[Cite as *Stalder v. St. Bernard-Elmwood Place City School Dist.*, 2010-Ohio-2363.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

RICK STALDER,	:	APPEAL NO. C-090632 TRIAL NO. A-0800247
Plaintiff-Appellee,	:	*D E C I S I O N.*
vs.	:	
ST. BERNARD-ELMWOOD PLACE CITY SCHOOL DISTRICT,	:	
	:	
Defendant-Appellant.		

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part and Reversed in Part

Date of Judgment Entry on Appeal: May 28, 2010

Blankenship, Massey, Steelman and *Randy J. Blankenship*, for Plaintiff-Appellee,

Ennis, Roberts & Fischer and *J. Michael Fischer*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Judge.

{¶1} Defendant-appellant Board of Education of St. Bernard-Elmwood Place City School District ("the Board") appeals the trial court's judgment reversing the decision of the Board to terminate plaintiff-appellee Rick Stalder and awarding damages, including attorney fees. For the following reasons, we affirm the trial court's judgment reversing the Board's decision to terminate Stalder, but reverse the award of attorney fees and damages other than lost wages and retirement contributions.

{¶2} Stalder was formerly employed as a physical-education and health teacher with the St. Bernard-Elmwood Place City School District. During his 20-year tenure, he consistently received positive evaluations for his job performance and had eight consecutive years of perfect attendance. According to the evaluations of Stalder from 1988 to 2006, he received the highest ranking (satisfactory) for his (1) implementation of Board of Education and Administration policies, rules, regulations, and directives; (2) positive contributions to the welfare of the District; (3) taking necessary and reasonable precautions to protect students; (4) demonstrating leadership and student control in the classroom; (5) maintaining a positive rapport with students; and (6) maintaining a positive working relationship with school personnel.

{¶3} Within these evaluations, Stalder was specifically complimented on his (1) "strong discipline"; (2) his "professional manner"; (3) having "full control of * * * his classes"; (4) his "classroom management"; (5) his "professional manner structure and organization"; (6) the fact that "safety is stressed in both health and

PE"; (7) being a "good role model"; and (8) being a "true professional who is a great role model for the students."

{¶4} In November 2006, while teaching a physical-education class, Stalder had instructed the students to stand underneath a basketball hoop and wait to be assigned a basketball. Despite this instruction, a female student tried to take a basketball. Stalder put his hand on the ball, told her that she could not take the ball, and repeated his instructions. The student again disobeyed his instructions and tried to take a ball. Because Stalder again put his hand on the ball to stop her from taking it, the student bent down and took a ball from the lower rack. As she was walking away, Stalder threw a basketball at her, hitting her head. The student was not injured. Although the Board had a "zero-tolerance policy" for student misbehavior, the student was not punished. But Stalder was suspended without pay for five days and given a warning that "any future repetition of similar behavior shall lead to further discipline, up to and including termination."

{¶5} In June 2007, a male student athlete who stood six feet seven inches left Stalder's class without permission and began "shooting hoops" in the gymnasium. Stalder found the student and instructed him to go to the locker room to change clothes and then to attend his next class. Stalder had to instruct this student three times before the student complied. The student changed in the locker room, but instead of going to his next class, he went back to the gym to play basketball. Stalder again instructed the student, at least five or six times, not to shoot the basketball and to leave the court. When the student refused to comply with the instructions, Stalder, "with a two-hand push" of his own basketball, knocked the basketball the student was holding out of the student's hands in an effort to get him

to leave the court. The student was angry and approached Stalder, but another teacher escorted the student from the gymnasium. The student was not injured.

{¶6} Although the student claimed that he had been hit in the stomach, another student who had witnessed the incident stated that the ball that Stalder had thrown hit the basketball in the student's hands. Stalder was suspended indefinitely without pay.

{¶7} The male student's mother initiated criminal proceedings against Stalder. The state charged Stalder with assault, but he was acquitted following the presentation of the state's case due to the failure to prove that Stalder had knowingly caused or attempted to cause physical harm to the student.[1] The student had testified that Stalder had not thrown the ball "very hard" at him and that he had not believed that Stalder intended to harm him. He further testified that he had not been injured.

{¶8} In August 2007, the Board notified Stalder that it had initiated proceedings under R.C. 3319.16 to terminate his teaching contract for "good and just cause" because Stalder had thrown a basketball at a student for failing to follow instructions, and because he had been warned seven months earlier that such behavior would be grounds for termination.

