COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 1997

NOTICE

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

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

No. 96-3418

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

RAY A. PETERSON, D/B/A MASTER BUILDERS,

PETITIONER-APPELLANT,

V.

DEPARTMENT OF INDUSTRY, LABOR & HUMAN RELATIONS,

RESPONDENT-RESPONDENT,

BRUCE BOULDEN,

COMPLAINANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Ray A. Peterson appeals an order of the circuit court under § 227.57, STATS., affirming a decision of the Department of Industry, Labor and Human Relations[1] (DILHR) which held that Peterson willfully refused to rent housing to a black family on the basis of race, in violation of the Wisconsin Open Housing Act (WOHA), § 101.22, STATS.[2] Peterson assigns several evidentiary errors to the administrative proceedings and contends that the record fails to support DILHR's decision. However, we conclude that the evidentiary decisions were proper and the decision on the merits of the discrimination complaint was supported by substantial and credible evidence. Accordingly, we affirm.

BACKGROUND

Bruce Boulden filed a complaint with the Equal Rights Division of DILHR on December 23, 1993, alleging that Ray A. Peterson refused to rent housing to him because of his race. The Equal Rights Division investigated the complaint and on November 1, 1994, it issued a Charge and Initial Determination finding probable cause to believe that Peterson had violated WOHA by refusing to rent to Boulden and/or imposing different terms or rental conditions due to race. Administrative Law Judge, John L. Brown (the ALJ), heard the matter on January 13, 1995.

It was undisputed at the hearing that Peterson operated a rental business in the Madison area under the name of Master Builders, and that in the

[1] DILHR was renamed the Department of Workforce Development by 1995 Wis. Act. 289, § 275.

[2] Section 101.22, STATS., was renumbered to § 106.04, STATS., by 1995 Wis. Act 27, § 3687, eff. July 1, 1996.

fall of 1993, Peterson offered a newly constructed seven bedroom house for rent. At that time, he was renting approximately twelve of his sixty housing units to African-Americans.

Boulden testified that on or about November 11, 1993, he saw a classified advertisement for the seven bedroom house, and called Peterson's number to get more information. Peterson advised Boulden to drive by the house and call him back if he wanted to set up an appointment. Boulden did so the same day, and arranged to have Peterson show him the house the following day.

Peterson showed the house to Boulden and his adult step-daughter, Regina Mitchell. Boulden said that he told Peterson during the tour that his household would consist of three adults (Regina, his wife, and himself) and four children (the Bouldens' daughter, his wife's nephew, and two of Regina's six children). Peterson didn't give Boulden a formal application, but asked him to submit a written statement listing who would be living in the house, where the tenants had lived in the previous twelve months, and the amount and sources of household income.

The following week, Boulden wrote Peterson a letter in which he listed the family's sources of income and gave him the name and address of the family's current landlord, stating that it was the only place they had lived since coming to Madison. Boulden attached copies of his wife's and his sister's[3] SSI checks and Regina's AFDC grant. Boulden's letter did not state who would be living in the house.

[3] Although Boulden's sister was not among the prospective tenants, Boulden listed her SSI income because he was her representative payee.

After waiting a few days for a response, Boulden contacted Peterson to inquire about his application. Peterson said he did not receive copies of the SSI checks and AFDC grant, so Boulden and his wife brought second copies of the documents to Peterson. Boulden testified that he also gave the names and ages of the four children who would occupy the household to Peterson at that time. Peterson said he would review the information and get back to Boulden.

Boulden called Peterson for another status check on November 22, 1993. He testified that Peterson told him he had verified the family's income and current tenancy and would get back to him. When Boulden again contacted Peterson on November 23, 1993, Peterson informed him that he would need to conduct a personal inspection of the Bouldens' apartment before approving their tenancy. They scheduled an appointment for the following day, which was the Wednesday before Thanksgiving.

During the inspection, Peterson asked Boulden about the number of children present in the apartment. Boulden explained that four of the children belonged to a friend who was visiting for the Thanksgiving holiday. In addition, there were four of Regina's children present, two of whom did not ordinarily reside with her. There was nothing in the inspection which suggested that the friend or four children were permanent residents. Peterson left without telling the Bouldens whether they had been approved.

