COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2444 **Cir. Ct. No. 2011CV17480**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CHRISTOPHER BOWEN,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed*.

Before Curley, P.J., Fine and Stark, JJ.

¶1 PER CURIAM. Christopher Bowen appeals from a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) that denied Bowen's claims that he was terminated based on his sexual orientation and/or in retaliation for complaining about discrimination. Bowen argues that

there was insufficient evidence to support LIRC's findings concerning his termination, asserting that the record, including the disciplinary procedures employed, "establishes that his sexual orientation and protected activity were factors in the decision to discharge him." (Capitalization omitted.) Bowen also argues that LIRC violated his due process rights when it "unlawfully changed the hearing examiner's findings of fact regarding witness credibility without consulting the [hearing] examiner or explain[ing] its disagreement with the examiner." (Capitalization omitted.) We reject Bowen's arguments and affirm.

BACKGROUND

¶2 Bowen was terminated from his job as a die cast mold operator for Stroh Die Casting Company, Inc. The stated reason for the termination was that Bowen had violated work rules for the second time within a year. Both violations, termed "Type B" rule violations pursuant to Stroh's work rules, involved disputes with other employees.

¶3 Bowen filed a *pro se* complaint with the Wisconsin Department of Workforce Development, Equal Rights Division, contending that Stroh violated the Wisconsin Fair Employment Act (WFEA) when it terminated him.[1] *See* WIS. STAT. §§ 111.31-111.395 (2011-12).[2] In that complaint and subsequent amended complaints, Bowen alleged that he was terminated because he is homosexual and in retaliation for activities that are protected under the WFEA (*i.e.*, opposing

[1] Bowen later retained counsel and was represented throughout most of the proceedings in this case, including on appeal.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

unlawful discrimination).[3] He also alleged that he was subjected to sexual harassment at work.

¶4 Bowen's claims were denied after a hearing and he sought review in the circuit court, which ordered a new hearing based on its conclusion that the hearing examiner improperly limited Bowen's evidence. LIRC appealed and we affirmed. *See* ***Bowen v. Labor and Industry Review Comm'n***, 2007 WI App 45, ¶1, 299 Wis. 2d 800, 730 N.W.2d 164.[4]

¶5 A new hearing was conducted. The hearing examiner found that Stroh "engaged in or permitted sexual harassment of [Bowen]—in relation to [Bowen's] sexual orientation—during the course of [Bowen's] employment." Stroh was ordered to pay attorney fees to Bowen. While Bowen was successful with his sexual harassment claim, the hearing examiner rejected Bowen's claims that he was terminated due to his sexual orientation and/or for his opposition to what he believed to be an unlawful discriminatory practice: sexual harassment.

¶6 Both Bowen and Stroh asked LIRC to review the hearing examiner's decision. LIRC adopted the hearing examiner's findings and conclusions as its own, and it also provided additional analysis. As relevant to this appeal, LIRC discussed the basis for Bowen's termination:

> The commission is troubled by the fact that [Bowen] was discharged during the period of time when he was experiencing sexual harassment in the workplace and

[3] The WFEA prohibits numerous practices, including discharging someone "because he or she has opposed any discriminatory practice under this subchapter." *See* WIS. STAT. § 111.322(3).

[4] This published decision provides details of Bowen's claims concerning sexual harassment and his termination.

> had unresolved, ongoing complaints. It is not hard to see how the hostile working environment to which [Bowen] was subjected, and the frustrations he felt about [Stroh's] unwillingness to address it, may have caused [Bowen] to overreact to incidents that he would have otherwise been able to better withstand. Given those facts, the commission believes that [Stroh] should have considered imposing some lesser degree of discipline than discharge, and considers it regrettable that [Stroh] did not do so.
>
> However, the fact remains that it is [Stroh's] state of mind that is at issue, and the commission does not believe the evidence warrants a conclusion that [Stroh] was motivated to discharge [Bowen] based upon his sexual orientation or in retaliation for having complained about harassment. [Stroh's] work rules clearly call for discharge after two Type B violations in a twelve-month period. [Bowen] had two Type B violations, the latter involving a physical altercation with a co-worker. The commission finds credible the testimony of [Stroh's] witnesses that they believed [Bowen] had anger management issues and that his conduct warranted discharge, and it does not doubt that [Stroh] discharged him for this reason. Moreover, given that [Bowen] had complained about harassment on several prior occasions without suffering adverse consequences, the commission considers it unlikely that [Stroh] was motivated to discharge him in retaliation for his protected activity. Finally, while there is certainly evidence to indicate that some of [Bowen's] co-workers harbored discriminatory animus against [Bowen] because of his sexual orientation, there is no reason to believe that [Stroh] shared this prejudice. Upon consideration of all the facts and circumstances, the commission agrees with the administrative law judge that the decision to discharge [Bowen] was not a pretext for discrimination.

¶7 Bowen sought review of LIRC's decision in the circuit court. The circuit court affirmed LIRC's decision in a written order. This appeal follows.

