COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0030

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

WAL-MART STORES, INC.,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF WORKFORCE DEVELOPMENT,
EQUAL RIGHTS DIVISION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Wal-Mart Stores, Inc. appeals from a Dane County Circuit Court order affirming a Department of Workforce Development (DWD) order. DWD concluded that Wal-Mart violated § 103.10, STATS., the Wisconsin Family Medical Leave Act (WFMLA), when it denied employee Thomas Rohne's

request for family leave in connection with the birth of his child. Wal-Mart argues that the circuit court erred when it applied a *de novo* standard of review and that DWD's decision is unreasonable, as well as factually erroneous. For the reasons set forth below, we affirm.

BACKGROUND

From 1994 until 1996, Wal-Mart employed Thomas Rohne as a third-shift receiving department employee in its Menomonee Falls store. On December 9, 1995, Rohne's child was born. On February 2, 1996, Rohne informally requested family leave, and on February 8, Rohne formally requested family leave to start February 18. On or about February 13, Wal-Mart informed Rohne that he could not take family leave until after February 24. On February 14, 1996, Rohne filed a complaint with DWD alleging that Wal-Mart violated his rights under WFMLA. Rohne did not return to work at Wal-Mart after February 15. On March 11, 1996, Rohne gave Wal-Mart two-weeks notice of resignation.

On April 2, 1996, a DWD investigator issued an initial determination that Wal-Mart had probably violated WFMLA. On June 12, an Administrative Law Judge conducted a hearing on the merits. On March 13, 1997, DWD issued a final order, finding that Rohne had given reasonable notice, that Rohne had taken Wal-Mart's scheduling requirements into consideration when he asked for leave, and that Wal-Mart violated WFMLA in denying leave. However, DWD denied Rohne's request for back-pay and reinstatement, finding that Wal-Mart had not constructively discharged Rohne. By an order dated November 13, 1997, the circuit court affirmed DWD's final order. Wal-Mart appeals.

STANDARD OF REVIEW

We review the decision of the agency, not that of the circuit court. ***Currie v. DILHR***, 210 Wis.2d 380, 386, 565 N.W.2d 253, 256 (Ct. App. 1997). There are three levels of deference granted to an agency's conclusions of law: great weight deference, due weight deference and *de novo* review. Which level is appropriate depends on the comparative institutional capabilities and qualifications of the court and the administrative agency. ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 285-87, 548 N.W.2d 57, 62-63 (1996).

The most deferential standard, "great weight deference," is granted when (1) the agency was charged by the legislature with the duty of administering the statute; and (2) the interpretation of the agency is one of long-standing; and (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. ***Id.***

In this case, we conclude that the appropriate standard of review to apply to DWD's interpretations of law is "great weight deference." DWD has been charged by the legislature with creating the administrative regulations interpreting WFMLA, and with applying them. Further, DWD's interpretation is subject to statewide application, leading to uniformity. The middle and lower standards are not appropriate because of DWD's long experience in this area. *See e.g.* ***Richland Sch. Dist. v. DILHR***, 174 Wis.2d 878, 890-95, 498 N.W.2d 826,

830-32 (1993) (applying great weight deference, and noting the agency's[1] rule-making expertise).

As to an agency's findings of fact, we will affirm them if they are supported by substantial evidence in the record. Section 227.57(6), STATS. *See also* ***Omernick v. DNR***, 100 Wis.2d 234, 250, 301 N.W.2d 437, 445 (1981), *cert. denied*, 454 U.S. 883 (1981) (where the evidence in the entire record, including the references therefrom is found to be such that a reasonable person, acting reasonably, might have reached the same decision, a reviewing court will sustain an agency's finding of fact) (citations omitted).

DISCUSSION

Under WFMLA, an employee may take up to six weeks of family leave in any twelve-month period for the birth of the employee's child, provided the leave takes place within sixteen weeks of birth. Sections 103.10(3)(a) and (b), STATS. In scheduling the leave, the employee must "reasonably consider" the employer's needs, and must give advance notice in a "reasonable and practicable manner." Sections 103.10(3)(c), 103.10(6).

On appeal, Wal-Mart challenges DWD's determination that Rhone complied with WFMLA's notice requirements.[2] DWD found that Rohne had complied. Specifically, DWD cited extensively from Rohne's testimony to show that Rohne "reasonably considered" his employer's needs because he chose his

[1] DWD was formerly known as the Department of Industry, Labor and Human Relations (DILHR). *See* 1995 Wis. Act 289, § 275, authorizing DILHR to use the name "Department of Workforce Development" for all official purposes.

[2] There is no disagreement that Rohne was entitled to take leave under WFMLA for the birth of his child.

leave for a month known to him from experience to be a slow time of year. DWD also found that Rohne first gave advance notice more than two weeks before the requested leave, and it concluded that was sufficient notice.

Before this court, Wal-Mart argues that the timing of the leave was inconvenient, and that the inconvenience demonstrates that Rohne failed to "reasonably consider" Wal-Mart's needs. Wal-Mart also argues that Rohne was required to make his request sooner. We reject both arguments.

The employer's convenience is a factor to be "reasonably considered," but the fact that leave ultimately may be inconvenient to the employer cannot overcome the employee's right to leave. To hold otherwise, would be to create an exception which would swallow the purpose of the law. WFMLA specifically states that employees "may" take leave for the birth of a child. Section 103.10(3)(b)1., STATS. Conditioning this right on the employer's circumstances, as Wal-Mart urges here, would run counter to the purpose of the law. Further, despite Wal-Mart's protestations of inconvenience, DWD's conclusion—that Rohne's consideration of Wal-Mart's needs was "reasonable"—is supported by ample record testimony regarding scheduling practices and workload at Wal-Mart.

As to whether the request should have been made sooner, Wal-Mart relies on § 103.10(6), STATS., which requires the employee to give "advance notice" of the expected birth "in a reasonable and practicable manner." According to Wal-Mart, because Rohne failed to give notice before the December, 1995 birth of his child, Rohne forfeited the right to leave. We reject this argument because it was not raised at the agency level. Therefore, we will not consider it here. *Cf.* ***Zeller v. Northrup King Co.***, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App.

1985); ***Gebhardt Bros., Inc. v. Brimmel***, 31 Wis.2d 581, 583, 143 N.W.2d 479, 480 (1966) (We do not review issues on appeal that could have been disposed of in a lower tribunal, had they been raised there).

Additionally, the agency's factual findings are supported by substantial evidence in the record, § 227.57(6), STATS.; ***Omernick***, 100 Wis.2d at 250, 301 N.W.2d at 445;[3] and under the "great weight" standard of review appropriate here, we defer to the agency's legal conclusions, ***UFE Inc.***, 201 Wis.2d at 285-87, 548 N.W.2d at 62-63. We therefore affirm.

By the Court.—Order affirmed.

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

[3] Citing a family trip Rohne made to Germany during his WFMLA leave, Wal-Mart also argues that Rohne was aware of his need for leave for a long time before he applied for leave. In Wal-Mart's view, this demonstrates that Rohne's notice was not "reasonable." We reject this argument. The measure of "reasonableness" relates to the notice given, not to notice that *could* have been given.