COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1779 **Cir. Ct. No. 2015CV50**

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

TCAT CORPORATION,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

ESTHER LEE PETERSON,

RESPONDENT.

APPEAL from an order of the circuit court for Richland County: WILLIAM ANDREW SHARP, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman, and Blanchard, JJ.

¶1 PER CURIAM. Employer TCAT Corporation, which owns a gas station, appeals a circuit court order affirming a decision of the Labor and Industry Review Commission in favor of Esther Peterson, a former clerk at the gas station, regarding her retaliatory discharge complaint. The employer challenges the Commission's conclusion that the employer discriminated against Peterson, in violation of the Wisconsin Fair Employment Act, WISCONSIN STAT. §§ 111.31-.395 (2015-16),[1] by terminating her employment because Peterson informed the employer that she planned to complain to a district attorney about the employer reducing Peterson's paycheck to cover losses from gas drive-offs.

¶2 On appeal, the employer makes three arguments: (1) the Commission improperly considered a portion of Peterson's administrative hearing testimony, which the Commission should have ignored because Peterson violated a discovery rule; (2) the Commission misinterpreted the fair employment act in concluding that it applies to the facts here; and (3) even if the Commission correctly interpreted the act, the Commission's decision is not supported by substantial evidence. We reject the employer's arguments and affirm.

BACKGROUND

¶3 The following summary is taken from pertinent facts found by the Commission. Peterson worked as a clerk at the employer's gas station. One

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Saturday, Peterson learned that the employer had deducted money from her paycheck in a purported attempt to hold Peterson responsible for gas drive-offs that the employer believed had occurred while Peterson was working. Upset by the deductions, Peterson tried to reach the co-owners of the employer by telephone. Unsuccessful in that effort, Peterson wrote the following note and left it for one co-owner, Cheri Crook, at the station that Saturday night:

> Cheri
>
> Exactly why did you take $87.37 out of my check[?] I had a $30 drive off. I will be talking to the D.A. on Monday about this since you will not answer my calls.
>
> Esther

¶4 On Sunday, having received the note, Cheri attempted to call Peterson to discuss it. Unable to reach Peterson directly, Cheri left Peterson a voicemail, asking her to call to discuss the note. On Monday, Cheri left a message for a co-worker of Peterson's, stating that Cheri had removed Peterson from the work schedule because of "a note saying something about going to the D.A."

¶5 Peterson was scheduled to work at the station each day, Tuesday through Saturday, following the Saturday on which she left the note. On Tuesday, Peterson went to the station before her scheduled night shift to try to talk to Cheri, but a co-worker informed her that Cheri had left for the day. The co-worker also informed Peterson that a different employee was now scheduled to work in place of Peterson that night. Peterson subsequently learned that her name had also been removed from all slots on the work schedule for that week and for the following week. Cheri told Peterson on Thursday that Peterson had been removed from the schedule because of Peterson's "nasty note."

¶6 Peterson filed a labor standards complaint with the Wisconsin Department of Workforce Development, alleging that the gas drive-off deductions violated the fair employment act. Peterson filed a separate complaint with the department alleging that she had been discharged from her employment in retaliation after she left the note for Cheri.[2] Only the retaliatory discharge complaint is before us in this appeal.

¶7 After holding a hearing on the retaliatory discharge complaint, an administrative law judge concluded that the employer violated WIS. STAT. § 111.322(2m)(a) and (2m)(d) by terminating Peterson's employment based on Peterson's note. On review, the Commission agreed with the administrative law judge. The employer sought review by the circuit court, which affirmed the Commission's decision. The employer appeals.

DISCUSSION

¶8 We review the Commission's decision on appeal and not the circuit court's decision. ***Knight v. LIRC***, 220 Wis. 2d 137, 147, 582 N.W.2d 448 (Ct. App. 1998). We now address in turn each of the employer's three arguments challenging the Commission's decisions.

The Commission's Consideration Of Testimony By Peterson

¶9 The employer's first argument is a meritless challenge to the discretionary decision of the Commission to consider certain evidence that was

[2] Peterson initially complained to the department of additional alleged labor standards violations, but those are not before us in this appeal.

admitted at the administrative hearing. Resolving this argument does not require consideration of the merits of Peterson's retaliatory discharge claim.

