COURT OF APPEALS
DECISION
DATED AND FILED

February 25, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP83 **Cir. Ct. No. 2013CV540**

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

CHRYSLER GROUP LLC,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND MICHAL L. SHEA,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 BROWN, C.J. Chrysler Group LLC appeals from a circuit court decision upholding the determination of the Labor and Industry Review Commission that Chrysler discriminated against Michal Shea on account of disability in violation of the Wisconsin Fair Employment Act (WFEA). Like the

administrative law judge and LIRC, the circuit court rejected Chrysler's argument that its refusal to reinstate Shea after her medical leave was justified by its company doctor's report about Shea's alcohol use, including statements Shea made during a meeting with the company doctor about drinking alcohol before work.

¶2 In an amicus brief supporting Chrysler's appeal, Wisconsin Manufacturers & Commerce and the Wisconsin Civil Justice Council express concern that affirming LIRC's decision:

> implies that employers must continue to allow in the workplace employees who admit to intentionally and consistently drinking alcohol immediately before coming to work with the goal of affecting their demeanor and work experience. Allowing this to become the standard for employers would greatly impact the safety of other employees in the workplace, and would expose employers to unwarranted and unnecessary liability with respect to their workplaces and products.

We agree wholeheartedly that the prospect of employees coming to work inebriated is a grave problem that employers can and should be concerned about and act to prevent. This is why Wisconsin law provides that an employer's actions do not constitute unlawful employment discrimination if the actions were based on an employee's inability to perform his or her job, or by workplace safety considerations. WIS. STAT. § 111.34(2)(a), (b) (2011-12).[1]

¶3 This appeal, however, is not about those policies or that clear law. Chrysler's arguments failed below not as a matter of policy but as a matter of proof. When reviewing a question of proof, our duty is to search the record for

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

"evidence which a reasonable [person] could accept as adequate to support" LIRC's determination. ***Chicago & N. W. R.R. v. LIRC***, 98 Wis. 2d 592, 607, 297 N.W.2d 819 (1980) (citation omitted). The sole evidence in the entire record to support Chrysler's view were reports of the company doctor. And, as explored in more detail below, a reasonable person might conclude that the strained relationship between Shea and Chrysler's company doctor made those reports somewhat less than reliable. No other evidence—no medical test, workplace incident, or additional witness—was offered to support the inference that Shea intended to drink alcohol before work. To the contrary, all the other witnesses (including Shea herself and Shea's own doctor) rejected the company doctor's view.

¶4 Our supreme court has held that categorical reliance on the company doctor's opinion is not a defense to employment discrimination. ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 423-24, 280 N.W.2d 142 (1979) ("[I]t can[not] reasonably be held that an employer has not discriminated because it cat[e]gorically relies upon the opinion of the company doctor."). In other words, an employer's reliance on the idiosyncratic view of its company doctor is not a defense to employment discrimination in Wisconsin. Instead, the company doctor's report and opinions are facts to be considered along with the rest of the evidence. *See* ***id.*** at 424-25 (rejecting company doctor's view based upon "additional facts" and contrary expert opinion).

¶5 What Chrysler really seeks in this appeal is to get around the holding in ***Bucyrus-Erie Co.***, but we are bound by the precedents of our supreme court. ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). When we consider the company doctor's reports as just one item of evidence to be considered with the rest of the record on appeal, as we must, ***Bucyrus-Erie Co.***, 90

Wis. 2d at 423-24, the record amply supports LIRC's determinations. Therefore we affirm.

Scope of Review

¶6 Before we get into the facts, a disclaimer is in order. We ordinarily place a premium on brevity and usually keep the recitation of facts to a minimum, writing only those necessary to the issue or issues. But Chrysler's singular spin on the facts, and the inferences drawn from that spin, require this court to relate, in depth, the wide range of factual information before LIRC. We must keep in mind that it is LIRC's prerogative to find the historical facts and we must also keep in mind that this court must adhere to those factual findings so long as "substantial evidence in the record" supports them. WIS. STAT. § 227.57(6). We may not "substitute [our] judgment for that of the agency as to the weight of the evidence on any disputed finding of fact," ***id.***, and we may not set aside LIRC's decision unless "upon an examination of the entire record, the evidence, including the inferences therefrom, is … such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences," ***Target Stores v. LIRC***, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998).

¶7 As for questions of law, we review the decision of LIRC, not the circuit court decision. ***Stoughton Trailers, Inc. v. LIRC***, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477. We will set aside an agency action if it was based upon an erroneous interpretation of law, WIS. STAT. § 227.57(5), though we must accord appropriate deference to the agency's expertise, § 227.57(10). With this scope of our review in mind, we now turn to the facts.

