COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1314 **Cir. Ct. No. 2014CV1133**

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

JOSE A. SANTIAGO,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

INTERESTED PARTY.

APPEAL from an order of the circuit court for Dane County: RHONDA L. LANFORD, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Jose Santiago appeals a circuit court order that affirmed the Labor and Industry Review Commission's (LIRC) dismissal of

Santiago's claim of employment discrimination based upon national origin. For the reasons discussed below, we affirm the dismissal of Santiago's discrimination complaint.

BACKGROUND

¶2 As a post-graduate Ph.D. candidate at the University of Wisconsin-Madison's College of Engineering, Santiago worked in the System Regeneration Laboratory of the Biomedical Engineering Department run by his faculty advisor, Associate Professor Dr. Brenda Ogle. Ogle assigned Santiago the task of maintaining a liquid nitrogen freezer in which cell cultures were stored. The assignment involved checking the pressure level of the freezer's tank periodically, changing the tank every week or two, and being on call twenty-four hours a day for any emergencies, because variations in the temperature inside the freezer could endanger the cell cultures. When making the assignment, Ogle commented that she anticipated that Santiago would not be traveling as much as the other three students who were working in the laboratory at that time.

¶3 Santiago's freezer maintenance assignment continued throughout the three-and-one-half years that he worked at the laboratory. During that time period, Santiago received an unspecified number of telephone calls requiring him to respond to emergencies. However, he also was able to take three vacation breaks, and he did not testify that he had ever asked or been refused permission to take any additional time off. Both Santiago's and Ogle's names and phone numbers were posted on the freezer to call in case of emergency.

¶4 Other students and employees working in the laboratory were given assignments as well, but none of the other assignments required being on call. A teaching assistant who was hired at the same time as Santiago was initially given

the tasks of maintaining the tissue culture area and making sure that a microscope in that area remained functional. That assignment was rotated as more people began to work in the laboratory. The tasks of cleaning the incubators and water vats were the only other tasks that rotated, and Santiago participated in that rotation. Santiago did not provide any further explanation of the tasks assigned to others, or explain what the relative time requirements or skill levels were for any of the other tasks.

STANDARD OF REVIEW

¶5 Judicial review of administrative proceedings pursuant to WIS. STAT. ch. 227 (2013-14) is akin to common law certiorari review.[1] *See* ***Williams v. Housing Auth. of Milwaukee***, 2010 WI App 14, ¶10, 323 Wis. 2d 179, 779 N.W.2d 185 (2009). We review the decision of the administrative agency rather than that of the circuit court, applying the same standards of review set forth for the circuit court in WIS. STAT. § 227.57. *See* ***Currie v. DILHR***, 210 Wis. 2d 380, 386-87, 565 N.W.2d 253 (Ct. App. 1997). We may not substitute our judgment for that of the agency as to the weight or credibility of the evidence underlying a finding of fact.[2] WIS. STAT. § 227.57(6); ***Currie***, 210 Wis. 2d at 387. Rather, we must examine the record for any substantial evidence that supports the agency's determination. ***Currie***, 210 Wis. 2d at 387.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings, although we may still accord them some degree of deference. ***Begel v. LIRC***, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220; ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). We need not discuss what degree of deference would be appropriate here, because we do not reach any questions of law under the Wisconsin Fair Employment Act.

¶6 The substantial evidence test does not require a preponderance of the evidence, merely that "reasonable minds could arrive at the same conclusion as the agency" based on the record and inferences drawn from it. ***Kitten v. DWD***, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (quoted source omitted); ***Hamilton v. DILHR***, 94 Wis. 2d 611, 618, 288 N.W.2d 857 (1980). Where more than one inference reasonably can be drawn, the finding of the agency is conclusive when it is "supported by any credible evidence." ***Vocational Tech. & Adult Ed., Dist. 13 v. DILHR***, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977).

DISCUSSION

¶7 The Wisconsin Fair Employment Act (WFEA) prohibits discrimination against an individual with respect to the terms, conditions, or privileges of employment based upon, among other prohibited factors, the employee's national origin. *See* WIS. STAT. §§ 111.321 (prohibited bases of discrimination) and 111.322(1) (prohibited acts of discrimination). A complainant must make a threshold showing of probable cause that discrimination occurred in order to proceed on the merits of a WFEA complaint. ***Boldt v. LIRC***, 173 Wis. 2d 469, 473, 496 N.W.2d 676 (Ct. App. 1992); WIS. STAT. § 111.39(4)(b). This standard requires "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that … [discrimination] *probably* has been or is being committed." WIS. ADMIN. CODE § DWD 218.02(8) (emphasis added). LIRC may determine, based upon credibility assessments and its view of the weight of the evidence, that it is not probable that discrimination occurred, notwithstanding some credible evidence that would support a possibility of discrimination. *See* ***Boldt***, 173 Wis. 2d at 475-76.

¶8 Once probable cause has been shown that some type of discrimination has been or is being committed, a claimant must establish a prima facie case regarding the elements of the claimant's specific theory of discrimination in order to raise a presumption of discrimination. *See generally* ***Puetz Motor Sales, Inc. v. LIRC***, 126 Wis. 2d 168, 172, 376 N.W.2d 372 (Ct. App. 1985) (adopting the analytic framework for discrimination claims set forth in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973)); *see also* ***Racine Unified Sch. Dist. v. LIRC***, 164 Wis. 2d 567, 594-95, 476 N.W.2d 707 (Ct. App. 1991) (discussing disparate treatment and disparate impact theories of discrimination). An employer may attempt to rebut a prima facie showing of intentionally disparate treatment by articulating a legitimate, nondiscriminatory reason for its action. ***Puetz Motor Sales***, 126 Wis. 2d at 172. If the presumption is rebutted, the employee may then produce evidence to show that the employer's proffered reason for the challenged act was pretextual, in order to satisfy the claimant's ultimate burden of proof. ***Id.*** An employer's actual motivation is a factual determination. ***Currie***, 210 Wis. 2d at 386.

¶9 On this appeal, Santiago contends that Ogle's assignment of the freezer maintenance task to him constituted discrimination against him based upon his national origin. LIRC determined that there was no probable cause for Santiago's disparate treatment claim because the evidence did not establish that the freezer maintenance task was less favorable than the assignments given to other students and employees.

¶10 Santiago challenges LIRC's determination by arguing that being the only person on call twenty-four hours a days for three-and-one-half years was an inherently onerous burden. He misses the point, however, that other assignments could also have had positive and negative aspects. Without more information

about what specific tasks the other assignments involved, the length of time they took to perform, the frequency with which they needed to be done, and the degree of skill needed to perform them, there is simply no basis in the record to conclude that Santiago's assignment was more onerous or burdensome than any other assignment.

¶11 Given LIRC's determination that Santiago had failed to show that the terms and conditions of his overall laboratory duties were less favorable than others, LIRC did not need to address Ogle's motive in assigning a particular task to Santiago. In sum, we are satisfied that reasonable minds could conclude, as did LIRC, that it was not probable that Ogle's assignment to Santiago of the freezer maintenance duty constituted discriminatory disparate treatment based upon his national origin.

By the Court.—Order affirmed.

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