COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1995

No. 95-1338

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

MARGARET A. VALERI,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Margaret A. Valeri appeals from a circuit court order upholding the conclusion of the Labor and Industry Review Commission that Valeri failed to establish probable cause of sex discrimination. Valeri claims that LIRC incorrectly determined that she and another co-worker were not "similarly situated" and that there was no probable cause to believe she had been discriminated against. We reject her claim and affirm.

Valeri began working for Delco Electronics Corporation as an apprentice electrician on August 29, 1980. An apprentice electrician was required to complete 7,904 hours of employment to qualify as a journeyman electrician. Delco had entered into an agreement defining the terms of the apprenticeship with the Division of Apprenticeship and Training of the Wisconsin Department of Industry, Labor and Human Relations (DAT), which required Delco to notify DAT of any interruption of the apprenticeship. Upon receiving notification from the employer, DAT would determine whether the apprenticeship was "unassigned" for the period of the interruption. "Unassigned" time was not considered as time spent toward completing the apprenticeship.

Valeri did not complete her apprenticeship until April of 1989 due to six absences, two of which were lengthy and which DAT considered "unassigned." The first unassigned absence was from December 17, 1981 to October 15, 1984 due to a back injury. The second unassigned absence was from February 1, 1986 until June 9, 1986 due to chemical dependency treatment. Accordingly, Delco changed her seniority date from August 29, 1980 to November 2, 1983. The change in seniority date was relevant only for shift preference and lay-off purposes. For purposes of vacations and other fringe benefits, however, her original start date was used. Valeri filed a grievance with her union, the International Brotherhood of Electrical Workers (IBEW), Local 663, but the union accepted Delco's explanation and the adjusted date was not changed.

Valeri filed a discrimination complaint, alleging that her seniority date was changed based on her sex because another apprentice, Mark Burbey, who began his apprenticeship on the same date that she did and who also had had absences during his apprenticeship period, did not have his seniority date changed. Burbey, however, only had a sixteen-day absence during his apprenticeship, which was not considered unassigned. The administrative law judge concluded that Valeri and Burbey were not "similarly situated" and found there was no probable cause to believe that Delco adjusted Valeri's seniority date on the basis of her sex. LIRC upheld the ALJ's decision, and the circuit court affirmed LIRC's decision. Valeri appeals.

For the purpose of interpreting the Wisconsin Fair Employment Act, WIS. ADMIN. CODE § IND. 88.01(8) defines the term "probable cause" as "a

reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief, that discrimination ... probably has been or is being committed." LIRC's interpretation of the WFEA and of the term "probable cause" are entitled to controlling weight unless it is inconsistent with the clear language of the administrative rule or is clearly erroneous. ***Boldt v. LIRC***, 173 Wis.2d 469, 476, 496 N.W.2d 676, 678 (Ct. App. 1992).

The LIRC stated in its memorandum opinion:

> This case concerns the question of whether [Valeri]'s sex (female) was a factor in [Delco]'s decision to adjust her seniority date in a manner unfavorable to her. Upon the completion of her apprenticeship program [Valeri's] seniority date was adjusted as a consequence of two lengthy periods of absence, amounting to over three years time, during which [Valeri] was deemed to be "unassigned" by the State of Wisconsin. Although [Valeri] has identified a male employee who took a leave of absence during his apprenticeship without a commensurate adjustment to his seniority date, this individual, Mark Burbey, was away for only a few weeks and was not considered to be unassigned. The complainant also took several short leaves of absence for which she was not considered unassigned and, like Mr. Burbey, these absences had no effect on her seniority date. Under the circumstances, the commission finds no reason to believe that Mr. Burbey was treated more favorably than [Valeri] or that [Valeri]'s sex was a factor in [Delco]'s decision to adjust her seniority date. Thus, there is no probable cause to believe that discrimination occurred.

LIRC's reasoning reflects careful consideration of the differences between Valeri's and Burbey's apprenticeships. As LIRC correctly noted, Valeri's two extended absences were lengthy and not comparable to Burbey's lone sixteen-day absence. In addition, while Delco did not adjust Burbey's

seniority date as a result of the one absence, Delco also did not adjust Valeri's seniority date on the basis of her shorter absences. LIRC could reasonably conclude that no probable cause existed to find that Delco discriminated against Valeri on the basis of her sex. LIRC's interpretation of section 88.01(8) as applied to the facts of this case is entitled to controlling weight and is not clearly erroneous. *See* ***Boldt***, 173 Wis.2d at 476, 496 N.W.2d at 678. Accordingly, we affirm.

By the Court. – Order affirmed.

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