Facts

¶8 In the administrative proceedings that LIRC reviewed, Shea testified that she began working for Chrysler[2] in 1973. At some point she was transferred to a Milwaukee parts facility to be a warehouse worker. In 2002 she was working as a parts picker for a small parts facility. In that position she spent about seven and one-half hours of each shift on her feet, using a manual cart and ladders to reach bins to fill orders for parts. Shea estimated that she used the ladder to reach parts on high shelves about twenty times during each shift. It was Shea's undisputed testimony that she never complained to Chrysler about any inability to perform her assigned tasks and was never disciplined for unsatisfactory performance. She never required any physical assistance to perform her job.

¶9 Shea took leave in April 2003 for three medical treatments: bunion surgery, replacement of abdominal mesh, and an abdominal aortic bypass. In May 2004, her primary physician, Leonardo Montemurro, cleared her to return to work. Shea had been Montemurro's patient since October 2000. As of May 2004, in Montemurro's opinion, Shea was capable of performing the demands of her job, and he released her to work with zero physical restrictions.

¶10 Shea testified that when she gave Montemurro's release to the supervisor in charge of reinstatements after medical leave, Tom Young, she mentioned to Young that she planned to retire in 2005. According to Shea, Young replied, "you'll never work here again." Young then told Shea she would not be reinstated until going to see the company doctor. According to Shea, this was the

[2] More precisely, Shea began her career with a different auto manufacturer, which eventually came under the Chrysler corporate umbrella.

first time ever that, upon returning from sick leave with her doctor's release, she was not reinstated but instead was required to see a company doctor.

¶11 At about 1:00 p.m. the next day, at her home in Kenosha, when she had just finished two hours of yard work and was sitting on her deck drinking a beer, Shea received a call telling her to report to the office of Dr. Andrew Seter in the Milwaukee area at 2:30 that afternoon. The clinic was a forty-five minute drive away, and she had to take a shower before she left, but she managed to arrive on time.

¶12 Seter conducted a five-minute physical examination of Shea. Seter then took an extensive medical history, asking questions, in Shea's estimation "for at least 20 minutes" and going back to when Shea was twelve years old. Shea said that at one point during the long questioning about her medical history, she remarked, "why stop at 12 years old." She said that at some point the doctor told her, "you realize that you're in violation of company policy?" When Shea asked which policy she was violating, the doctor said, "I can smell alcohol on your breath." Shea testified that she then "stood up turned around in a circle" and said "I don't appear to be on company property" and asserted that consuming alcohol did not equate to intoxication. Shea testified that when Seter asked her how often she drank, she answered, "whenever I feel like it," and that at the time of the exam she in fact drank alcohol socially a couple times a month.

¶13 After that initial meeting with Shea, Seter issued a report entitled Return to Work Evaluation. In the report, Seter acknowledged that Shea's own physician had released Shea to work with no restrictions. Seter then summarized some of Shea's medical history and noted that Shea said that "the bypass surgery provided definite benefit" and "the only part of her body that is causing any pain

are her knees." Seter reported that when asked about her functional ability, Shea replied, "I am clueless," but he also noted that Shea had been doing yard work recently. Seter reported that Shea was "uncertain how long or for what distance she can walk," but also noted that Shea "denied any restrictions with regards to lifting, sitting, standing or walking."

¶14 With respect to Shea's use of alcohol, Seter first notes that Shea said she "drinks five to six beers per week," but then that Shea said she "routinely would drink two beers every morning before going to work." In the physical exam portion of the report, Seter remarked that the "liver edge was palpable."

¶15 In his assessment at the conclusion of the report, Seter opined:

> Ms. Shea presents with multiple medical problems of a serious nature. She has been off work for an extended period of time. Ms. Shea indicated that she has been allowed to return to work without restrictions, but then readily admitted that she is uncertain how long she can stand or walk, or whether she can tolerate return to full duties at this time. She additionally admitted to drinking two alcoholic beverages every morning before going to work. She denied a history of alcoholism.
>
> Concern must be expressed that Ms. Shea is not fit to return to work at this time in any capacity. The combination of multiple serious medical problems raises question as to her overall functional status. In addition, concern must be expressed that Ms. Shea is an active alcoholic.

Days later, after reviewing Shea's medical records, Seter issued a Medical Records Review, in which he described her medical history in much more extensive detail. Seter also pointed out that the notes of one of Shea's surgeons indicated that Shea was "doing well with the exception of depression" after her operation but also "admit[ted] to drinking excessive alcohol approximately on an every-other day basis," and recommended treatment. In his Medical Records

Review, Seter opined that "[g]iven a combination of her medical conditions … [Shea] would not be able to return to work in any productive capacity for any extended duration of time," and in fact, "should be viewed as being permanently and totally disabled from all work." He also reasserted his concern that "Shea is an active alcoholic," due to her admission that she consumes alcoholic beverages "before arriving for work every day."