STANDARD OF REVIEW

¶8 "In an appeal following an administrative agency decision, we review the decision of the agency, not that of the circuit court." ***McRae v. Porta Painting, Inc.***, 2009 WI App 89, ¶5, 320 Wis. 2d 178, 769 N.W.2d 74. "We do

not weigh the evidence or pass upon the credibility of the witnesses," and we uphold the agency's findings of fact "if they are supported by credible and substantial evidence in the record." ***Id.***; *see also* WIS. STAT. § 102.23(6). "'Substantial evidence does not mean a preponderance of the evidence.' Instead, the test is whether, after considering all the evidence of record, reasonable minds could arrive at the same conclusion." ***Hilton ex rel. Pages Homeowners' Ass'n v. DNR***, 2006 WI 84, ¶16, 293 Wis. 2d 1, 717 N.W.2d 166 (citation omitted). "If there is credible evidence to sustain the [agency's] finding, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm." ***L & H Wrecking Co., Inc. v. LIRC***, 114 Wis. 2d 504, 509, 339 N.W.2d 344 (Ct. App. 1983).

DISCUSSION

¶9 Bowen challenges that portion of LIRC's decision that determined he was not wrongfully terminated.[5] He argues that there was insufficient evidence to support LIRC's findings concerning his termination, asserting that the record, including the disciplinary procedures employed, "establishes that his sexual orientation and protected activity were factors in the decision to discharge him."[6] (Capitalization omitted.) Bowen also argues that LIRC violated his due process rights when it "unlawfully changed the hearing examiner's findings of fact regarding witness credibility without consulting the [hearing] examiner or

[5] Bowen also opposes LIRC's request that we strike Bowen's appendix because there are handwritten markings on some documents and the order of some documents could be confusing. We decline to strike Bowen's appendix as it does not contain inappropriate or misleading material and we do not discuss the issue further.

[6] Bowen's brief does not specifically challenge LIRC's legal conclusions. Therefore, we do not discuss the appropriate level of deference for LIRC's legal conclusions.

explain[ing] its disagreement with the examiner." (Capitalization omitted.) We examine each issue in turn. At the outset, we note that Bowen raises numerous subissues, sometimes in a single paragraph. To the extent that we do not address a subissue, we have rejected it because it is unpersuasive or inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court will not consider inadequately developed arguments).

I. Challenges to LIRC's findings.

¶10 Bowen does not deny that there were two incidents that led to personnel action reports. According to written personnel action records, the first violation, disorderly conduct, was for "threatening comments and escalating physical reaction." Bowen was not suspended. Instead, the form stated that the "penalty for [the] violation is mandatory referral to the EAP [employee assistance program]." He was also placed on paid leave for three days. The second violation occurred ten months later. The personnel action record stated that during a dispute with another employee named Tom Meier, Bowen "grabbed the employee's shirt sleeve and turned him." The personnel action record continued: "This is a type B '7' rule violation[:] 'Disorderly Conduct.' This is [Bowen's] second type 'B' violation within 12 months and therefore results in termination."[7]

¶11 However, Bowen contends that he was not terminated for those two incidents. Specifically, he argues that there was evidence that his sexual orientation and protected activity (*i.e.*, complaining about unlawful harassment) were factors in Stroh's decision to terminate him. He also challenges the

[7] Under Stroh's written work rules, a second Type B violation within twelve months was grounds for termination.

credibility of witnesses. For instance, Bowen asserts that the supervisor who disciplined Bowen "had a propensity for failing to tell the truth."

¶12 It is not our role to reweigh evidence or evaluate the credibility of witnesses. *See* ***American Mfrs.***, 252 Wis. 2d 155, ¶11. LIRC was entitled to believe the records and testimony from Stroh employees about the incidents and the decision to terminate Bowen, and it explicitly did so, stating: "The commission finds credible the testimony of [Stroh's] witnesses that they believed [Bowen] had anger management issues and that his conduct warranted discharge, and it does not doubt that [Stroh] discharged him for this reason." The personnel action records and testimony constitute substantial evidence that supports LIRC's decision.

¶13 Bowen also contends that the first "Type B violation was retaliatory in nature" because "Bowen was disciplined after he had put the employer on notice that he had been harassed, that the harassment was related to his sexual orientation and that management's inaction warranted legal action." Bowen does not provide additional analysis of this assertion and, therefore, we need not consider it. *See* ***Pettit***, 171 Wis. 2d at 646. We do observe, however, that this assertion contradicts LIRC's finding that the first Type B violation was based on Bowen's conduct, which included "yelling and screaming at other employees," as opposed to Bowen's complaints about harassment. As noted, this court will not reweigh competing evidence. *See* ***American Mfrs.***, 252 Wis. 2d 155, ¶11.

