparison between employees to trump the only consideration appropriate in a just cause determination: whether the employee was at fault for the discharge. If allowed to stand, the Eighth District's approach would turn the Unemployment Compensation Review Commission into an arbiter of employment-related grievances, a function that the Commission is neither equipped nor authorized to perform.

**A. When determining whether an employee was discharged for just cause, the focus should be solely on the individual employee's fault, not on that employee's performance in relation to that of other employees.**

The Unemployment Compensation Act "provide[s] financial assistance to" individuals "temporarily without employment through no fault or agreement of [their] own." *Salzl v. Gibson Greeting Cards* (1980), 61 Ohio St. 2d 35, 39. With that guidepost in mind, eligibility for unemployment benefits turns on employee fault. *Tzangas*, 73 Ohio St. 3d at 698. "[N]o individual," the statute says, "may . . . be paid benefits . . . if the director [of the Ohio Department of Job and Family Services] finds that . . . [t]he individual . . . has been discharged for just cause in connection with the individual's work." R.C. 4141.29(D)(2)(a).

Failure to meet an employer's reasonable expectations may amount to fault sufficient to support a just cause discharge. *Tzangas*, 73 Ohio St. 3d at 698. In *Tzangas*, this Court laid out a four-prong test for determining whether a performance-related discharge was supported by just cause. *Id.* Under *Tzangas*, an employee discharged for performance reasons is discharged for just cause if: “(1) the employee does not perform the required work, (2) the employer made known its expectations of the employee at the time of hiring, (3) the expectations were reasonable, and (4) the requirements of the job did not change since the date of the original hiring for that particular position.” *Id.* at 699-99.

For good reason, the *Tzangas* test focuses the inquiry solely on the discharged employee—what she knew, what was expected of her, and whether she lived up to those expectations. “[F]ault is essential to the unique chemistry of a just cause termination.” *Id.* at 698. “When an employee is at fault,” she cannot receive benefits, seeing how “[s]he is no longer the victim of fortune’s whims, but is directly responsible for h[er] own predicament.” *Id.* at 697-98. Individual “[f]ault,” this Court has said, is what “separates [the employee] from the Act’s intent and the Act’s protection.” *Id.* at 698. And because employee fault lies at the core of a just cause determination, the individually-focused *Tzangas* test provides a useful rubric for separating those employees for whom unemployment benefits are designed from those who bear responsibility for their own discharge.

Gauged by the *Tzangas* factors, short work can be made of Williams’s claim. First, no one disputes that Williams failed to obtain her LISW certification within the required time frame and therefore “d[id] not perform the required work.” *Tzangas*, 73 Ohio St. 3d at 698. Second, Bridgeway “made known its expectation[.]” that Williams would obtain her LISW “at the time” it promoted her, *id.*, expressly stating that licensure was “a requirement for th[e] position,” Hr’g

Off. Op. 2. As for the third factor, Bridgeway's expectation that Williams would obtain LISW certification was "reasonable." *Tzangas*, 73 Ohio St. 3d at 697. A LISW license, Williams's supervisor testified, gives social workers "a certain expertise" in providing their services. Hr'g Tr. 14. And without that license, Williams had to ask another program manager to sign off on her treatment plans, Hr'g Tr. 21, something that Bridgeway reasonably did not want to become a long-term arrangement, as it required "additional . . . support from outside [help]," Hr'g Tr. 14. Bridgeway, moreover, acted reasonably in how it applied the licensure requirement to Williams. It gave her fifteen months—until May 2008—to take and pass the exam, and it even extended her deadline by a month after health problems prevented Williams from sitting for the April 2008 exam. Hr'g Tr. 12, 22-23. Finally, the requirement that Williams pass the LISW test "did not change since the date of [her] original hiring for that particular position"—that is, her promotion to Residential Program Manager. *Tzangas*, 73 Ohio St. 3d at 698-99. Williams knew upon accepting the position that Bridgeway expected her to receive her LISW certification.

The Eighth District strayed from this straightforward application of the *Tzangas* test. After acknowledging that three of the factors were met, App Op. at ¶¶ 3, 18 ("Williams was aware of the licensing requirement and understood it," and "she did not pass the exam"), and assuming for argument's sake that the other one was, App. Op. ¶ 18 ("[e]ven assuming that there is a rational basis for the policy"), the appellate court invented a factor of its own—whether the expectation was "fairly applied"—and turned *it* into the dispositive consideration.

The appellate court's approach cannot be reconciled with *Tzangas*. In *Tzangas*, this Court declined to consider more than the individual employee's fault when analyzing just cause, emphasizing that determining just cause required a "fault-based . . . analysis," not a "totality of the circumstances examination." 73 Ohio St. 3d at 698. Yet the Eighth District—by looking not

only to Williams's individual fault, but to whether she was treated the same as other employees, exceeded the bounds of fault-based analysis and stepped into the type of totality-of-the-circumstances inquiry that *Tzangas* rejects.