¶16 During his deposition, Seter stated that Shea "was physically an unhealthy woman" and that "[w]hat struck me as my biggest concern at that time [of his first meeting with Shea] was … the odor of alcohol present on her breath." On cross-examination, Seter acknowledged that he had no idea how much notice Shea had before being summoned to his office. He asserted that typically a patient would have "several weeks" advance notice of such a visit. He stated that it was "[n]ot at all" typical practice for his office to call someone to report for a Return to Work Evaluation that very same day.

¶17 Seter acknowledged that he had reviewed no liver function panels or other blood tests to support his impression that Shea is an active alcoholic; in his view, such tests were not needed because behavior is the primary factor for assessing alcoholism. On cross-examination, Seter admitted that his only opportunity to assess Shea's behavior was in his office and through the medical records. Seter testified that if Shea had reported to him that she were capable of, for instance, lifting twenty pounds and going for long walks, that information would have zero effect on his evaluation of her ability to perform her job. Instead, "[t]he combination of her medical history taken together leads to the conclusion that she would be unable to perform this work," regardless of Shea's statements about her abilities.

¶18 Shea later testified that at the time of her first meeting with Seter, she was in the habit of consuming alcohol "[a] couple times a month" and that she might drink at any time of day, "from the time I woke up until the time I went to bed." She testified that when she drank it was usually two beers and was in the context of socializing with a friend or after doing yard work. She stated that from the time period of February 2004 forward, she never drank to the point of intoxication, never drank due to depression, and was never treated for alcohol abuse. She received such treatment in the early 1980s, but in the relevant time period she had never been informed by any doctor that she should seek professional assistance for a drinking problem.

¶19 Ronald Suminski, a representative from Shea's union, testified that he became involved in her case after Seter failed to release Shea back to work. Suminski said that a grievance was filed "because the company was taking the position that they weren't going to allow [Shea] back to work." Through the grievance process they sought reinstatement or, in the alternative, sickness and accident benefits for Shea. Because Shea's own physician said that she was fit to work, Shea could not qualify for sickness and accident benefits. Initial attempts at negotiation did not resolve the grievance, but eventually there was an agreement to withdraw the initial grievance without prejudice, with the understanding that the company would help Shea get benefits.

¶20 Shea testified that when Chrysler would not reinstate her, her union representative advised her to go on an "extended medical" leave. Shea testified that she thought "if I'm on extended medical I might as well do a medical thing," so she elected to have post-mastectomy breast reconstruction surgery that she had been planning for after retirement. Successive reconstructive surgeries were required, and it was not until February 2005 that Shea again sought reinstatement.

Montemurro once again released her for work without any physical restrictions, but Young again told Shea she would need to meet with Seter before being allowed to work.

¶21 That same day Shea went to Seter's clinic. Shea's testimony makes clear that she was "[n]ot entirely" cooperative with Seter at their second meeting. Seter asked if Shea would consent to a physical examination, but Shea declined, telling him, "I was totally cooperative on my first visit … and you did not disable me on my status of fitness to return to work [but] … on [my] medical history." Shea informed Seter that her medical history was unchanged and spoke with him. After the examination, Seter issued a second Return to Work Evaluation opining once again that Shea was unfit for work. Specifically, Seter stated that "[g]iven the combination" of various physical ailments and chronic conditions, as well as "physical deconditioning," he "doubt[ed] that she would be able to perform" her work tasks. Seter also stated "at the time of prior Return to Work Evaluation, Ms. Shea reported regular alcohol use prior to arriving to work," and that he was "uncomfortable in considering returning an individual to work if they have a history of active alcohol abuse." Shea was put on "layoff" status as a result of this report.

¶22 In May 2006, Shea once again was required to meet with Seter about her fitness for work. Shea once again declined to be physically examined by Seter. Seter reported that he once again questioned Shea about her alcohol use, and Shea said that she does drink alcohol, though "not daily." She estimated that she drank a twelve-pack of beer each month, "along with a shot of Drambuie every Sunday morning." In the report of this May 2006 meeting with Shea, Seter recorded the following exchange:

> Ms. Shea was reminded that she had previously stated that she would drink beer prior to working. Her response was "And I probably will continue." She then added that she needs a "bracer for all the shit I need to put up with there." Ms. Shea also stated that she is careful not to drink prior to work to reach the "0.08 level."
>
> Ms. Shea feels that she is able to return to work and has been able to do so in spite of my prior reports. She added that five physicians have allowed her to return to work without restrictions.

