

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY H. WILLIAMS,)	Case No. 2010-1166
)	
Plaintiff-Appellee,)	On Appeal from the Cuyahoga
)	County Court of Appeals
v.)	Eights Appellate District, Court of
)	Appeals
DIRECTOR, OHIO DEPARTMENT OF)	
FAMILY SERVICES, et al.,)	Case No. 93594
)	
Defendant-Appellee.)	

REPLY BRIEF OF APPELLANT BRIDGEWAY, INC.

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REPLY BRIEF

A. THE RECORD IN THIS CASE SHOWS “FAULT” ON THE PART OF CLAIMANT SUPPORTING A “JUST CAUSE” DETERMINATION.

The briefs of Appellee Mary Williams (“Claimant”) and Amici Curiae Legal Aid Society of Cleveland and Ohio State Legal Services Association (“Legal Aid”) misstate the argument of Appellant Bridgeway (Employer). More importantly, they misapply facts of the instant case to the *Tzangas* standard. In *Tzangas*, this Honorable Court stated:

When an employee is at fault, he is no longer the victim of fortune’s whims, but is instead directly responsible for his own predicament. Fault on the employee’s part separates him from the Act’s intent and the Act’s protection. Thus, fault is essential to the unique chemistry of a just cause termination.

Tzangas also says:

The question of fault cannot be rigidly defined, but, rather, can only be evaluated upon consideration of the particular facts of each case. If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause.

And further:

To find that an employee is entitled to unemployment compensation when she is terminated for inability to perform the job for which she was hired would discourage employers from taking a chance on an unproven worker.

Tzangas concludes that the claimant there:

. . . was simply terminated because she could not do the required work. While that may not be her fault in a moral sense, it does constitute fault in a legal sense sufficient for her termination to have been made with just cause.

See Tzangas, 73 Ohio St.3d at 697-699.

Under these guiding principles, the record in the present case establishes that Claimant’s discharge was for just cause. Claimant is culpable because she failed to satisfy a reasonable condition of her employment, and because she chose to wait until the end of the prescribed time limit to take the examination. By waiting, she left herself no room to re-take the examination

within 90 days, and she also could not learn from the experience of why she had failed the examination. These factors were absolutely within her control.

It is unclear in the record when Claimant began studying for the exam, but what is clear is that she did not schedule herself to take the test until the deadline, and then when her health issue arose, she was given an extension of time. Her conduct in delaying until the end to take the examination demonstrates a significant disregard of Employer's interests, because during this delay it was necessary for another employee to perform an essential function of Claimant's job.

The letter of termination (attached as A-31 in Employer's Merit Brief) provides further evidence of fault. In particular, the letter provides in part:

The issue of obtaining an LISW was also addressed with you in numerous supervision sessions held with Cheryl Lydston. Additionally, you were also sent a reminder email relative to this requirement. At no time did you report that you were having difficulties obtaining licensure.

This is direct evidence of fault on the part of Claimant in connection with her discharge.

Both Claimant and Legal Aid minimize the licensure requirement by alleging that all other job requirements were performed. This mischaracterizes the nature of the license requirement. According to the testimony of Claimant's supervisor, Cheryl Lydston, the LISW license is necessary to perform an essential function of the program manager position, and because Claimant did not have this license during the fifteen months she worked in the position, she was not performing all of the essential functions of the position. (Tr. at 15.) In particular, Claimant's lack of the LISW license meant she was not able to clinically monitor treatment plans of Employer's clients. (Tr. at 14.) Consequently, the argument of Claimant and Legal Aid concerning the LISW requirement is inaccurate, and they downplay an essential function and/or requirement of the job.

In sum, under the “general fault” standard provided by *Tzangas*, the record in this case does in fact show the requisite fault. In the words of *Tzangas*, Claimant is “directly responsible” for her own predicament. Under this record, Employer has been reasonable in finding fault on behalf of Claimant, and hence the discharge was with just cause.

