COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2056 **Cir. Ct. No. 2013CV57**

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

PATRICIA J. MCLISH,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND CITY OF SUPERIOR,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Patricia McLish, pro se, appeals an order affirming the Labor and Industry Review Commission's (Commission) decision to deny her claim for unemployment insurance benefits. McLish argues she is entitled to benefits because there was good cause for her refusal to accept an offer of work

within the meaning of WIS. STAT. § 108.04(8).[1] Because there is credible and substantial evidence to support the Commission's decision concluding otherwise, we affirm the order.

BACKGROUND

¶2 McLish worked for approximately six years as an "engineering technician" for a temporary staffing agency that provided services to the City of Superior. In 2012, the City determined it could not continue to employ temporary workers in McLish's position. At that time, McLish worked 37.5 hours per week, earning $17.38 per hour.

¶3 When she started her job, McLish assisted with the City's flood control program. Her primary job duties during the last two years of her employment, however, consisted of working on an asset inventory project. She also worked on implementing a computerized maintenance management system that included updating computerized drawings and technical documentation. A small amount of McLish's time was spent assisting the City's maintenance manager by overseeing the work of contractors when the maintenance manager was unavailable. McLish also performed some work assessing how the City's pumps were working and inspecting valve vaults.

¶4 McLish was informed that her position through the temporary staffing agency would end on July 6, 2012, but that she could start a position working directly for the City the following week. The City offered her a "research

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

assistant" position with a wide variety of duties—the primary duty would be to continue with the asset inventory project she had been working on. The offered position was forty hours per week, at $14.23 per hour, with benefits such as health and dental insurance, a retirement plan, life insurance and paid leave. McLish refused the job offer and applied for unemployment insurance benefits. Her application was denied and she appealed to the Department of Workforce Development. An administrative law judge (ALJ) affirmed the Department's decision and the ALJ's decision was affirmed, with some modification, on appeal to the Commission. On certiorari review, the circuit court affirmed the Commission's decision, and this appeal follows.

DISCUSSION

¶5 On appeal, this court reviews the Commission's findings of fact and conclusions of law, not those of the circuit court. *See* ***United Parcel Serv., Inc. v. Lust***, 208 Wis. 2d 306, 321, 560 N.W.2d 301 (Ct. App. 1997). The Commission's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995); *see also* WIS. STAT. § 102.23(6) (2011-12). Our role on appeal is to search the record for evidence supporting the Commission's factual determinations, not to search for evidence against them. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶6 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. Rather, an agency's legal determinations may be accorded great weight deference, due weight deference, or we may review

de novo, depending on the circumstances. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

¶7 The highest level of deference—great weight—is appropriate where: (1) the agency is charged by the legislature with administering the statute at issue; (2) the interpretation of the statute is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in the application of the statute. ***Brown v. LIRC***, 2003 WI 142, ¶16, 267 Wis. 2d 31, 671 N.W.2d. 279.

¶8 "Due weight deference [applies] when an agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than a court to interpret and apply a statute." ***Id.***, ¶15. "Under the due weight deference standard 'a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable.'" ***Id.*** (quoting ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 660 n.4, 539 N.W.2d 98 (1995)).

¶9 "No deference is due an agency's conclusion of law when an issue before the agency is one of first impression or when an agency's position on an issue provides no real guidance." ***Id.***, ¶14. When no deference is given, a court engages in an independent determination of the questions of law presented, benefiting from the analyses of the agency and the courts that have reviewed the agency action. ***Id.***

¶10 This case involves the interpretation of WIS. STAT. § 108.04(8), which provides, in relevant part, that to be eligible for benefits, an employee must have "good cause to reject suitable work when offered." Despite McLish's argument to the contrary, the Commission is afforded great weight deference in

cases involving the interpretation of § 108.04(8) because it has "longstanding experience, technical competence and specialized knowledge in administering the unemployment compensation statutes." ***Hubert v. LIRC***, 186 Wis. 2d 590, 597, 522 N.W.2d 512 (Ct. App. 1994); *see also* ***DILHR v. LIRC***, 193 Wis. 2d 391, 397, 535 N.W.2d 6 (Ct. App. 1995). Under this standard, we uphold the Commission's interpretation and application of the statute as long as it is reasonable and consistent with the statute's language, regardless whether other interpretations are reasonable. ***Hubert***, 186 Wis. 2d at 597.

¶11 An employee has good cause to reject suitable work offered if the work constitutes a lower grade of skill or provides a significantly lower rate of pay than one or more recent jobs. *See* WIS. STAT. § 108.04(8)(d). McLish argues she had good cause to refuse the job offer because it was for significantly lower pay when evaluated in terms of equal hours. By her calculations, the position offered a 23% reduction in pay because the hourly wage was lower and the work week was longer. The commission, however, utilized a weekly wage comparison rather than the "equalized weekly hours" comparison utilized by McLish or the "hourly pay rate" comparison utilized by the ALJ.[2]

¶12 McLish argues the Commission's use of a weekly wage comparison is unfair and unreasonable when the hours worked per week are different. She offers the extreme example of an employee working twenty hours per week at $20 per hour being offered a position working forty hours per week at $10 per hour.