¶10 At various stages in the process (complaint, deposition, and administrative hearing), Peterson provided somewhat differing accounts regarding her whereabouts on the Sunday and Monday after she left the note and regarding when she first heard Cheri's voicemail. For ease of reference we will refer to all of Peterson's testimony at the administrative hearing that diverged from prior statements she had made in these proceedings as "the new assertions."

¶11 At the administrative hearing, the employer cross examined Peterson regarding the new assertions and did not argue that there was a discovery problem. However, the day after the hearing, the employer took a different approach, asking the administrative law judge to sanction Peterson for having failed to notify the employer before the hearing that she would be making assertions that would diverge in some respects from her prior positions in the complaint and at the deposition. More specifically, the employer filed a post-hearing motion to ignore all of the testimony containing new assertions. The employer requested a new evidentiary hearing that would delve into the question of when Peterson changed her mind on related issues and realized that she would be presenting new assertions at the hearing. The employer argued that, if the administrative law judge put to the side the new assertions, all that would remain would be evidence that Peterson voluntarily resigned and was not discharged.

¶12 Without holding a new evidentiary hearing, the administrative law judge denied the post-hearing motion to ignore the new assertions, reasoning that the employer's use of Peterson's earlier statements to cross examine her at the hearing was an adequate, routine way to address conflicts between testimony and

prior statements and positions. The administrative law judge noted that, during the hearing, the employer had had the opportunity to impeach Peterson by using her complaint and deposition testimony. The administrative law judge reasoned that ignoring the new assertions would not be an appropriate response, in part because nothing prevented the administrative law judge from properly exercising her obligation to weigh inconsistencies in Peterson's statements and testimony.

¶13 The Commission considered all of Peterson's accounts and credited the version of events that she gave at the hearing. *See* ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989) (the Commission has responsibility to make credibility determinations and to weigh the evidence).

¶14 The employer contends that the Commission erroneously exercised its discretion in considering the new assertions. We reject this argument based on our conclusion that the Commission properly acted within its discretion in crediting Peterson's new assertions. Moreover, the employer fails to persuade us that ignoring the new testimony would have mattered to the determination of whether Peterson was discharged or voluntarily resigned.

¶15 A court's decision to grant or deny a motion to impose a sanction for a discovery violation is discretionary. WIS. STAT. § 804.12(4); ***Sentry Ins. v. Davis***, 247 Wis. 2d 501, ¶19, 634 N.W.2d 553 (Ct. App. 2001). We review discretionary decisions by administrative agencies using the same standard of review that we use for circuit court discretionary decisions: the agency must have made a reasonable determination based on the relevant facts and the proper legal standard. *See* WIS. STAT. § 227.57(8); ***Verhaagh v. LIRC***, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996). The burden to demonstrate an erroneous

exercise of discretion rests on the party claiming the exercise of discretion was improper. ***Verhaagh***, 204 Wis. 2d at 160-61.

¶16 We have not summarized details regarding the inconsistent statements, but it is sufficient to explain our conclusion on this issue that the inconsistencies concerned only Peterson's whereabouts on the Sunday and Monday after she left the note and the precise timing regarding when Peterson first heard Cheri's message asking Peterson to call her. The employer fails to meet its burden to demonstrate an erroneous exercise of discretion in the Commission's determination that the new testimony did "not appear to have any bearing on the relevant facts of this case."

¶17 As for the employer's apparently intended argument that the administrative law judge was obligated to hold a new evidentiary hearing, the employer provides no support for such a position and further provides us with no reason to conclude that the result before the Commission would have been different if there had been a new evidentiary hearing.

The Commission's Interpretation Of The Wisconsin Fair Employment Act

¶18 The employer's second argument brings us to the merits of Peterson's retaliatory discharge claim. It is a narrow argument, which we summarize after first describing the pertinent statutes.

¶19 The fair employment act prohibits discharge of an employee because the employee "files a complaint or attempts to enforce any right under" various statutes listed. *See* WIS. STAT. § 111.322(2m)(a) ("subpart (2m)(a)"). One statute listed in subpart (2m)(a) is WIS. STAT. § 103.455, which prohibits employers from making deductions to an employee's paycheck based on loss or theft from the

employer if the employer has not already obtained the employee's authorization in writing to make a deduction. *See* WIS. STAT. §§ 111.322(2m)(a), 103.455. The fair employment act further prohibits discharge of an employee because an "employer believes that the [employee] engaged or may engage in" the activity of filing a complaint or attempting to enforce rights that include those created under § 103.455. *See* § 111.322(2m)(d) ("subpart (2m)(d)"). Thus, in the terms of these statutes, Peterson's retaliatory discharge claim was that the employer discharged her because the employer believed that she had filed or would file a complaint or would otherwise attempt to enforce her right to prevent deductions from her paycheck without her authorization.

