COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1555 **Cir. Ct. No. 2010CV243**

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

JOHNNY LEE LACY,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND ALL AMERICAN LUMBER, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Johnny Lacy appeals an order confirming a decision of the Labor and Industry Review Commission denying unemployment compensation. LIRC concluded Lacy voluntarily terminated his employment with All American Lumber Inc., by abandoning his job without good cause when he

checked himself out of an inpatient treatment program knowing that All American required completion of the program as a prerequisite to returning to work. Lacy argues he was either discharged or quit with good cause attributable to the employer. Lacy also contends he was denied due process. We reject Lacy's arguments and affirm.

¶2 All American is a home improvement business. Lacy worked for All American approximately nine years, most recently as a sales representative. On October 9, 2009, Lacy began a leave of absence to address physical and mental health issues. The leave of absence was to end on October 31, but All American extended the leave for disciplinary reasons after Lacy contacted customers while on leave.

¶3 During the first week of November 2009, Lacy met with All American's management concerning his job status. During that meeting, Lacy informed them that he would be entering an in-patient drug rehabilitation program for approximately forty-five days.

¶4 On November 23, 2009, Lacy's wife emailed All American to inform them that Lacy was in treatment and should be out around January 3, 2010. All American told her that Lacy had to complete the program in order to return to work. All American agreed to hold a job open for Lacy while he was in treatment.

¶5 On December 12, 2009, Lacy checked himself out of the treatment facility. Lacy claimed that he contacted All American's general manager on December 24 and asked if they could meet, but she failed to get back to him. Lacy subsequently filed for unemployment benefits.

¶6 The Department of Workforce Development determined that Lacy quit, but not for a reason that would allow for unemployment benefits. An administrative law judge reversed the department's decision and concluded Lacy was terminated, but not for misconduct. LIRC reversed the ALJ's decision and concluded that Lacy quit his position after failing to complete his treatment program. It found Lacy failed to maintain contact with All American after notifying it that he would be entering treatment. LIRC found All American's testimony that Lacy made no contact with it to be "more credible than the employee's vague assertion that he made a few efforts to contact the employer." LIRC determined that Lacy was ineligible for benefits and that he had been overpaid benefits, requiring a repayment. The circuit court confirmed LIRC's decision. Lacy now appeals.

¶7 "We review LIRC's factual findings and legal conclusions, not those of the circuit court." ***Klatt v. LIRC***, 2003 WI App 197, ¶10, 266 Wis. 2d 1038, 669 N.W.2d 752. Review of LIRC's findings of fact is significantly limited. ***Heritage Mut. Ins. Co. v. Larsen***, 2001 WI 30, ¶24, 242 Wis. 2d 47, 624 N.W.2d 129. Findings of fact made by LIRC acting within its powers are, in the absence of fraud, conclusive. ***Id.*** We may not substitute our judgment for LIRC's on the weight or credibility of the evidence. *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). A court may set aside LIRC's award if the order depends on any material and controverted findings of fact that are not supported by credible and substantial evidence. ***Larsen***, 242 Wis. 2d 47, ¶24.

¶8 A reviewing court is not bound by LIRC's determinations on questions of law but accords deference that recognizes LIRC's significant expertise. ***Holy Name School v. DILHR***, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982). Reviewing courts have identified three levels of deference

applicable to LIRC's legal conclusions: great weight deference, due weight deference and de novo review. ***Brown v. LIRC***, 2003 WI 142, ¶13, 267 Wis. 2d 31, 671 N.W.2d 279. Great weight deference is appropriate where: (1) the agency is charged with administering the statute; (2) the interpretation of the statute is one of longstanding; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in application. ***Id.***, ¶16.

¶9 Lacy disputes the level of deference afforded LIRC's conclusions of law in this case. In ***Klatt***, we observed that LIRC has extensive experience, in a variety of situations over many years, in administering statutes governing whether an employee quits or voluntarily terminates employment. ***Klatt***, 266 Wis. 2d 1038, ¶13. We are satisfied that LIRC's legal conclusions in the present case are entitled to great weight deference.

