COURT OF APPEALS
DECISION
DATED AND FILED

October 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2441 **Cir. Ct. No. 2014CV2982**

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

KEVIN ROBERTS,

PLAINTIFF-APPELLANT,

V.

STEVENS CONSTRUCTION CORPORATION AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Kevin Roberts appeals a circuit court order that affirmed the decision of the Labor and Industry Review Commission (LIRC) dismissing Roberts' claim that Roberts' former employer unreasonably refused to

rehire Roberts following a workplace injury. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In May 2012, Roberts was hired by Stevens Construction Corporation to work as a project superintendent for a construction project in Michigan. The construction project was ninety days behind schedule and Roberts was hired to help Stevens Construction meet the Michigan project's construction deadline.

¶3 On July 29, 2012, Roberts suffered a work-related injury. As a result of his injury, Roberts received workplace restrictions and was unable to continue working on the Michigan project. While Roberts received medical treatment for his injuries, Roberts remained employed by Stevens Construction. On August 20, 2012, Roberts' treating physician stated that Roberts was able to "return to regular duty." That day, Roberts reported to Stevens Construction and informed Stevens Construction's human resources manager that his workplace restrictions had been lifted. Roberts was asked to wait in a conference room for Geoff Vine, president of Stevens Construction. When Vine arrived, he informed Roberts that "things hadn't gone as well as [Vine] had hoped" and Vine terminated Roberts' employment. Roberts subsequently received a letter dated August 20, 2012, from Stevens Construction that confirmed the termination of Roberts' employment and stated that Roberts' "performance at the Michigan project was not what [Vine] had hoped for/expected and [Roberts'] position with Stevens Construction was terminated."

¶4 Roberts filed a claim under WIS. STAT. § 102.35(3) (2011-12)[1] with the Department of Workforce Development, claiming Stevens Construction had unreasonably refused to rehire[2] Roberts following his injury. Following a hearing, the administrative law judge (ALJ) determined that Stevens Construction had not unreasonably refused to rehire Roberts and the ALJ dismissed Roberts' claim. The ALJ found that Roberts' employment had been terminated because of Roberts' performance, but also because Stevens Construction did not have any ongoing work available for Roberts when his employment was terminated.

¶5 Roberts petitioned LIRC for review of the ALJ's decision. LIRC affirmed the ALJ's decision, adopting the ALJ's findings and conclusions as its own.

¶6 Roberts sought review of LIRC's decision by the circuit court. The circuit court affirmed LIRC's decision. Roberts appeals.

---

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

WISCONSIN STAT. § 102.35(3) provides:

> Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year's wages…."

[2] "'[R]ehire' under [WIS. STAT. §] 102.35(3) means that if an employee is absent from work because of an injury suffered in the course of employment, the employee must be allowed the opportunity to return to work if there are positions available and the previously injured employee can do the work." ***Link Indus., Inc. v. LIRC,*** 141 Wis. 2d 551, 556, 415 N.W.2d 574 (Ct. App. 1987).

ANALYSIS

¶7 Roberts contends that the circuit court erred in affirming LIRC's determination that Stevens' Construction showed reasonable cause for its refusal to rehire Roberts following Roberts' work-related injury.

¶8 In reviewing a decision of an administrative agency, it is the decision of the agency, rather than the decision of the circuit court, that is reviewed. ***Hilton v. DNR***, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166.

¶9 Whether an employer has unreasonably refused to rehire an employee under WIS. STAT. § 102.35(3) presents a mixed question of fact and law. ***deBoer Transp., Inc. v. Swenson***, 2011 WI 64, ¶29, 335 Wis. 2d 599, 804 N.W.2d 658. We will uphold LIRC's factual findings "'if there is credible and substantial evidence in the record on which reasonable persons could rely to make the same findings.'" ***Id.***, ¶30 (quoted source omitted).

¶10 Whether the facts "give rise to reasonable cause under WIS. STAT. § 102.35(3) requires us to examine the construction of the statute and its application to the facts," which is a question of law that we ordinarily review de novo. ***Id.***, ¶31. However, when our review is of an agency's interpretation of a statute, we afford the agency's interpretation one of three levels of deference: no deference, due weight deference, or great weight deference. ***Id.***, ¶¶31-35 (explaining the levels of deference and when they are applied). When we apply due weight deference, we will uphold the agency's decision so long as the agency's interpretation and application is reasonable and another interpretation is not more reasonable. ***Id.***, ¶34. When we apply great weight deference, we will uphold the agency's decision so long as the agency's interpretation and application is reasonable, even if there are other more reasonable interpretations. ***Id.***, ¶33.

