

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1481

Cir. Ct. No. 2004CV122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ELITE MARBLE COMPANY,

PETITIONER-RESPONDENT-CROSS-APPELLANT,

V.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-CROSS-RESPONDENT,

DONALD R. GOLDSWORTHY,

RESPONDENT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed in part; reversed in part.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. This case arises from an administrative decision of the Wisconsin Labor and Industry Review Commission. The Commission held that Elite Marble Company discriminated against Donald Goldsworthy based on a disability in violation of the Wisconsin Fair Employment Act. Specifically, the Commission determined that Elite Marble had terminated Goldsworthy's employment without making reasonable accommodation for his diabetes. It ordered Goldsworthy reinstated with back pay and 12% interest. On judicial review, the circuit court set aside the reinstatement order and limited the amount of back wages due based on Goldsworthy's refusal to accept a reinstatement offer made immediately prior to the administrative hearing. It also eliminated the interest provision. Goldsworthy appeals the circuit court's modifications, and Elite Marble cross-appeals the Commission's underlying discrimination determination on the grounds that the Commission made improper credibility determinations. For the reasons discussed below, we uphold the Commission's decision in all respects, reinstating its orders for back pay and interest. Accordingly, the circuit court's judgment and order is affirmed in part and reversed in part.

BACKGROUND

¶2 Because Elite Marble challenges the sufficiency of the evidence to support the Commission's factual findings, we will describe the evidence in some detail.

¶3 Elite Marble is a manufacturer of sinks and countertops. The company is owned by Daniel and Marlene Haas.¹ Goldsworthy filed a disability

¹ To avoid confusion, we will refer to Daniel and Marlene Haas by their first names.

discrimination complaint with the Department of Workforce Development (DWD) alleging that Marlene had fired him for “appearing to be drunk” when he was having an insulin reaction, despite her having prior knowledge that he was diabetic. The matter was eventually set for a hearing.

¶4 Prior to taking testimony, the hearing examiner asked about the status of any settlement negotiations. Goldsworthy said opposing counsel asked him the morning of the hearing whether he would be willing to go back to work at Elite Marble and he told him he would not.

¶5 Goldsworthy testified that Marlene interviewed him for a position with Elite Marble on February 15, 2002. Goldsworthy said that during the interview, Marlene asked why his military history was so short, and he disclosed that he had been medically discharged due to his diabetes. He said he further explained to Marlene that he could have insulin reactions with little warning, in which he could “act out of sorts, confused, basically look like I’m drunk, and that’s from low blood sugar.” According to Goldsworthy, Daniel came in at the end of the interview and asked Goldsworthy to come back the following Monday, which was February 18, 2002. When Goldsworthy showed up on Monday, Daniel informed him that he was hired.

¶6 Over the course of the next week or two, Goldsworthy claimed that he had several conversations with co-workers in the break room regarding his diabetes. During one of those conversations, he said he asked his co-workers to have him drink some sugar or eat some candy if they noticed him acting out of sorts or drunk or confused. Marlene came out of her nearby office and remarked, “goofier than normal,” prompting laughter.

¶7 On the morning of April 4, 2002, Goldsworthy had an elevated blood sugar level, so he took extra insulin to bring it down. He showed up for work at his normal time of 5:00 a.m., and continued working until about 9:30 a.m. Then, as he testified:

And all of a sudden, Marlene comes up to me and says, have you been drinking, to which I, of course, responded, no. And she said, well, you look like you're drunk. And I said, well, my blood, my blood must be low. My blood's got to be off

He said he went over to a workstation and took a large sip of Mountain Dew to try to quickly get some sugar in his system. Marlene left the room, came back ten minutes later, and informed him, “[T]hat’s it. You’re out of here.... [Y]ou ought to know better than to come to work drunk. I’m firing you.” Goldsworthy protested that he was not drunk; he was having an insulin reaction. Marlene told him, “I don’t care. You’re dangerous,” and that no one wanted to work with him. Goldsworthy then retrieved his belongings while Marlene made up his final paycheck, and he left.

¶8 Goldsworthy offered into evidence medical records documenting his diabetes; a military record verifying that he had been discharged due to diabetes; and a page from his log book showing that he had a blood sugar reading of 42 when he came home after being discharged on April 4, 2002.

¶9 Goldsworthy’s version of events was supported by the testimony of another former employee of Elite Marble. Scott Choate testified that other employees were aware of Goldsworthy’s diabetes from conversations in the break room, and confirmed the incident where Marlene had come out of her office to comment on Goldsworthy being “goofier than normal.” He said Marlene had asked him to keep an eye on Goldsworthy and to come get her if he was acting

strange or goofy. He said after the termination, Marlene told him that she had fired Goldsworthy because he was wobbling around, seemed confused and could not plug something in. When Choate said he did not believe that Goldsworthy had been drunk, Marlene told him with a smirk that she had fired Goldsworthy because his sugar was low.