What is more, the Eighth District's comparative analysis directly conflicts with prong four of the *Tzangas* test—whether “the requirements of the job did not change since the date of the original hiring for that particular position.” *Tzangas*, 73 Ohio St. 3d at 699. In its framing, this prong makes explicit that the measure of just cause must be calibrated to the individual: it focuses on the job requirements on the date the individual was “original[ly] hir[ed]” “for that particular position.” *Id.* at 699. This guards against a scenario in which an employer pulls the rug out from an employee by firing her for not meeting expectations she was never told about. The prong does not, however, prevent an employer from holding new employees to new job requirements, ones that it might not have asked its longer-serving employees to fulfill. In contrast, the Eighth District's approach does not account for the reality that employers frequently increase prerequisites for a particular position as new employees join the company. In short, under the Eighth District's brand of comparative analysis, there would never be just cause to discharge an employee for failure to meet an expectation of her position if, prior to her arrival at the company, those expectations had ever been different. Prong four of the *Tzangas* test forecloses that errant rule.

Beyond clashing with *Tzangas*, the Eighth District's comparative analysis fundamentally confuses what is at issue in a just cause determination with what workers may raise when arguing disparate treatment in an action for wrongful discharge or discrimination. In doing so, it overlooks the purpose of a just cause determination. A just cause determination is not designed to ferret out workplace inequities in order to compensate wronged employees. See *Thurman v.*

*Yellow Freight Sys.* (6th Cir. 1996), 90 F.3d 1160, 1170 (“[U]nemployment compensation is paid not to discharge an obligation of the employer, but to carry out the social policies of the state.”). Rather, the unemployment system’s fault-based approach to just cause serves the Act’s singular purpose—to provide subsistence to those discharged through no fault of their own. *Irvine*, 19 Ohio St. 3d at 17. The Eighth District’s approach would transform the unemployment system into a forum for airing employee grievances about unequal treatment—a role the General Assembly did not intend it to play.

This Court has recognized that fault-based just cause determinations should be kept separate from the analyses that occur in other employment-related adjudications. See *Youghioghery*, 23 Ohio St. 3d at 41-42 (determining that a just cause determination in a claim submitted to arbitration under a collective bargaining agreement is not the same as a just cause determination in the unemployment benefits context). And the impact of a just cause determination further demonstrates that the unemployment system is not the place to vet whatever workplace grievances an employee may have. “[N]o finding of fact or law [in an unemployment benefits adjudication] [is] given collateral estoppel or res judicata effect in any separate or subsequent . . . proceeding . . . other than a proceeding arising under [R.C. 4141, the chapter governing unemployment benefits].” R.C. 4141.281(D)(8). Moreover, unemployment benefits are payable to a worker discharged without just cause independent from any recovery she may later receive for unlawful discrimination. See *Ohio Civil Rights Comm’n v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St. 3d 89, 95-96. Thus, the system is set up to allow an employee to seek the temporary subsistence provided by the Unemployment Act while still pursuing whatever disparate-treatment claim she may later develop. All of this suggests that the

distinction between just cause determinations and wrongful discharge/discrimination claims is one that should be preserved rather than blurred.

Outside the Eighth District, other Ohio appellate courts have recognized that “[i]t is important to distinguish between just cause for discharge in the context of unemployment compensation and in other contexts.” See *Markovich v. Employers Unity, Inc.* (9th Dist.), 2004-Ohio-4193 ¶ 7 (quotations and citations omitted). “[B]ecause just cause, under the Unemployment Compensation Act, is predicated upon employee fault,” the Ninth District reasons, courts should be “unconcerned with the motivation or correctness of the decision to discharge.” *Id.* (quotations and citations omitted). And as noted by the Seventh District, “whether another employee engaged in similar conduct without being terminated does not have any relevance to whether [an employee] has become involuntarily unemployed.” *Hord v. Dir., Ohio Dept. of Job & Family Servs.*, 2006-Ohio-4382 ¶ 27 (7th Dist.). “An employee cannot be excused for [not meeting an employer’s expectations] for the purposes of unemployment compensation simply because other employees engage in the same conduct.” *Id.* As these courts recognize, fault-based, not comparative, analysis controls the just cause determination.

**B. The Eighth District’s reasoning is not sound.**

The Eighth District’s approach not only conflicts with this Court’s case law and the purpose of the Act; it lacks *any* legitimate support. Quoting from one of its prior unpublished decisions, the Eighth District concluded without explanation that, notwithstanding the *Tzangas* test, “[a] termination pursuant to company policy will constitute just cause only if the policy is fair, and fairly applied . . . [and] [t]he issue of whether the policy was fairly applied relates to whether the policy was applied to some individuals but not others.” App. Op. ¶ 17 (quoting *Shaffer v. Am. Sickle Cell Anemia Ass’n* (8th Dist. June 12, 1986), 1986 Ohio App. Lexis 7116, \*4-5.). Its reliance on *Shaffer* suffers from several incurable flaws.

