COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1199 **Cir. Ct. No. 2006CV754**

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

TAWNI S. HARPER,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND MENARD, INC.,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Tawni Harper appeals an order affirming a Labor and Industry Review Commission decision finding that she lacked good cause for terminating her employment with Menard, Inc. (Menards). Harper argues that

LIRC made erroneous legal conclusions. We conclude the decision was based on credibility, something we do not review on appeal, and we therefore affirm.

¶2 Harper began working for Menards in September 2004. At some point, one of her supervisors, Mark Newman, began making inappropriate, sexually tinged comments toward her. Harper testified this harassment began almost immediately after she started her employment. She contended that she informed Paul Middleton, her direct supervisor but Newman's subordinate, of the harassment on multiple occasions. She further contended Middleton told her he would talk to assistant general manager Les Pitzer about Newman. Harper asserted Newman's behavior eventually became too much for her, forcing her to quit on June 8, 2006.

¶3 After she quit, Harper applied for unemployment insurance benefits. The Department of Workforce Development concluded Harper had quit, but not for a reason that would allow her to receive benefits. Harper appealed, and the administrative law judge concluded her testimony as a whole was not credible. The ALJ also indirectly concluded that Harper had failed to sufficiently bring the problem to Menards' attention to give it an opportunity to correct the problem.

¶4 Harper appealed further. LIRC agreed with the ALJ's decision, adopting its findings and conclusions as LIRC's own, specifically noting Harper's lack of credibility. LIRC further concluded that the statements Harper complained of did not constitute sexual harassment. LIRC then noted that even if the statements did rise to the level of harassment, Harper had failed to prove that Menards knew or should have known about the problem and failed to correct it. Harper petitioned the circuit court for review, and it affirmed LIRC. The court concluded that the decision was based on credibility, making the standard of

review very high, and refused to substitute its judgment for LIRC's. Harper now appeals to us.

¶5 An employee who voluntarily terminates employment is limited in the unemployment benefits he or she can collect unless it is determined the employee terminated the work "with good cause attributable to the employing unit." WIS. STAT. § 108.04(7)(b).[1] "Good cause" includes, but is not limited to, sexual harassment as defined in WIS. STAT. § 111.32(13), "of which the employer knew or should have known but failed to take timely and appropriate corrective action." WIS. STAT. § 108.04(7)(b). Judicial review of unemployment benefits determinations is governed by WIS. STAT. § 102.23. *See* WIS. STAT. § 108.09(7)(b).

¶6 When we review the decision of an administrative agency, we review the agency's decision directly, not the circuit court's decision. ***Estate of Szleszinski v. LIRC***, 2007 WI 106, ¶22, 736 N.W.2d 111. LIRC's findings of fact are conclusive. WIS. STAT. § 102.23(1). This court may not substitute its judgment for LIRC's as it relates to the weight or credibility of evidence. WIS. STAT. § 102.23(6). As long as the factual findings are supported by credible and substantial evidence, we will affirm them. ***Id.***

¶7 The ALJ, whose findings LIRC expressly adopted, noted that while Harper claimed she repeatedly informed Middleton of Newman's behavior, Middleton—called by Harper herself—testified that she did not inform him of Newman's conduct until February or March of 2006. Contrary to Harper's

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

testimony that Middleton said he would talk to assistant general manager Pitzer, Pitzer denied ever hearing from Middleton. Pitzer also testified that some time in March 2006, and later on June 6, 2006, he had a meeting with Harper specifically regarding management issues, and she said nothing to him about Newman's harassment. The ALJ specifically considered Pitzer's testimony credible.

¶8 The findings also note that Harper testified she did not complain more often because she was afraid of losing her job. The ALJ noted there was nothing in the record to support her claim that her job would be in jeopardy and, in fact, Menards had procedures in place for employees to make harassment complaints. This procedure involved successive complaints up the chain of command and meant that when Harper was unable to get resolution by going to Middleton, she should have contacted Pitzer, and the credible testimony indicated she had not.

¶9 "Good cause" under the statute requires Harper to show "some real and substantial fault on the part of the employer." ***Klatt v. LIRC***, 2003 WI App 197, ¶25, 266 Wis. 2d 1038, 669 N.W.2d 752. In short, LIRC concluded that Harper failed to adequately bring Newman's behavior to Menards' attention. This meant that Menards never had the opportunity "to take timely and appropriate corrective action" and Harper therefore lacked good cause for quitting. *See* WIS. STAT. § 108.04(7)(b). This determination was based on credibility, with LIRC rejecting Harper's testimony about the frequency of Newman's behavior and her reporting in favor of testimony from Middleton and Pitzer that indicated a much shorter timeline.

¶10 Harper complains that LIRC erroneously concluded Newman's behavior did not rise to the level of sexual harassment and she asserts that LIRC

actually determined it did not have to rule on credibility because of that finding. First, Harper fails to cite any language of LIRC's decision that would support her contention it declined to assess credibility because of its legal conclusions. Indeed, LIRC expressly adopted the ALJ's findings, which stated Harper's "testimony as a whole was not credible." Further, LIRC itself noted twice that it considered Harper "not generally credible." It is evident to us, from the two administrative decisions, that Harper's credibility was the key factor.

¶11 To the extent that LIRC may have made legal errors in its decision, particularly as to whether Newman's behavior might have constituted sexual harassment,[2] those errors are irrelevant given the rest of LIRC's holding. The alternatives offered by LIRC are merely what the agency would have decided had it first concluded Harper was a credible witness. But LIRC's primary determination that Harper was incredible is the only determination necessary for us to affirm the decision; anything else, including LIRC's alternate theories, is surplusage. *See* ***Franckowiak v. Industrial Comm'n***, 12 Wis. 2d 85, 88, 106 N.W.2d 51 (1960); *see also* ***State ex rel. Schultz v. Bruendl***, 168 Wis. 2d 101,

[2] Indeed, LIRC's conclusion in this regard is puzzling, given WISCONSIN STAT. § 111.32(13):

> "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.… "Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to the deliberate, repeated making of unsolicited gestures or comments of a sexual nature; … or deliberate verbal or physical conduct of a sexual nature, whether or not repeated, that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.

112, 483 N.W.2d 238 (Ct. App. 1992); ***Eaton Corp. v. LIRC***, 122 Wis. 2d 704, 709, 364 N.W.2d 172 (Ct. App. 1985).

By the Court.—Order affirmed.

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