

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2026

Samuel A. Christensen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2025AP1248

Cir. Ct. No. 2024CV93

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MENARD, INC.,

PETITIONER-RESPONDENT,

V.

MICHAEL FLORIANA, SR.,

RESPONDENT,

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
JON M. THEISEN, Judge. *Affirmed.*

Before Stark, P.J., Hruz, and Gill, JJ.

¶1 GILL, J. Michael Floriana, Sr., sustained an injury while working for Menard, Inc., (“Menard”) as a forklift driver. Following his return to work, Floriana was disciplined four times in nine months for safety violations and his

employment was ultimately terminated. Floriana filed a worker's compensation claim, asserting that his termination was pretextual and, therefore, that Menard had violated WIS. STAT. § 102.35(3) (2023-24)¹ for discharging him without probable cause following a compensable work-related injury.

¶2 An administrative law judge ("ALJ") found that Menard had reasonable cause to terminate Floriana based on four documented safety violations. Floriana petitioned the Labor and Industry Review Commission ("LIRC") for review of the ALJ's decision. LIRC overturned the ALJ's findings, determining that: Menard's termination of Floriana on the basis of the four safety violations was pretextual; Menard did not have reasonable cause to discharge Floriana; and Menard had violated WIS. STAT. § 102.35(3). Menard sought review in the circuit court, which reversed LIRC's decision, holding that there was no credible and substantial evidence to support LIRC's finding that the termination was pretextual. LIRC now appeals the circuit court's order.

¶3 For the reasons explained below, we conclude that LIRC failed to adequately set forth the reasons, facts, and conclusions it relied on in setting aside the ALJ's findings. See *Operton v. LIRC*, 2016 WI App 37, ¶23, 369 Wis. 2d 166, 880 N.W.2d 169 (citing *Transamerica Ins. v. DILHR*, 54 Wis. 2d 272, 284, 195 N.W.2d 656 (1972)). Accordingly, we affirm the circuit court's order reversing LIRC's decision.

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

¶4 Floriana suffered a work-related back injury while he was employed as a forklift driver at a Menard distribution center. Sometime later, Floriana returned to work with temporary restrictions while receiving treatment for his injury.

¶5 On October 6, 2016, Floriana was observed not wearing his seatbelt on the forklift in violation of Menard's "Mandatory Use of Seat Belts" policy. Floriana received a written warning for this safety violation. The written warning, which was signed by Floriana, included the following statement: "Safety is the most important consideration when working at the Distribution Center. When you violate safety rules, you risk injuring yourself as well as others around you. We strive to have all team members go home each day in the same condition that they arrived in." The warning also cautioned that "Continued safety violations or a severe incident may result in immediate termination of employment."

¶6 A week later, Floriana was disciplined for a second safety violation. The written disciplinary report stated: "[Floriana] picked up and threw landscape rock from in front of the warranty center." Floriana described the object he threw as "a little pebble about the size of a quarter" and admitted "tossing it ... like four, five feet away" from a coworker. Floriana was suspended for three days. The disciplinary report again included the statement about the importance of safety and the same cautionary warning regarding continued safety violations and possible termination.

¶7 On May 16, 2017, Floriana was disciplined for a third safety violation. The written warning stated that Floriana "dropped product from 3rd level." Contrary to his training, Floriana drove the forklift while also raising the

forklift's tines at the same time. When Floriana came to a quick stop, the product slid off the forklift's tines. In addition to the written warning, Floriana was removed from the forklift for one week, and during that week he was required to retake forklift training by video and complete hands-on retraining with his assistant department manager. Once again, the written warning documented Menard's emphasis on safety and stated that termination could result if there were continued safety violations.

¶8 Floriana's work restrictions, which had been temporary since his return to work, became permanent on June 1, 2017. These permanent restrictions did not limit his ability to continue his work as a forklift driver. On June 13, 2017, less than a month after Floriana had undergone forklift retraining, Floriana was disciplined for his fourth and final safety violation. The violation was documented as: "[Floriana] tipped over a board plant pallet from about 10 to 12 [feet] in the air." A coworker's written statement concerning the incident said that as Floriana was transporting product by forklift, the product got "caught on the racking" and that Floriana continued to raise the forklift tines higher until the product slid off the forklift's tines. Floriana denied continuing to raise the product after it was caught, but he acknowledged that the product had been caught and that he could not stop it from falling to the ground.

¶9 Floriana was terminated following his fourth safety violation in nine months. Floriana's supervisor later testified that the decision to terminate Floriana was based only on Floriana's safety violations and that Floriana's work injury and restrictions had no bearing on that decision.

