

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

-vs.-

CSAHS UHHS CANTON, INC., et al.

Court of Appeals
Case No. 2011 CA 00165

Appellees

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE CSAHS UHHS CANTON, INC.

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FILED
APR 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
APR 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

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I. THIS CASE DOES NOT INVOLVE AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST WARRANTING REVIEW BY THIS COURT BECAUSE EACH LEVEL OF REVIEW HAS BEEN CONDUCTED IN COMPLETE COMPLIANCE WITH THE STANDARDS ESTABLISHED BY THIS COURT AND RECOGNIZED AND APPLIED BY THE OHIO APPELLATE DISTRICT COURTS.

A. This case does not present any unique issues that are of public or great general interest that require resolution.

This appeal is based on the Stark County Court of Appeals' decision that affirmed the Stark County Court Common Pleas. That decision affirmed the administrative decision denying Appellant Laura A. Scali's ("Scali") claim for unemployment benefits. At each level of review, the reviewing agency / court applied the correct legal standards. Each level of review determined that Appellant Scali was not entitled to unemployment compensation benefits. The decision at each level of review was supported by sufficient, competent, and credible evidence.

The Court of Appeals did not make any grand pronouncements of law or policy, or adopt a new legal standard in its decision affirming the Common Pleas Court. Instead, the Court of Appeals strictly followed this Court's prior decisions on this subject holding that it is the function of the trier of fact at an administrative hearing to consider hearsay, along with the credibility of the individuals giving testimony. *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468; see also R.C. 4141.28(J). The Court of Appeals in this case, along with the other Ohio Appellate District Courts, have routinely relied upon this standard and have applied it to cases just like this for years. There is no reason or justification to suddenly change those standards now.

Scali asserted only one assignment of error before the Court of Appeals; namely, that the "Review Commission's decision that Scali was discharged [sic] for just cause was against the manifest weight of the evidence and was unreasonable." In its review of this sole assignment of error, the Court of Appeals recognized that the standard of review in an unemployment

compensation case is limited. The Court adhered to that limitation, applied the standards established and recognized by this Court, and affirmed the decision of the Court of Common Pleas.

As this Court has established, an appellate court may reverse a board's decision only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207, citing *Irvine v. Unemployment Compensation Board of Review*, 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587 (1985). The Court of Appeals also noted this Court's rationale for the well-settled standard of review that the hearing officer, as the fact finder, is in the best position to judge the credibility of witnesses. *Hall v. American Brake Shoe Co.*, 13 Ohio St.2d 11, 233 N.E.2d 582 (1968); *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 76 N.E.2d 79 (1947). The Court of Appeals correctly applied this Court's precedent in holding that the record contains sufficient, competent, and credible evidence from which the trial court could affirm the administrative decision denying Scali's claim for unemployment benefits.

There is nothing in the Court of Appeals' decision, or at any level of review of this claim, that deviates from this Court's prior decisions. Further, it is entirely consistent with decisions of other Ohio Courts of Appeals that have addressed these issues. As such, this case does not present any unique issues that are of public or great general interest that require resolution. *See*, Ohio Const. Art. IV, § 2. Accordingly, there is no reason for this Court to review this matter.

B. Appellant asserts that all levels of administrative review, the trial court, and most recently the Court of Appeals all relied solely upon hearsay evidence in denying Scali's claim for unemployment benefits. This assertion is not accurate, and there is no compelling need for judicial guidance from this Court regarding hearsay evidence.

Scali asserts that the Review Commission and all reviewing courts in this case have relied upon the "ranked hearsay" in making a determination of 'fault' necessary for denying a claim for unemployment compensation." *See*, Memorandum in Support of Jurisdiction of Appellant, Laura

A. Scali at p. 3. Scali further states that the Review Commission and all reviewing courts relied *solely* upon uncorroborated hearsay in determining Scali's fault. See, Memorandum in Support of Jurisdiction of Appellant, Laura A. Scali at p. 4. These assertions are inaccurate.

An accurate examination of the decisions at every level of review in this case reveals that testimony from Scali's direct supervisor proved that Appellee followed all four levels of its progressive corrective action policy. Appellee warned Scali, attempted to correct her repeated violations, warned her again, and then warned her again. Appellee resorted to termination only after Scali demonstrated that she had absolutely no interest in correcting her repeated policy violations.

