ORIGINAL

In the
Supreme Court of Ohio

LAURA A. SCALI,	:	Case No. 2012-0527
	:	
Appellant,	:	On Appeal from the Stark County Court of Appeals, Fifth Appellate District
v.	:	
CSA HS UHHS CANTON, INC., *et al.*,	:	
	:	Court of Appeals Case No. 2011-CA-00165
Appellees.	:	

MEMORANDUM OPPOSING JURISDICTION OF APPELLEE DIRECTOR, OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

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INTRODUCTION

Appellant Laura Scali was denied unemployment benefits because the Unemployment Compensation Review Commission (the "Commission") determined that her employer had just cause for its decision to discharge her. The administrative record—although containing conflicting evidence—supports the Commission's decision. As a result, the courts below denied Scali's request to set aside the Commission's order. Scali now seeks further judicial review in this Court. This Court should deny review for three reasons.

First, this case is a run-of-the-mill challenge to the application of well-understood legal principles to a particular set of facts. Significantly, Scali does not dispute the legal framework applicable to unemployment compensation appeals. Nor does she question the Commission's role as trier-of-fact and consequent duty to make credibility findings and weigh conflicting evidence. Instead, she asserts that the Commission should have come to the opposite conclusion on the just cause issue given the evidence before it. Even if she is correct (and she is not), Scali's case presents at most an opportunity for error correction, not resolution of a legal question.

Second, the broader question Scali purports to have this Court answer—even if meriting consideration—is not fairly presented on these facts. Scali frames the issue as one concerning the relative weight the Commission must assign hearsay and non-hearsay evidence in making its factual findings. In doing so, Scali both misunderstands the meaning of the Commission's just cause determination and misstates the nature of the evidence presented in the administrative record. There is no dispute that the record contained conflicting evidence. However, the Commission hearing officer ultimately rejected Scali's self-serving testimony in favor of testimony and documentary evidence offered by her former employer—some, though not all, of which was hearsay. Although framed broadly, Scali's proposition of law reflects little more than

her disagreement with the Commission's resolution of that conflict and therefore does not warrant review by this Court.

Third, the administrative record supports the finding of just cause. Scali's position involved patient contact, and providing customer service to those patients was integral to her responsibilities. In the months leading up to Scali's termination, her supervisor received multiple complaints from patients concerning Scali's attitude and demeanor. Despite receiving warnings about the potential consequences of continued poor performance, these complaints did not abate. Although Scali testified to her belief that the patients' concerns were unfounded, the hearing officer apparently rejected her account and concluded that her employer was reasonable in concluding that Scali bore some fault. Resolving this evidentiary conflict was the hearing officer's prerogative. And the courts below were correct to refrain from second-guessing that judgment. Further review by this Court is therefore unwarranted.

STATEMENT OF THE CASE AND FACTS

CSA HS UHHS Canton, Inc. ("Mercy") employed Scali as a dental care assistant until her termination in December 2009. *See Scali v. CSA HS UHHS Canton, Inc.*, Stark C.P. No. 2010CV03609, 1 (June 30, 2011). Her job duties included administrative support and direct patient contact. *Id.*

Concerns over Scali's job performance first arose in June 2009. *Id.* at 2. At that time, Scali's supervisor, Lisa Shannon, became aware that Scali was taking personal telephone calls in patient areas. *Id.* at 2. Shannon advised Scali that this behavior violated Mercy policy and admonished her to avoid doing so in the future. *Id.* Scali failed to comply, and Shannon issued a verbal warning. *Id.*

In August 2009, Shannon received complaints from two patients who claimed Scali had been rude and argumentative. *Id.* Shannon spoke with Scali about these complaints and stated that during this conversation, Scali behaved inappropriately by sighing, crossing her arms, and interrupting her. *Id.* Shannon issued a formal warning as a result of these patient complaints and advised Scali that additional violations of Mercy policy would result in further corrective action, up to and including termination. *Id.*

In November 2009, Mercy received a letter from a patient complaining of Scali's rude behavior. *Id.* After discussing the complaint with Scali, Shannon issued a final warning in lieu of suspension and again advised Scali that further misconduct could result in termination. *Id.* In December 2009, Shannon received yet another complaint from a patient (who also was an employee of Mercy) about rude treatment by Scali. Mercy terminated Scali's employment. *Id.* at 2-3.

