

ORIGINAL

In the  
Supreme Court of Ohio

MARY H. WILLIAMS,

Plaintiff-Appellee,

v.

DIRECTOR, OHIO DEPARTMENT OF  
JOB AND FAMILY SERVICES, et al.,

Defendant-Appellant.

: Case No. 2010-1166  
:  
:  
: On Appeal from the  
:  
: Cuyahoga County  
:  
: Court of Appeals,  
:  
: Eighth Appellate District  
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: Court of Appeals Case  
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: No. CA 09 93594  
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**REPLY BRIEF OF *AMICUS CURIAE***  
**OHIO DEPARTMENT OF JOB AND FAMILY SERVICES IN SUPPORT OF**  
**DEFENDANT-APPELLANT BRIDGEWAY, INC.**

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FRED J. POMPEANI\* (0001431)

*\*Counsel of Record*

REBECCA A. KOPP (0077332)

Porter Wright Morris & Arthur LLP

925 Euclid Ave., Suite 1700

Cleveland, Ohio 44115

216-443-9000

216-443-9011 fax

fpompeani@porterwright.com

Counsel for Defendant-Appellant

Bridgeway, Inc.

KENNETH J. KOWALSKI\* (0024878)

*\*Counsel of Record*

Employment Law Clinic

Cleveland-Marshall College of Law

2121 Euclid Avenue, LB 138

Cleveland, Ohio 44115-2214

216-687-3947

216-687-9297 fax

kenneth.kowalski@law.csuohio.edu

Counsel for Plaintiff-Appellee

Mary H. Williams

MICHAEL DEWINE (0009181)

Attorney General of Ohio

ALEXANDRA T. SCHIMMER\* (0075732)

Chief Deputy Solicitor General

*\*Counsel of Record*

LAURA EDDLEMAN HEIM (0084677)

Deputy Solicitor

LAUREL BLUM MAZOROW (0021766)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

alexandra.schimmer@ohioattorneygeneral.gov

Counsel for *Amicus Curiae*

Ohio Department of Job and Family Services

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ANITA L. MYERSON\* (0022248)

*\*Counsel of Record*

Legal Aid Society of Cleveland

1223 West Sixth Street

Cleveland, Ohio 44113

216-861-5607

216-861-0704 fax

anita.myerson@lasclev.org

THOMAS W. WEEKS (0028992)

Ohio State Legal Services Association

555 Buttlers Avenue

Columbus, Ohio 43215-1137

614-221-7201

614-221-7625 fax

tweeks@oslsa.org

Counsel for *Amici Curiae*

Legal Aid Society of Cleveland

Ohio State Legal Services Association

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## INTRODUCTION

Williams and the *amici* supporting her position center their argument on two primary points: (1) the four-factor *Tzangas* test applies only to cases involving unsatisfactory work performance; and (2) the Unemployment Commission's policy statements conflict with the Director's position in this case. The first point is correct but unhelpful to Williams; the second is inaccurate.

First, the Director agrees that the four-prong *Tzangas* test gauges eligibility for benefits only when a worker is discharged based on unsatisfactory work performance. But that does not help Williams, as her discharge for failing to obtain the required social-work license *was* a discharge based on unsatisfactory work performance. Though Williams insists otherwise, her inability to satisfy a requirement of her position places her claim within *Tzangas*'s purview. See *Tzangas, Plakas & Mannos v. Admin., Ohio Bureau of Employment Services* (1995), 73 Ohio St. 3d 694, 698-99. And Williams's claim fails under *Tzangas*'s four prongs: She did not "perform the required work" of obtaining her license; she knew "at the time of hiring" that Bridgeway expected her to obtain her license; Bridgeway's "expectation[] w[as] reasonable;" and the licensure requirement "did not change since" Williams's "original hiring for that position." See *Tzangas*, 73 Ohio St. 3d at 698-99.

