

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARY RUTH CLARK,

Petitioner-Appellant,

v

SWARTZ CREEK COMMUNITY SCHOOLS  
BOARD OF EDUCATION,

Respondent-Appellee.

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UNPUBLISHED  
December 3, 2013

No. 310115  
State Tenure Commission  
LC No. 08-000062

Before: FORT HOOD, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Petitioner/appellant Mary Ruth Clark appeals by leave granted an April 11, 2012 order of the State Tenure Commission wherein the Commission found that petitioner was not entitled to any damages from August 23, 2008 through May 16, 2011, during the time in which petitioner was wrongfully denied continuous employment with respondent Swartz Creek Community Schools. For the reasons set forth in this opinion, we affirm.

Petitioner started working for respondent as a teacher in 1967. It is undisputed that from August 23, 2008 through May 16, 2011, respondent wrongfully denied petitioner continuous employment in violation of the Teacher Tenure Act (TTA), MCL 38.71 *et seq.* The issue in this case involved whether petitioner acted with reasonable diligence to mitigate her damages during that time period. An administrative law judge (ALJ) held an evidentiary hearing where respondent introduced evidence that there were approximately 30 open teaching positions during the time period within a 25-mile radius of petitioner's home that petitioner was qualified to teach. The positions were posted online and applicants could apply through a job-posting system called AppliTrack. Petitioner did not apply for any of the positions because she claimed that she was unaware of the postings and did not know how to apply for them. Petitioner offered extensive testimony concerning other efforts she claimed to have taken in order to find employment. The ALJ held that petitioner made reasonable efforts to obtain alternate employment from August 23, 2008 through May 15, 2010. Both parties filed exceptions.

On April 11, 2012, the Tenure Commission reversed the ALJ, finding that petitioner failed to act with reasonable diligence to mitigate her damages for the entire time that she was unemployed and therefore she was not entitled to any damages. This Court granted petitioner's application for leave to appeal the Commission's order.<sup>1</sup>

Petitioner contends that the Commission erred in finding that she failed to use reasonable diligence to mitigate her damages.

We review the Tenure Commission's findings of fact to determine whether they are supported by competent, material, and substantial evidence on the whole record. *Beebee v Haslett Pub Sch*, 406 Mich 224, 231; 278 NW2d 37 (1979); *Tomczik v State Tenure Com*, 175 Mich App 495, 499; 438 NW2d 642 (1989). "Substantial evidence" is evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *Tomczik*, 175 Mich App at 499. Review of an agency decision "must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Vanzandt v State Employees Retirement Sys*, 266 Mich App 579, 588-589; 701 NW2d 214 (2005) (quotation omitted). "An agency's findings of fact are afforded deference, particularly with regard to witness credibility and evidentiary questions." *Id.* "It is not a reviewing court's function to resolve conflicts in the evidence or to pass on the credibility of witnesses." *Id.*

A teacher who is damaged as a result of a violation of the TTA is entitled to damages, but that teacher must make reasonable efforts to mitigate her damages. *Harper Woods Fed of Teachers v Bd of Ed*, 103 Mich App 649, 652-653; 302 NW2d 857 (1981); *Shiffer v Bd of Ed*, 393 Mich 190, 197-199; 224 NW2d 255 (1974). The school district has the burden to show that the teacher failed to mitigate by showing that through "reasonable diligence" the teacher "might have secured employment of the same grade in the same locality where she was employed to teach." *Harper Woods*, 103 Mich App at 653 (quotation omitted).

Determining the "reasonableness" of a job search is a fact-laden inquiry requiring thorough evaluation of, for example, the earnestness of a plaintiff's motivation to find work and the circumstances and conditions surrounding his job search, as well as the results of it . . . *Much of this inquiry depends upon determinations of credibility, which are far more within the competence of the trial court than within the competence of appellate judges reading dry records.* [*Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998) (emphasis added).]

The Commission found that there were 30 positions in the relevant locality and that petitioner did not apply to any of them. The Commission found that petitioner, acting with

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<sup>1</sup> *Clark v Swartz Creek Cmty Sch Bd of Ed*, unpublished order of the Court of Appeals, entered January 23, 2013 (Docket No. 310115).

reasonable diligence, could have discovered and applied for the open teaching positions. Here, the record supported the Commission's finding. Petitioner admitted she possessed at a minimum, rudimentary computer skills. Petitioner testified that she went to Michigan Works! and the public library and received help using a computer. Petitioner owned a laptop and she testified that she used Google to search for jobs online at Michigan Works! or at the public library. Petitioner testified that she searched for school districts on Google. Seemingly, the Commission found that she lacked credibility when she testified that none of the school districts that she called informed her that jobs were posted online. We defer to the Commission on issues of witness credibility. A "reasoning mind" could accept that petitioner had the ability to locate the jobs posted on the school district websites and apply for the positions. *Tomczik*, 175 Mich App at 499. Notwithstanding jobs on the AppliTrack system, the record supported the Commission's finding that petitioner's job search efforts as a whole fell below a standard of reasonableness.