¶10 Thereafter, Floriana filed a claim for worker's compensation benefits, seeking a penalty against Menard under WIS. STAT. § 102.35(3) for

Menard's termination of his employment without reasonable cause following his work-related injury. After a hearing, an ALJ found that Menard had reasonable cause to terminate Floriana based on the four documented safety violations.

¶11 Floriana petitioned LIRC for review of the ALJ's decision. LIRC consulted the ALJ regarding the credibility of the witnesses, and LIRC's order ultimately turned on the matter of credibility. While the ALJ found the testimony of Menard's witnesses to be "straightforward and believable," LIRC found the testimony of Floriana and his witness to be more credible. In support of its order, LIRC cited to the testimony of one of Floriana's witnesses, a former forklift driver for Menard. According to LIRC, this witness convincingly testified that he was never disciplined for safety violations while employed with Menard, despite dropping product from his forklift about every two months and regularly not wearing his seatbelt. LIRC held that each disciplinary incident involving Floriana was pretextual and, therefore, Menard had failed to establish reasonable cause for Floriana's termination. On that basis, LIRC reversed the ALJ's decision.

¶12 Menard petitioned for judicial review of LIRC's decision. The circuit court determined that there was no credible and substantial evidence to support LIRC's finding that Menard's reasons for the termination were pretextual and that, as a result, Menard had failed to establish reasonable cause for Floriana's discharge. LIRC now appeals.

DISCUSSION

¶13 This appeal concerns the applicability of the penalty provisions of WIS. STAT. § 102.35(3), and LIRC's standard of review on the appeal of an ALJ's determination regarding the applicability of that statute's penalty provisions. The statute provides for remedies against "[a]ny employer who without reasonable

cause refuses to rehire an employee who is injured in the course of employment.” *Id.* While the statute refers to a refusal to rehire, the statute is also “applicable if the employee is rehired only to meet the technical requirements of [§] 102.35(3) and then is discharged.” *Dielectric Corp. v. LIRC*, 111 Wis. 2d 270, 277-78, 330 N.W.2d 606 (Ct. App. 1983). “Rehire” means “that the employer must reemploy the injured employee with the intention of continuing to keep this employee on the job.” *Id.* at 277. An employer is liable for penalties under § 102.35(3) for a “pro forma rehiring” when the employee is subsequently discharged without good cause. *Dielectric Corp.*, 111 Wis. 2d at 278 (italics omitted).

¶14 In order to make a prima facie case for a pro forma rehiring, the employee must first show he was injured at work and subsequently discharged. *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 123, 438 N.W.2d 823 (1989). If the employee makes that showing, the burden then shifts to the employer to show “reasonable cause” for the discharge. *Id.* Whether reasonable cause exists for such a discharge is a mixed question of law and fact. *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994). “Once the facts are established, whether they give rise to reasonable cause is a question of law.” *Id.* Determinations of witness credibility are findings of fact. *Robles v. Thomas Hribar Truck & Equip., Inc.*, 2020 WI App 74, ¶13, 394 Wis. 2d 761, 951 N.W.2d 853. Pretext is also a finding of fact. *Ray Hutson Chevrolet*, 186 Wis. 2d at 124. “We review LIRC’s factual findings and legal conclusions, not those of the circuit court.” *Anderson v. LIRC*, 2021 WI App 44, ¶10, 398 Wis. 2d 668, 963 N.W.2d 89.

¶15 “Parties in administrative proceedings are entitled to know why an agency set aside the findings of an ALJ and on what basis and what evidence the agency relied upon to make its contrary findings.” *Operton*, 369 Wis. 2d 166,

¶23. “Fundamental fairness requires that administrative agencies ... set forth the reasons why a fact-finder’s findings are being set aside or reversed, and spell out the basis for independent findings substituted.” *Transamerica*, 54 Wis. 2d at 284. In order to set aside an ALJ’s credibility determinations, the agency must: (1) show that it consulted with the ALJ; and (2) prepare a statement setting forth “the reasons, facts and conclusions [the agency] relied upon when rejecting” the ALJ’s credibility findings. *Mervosh v. LIRC*, 2010 WI App 36, ¶10, 324 Wis. 2d 134, 781 N.W.2d 236.

¶16 Over a period of about nine months, from October 2016 to June 2017, Floriana was disciplined for four different safety violations.² While the parties disagree on some of the circumstances that led to—and the good faith basis for—Menard’s finding that Floriana’s actions constituted safety violations, the fact that Floriana was disciplined for the four safety violations is not in dispute. LIRC’s finding that Menard had not established reasonable cause (and LIRC’s subsequent decision reversing the ALJ) was based primarily upon LIRC’s perception of witness credibility and LIRC’s determination that each safety violation for which Floriana was disciplined was pretextual.