Second, the Unemployment Commission's policy statements do not, as Williams and her *amici* argue, envision comparative analysis of the type the Eighth District conducted. In the context of a performance-related discharge, the Commission does allow adjudicators—when assessing whether an employer's performance expectations were reasonable—to consider whether other employees met the standards that the discharged employee could not. Measuring the reasonableness of an expectation by seeing if other employees were capable of meeting it is one thing: that gauges only whether the performance standards set for the claimant were

attainable. Determining just cause for discharge based on a finding of disparate treatment is quite another: that would require a finding that similarly situated employees (1) were asked to satisfy the same job requirements; (2) did not satisfy the same job requirements; and (3) were not, like the claimant, subjected to the same adverse employment action. It is this latter analysis that the Eighth District attempted, and it is this latter analysis that lacks support in the applicable Commission policy statements.

With neither of these points giving weight to Williams's argument, her remaining claims cannot overcome the deference this Court affords to administrative judgments. And even if the Court found that disparate-treatment analysis applies to performance-related discharges, Williams's claim would still fail because she has not shown that she was similarly situated to the employees to whom she compares herself.

## ARGUMENT

### A. **The *Tzangas* factors measure just cause for performance-related discharges, and this case involves a performance-related discharge.**

Williams and her *amici* assert that the *Tzangas* factors only determine just cause for a discharge when an employee "is discharged for unsatisfactory work performance." Legal Aid Br. 5, see also Appellee Br. 21. They are right. In *Tzangas*, the Court said that "[u]nsuitability for a position" is "fault sufficient to support a just cause determination" 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 position." 73 Ohio St. 3d at 698-99. Though Williams reads the Director's first brief as "seem[ing] to contend that *Tzangas* should apply to all discharge cases," Appellee Br. 21, see also Legal Aid Br. 6, that is not the Director's position. The Director's opening brief describes *Tzangas* as "a four-prong test for

determining *whether a performance-related discharge* was supported by just cause,” and explains that “an employee *discharged for performance reasons* is discharged for just cause if” she does not meet the *Tzangas* test. ODJFS Br. 6 (emphasis added). The Director and Williams are thus in accord: *Tzangas* applies when an employee is discharged because of work performance.

This is a work performance case. Williams was required, as a condition of her employment, to pass the Licensed Independent Social Worker exam. Licensure, Williams’s supervisor testified, gave program managers “a certain expertise” in providing their services. Hr’g Tr. 14. And while Williams could perform some of her duties without holding a LISW certificate, she could not perform them all: Her unlicensed status required another program manager to sign off on her treatment plans and required Bridgeway to pull in “additional . . . support from outside [help].” Hr’g Tr. 14, 21. These facts provide ample support for classifying Williams’s discharge as one based on unsatisfactory performance and for using the *Tzangas* factors to determine just cause.

Williams disagrees. Discharge for failing to acquire a professional license, she says, is not a discharge based on unsuitability for the position. Appellee Br. 24, see also Legal Aid Br. 5. But she offers no way to distinguish her discharge from any other discharge based on inability to satisfy a performance-related expectation. And indeed there is none. When licensure is required to perform the full scope of an employee’s expected duties, failing to obtain that required license amounts to a deficiency in job performance. As an unlicensed social worker, Williams was little more suitable for her position than a lawyer would be without a bar license. In both contexts, the unlicensed employee could perform certain functions of her employment: a person with legal training could, under supervision, draft internal legal memoranda just as a person with social

work training could draft treatment plans. But in both contexts, inability to secure a professional license leaves the employee unable to perform all the tasks required of her. Having failed to obtain the license required by her employer and necessary to perform all her job functions, Williams cannot avoid *Tzangas*'s reach.

With *Tzangas* marking the bounds of Williams's just cause inquiry, there is no room for the type of comparative analysis employed by the Eighth District. *Tzangas* limits the scope of the just-cause inquiry to the four *Tzangas* factors and firmly rejects a "totality of the circumstances" approach. *Tzangas*, 73 Ohio St. 3d at 698. Confining the inquiry in this fashion does not, as Williams's *amici* suggest, ignore the requirement that "the facts be examined to evaluate fault." Legal Aid Br. 11. Rather, *Tzangas* provides a framework for *how* the facts should be examined—and a guide as to which facts warrant weight.

