

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP3017

Cir. Ct. No. 2004CV4366

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT 1**

JOE M. JANZ,

PLAINTIFF-APPELLANT,

v.

**WISCONSIN STATE LABOR AND
INDUSTRY REVIEW COMMISSION AND
LIQUID JOHNNY'S REFRESHMENT PARLOR,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Joe M. Janz appeals *pro se* from an order affirming a decision of the Labor and Industry Review Commission (“LIRC”) that denied his

claim for unemployment compensation benefits and required Janz to repay benefits he was previously awarded. We affirm.

BACKGROUND

¶2 Janz was the sole owner of a corporation, JMJ Transportation, Inc. (“JMJ”). His corporation owned, among other investments, a tavern known as Liquid Johnny’s Refreshment Parlor (the “tavern”). Janz operated the tavern for twenty-one years, and claims to have paid himself an average annual salary of \$10,728 over those years. Janz was not in default on any obligations related to the tavern or JMJ in 2002 when he decided to sell the tavern. At that time, no creditor had filed a lien against the tavern or JMJ, no lawsuits against the tavern or JMJ claimed a debt, and no voluntary or involuntary bankruptcy proceedings were pending or threatened against the tavern or JMJ.

¶3 Janz sold the tavern in September 2002, to LJRP, LLC, (“LJRP”) which was owned by Gene Mack and Adam Hock. Two weeks after closing the sale, Janz filed for unemployment compensation from LJRP, claiming that his employment with the tavern ended because of an “involuntary cessation of business” due to “economic inviability” of the tavern at the time of the sale, within the meaning of WIS. STAT. § 108.04(1)(gm)4.c. (2001-02).¹ At that time, JMJ had not been dissolved.

¶4 In its initial determination, the Department of Workforce Development (“Department”) held that Janz’s sale of the tavern was due to

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

economic inviability. Thus, Janz's sale was not considered a voluntary termination of work under WIS. STAT. § 108.04(7)(a), and he was immediately eligible for unemployment compensation benefits.

¶5 Because the tavern's unemployment compensation account would be charged for benefits paid to Janz, the new owner had the right to appeal the initial determination, and chose to do so. At a hearing before a Department administrative law judge ("ALJ"), Janz testified that at the time of the sale, he was not involved in any personal bankruptcy arising out of the tavern, and the corporation was not in bankruptcy. Janz testified that there was nothing that required him to sell the tavern at that time "other than [Janz] found a buyer who would pay a price [Janz] felt was appropriate." He also contended that the tavern lost money over the years, although he admitted that he received net proceeds of \$15,076 from the sale and had earned a modest salary during the years he owned the tavern.

¶6 The ALJ issued a decision reversing the initial determination, concluding that the sale was not due to economic inviability, and that Janz's departure was a voluntary termination of work that did not entitle him to benefits. In doing so, the ALJ found that documents Janz submitted for the initial determination—upon which the original decision to award unemployment compensation benefits was based—were inaccurate. The ALJ specifically found that the sale of the tavern was not due to economic inviability, because "the business was not the subject of a bankruptcy, payments were being made timely and fully on all business obligations, and there were no involuntary transfer of assets."

¶7 Janz filed a petition for LIRC to review the decision. After reviewing the record, LIRC affirmed the decision, adopting the ALJ's findings and conclusions as its own. Janz appealed LIRC's decision to the trial court, which affirmed LIRC's decision. This appeal followed.

STANDARD OF REVIEW

¶8 Our scope of review is identical to that of the trial court, and we review LIRC's decision, not the trial court's. *Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). "We affirm LIRC's findings of fact if they are supported by substantial evidence." *Id.* "The agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." *Id.*

¶9 Reviewing courts are not bound by LIRC's determinations of law. *DILHR v. LIRC*, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990). However, this court will apply one of three levels of deference applicable to LIRC's interpretations of a particular statute: great weight, due weight, or no weight (*de novo* review). *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659-60, 539 N.W.2d 98 (1995). Here, LIRC argues that its interpretation of the relevant statute, WIS. STAT. § 108.04(1)(gm)4.c., is entitled to great weight. Janz argues that *de novo* review is appropriate because "LIRC has not demonstrated the specialized accounting knowledge necessary to analyze the financial statements presented to adequately determine economic inviability." Although LIRC makes a persuasive case for great weight deference, we decline to decide this issue, because regardless of the level of deference afforded, the result is the same: we

agree with LIRC that under the facts presented, there is insufficient evidence that the tavern was “economically inviable” under § 108.04(1)(gm)4.c. at the time it was sold.