Boulden called Peterson again on November 26, 1993. According to Boulden, Peterson told him that his application was being rejected for misrepresentation, because Peterson had counted more than four children when he inspected the family's current residence. Peterson testified that he could not recall

having met Boulden or rejecting his application, but maintained that he would not have rented to Boulden based on his application letter.

On February 10, 1995, before the ALJ had issued a decision, Peterson filed a motion for a new hearing to present additional rebuttal evidence. The ALJ denied the motion on February 15, 1995. The next day, Peterson filed a motion to admit Respondent's Exhibit 18A, which detailed certain misrepresentations about the Bouldens' income which Peterson had discovered. The parties briefed the issue, and Peterson requested that the ALJ disqualify himself. The ALJ denied both motions.

On August 25, 1995, the ALJ found that Peterson's only expressed reason for rejecting the application was the alleged misrepresentation of the number of household members, and that the expressed reason was a pretext. He reasoned that because Peterson never initiated any contact with Boulden, required a special home inspection, and expressed an unsubstantiated reason for rejecting Boulden's application, Peterson was unwilling to rent to Boulden due to racial discrimination. The ALJ found Peterson's discrimination was willful and that it caused the Bouldens embarrassment and humiliation. He ordered Peterson to cease discriminating on racial grounds; he awarded Boulden $7,200.00 in non-economic damages, $29.74 in economic loss, $100.00 forfeiture, and $13,305.83 in attorney fees.

Peterson sought review in the Dane County Circuit Court, where DILHR's decision was affirmed. This appeal followed.

DISCUSSION

Standard of Review.

We review the decision of the administrative agency, rather than that of the circuit court.[4] ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). The precise standard of review varies depending on whether the issue is factual or legal in nature. *See* § 227.57(3), STATS.

The agency's factual findings must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983); § 227.57(6), STATS. A reviewing court may not substitute its judgment for that of the agency in regard to the weight or credibility of the evidence on any finding of fact. *See* ***Advance Die Casting Co. v. LIRC***, 154 Wis.2d 239, 249, 453 N.W.2d 487, 491 (1989); § 227.57(6). Rather, it must examine the record for credible and substantial evidence which supports the agency's determination.

Discriminatory motivation is a factual determination. ***St. Joseph's Hospital v. Wisconsin Employment Relations Bd.***, 264 Wis. 396, 401, 59 N.W.2d 448, 451 (1953). However, evidentiary rulings require the application of legal standards to a particular set of facts. *See* ***State v. Gil***, 208 Wis.2d 531, 538, 561 N.W.2d 760, 763 (Ct. App. 1997). A court is not bound by an agency's

[4] Thus, we do not consider any of the appellant's contentions of trial court error in its review of the case. We also do not address whether trial review was appropriate because the appellant's brief failed to develop that issue. ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

conclusions of law in the same manner as by its factual determinations. ***West Bend Educ. Ass'n v. WERC***, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). However, some deference may nonetheless be appropriate.[5] This is also true in the case of evidentiary decisions which occur during the course of a contested case hearing because they depend greatly upon the weight and credibility of testimony and the foundational basis for admission, which the fact-finder is in the best position to assess. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388-89, 541 N.W.2d 753, 761 (1995). Decisions about which evidence is admissible are discretionary in nature, and we will not disturb them so long as the ALJ examined the relevant facts, applied a proper standard of law, and used a rational process to reach a conclusion which a reasonable ALJ could make. *See* ***Ritt v. Dental Care Associates, S.C.***, 199 Wis.2d 48, 72, 543 N.W.2d 852, 861 (Ct. App. 1995).

Racial Discrimination.

It is unlawful for a landlord to discriminate by refusing to rent housing to any person on the basis of race or color. Section 101.22(1)(h) and (2)(a), STATS., 1993-94. However, a landlord does have the right to request information about the family and financial status of prospective tenants under § 101.22(5m)(f). Therefore, an inadequate or incomplete application form may act as a defense to a discrimination charge by providing a legitimate basis for the action taken. The issue, however, is one of motivation. *See, e.g.,* ***Gamble v. City of Escondido***, 104 F.3d 300, 305 (9th Cir. 1997) ("Proof of discriminatory motive is crucial to a disparate treatment claim.") *citing* ***Familystyle of St. Paul, Inc. v.***

[5] The supreme court has recently clarified both when to defer to an agency's legal conclusion, and how much deference the courts should give. *See* ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996) (citations omitted) for a discussion of the great weight, due weight and *de novo* standards of review.