Scali's Memorandum in Support of Jurisdiction illustrates that Scali simply disagrees with the rulings of all administrative levels of review, the holding of the trial court, and the Court of Appeals' ruling. Scali is merely seeking another layer of judicial review hoping that this additional layer of review will somehow result in a finding in her favor.

In deciding whether to certify the record, "the sole issue for determination" is "whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties." *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876, 877. This Court's "role as a court of last resort is not to serve as an additional court of appeals on review," but to clarify legal uncertainty in special cases. *State v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31. (O'Donnell, J., dissenting). There is absolutely no legal uncertainty in this case. The standards are clearly established. The principles were followed. This case does not warrant such review. Accordingly, this Court should not grant jurisdiction.

II. ARGUMENT IN OPPOSITION TO APPELLANTS' PROPOSITIONS OF LAW.

Response to Appellants' Proposition of Law:

An appellate court may reverse the board's decision only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence; a board decision is not unlawful, unreasonable, or against the manifest weight of the evidence merely because the board relies, in part, on hearsay evidence.

There can be little dispute that the Court of Appeals employed this Court's well-established limited standard of review in an unemployment compensation case, which mandates that an appellate court may reverse a board's decision only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207, citing *Irvine v. Unemployment Compensation Board of Review*, 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587 (1985). There likewise can be little dispute that the Court of Appeals correctly reviewed the administrative and lower court's reliance upon consideration of hearsay evidence in applying this Court's well-established precedent that the hearing officer, as the fact finder, is in the best position to judge the credibility of witnesses. *Hall v. American Brake Shoe Co.*, 13 Ohio St.2d 11, 233 N.E.2d 582 (1968); *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 76 N.E.2d 79 (1947).

The issue is erroneously framed by the Appellant because it incorrectly presupposes that the decision denying unemployment compensation benefits rested solely upon uncorroborated hearsay. Appellee respectfully submits that its proposition of law accurately sets forth the issue in this matter. As such, this Court should apply this standard, as it has done in the past, to deny Appellant's appeal, or to affirm the decision of the Court of Appeals.

Here, the administrative agency and lower courts did not rely solely upon hearsay, but also the testimony of Scali's immediate supervisor that testified before the administrative agency. All reviewing agencies and the Court of Common Pleas and Court of Appeals therefore correctly found that the record contained sufficient, competent, and credible evidence to affirm the administrative decision denying Scali's claim for unemployment benefits.

A. The administrative and judicial levels of review all correctly determined that Scali was terminated for just cause, as Mercy properly followed all four of its disciplinary levels, completely consistent with its written progressive discipline policy.

On October 20, 2008, Appellee CSAHS UHHS Canton, Inc. (“Mercy”) hired Scali as a “casual dental assistant” at the dental clinic at Mercy Medical Center.¹ After her termination, Appellant applied for unemployment compensation benefits and was **denied benefits at each and every level of review**, as follows²:

Date	Level of Review	Outcome
January 7, 2010	Initial Determination	Denied
February 11, 2010	Director’s Redetermination	Denied—Appellant discharged for just cause.
August 4, 2010	Unemployment Compensation Review Commission (“UCRC”)	Denied—Appellant discharged for just cause
June 30, 2011	Stark County Court of Common Pleas	Denied—Review Commission’s decision was not unlawful, unreasonable, or against the manifest weight of the evidence.
February 13, 2012	Court of Appeals for the Fifth District of Ohio	Denied—The record contains sufficient, competent, and credible evidence from which the trial court could affirm the administrative decision to deny Scali’s claim for unemployment benefits.

The Appellant was the subject of four disciplinary levels, completely consistent with Mercy’s written progressive discipline policy.³ Scali’s own actions in making personal phone calls in patient areas in violation of company policy and poor customer service in routinely mishandling patients’ concerns were the sole bases for Scali’s termination. The administrative and judicial levels of review all correctly determined that Scali was terminated for just cause.

¹ Scali v. CSA HS UHHS Canton, Inc., 5th Dist. No. 2011-CA-00165, 2011-Ohio-0577 (Feb. 13, 2012), ¶ 3.

² Id. at ¶¶ 3-5.

³ Id. at ¶¶ 7-11.