In his assessment, Seter opines as follows:

> I continue to maintain that Ms. Shea would not be able to work in a productive capacity for any reasonable duration of time. As such, I would view her as being permanently and totally disabled from all work. I make this judgment based upon a combination of chronic, active alcoholism and a multitude of other medical factors that significantly limit Ms. Shea's functional ability. I do not anticipate that Ms. Shea's condition will significantly improve any time in the near future…. Ms. Shea is strongly encouraged to consider retirement.

¶23 In direct conflict with Seter, Shea's own doctor, Montemurro, testified to a reasonable degree of medical certainty that Shea is not an alcoholic. Montemurro asked Shea about her alcohol use during his very first visit with her in October 2000, and Shea disclosed that she consumed alcohol on a regular basis, drinking "one to two per day throughout the week." Shea told him she did not drink to the point of intoxication and that she drank "[l]ess than twelve per week." Montemurro also pointed out that another doctor, a psychiatrist, had prescribed for Shea an anti-anxiety medication that was contraindicated for alcoholics. Additionally, Montemurro did ask Shea about her alcohol use again at her May 2004 examination and, at that time, Shea told him she regularly consumed fewer than six drinks per week.

¶24 Montemurro further testified in a later examination, Montemurro once again asked Shea about her alcohol use, and she once again reported that she drank fewer than six servings per week. In Montemurro's view, nothing in Shea's blood tests indicated any underlying alcoholism.

¶25 On cross-examination, Montemurro acknowledged that it was possible that a patient could be unwilling to disclose the extent of his or her alcohol use to her personal physician but said that "people are generally honest." When asked how he would assess a patient's ability to work if the patient reported consuming two beers before work on a routine basis, Montemurro stated that it "would have prompted further questioning" about volume and the timing of the drinks in relation to the person's work shift. Montemurro said that if he was informed that Shea drank two alcoholic beverages before "head[ing] off to [her] job," that would concern him. On cross-examination, Montemurro also asserted that his referral of Shea to a psychiatrist regarding her depression, sometime after May 2004, was "indirectly" a referral relating to the concerns Seter raised about alcohol abuse, because "any time there's depression, the psychiatrist will delve into the abuse concern as well." Once that psychiatrist saw Shea, and continued to prescribe a medication contraindicated in alcoholics, that "took care of any concern" raised by Seter's report, in Montemurro's opinion. Finally, Montemurro disagreed with Seter's concern in the second Return to Work Evaluation regarding Shea's physical capability, pointing out that the conditions Seter expressed concern about were "chronic conditions that she's had in the job she's done beforehand."

¶26 Young, the Chrysler human resources supervisor, stated that the basis for refusing to return Shea to work was Seter's opinion and that Chrysler "always take[s] the medical opinion" of its doctor. On cross-examination, Young

acknowledged that the parties' collective bargaining agreement allowed either side to seek a third-party medical opinion in the event of a disagreement among medical experts. Young stated that the company will never disagree with its own doctor's findings and will never invoke that provision.

¶27 Shea also acknowledged that provision of the parties' contract, but said that she was apprehensive to request a third-party examination and therefore declined to do so. She said, "I had already submitted myself to a doctor who is a total stranger," meaning Seter, and that she chose not to submit herself to "another total stranger doctor."

¶28 In June 2006, Chrysler informed Shea that as a result of Seter's May 2006 report "we have determined you are medically unable to perform the work assigned in a productive capacity." Chrysler said it was converting Shea to "disability" status and that she should contact the disability insurer. The disability insurer later informed Shea that "your Sickness and Accident claim is denied because your medical provider, Dr. Montemurro, does not certify your total disability." Shea retired from Chrylser in 2008.

¶29 Shea's initial complaint to the Equal Rights Division (ERD) was filed in May 2005. She alleged that Chrysler had discriminated against her based upon her age and her health history. An ERD investigator dismissed the age discrimination claim but found probable cause to believe that Chrysler violated the WFEA by terminating Shea's employment due to disability. The ERD held a hearing on the matter in June 2008 before an ALJ. In addition to the depositions of Seter and Montemurro, and the testimony of Shea, Young, and Suminski, there was also testimony from two of Shea's friends.

¶30 Shea's friend Joseph D'Acquisto, who had worked at Chrysler but never side-by-side with Shea, testified that in the four or five years preceding the time of the hearing, he and Shea would regularly go fishing together, once or twice a week, in the summer, including the summers of 2004, 2005, 2006, and 2007. Shea was able to put the anchor in and pull it out and to hold the boat lines. She helped launch the boat and pull it out of the water. D'Acquisto said that he has also seen Shea do work around her house and yard. He saw her mow the lawn and clear snow from her property. He stated that she never complained about any physical problems to him except when she had cancer. With respect to Shea's alcohol consumption, D'Aquisto said that he and Shea would have "a beer or two," at a time, and that he never saw her drink more than that.

