COURT OF APPEALS
DECISION
DATED AND RELEASED

JANUARY 14, 1997

No. 96-1774

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

DEWEY M. PURNELL,

Plaintiff-Appellant,

v.

LABOR and INDUSTRY REVIEW COMMISSION, WILDERNESS WALK and MIKE PERSSON,

Respondents-Respondents.

APPEAL from a judgment and an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Dewey Purnell appeals an order affirming a decision of the Labor and Industry Review Commission finding that Wilderness Walk did not discriminate against Purnell based upon his handicap when it refused to reinstate him as groundskeeper at its recreation park. Purnell asserts that Wilderness illegally terminated his employment based solely upon its mistaken perception of his disability. We find sufficient evidence in the record to support LIRC's decision and therefore affirm.

Purnell filed this action with LIRC in May of 1993. After a hearing, an administrative law judge made certain findings of fact, which this court accepts if there is substantial evidence in the record to support those findings. ***Madison Gas & Elec. Co. v. PSC***, 109 Wis.2d 127, 133, 325 N.W.2d 339, 342-43 (1982).[1] The test is whether, taking into account all the evidence in the record, reasonable minds could arrive at the same conclusion as the agency. ***Id.*** Further, this court may infer that LIRC made unexpressed factual findings that the evidence supports. ***Doersching v. Funeral Directors***, 138 Wis.2d 312, 323, 405 N.W.2d 781, 786 (Ct. App. 1987). Our review of the record reveals substantial evidence to support the following decision.

Wilderness Walk is a recreation park located in Hayward and owned by Mike and Deanna Persson. Purnell was employed by the Perssons as a "full time year around" groundskeeper until February 1, 1993, when he suffered a transient ischemic attack.[2] Purnell's duties as groundskeeper were assumed by another individual. Those duties included feeding and watering animals and ground maintenance. The groundskeeper is also required to pick up feed for the animals, some of which comes packaged in 100-pound bags. Additionally, the groundskeeper must chop ice with a heavy maul and shovel snow, sometimes in sub-zero temperatures.

Finally, the groundskeeper must take precautions to secure the animals at Wilderness Walk. On the day of his illness, another worker found that the bison pen security gate had been left open, another door had been left unlocked and that the bobcat had been overfed.

One week after his illness, Purnell told his physician, Dr. Lloyd Baertsch, that his condition had returned to normal and he received a slip authorizing him to return to work without restrictions. However, Baertsch later testified by deposition that he was unaware of all the duties Purnell was required to perform at Wilderness Walk, and also expressed uncertainty

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[1] The ALJ's decision was appealed to LIRC, which affirmed that decision in its entirety. It is this decision that we review, and we give no deference to the decision of the circuit court. ***Soo L. R. Co. v. Commissioner of Transp.***, 170 Wis.2d 543, 549, 489 N.W.2d 672, 675 (Ct. App. 1992).

[2] Purnell asserts that a transient ischemic attack presents symptoms similar to a temporary stroke.

whether Purnell could perform those duties. When Purnell reported back to work, in response to questions from Mike Persson, Purnell indicated that he was still having memory problems and dizzy spells and that he did not have all his strength back. Persson also testified that Purnell appeared to have memory and speech problems. Based on this encounter, Persson advised Purnell to return home to get his strength back.

At a meeting later that month, Purnell met with Deanna Persson to discuss his employment with Wilderness Walk. Persson asked Purnell if he had been walking, and Purnell admitted that he did not feel "up to that." Persson told Purnell that they would have work for him in the spring if he was fully recovered. The next contact between the parties occurred later when Deanna called Purnell to offer him employment at Wilderness Walk. Purnell, however, hung up on Persson.

Based upon LIRC's findings, we agree with LIRC that Wilderness Walk did not violate the Wisconsin Fair Employment Act. Purnell must demonstrate three elements to claim a violation of the WFEA. First, he must establish that he is handicapped within the meaning of the Act. Second, he must establish that the Perssons' refusal to reinstate him to his former position was motivated by his real or perceived handicap. *See* ***Boynton Cab Co. v. DILHR***, 96 Wis.2d 396, 406, 291 N.W.2d 850, 855 (1980). If Purnell can make such a showing, the burden would then shift to the Perssons to show that their actions were legitimate under § 111.34(2), STATS. In this case, the Perssons would have to show that Purnell's handicap is reasonably related to his ability to undertake the duties required of a groundskeeper at Wilderness Walk. *See* § 111.34(2)(a), STATS. While we accept that Purnell has established the existence of the first two elements, we agree that the Perssons have met their burden on the third.[3]

[3] Citing WIS. ADMIN. CODE § IND 88.11(2), Purnell asserts that the Perssons have waived all affirmative defenses because none were contained in their answer to Purnell's complaint. After a review of the materials submitted by the Perssons, we conclude that they adequately preserved their argument that Purnell was not able to perform the duties required of the groundskeeper position. Because we conclude that the Perssons prevail on this issue, we do not discuss whether they waived other affirmative defenses.

Michael Persson testified that when Purnell approached him to return to work, Purnell was still complaining of dizziness and headaches. Furthermore, Persson testified that Purnell seemed to have memory and speech problems. Deanna testified that Purnell later told her that he was indeed having memory problems and that he was not "up to" walking. Based upon this testimony, it was reasonable for the ALJ to conclude that Purnell was not able to perform the duties required of his former position. The groundskeeper at Wilderness Walk is required to perform duties involving heavy lifting and other physical labor. Sometimes these duties are required in freezing temperatures and other difficult conditions. In addition, the Perssons rely upon the groundskeeper to secure the animals, obviously an important duty.

It is undisputed that Dr. Baertsch released Purnell to return to work without restrictions. However Baertsch later admitted that he did not fully understand the nature of Purnell's job duties at Wilderness Walk. In fact, when informed of the nature of Purnell's duties, Baertsch expressed uncertainty whether Purnell could perform those duties. Under such circumstances, it was reasonable for the ALJ to discount Purnell's work release.

Purnell claims that expert medical testimony was necessary to establish that he was unable to perform the duties required of his former position. We disagree. In ***Sieger v. Wisconsin Personnel Comm'n***, 181 Wis.2d 845, 512 N.W.2d 220 (Ct. App. 1994), this court held that expert opinion was not necessary to establish an employee's inability to perform necessary job functions when the employee exhibits outward and overt manifestations that are recognizable to lay persons as prohibiting proper performance of those functions. ***Id.*** at 862, 512 N.W.2d at 225. We conclude that ***Sieger*** controls this case and that therefore medical testimony was not required to establish that Purnell was unable to perform the duties of his former position.

Finally, Purnell claims that the Perssons failed to accommodate his disability. The WFEA requires employers to reasonably accommodate an employee's handicap unless the employer can demonstrate that the accommodation would pose a hardship on the employer's business. *See* § 111.34(1), STATS. Whether a particular type of accommodation is reasonable and whether it imposes a hardship are factual issues that must be resolved on a case-by-case basis. ***McMullen v. LIRC***, 148 Wis.2d 270, 276, 434 N.W.2d 830, 833 (Ct. App. 1988). The ALJ in this case found that the only plausible

accommodation available to the Perssons would be to hire a second groundskeeper. We agree with the implied conclusion that this accommodation is unreasonable. Furthermore, Purnell himself eliminated any opportunity the Perssons had to accommodate his disability when he hung up on Deanna.

Because we conclude that the Perssons have established that Purnell was unable to perform the duties of his former position, we affirm the circuit court order. We therefore do not address Purnell's contention that his continued employment at Wilderness Walk did not pose a present or future safety hazard. *See* § 111.34(2)(b), STATS.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.