Williams cannot prevail under the *Tzangas* test. She "d[id] not perform the required work" when she failed to obtain her LISW certification within the required time frame. *Tzangas*, 73 Ohio St. 3d at 698. She knew "at the time" Bridgeway promoted her that licensure was a requirement of the position. *Id.* Bridgeway's expectation that Williams would obtain LISW certification was reasonable, as licensure would have enabled Williams to perform the full scope of her job functions. Hr'g Tr. 14, 21. Finally, the requirement that Williams pass the LISW test remained constant "since the date of [her] original hiring" for the position of Residential Program Manager. *Tzangas*, 73 Ohio St. 3d at 698-99.

The *Tzangas* test producing an unfavorable result, Williams and her *amici* argue that the Commission should have looked to two *additional* factors to find that her discharge lacked just cause: (1) whether Bridgeway's enforcement of the licensure requirement constituted disparate

treatment, and (2) whether Williams tried in good faith to pass the exam. See, e.g., Legal Aid Br. 6; Williams Br. 9, 19. Neither factor is relevant in a work-performance case.

First, Williams's *amici* argue that because the *Tzangas* Court considered whether other employees had met the employer's expectations in the course of evaluating the reasonableness of those expectations, *Tzangas* permits disparate-treatment analysis of the type conducted by the Eighth District. Legal Aid Br. 11, n. 4. This argument overlooks a key difference between *Tzangas*'s reasonableness prong and the Eighth District's brand of comparative analysis. In *Tzangas*, the Court considered other employees in the course of determining whether the performance goals set for the claimant were *attainable*. 73 Ohio St. 3d at 699. That makes sense: If, for example, an employer required its employees to lift a 500-pound object without assistance, demonstrating that no other employee was capable of lifting 500 pounds would be one way to show that the employer's expectations were unreasonable. But the Eighth District did not look to other employees to determine whether Bridgeway's licensure requirement was reasonable. Rather, it looked to other employees to determine whether Bridgeway treated Williams differently. Nothing in *Tzangas* supports that form of comparative analysis.

Nor does *Tzangas* recognize subjective determinations about an employee's good faith. Williams argues that her "bona fide effort to pass the LISW exam refutes the conclusion that her actions were culpable and thus at fault." See Williams Br. 10. But *Tzangas* explicitly rejects subjective considerations of this kind, holding that an employee can be discharged for just cause based on unsatisfactory work performance even without "willful or heedless disregard of duty or violation of employer instructions." 73 Ohio St. 3d at 698. "There is little practical difference between an employee who will not perform her job correctly and one who cannot perform her job correctly," *Tzangas* reasons. *Id.* at 698. Though the latter employee might not be

blameworthy “in a moral sense,” inability to perform the functions of her position “does constitute fault in a legal sense sufficient for her termination to have been made with just cause.” *Id.* at 699. It may very well be the case that Williams tried her best to pass the exam, but her intentions are simply not relevant to a just-cause determination under *Tzangas*.

**B. The Commission’s policy statements do not invite disparate-treatment analysis in the context of determining whether a performance-based discharge was supported by just cause.**

Williams and her *amici* next rely on inapplicable portions of the Commission’s policy guide and online abstract to argue that her discharge lacked just cause. The relevant policy statements lead to no such conclusion. Part IV, Section II, Paragraph 17 of the policy guide describes the standard adjudicators should use when evaluating whether a discharge for “unsatisfactory work performance” was supported by just cause. See Unemployment Compensation Policy Guide, Part IV, Section II, Pg. 11 (found at Legal Aid App’x 11). The standard mirrors the *Tzangas* test nearly word for word:

If a worker is discharged because of inability to meet performance standards of the job, a disqualification is imposed when all of the following conditions exist:

1. The individual did not perform the required work; and
2. The individual was aware of the performance expectations of the position at the time of hire for that position; and
3. The expectations were reasonable; and
4. The requirements of the job did not change between the date of hire for that particular position and the individual’s discharge.