¶10 Goldsworthy's account was sharply contradicted by both Marlene and Daniel Haas. Marlene testified that Goldsworthy came in and asked for an application several weeks prior to being hired, then kept checking back several times until Daniel happened to be in on February 18, 2002. Marlene denied any recollection of having spoken to Goldsworthy on February 15th or ever discussing his military service with him. She claimed that she did not know that he was diabetic.

¶11 Sometime around 8:15 a.m. on April 4th, Marlene observed that Goldsworthy seemed "out of sorts," and was drinking from a coffee cup. When she came back around 9 a.m., he was sitting on the floor with his legs spread out, wobbling all over the place with an extension cord he was trying to plug in. She asked him to come back to her office, and he followed, wobbling back and forth. She asked him if he had been drinking, and he denied it. He was "wobbling all over and acting just like a drunk would." She said he got down on his knees and was telling her that she was the hardest working women he had ever met and he would work for her anytime, and she thought he was drunk. She said Goldsworthy never told her he was diabetic or that he needed sugar. She said she did not tell him he was fired; she just gave him his check because it was payday, and he assumed he was fired. She said he then went to the locker area and started taking his things out of his own accord. No one checked his coffee cup for alcohol or ever found any alcohol hidden anywhere around the plant.

¶12 During Marlene's testimony, Elite Marble had marked as Exhibit 4 an application form filled out by Goldsworthy. In a section at the bottom of the form set aside for comments by the employer was a line that stated "INTERVIEWED BY Daniel Hass DATE 2/18/02."

¶13 Daniel testified that Goldsworthy just showed up at the plant before 7:00 a.m. on February 18th and he hired him on the spot because one of their other workers had recently been injured. Daniel denied that Goldsworthy ever told him he was diabetic or that he should be given sugar if he was ever wobbly. He also denied that he had spoken to Goldsworthy the previous Friday.

¶14 Daniel first said the notation on Goldsworthy's application that said February 18, 2002 near his signature was Marlene's writing. During cross-examination, however, Goldsworthy introduced another copy of his application, which showed "DATE 2/15/02." Daniel acknowledged that the two copies of Goldsworthy's application appeared to be identical except for the date, and said the date on each was definitely his own handwriting. He further acknowledged that it appeared the 18 "might be written in" over the 15, but said he had no idea why there was a difference.

¶15 Four current employees testified on Elite Marble's behalf. None of them recalled ever hearing Goldsworthy discuss his diabetes at work, although one of them had learned he was diabetic in a social context.

¶16 Shawn Bahm testified that Goldsworthy seemed normal when he arrived at work at 5:00 a.m., and that he did not notice anything strange about his behavior until around 9:00 or 9:30 a.m., when he observed Goldsworthy "bouncing off the lockers and the wall," trying to get things out of his locker, but hardly able to stand. He saw no indication that Goldsworthy had been drinking.

¶17 Steve Dolgner also did not notice anything unusual about Goldsworthy from 5:00 a.m. until about 9:00 a.m. Then he noticed that Goldsworthy “started getting kind of wobbly and just kind of walked away from” the sink he was working on. When Dolgner inquired what Goldsworthy was doing, he said he was just trying to figure out where he was going. Goldsworthy then exhibited difficulty plugging in a buffer and holding on to it. He was wobbling his head and mumbling. He followed Marlene back to her office, then came back out 20 to 25 minutes later, smiling and shaking everybody’s hands. He then left in a “real wobbly fashion.” Dolgner was in the same area as Goldsworthy all morning and did not see him drinking.

STANDARD OF REVIEW

¶18 We review the decision of the administrative agency rather than that of the circuit court. *Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App.1997). We may not substitute our judgment for that of the administrative agency as to the weight or credibility of the evidence on a finding of fact. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). Rather, we must examine the record for any substantial evidence that supports the agency’s determination. WIS. STAT. § 227.57(6) (2003-04);² see *Currie*, 210 Wis. 2d at 387.

¶19 We are not bound by an agency’s conclusions of law in the same manner as we are by its factual findings. *Begel v. LIRC*, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to its

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

legal determinations. An agency's legal determinations may be accorded great weight deference, due weight deference or de novo review, depending on the circumstances. See *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). We need not discuss what level of deference would be due here, because we would affirm the Commission's decision even upon de novo review.

DISCUSSION

¶20 We begin our discussion with the cross-appeal because the issues raised by Elite Marble challenging the Commission's discrimination determination logically precede the remedy issues raised by Goldsworthy.

Credibility Determinations

¶21 Elite Marble contends that the Commission "changed the examiner's findings to state [that] Daniel Haas interviewed and hired Mr. Goldsworthy on February 18, 2002." From that starting point, it argues that the altered application form submitted by Elite Marble as Exhibit 4 should properly have been construed as a "corrected," rather than a "falsified" document, and thus should not have been used to undermine the Haas's credibility.