Scali subsequently filed for unemployment compensation, and her claim was disallowed. *Id.* at 3. Scali appealed, and the Ohio Department of Job and Family Services ("ODJFS") affirmed, concluding that Scali was discharged with just cause. *Id.* Scali's case was transferred to the Commission, and a hearing was held before a Commission hearing officer. *Id.* Both Shannon and Scali testified during that hearing. *Id.* The hearing officer issued a decision affirming the just cause determination. *Id.* Scali appealed to the full Commission, and the Commission declined further review. *Id.*

Scali challenged the Commission's benefits denial in the Stark County Court of Common Pleas. *Id.* Scali pressed the same argument before the trial court that she presses here: namely, that it was improper for the hearing officer to credit evidence offered by Mercy, some of which constituted hearsay, over Scali's own contrary testimony. *Id.* at 5. More specifically, Scali

asserted Shannon's testimony and the documentary evidence concerning the complaints about Scali's conduct were insufficient to rebut Scali's testimony that these patient complaints were unfounded. *Id.* The trial court rejected Scali's argument, observing that it is not a reviewing court's role to substitute its judgment for that of the Commission as to matters of credibility and weight where there is conflicting evidence. *Id.* at 5-8. The trial court affirmed, concluding that there was at least *some* evidence supporting the Commission's order. *Id.* The Fifth District unanimously affirmed. *Scali v. CSA HS UHHS Canton, Inc.*, No. 2011-CA-00165, 2012-Ohio-577 (5th Dist.).

THIS CASE IS NOT OF PUBLIC AND GREAT GENERAL INTEREST AND DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Review by this Court is not warranted. At its core, Scali's objection to the Commission's order is based on her disagreement about how the evidentiary conflict in the record should have been resolved. Thus, at most, this case presents an opportunity for error correction. Moreover, the broader question Scali presses—concerning how the Commission should exercise its discretion to weigh evidence—is not fairly presented on these facts. Finally, the administrative record supports the Commission's just cause finding. And the courts below were therefore correct in refusing to set that finding aside.

A. Review is unwarranted because Scali seeks to have this Court resolve a dispute over the inferences to be drawn from, and weight accorded to, conflicting evidence.

At its core, this case involves a dispute over what inferences may be drawn from, and the amount of weight that should be accorded to, particular evidence. Scali does not dispute the legal principles that govern unemployment compensation. She acknowledges that it is the claimant's burden to demonstrate an entitlement to benefits and that it is the Commission's responsibility to weigh the evidence, assess the credibility of witnesses, and ultimately serve as

the trier-of-fact. *See* Appellant Laura Scali's Mem. in Support of Jurisdiction 1-2 ("Jur. Mem."); *see also Irvine v. State of Ohio Unemp. Comp. Bd. of Rev.*, 482 N.E.2d 587, 19 Ohio St. 3d 15, 17-18 (1985). In contrast, "[t]he duty . . . of . . . courts is to determine whether the decision of the board is supported by the evidence in the record. The fact that reasonable minds might reach different conclusions is not a basis for the reversal of the board's decision." *Id.* at 18. Here, Scali objects to the manner in which the Commission resolved an evidentiary conflict. But her disagreement with the decision of the Commission as trier-of-fact does not justify review by this Court.

As she has throughout these proceedings, Scali argues that it was inappropriate for the Commission to reject her testimony in favor of the testimony and documentary evidence offered by Mercy in concluding there was just cause for her termination. This was improper, she claims, because Mercy's evidence constituted hearsay. Scali's primary criticism is that the Commission should have given greater weight to her testimony than it did that of her supervisor (Shannon) and the associated documentary evidence. However, as this Court has made clear, as factfinders, the Commission and its hearing officers are not bound by common law or statutory rules of evidence in the administrative hearing process. R.C. 4141.281(C)(2). They have broad discretion regarding evidentiary matters and may consider and rely upon hearsay evidence in rendering a decision. *See, e.g., Simon v. Lake Geauga Printing Co.*, 430 N.E.2d 468, 69 Ohio St. 2d 41, 43 (1982). It is not for a reviewing court to reweigh the evidence or substitute its judgment for that of the Commission. *See Irvine*, 19 Ohio St. 3d at 17-18. As discussed below, the administrative record provides ample support for the Commission's finding that Scali was discharged for just cause, and its decision disallowing her claim for unemployment benefits must therefore stand.

Accordingly, even if Scali were correct that the Commission should have resolved the evidentiary conflict differently (and she is not), hers is not a case that merits review by this Court. Scali's invocation of this Court's jurisdiction for purposes of mere error correction is simply not appropriate, particularly where, as here, there is no error to correct. The Court should therefore deny review.