¶11 The parties dispute the level of deference LIRC's interpretation and application of WIS. STAT. § 102.35(3) should be afforded. Roberts argues that it should be afforded due weight deference, while LIRC argues that its decision should be afforded great weight deference. However, we need not determine whether LIRC's decision is entitled to due weight or great weight deference because we conclude that under either standard we would affirm LIRC's application of WIS. STAT. § 102.35(3).

¶12 To make a claim for unreasonable failure to rehire under WIS. STAT. § 102.35(3), the employee must first make a prima facie showing of unreasonable failure to rehire and if the employee does so, the burden shifts to the employer to show a reasonable cause for the employer's refusal to rehire the employee. ***deBoer Transp., Inc.***, 335 Wis. 2d 599, ¶¶39, 43 (setting forth the elements for a claimant's prima facie showing).

¶13 LIRC determined that Roberts made a prima facie showing that Stevens Construction unreasonably failed to rehire Roberts when Stevens Construction terminated his employment in August 2012. The parties do not challenge this conclusion. Accordingly, we focus our analysis on whether Stevens Construction satisfied its burden of showing a reasonable cause for its refusal to rehire Roberts. On appeal, Roberts challenges the factual findings that underlie LIRC's conclusion that Stevens Construction showed reasonable cause for its decision to terminate Roberts' employment, as well LIRC's conclusion that Stevens Construction met its burden. As we explain below, we affirm LIRC as to both.

1. Factual Findings

¶14 In reviewing an agency's findings, we are to affirm if there is any credible evidence to support those findings. ***L & H Wrecking Co., Inc. v. LIRC***, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). If there is more than one reasonable inference that can be drawn from the facts, the inference drawn by the agency is conclusive on review. ***Farmers Mill of Athens, Inc. v. DILHR***, 97 Wis. 2d 576, 580, 294 N.W.2d 39 (Ct. App. 1980).

¶15 In its memorandum opinion, LIRC, which had adopted the ALJ's findings and decision as its own, stated: "The commission agrees that [Stevens Construction] showed a reasonable cause—lack of work—for terminating [Roberts'] employment. The student housing project for which [Roberts] was hired was coming to an end. Other workers were laid off or not offered rehire at the time."

¶16 Roberts argues that LIRC's finding that other employees besides him were laid off or not rehired is not based on credible and substantial evidence, but is instead based "on nothing more than conjecture and speculation." Roberts asserts that there is no evidence that Stevens Construction laid off or refused to rehire any other superintendents, or any other workers in general, besides Roberts at around the time of his termination. Roberts argues that the evidence instead shows that other superintendents and employees who had been working on the Michigan project were either moved to one of the limited number of available superintendent jobs or were allowed to utilize their paid time off days (PTO).

¶17 At the hearing before the ALJ, Dena Gullickson**,** the human resources manager for Stevens Construction, testified that another superintendent on the Michigan project, Ken Fenney, completed his work on the Michigan project

on August 25, 2012. Gullickson testified that Stevens Construction did not give Fenney a position at another project at that time. Gullickson further testified, however, that because Fenney had PTO remaining, he was required to use his PTO while he remained without a project to work at.

¶18 We conclude that Gullickson's testimony supports LIRC's finding. Her testimony establishes that Stevens Construction did not have a position available for Fenney in late August 2012, and that Roberts was in the same position. Although Fenney was permitted to use his remaining PTO, it could reasonably be inferred that if Fenney had not had any available PTO at that time, his employment with Stevens Construction would have been terminated at that time. In addition, Roberts does not direct this court to any evidence that he had any PTO after such a short period of employment. Evidence in the record established that Roberts was to receive twelve and one-half days of PTO in 2012. However, PTO is generally accrued throughout the year, not all at once, and there is no evidence of how much, if any, PTO Roberts had available when his employment was terminated.