B. Contrary to Appellant's assertion, the administrative and judicial levels of review did not rely solely upon hearsay; rather, they also relied upon direct testimony from Appellant's immediate supervisor.

Lisa Shannon, the Dental Office Manager, testified at the redetermination hearing.⁴ Ms. Shannon provided sworn testimony.⁵ Ms. Shannon was Appellant's immediate supervisor for Appellant's tenure with Mercy. She had first-hand, personal knowledge of the Appellant's employment with Mercy and her disciplinary violations.⁶ Ms. Shannon was therefore the ideal witness to testify regarding Appellant's performance as an employee at Mercy, the numerous warnings that Appellant received, and Appellant's failure to observe Mercy's policies even after being warned on repeated occasions.

Ms. Shannon testified that the Appellant's violations of Mercy policy began on June 3, 2009 when Appellee learned that Appellant was making personal phone calls in patient areas, a violation of Mercy's policies.⁷ Ms. Shannon had two previous discussions with Appellant urging her that if it was necessary to make a personal call, that it must occur in the break room after notifying the office manager that she was going to leave the floor.⁸ When the misconduct continued over several days, Ms. Shannon issued a verbal warning to Appellant on June 5, 2009.⁹ Ms. Shannon signed the verbal warning and left no remarks in the section provided for "employee's comments."¹⁰

The next violation of Mercy policy occurred on August 19, 2009 when two patients contacted Ms. Shannon by phone to inform her that Appellant was "very rude" during a

⁴ Trans. at p. 6.

⁵ Trans. at p. 6.

⁶ Trans. at pp. 7, 12.

⁷ Trans. at p. 8.

⁸ See, Anecdotal Report.

⁹ Trans. at p. 8.

¹⁰ See, Anecdotal Report

conversation and, in fact, began to argue with them.¹¹ In response to the phone call, Ms. Shannon spoke directly with Appellant, who interrupted her, sighed, and crossed her arms.¹²

Ms. Shannon was concerned about Appellant's reactions, realizing that "these are the actions that the patients are seeing," adding, "her sighing which makes you know patients believe that she's upset with them and those kind of things."¹³ As a result of these patients' complaints, Ms. Shannon issued a formal warning.¹⁴

Incredibly, even though Appellant had received these numerous warnings about violations of Mercy policy, she continued her poor performance. On November 2, 2009, Ms. Shannon received a letter from a patient that was "very upset with the way that she felt that she was treated and also was spoke to" by Appellant.¹⁵

The patient stated that she felt that Appellant was "condescending" regarding her intelligence and that she felt Appellant could not "relate to her family living on \$13,503 per year and having to account for every expense."¹⁶ The patient felt that Appellant's comment that an additional visit to the dentist would "only" cost \$37.00 was "disrespectful to me and not at all sensitive to my financial situation."¹⁷ Ms. Shannon provided Appellant an opportunity to review the letter and after their conversation, she felt it necessary to issue Appellant a final warning.¹⁸

Finally, on December 4, 2009, Ms. Shannon received a memorandum from another patient, who happened to be an employee of Mercy.¹⁹ The patient encountered Appellant toward the very beginning of the staff lunch hour and Appellant indicated that "it was lunch time and she couldn't

¹¹ Trans. at p. 8; see also, Formal Warning

¹² Trans. at p. 9.

¹³ Trans. at p. 9.

¹⁴ See, Formal Warning.

¹⁵ Trans. at p. 9.

¹⁶ See, Final Warning.

¹⁷ See, Final Warning.

¹⁸ Trans. at p. 9.

¹⁹ Trans. at p. 10.

help him with any questions that he was asking.”²⁰ The memorandum indicated that the patient “felt he was brushed off by Laurie and was very upset with the way that he felt she conducted the conversation.”²¹

Having been given multiple warnings and opportunities to bring her performance into compliance with Mercy’s policies, Mercy had no other alternative but to terminate Appellant’s employment. To do otherwise would actually violate Mercy’s employment policies and guidelines.

In discussing the letters written by patients complaining about her service, Appellant even agreed with the hearing officer during the following exchange:

Hearing Officer: I understand your argument but generally you have to have pretty poor customer service if someone goes to the extent to write a letter. Would you not agree with that assessment?

Appellant: Well yes I understand that.²²

After considering all of the evidence and testimony the UCRC determined that Appellant was discharged for just cause. That determination was upheld at each level of review.