First, to the extent *Shaffer* was ever persuasive authority, that time has passed. The Eighth District's 1986 *Shaffer* decision preceded *Tzangas* by nearly a decade. And by crafting the *Tzangas* factors and emphasizing the importance of fault-based analysis, this Court superseded prior inconsistent appellate-level decisions—including *Shaffer*'s suggestion that comparisons between employees should inform a just cause determination. The fact that the Eighth District cited one of its post-*Tzangas* decisions in addition to quoting from *Shaffer* does not make its analysis any more persuasive. See App. Op. ¶ 17 (citing *Apex Paper Box v. Ohio Bureau of Employment Servs* (8th Dist. May 11, 2000), 2000 Ohio App. Lexis 2038). *Apex Paper Box* merely recites *Shaffer*'s “fairly applied” standard; it does nothing to reconcile *Shaffer* with *Tzangas*. See *id.* at \*4-5.

Second, *Shaffer* itself never rested on solid ground. Its sole support for the idea that terminations based on “company policy” constitute “just cause only if [the policy is] . . . fairly applied” is a decades-old common pleas court decision. See *Shaffer*, 1986 Ohio App. Lexis 1187 at \*5 (citing *Harp v. Admin., Bureau of Unemployment Comp.* (Hamilton County C.P. Ct. 1967), 12 Ohio Misc. 34). Worse, *Shaffer* took *Harp*'s statement that an employer's policies must be “administered fairly” out of context: *Harp* considered when it was appropriate to discharge an employee because of garnishments to her wages—whether just cause determinations should be made through comparative analysis was *not at issue*. *Harp*, 12 Ohio Misc. at 38 (“If the employee is to be . . . deprived of benefits . . . on the ground that the discharge [because of garnishments] was for just cause . . . the employer must fairly consider whether the garnishments were justified and were due to irresponsibility on the part of the employee.”).

In light of the appellate court's improper reliance on *Shaffer*, not to mention *Shaffer's* improper reliance on *Harp*, the reasoning that supports the Eighth District's comparative analysis is unsound and cannot survive.

**C. Even if comparisons between employees are relevant to a just cause determination, the Eighth District should not have disturbed the Commission's decision because Williams failed to prove selective enforcement.**

Even if a comparative analysis were appropriate in a just cause determination (and it is not), deference is due to the Commission's decision. "[A] reviewing court may reverse the [Commission's] determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence." *Tzangas*, 73 Ohio St. 3d at 697. "The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the [Commission]'s decision." *Irvine*, 19 Ohio St. 3d at 18.

The Commission considered and rejected the evidence of disparate treatment to which the Eighth District gave dispositive weight. Williams put on evidence that one Residential Program Manager who had held the post for thirteen years did not have LISW certification and that another Residential Program Manager who had held the post for approximately six years did not obtain LISW certification while she held that title. That evidence did not persuade the Commission to find that Williams was discharged without just cause. Williams had joined Bridgeway far later than the other two program managers and, as noted by the Commission, "[i]t is not uncommon to have employers increase the educational pre-requisites in order to be hired or maintain employment." Hr'g Off. Op. 2. What mattered was not that Bridgeway did not expect its longer-serving employees to obtain licensure within fifteen months of becoming program managers, but that it *did* expect *Williams* to obtain licensure and that Williams had fallen short of the mark. *Id.*

The Commission's decision to discount Williams's comparative evidence was not "unlawful, unreasonable, or against the manifest weight of the evidence," such that a reviewing court had authority to reverse it. *Tzangas*, 73 Ohio St. 3d at 697. Williams did not show that she was similarly situated to the two employees to whom she compared herself, beyond the fact that the employees held her same title. She presented no evidence that the other program managers had, like Williams, been told *at the time of hiring* that they would be required to receive LISW certification on that same timetable. It follows that, even assuming that comparative analysis can play a role in a just cause determination, the comparisons in this case were simply not apt. Without showing that Bridgeway had identical expectations of all three employees and that Bridgeway only enforced that expectation as to Williams, she cannot make out a case of selective enforcement.

In sum, in the event this Court adopts some form of comparative analysis, it should at the very least clarify that only comparisons between similarly situated employees warrant weight in a just cause determination and uphold the Commission's denial of benefits.

## CONCLUSION

For these reasons, the Court should reverse the judgment of the Eighth District.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

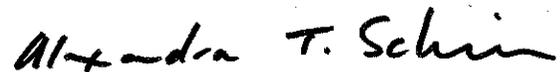
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Department of Job and Family Services in Support of Defendant-Appellant Bridgeway, Inc. was served by U.S. mail this 9th day of December, 2010 upon the following counsel:

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