

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

August 14, 1997

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. 97-0067-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NATALIE BAKER,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION, WEST
SALEM PLASTICS,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Natalie Baker appeals from a circuit court decision and order affirming an order of the Labor and Industry Review Commission (LIRC). At issue in this appeal is whether her employer, West Salem Plastics, had “other suitable employment” for her after she was injured. For the reasons set

forth below, we conclude that LIRC did not err in determining that West Salem was not required to tailor a special position for Baker and that West Salem's decision not to rehire Baker was reasonable.¹

BACKGROUND

In 1992, Baker began work for West Salem as a finishing operator. Her position involved repetitive hand motions. In June 1993, Baker's physician diagnosed carpal tunnel syndrome. In November 1993, Baker returned to work with a physician's restriction on strenuous, repetitive work. For the next year, Baker operated a vac-form machine with no reinjury. However, in November 1994, West Salem reorganized its production lines. One result was that each person in Baker's job classification had to be able to do work which required repetitive hand motions. Within one week of reassignment, Baker reinjured her hand.

From early November through early December 1994, Baker was away from work due to her reinjury. When she returned under the same physician's restriction as previously, West Salem advised her that she could not be accommodated and placed her in lay-off status. In September 1995, Baker was terminated. Thereafter, Baker brought this action, claiming unreasonable refusal to rehire under § 102.35, STATS.² An administrative law judge found that West

¹ This is an expedited appeal under RULE 809.17, STATS.

² Section 102.35(2) and (3), STATS., provide:

(2) Any employer, or duly authorized agent thereof, who, without reasonable cause, refuses to rehire an employe injured in the course of employment, or who, because of a claim or attempt to claim compensation benefits from such employer, discriminates or threatens to discriminate against an employe as to the employe's

(continued)

Salem had reasonable cause for not rehiring Baker because of the reorganization of its product lines. LIRC affirmed, and Baker appealed to the circuit court, which also affirmed. Baker now appeals to this court.

STANDARD OF REVIEW

In a review of an unemployment compensation case, we review the decision of LIRC, not that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). We will set the factual findings aside only if LIRC acted without or in excess of its powers, or if the award was procured by fraud, or if LIRC's findings do not support the order or award. Sections 102.23(1)(a) and (e), STATS. We examine the entire record to determine whether there is substantial and credible evidence which could support the findings, *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 53-55, 330 N.W.2d 169, 173-74 (1983), not whether there is evidence to sustain a finding not made. *Mednicoff v. DILHR*, 54 Wis.2d 7, 18, 194 N.W.2d 670, 675-76 (1972). If there

employment, shall forfeit to the state not less than \$50 nor more than \$500 for each offense. No action under this subsection may be commenced except upon request of the department.

(3) Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

is evidence upon which reasonable people could rely in reaching the conclusion, we must affirm. *Princess House*, 111 Wis.2d at 54, 330 N.W.2d at 173.

Generally, three levels of deference are granted to an agency's conclusions of law and statutory interpretations. *Sauk County v. WERC*, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991). First, if the agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's determination is entitled to "great weight." *Id.* On the second level of review, if the agency's decision is "very nearly" one of first impression, we grant it "due weight" or "great bearing." *Id.* at 413-14, 477 N.W.2d at 270. The third and lowest level of review provides that we will review the conclusions or interpretation *de novo* where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. *Id.* at 414, 477 N.W.2d at 270-71.

Although the parties disagree as to which level of review of law applies here, we need not reach this issue. Reasonable cause is a question of mixed law and fact. *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis.2d 118, 122, 519 N.W.2d 713, 716 (Ct. App. 1994). Once the facts are established, whether they give rise to reasonable cause is a question of law. *Id.* Under the factual findings here, even if we were to employ the most stringent standard of legal review (*de novo*), we would affirm LIRC's holding.

ANALYSIS

The parties do not dispute that Baker met her burden of proof to show that: (1) she sustained injury on the job, (2) she applied for rehire, and (3) she was not rehired because of her injury. See *West Bend Co. v. LIRC*, 149

Wis.2d 110, 126, 438 N.W.2d 823, 830-31 (1989). Once Baker discharged this burden, the burden shifted to West Salem to show that its refusal to rehire was not unreasonable. This requires a showing that: (1) the employee could not do the work for which she applied, and (2) no other suitable employment is available within the employee's physical and mental limitations. *Id.* at 126, 519 N.W.2d at 831. We conclude that West Salem made both of these showings. In addition, the specific question of reasonableness in refusal to rehire may be affected by legitimate decisions made by the employer regarding business organization. *Ray Hutson Chevrolet*, 186 Wis.2d at 123, 519 N.W.2d at 716. We conclude that West Salem prevails on this issue also.

The ALJ found, LIRC affirmed, and appellant does not dispute that around the time of Baker's reinjury, West Salem reorganized its product lines for purely commercial purposes. West Salem's corporate nurse analyzed the physical attributes necessary to discharge each reorganized job classification and determined that Baker's physical restrictions could not be accommodated within any of the new job descriptions. West Salem's plant manager testified that each worker is required to be able to do each of the job tasks within their job description.

Baker argues that West Salem should have made a new position for her because, as a large company with twenty-nine separate assembly line job tasks, West Salem could have put her to work on one of the "at least seven" job tasks that Baker could manage under her physical restrictions, although there is no job description which consists of only these seven tasks. Stated otherwise, Baker argues in essence that West Salem's refusal to rehire was unreasonable because, although West Salem had reorganized in a manner that made it impossible to

accommodate her within the new job descriptions, it could have created a special job description for her from some of the job tasks she could perform.

We conclude that the testimony of the nurse and the plant manager are sufficient credible evidence to sustain the facts as affirmed by LIRC. Although there were some job tasks Baker could perform in the West Salem plant, there was no “suitable employment” after reorganization that was available within Baker’s “physical and mental limitations.” Section 102.35, STATS. *See also West Bend*, 149 Wis.2d at 126, 438 N.W.2d at 831. Stated otherwise, the ability to perform part of a job is not tantamount to being able to discharge the requirements of “employment,” and employment which includes work from which Baker was precluded by physician’s orders is not “suitable” because it is not within Baker’s “limitations.”

As to the specific issue of whether West Salem’s refusal to rehire was “reasonable” because of a business reason, Baker does not argue that West Salem could not reorganize its production lines, and she does not argue that the reorganization was a pretext for refusing to rehire her. Thus, Baker does not contest that West Salem’s reorganization was for purposes unrelated to her employment there. This court has previously found that where there exists a legitimate business reason to refuse to rehire, such as increased efficiency, refusal to rehire may be reasonable. *See Ray Hutson Chevrolet*, 186 Wis.2d at 123, 519 N.W.2d at 716 (“A business decision ... can, by itself, establish the reasonableness of the decision [not to rehire].”). In our analysis, West Salem’s non-pretextual business purpose reorganization, coupled with Baker’s inability to perform the tasks within her reorganized job description, make West Salem’s refusal to rehire “reasonable” under *Ray Hutson Chevrolet*.

By the Court.—Order affirmed.

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