{¶9} Upon receipt of the Board's letter, Stalder exercised his right under R.C. 3319.16 to have a hearing before a referee, instead of the Board, regarding his termination. After taking evidence, the referee found that Stalder, with a "two-hand[ed] push," had thrown a basketball at the basketball in the student's hands because the student had failed to obey repeated instructions to leave the basketball court and to return to the classroom. The referee concluded that this act differed

[1] *State v. Stalder* (Sept. 25, 2007), Hamilton Cty. M.C. No. C-07CRB-20875.

from throwing a basketball directly at a student, and thus that the act of throwing a basketball at the basketball the student was holding did not amount to "just and good cause" to terminate Stalder's contract. More specifically, the referee found that the Board had failed to prove by a preponderance of the evidence that Stalder had thrown a basketball at the student.

{¶10} Despite the referee's findings and conclusions, the Board voted to terminate Stalder's contract. The Board believed that the referee's finding that Stalder had not thrown a basketball at the male student was arbitrary, because, in its view, there was no difference between throwing a basketball at a student and throwing a basketball at an object that the student was holding.

{¶11} Upon termination, Stalder initiated an administrative appeal of the Board's decision to the Hamilton County Court of Common Pleas. The case was assigned to a magistrate. The magistrate heard oral argument, but did not take any additional evidence. After oral arguments and a review of the administrative record, the magistrate determined that the referee's finding—that the Board had failed to prove that Stalder had intended to throw a basketball at the male student—was supported by a preponderance of the evidence, and thus that there was not "good and just cause" to terminate Stalder's teaching contract. Therefore, the magistrate reversed the Board's decision terminating Stalder.

{¶12} The Board filed objections to the magistrate's decision. The trial court overruled the objections, noting specifically Stalder's exemplary 20-year teaching record. On July 31, 2009, a hearing on damages was held. After the hearing, the trial court ordered that Stalder be reinstated to his position as a teacher with the St. Bernard-Elmwood Place City School District for the 2009-2010 school year, and that he be awarded $104,684.78 in lost wages. Further, the court ordered

that the Board contribute $20,075.16 to Stalder's retirement plan and pay Stalder $17,000 for a tax penalty he had allegedly incurred when he withdrew money from a pension following his termination. Finally, the court awarded Stalder $35,038.88 in attorney fees after finding that the Board had acted in bad faith in terminating Stalder's teaching contract. This appeal followed.

{¶13} In its first assignment of error, the Board argues that the trial court abused its discretion by reversing the termination of Stalder's teaching contract.

{¶14} In a teacher-termination proceeding, a court of common pleas may reverse a board of education's decision to terminate a teacher's contract when the board's decision is not supported by, or is against, the weight of the evidence.[2] In comparison, the scope of review by an appellate court is "strictly limited to a determination of whether the common pleas court abused its discretion."[3] "Absent an abuse of discretion, an appellate court may not engage in what amounts to a substitution of the judgment of the common pleas court."[4] An abuse of discretion is more than an error of law or judgment; it implies "that the court's attitude is unreasonable, arbitrary or unconscionable."[5]

{¶15} Here, the trial court determined that the Board's decision was not supported by the weight of the evidence, particularly in light of Stalder's exemplary 20-year teaching record. Although the trial court did not detail its complete reasoning process, this does not prevent us from concluding that the court did not act arbitrarily or unreasonably in reversing the Board's decision on the evidence

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[2] *Douglas v. Cincinnati Bd. of Edn.* (1992), 80 Ohio App.3d 173, 176, 608 N.E.2d 1128; *Hale v. Bd. of Edn.* (1968), 13 Ohio St.2d 92, 234 N.E.2d 583.
[3] *James v. Trumbull Cty. Bd. of Edn.* (1995), 105 Ohio App.3d 396, 663 N.E.2d 1361.
[4] Id.
[5] *Katz v. Maple Heights City School Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 256, 261, 622 N.E.2d 1.

presented in the record.[6] A review of the complete record demonstrates that the trial court did not abuse its discretion by reversing Stalder's termination given Stalder's exemplary teaching record and the fact that Stalder did not intentionally throw the ball directly at the student.

{¶16} Here, the referee found that Stalder had not thrown the basketball at the male student, but instead had thrown at the basketball that the student was holding. A referee's findings of fact must be accepted unless such findings are against the greater weight, or preponderance, of the evidence.[7] Deference is given to the referee's findings of fact because he is "best able to observe the demeanor of the witnesses and weigh their credibility."[8]

{¶17} A review of the record demonstrates that the referee relied on Stalder's testimony that he had thrown the basketball at the basketball that the student was holding and not at the student himself. An eyewitness to the event also testified that Stalder had thrown the basketball at the ball in the student's hand. Given that the referee's finding was supported by a preponderance of the evidence, it should have been accorded deference by the Board. Considering that fact, we cannot reasonably say that there was "good and just cause" to terminate Stalder's teaching contract.