B. Review is unwarranted because this case does not fairly present the broader question Scali purports to have this Court answer.

In her proposition of law, Scali offers what at first blush seems a provocative question: whether a claimant may be deemed to have been discharged for just cause on the basis of uncorroborated hearsay where he or she presents contrary, competent, and credible evidence to support his or her claim. Whatever may be said about the significance of this question in the abstract, the particular facts of Scali's case fall short of fairly presenting it for resolution by the Court.

First, the competent, credible evidence to which Scali refers consists entirely of her own self-serving testimony. Scali has repeatedly maintained that she fully and credibly rebutted Mercy's evidence of just cause during the Commission hearing. But her account overlooks the fact that this rebuttal consisted entirely of her own statements. Her belief that the patient complaints that resulted in her eventual termination were unfounded does not make them so. In fact, the hearing officer, who was in the best position to evaluate Scali's testimony, was not convinced that her account was accurate. Given her own self-interest, the Commission's hearing officer could have discounted her testimony in light of other evidence. Moreover, as discussed below, the question of just cause does not ultimately turn on the truth of every detail of the patients' accounts of their interactions with Scali. Rather, the just cause finding turns on whether

Mercy had a reasonable belief that Scali had some degree of fault in the circumstances giving rise to these complaints.

Second, and more importantly, the evidence offered by Mercy did not consist entirely of hearsay. To the contrary, Shannon testified as to her personal knowledge concerning her interactions with Scali and their discussions regarding patient complaints. Significantly, she noted that Scali demonstrated behaviors fairly described as defensive and unconstructive during Shannon's discussions with her about the patient complaints received in August. It is true that Shannon's testimony (and the related documents) regarding her interactions with the complaining patients would constitute hearsay if offered to prove the truth of the patients' accounts. But it is unlikely there would be any valid hearsay objection to that evidence if offered to prove that the complaints were filed or their effect on Shannon's, and thereby Mercy's, view of Scali's performance.

Scali's apparent theory is that because she refuted the patients' accounts of her demeanor in her testimony, the Commission had no choice but to conclude that Mercy lacked just cause for her discharge. In doing so, however, Scali misapprehends the nature of the just cause analysis. The critical inquiry is whether the employer acted reasonably in finding fault on the part of the employee. *See Tzangas, Plakas & Mannos v. Adm'r, Ohio Bur. of Emp. Servs.*, 653 N.E.2d 1207, 73 Ohio St. 3d 694, 698 (1995).

Plainly, the record before the Commission contained non-hearsay evidence supporting an inference that Mercy acted reasonably in finding fault on Scali's part. The mere fact that four complaints were made over a period of four months supports an inference that Scali's customer service was inadequate. After all, that someone would invest the time and effort to register their dissatisfaction is significant. Scali herself agreed that the fact that a patient is prepared to draft a

complaint letter suggests "pretty poor customer service." Transcript of July 15, 2010, Telephonic Hearing Before the Unemployment Compensation Review Commission 19. Shannon's testimony about Scali's behavior during their August conversation is also relevant. By interrupting her supervisor, sighing audibly, and crossing her arms, one might infer recalcitrance on Scali's part. Finally, it bears noting that Scali did not avail herself of the opportunity to cross-examine Shannon and explore whether Shannon's concerns about Scali's job performance were genuine. *Id.* at 12 (confirming Scali's intent not to examine Shannon).

Scali also misunderstands what the Commission's just cause finding represents. It is not an endorsement of the patients' accounts of their interactions with Scali. Nor is it a complete rejection of her contrary account. Rather, the hearing officer concluded on the record before it that there was sufficient evidence to find that Mercy acted reasonably in finding some fault on the part of Scali in providing deficient customer service. The hearsay issue she identifies has little effect on this case because the ultimate truth about the details of the complaining patients' interactions with Scali need not be established.

Whatever may be said of the wisdom of a rule precluding the Commission from crediting uncorroborated hearsay evidence over non-hearsay evidence, the question is not fairly presented in this case. Answering the broad question will make no difference in this case because even if Scali were correct that the Commission cannot weigh hearsay over non-hearsay, that rule would not mean reversal in her favor. Here, the hearing officer faced a conflicting evidentiary record. And she resolved the conflict against Scali. The record contains sufficient non-hearsay evidence to support the Commission's finding. Accordingly, there is no reason for the Court to address the broader question pressed by Scali.

C. Review is unwarranted because the Commission's order is supported by the record and the courts below therefore correctly declined to set it aside.