C. The Unemployment Compensation Act only protects former employees who are discharged through no fault of their own.

The purpose of the Unemployment Compensation Act is to “enable unfortunate employees, who become and remain *involuntarily* unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level[.]” *Tzangas, Plakas & Mannos*, 73 Ohio St.3d 697. (Emphasis in original). The Act is only intended to provide compensation to those former employees who are “temporarily without employment through no fault or agreement of [their] own.” *Id.*, citing *Irvine*, 19 Ohio St.3d, 17. The Act does *not* exist “to protect employees from themselves,” but rather “to

²⁰ Trans. at p. 10.

²¹ Trans. at p. 10; see also, Termination.

²² Trans. at p. 19.

protect them from economic forces over which they have no control.” *Id.* In this case, Scali had complete control over her behavior and simply chose to disregard the multiple warnings she was given to bring her performance in line with Mercy’s policies.

D. This Court of Appeals’ standard of review is limited to determining whether or not the administrative decision was unlawful, unreasonable or against the manifest weight of the evidence.

In this matter, every single level of administrative review has resulted in a finding that Scali’s termination was for just cause. See, R.C. 4141.29(D)(2)(a). In light of the purpose of the Act, Ohio law is well-settled in holding that a reviewing court may only reverse the Unemployment Compensation Board of Review’s “just cause” determination “if it is unlawful, unreasonable or against the manifest weight of the evidence.” *Tzangas, Plakas & Mannos*, 73 Ohio St.3d at syllabus ¶ 1. This standard of review “is shared by all reviewing courts, from the first level of review in the Common Pleas Court, through the final appeal” in the Ohio Supreme Court. *Id.* at 696.

Notably, the application of the same standard at both the common pleas and appellate levels of review “does not result in a *de novo* review standard.” *Id.* The mere fact that “reasonable minds might reach different conclusions is not a basis for the reversal of the board’s decision.” *Id.* at 697, citing *Irvine*, 19 Ohio St.3d at 17-18; see also, *Scali*, 2012-Ohio-0577 at ¶ 15. The Board’s “role as factfinder” must remain intact throughout common pleas and appellate review. *Id.*

“Just cause” is that which, “to an ordinarily intelligent person, is a justifiable reason for terminating an employee.” *Brown v. Bob Evans Farms, Inc.*, Ohio No. 10 CO 8, 2010-Ohio-6011 (Dec. 3, 2010), ¶ 17, citing *Irvine*, 19 Ohio St.3d at 15, 17. If an employer is “reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause.” *Id.*, citing *Tzangas, Plakas & Mannos*, 73 Ohio St.3d at 698. A reviewing court is “limited to determining whether the hearing officer’s decision was supported by the evidence in the record,” and the court “is not permitted to make factual findings or to determine the credibility of witnesses

as long as reasonable minds can reach different conclusions.” *Id.* at ¶ 19, citing *Irvine*, 19 Ohio St.3d at 18.

Mercy respectfully submits that the Court of Appeals correctly affirmed the trial court’s decision, which is supported by the evidence in the record, and therefore, is not against the manifest weight of the evidence. Far from this being an arbitrary or random aberration of a decision, Scali’s claim was consistently rejected at every level of administrative review.

E. Ohio courts have repeatedly held that the Commission is permitted to rely upon hearsay evidence in rendering its determination.

Scali asserts that a matter of great public interest is at hand because the Commission relied upon hearsay evidence. Such evidence is entirely permissible in this administrative determination process. Accordingly, no matter of great public interest exists. More importantly, the Commission did not rely solely upon hearsay, as asserted by Scali, but also considered the testimony of Scali’s immediate supervisor who had personal knowledge of the Scali’s consistent shortcomings.

Contrary to Scali’s assertions, it is well-settled in Ohio that the Commission **is permitted** to consider hearsay in making its determination. In fact, hearsay evidence is encouraged to be considered in these proceedings. As stated by the Ohio Supreme Court:

[E]vidence which might constitute inadmissible hearsay where stringent rules of evidence are followed **must be taken into account in proceedings such as this** where relaxed rules of evidence are applied. Consequently, **it was the referee’s function, as the trier of fact, to consider the evidence listed above [hearsay]**, along with the credibility of the individuals giving testimony before the board, in reaching his decision. [Emphasis added.]