[2] To the extent McLish challenges findings by the Commission that were contrary to the ALJ's findings, the "ultimate responsibility for findings is upon the Commission itself, not the administrative law judge." ***Falke v. Industrial Comm'n***, 17 Wis. 2d 289, 295, 116 N.W.2d 125 (1962).

McLish contends it would be unfair to expect the hypothetical employee to accept the offered position even though the employee's weekly wages remained the same. This challenge to the Commission's decision is not persuasive, as McLish compares part-time work to full-time work.[3] Because the position offered to McLish consisted of full-time hours, the Commission appropriately compared it with McLish's most recent full-time work.

¶13 When comparing McLish's weekly wages for the previous position and the offered position, the Commission concluded the offered position would result in a 12.7% reduction in pay. The Commission, however, looked beyond the simple wage comparison and also properly considered the pay scale progression and the fringe benefits offered in determining that the new position did not provide a significantly lower rate of pay within the meaning of WIS. STAT. § 108.04(8)(d). We conclude the Commission reasonably utilized weekly wages to compare McLish's previous position with the offered position.

¶14 McLish also challenges labor market information the Commission cited in concluding that McLish lacked good cause to refuse the offered position. WISCONSIN STAT. § 108.09(4n) provides that if the Department of Workforce Development maintains a database system of occupational information and employment conditions data, reports based on this data may be created and admitted into evidence at a hearing. A "conditions of employment" database (COED) report may constitute prima facie evidence of labor market information. *See* WIS. STAT. § 108.09(4n).

[3] "Full-time" work means work that is performed for thirty-two or more hours in a week. *See* WIS. ADMIN. CODE § DWD 100.02(28).

¶15 At the hearing before the ALJ, two COED reports were introduced. One provided relevant labor market information regarding wages, shifts and travel distances for a position identified as "Clerk, Engineering," and the other provided labor market information for a position identified as "Technician, Civil Engineering." The Commission relied on the "Clerk, Engineering" COED report to conclude that the offered position's hourly wage of $14.23 was customary for similar work in the relevant labor market. The report noted that 25% of "Clerk, Engineering" workers in that market earned less than $12.25 per hour, with a pay range of $10.62 to $18.77. McLish argues the Commission could not reasonably conclude the offered position was similar to that found in the "Clerk, Engineering" COED report, as that title gave no definition of duties. As the Commission points out, however, "Clerk, Engineering" was described in the report as: "All other material recording, scheduling and distributing works not classified separately above. Include: Engineering Clerks and Traffic-rate Clerks." That the description was not more specific, does not mean it was inapplicable.

¶16 McLish further contends that because the offered position involved the same work she performed as an "engineering technician" with the temporary staffing agency, the Commission should have relied on the "Technician, Civil Engineering" COED report, which listed a pay range of $12.29 to $27.74, with 25% of workers earning less than $16.73. The City's Human Resources Administrator, Cammy Koneczny, testified, however, that although McLish had been called an engineering technician, "she was an employee through a temp service," and when "utilizing people through a temp service we're utilizing them for whatever type of work we need done that fits certifications." Koneczny added that although McLish was called an engineering technician and paid similar to engineering technicians, all other engineering technicians reported to the

engineering manager, while McLish reported to an administrative manager. Koneczny opined that the research assistant position offered was "most aligned" with the work McLish was doing. To the extent McLish may dispute Koneczny's testimony, the weight and credibility of testimony are to be decided by the Commission. *See* ***E.F. Brewer Co. v. DILHR***, 82 Wis. 2d 634, 636-37, 264 N.W.2d 222 (1978).

¶17 Based on the evidence, the Commission could reasonably infer that the chain of command was a reflection of the work McLish had primarily done and would continue to do—asset inventorying—and this type of work is performed by engineering clerks, not engineering technicians. The Commission thus reasonably concluded that despite McLish's previous job title, the work she most recently performed and the job offered more accurately fell within the "Clerk, Engineering" COED report.

¶18 Ultimately, McLish's attempt to offer a reasonable alternative interpretation of the statute is immaterial to our review. As noted above, when applying great weight deference, we uphold the Commission's interpretation and application of the statute as long as it is reasonable and consistent with the statute's language, regardless whether other interpretations are reasonable. ***Hubert***, 186 Wis. 2d at 597. There is credible and substantial evidence to support the Commission's conclusion that McLish lacked good cause to reject suitable work offered by the City.

By the Court.—Order affirmed.

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