¶22 Elite Marble mischaracterizes the Commission's findings, however. The Commission actually stated:

The commission agrees with the respondent to the extent that it argues the facts show that Goldsworthy was hired on February 18, 2002. However, the fact of the matter is that the obviously altered date on Exhibit 4 was an effort by the respondent to support its testimony regarding the hiring process, which was directly at odds with the clear recollection of the process by Goldsworthy.

The Commission went on to explain why Goldsworthy's recollection of having interviewed with Marlene for about an hour and then having spoken briefly with Daniel on the 15th was more believable than Marlene's assertion that she did not remember interviewing Goldsworthy on the 15th. For instance, Marlene admitted discussing with Goldsworthy shared experiences at a lake in Green County, even though she denied any recollection of the interview at which Goldsworthy claimed that discussion took place.

¶23 In other words, the Commission did *not* find that Goldsworthy had been both interviewed and hired on the 18th. To the contrary, it explicitly found, as did the hearing examiner, that Goldsworthy had been interviewed by Marlene on the 15th. It may be fairly inferred that the Commission also accepted Goldsworthy's testimony that he spoke with Daniel at the end of that interview, which would explain Daniel's signature by the date of the 15th.

¶24 The Commission found several additional reasons to question Marlene's credibility. It pointed out that Marlene frequently testified that she could not remember certain things it seemed she certainly ought to recall, including ever having told Goldsworthy that he was fired. Moreover, Marlene's assertion that she believed Goldsworthy to be drunk was inherently implausible given that he had been working for three hours before anyone noticed any impairment. The Commission also noted that the ALJ—who was in the best position to judge the demeanor of the various witnesses—found that the employees who supported Marlene's assertion Goldsworthy never told anyone at work he was diabetic were less credible than the former employee who testified on Goldsworthy's behalf that he had told others, including Marlene, about his diabetes, because Marlene's witnesses were “still employed and obviously distressed at being required to testify.”

¶25 Therefore, the Commission reasonably treated the unexplained alteration of the date for the interview from the 15th to the 18th on Goldsworthy's application as an attempt to falsify that document to support the Haas's position that Goldsworthy had only interviewed with Daniel on the morning of the 18th immediately prior to being hired. There is no basis to set aside the resulting adverse credibility determinations.

Sufficiency of the Evidence

¶26 Elite Marble's contention that there was no substantial evidence in the record to support the Commission's decision relies heavily upon its credibility arguments. Having rejected those arguments, we are satisfied that the evidence was more than sufficient. First, the medical records established that Goldsworthy was in fact an insulin-dependent diabetic. Second, Goldsworthy's testimony that his behavior was caused by an insulin reaction rather than intoxication was bolstered by the testimony of other co-workers who observed that his conduct was normal for the first several hours of the shift and that he did not smell of intoxicants, as well as Goldsworthy's own log of his blood sugar level when he arrived home. Third, Goldsworthy testified that he had told Marlene about his diabetes and what would happen if his blood sugar was ever off. Finally, Scott Choate testified that Marlene had told him that she had fired Goldsworthy because his blood sugar was low.

Backpay

¶27 “[A] valid offer of reinstatement ends the accrual of back pay.” *Anderson v. LIRC*, 111 Wis. 2d 245, 254, 330 N.W.2d 594 (1983). In order to be valid, an offer must meet several conditions:

First, the offer of reinstatement must be for the same position or a substantially equivalent position.... Second, the offer of reinstatement must be unconditional.... Third, the employee must be afforded a reasonable time to respond to the offer of reinstatement.... Finally, the offer should come directly from the employer or its agent who is authorized to hire and fire, rather than from another employee or other unauthorized individual.

Id. at 256-57. The mere fact that an employee has rejected some reinstatement offer cannot be used to imply that a valid offer was made. *Id.* at 257-58.

¶28 The record does not show that the reinstatement offer made by Elite Marble in this case complied with the requirements of *Anderson*. We do not know if the reinstatement offer was for the same job at the same rate of pay, we do not know if any conditions were attached to the offer, we do not know how much time Elite Marble gave Goldsworthy to consider the offer, and we do not know if someone with actual authority to make hiring and firing decisions for Elite Marble conveyed the offer to Goldsworthy. All we know is that Goldsworthy rejected some offer made by counsel, and that neither of the parties was interested in the area where the other was willing to talk. We therefore conclude the trial court erred in setting aside the reinstatement and backpay provisions of the Commission's decision, and we reinstate them.

Interest

¶29 Finally, we see nothing in the circuit court's judgment and order that explains why it failed to include interest for the backpay award. It appears that the omission may merely have been an oversight. In any event, we are satisfied that the Commission's award of 12% interest was within its authority. *Id.* at 259-60 (holding that interest should be added to backpay awards); WIS. ADMIN. CODE

§ DWD 218.20(4) (setting the current amount at 12%). We therefore reinstate the Commission's order in all respects, including the interest provision.

By the Court.—Judgment and order affirmed in part; reversed in part.

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