DISCUSSION

¶10 At issue is whether Janz is entitled to unemployment compensation benefits, even though he owned and decided to sell the tavern that had been providing him employment and a salary. Pursuant to WIS. STAT. § 108.04(7)(a), an employee who voluntarily terminates his employment is not immediately eligible for unemployment compensation benefits. However, one exception to § 108.04(7)(a) occurs when a family-owned business is dissolved due to economic inviability. *See* § 108.04(1)(gm)4.c. Section 108.04(1)(gm) provides:

Paragraph (g) does not apply if the department determines that the individual whose base period wages are being computed was employed by an employer which is a family corporation and the individual’s employment was terminated by the employer because of involuntary cessation of business of the family corporation under one or more of the following circumstances:

....

4. Disposition of a total of 75% or more of the assets of the corporation using one or more of the following methods:

....

c. Sale, due to economic inviability, if the sale does not result in ownership or control by substantially the same interests that owned or controlled the family corporation....

¶11 LIRC concluded that economic inviability means the operation of a business at a loss. Janz does not appear to contest this interpretation of the statute. Rather, he contends that the tavern *was* operating at a loss. Specifically, Janz

contends that the tavern was not profitable and that he was still personally paying off the debt incurred by the tavern. He also notes that he averaged a salary of \$10,728 a year over a twenty-one-year period, and asserts that it could not be the intent of the legislature that one could be precluded from “meeting the definition of economic inviability simply by drawing a meager salary.”

¶12 Janz also contends that JMJ showed a profit in 2000, but that the tavern operated at a loss. Janz appears to claim that his financial records reflect that although JMJ showed a profit over time, the tavern showed a loss at the same time, hence the tavern was “economically inviable” under the statutes at the time of sale. Janz repeatedly asserts that analysis of his financial statements by “someone with the proper accounting background” could result in only his conclusion. Janz points out that a CPA prepared his tax returns, and that “analysis of the financial statements by someone with the proper accounting background would affirm my explanation.”

¶13 In contrast, LIRC asserts that Janz did not provide adequate proof that the tavern or JMJ was operating at a loss. LIRC also notes that there is substantial evidence that Janz sold the tavern at what he believed was an appropriate price, that there was no bankruptcy and no assets in receivership, that there was a positive cash flow from the tavern, and that Janz received an “overage” of \$15,076 when he sold the tavern. LIRC argues that under these facts, the tavern was not sold due to economic inviability. LIRC notes that the Wisconsin Supreme Court has recognized that cessations of business under far worse circumstances than those present here, including adverse economic circumstances and even bankruptcy, are voluntary terminations of employment by the seller. *See, e.g., Hanmer v. DILHR*, 92 Wis. 2d 90, 284 N.W.2d 587 (1979);

Fish v. White Equip. Sales & Serv., Inc., 64 Wis. 2d 737, 221 N.W.2d 864 (1974).

¶14 LJRP likewise argues that LIRC “correctly concluded that the evidence put in the record was simply insufficient to establish that the tavern was operating at a loss, or was in any way inviable.” It notes that Janz was able to sell the tavern for a sale price negotiated by the parties, and that Janz realized a profit from the sale.

¶15 We begin our analysis by considering the facts LIRC found. Despite Janz’s protestations to the contrary, there is substantial evidence that the tavern was not losing money at the time it was sold. LIRC’s findings, based on Janz’s testimony and the financial records submitted, are reasonable and supported by substantial evidence. Thus, we will not disturb them. *See Target Stores*, 217 Wis. 2d at 11. There is also no evidence that Janz’s sale of the tavern was anything but a voluntary sale—a transaction between a willing buyer and a willing seller. This too supports LIRC’s ultimate findings.

¶16 As the ALJ and LIRC both concluded, Janz failed to prove that the tavern, in an economic sense, could not live, grow and develop. Janz does not dispute that he operated the tavern for twenty-one years, and that he paid himself a salary. He provides no evidence to suggest recent financial disaster; on the contrary, he was current in all of the tavern-related obligations, and there were no creditors threatening any actions—much less bankruptcy—against the tavern. On those bases alone, LIRC could reasonably infer that the tavern was continuing to be financially viable. That conclusion was reasonable even if LIRC accepted

Janz's claims that the accounting records showed the tavern did not show a profit in the context of the rules of accounting.²

¶17 Based on these facts, we agree with LIRC's conclusion that the tavern was not sold "due to economic inviability" as required to meet the exception in WIS. STAT. § 108.04(1)(gm)4.c. Janz may not have been making a large profit, but the tavern was not losing money, had no creditor actions against it and was not in risk of bankruptcy. Janz does not meet the exception in § 108.04(1)(gm)4.c. He has offered no other basis to exempt him from the operation of § 108.04(7)(a). Therefore, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

² The tone of Janz's briefs suggest that he did not understand that it is *his* obligation to prove by competent evidence the facts he wishes the legal system to find, and that it is *his* responsibility to make the necessary tools available to the fact finder, particularly if that includes interpretation of financial documents by a qualified expert.

