COURT OF APPEALS
DECISION
DATED AND FILED

July 2, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1277 **Cir. Ct. No. 2011CV18405**

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

VIRGIL C. JOINER,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

MILWAUKEE HEALTH SERVICES SYSTEM,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Virgil C. Joiner appeals an order affirming a decision of the Labor and Industry Review Commission (LIRC) denying her unemployment insurance benefits. Joiner argues she qualifies for benefits based on two statutory exceptions to the general rule that an employee who voluntarily terminates employment is ineligible for benefits. *See* WIS. STAT. §§ 108.04(7)(b) & (7)(c) (2011-12).[1] We reject Joiner's arguments and affirm.

BACKGROUND

¶2 Joiner worked for approximately sixteen months as a counselor for an outpatient drug clinic. She resigned from her position on August 26, 2011. At that time, Joiner told the human resources director that she decided to resign because she could not keep up with the pace of the job.

¶3 Joiner subsequently filed a claim for unemployment insurance benefits. The Department of Workforce Development (DWD) denied her claim, finding that she quit her employment, but not for a reason that would permit the payment of benefits. Joiner appealed the DWD's determination and a hearing was held before an administrative law judge (ALJ).

¶4 During the hearing, Joiner gave two reasons for resigning. She first argued that she was the target of undue criticism. Joiner cited a July 29, 2011 incident with her employer, claiming that the executive director asked a question that was critical of her response during a practice code alert. Joiner thought the question was rude and did not like that it had been asked in front of other

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

employees. She told the executive director that he should call her into his office if he wanted to discuss the conduct. The executive director then roughly told Joiner to meet him in his office; she refused. Later in the questioning, Joiner admitted that she never spoke to the executive director or anyone in management to let them know that she thought the executive director's conduct on that date was inappropriate and that she was considering quitting as a result. As explanation for why she did not pursue the matter, Joiner told the ALJ that she did not think it would have done any good because she had raised other issues in the past without success.

¶5 The second reason offered by Joiner related to injuries she sustained in a fall at her home on August 14, 2011. As a result of the injuries, Joiner had difficulty concentrating and sitting at work. Joiner acknowledged that she did not speak to her employer about her injuries nor did she explore alternatives to quitting such as taking a leave of absence.

¶6 Following the hearing, the ALJ affirmed the DWD's determination. Joiner appealed the ALJ's decision to LIRC, which affirmed the ALJ's decision and adopted the ALJ's findings of fact and conclusion of law as its own.[2]

¶7 Joiner then began an action for judicial review of LIRC's decision in the circuit court. The circuit court affirmed LIRC and this appeal follows.

[2] In its decision, LIRC pointed out that Joiner had provided additional information in her petition, which was not presented during the hearing before the ALJ. It did not address or consider the factual assertions by Joiner that were not supported by the record. LIRC acknowledged Joiner's claim that the ALJ improperly limited her ability to fully present her case during the hearing, but stated that it had reviewed the record and disagreed.

DISCUSSION

¶8 "We review LIRC's factual findings and legal conclusions, not those of the circuit court." ***Klatt v. LIRC***, 2003 WI App 197, ¶10, 266 Wis. 2d 1038, 669 N.W.2d 752. Review of LIRC's findings of fact is significantly limited. ***Heritage Mut. Ins. Co. v. Larsen***, 2001 WI 30, ¶24, 242 Wis. 2d 47, 624 N.W.2d 129. Findings of fact made by LIRC acting within its powers are, in the absence of fraud, conclusive. ***Id.*** We may not substitute our judgment for LIRC's on the weight or credibility of the evidence. *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). A court may, however, set aside LIRC's award if the order depends on any material and controverted findings of fact that are not supported by credible and substantial evidence. ***Heritage Mut. Ins. Co.***, 242 Wis. 2d 47, ¶24.

¶9 A reviewing court is not bound by LIRC's determinations on questions of law but accords deference that recognizes LIRC's significant expertise. ***Holy Name School v. DILHR***, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982). Reviewing courts have identified three levels of deference applicable to LIRC's legal conclusions: great weight deference, due weight deference and *de novo* review. ***Brown v. LIRC***, 2003 WI 142, ¶13, 267 Wis. 2d 31, 671 N.W.2d 279. Great weight deference is appropriate where: (1) the agency is charged with administering the statute; (2) the interpretation of the statute is one of longstanding; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in application. ***Id.***, ¶16.