¶31 Another friend, Mary Arredondo, testified that she is Shea's neighbor and "fairly close" friend. She said that since April 2003, she has seen Shea perform her own housekeeping, her yard work, gardening, "[a]nything and everything." She said that Shea mows and fertilizes her own lawn, removes her own snow, and removes snow from Arredondo's property as well. Arredondo said that Shea had never complained of being unable to perform household tasks.

¶32 In April 2011, the ALJ issued a decision and memorandum opinion concluding that Chrysler violated the WFEA. In the ALJ's view, the evidence established that Shea had a "'perceived' disability" as defined by WIS. STAT. § 111.32(8)(c). This perception, the ALJ stated, "was based on the return-to-work evaluations" by Seter, "in which he concluded that due to [Shea's] multiple medical conditions, she was unable to tolerate the prolonged walking and standing that her job involved" and in which he "opined that [Shea] was an active alcoholic." The ALJ also concluded that Chrysler failed to establish any reasonable accommodation or workplace safety defense.

¶33 Chrysler filed a petition for review of the ALJ's decision, and LIRC affirmed. LIRC agreed with the ALJ that Chrysler perceived Shea to be disabled because of Seter's opinion that Shea's multiple medical conditions would make her unable to tolerate prolonged walking and standing and that Shea was an active alcoholic. LIRC further agreed with the ALJ that Shea's perceived disability status was the basis for Chrysler's adverse employment decision, i.e., its refusal to allow Shea to return to work. LIRC then determined that Chrysler did not establish any defense.

¶34 LIRC rejected the ALJ's conclusion that the two medical opinions were "in equipoise," finding instead that Montemurro's opinion was "more persuasive" and "entitled to greater weight," since Montemurro was so much more familiar with Shea. Montemurro had treated Shea since 2000, conducted multiple physical examinations of Shea, and closely followed Shea's treatments from various specialists. Montemurro's physical examinations confirmed that Shea had normal stress echo results, was not short of breath with activity, and could walk one hundred yards without any discomfort. In contrast, Seter's opinions were given in the "absence of specific, quantified evidence as to the nature of supposed limitations" on Shea's physical capacities. For these reasons, LIRC concluded, Chrysler failed to carry its burden to establish the defense that Shea was unable to perform job-related responsibilities.

¶35 Likewise, with respect to Shea's purported alcoholism, LIRC found Montemurro's opinion that Shea was not an alcoholic and posed no safety risk to be more credible and persuasive than Seter's. LIRC noted that Montemurro asked Shea about her alcohol consumption from the outset of his treatment of her. Shea told Montemurro that she consumed alcohol regularly, but at the relevant time, totaling fewer than six drinks per week. Montemurro knew that Shea was seeing a

psychiatrist, who had prescribed a medication contraindicated for alcoholics. "Given this, and given the complete lack of evidence that [Shea] had ever before come to work under the influence of alcohol," LIRC found that Chrysler failed to meet its burden to establish the defense that Shea was a "future safety" risk in the workplace.

¶36 Finally, LIRC pointed out that the ALJ's discussion of the "hardship" defense under WIS. STAT. § 111.34(1)(b) was unnecessary, because Chrysler failed to establish that Shea had any disabilities that were reasonably related to her ability to perform her job. Because Shea needed no accommodations to perform her job, the discussion of whether accommodating Shea was a hardship was unnecessary.

¶37 Chrysler petitioned for judicial review of LIRC's determination. On review, the circuit court found that all of LIRC's findings were supported by credible and substantial evidence and affirmed LIRC's determination. Chrysler now appeals to this court.

Analysis

¶38 Chrysler's chief argument is that LIRC erred in determining that Chrysler failed to establish that reinstating Shea posed a workplace safety issue. Chrysler also argues that LIRC erred when it determined that Chrysler failed to establish that Shea was physically unable to perform her job and rejected the argument that Shea's layoff status was a reasonable accommodation of a disability.

¶39 With respect to the workplace safety defense, all of Chrysler's arguments are founded on the evidence of a single witness, the company doctor,

Seter, and his report of statements Shea made to him. The argument goes that if the "uncontested" evidence of statements Shea made to Seter about drinking alcohol before work is taken into account, since everyone agrees that the prospect of inebriated workers is unsafe, Chrysler's decision not to reinstate Shea was justified by WIS. STAT. § 111.34(2)(a) and (b).