¶20 The employer's narrow argument is the following. Peterson's statement that she was going to *the district attorney* about the payroll deductions was not sufficient "to put the employer on notice that Peterson" intended to enforce her rights under WIS. STAT. § 103.455, because there was the potential for retaliatory discharge only if Peterson had made an express statement to the employer that she planned to go to *the department*.[3] That is, the employer apparently contends that the fair employment act does not apply to the facts here because the statute refers only to enforcement by the department, not by the district attorney. We reject this narrow argument about the person or entity to whom Peterson said she was taking her concerns. It is obvious that, at a

[3] Peterson makes an argument based on ***Wisconsin Dep't of Justice v. Wisconsin Dep't of Workforce Dev. ("Schigur")***, 2015 WI 114, 365 Wis. 2d 694, 875 N.W.2d 545, that appears to be completely unsupported. This involves the proposition that ***Schigur*** mandates that WIS. STAT. § 111.322(2m) must be strictly construed in favor of employers. We are not able to follow the employer's argument as to what bearing any statement in ***Schigur*** could have on our interpretation of § 111.322(2m). Further, we note that ***Schigur*** explains that it addresses only "a narrow question of statutory interpretation" of WIS. STAT. § 230.80-.89, a statute not at issue here. *See* ***id.*** at ¶3. We do not address the employer's strict construction argument further.

minimum, Peterson's note to the employer stating that she "will be talking to the D.A." about the wage deductions is sufficient to support a determination that the employer violated subpart (2m)(d) by discharging Peterson because the employer believed that Peterson "may engage" in the "activity" of "attempt[ing] to enforce" her rights under § 103.455. *See* § 111.322(2m)(d).

¶21 In this context, when reviewing questions of law, including those of statutory interpretation, "we apply one of three levels of deference to the agency conclusion: 'great weight,' 'due weight,' or 'de novo.'" ***Knight***, 220 Wis. 2d at 147 (quoted source omitted). The parties disagree about the proper standard of review of the Commission's statutory interpretation in this case. However, for reasons we now explain, we conclude that the Commission's interpretation of the statute is correct under any level of deference, and we therefore need not address the standard of review on this topic.

¶22 We first observe that we need not determine the precise meaning of the phrase "files a complaint" under subpart (2m)(a), such as whether subpart (2m)(a) strictly contemplates the filing of a formal complaint with the department. We need not address that issue because the plain language of subpart (2m)(d) sweeps much more broadly, prohibiting a discharge based on an employer's belief that an employee "may engage" in the "activity" of "attempt[ing] to enforce" her rights under WIS. STAT. § 103.455. *See* WIS. STAT. § 111.322(2m)(d).

¶23 Having made that point about the reach of subpart (2m)(d), we conclude that, based on a plain language interpretation, Peterson was not required to provide evidence that she explicitly referenced the department in a communication with her employer in order to be protected from a retaliatory discharge under the fair employment act, and instead it was enough that she spoke

of going to the district attorney. Neither subpart (2m)(d) nor WIS. STAT. § 103.455 contains a requirement that the employee mention the department in order to be protected from retaliation. More to the point, discharge is explicitly prohibited if it is based on a belief that the employee has engaged, or *may* engage, in a mere *attempt* to enforce the right at issue. Peterson's note plainly conveyed to the employer a plan to pursue enforcement of her rights in connection with payroll deductions for theft, and that her immediate plan was to go to the district attorney. The Commission correctly operated from the premise that, in order to be protected from retaliation under subpart (2m)(d), an employee who informs an employer that he or she plans to complain about an alleged violation of one of the provisions listed in subpart (2m)(a) is not required to specifically tell the employer that the department is the next stop in a planned attempt to enforce a right identified in subpart (2m)(a).