City of St. Paul, 728 F.Supp. 1396, 1401 (D. Minn. 1990) (importing an employment discrimination standard into a housing discrimination case).[6] Thus, it is possible for a landlord to violate WOHA even if a potential tenant fails to satisfy the formal requisites of a rental application, or misrepresents certain information. *See* ***LeBlanc-Sternberg v. Fletcher,*** 67 F.3d 412, 425 (2nd Cir. 1995) ("If the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons.") (citations omitted).

1. Sufficiency of evidence for factual findings.

Peterson claims that the record is void of any evidence that he rejected a completed application whose accuracy had been verified. However, Peterson's focus on the adequacy of Boulden's rental application begs the real question, which is the *actual motivation* behind his rejection of the Bouldens as tenants.

At the hearing, Peterson offered no reason for rejecting the Bouldens' tenancy. He claimed that he could not remember either Boulden or his rental application. However, Boulden testified that Peterson specifically told him over the phone that he was being denied for misrepresenting the number of children who would be living in the household, and the ALJ credited Boulden's account. Therefore, despite Peterson's subsequent lack of recall, the record

[6] Because Wisconsin's Open Housing Act is substantially similar to the federal Fair Housing Act, federal decisions may provide guidance for applying the state civil rights law. *See* ***Puetz Motor Sales Inc. v. LIRC***, 126 Wis.2d 168, 376 N.W.2d 372 (Ct. App. 1985); ***Currie v. DILHR***, No. 96-1720 (Wis. Ct. App. Apr. 24, 1997).

supports the finding that Peterson's expressed reason for the rejection was misrepresentation of the number of household occupants.

The record similarly supports the finding that Peterson's expressed reason for rejecting the application was pretextual. Boulden testified he orally informed Peterson of who would be occupying the house during the tour of the house, and that he wrote down a list of the intended residents when he was at Peterson's house to leave the duplicate application materials. In addition, Boulden testified that he inquired on numerous occasions about the status of his application, without receiving any indication that the information he had provided was inadequate. More importantly, the Bouldens plausibly answered Peterson's questions about the number of children present during the pre-Thanksgiving home inspection, and Peterson left without making any comment about misrepresentation.

2. Relevance of excluded evidence.

"While not bound by the rules of evidence, a hearing examiner is directed to admit testimony having reasonable probative value but to exclude immaterial or irrelevant testimony." ***Village of Menomonee Falls v. DNR***, 140 Wis.2d 579, 609, 412 N.W.2d 505, 518 (Ct. App. 1987); § 227.45(1), STATS. Relevant evidence is that which has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Section 904.01, STATS. In some instances, the relevancy of evidence may depend upon the existence of a certain fact or facts, and such foundational facts become necessary prerequisites for the admission of the conditionally relevant evidence. Section 901.04(2), STATS; *see* ***Paro v. Carter***, 177 Wis. 121, 188 N.W. 68 (1922).

Peterson argues that all of his evidence relating to the inaccuracies in Boulden's application letter was relevant to his defense that the application was denied for a reason other than race, and should have been admitted. However, the ALJ correctly noted that the relevance of any application inaccuracy was dependent upon Peterson's knowledge of the information at the time he rejected the Bouldens' application. Since Peterson could not have relied on inaccuracies of which he was unaware, those inaccuracies shed no light on his actual motivation for rejecting the application. The ALJ's conclusion that such evidence was not probative represented a rational application of the proper standard of law to the facts of this case. Therefore, the exclusion of the evidence was a proper exercise of discretion.

CONCLUSION

The evidence which Peterson sought to introduce regarding alleged inaccuracies in Boulden's application letter was irrelevant to Peterson's motivation at the time of the rejection without the foundational fact that Peterson was aware of the inaccuracies at the time that he rejected Boulden's application. Therefore, the ALJ's exclusion of the evidence was a reasonable exercise of its discretion under § 227.45(1), STATS. In addition, substantial and credible evidence in the record support the finding that the reason Peterson gave Boulden for rejecting his application was pretextual and that Peterson's refusal to rent to Bouldens was motivated by race.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.