¶40 It is not unlawful to discriminate on the basis of a disability that is "reasonably related to the individual's ability to adequately undertake the job-related responsibilities" or that endangers "the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general public." WIS. STAT. § 111.34(2)(a), (b). For instance, it was not discrimination under the WFEA when an employer terminated an employee who repeatedly reported to work under the influence of alcohol and "unable to adequately perform his job duties." ***Squires v. LIRC***, 97 Wis. 2d 648, 650, 653, 294 N.W.2d 48 (Ct. App. 1980). Similarly, under federal anti-discrimination law,[3] the firing of a police officer who violated workplace rules against drunk driving was justified under the Americans with Disabilities Act, where the record contained evidence that the officer was convicted of drunk driving and had previously been subject to work inquiries about drinking on the job. ***Budde v. Kane Cnty. Forest Preserve***, 603 F. Supp. 2d 1136, 1138-39, 1143 (N.D. Ill. 2009). And in a case cited by Chrysler in support of its appeal, ***Bekker v. Humana Health Plan, Inc.***, 229 F.3d 662 (7th Cir. 2000), a doctor's firing was justified by ample evidence that she worked while

[3] The WFEA and federal ADA differ in that under the ADA, it is the employee's burden, first, as part of the prima facie case, to establish he or she is qualified to perform the job. *See* ***Estate of Szleszinski v. LIRC***, 2007 WI 106, ¶36, 304 Wis. 2d 258, 736 N.W.2d 111. Under the WFEA, in contrast, the employee's inability to adequately perform the job is a defense that the employer has the burden to establish. ***Id.***; WIS. STAT. § 111.34(2)(a), (b).

under the influence of alcohol, including patient complaints in 1995 and 1996 and coworker reports in 1990, 1995, and 1996. ***Id.*** at 664-65. Even though there was no evidence that the doctor actually made alcohol-related mistakes, "substantial proof" supported the district court's granting of summary judgment against the doctor's ADA discrimination claim. ***Id.*** at 668, 672.

¶41 If Chrysler had submitted evidence like the employers in ***Squires***, ***Budde***, or ***Bekker*** this would be a different case. Based on the record it made below, however, as evidence that Shea's alcohol use posed a workplace safety danger, Chrysler can point only to the statements Seter recorded in his reports. Other evidence, however, cuts against the reliability of Seter's reports as evidence of Shea's actual alcohol use.

¶42 To begin with, a reasonable person might discount the evidentiary value of Seter's reports of his conversations with Shea, given the apparently hostile relationship that developed between the two. By his own testimony, from the moment Seter smelled "the odor of alcohol present on [Shea's] breath" during his first visit with her, his suspicion that she abused alcohol became his "biggest concern" about Shea. At the moment when Seter formed this "big concern" he did not recognize that Shea was summoned to his office from her own home, with less than two hours notice, after finishing a beer. What is more, despite having no idea about how much notice Shea was given before her appointment or where she was when she received the summons, Seter accused Shea of violating workplace rules about alcohol consumption, during that very office visit. Furthermore, the most outrageous statements attributed to Shea,[4] and the ones emphasized in Chrysler's

[4] For example, Shea's statement that she drank two beers every morning before work as a "bracer for all the shit" she dealt with and might continue to do so.

briefs, were reported in May 2006, by which time Shea already had been excluded from the workplace for two years, against her wishes, on the sole basis of Seter's opinion. A reasonable person could conclude that Shea's statements were hyperbolic or made in anger, rather than reflective of Shea's actual intended behavior.[5]

¶43 Additionally, even Seter's own reports contain contrary evidence. In his first report, Seter notes that in addition to stating that she drinks every day, Shea stated that she drinks no more than five or six drinks a week. Seter's later reports acknowledge Shea's continued denial that she has any problem with excessive drinking.

¶44 On top of that, LIRC had before it the evidence that Shea's own doctor, Montemurro, examined and questioned her multiple times, before and after Seter's examination, and concluded that although Shea consumed alcohol regularly, she was not an alcoholic. Furthermore, none of Shea's bloodwork gave him reason to suspect alcoholism, and Shea's treatment by an independent psychiatrist who had prescribed a medication contraindicated for alcoholics put to rest any concerns raised by Seter's reports.

¶45 In addition to the medical expert testimony disagreeing with Seter, LIRC had before it Shea's own testimony that she drank no more than two beers at a time, generally with friends or after doing yard work, and that she did not have a drinking problem.

[5] Indeed, reading Seter's reports, one is reminded of Kris Kringle's interaction with Macy's company doctor in Miracle on 34th Street.