With respect to the 2008-2009 school year, the Commission found as follows:

[I]n September 2008, [petitioner] presented herself at Swartz Creek High School, and . . . was denied employment at that time . . . Given the ongoing controversy between [the parties] . . . we cannot find that this effort to return to work can be considered in determining whether she exercised reasonable diligence. There was no other evidence showing efforts to secure employment for the 2008/2009 school year, and we find that it cannot be said that appellant exerted even minimally sufficient effort to secure employment during that year.

Petitioner has failed to show that these findings were unsupported by the evidence. Respondent and petitioner were involved in an ongoing legal dispute and the Commission concluded that it was unreasonable for petitioner to expect that she would have been allowed to return to work in September 2008 given the circumstances. Moreover, petitioner fails to cite documentary evidence showing that she engaged in job search efforts during the 2008/2009 school year. Evidence showed that petitioner created her Talent Bank account in 2007, but she only conducted 13 activities in total during the entire time that she had the account and her account was "inactive" as of September 2009. The inactivity contradicted petitioner's testimony that she searched for "hundreds" of jobs and spent "hours" searching for jobs on the Talent Bank and went to Michigan Works! once per month.

With respect to the 2009/2010 school year, the Commission found as follows:

[E]vidence relevant to that school year included a \$3.50 Walmart receipt dated May 21, 2009, which appellant testified was for photocopying her resume and for faxing documents in support of her unemployment . . . In addition, a June 30, 2009, postcard from Durand Area Schools . . . acknowledged receipt of appellant's resume . . . Another exhibit was an envelope addressed to Heartland Consolidated Schools . . . stamped "Return to Sender" . . . Also introduced into evidence was an envelope addressed to Davenport University . . . stamped "Return to Sender" . . . [Petitioner] . . . could not recall if she resent the envelope to Davenport . . . but that she was "pretty sure" she resent the one to Hartland. . . .

[Petitioner] testified that she went to the Michigan Works! office approximately once a month . . . The evidence included an [unemployment form signed by [petitioner] on January 27, 2010 [showing she contacted six employers] . . . [petitioner] worked for the Census Bureau for a short time . . . According to [petitioner] documents related to her job search efforts were destroyed or stolen when her house was burglarized on June 8, 2010.

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[Petitioner] should have applied to a majority of school districts within a reasonable distance of her home to attempt to secure employment for the 2009/2010 school year. There was no evidence that she did so. Based on the record, we find that appellant did not exercise reasonable diligence to secure employment during the 2009/2010 school year.

With respect to the remainder of the 2010-2011 school year before petitioner was reinstated on May 16, 2011, the Commission made the following findings:

[Petitioner] was reinstated near the end of the 2010/2011 school year. When asked whether she had documentation of her job search efforts between June 2010 (when her home was burglarized) and her reinstatement, appellant testified, “not with me today. I would have to look for those.” []

[] The record is devoid of evidence that appellant applied to any particular school district, much less a majority of school districts in the relevant locality, for the 2010/2011 school year. For this reason, we agree . . . that [respondent] proved by a preponderance of the evidence that appellant did not exercise reasonable diligence to secure employment for that school year.

Petitioner fails to show how these findings were not supported by competent, material, and substantial evidence on the record. Here, during this entire time period, documentary evidence showed that petitioner applied to Durand Area Schools and the Census Bureau, and that she contacted six employers for purposes of unemployment compensation.<sup>2</sup> Petitioner attempted to send applications to Davenport and Hartland, but she could not confirm that she resent those applications after they were returned as undeliverable as petitioner sent them to the wrong addresses. That petitioner did not know the correct address of school districts underscores the Commission’s findings. Such information, especially for a school teacher, is widely disseminated and very easy to obtain. Accordingly, the Commission did not err in concluding

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<sup>2</sup> Copies of a cell phone bill, newspaper classified ads, a letter from Tusculum College, information on obtaining a Tennessee teaching certificate, and testimony of an interview in 2007 were all dated outside the applicable time period and therefore were irrelevant to the Commission’s findings.

that this documentary evidence did not amount to a reasonably diligent job search. Otherwise, evidence of petitioner's mitigation efforts turned on her credibility and issues of credibility fall within the purview of the Commission. *Vanzandt*, 266 Mich App at 588-589. Here, the Commission could have concluded that petitioner lacked credibility. Petitioner's job search efforts were disorganized and unsubstantiated; her testimony was vague and replete with inconsistencies. Petitioner did not recall details associated with the potential employers that she allegedly contacted. Petitioner could not recall the year that she claimed to have contacted or applied to numerous employers. Petitioner claimed to have lost numerous documents related to her job search in a home burglary, but she could not explain why she did not have similar documents from the 11 months after the burglary. In short, the Commission's finding that petitioner did not act with reasonable diligence to mitigate her damages during the entire time she was unemployed was supported by competent, material, and substantial evidence.<sup>3</sup>

Next, petitioner contends that the Commission erred in finding that respondent's repeated failure to comply with its orders was irrelevant to the mitigation issue and she claims that respondent acted with "unclean hands" in refusing to allow her to return to work. Petitioner conflates the issue of mitigation with the issue of her wrongful termination. The Commission had already held that respondent wrongfully terminated petitioner. Although respondent wrongfully denied petitioner employment, petitioner nevertheless had a duty to mitigate her damages. *Harper Woods*, 103 Mich App at 653. Respondent's wrongful conduct was unrelated to whether petitioner took reasonable steps to mitigate her damages.

