

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0628

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

RALPH LUBITZ,

PETITIONER-RESPONDENT,

v.

WISCONSIN PERSONNEL COMMISSION,

RESPONDENT-(IN T.CT.),

UNIVERSITY OF WISCONSIN SYSTEM,

APPELLANT.

APPEAL from an order of the circuit court for Portage County:
JAMES M. MASON, Judge. *Reversed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. The University of Wisconsin System appeals from a circuit court order reversing a Wisconsin Personnel Commission (WPC) decision

and concluding that the University violated the Wisconsin Family Medical Leave Act (FMLA) by retaliating against Lubitz for taking a FMLA leave of absence. The University does not contest the circuit court's determination that Lubitz's medical condition is a serious health condition under the FMLA.¹ The University does, however, contest the circuit court's determination that the University retaliated against Lubitz for taking FMLA leave. The University contends that substantial evidence in the record supports the WPC's factual finding that the University did not retaliate against Lubitz and that the circuit court erred by improperly substituting its own factual finding for the WPC's, instead of examining whether substantial evidence in the record supports the WPC's factual finding. Because we conclude that substantial evidence in the record supports the WPC's factual finding that the University did not retaliate against Lubitz and that the circuit court failed to apply the proper standard of review, we reverse.

¶2 Ralph Lubitz, a professor at the University of Wisconsin-Stevens Point, suffers from a migraine-equivalent health condition. Beginning in 1987, he requested and was granted a series of partial and full-time leaves of absence from work due to this condition. By 1991, the University advised Lubitz that it would oppose future leave without pay requests because his absence was impacting the University's ability to fulfill its teaching responsibilities to students. Lubitz returned to full-time employment on a four-day per week schedule. In 1992, students began complaining that Lubitz was not keeping scheduled appointments or providing adequate office hours. In January 1993, he failed to timely turn in his grades for the semester. Lubitz was scheduled for post-tenure review in the fall of

¹ Because the University does not contest this determination, we assume its accuracy for purposes of this appeal.

1993 and spring of 1994. Although the review indicated Lubitz was an excellent teacher, it also raised concerns about his class cancellations, infrequent department meetings, and his lack of participation with department committees.

¶3 A tenure-review plan was implemented to address these concerns. Lubitz made some progress implementing the plan's suggestions during the latter part of 1994 and into 1995, but missed several department meetings and was unavailable to teach for several days during the 1994 fall semester and the 1995 spring semester. He did not reschedule cancelled classes and secured coverage for only one-half day during his absences. In February 1995, a parent complained that Lubitz had missed five of the first twelve sessions of his son's class. The University required Lubitz to provide medical documentation of his condition, to provide medical verification for future absences due to illness and advised him that he had to work a five-day work week. After another post-tenure review meeting in April 1995, a development plan was established for the 1995-96 academic year. Lubitz was required to meet all scheduled class sessions, provide written information for all absences due to illness, hold regular office hours for students, attend department meetings, and meet various professional goals. In spring of 1995, the University awarded faculty merit pay for the 1994-95 academic year based on 1994 calendar year performance. The University reduced his merit points from eight to four and Lubitz filed an action with the WPC.

¶4 Lubitz claimed that the University retaliated against him for taking FMLA leave by requiring written verification of his illness, giving him a negative performance evaluation, ordering him to return to a five-day work week, and awarding him only four merit points. The WPC concluded that: (1) Lubitz's medical condition did not meet the threshold "serious health condition" defined in

WIS. STAT. § 103.10(1)(g) (1997-98)² so as to bring his claim within the FMLA's protection; and (2) the University did not retaliate against Lubitz in violation of the Fair Employment Act (FEA). Lubitz sought judicial review of the WPC's determination. The circuit court reversed, concluding that Lubitz did have a serious health condition protected under the FMLA and that the University did retaliate against Lubitz for taking FMLA leave. The University appeals contending that substantial evidence in the record supports the WPC's factual finding that the University did not retaliate against Lubitz and that the circuit court erred by improperly conducting its own *de novo* factual finding instead of examining whether substantial evidence in the record supported the WPC's factual determination.

¶5 When an appeal is taken from a circuit court order reviewing an administrative agency decision, we review the agency's decision, not the circuit court's decision. See *Sterlingworth Condominium Ass'n., Inc. v. DNR*, 205 Wis. 2d 710, 720, 556 N.W.2d 791 (Ct. App. 1996). Our scope of review is identical to that of the circuit court. See *L&H Wrecking Co., Inc. v. LIRC*, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). Generally, the question of an employer's motivation is a question of fact. See *Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). When presented with a factual question, we employ the substantial evidence standard of review. See *Knight v. LIRC*, 220 Wis. 2d 137, 149, 582 N.W.2d 448 (Ct. App. 1998), *review denied*, 220 Wis. 2d 365, 585 N.W.2d 157 (1998). Under this standard, the agency's factual conclusion will not

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

be set aside unless we determine that such conclusion could not have been reached by a reasonable person acting reasonably. *See id.*

¶6 Where conflicting views of the evidence may each be sustained by substantial evidence, it is for the agency to determine which view of the evidence to accept. *See Robertson Transp. Co. v. Public Serv. Comm'n*, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). On this record, we conclude that substantial evidence supports the WPC's determination that the University did not retaliate against Lubitz for taking FMLA leave. The record establishes a basis to believe that the University's actions were taken for reasons other than retaliation for Lubitz's FMLA leave. The record further establishes a basis to believe that Lubitz was given a negative performance evaluation and merit award reduction as the result of his failure to make up canceled classes or to secure coverage by colleagues, as well as his failure to make satisfactory progress on the requirements of his tenure-review plans. Finally, the record establishes a basis to believe that the University required that Lubitz return to a five-day work week because it was concerned about recent legislative attention focused on faculty work hours and was seeking to avoid potential conflicts with state work reporting and leave requirements. The WPC accepted that view of the evidence supporting the conclusion that the University's actions were not motivated by retaliation, which view is amply supported in the record.

¶7 The circuit court, in this instance, proceeded to make its own factual finding that the University's actions were motivated by retaliation. A reviewing court, however, does not make *de novo* findings of fact or substitute its judgment for the agency's as to the weight of the evidence on a disputed issue of fact. *See WIS. STAT. § 227.57(6)*. Rather, a reviewing court considers whether substantial evidence in the record supports the agency's findings of fact. *See id.* By making

de novo findings of fact, the circuit court failed to apply the proper standard of review for this type of determination.

¶8 We conclude that substantial evidence in the record supports the WPC's determination that the University did not retaliate against Lubitz for taking FMLA leave. Accordingly, we reverse the circuit court's order.

By the Court.—Order reversed.

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

