

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BUTLER COUNTY

KEVIN JOHNSON,	:	
	:	CASE NO. CA2008-11-278
Plaintiff-Appellant,	:	
	:	<u>OPINION</u>
- vs -	:	7/6/2010
	:	
EDGEWOOD CITY SCHOOL DISTRICT	:	
BOARD OF EDUCATION, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS  
Case No. CV2007-08-3081

J.C. Shew, 16 North Main Street, Middletown, Ohio 45042 and Fred S. Miller, 246 High Street, Hamilton, Ohio 45011, for plaintiff-appellant

Frost Brown Todd, LLC, Thomas B. Allen, 9277 Centre Pointe Drive, Suite 300, West Chester, Ohio 45069, for defendant-appellee, Edgewood City School District Board of Education

Richard Cordray, Ohio Attorney General, Robin A. Jarvis, 1600 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-2809, for appellee, Butler County Department of Job & Family Services

**RINGLAND, J.**

{¶1} Plaintiff-appellant, Kevin Johnson, appeals a decision of the Butler County Court of Common Pleas affirming the denial of unemployment compensation benefits.

{¶2} Appellant was a teacher at Edgewood High School from November 25,

1991 until he was terminated on November 15, 2006. Throughout his employment, appellant would receive periodic reviews of his performance by the school administration. With the exception of the two incidents at issue in this case, appellant's reviews always ranged from good to outstanding. In the latter years, he received almost all outstanding reports.

{¶3} In this case, the parties refer to two specific incidents occurring during appellant's employment at the school. In 2001, appellant sent approximately six sexually-explicit emails to two women using his school email account. These emails were discovered in 2005 during a random review of employee emails. On November 9, 2005, appellant received a written reprimand from the principal and the school district imposed a ten-day suspension without pay. Additionally, appellant was required to sign an agreement stating that, if he should violate any further school policy, he would be subject to further discipline up to and including termination.

{¶4} Appellant's termination stemmed from a project assigned to his 2006 senior sociology class known as the "20-Year Reunion" project. The project asked students to make predictions about their fellow classmates' future lives. Appellant encouraged these predictions to be humorous in nature in order to "roast" their fellow classmates and, on the last day of class, appellant would read some of the predictions aloud after being "screened" for appropriateness. Appellant had assigned this project for 13 years as an enjoyable final-day activity. The project was voluntary and appellant informed the students that they could opt-out if they did not wish to participate. As designed, on May 30, 2006, appellant spent the class period reading predictions to the students. Excerpts included statements that a student would be a pole dancer, a student would become fat, a student would be living in a trailer with nine kids fathered by nine different men, and a student would return to the class reunion with a nose-job.

Following class, a few students complained to the principal that some of the predictions read by appellant were embarrassing or upsetting.

{¶15} After hearing the complaints, the Board placed appellant on administrative leave, without pay, pending termination. Following a hearing before a referee, the referee recommended that appellant should not be terminated. The Board rejected the recommendation and decided to terminate him. Upon termination, appellant initiated an administrative appeal of the Board's decision to the Butler County Court of Common Pleas. Additionally, appellant applied for unemployment benefits. The common pleas court reversed the decision of the School Board, concluding that appellant's termination was against the greater weight of the evidence. The Board appealed that decision to this court. In *Johnson v. Edgewood City School Dist. Bd. of Edn.*, Butler App. No. CA2008-09-215, 2009-Ohio-3827 ("*Johnson I*"), this court affirmed the common pleas court's decision.

{¶16} In the separate unemployment action, the Unemployment Compensation Review Commission denied appellant's unemployment benefits, concluding that "just cause" existed for the school district to terminate appellant. Appellant appealed to the Butler County Court of Common Pleas, which affirmed the commission's decision. Appellant timely appeals, raising one assignment of error:

{¶17} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT DETERMINED THAT APPELLANT HAD BEEN TERMINATED FOR 'JUST CAUSE.'"