{¶18} The Ohio Supreme Court has stated that "other good and just cause" must "be a fairly serious matter" to support a Board's decision to terminate a teaching contract.[9] Here, Stalder's attempt to knock the basketball from the male

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[6] *Johnson v. Edgewood City School Dist. Bd. of Edn.* (Aug. 3, 2009), 12th Dist. No. CA2008-09-215, ¶11.
[7] *Aldridge v. Huntington Local School Dist. Bd. of Edn.* (1988), 33 Ohio St.3d 154, 527 N.E.2d 291, paragraph one of the syllabus.
[8] Id. at 157.
[9] *Hale v. Lancaster Bd. of Edn.* (1968), 13 Ohio St.2d 92, 99, 234 N.E.2d 583.

student's hand clearly did not amount to a "fairly serious matter."[10] The student was not injured, and there was no intent to hit the student with the basketball. Further, Stalder did not violate any of the Board's policies or regulations by knocking the basketball out of the student's hands, nor did his action amount to any crime in violation of state law.

{¶19} Finally, in considering whether there was good and just cause to terminate Stalder, the Board did not consider Stalder's exemplary teaching record or his evaluations, which complimented Stalder on his "strong discipline" and ability to maintain "control of his classroom" and described him as a "good role model." A board of education must consider a teacher's employment record prior to imposing a particular sanction.[11] The trial court specifically noted in its decision reversing Stalder's termination that it was relying in part on Stalder's excellent teaching record.

{¶20} Accordingly, based on the foregoing, we cannot say that the trial court abused its discretion or acted arbitrarily or unreasonably in reversing the Board's decision to terminate Stalder. The first assignment of error is overruled.

{¶21} In its second assignment of error, the Board contends that the trial court erred by awarding attorney fees to Stalder. We agree.

{¶22} R.C. 3319.16 does not specifically allow for the recovery of attorney fees in teacher-termination proceedings. But Ohio has adopted the "American Rule,"

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[10] See, e.g., *James v. Trumbull Cty. Bd. of Edn.* (1995), 105 Ohio App.3d 392, 663 NE.2d 1361 (use of "aversive" discipline, which did not violate the board of education's policies and was the result of quick decision, did not constitute "other just and good cause" justifying termination); *Bates v. Noble Local Bd. of Edn.* (June 27, 1980), 7th Dist. No. 179 (because "no crime was committed," irregularities in yearbook funds were not sufficiently serious to justify discharge for "other just and good cause").

[11] *Katz v. Maple Heights City School Dist. Bd. of Edn.*, (1993), 87 Ohio App.3d 256, 263, 622 N.E.2d 1 (the trial court abused its discretion when it affirmed the decision of the school board to impose "the most severe sanction" of termination upon the teacher without first "consider[ing the] teacher's employment record").

which permits an award of attorney fees to a prevailing party whenever the losing party has acted in bad faith.[12] In his complaint filed in January 2008, Stalder asked for attorney fees, but did not allege that the Board had acted in bad faith in terminating his employment. But in July 2009, the trial court permitted Stalder to amend his complaint to allege bad faith. Interestingly, this bad-faith theory was not even raised until the trial court had reversed the Board's decision terminating Stalder. Regardless, presuming the issue of bad faith was properly before the trial court, we cannot say that the evidence presented demonstrated "bad faith" in terminating Stalder. Although Stalder presented evidence that he had had disagreements with several members of the Board regarding their children's playing time on athletic teams coached by Stalder, these disagreements had occurred 15 years prior to the termination proceedings and could in no way be related to the events leading up to the termination. The second assignment of error is sustained.

{¶23} In its final assignment of error, the Board contends that the trial court erred by ordering the Board to reimburse Stalder for a $17,000 tax penalty he had incurred subsequent to his termination. We sustain this assignment of error because there was no credible evidence presented at trial that Stalder had incurred tax liability in the amount of $17,000 solely for withdrawing monies from his pension.

{¶24} In sum, we affirm those parts of the trial court's judgment reversing the Board's decision to terminate Stalder and awarding lost wages and retirement benefits. But we reverse the trial court's award of attorney fees and the $17,000 in

[12] See, e.g., *Norwell v. Cincinnati* (1999), 133 Ohio App.3d 790, 813, 729 N.E.2d 1223.

damages for an alleged tax penalty.

Judgment accordingly.

DINKELACKER and **MALLORY, JJ.,** concur.

Please Note:

The court has recorded its own entry this date.