COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1827

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

RIB MOUNTAIN SKI CORPORATION,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION AND HOWARD MANSKE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Marathon County: DOROTHY L. BAIN, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Curley, J.

CANE, C.J. This is a worker's compensation action involving Howard Manske's claim that his discharge following a work-related injury violates § 102.35(3), Stats., the "unreasonable refusal to rehire" provision. Rib Mountain Ski Corporation, the employer, appeals the circuit court's order affirming the

Wisconsin Labor and Industry Review Commission's award of lost wages to Manske because of Rib Mountain's unreasonable refusal to rehire. On appeal, Rib Mountain contends that: (1) the commission improperly applied the burden of proof by relieving Manske of his initial burden to show that Rib Mountain refused to rehire him because of his work injury; (2) Manske failed to show Rib Mountain did not rehire him because of his injury; and (3) alternatively, it established reasonable cause for not rehiring Manske. We reject his arguments and affirm the circuit court.

I. Background

The commission's decision sets forth the following facts. In 1987, Manske began working as a ski instructor for the Rib Mountain Ski Corporation, which operates an alpine ski hill from approximately December to March. In 1991, Rib Mountain promoted Manske to ski school director. In January 1992, Manske suffered an on-the-job left knee fracture. Just before his work injury, Rib Mountain sent Manske a birthday card complimenting his job performance. Manske never received any complaints about his on-the-job performance or behavior from Rib Mountain. Following his recovery, Manske expected to return to work the next season just as he had the previous five years.

On July 13, 1992, Manske received a termination letter from Rib Mountain indicating that during the upcoming season, the ski school would be led by "an administrative person and will have a limited need for certified ski instructors." The letter further stated that Rib Mountain felt that Manske "deserved to be informed as soon as possible" so that he could "have an opportunity to find other winter employment. We wish you well in your

employment search and thank you for your past efforts at Rib Mountain." Rib Mountain subsequently hired another person for the position.

Manske filed a worker's compensation claim alleging that Rib Mountain unreasonably refused to rehire him contrary to § 102.35(3), Stats. The administrative law judge agreed and awarded him one year's wages. The commission affirmed the ALJ's decision and adopted the ALJ's findings and order "as its own."1 The circuit court affirmed the commission's decision. This appeal followed.

II. ANALYSIS

The unreasonable refusal to rehire statute, § 102.35(3), STATS., provides in pertinent part:

> 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.

We must liberally construe the statute to effectuate its beneficient purpose of preventing discrimination against employees who have sustained compensable work-related injuries. ***West Allis Sch. Dist. v. DILHR***, 116 Wis.2d 410, 422, 342 N.W.2d 415, 422 (1984). To establish a prima facie case under § 102.35(3), STATS., employees have the burden to show: (1) they were an

[1] Because the commission adopted the administrative law judge's findings and order "as its own," we will collectively refer to the ALJ's and the commission's decisions as those of the "commission's."

employee; (2) they sustained a compensable injury; (3) they applied for rehire; and (4) the employer refused to hire them because of their injuries.[2] ***Universal Foods Corp. v. LIRC***, 161 Wis.2d 1, 6, 467 N.W.2d 793, 795 (Ct. App. 1991). When reviewing a worker's compensation case, we review the commission's decision, not the circuit court's. *See* ***Stafford Trucking v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981).

Whether an employer unreasonably refused to rehire an injured employee under § 102.35(3), STATS., is a question of fact for the commission to determine. *See* ***Link Indus. v. LIRC***, 141 Wis.2d 551, 558, 415 N.W.2d 574, 577 (Ct. App. 1987). Section 102.23(1), STATS.,[3] governs the scope of judicial review of the commission's findings of fact. *See* ***R. T. Madden, Inc. v DILHR***, 43 Wis.2d 528, 536, 169 N.W.2d 73, 76 (1969). We must affirm the commission's findings of fact if the record contains any credible and substantial evidence to support those findings. *See* § 102.23(6), STATS. "Substantial evidence" is that which is relevant, probative, and credible, and in a quantum upon which a reasonable fact finder could base a conclusion. ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173-74 (1983).