{¶18} In the instant appeal, appellant argues that the common pleas court erred in affirming the Commission's decision denying unemployment benefits. Appellant argues that he has an excellent work record, which the court failed to properly consider in this case. Further, appellant claims he had no intent to harm or embarrass his

students. Appellant submits that he has used this project for 13 years with no issues. Appellant urges that the common pleas court's decision is contradictory to its earlier decision since it found that he should not have been terminated but denied his unemployment benefits.

### Standard of Review

{¶9} The standard of review in unemployment-compensation appeals is well-established. A reviewing court may reverse the board's determination only if it is unlawful, unreasonable, or against the manifest weight of the evidence. *Geretz v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 89, 2007-Ohio-2941, ¶10, citing *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206. "[W]hile appellate courts are not permitted to make factual findings or to determine the credibility of witnesses, they do have the duty to determine whether the board's decision is supported by the evidence in the record." *Tzangas* at 696. "This duty is shared by all reviewing courts, from the first level of review in the common pleas court, through the final appeal in this court." *Id.*<sup>1</sup> See, also R.C. 4141.282(H).

### Just Cause

{¶10} "[N]o individual may \* \* \* be paid [unemployment] benefits \* \* \* [f]or the duration of the individual's unemployment if the administrator 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).

{¶11} The Ohio Supreme Court has recognized that "[t]here is, of course, not a

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1. Appellant disputes the standard of review, arguing that the trial court was required to conduct a trial de novo following the decision by the Unemployment Review Commission. In support, appellant offers this court's recent decision in *Bryant v. Hamilton Civil Serv. Comm.*, Butler App. No. CA2008-10-243, 2009-Ohio-3676. *Bryant* is an administrative appeal of a termination decision like *Johnson I*, not a unemployment compensation matter like the case at bar. Unemployment Compensation cases have a different standard of review from termination cases. The Ohio Supreme Court clearly outlined the standard of review in *Tzangas*, which was properly followed by the trial court and which we also follow in this case.

slide-rule definition of just cause." *Irvine v. Unemp. Comp. Bd. of Rev.* (1985), 19 Ohio St.3d 15, 19. However, the court has explained that "[t]raditionally, 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." *Tzangas* at 697, citing *Irvine* at 17. Just cause for discharge need not reach the level of misconduct but there must be some fault on the part of the employee. *McCarthy v. Connectronics Corp.*, 183 Ohio App.3d 248, 2009-Ohio-3392, ¶13.

{¶12} In order to award unemployment compensation, the just cause determination must be consistent with the legislative purpose underlying the Unemployment Compensation Act. *Tzangas* at 697. The Unemployment Compensation Act "was intended to provide financial assistance to an individual who had worked, was able and willing to work, but was temporarily without employment through no fault or agreement of his own. \* \* \* The Act does not exist to protect employees from themselves, but to protect them from economic forces over which they have no control. 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." *Id.* at 697-698.

{¶13} Since "fault is essential to the unique chemistry of a just cause termination,\* \* \* the critical issue is not whether an employee has technically violated some company rule, but rather whether the employee, by his or her actions demonstrated an unreasonable disregard for employer's best interests." (Internal citations omitted.) *Binger v. Whirlpool Corp.* (1996), 110 Ohio App.3d 583, 590; *Janovsky v. Ohio Bur. of Emp. Serv.* (1996), 108 Ohio App.3d 690, 694.

{¶14} Each unemployment compensation case must be considered upon its

particular merits in determining whether there was just cause for discharge. *City of Warrensville Heights v. Jennings* (1991), 58 Ohio St.3d 206, 207. The determination of just cause depends upon the "unique factual considerations" of a particular case and is therefore primarily an issue for the trier of fact. *Irvine* at 17.

{¶15} Appellant claims that the Commission and trial court erred by failing to take into account his entire work history in determining whether unemployment compensation should be denied and asks this court to similarly review this evidence. Further, appellant argues that, despite claims to the contrary, the administration was aware of his 20-year project. Further, appellant suggests that, by failing to give him "fair warning" about the assignment, the school tacitly approved of the project.