¶17 Four witnesses plus Floriana testified before the ALJ, including three for Menard. The three Menard witnesses were employees of Menard who

² It is undisputed that Floriana suffered a work-related injury and that, after returning to work, he was discharged a year later. Therefore, Floriana met his initial burden of making a prima facie case for a pro forma rehiring. See *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 123, 438 N.W.2d 823 (1989). The burden then shifted to Menard to establish reasonable cause for Floriana’s discharge. See *id.*

had each acted as Floriana's supervisor during Floriana's employment.³ Floriana testified on his own behalf, and he also presented the testimony of a former Menard employee who had also worked as a forklift driver in the same department at Menard.

¶18 Floriana's witness, the former employee, testified that he was never disciplined for safety violations while employed with Menard, despite the fact he regularly failed to wear his seatbelt while operating a forklift and dropped product from his forklift "approximately once every two months." The former employee also knew of no other forklift drivers who were fired for dropping product. However, this former employee did not work under the same supervisors as Floriana,⁴ was unsure about when he quit Menard (stating it could have been anywhere from 2015 to 2017), and conceded that safety policies could have become more formalized after he left Menard.

¶19 Although Floriana asserted that he was also not aware of any other forklift driver who was fired, he did *not* testify that he knew of other Menard employees who had committed safety violations and were not disciplined for those violations. On the matter of his termination, Floriana's testimony was simply that he believed his work injury had something to do with his firing because Menard

³ The first Menard witness was the manager of the department Floriana worked in until the witness took a different position in January 2017. The second Menard witness succeeded that person as the manager of the department and supervised Floriana until Floriana's termination. The third Menard witness was the assistant manager of the department during 2016 and 2017.

⁴ The former employee did not know two of the three Menard witnesses. As to the third, Floriana's witness testified that person was "the supervisor of the supervisors" and never left his office.

“didn’t want to cater to me. They needed forklift drivers, and I could have [done] that job.”

¶20 In contrast, each of Menard’s three witnesses testified that safety was extremely important at Menard and echoed the words found on each of Floriana’s written disciplinary documents that Menard’s goal was for every team member to go home in the same condition they arrived each day. Two of Menard’s witnesses also testified that seatbelt violations were universally enforced and that “horseplay” (e.g., Floriana throwing a rock in the parking lot) was never tolerated.

¶21 As for the two dropped product safety violations (the third and fourth incidents), Floriana asserted that a number of factors led to the dropped product in both incidents, including the “tight fit” in the area where he was working and his inability to see in front of the pallet he was raising. Of the fourth and final incident, Floriana admitted violating the safety rules but stated he had to do so in order to get the job done.

¶22 Conversely, one of Menard’s witnesses testified that the general philosophy at Menard was that there are no “accidents,” meaning that damage to product or injuries are only caused by failure to follow proper procedures. Menard’s other two witnesses testified that it was Floriana’s responsibility to ensure that he could safely complete his forklift jobs and that if the incidents occurred the way Floriana described, then the proper procedure was to stop and ask for help. Therefore, the dropped product incidents were not *accidents*, but rather they were mistakes on Floriana’s part. None of Menard’s witnesses saw the dropped product incidents as they happened, but there was testimony that the fourth incident was a violation *based on how Floriana himself described that it*

occurred. Menard also relied on the description of the fourth incident from another Menard employee who was an eyewitness and saw Floriana drop the product. That witness provided a written statement regarding what he saw and verbally described the event to one of the Menard supervisors who ultimately made the decision to terminate Floriana.

¶23 Concerning the basis for Floriana’s termination, all three of Menard’s witnesses testified as to two significant considerations: the fourth incident occurred a mere three weeks after the third incident and Floriana’s retraining on the forklift; and Floriana’s continued violations caused serious concern for the safety of both Floriana’s coworkers and Floriana himself.⁵ The two supervisors involved in Floriana’s termination also explicitly testified that Floriana’s work injury and restrictions were of no consequence to that termination decision.

¶24 In its decision, LIRC stated that it had consulted with the ALJ regarding the ALJ’s credibility findings and summarized those findings. According to the ALJ, the testimony of Menard’s witnesses was “straightforward and believable, the answers were not evasive.” On the other hand, the ALJ found the former employee to be less credible, specifically because the former employee had not witnessed any of the events and neither knew Floriana’s supervisors nor worked under them. Finally, the ALJ did not find Floriana credible based on Floriana’s demeanor during the hearing, which included “scoffing, muttering, and shaking his head during the testimony of one of [Menard’s] witnesses.” The ALJ

⁵ One of Menard’s witnesses specifically noted that a significant concern regarding the fourth incident was that Floriana dropped the product, during lunch hours, onto a walkway that employees used to leave for lunch.

also noted that Floriana had to be admonished during his testimony to answer the questions posed to him, which gave the ALJ “the impression that [Floriana] felt he did not have to follow the rules at work.”