The commission, not this court, determines the credibility of witnesses and weighs conflicting testimony. ***Link***, 141 Wis.2d at 558, 415

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[2] Manske contends that it is unclear whether he has the burden to show that Rib Mountain's refusal to rehire him was due to his work injury. Normally we would agree that, because such information is particularly within the employer's knowledge, the employee should not be required to prove that the employer's failure to rehire was due to a work injury. However, ***Universal Foods Corp. v. LIRC***, 161 Wis.2d 1, 6, 467 N.W.2d 793, 795 (Ct. App. 1991), requires such a showing.

[3] Section 102.23(1)(a), STATS., provides, in part: "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive."

N.W.2d at 577. Even if contrary to the great weight and clear preponderance of the evidence, we will uphold the commission's findings. *See* ***Goranson v. DILHR***, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278 (1980).

If the employee makes a prima facie showing, then the burden of proof shifts to the employer to show reasonable cause for its refusal to rehire. *See* ***Universal Foods***, 161 Wis.2d at 6, 467 N.W.2d at 795; ***West Bend Co. v. LIRC***, 149 Wis.2d 110, 126, 438 N.W.2d 823, 831 (1989); *see also* § 102.35(3), STATS. To meet this burden of proof, the employer must make a two-part showing. ***Universal Foods***, 161 Wis.2d at 7, 467 N.W.2d at 795. First, the employer must show that the employee could not do the work. ***Id***. Second, the employer must show that no other "suitable employment is available within the employe's physical and mental limitations." Section 102.35(3), STATS.; *see also* ***West Bend***, 149 Wis.2d at 126, 438 N.W.2d at 831.

Reasonable cause is a mixed question of law and fact. ***Ray Hutson Chevrolet v. LIRC***, 186 Wis.2d 118, 122, 519 N.W.2d 713, 716 (Ct. App. 1994). Again, we will sustain the commission's findings of fact if supported by credible and substantial evidence. ***Id***. Whether a justification is a pretext is a question of fact. *See* ***id***. at 124, 519 N.W.2d at 716. Once the facts are established, whether they give rise to reasonable cause is a question of law we review de novo. *See* ***id***. Because the commission has special expertise in the application of § 102.35(3), STATS., we give its conclusions of law great deference. *See* ***Hill v. LIRC***, 184 Wis.2d 101, 109-10, 516 N.W.2d 441, 446 (Ct. App. 1994).

While Rib Mountain concedes that Mankse meets the first three requirements of an unreasonable refusal to rehire claim,[4] it argues that: (1) Manske failed to establish the fourth element, that the employer refused to rehire him because of the injury;[5] and (2) the commission and the circuit court failed to address whether Manske satisfied the fourth element, but "jumped directly to the second step of the analysis" dealing with whether Rib Mountain's refusal to rehire was reasonable, that is, it switched the burden of proof. We are not persuaded.

Although Rib Mountain correctly states the law, we reject its interpretation of the commission's findings. The commission did not switch the burden of proof or relieve Manske of his burden. To the contrary, the commission concluded that Manske met his burden to show that he was not rehired because of his injury and that Rib Mountain's refusal to rehire him was without reasonable cause:

> The commission agrees with the [ALJ] that the purported reasons given for the applicant's discharge had the clear ring of pretext and were not credible based on the praise [the birthday card] that was given to the applicant just

[4] Elsewhere in its briefs, Rib Mountain argues that to the extent that Manske "claims an entitlement to benefits on the basis that he should have been rehired as a ski instructor," Manske took no affirmative steps to apply for rehire as an instructor, thus rendering him "ineligible for benefits." To the contrary, when an injured employee has been terminated, it is not part of the employee's prima facie case to apply for rehire. *See* ***L & H Wrecking Co. v. LIRC***, 114 Wis.2d 504, 510, 339 N.W.2d 344, 347 (Ct. App. 1983). Further, the commission concluded that Rib Mountain terminated any sort of employment relationship with Manske.

[5] Rib Mountain also contends that it could not have unreasonably refused to rehire Manske following the injury because Manske's employment was seasonal and ended before the notice of termination. Put another way, it argues that because Manske was an at-will employee, it owned no duty to *rehire* him. Rather, it argues that it could not refuse to *hire* him because of his injury. Once again, the commission rejected the argument that Manske was an at-will employee and concluded that Rib Mountain clearly considered that an employment relationship existed; otherwise, it would not have sent Manske a termination letter.