Policy Guide 11, see Legal Aid App’x 11; compare *Tzangas*, 73 Ohio St. 3d at 698-99. In line with *Tzangas*, the section’s explanatory notes say that adjudicators may test “the reasonableness of the expectations” by “determin[ing] whether other employees in the same or similar position are able to meet the standards of the employer.” Policy Guide 13, see Legal Aid App’x 13

(emphasis added). But nowhere in the course of explaining the *Tzangas* rubric does the guide suggest that disparate-treatment analysis is appropriate, or that adjudicators may consider factors other than the four specifically mentioned in *Tzangas*, when evaluating a performance-based discharge.

With the policy guide offering the same guidance as *Tzangas*, Williams's remaining points about the Commission's policy statements are unpersuasive.

First, the guide's basic instructions on finding just cause do not support Williams's theory that it is appropriate in a work-performance case for adjudicators to consider whether a claimant's actions demonstrated a "disregard of the employer's best interest." Appellee Br. 6-7 (citing Policy Guide Part IV, Section 2, Pg. 3, see Legal Aid App'x 3). The relevant portion of the guide reads as follows:

Conduct or performance that would constitute just cause for discharge includes (but is not limited to):

- (1) The individual disregards his/her duties to the employer signifying an intentional disregard of the employer's interest;
- (2) The individual disregards or ignores established rules or any standards of behavior which the employer has the right to expect;
- (3) The individual shows carelessness or negligence in the performance of the work to such a degree or recurrence as to demonstrate a disregard of the employer's interest  
..... *or*
- (4) The individual is not able to perform the required work . . . and all of the specific conditions detailed in Section C, paragraph 17 [the *Tzangas* factors] are met.

Policy Guide 3, see Legal Aid App'x 3 (emphasis added). Though Williams appears to read this section as including an "unreasonable disregard" assessment as part of *any* just cause determination, what the section actually says is just the opposite. In some contexts (those falling under points 1-3), it may be appropriate to consider whether an employee acted with willful

disregard of an employer's interests. Not so with performance-based discharges, which fall under point 4. In that context, the section states that the relevant criteria are those detailed in paragraph 17: those criteria include only the *Tzangas* factors. See Policy Guide 11.

Second, the policy guide's criteria for evaluating just cause for violation of a *work rule* do not shed light on how to evaluate just cause in a *work-performance* case. See Legal Aid Br. 18-20. When an employee has been discharged for violating a work rule, the guide says, adjudicators may consider whether the rule is, among other factors, "uniformly applied." Policy Guide, Part IV, Section II, Pg. 22, Legal Aid App'x 22. The section specifies, however, that the uniformly applied factor comes into play when "a claimant was discharged for a violation of an employer's policy or established rules *not specifically covered elsewhere*" in the guide. Policy Guide, Part IV, Section II, Pg. 22, Legal Aid App'x 22 (emphasis added). It follows that, while uniform applicability might factor into the assessment of a work-rule discharge, it does not belong in the assessment of a work-performance discharge—a discharge "specifically covered elsewhere" by the section that governs discharge for unsatisfactory performance and describes the *Tzangas* test. See Part IV, Section II, Pg. 11, Legal Aid App'x 11. Whatever weight the Commission gives to uniform applicability in the context of work-rule cases, that standard does not factor into a determination of just cause for a performance-related discharge.

Finally, the Ohio Unemployment Compensation Law Abstract offers little in support of Williams's claim. Though Williams points to a section regarding civil service exams that purportedly helps her case, Appellee Brief 7-9, she overlooks straightforward—and directly applicable—instructions elsewhere in the abstract. Those instructions state that "Where an employee is required to be licensed . . . as a condition of continued employment, and the employee loses the required license . . . the employee can be discharged for just cause in

connection with work.” Ohio Unemployment Compensation Law Abstract, VIII. Separations from Employment, Section D, Discharge (2006), <http://www.web.ucrc.state.oh.us/Abstract/Abstract.stm>. In sum, Williams’s reliance on the Commission’s policy statements do not add strength to her claim or to the Eighth District’s mistaken reasoning.