Because the Commission's just cause determination finds ample support in the record, the courts below correctly declined Scali's request to set that order aside. The Commission heard testimony that four different individuals expended the time and effort necessary to register complaints about the level of customer service they received from Scali, which provides strong support for an inference of fault on Scali's part. Moreover, the defensive attitude she displayed with her supervisor during the discussion about the complaints received in August 2009 undermines Scali's claim that these complaints were unjustified and that she never exhibited the kind of rude and argumentative behavior about which patients complained. It is a finding of fault on the part of the employee that is critical to a just cause determination, *see Tzangas*, 73 Ohio St. 3d at 698, and the record plainly supports that finding. In an unemployment compensation appeal, the question is not whether a just cause finding is the only conclusion that may be drawn from the record before the Commission but whether that conclusion is reasonable in light of the evidence. Such is the case here, and review by this Court is therefore unnecessary.

ARGUMENT

Appellee's Proposition of Law:

> *It is for the Commission and its hearing officers to determine the weight to be given to particular evidence—including hearsay—in rendering a benefits determination, and a reviewing court may not set aside a Commission order as against the manifest weight of the evidence so long as there is some evidence in the record to support it.*

Scali does not dispute the standard of review applicable to Commission orders. A court may only set aside a Commission order only upon finding it to be "unlawful, unreasonable, or against the manifest weight of the evidence." R.C. 4141.282(H); *see also Tzangas*, 73 Ohio St. 3d at 696. A reviewing court is not permitted to make factual findings or assess the credibility of witnesses; rather, its duty is to "determine whether the [Commission]'s decision is supported by

the evidence in the record." *Id.*; *see also Irvine*, 19 Ohio St. 3d at 17-18. In determining whether a Commission order is against the manifest weight of the evidence the court must sustain the order so long as some credible evidence supports it. *Williams v. Ohio Dep't of Job & Fam. Servs.*, 129 Ohio St. 3d 332, 2011-Ohio-2897, ¶ 20. "In other words, a reviewing court may not reverse the [C]ommission's decision simply because 'reasonable minds might reach different conclusions.'" *Id.*; *see also Tzangas*, 73 Ohio St. 3d at 696; *Irvine*, 19 Ohio St. 3d at 18. Accordingly, courts must defer to the Commission on matters of credibility and the weight of conflicting evidence. *See id.*

Scali also acknowledges that the Commission is not bound by common law or statutory rules of evidence and therefore may consider and rely upon evidence, such as hearsay, that ordinarily might not be admissible in a court of law. *See* Jur. Mem. at 9; *see also Simon*, 69 Ohio St. 2d at 43. In the same breath, however, Scali suggests that the Commission's discretion to consider and assign weight to hearsay evidence is considerably limited where that evidence is contradicted by live testimony. *See* Jur. Mem. at 8-9.

Scali's proposition is flawed in several important respects. First, it is wholly inconsistent with the principles governing judicial review of Commission orders outlined above. The Commission, as factfinder, must be free to weigh conflicting evidence as it deems appropriate, and the courts must defer to the Commission's resolution of these evidentiary conflicts. As this Court itself observed, "[t]he logical corollary [of the Commission's authority to consider hearsay evidence] is such evidence placed in the record . . . must also be weighed and considered when making a decision." 69 Ohio St. 2d at 43. This statement would have no meaning if hearsay evidence must be disregarded anytime there is contrary live testimony. The cases cited by Scali

cannot be read to establish the *per se* rule she advocates if the Commission's statutory role as factfinder is to remain intact.

Second, whether or not there are circumstances under which the Commission's decision to credit hearsay evidence over other non-hearsay evidence might justify reversal, Scali's is not such a case. Here, the Commission chose to credit Shannon's testimony and related documentary evidence—some of which contained hearsay evidence concerning patient complaints—over Scali's self-serving testimony. Scali had the opportunity to confront Shannon and cross-examine her. But she chose not to do so. And most of the evidence about which Scali complains is not hearsay for the purposes of the just cause inquiry, which asks only whether Mercy had reasonable grounds to believe Scali was at fault. The truth of the patients' accounts need not be established to prove reasonableness on the part of Mercy. Thus, the hearsay problem Scali identifies, if any exists, is simply not at issue here.

CONCLUSION

For the foregoing reasons, the Court should deny review of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum Opposing Jurisdiction of Appellee Director, Ohio Department of Job and Family Services, was sent by regular U.S. Mail this 26th day of April, 2012, to:

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