> weeks before his injury and that he never received any complaints about his work, together with the evidence that he was not let go until after his injury. In addition, it appears that the applicant could have worked for employer as a ski instructor …. The applicant was not hired for work as a ski instructor for which he was qualified. *The credible evidence indicates that the employer did not discharge the applicant for a valid business reason but as a pretext to discharge the applicant due to his work injury*. (Emphasis added.)

The commission may have discussed the fourth requirement and reasonable cause together, but it indeed concluded that Rib Mountain discharged Manske "due to his work injury." The commission may state its findings as ultimate facts. *See* ***Mrs. Drenk's Foods v. Industrial Comm'n***, 8 Wis.2d 192, 196, 99 N.W.2d 172, 175 (1959) (discussing § 102.18(1), STATS.).[6] In addition, we reject Rib Mountain's assertion that the commission must identify the reason an applicant was not rehired. Rather, we agree with Manske that proving this fourth factor is a matter of inference, one that may be proven by excluding other possibilities or justifications. Further, we conclude that a finding of pretext, which essentially excludes other possibilities or justifications, is a sufficient basis for the prima facie showing that the refusal to rehire was due to the injury.

Rib Mountain also argues that, alternatively, it had reasonable cause not to rehire Manske. It repeatedly insists that its decision "had nothing to do with his injury" and relies on the evidence it presented at hearing that it did not rehire Manske for business and fiduciary reasons. These reasons included that under Manske's direction, the ski school "failed to make a solid corporate connection" and was too autonomous. Further, it contended that Manske's on-the-job problems

[6] Section 102.18(1)(b), STATS., provides, in part: "[A]fter the final hearing … the [commission] shall make and file its findings upon the … facts involved in the controversy."

also influenced its decision not to rehire.[7] However, this evidence merely contradicts the evidence upon which the commission relied, and conflicting evidence is an insufficient basis to reverse the commission. *See* ***Eastex Packaging v. DIHLR***, 89 Wis.2d 739, 745, 279 N.W.2d 248, 250-51 (1979). Additionally, the commission found Rib Mountain's testimony incredible and determined that the reasons it gave for its refusal to rehire Manske were pretextual. We must accept the commission's credibility findings. *See* ***Link***, 141 Wis.2d at 558, 415 N.W.2d at 577.

To make its factual findings that the refusal to rehire was due to the work injury and that no reasonable cause existed because its justifications were pretextual, the commission relied on the following evidence: (1) Rib Mountain praised Manske's job performance shortly before the injury; (2) Rib Mountain never complained to Manske about his on-the-job performance or behavior; (3) Manske was terminated after his injury; and (4) Mankse was not offered a ski instructor position. Additionally, we are satisfied that the commission's finding of pretext is also a sufficient basis for a prima facie showing that the failure to rehire was because of the injury. This evidence would permit a reasonable person to make the same factual findings as those the commission made. We therefore affirm these factual findings because substantial and credible evidence supports them. *See* § 102.23(6), STATS.

[7] Rib Mountain identified seven problems it had with Mankse: (1) the ski school failed to make a solid corporate connection; (2) Manske had been observed behaving inappropriately with customers and female ski instructors; (3) he had an "explosive temper"; (4) he failed to respond to Rib Mountain's request for semi-private lessons; (5) customers had complained regarding Manske; (6) he was not an effective leader because he has "too close of a relationship with ski instructors"; and (7) Manske and Rib Mountain's inability to communicate resulted in "management having no control over the ski school."

Next, we apply the commission's factual findings to the legal standard of whether Rib Mountain had reasonable cause. Again, because of the commission's special expertise in applying § 102.35(3), STATS., we give great deference to its legal determination that no reasonable cause existed. *See* ***Hill***, 184 Wis.2d at 109-10, 516 N.W.2d at 446. Rib Mountain offered no evidence that Manske could not do the work or that no suitable work was available for him. Instead, as the commission noted, Rib Mountain chose to use a "shotgun approach" and alleged a variety of reasons for Manske's discharge, reasons the commission deemed incredible. Based on the commission's finding of fact that the reasons were pretextual, we agree with the commission that no reasonable cause exists.

By the Court.–Order affirmed.

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