B. THE RECORD SHOWS FAULT UNDER EITHER THE “GENERAL FAULT” TZANGAS STANDARD OR THE FOUR-PRONG TZANGAS TEST.

In their respective briefs, Claimant and Legal Aid incorrectly assert that Employer’s position is the four-prong *Tzangas* test must be applied to the present case. On the contrary, Employer’s merit brief primarily argued that Claimant’s discharge was justified under the “general fault” standard of *Tzangas*.

However, even if the record here is viewed under the *Tzangas* four-prong test, all four prongs are nonetheless satisfied. As to the first prong, Claimant did not perform the required work of the position, in that she simply was not able to fulfill her job duties without an LISW certification. Hence, it was necessary for another employee to complete an essential function and duty of Claimant’s job. As to the second prong, Employer definitely made known its expectation of Claimant at the time of hiring, as seen in the relevant Letter of Appointment (attached as A-30 to Employer’s Merit Brief). This letter contained the specific requirement that Claimant was to obtain an LISW certification within 15 months. As to the third prong, Employer’s expectations regarding the LISW certification were reasonable, in that this was an important function of the position as explained by the supervisor’s testimony. As to the fourth prong, there is no evidence the requirements of the job changed at all since the date of original hire for that position.

In sum, the four-prong test of *Tzangas* is fulfilled by the facts in the present case. As indicated in the journal entry and opinion of the Court of Common Pleas, Claimant’s failure to

obtain the LISW certification rendered her unsuitable and/or unfit to continue in her position, thereby constituting fault sufficient to support a just cause termination. (See Conclusion in Journal Entry and Opinion of Court of Common Pleas, attached as A-17 to A-21 in Employer's Merit Brief.)

C. A REVIEW OF THE RECORD UNDER THE DIRECTOR'S POLICY GUIDELINES AND ADMINISTRATIVE INTERPRETATION SUPPORTS THE REVIEW COMMISSION'S DECISION.

The briefs of Claimant and Legal Aid place substantial emphasis on the Director's policy guides and administrative interpretation of the *Tzangas* decision. However, as shown above such an analysis supports the Review Commission's decision in this case. Overall, the record shows that Claimant disregarded her duties to Employer and did not meet the standard set by the Letter of Appointment for her position, which Employer had the right to expect. Further analysis of the present case under the four-prong *Tzangas* test shows that the evidence meets this test and that Claimant's discharge was for just cause.

The present case does not appear to fit within twenty-nine types of separation cases cited in the policy guides. However, as noted by this Court in the *Tzangas* case, the question of fault cannot be rigidly defined, and is dependent upon consideration of the particular facts of each case. In the present case, the facts show that Claimant was at fault in connection with her discharge, whether the facts are examined under the "general fault" standard of *Tzangas* or the four-prong test.

D. CLAIMANT'S ATTEMPTED ANALOGY HAS NO MERIT.

Claimant's attempted analogy to a civil service examination has nothing to do with the facts of the present case, and is an unsound analogy. Specifically, the present case does not

involve a situation where Claimant was discharged because another individual passed a civil service examination.

E. CLAIMANT HAD CONTROL OVER COMPLIANCE WITH HER LETTER OF APPOINTMENT.

Claimant contends she did not have control over passing the examination; Employer strongly disagrees with this contention. As explained above, Claimant did not have the best interests of her Employer in mind by waiting to take the examination. The purpose of the examination was not for Claimant to “become more autonomous,” but rather so that Claimant could perform the essential functions of the position. Claimant’s failure to take the exam until the end of the prescribed time period shows that she did not take this requirement seriously. Hence, Claimant is culpable and is responsible for her discharge.

F. THE COMPARISON BY THE COURT OF APPEALS WAS INAPPROPRIATE AND UNFAIR.

Both Claimant and Legal Aid argue that the requirement to obtain the LISW certification was not fairly applied. This was the focus of the decision of the Court of Appeals. However, the Court of Appeals did not make a valid comparison between similarly situated employees. Hence, the Court of Appeals was not comparing “apples to apples.” In essence, the “fault” in the present case stems from the Court of Appeals embarking upon a flawed comparison between Claimant and two employees who were not similarly situated.