¶25 In contrast, LIRC’s findings relied heavily on the testimony of the former employee, with LIRC noting that he “credibly testified” that he was not disciplined for safety violations while employed at Menard. LIRC also found that Floriana “credibly testified that he was simply trying to perform his job to the best of his ability[,] and due to various circumstances beyond his control product was dropped on two occasions.” LIRC dismissed the testimony of the three Menard witnesses in favor of the testimony of the former employee, declaring that LIRC was “not persuaded” by the Menard witnesses’ testimony that there is no such thing as an accident. LIRC specifically noted that “this contention is hindered by the fact that none of [Menard’s] witnesses witnessed either of [the third or fourth forklift] events and were unable to provide anything beyond speculation as to how those incidents occurred.”

¶26 We are compelled to reject LIRC’s findings here as LIRC failed to set forth set forth “the reasons, facts and conclusions” that it relied on in rejecting the ALJ’s findings as to credibility of the witnesses. See **Mervosh**, 324 Wis. 2d 134, ¶10.

¶27 On appeal, LIRC concedes that the standards set forth in **Transamerica** and **Mervosh** require LIRC to explain its reasons for disagreeing with the ALJ, but it argues that it satisfied that requirement. In **Transamerica**, the court found that something more than a written opinion and mere “stated reasons” is required by an agency disregarding the findings of a factfinder. **Transamerica**, 54 Wis. 2d at 284. The agency must provide “the reasons why a fact-finder’s

findings are being set aside or reversed, *and spell out the basis for independent findings substituted.*” *Id.* (emphasis added); see also *Mervosh*, 324 Wis. 2d 134, ¶13 (stating that fundamental fairness requires an agency to “explain” a decision that reverses the factfinder).

¶28 Here, the former employee’s testimony was the only evidence LIRC cited in finding that the four safety violations for which Floriana was disciplined were pretextual—that is, that they were not legitimate causes for discipline and that Menard was issuing them solely to have cause to terminate Floriana because of his work injury and restrictions. LIRC failed, however, to *explain* why it ignored the ALJ’s finding that the former employee was incredible. In its decision, LIRC summarily rejected the ALJ’s credibility findings, stating: “[LIRC] finds the applicant’s testimony and the testimony of the applicant’s witness to be more credible.” LIRC provided no further detail or justification for setting aside the ALJ’s findings, beyond noting that the credibility of Menard’s witnesses was “hindered by the fact” that they did not personally witness the third and fourth safety violations and were speculating as to how those incidents occurred. This sole assertion is insufficient⁶ to rationalize LIRC’s *wholesale* rejection of those witnesses’ testimony in favor of Floriana’s witnesses. Additionally, the testimony is clear that although they did not personally witness the incidents, these witnesses did investigate each of the incidents and instituted progressive discipline.

¶29 LIRC also did not provide any insight into why it chose to wholly disregard the Menard witnesses’ testimony on the reasons that Floriana’s fourth

⁶ The assertion is also inaccurate. As explained above, the Menard witnesses relied on both Floriana’s descriptions of the incidents and an eyewitness’s statement as to the fourth incident.

safety violation required termination—namely, the violation’s recency in relation to Floriana’s forklift retraining and concern for the safety of Floriana and other Menard employees. LIRC further did not identify why it ignored the specific testimony of the Menard witnesses involved in Floriana’s termination, who each testified that Floriana’s work injury and restrictions were of no consequence to that termination decision. Finally, LIRC also provided no reason or explanation for why it found Floriana’s testimony and demeanor—which the ALJ stated gave the impression that Floriana believed he did not have to follow rules—was more compelling than that of the “straightforward, believable” testimony and not evasive answers of the three Menard witnesses.

¶30 The parties to this proceeding were entitled to know the basis for LIRC’s rejection, and fundamental fairness demands that LIRC provide such insight. See *Operton*, 369 Wis. 2d 166, ¶23; *Transamerica*, 54 Wis. 2d at 284. LIRC simply failed to provide, beyond mere “stated reasons,” any explanation for its dismissal of the ALJ’s findings and substitution of its own findings instead. That lack of reasoning, explanation and insight constitutes a lack of due process, which necessitates our rejection of LIRC’s findings.

¶31 In summary, we conclude that LIRC did not provide the parties with sufficient due process because it failed to provide reasoning and an explanation for its rejection of the ALJ’s findings on the credibility of the witnesses. Accordingly, we overturn LIRC’s findings on appeal and affirm the circuit court’s order which set aside LIRC’s decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.