¶14 Next, Bowen complains that the first Type B violation should not have provided a partial basis for his termination because it should have been removed from his personnel file when he complied with the EAP referral. He asserts that "it is Stroh company policy to remove the disciplinary action from the

employee's personnel file when an EAP referral is made in lieu of discipline." In support of this assertion, Bowen cites several pages of testimony from a Stroh "union shop chair" who works with employees who have grievances. When Bowen presented this argument in his closing brief to LIRC, he stated: "*Generally* … when a notice of a suspension is issued and EAP assistance is a condition for return to work, the discipline is removed from the employee's file and not used as the basis for further discipline, as long as the employee complies with the requirement that s/he seek the assistance of EAP and follows the recommendations of the counselor." (Emphasis added.) LIRC implicitly rejected Bowen's argument that the first Type B violation had to be disregarded when it found that Bowen's termination was supported by two Type B violations. LIRC's decision is supported by the record: Stroh's written work rules provide that "prior violations of any Type 'B' rule will be disregarded" after twelve months pass without another Type B violation, and the rules do not mention removing disciplinary reports. Even the union shop chair's testimony does not establish that Stroh always removed disciplinary reports from an employee's file. Bowen has not shown that LIRC's findings are unsupported.

¶15 Bowen also argues that his supervisor "did not follow standard operating procedures when he discharged Bowen" and, therefore, Stroh demonstrated discriminatory intent. Bowen contends that he "was disciplined more harshly and unnecessarily than similarly situated employees who did not engage in statutorily protected activity." He also asserts that Stroh applied discipline differently because Bowen is homosexual. He explains: "The evidence in the record demonstrating this disparate treatment is offered to support the contention that bias based on sexual orientation was a factor in Bowen's discharge." Again, we reject Bowen's suggestion that this court should reweigh

the evidence and make findings in his favor. LIRC, which adopted the hearing examiner's findings of fact, considered the discipline imposed on Bowen and other employees and the circumstances surrounding Bowen's disciplinary violations. LIRC's findings are supported by substantial evidence, including testimony about the termination procedures, the work rules, the two incidents, and information concerning the termination of other employees. Bowen is not entitled to relief.

¶16 Bowen's next argument appears to challenge a sentence in LIRC's decision that followed LIRC's statement that it believed Stroh's employees' testimony that Bowen was discharged because he had anger management issues and had engaged in conduct that warranted discharge.[8] That sentence stated: "Moreover, given that [Bowen] had complained about harassment on several prior occasions without suffering adverse consequences, the commission considers it unlikely that [Stroh] was motivated to discharge him in retaliation for his protected activity." Bowen argues that the record does not support that inference and instead "demonstrates that … Bowen's sexual orientation and complaints of harassment led to his discharge."

¶17 In response, the State notes that LIRC offered this analysis "as an *additional* reason, combined with others it identified, for concluding that it was 'unlikely that [Stroh] was motivated to discharge him in retaliation for his protected activity.'" We agree. LIRC did not find that the lack of immediate adverse consequences for Bowen's complaints of harassment was the sole basis why LIRC believed that Bowen was not terminated for his protected activity.

[8] Bowen does not quote or provide a page number for the language in LIRC's decision that he challenges, but we agree with the State that Bowen is likely referring to a statement LIRC made at page nine of its decision.

Instead, LIRC relied on testimony and written documentation concerning the reasons for the termination. LIRC's decision is supported by substantial and credible evidence and the single challenged sentence does not undercut its findings.

¶18 Finally, Bowen takes issue with the level of detail provided in the hearing examiner's and LIRC's decisions. He contends that they failed to address certain issues that were raised. We are not persuaded that Bowen is entitled to relief. The record in this case is voluminous. The hearing examiner issued a thirty-four page decision, which LIRC adopted, and LIRC added additional analysis. The explanation for LIRC's decision was adequate.

II. Due process challenge.

¶19 Bowen argues that his due process rights were violated because LIRC "unlawfully changed the hearing examiner's findings of fact regarding witness credibility without consulting the examiner or explain[ing] its disagreement with the examiner." (Capitalization omitted.) Bowen's argument is based on his interpretation of LIRC's decision. Specifically, he asserts that LIRC "summarily rejected" two of the hearing examiner's findings of fact. We disagree.

¶20 The first finding at issue was the hearing examiner's finding that Meier—the employee whose arm Bowen touched during his second Type B violation—later said to another employee, "oh, you owe me one" after Bowen was terminated. The second finding was that the employee who heard that comment had his work schedule changed back to first shift—his apparent preference—after Bowen was terminated. Although LIRC explicitly adopted the hearing examiner's findings, Bowen argues that part of LIRC's memorandum decision contradicts those findings and, therefore, LIRC was actually rejecting the hearing examiner's

findings and should have followed certain due process procedures before doing so. Bowen explains: "Despite these findings, LIRC somehow determined that there is 'no evidence' to support that Meier staged the incident with Bowen in order to accomplish Bowen's discharge."

¶21 Bowen's argument is unpersuasive. The two facts found by the hearing examiner do not necessarily support a finding that the incident was orchestrated to get Bowen fired. Therefore, LIRC's finding that "[t]he record contains no evidence to support" Bowen's claim that the altercation with "Meier was 'staged' and 'set up' by Meier" did not require LIRC to consult with the hearing examiner. Bowen was not denied due process.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.