In particular, this type of analysis does not fit here because it necessarily requires a comparison of a brand new manager (Claimant) to one employee (Marie Burkett) who is a Registered Nurse and a Licensed Professional Counselor and who has been in her position for sixteen years, and to another employee (Cheryl Lydston) who was Claimant’s immediate supervisor and had held the Program Manager position for five years before being promoted to

Residential Program Director. The bottom line is that the comparison made by the Court of Appeals was both unnecessary and invalid, because the employees being compared are dissimilar. Therefore, this was an unfair comparison, unsupported by the record, which was prejudicial to Employer.

G. CASES FROM OTHER JURISDICTIONS DO NOT FIT THE PRESENT CASE AND ARE UNPERSUASIVE.

Claimant argues that case decisions from other jurisdictions support her position in the present case. But, Claimant acknowledges that Employer is “certainly correct that these cases are not controlling in Ohio.” Employer submits that not only are these cases not controlling, but they should not be persuasive under the record in the present case.

First, the cases cited from other jurisdictions do not employ the *Tzangas* standard and/or principles enunciated by this Court which apply to just cause determinations in the State of Ohio. In the present case, *Tzangas* provides the relevant standard to be applied to the facts and the record. Under the *Tzangas* analysis, the record supports the conclusion of a just cause termination.

Second, a review of the facts and circumstances in these other cases reveals that they are distinguishable from the facts of the present case, and hence are not persuasive authority.

H. THE LETTER OF APPOINTMENT WAS NOT A WAIVER.

Claimant’s brief states that her examination requirement constitutes a waiver of unemployment benefits under R.C. 4141.32. This is incorrect. Nothing in the Letter of Appointment states that it is a waiver of unemployment benefits. In reality, Claimant’s termination was based upon her failure to satisfy an express condition of her employment, and the question whether this termination is disqualifying under the Act is the question now before

this Honorable Court. Employer submits that the record in this case shows that Claimant's discharge meets the just cause standard under *Tzangas*.

I. IF THE COURT OF APPEALS' DECISION STANDS, THIS WOULD PENALIZE AND/OR DISCOURAGE OHIO EMPLOYERS.

Legal Aid argues that in the current economy, Employer's position in the present case would penalize an employee who attempts to obtain a job in a new field and then finds they cannot pass a required test. However, Claimant was not taking a position in a "new field." The position was in her field of study, and therefore Legal Aid's argument is misguided.

Moreover, the *opposite* argument is true, namely, that a decision in Claimant's favor in the present case could very well have the effect of discouraging Ohio employers from taking a chance on an unproven worker, i.e. an employee who does not have the requisite license and/or certification for a given position. It is this position which finds direct support from *Tzangas*. Here, Employer was willing to offer Claimant a position in her field, conditioned upon Claimant's obtaining a LISW certification within a reasonable period of time. The fact that Claimant failed to uphold her end of the agreement constitutes fault on her part and therefore takes her out of coverage under the unemployment compensation system.

J. IN CONCLUSION, CLAIMANT'S DISCHARGE WAS FOR "JUST CAUSE" AND IS DISQUALIFYING.

In summary, the essence of the instant case involves an individual who accepted a position in her own field of study which required her to obtain a LISW certification within fifteen months in order to satisfy a requirement of the new position. This requirement was spelled out in the Letter of Appointment, along with the result if the license was not obtained; thus, Claimant was fully cognizant of both the requirement and the consequences should she not satisfy this condition. Subsequently, Claimant waited until the end of the prescribed time period

to take the examination, was granted an extra month of time to obtain the license due to an unforeseen health condition, but failed to obtain the required license. Ultimately, because Claimant failed to satisfy a reasonable condition of her employment, she was unsuitable for this new position and was “at fault” in connection with her discharge. Hence, her discharge was for “just cause” and is disqualifying under the Act.

For these reasons, Employer requests this Honorable Court to reverse the judgment of the Eighth District Court of Appeals, and to reinstate the judgment of the Cuyahoga County Court of Common Pleas.

Respectfully submitted,



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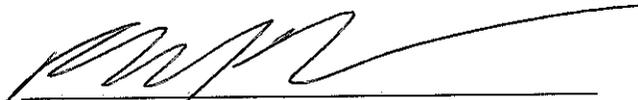
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