2. Reasonable Cause Conclusion

¶19 "[R]easonable cause" under WIS. STAT. § 102.35(3) has been defined "to mean that 'an employer, if there is suitable employment available, can [] refuse to rehire [only] for a cause or reason that is fair, just, or fit under the circumstances." ***deBoer***, 335 Wis. 2d 599, ¶43 (quoted source omitted). Section 102.35(3) does not "require[] that employers change their legitimate and universally applied business policies to meet the personal obligations of their employees." ***Id.***, ¶45. The employer is, therefore, not required to modify its policies to ensure a previously injured employee's rehire. *See* ***id.***, ¶¶43, 50. Cases

have held that an employer has established reasonable cause for not rehiring a claimant where the employee has not been rehired due to poor performance, or a business slowdown. *See* ***Great Northern Corp. v. LIRC***, 189 Wis. 2d 313, 318-19, 525 N.W.2d 361 (Ct. App. 1994).

¶20 Roberts contends that it is more reasonable to conclude that Stevens Construction did not meet its burden of showing reasonable cause for not rehiring Roberts because there is no evidence that Stevens Construction did not have any other "suitable employment [] available within [Roberts'] physical and mental limitations" when Roberts' employment was terminated.[3] *See* WIS. STAT. § 102.35(3).

¶21 Roberts argues first that to satisfy its burden, Stevens Construction was required to show "not only [that there was] a lack of superintendent work[,] but also [that there was] a lack of non-superintendent work within Roberts' physical and mental limitations." *See* ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 125-126, 438 N.W.2d 823 (1989) (stating that an employer's burden in a WIS. STAT. § 102.35(3) claim is "to show that [the employee] could not do the work for which [he or] she applied and to demonstrate that no other 'suitable employment is available within the employe's physical and mental limitations'") (quoted source omitted). Roberts argues that Stevens failed to show that there were no non-supervisory positions available for him. We disagree.

[3] In his brief on appeal, Roberts characterizes this argument as a challenge of LIRC's factual findings. However, the argument is, at its essence, a challenge of LIRC's application of WIS. STAT. § 102.35(3).

¶22 Vine testified that at the time Roberts' employment was terminated, the Michigan project was nearing its completion and that employees working on that project were being taken off of it. Vine testified that besides the Michigan project, Stevens Construction had six other ongoing projects in August 2012, but that there were no available positions for Roberts at those projects. In addition, as stated above in ¶17, Gullickson testified that in August 2012, Stevens Construction did not have work for Fenney, who had worked as a superintendent at the Michigan project, and that Fenney was forced to take PTO while Fenney waited for a position to become available.

¶23 The facts above support a conclusion that at the time Roberts' employment was terminated, Stevens Construction did not have *any* positions available for Roberts. Moreover, even assuming for the sake of argument that Stevens Construction did have some non-supervisory positions available, Roberts does not cite this court to any evidence in the record that he was able to perform any particular, available non-supervisory positions within Stevens Construction.

¶24 Roberts also asserts that Stevens Construction failed to show that there was no "suitable employment available" because Fenney was permitted to use his PTO while Fenney waited for another work assignment following the Michigan project. As best we can tell, Roberts is arguing that even if Stevens Construction did not have any work available for him at the time his employment was terminated, there was still "suitable employment available" under the circumstances because Stevens Construction has permitted employees for which no work is available to remain employed by using their accrued PTO.

¶25 In support of this argument, Roberts cites this court to case law stating that WIS. STAT. § 102.35(3) is to be liberally construed to effectuate its

purpose of preventing discrimination against employees who have sustained a work-related injury. Roberts argues that because the construction business is especially cyclical, with alternating busy and slow periods, and because Stevens Construction permits its employees to use their PTO during slow periods to avoid having their employment terminated, "suitable employment available" should be construed in the present case as the utilization of available PTO. Roberts argues that his proposed construction of § 102.35(3) is more reasonable than LIRC's more narrow construction, which restricts "suitable employment [] available" to actual work, because his proposed construction would "deter employers from … rid[ding] themselves" during slow periods "of employees who have sustained compensable work-related injuries."

¶26 Assuming without deciding that Roberts is correct that his construction of "suitable employment [] available" in WIS. STAT. § 102.35(3) is more reasonable than LIRC's more narrow construction, Roberts does not argue that he had any available PTO when his employment was terminated and, as we explain in ¶18, there is no evidence in the record that Roberts had any PTO when his employment was terminated.

¶27 Accordingly, we conclude that it was not more reasonable to conclude that Stevens Construction did not meet its burden.

CONCLUSION

¶28 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

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