¶46 Finally, and importantly, there was the utter absence of any other evidence, aside from Shea's statements during interactions with Seter, that she ever came to the workplace under the influence of alcohol, or had any other workplace performance issue, whatsoever, in over thirty years of working at Chrysler. Chrysler undoubtedly has many, many employees and supervisors who interacted with Shea on a daily basis. But Chrysler has failed to produce any one of them who could testify that she was impaired on the job. All Chrysler had to do was produce a single one, and this would have been a very different case. For reasons we do not know, Chrysler did not present any evidence besides Seter's reports.[6]

¶47 So, this case is not ***Squires***, ***Budde***, or ***Bekker***. Unlike in those cases, in this case there were no coworker or supervisor complaints about Shea. Instead, Chrysler rested its whole case on the reports of its company doctor, which was a risky legal strategy, since Wisconsin law rejects categorical reliance on the company doctor as a defense to employment discrimination. ***Bucyrus-Erie Co.***, 90 Wis. 2d at 423-24. After considering all of the evidence, LIRC concluded that whatever Shea may or may not have actually said to Seter, Seter's reports and

[6] The concurrence does not believe Chrysler, or any other company, must prove that an employee "has been fully 'inebriated' on-the-job in the past" before it may take action. Concurrence, ¶56. We agree with that statement and our opinion does not say otherwise. As the concurrence points out, one does not have to be legally intoxicated before his or her judgment or motor performance is affected. Besides, it would be very difficult at the least for a company to prove that an employee was legally drunk when coming to the workplace. So, we agree that "full" inebriation cannot be the standard. We also have no quarrel with the argument Chrysler should not have to wait until something bad happens before it can act. Evidence that Shea actually came to work "under the influence" *or* was impaired on the job would be enough regardless how her workday went. However, given the absence of such evidence corroborating the inconsistent and apparently hostile exchanges between Shea and the company doctor, her statements elsewhere disclaiming alcoholism, the opinion of her own doctor, and information provided by friends, we are in agreement with the concurrence that we cannot find that LIRC's determination was unreasonable.

testimony were insufficient to establish Chrysler's workplace safety defense. That decision is supported by substantial evidence and therefore must be affirmed.

¶48 Turning to the second issue, substantial evidence in the record likewise supports LIRC's conclusion that Chrysler failed to establish Shea was physically incapable of her job. As LIRC pointed out, Seter never performed any functional capacity examination, and his opinion that Shea was incapable was based on no "specific, quantified evidence as to the nature of the supposed limitations" on Shea's abilities. In contrast, Montemurro acknowledged that Shea had various health conditions, but concluded that because Shea could walk without discomfort and had no weight-lifting restrictions, she was physically capable of her work as a picker. Chrysler emphasizes that LIRC disregarded Shea's statements to Seter that she did not know her own capabilities and could not estimate how far or long she could walk or stand, but as with the discussion of her alcohol use, Shea's responses to Seter are colored by the fact that the two did not interact very successfully. LIRC could reasonably rely upon the more specific, sworn testimony of another doctor, Montemurro, who interacted more frequently and successfully with Shea. He conducted specific physical examinations of her, monitored her treatment by other specialists, and opined that she was perfectly capable of performing her job. In short, "a reasonable person, acting reasonably, could … have reached the decision" based on this record. *See* ***Target Stores***, 217 Wis. 2d at 11.

¶49 Finally, Chrysler's reasonable accommodation defense is a nonstarter. Since Chrysler failed to establish that Shea had a disability that affected her ability to perform her job, there was no reason to formulate any reasonable accommodation whatsoever, let alone the drastic accommodation of layoff.

¶50 In conclusion, upon thorough review of the entire record, we conclude that LIRC's determinations are supported by credible and substantial evidence and consistent with applicable law. We want to repeat that we understand the concern that an employer would justifiably have when informed that an employee drinks before coming to work. But the way to proceed, consistent with the WFEA, is to determine if the information is true and, if so, whether the employee has had past issues in the workplace due to drinking or at least proof of inebriation when arriving at the workplace. Categorical reliance on the company doctor is not a defense to employment discrimination under the WFEA. ***Bucyrus-Erie Co.***, 90 Wis. 2d at 423-24.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶51 GUNDRUM, J. (*concurring*). I am troubled by LIRC's decision in this case, but because of our deferential standard of review, I am obliged to concur rather than dissent.

¶52 As the majority points out, "our duty is to search the record for 'evidence which a reasonable [person] could accept as adequate to support' LIRC's determination." Majority, ¶3 (citing ***Chicago & N. W. R.R. v LIRC***, 98 Wis. 2d 592, 607, 297 N.W.2d 819 (1980) (citation omitted)). Further,

> [w]e may not "substitute [our] judgment for that of the agency as to the weight of the evidence on any disputed finding of fact," and we may not set aside LIRC's decision unless "upon an examination of the entire record, the evidence, including the inferences therefrom, is ... such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences."

Majority, ¶6 (citing WIS. STAT. § 227.57(6); ***Target Stores v. LIRC***, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998)). Although I disagree with LIRC's determination, I cannot say that a reasonable person, acting reasonably, could not have reached the decision LIRC reached based on the evidence presented. As a result, my comments come in the form of a concurrence.