Williamson v. Complete Healthcare for Women, Inc., 5th Dist. No. 10CA0044, 2010-Ohio-3693 (Aug. 6, 2010), ¶ 10, citing *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 44, 430 N.E.2d 468; see also, R.C. 4141.28(J). See also, *Binger v. Whirlpool Corp.*, 110 Ohio App.3d 583, 589, 674 N.E.2d 1232 (6th Dist. 1996), *Metzenbaum v. Unemployment Compensation Bd. of Rev.*, 8th Dist. No. 72233, 1997 WL 547831 (Sept. 4, 1997), * 3; *Crisp v. Scioto Residential Services*,

Inc., 4th Dist., 2004-Ohio-6349 ¶ 20, *Doersam v. City of Gahanna*, 10th Dist. No. 96APF12-1766, 1997 WL 607473 (Sept. 30, 1997), * 9; *Boos v. Ohio Bur. of Unemployment Services*, 11th Dist. No. 2003-T-0174, 2004-Ohio-6693 (Dec. 10, 2004), ¶ 19; *Autozone, Inc. v. Herring*, 9th Dist. No. 22824, 2006-Ohio-1039 (Mar. 8, 2006), ¶ 18, fn. 1.

Hearsay is admissible evidence in hearings before the Commission, and **'None of the reviewing courts can reverse a commission decision as being against the manifest weight of the evidence when there is some evidence in the record to support the commission's decision.'** (Emphasis added).

Struthers v. Morell (2005), 164 Ohio App.3d 709, 715, 2005-Ohio-6594, 843 N.E.2d 1231 .

It is the “duty of the fact-finder [the Commission] to weigh the evidence and credibility of witnesses” and **“it is not for this Court to disturb that determination.”** (Emphasis added.)

Williamson, 2010-Ohio-3693 at ¶ 13. “[T]o state a rule that the Commission must not give credibility to hearsay over sworn testimony is to weigh evidence.” *Id.* (Emphasis added). The trier of fact may “believe a witness completely, in part, or not at all.” *Id.*, citing *Royster v. Board of Review* (Ohio App. 4th Dist. 1990), 1990 Ohio App. LEXIS 1640.

Here, Scali’s immediate supervisor testified at the unemployment hearing on behalf of Mercy. She was the individual who took the patient complaints against Scali and had conversations with Scali regarding each complaint prior to issuing disciplinary action. Accordingly, it was proper for the Court of Appeals to determine that the trial court and the Commission’s decisions to deny unemployment benefits was *not* against the manifest weight of the evidence and thereby affirm the trial court’s decision.

This Court has held that “the duty of the fact-finder is to weigh and consider the reliability of the evidence and the credibility of the witnesses.” *Simon v. Lake Geauga Printing Co.* (1982), 69 Ohio St.2d 41, 43, 430 N.E.2d 468. In *Simon*, the this Court stated that the Commission’s decision is to be upheld even when it is based upon inadmissible hearsay. 69 Ohio At.2d at 44. It has also

held that “to hold, as a matter of law, that the sworn testimony of a claimant must be given unquestioned credibility absent nonhearsay evidence to the contrary usurps the trier of facts [sic] powers.” *Brown-Brockmeyer Co. v. Roach* (1947), 148 Ohio St.511.

III. CONCLUSION

The Court of Appeals in this case applied this Court’s well-established precedent. Every level of administrative and judicial review applied the standards that have been consistently approved by this Court and the Ohio Appellate Courts. Each level of review denied Scali’s claim for unemployment compensation.

The Court of Appeals correctly determined that the record contains sufficient, competent, and credible evidence from which the Court of Common Pleas could affirm the administrative decision. It therefore overruled Scali’s sole assignment of error. The decision did not rest solely upon uncorroborated hearsay. It was, in fact, supported by direct testimony from Scali’s immediate supervisor. Accordingly, this case does not involve any issue of public or great general interest warranting review by this Court. Rather, Scali merely seeks yet another level of appellate review upon facts that are of interest primarily to her, as the Appellant in this matter. This Court should deny jurisdiction.

Respectfully Submitted,

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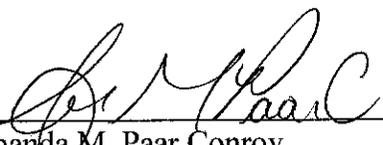
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