

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 30, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JEROME FOODS, INC. AND SENTRY INSURANCE
COMPANY,**

PLAINTIFFS-APPELLANTS,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
TERRI STRZYZEWSKI,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Barron County:
JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jerome Foods, Inc., and its insurer appeal a judgment affirming a decision of the Labor and Industry Review Commission in which the commission found that Jerome Foods refused to rehire Terri

Strzyzewski without reasonable cause. Jerome Foods argues that Strzyzewski failed to prove a *prima facie* case that she applied for rehire and her employer refused to rehire her because of a work-related injury. It also argues that it had reasonable cause not to rehire Strzyzewski after she reapplied. We reject these arguments and affirm the judgment.

¶2 Strzyzewski broke her ankle while working for Jerome Foods in February 1992. After undergoing surgery three times, her doctors restricted her to sedentary work in a warm environment. In October 1992, she was placed on indefinite layoff status and was told to watch for available positions within her restrictions. Jerome Foods' personnel staff indicated that they would call her if positions became open within her restrictions. They never contacted her.

¶3 On August 10, 1993, after completing one semester of micro computer office assistant training, Strzyzewski wrote a letter to the human resource manager enclosing a copy of her current restrictions and indicating her interest in employment with Jerome Foods. The manager replied by letter that her restrictions had essentially not changed and that there were no openings at Jerome Foods within her restrictions at that time.

¶4 In November 1993, Strzyzewski applied for a specific job in the human resources department that was ultimately given to another person. Strzyzewski was turned down for the position on December 23, and, on that same day, received notice that her job had been terminated.

¶5 The commission concluded that Jerome Foods had a legitimate reason to hire the other individual for that specific job. However, it affirmed the administrative law judge's finding that Jerome Foods unreasonably failed to rehire Strzyzewski beginning at the end of May 1993. Its decision was substantially

based on Jerome Foods' knowledge of Strzyzewski's limitations, her retraining, and her desire to return to work. Jerome Foods' personnel office employees testified that there were job openings, potentially within Strzyzewski's restrictions, from May through December 1993. After November 1993, entry level positions for office work became available, but no one contacted Strzyzewski.

¶6 To establish an employer's liability under WIS. STAT. § 102.35(3) (1999-2000) for unreasonable refusal to rehire an injured employee, six conditions must be met. The burden was on Strzyzewski to establish that she had been an employee, had sustained a compensable injury, had applied for rehire and that Jerome Foods refused to rehire her at least in part because of the injury sustained at work. *See West Bend Co. v. LIRC*, 149 Wis. 2d 110, 126, 438 N.W.2d 823 (1989). If the employee makes a *prima facie* case on those four elements, the burden switches to the employer to show that suitable work was not available within her restrictions and/or that it had reasonable cause not to rehire the claimant. *Id.* at 123. Jerome Foods argues that Strzyzewski failed to establish that she applied for rehire or that Jerome Foods refused to rehire her because of her injury. Even if she made a *prima facie* case, Jerome Foods argues that the commission's finding that Jerome Foods hired a more qualified applicant for the human resource position precludes any finding that Jerome Foods unreasonably failed to rehire Strzyzewski.

¶7 The commission reasonably found that Strzyzewski had applied for work with Jerome Foods as of the end of May 1993. The evidence shows that Jerome Foods' personnel office was aware of Strzyzewski's medical restrictions and her desire to work for them within those restrictions. The personnel office indicated they would call her when positions became available. They did not call her even though office positions periodically became available. All that was

required was for Strzyzewski to express an interest in working for Jerome Foods in a different capacity. *See Hill v. LIRC*, 184 Wis. 2d 101, 111-12, 516 N.W.2d 441 (Ct. App. 1994). It was not necessary for Strzyzewski to identify any specific position to constitute an application for employment, and her application need not be accomplished through any formal written communication. *Id.* The commission reasonably found that the evidence supported the administrative law judge's finding that Strzyzewski applied for another position with Jerome Foods by the end of May 1993.

¶8 Jerome Foods' remaining arguments are premised on the erroneous assertion that Strzyzewski's letter of August 1993 or formal application in November 1993 constituted her first applications for rehire. Its arguments that positions were not available and that it had sufficient grounds for hiring another applicant for the human resources position do not address its continuing failure to hire her for other office positions after May 1993. Jerome Foods' personnel office employees testified that entry level office jobs were available periodically after May 1993 and were not offered to Strzyzewski despite their promise to call her if positions became available within her restrictions. Jerome Foods offered no valid reason for its failure to hire Strzyzewski for an office job other than the human resource assistant position that opened in November 1993. Therefore it failed to meet its burden of proving that suitable work was not available within Strzyzewski's restrictions or that it reasonably refused to rehire her.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