¶24 This is all the more clear because district attorneys in Wisconsin play a role in enforcing wage claims in certain circumstances, *see* WIS. STAT. ch. 109, and therefore Peterson's note did not represent a vague or unclear plan to enforce her rights. For that matter, her statement that she planned to "talk to the D.A." could reasonably have been seen as a statement that she planned to file a wage claim under ch. 109, rather than a more specific claim under WIS. STAT. § 103.455, and attempts at enforcement under ch. 109 activity are also protected under WIS. STAT. § 111.322(2m). *See* § 111.322(2m)(a).[4]

[4] We rely on plain meaning interpretations of WIS. STAT. §§ 111.322(2m) and 103.455, and our analysis does not depend on any precedent from the Commission. However, we observe that the Commission has held "that the law does not require any 'magic words,' and that an employee need not make an explicit threat to file a wage claim" to come under the protection of the Fair Employment Act are consistent with our reading of the statute. *See* ***Jancik v. Advantage Learning Sys.***, ERD Case No. CR2000100941 at 1 (LIRC, Sept. 16, 2005); *see also* ***Travis v. DC***
(continued)

Substantial Evidence To Support The Commission's Decision

¶25 The employer argues that there was not substantial evidence to support the Commission's findings that Peterson did not voluntarily terminate her employment, but instead, that the employer discharged her in violation of WIS. STAT. § 111.322(2m). We reject this argument because a reasonable person could have reached the same conclusions as the Commission.

¶26 We apply a "substantial evidence" standard of review to agency fact finding. ***Knight***, 220 Wis. 2d at 149; WIS. STAT. § 227.57(6). "Substantial evidence" is defined as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" ***Knight***, 220 Wis. 2d at 149 (quoted source omitted). Under the substantial evidence standard, we will not set aside an agency conclusion unless no reasonable person could have reached such a conclusion. ***Id.*** (citation omitted). Additionally, we do not evaluate the credibility or weight of the evidence regarding any of the agency's findings of fact, but instead we review the record for substantial evidence which supports the findings. ***Id.*** at 149-50.

¶27 Here, a reasonable mind could infer from relevant evidence in the record that the employer discharged Peterson based on the belief that she had

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Nevels Trucking, Inc., ERD Case No. 200003726 (LIRC, Oct. 7, 2002) (employee fired after telling employer he had spoken to DOT about wage issue protected under act); ***Hickman v. Milwaukee Immediate Care Center***, ERD Case No. 199702676 (LIRC, Feb. 16, 2000) (employee fired after telling employer she had spoken to Labor Standards Bureau about employer's "illegal" manner of paying overtime protected under the act). In ***Jancik***, the Commission explained that the employees' conduct in ***Hickman*** and ***Travis*** came under the protection of the act because the employees there "notified their employers that they had spoken to state authorities about their wage issues" and the employers "believed the employees were planning on causing problems for them with the state." ***Jancik***, at 2.

engaged or may engage in an attempt to enforce her rights under WIS. STAT. § 103.455 regarding payroll deductions made without prior written authorization. For example, a reasonable mind might accept as adequate the testimony, summarized above, that Cheri told both Peterson and a co-worker that Peterson's name had been removed from the work schedule based on the note, and that Cheri referred to it as a "nasty note." Moreover, there was the evidence that Peterson missed no scheduled shifts before Cheri removed Peterson's name from the schedule.

¶28 On the specific question of discharge, as opposed to voluntary resignation, the Commission could reasonably rely on its finding that Peterson told Cheri that she wanted to keep her job, that Cheri was unwilling to put Peterson back on the schedule, and that when Peterson later attempted to speak with co-owner John Crook, per Cheri's suggestion, John refused to talk to Peterson. Moreover, the Commission found that Cheri provided a series of incredible, inconsistent explanations for the employment separation.

¶29 The employer argues that the Commission's decision is supported "only" by "uncorroborated hearsay" rather than by substantial evidence. However, the argument is meritless on its face, because the employer points to only one example of allegedly uncorroborated hearsay, namely, Peterson's testimony that, when she reported to work before her shift on Tuesday, a coworker told her that someone else had been assigned to work Peterson's shift that night and that Cheri was currently unavailable to talk to Peterson. Moreover, under the pertinent administrative code provision, hearsay is permissible in these types of hearings, so long as the decision is not based exclusively on hearsay, which is clearly not the case here. *See* WIS. ADMIN CODE § DWD 140.16 (through July 2017).

CONCLUSION

¶30 For the foregoing reasons, we affirm the decision of the circuit court affirming the Commission's decision.

By the Court.—Order affirmed.

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