**C. Even if disparate-treatment analysis were appropriate when determining whether a performance-based discharge was supported by just cause, Williams was not similarly situated to the other employees.**

Williams could not prevail even if this Court were to decide that disparate-treatment analysis can play a role in determining just cause for a performance-based discharge, as she has not shown that she was similarly situated to the employees to whom she compares herself. Williams states that Bridgeway “promoted one program manager who had not passed the LISW test,” but fired Williams, and “afforded one program manager more than twenty months to pass the test,” but allowed Williams only fifteen months. Appellee Br. 19. But she does not explain how she was similarly situated to these other employees, and the record in fact suggests that she was not. This is a case where the requirements of the position changed over time: One Residential Program Manager who did not have LISW certification had held the post for thirteen years, and another Residential Program Manager who had held the post for approximately six years did not obtain LISW certification while she held that title. But an employer’s decision to change the licensure requirement as it brings new employees to the position is a case of changed circumstances, not evidence of disparate treatment. Williams presented no evidence that these longer-serving employees had, like Williams, been told at the time of hiring that they would be required to receive LISW certification within fifteen months. In light of the critical differences between Williams and the other program managers, the Commission’s decision was not “unlawful, unreasonable, or against the manifest weight of the evidence” such that the Eighth

District had authority to reverse it. *Irvine v. Unemployment Comp. Bd. of Review* (1985), 19 Ohio St. 3d 15, 17-18.

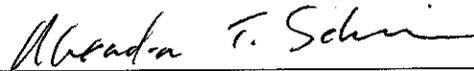
Adopting the Eighth District's line of reasoning would create significant problems for employers wanting to revise a position's performance requirements over time. If comparisons between dissimilar employees could support a finding of discharge without just cause, an employer could, for example, find itself on the hook for discharging an employee who could not use a computer on the theory that employees holding her same position several decades ago needed only to use a typewriter. The Unemployment Compensation Act does not require such frozen-in-time comparisons. Neither should this Court.

### CONCLUSION

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

Respectfully submitted,

MICHAEL DEWINE (0009181)  
Attorney General of Ohio



ALEXANDRA T. SCHIMMER\* (0075732)  
Chief Deputy Solicitor General

*\*Counsel of Record*

LAURA EDDLEMAN HEIM (0084677)  
Deputy Solicitor

LAUREL BLUM MAZOROW (0021766)  
Assistant Attorney General

30 East Broad Street, 17th Floor  
Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

[alexandra.schimmer@ohioattorneygeneral.gov](mailto:alexandra.schimmer@ohioattorneygeneral.gov)

Counsel for *Amicus Curiae*

Ohio Department of Job and Family Services

## 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 2nd day of February, 2011 upon the following counsel:

Fred J. Pompeani  
Rebecca A. Kopp  
Porter Wright Morris & Arthur LLP  
925 Euclid Ave., Suite 1700  
Cleveland, Ohio 44115

Counsel for Defendant-Appellant  
Bridgeway, Inc.

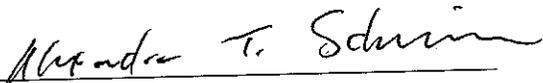
Anita L. Myerson  
Legal Aid Society of Cleveland  
1223 West Sixth Street  
Cleveland, Ohio 44113

Thomas W. Weeks  
Ohio State Legal Services Association  
555 Buttles Avenue  
Columbus, Ohio 43215-1137

Counsel for *Amici Curiae*  
Legal Aid Society of Cleveland  
Ohio State Legal Services Association

Kenneth J. Kowalski  
Employment Law Clinic  
Cleveland-Marshall College of Law  
2121 Euclid Avenue, LB 138  
Cleveland, Ohio 44115-2214

Counsel for Plaintiff-Appellee  
Mary H. Williams

  
Alexandra T. Schimmer  
Chief Deputy Solicitor General