Petitioner compares her case to *Rumph v Wayne-Westland Community Schools*, (STC 67-2) (1979), and claims, like in that case, she had an "immediate expectation of reinstatement" and this expectation "tempered her affirmative duty to actively seek alternative employment." Contrary to petitioner's argument, this case is dissimilar to *Rumph*. Here, petitioner did not have a reasonable expectation of reinstatement. Our Supreme Court denied respondent's motion for leave to appeal the issue of wrongful termination on December 17, 2010. See *Clark v Swartz Creek Community Sch*, 488 Mich 993; 791 NW2d 434 (2010). However, respondent moved for reconsideration of that order and our Supreme Court did not deny respondent's motion until May 24, 2011, eight days after petitioner was reinstated. See *Clark v Swartz Creek Community Sch*, 489 Mich 937; 797 NW2d 164 (2011). Thus, unlike the school district in *Rumph*, here, respondent had not exhausted its appeals long before it reinstated petitioner. Accordingly, the Commission did not commit legal error in finding that the unique factual situation in *Rumph* was inapplicable in the present case. Moreover, the record was devoid of evidence that petitioner made any effort to obtain employment during the 2010-2011 school year; thus, it is unlikely that the Commission would have found that petitioner's job search efforts satisfied any reduced burden.

Next, petitioner contends that the Commission erred when it affirmed the ALJ's imposition of sanctions. We review assessment of discovery sanctions for an abuse of discretion.

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<sup>3</sup> Given our resolution of this issue, we need not address petitioner's argument with respect to the ALJ's calculation of damages.

*Traxler v Ford Motor Co*, 227 Mich App 276, 282; 576 NW2d 398 (1998). An abuse of discretion occurs when a tribunal’s decision “falls outside the range of reasonable and principled outcomes.” *Loutts v Loutts*, 298 Mich App 21, 26; 826 NW2d 152 (2012) (quotation and citations omitted).

Before the evidentiary hearing, the ALJ ordered petitioner to produce her tax returns for the relevant time period and all documents related to her job search efforts. Petitioner did not produce any tax returns and testified at the hearing that she had documents related to her job search efforts in her vehicle and that she needed to look for documents dated after her home was burglarized in June 2010. At the close of the hearing, the ALJ imposed sanctions and refused to consider any evidence related to petitioner’s efforts to mitigate her damages after May 15, 2010. The Tenure Commission affirmed the sanctions.

The ALJ did not abuse his discretion in imposing sanctions and the Tenure Commission did not err in affirming the sanctions. Here, petitioner willfully violated the ALJ’s discovery order by failing to produce her tax returns and documents related to her job search. Moreover, petitioner cannot show that the sanctions resulted in prejudice because she fails to cite what evidence was impacted by the sanctions.

Next, petitioner contends that the ALJ erred in applying the burden of proof. The ALJ held that respondent had the burden on the mitigation issue, that petitioner had the “affirmative duty to use reasonable diligence to mitigate [her] damages by seeking alternative employment,” and that the issue was whether respondent proved that petitioner “failed to use reasonable diligence to minimize her damages.” The ALJ held that petitioner failed to use “reasonable diligence to pursue employment” after May 15, 2010. The Commission also properly articulated and applied a similar reasonableness standard. In doing so, both the Commission and the ALJ applied the appropriate burden of proof. See *Harper Woods*, 103 Mich App at 653. Petitioner’s arguments to the contrary lack merit.

Petitioner claims that the ALJ erred in finding that respondent established a prima facie case that petitioner failed to use reasonable diligence to mitigate her damages based on evidence that there were jobs posted on AppliTrack. Petitioner also contends that the ALJ improperly shifted the burden of proof. Petitioner’s argument lacks merit. As noted above, evidence supported the finding that petitioner could have accessed and applied for the positions on AppliTrack. Additionally, in shifting the burden of *production* to petitioner after having found that the school district established a prima facie case, neither the ALJ nor the Commission improperly shifted the burden of *proof* to petitioner. See e.g. *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994).

Affirmed. Both parties having presented valid arguments on appeal, neither may tax costs. MCR 7.219. We do not retain jurisdiction.

/s/ Karen M. Fort Hood  
/s/ Henry William Saad  
/s/ Stephen L. Borrello