¶53 As part of her daily job duties in her industrial work environment, Michal Shea would "drag" "tall ladders that would go to the highest shelf ..., put on the brakes so it could not move and climb up." Approximately twenty times per shift, she would retrieve parts from bins on high shelves in this way.

¶54 Shea does not dispute that she told the company doctor in May 2004 that she would routinely drink multiple alcoholic beverages before going to work, that just a few months before that she told a surgeon that she would "drink[] excessive alcohol approximately on an every-other-day basis," or that she subsequently told the company doctor that she "probably" would continue drinking alcohol before coming to work because she needed a "bracer for all the shit I need to put up with there" but that she is cautious not to consume so much alcohol as to reach the "0.08" level. Further, Shea does not dispute the company doctor's personal observation that she smelled of alcohol when she reported to see him at 2:30 in the afternoon.[1]

¶55 The above undisputed statements by Shea were contrary to her interest, and it indeed would have been foolish for Chrysler not to believe her. These statements are not "opinions" of the company doctor, but recitations of comments attributed to Shea herself. What if Shea had instead stated that she smoked a bowl of marijuana before coming to work each day as a "bracer" to help her get through the work day? The question should not turn on the fact that possession of marijuana is illegal while possession and consumption of alcohol is generally legal; the question should turn on the safety issue that would also arise

[1] The majority treats as suspect the fact that Shea was informed of her appointment with the company doctor on the same day as the appointment. Majority, ¶16. In that Shea was not permitted to return to work until examined by the doctor, it would seem this was not a typical situation where an appointment might be scheduled "several weeks" in advance. Had she been required to wait several weeks for an appointment, it would have been certain that she could not have returned to work for a longer period of time than with the appointment scheduled as it was. Thus, it seems the expedited doctor appointment was actually to Shea's benefit and one would normally envision an employee in such a situation being appreciative of the opportunity to be examined by the doctor sooner so she would have the opportunity to return to work sooner.

from an individual who smokes marijuana before starting her shift. The same issue is before us, but with Shea's mind-affecting drug of choice being alcohol.

¶56 I do not believe a company needs to prove that an employee who has admitted to consuming alcohol before coming to work has been fully "inebriated" on the job in the past before it may take action to protect the safety of the employee and others in the workplace. A person who "drag[s]" tall ladders and retrieves items from high shelves does not have to be fully "inebriated" or reach the "0.08" level to be a safety hazard in an industrial work environment. Here, Chrysler had good reason to believe Shea posed a risk to herself and others based on her own undisputed statements. The fact that there are no documented work incidents related to her alcohol use does not lessen the risk she posed to herself and others. Chrysler need not wait until the first serious incident occurs before taking action to ensure workplace safety. Indeed, with the knowledge it had about Shea's prework drinking habits, it is not difficult to imagine financial responsibility befalling Chrysler if Shea injured a fellow worker or visitor.

¶57 While a motor vehicle driver may not have a prohibited alcohol concentration in his/her system if his/her blood alcohol concentration (BAC) level is below "0.08" (for a first-time offender), motor skills, judgment, etc., can still be affected even if not at the 0.08 level. For example, a 150-pound adult will have his or her judgment and coordination affected after one beer (a BAC of 0.02-0.03 percent), while after two beers (BAC of 0.04-0.05 percent), "[p]sychomotor performance is significantly impaired; slower eye movements occur; visual perception, reaction time and information processing are adversely affected resulting in reduced coordination, [there is a] reduced ability to track moving objects, difficulty steering and reduced response to emergency driving situations [if driving]." *See Alcohol (BAC, Gender, etc.)*, AMERICAN AUTOMOBILE ASS'N

DUI JUSTICE LINK, http://duijusticelink.aaa.com/for-the-public/get-educated/alcohol; *Drinking and Driving*, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC., https://ncadd.org/learn-about-alcohol/drinking-and-driving; *The ABCs of BAC: Guide to Understanding Blood Alcohol Concentration and Alcohol Impairment*, NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., http://www.nhtsa.gov/links/sid/ABCsBACWeb/page2.htm. Ultimately, "[i]t's not a question of whether you are legally intoxicated …. Research shows that impairment begins long before a person reaches the blood alcohol concentration level necessary to be guilty of drunken driving." *Why You Should Never Drink and Drive: Impairment Begins Long Before You Are Legally Drunk*, About.com, http://alcoholism.about.com/od/dui/a/impaired.htm.

¶58 I agree with Chrysler that permitting Shea to return to work would have created a reasonable probability of a safety hazard. The evidence supporting this conclusion, however, was not so overwhelming as to make LIRC's contrary determination an unreasonable one.