¶10 An employee voluntarily terminates or quits under WIS. STAT. § 108.04(7)(a) (2009-10),[1] when he or she shows an intention to leave employment and "'indicates such intention by word or manner of action, or by conduct inconsistent with the continuation of the employee-employer relationship.'" ***Nottelson v. DILHR***, 94 Wis. 2d 106, 119, 287 N.W.2d 763 (citation omitted). Whether an employee quits is a legal conclusion, but "dependent on findings of fact concerning an employe's conduct and intent." ***Holy Name School***, 109 Wis. 2d at 388.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶11 An employee who voluntarily terminates employment is ineligible for benefits. ***Klatt***, 266 Wis. 2d 1038, ¶15. An exception to this rule exists when an employee voluntarily terminates employment with good cause attributable to the employing unit, under WIS. STAT. § 108.04(7)(b). *See* ***id.*** "'[G]ood cause attributable to the employing unit'" involves some fault of the employer and must be "'real and substantial.'" ***Id.*** (citation omitted). Additionally, the "good cause" must be the actual reason or cause of the decision to quit. ***Kessler v. Industrial Comm'n***, 27 Wis. 2d 398, 401, 134 N.W.2d 412 (1965). The employee has the burden of showing "good cause attributable." *See* ***Klatt***, 266 Wis. 2d 1038, ¶¶15, 25.

¶12 Lacy insists he did not voluntarily terminate his employment, but was discharged. He argues LIRC's findings regarding his conduct and intent are not based on credible and substantial evidence, and should be disregarded. Lacy emphasizes that he completed a second treatment program, and that "he and All American kept in continual contact through December 24, 2009."

¶13 However, LIRC considered Lacy's assertions in this regard "unpersuasive." It found "the credible evidence indicates that the employee made no further contact with the employer after his wife notified it he was beginning treatment." LIRC also found that Lacy's conversation with All American's general manager on her cellphone on her day off on Christmas Eve did not constitute contacting the employer.[2] Accordingly, LIRC held that Lacy did not exercise reasonable diligence in communicating his status to All American while

[2] LIRC also noted that while Lacy contended that his doctor released him to return to work, despite his failure to complete the treatment program, he presented no evidence supporting this assertion at the hearing.

on leave, and thus engaged in conduct "so inconsistent with a continuing employment relationship as to evince an intention to quit."

¶14 LIRC's findings are supported by substantial and credible evidence. Whether Lacy completed a second treatment program at some later point in time simply is not relevant to the issue of his employment separation. Lacy abandoned his job before he completed the second treatment program.

¶15 Lacy also argues that even if he voluntarily terminated his employment, he is entitled to benefits because he terminated the employment for good cause attributable to the employer. According to Lacy, had All American contacted him after December 24, 2009, it would have learned that Lacy was actively seeking treatment and was ready to return to work. Instead, All American ceased communications with him and "assumed" he had abandoned his position. Thus, he argues All American's "failure to monitor Mr. Lacy's progress was a real and substantial fault that caused Mr. Lacy to terminate his employment."

¶16 We reject Lacy's contention that All American had a continuing duty to monitor Lacy, or to contact him to offer re-employment. Essentially, Lacy is contending that he had good cause to quit because, after he quit by abandoning his job, All American did not contact him to find out whether he planned to return to work. This puts the proverbial cart before the horse. Lacy failed to satisfy his burden of demonstrating the reasonableness of shifting to All American the responsibility to act in a manner consistent with maintaining the employment relationship. LIRC reasonably concluded that Lacy quit his job because he failed to keep in contact with the employer concerning his progress towards fulfilling the condition precedent for returning to work.

¶17 Finally, Lacy argues he was denied due process because LIRC "failed to include an adequate explanation for its disagreement with the hearing examiner." LIRC is not required to give deference to the ALJ's findings of fact. Initial determinations on witness credibility made by the ALJ are subject to LIRC's ultimate review. *See* ***Transamerica Ins. Co. v. DILHR***, 54 Wis. 2d 272, 285, 195 N.W.2d 656 (1972). Here, LIRC specifically noted in its decision that it consulted with the ALJ about witness credibility and demeanor. LIRC stated:

> The commission conferred with the administrative law judge about witness credibility and demeanor. The administrative law judge had no demeanor impressions to impart. The commission finds the employer's testimony that the employee made no contact with it to be more credible than the employee's vague assertion that he made a few efforts to contact the employer. Even assuming that the December 24 call took place as the employee described it, the employee did not contend that he broached the topic of returning to work during that conversation.

¶18 LIRC's findings on credibility had the benefit of the ALJ's findings, conclusions, and impressions. *See* ***id.*** at 282-83. Lacy was not denied due process.[3]

By the *Court.*—Order affirmed.

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

[3] We do not construe Lacy's argument to challenge the procedures articulated in ***Transamerica Ins. Co. v. DILHR***, 54 Wis. 2d 272, 285, 195 N.W.2d 656 (1972). To the extent Lacy contends these procedures, which LIRC followed, constitute a violation of due process, that argument is undeveloped and will not be considered. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).