{¶16} We cannot say the board's determination was unlawful, unreasonable, or against the manifest weight of the evidence. For the purposes of governing unemployment compensation, "just cause" refers to a justifiable reason for terminating the employee from the employee's perspective and necessarily must be predicated upon conduct of the employee. *Morris v. Ohio Bur. of Emp. Serv.* (1993), 90 Ohio App.3d 295, 299. A review of the record supports the commission's decision finding fault on behalf of appellant. After discovering inappropriate emails sent by appellant, appellant was disciplined and warned that any future violations could lead to termination. A few months after receiving this warning, appellant read inappropriate comments from his "20 year project" to his class. Appellant urges that the administration was aware and, as a result, approved of his traditional project; a claim denied by the school board. Whether the administration was aware of the project is immaterial. Appellant, in his sole discretion, "screened" which comments he intended to broadcast in class and which he felt were appropriate. Appellant demonstrated poor judgment in selecting the comments. More importantly, the comments were specifically directed at individual

students that, even if intended in jest, could be hurtful. An ordinary, reasonable person would not find such comments were appropriate in a school setting. Accordingly, appellant's conduct constitutes fault.

{¶17} Regardless of whether appellant had a flawless employment record aside from the two incidents at issue in this case, appellant's conduct was improper and justifies the commission's finding of a "just cause" termination. Moreover, appellant concedes some fault, acknowledging that he exercised poor judgment and that the comments were inappropriate. We find no reason to doubt appellant's sincere claim that he did not intend to harm or embarrass his students, but regardless of his intent appellant's conduct was inappropriate and was solely fault on his behalf.

{¶18} Our decision in the instant matter may appear illogical or contradictory when compared to the *Johnson I* decision since in the former case this court affirmed a decision finding appellant to be improperly terminated, yet in this case we find "just cause" existed to deny appellant's unemployment compensation. We are further aware of the existence of significant case law suggesting that "just cause" under the Unemployment Compensation Act is a more stringent standard than the standard necessary to terminate an employee for a disciplinary violation. See *Youghioghney & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St.3d 39, syllabus; *Guy v. Steubenville*, 147 Ohio App.3d 142, 2002-Ohio-849, ¶29 ("An employee terminated for 'just cause' pursuant to a labor contract could theoretically secure unemployment benefits, because the 'just cause' sufficient to uphold the discharge of that employee need not be as grave as the 'just cause' required to disqualify that discharged employee from receiving unemployment compensation"); *Struthers v. Morell*, 164 Ohio App.3d 709, 2005-Ohio-6594, ¶18; *Lorain Cty. Aud. v. Ohio Unemp. Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, ¶28. See, also, *Jennings*, 58 Ohio St.3d 206.

{¶19} This anomaly results from our limited standards of review in both cases. Specifically, unemployment compensation and termination of a civil service employee have separate procedures, legal considerations and remedies. See *James v. Ohio State Unemployment Rev. Comm.*, Franklin App. No. 08AP-976, 2009-Ohio-5120, ¶16. Moreover, "the two proceedings are completely separate and distinct, and a ruling in [a] disciplinary appeal is not binding on the [agency] in determining unemployment benefits." *Guy* at ¶29, citing *Adams v. Harding Mach. Co., Inc.* (1989), 56 Ohio App.3d 150, 154-155.

{¶20} The record in this case contained evidence of some fault on behalf of appellant to support the Commission's finding of "just cause," a decision we must affirm if it was not unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas* at 697.

{¶21} In contrast, the trial court had greater discretion in appellant's termination case since it could independently "weigh the evidence, hold additional hearings, if necessary, and render factual determinations." *Katz v. Maple Heights City Sch. Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 256, 260. In *Johnson I*, the trial court concluded based upon a review of appellant's work history that he should not have been terminated by the school district. In that case, our standard of review was also limited. See *Johnson I*, 2009-Ohio-3827 at ¶9 (applying an abuse of discretion standard). Regardless of whether we would have agreed with the trial court's conclusion in *Johnson I*, the court's decision in that case did not constitute an abuse of discretion. *Id.* at ¶25 and ¶27.

{¶22} Appellant's sole assignment of error is overruled.

{¶23} Judgment affirmed.

YOUNG, P.J., and POWELL, J., concur.