¶10 Joiner does not attempt to set forth the appropriate level of deference in her brief-in-chief, nor does she challenge LIRC's assertion that the great weight

level of deference applies. Unrefuted arguments are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). In according great weight deference, "we will uphold LIRC's decision so long as it was reasonable, even if we feel that an alternative interpretation is more reasonable."[3] ***Klatt***, 266 Wis. 2d 1038, ¶14. It is Joiner's burden to establish that LIRC's decision is unreasonable. *See* ***Bunker v. LIRC***, 2002 WI App 216, ¶26, 257 Wis. 2d 255, 650 N.W.2d 864.

¶11 At issue is whether Joiner is entitled to unemployment insurance benefits. The general rule is that an employee who voluntarily terminates employment is ineligible for unemployment insurance benefits. ***Klatt***, 266 Wis. 2d 1038, ¶15. Joiner relies on two statutory exceptions to this general rule. Neither argument is persuasive.

¶12 Joiner first argues that she was eligible for benefits because she voluntarily terminated her employment with good cause attributable to the employing unit. *See* WIS. STAT. § 108.04(7)(b). "'[G]ood cause attributable to the employing unit'" involves some fault of the employer and must be "'real and substantial.'" ***Klatt***, 266 Wis. 2d 1038, ¶15 (citation omitted).

¶13 Additionally, Joiner argues that she was eligible for benefits despite terminating her employment based on the exception set forth at WIS. STAT. § 108.04(7)(c). This subsection provides that the general rule "does not apply if the department determines that the employee terminated his or her work but had

[3] Joiner questions this holding. However, unless they are reversed or overturned, we are bound by our past decisions. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997) ("[O]fficially published opinions of the court of appeals shall have statewide precedential effect.").

no reasonable alternative because the employee was unable to do his or her work." ***Id.***

¶14 LIRC concluded:

> While the employee testified that she quit because she felt "targeted" by the employer and received "undue criticisms," there is no evidence in the record that the employee alerted management to her objections concerning the way that she was treated and her intention to quit if things did not change. Moreover, the employee continued working for several weeks after the final incident occurred. The employee also testified that she quit because she was unable to perform her duties after sustaining an off-duty injury. The employee did not present any medical evidence to substantiate her testimony. She admittedly failed to pursue alternatives short of quitting, such as seeking accommodations from the employer. Under the circumstances, the employee failed to establish that she quit with good cause attributable to the employer or for any other reason permitting the immediate payment of benefits.

Joiner has not established that this decision, which is supported by the record, is unreasonable. *See* ***Klatt***, 266 Wis. 2d 1038, ¶14; ***Bunker***, 257 Wis. 2d 255, ¶26.

¶15 Joiner goes on to claim that the ALJ improperly limited her opportunity to present supporting facts and asserts that if she had been allowed to present additional evidence, the outcome would have been different. On appeal, Joiner's brief includes findings of fact that she believes LIRC should have made and presents additional assertions that were not made at the hearing. *See* ***Briggs & Stratton Corp. v. DILHR***, 43 Wis. 2d 398, 409, 168 N.W.2d 817 (1969) (explaining that an appellant's "'what might have been' theory" is unlikely to be successful).

¶16 Here, the ALJ determined during her examination of Joiner that her exact reasons for resigning were the July 29, 2011 incident and the injuries Joiner

sustained as a result of her fall on August 14, 2011. Later in the hearing, when Joiner's representative[4] began asking about Joiner's health conditions approximately eight months prior to her resignation, the ALJ concluded "that seems a little too far removed to be relevant to the final trigger for quitting." "Decisions on relevance are left to the discretion of the hearing examiner, just as they are to that of a [circuit] court, and will be accepted unless there has been an [erroneous exercise] of discretion." ***Village of Menomonee Falls v. DNR***, 140 Wis. 2d 579, 610, 412 N.W.2d 505 (Ct. App. 1987). We, like the circuit court, conclude that based on the record, any limitations by the ALJ—including the ALJ's request that Joiner use her representative to ask questions on Joiner's behalf—were reasonable and were appropriately geared toward focusing the testimony as it related to the specific exceptions Joiner was relying on. *See* ***Heritage Mut. Ins. Co.***, 242 Wis. 2d 47, ¶25 n.13 (reviewing court may benefit from a lower court's analysis).

¶17 As such, we conclude LIRC's denial of unemployment insurance benefits was proper.

By the Court.—Order affirmed.

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

[4] Joiner was assisted by a law student during the hearing.