

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 31, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 2005AP1931**

**Cir. Ct. No. 2004CV1911**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**PLATTEN DEVELOPMENTS, LLC,**

**PLAINTIFF-APPELLANT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND WENDY M. OLSON,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Brown County:  
MARK A. WARPINSKI, Judge. *Affirmed.*

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

¶1 LUNDSTEN, P.J. Platten Developments appeals a judgment of the circuit court affirming the Labor and Industry Review Commission's award of one year's wages to Wendy Olson as a penalty under a worker's compensation statute. The Commission found that Platten Developments' business reorganization, which

resulted in the elimination of Olson's position, was a pretext to justify Platten's refusal to rehire her in violation of WIS. STAT. § 102.35(3) (2003-04).<sup>1</sup> The circuit court affirmed the award, and we affirm the circuit court.

### ***Background***

¶2 Platten Developments is a family-owned limited liability company engaged in both property development and management of rental properties. Olson was employed by Platten Developments as an on-site manager and maintenance supervisor for various rental properties. As part of Olson's compensation, she lived rent-free in an apartment on one of the properties.

¶3 On September 21, 2001, Olson injured her shoulder while performing job duties.<sup>2</sup> After missing some work, Olson reported back on October 2, 2001, with a doctor's restriction preventing her from performing up to 75% of her duties. At that time, Peter Platten, one of the two member-owners of Platten Developments, fired Olson.

¶4 On October 29, 2001, a physician certified that Olson was capable of returning to work without restrictions. Olson kept Peter Platten apprised of changes in her restrictions, but Platten Developments declined to rehire Olson.

¶5 Effective November 1, 2001, the ownership of Platten Developments changed, as did the scope of its business. Peter Platten's mother bought out his interest, and the company stopped managing properties. The other member-owner

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> The nature of the injury is not important to our decision.

of Platten Developments was Peter's father. Thereafter, Peter managed property formerly managed by Platten Developments and, in February 2002, formed his own management company, Platten Management, Inc.

¶6 Olson filed an application for a worker's compensation hearing, alleging that Platten Developments unreasonably refused to rehire her. At the hearing before an administrative law judge (ALJ), two people testified: Olson and Peter Platten's brother, Christopher Platten. Olson testified about the circumstances surrounding her termination. Christopher, who prepared tax returns for Platten Developments, testified about the circumstances of the company's reorganization. Olson argued that Platten Developments' reorganization was a "sham," or pretext, to justify its refusal to rehire her.

¶7 The ALJ found that Platten Developments' reorganization was pretextual, at least in part, and that the company had violated WIS. STAT. § 102.35(3) by refusing to rehire Olson.<sup>3</sup> The ALJ determined that Olson should be awarded one year's wages.

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<sup>3</sup> WISCONSIN STAT. § 102.35(3) provides:

Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee 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.

¶8 Platten Developments sought review before the Commission, which agreed with the ALJ's decision and adopted the ALJ's findings and order as its own. Platten Developments then petitioned for circuit court review of the Commission's decision. The circuit court entered judgment affirming the Commission, and Platten Developments appeals from that judgment.

### *Discussion*

¶9 Platten Developments argues that its refusal to rehire Olson was lawful because it did not have suitable employment available for her due to the reorganization of its business. Thus, it contends, the Commission erred when it found that Platten Developments' reorganization was pretextual and, therefore, that the Commission erred when it concluded that Platten Developments violated WIS. STAT. § 102.35(3). We reject Platten's arguments and conclude that the Commission properly found that the reorganization was pretextual.<sup>4</sup>

¶10 WISCONSIN STAT. § 102.35(3) prohibits an employer, without reasonable cause, from "refus[ing] to rehire" an employee injured in the course of employment when "suitable employment is available" within the employee's limitations. Although Olson was fired on October 2, 2001, the pertinent dispute on appeal is whether Platten Developments violated the statute by refusing to rehire Olson on October 29, 2001. In that respect, Platten Developments argues only that its refusal was justified under § 102.35(3) because it did not have suitable employment available for her. More specifically, Platten Developments asserts it did not have suitable employment available when Olson became free of

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<sup>4</sup> We review the Commission's decision, not the circuit court's. *Hill v. LIRC*, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994).

restrictions because her position was about to be eliminated as a result of Platten Developments' business reorganization that would take effect November 1, 2001.<sup>5</sup>

¶11 We pause to note that Platten Developments does not argue that it can avoid liability under WIS. STAT. § 102.35(3) if the Commission properly found that its business reorganization was a pretext. And, Platten Developments does not argue that the Commission's "at least in part" finding is insufficient. In other words, we are not asked to address whether the Commission was required to find that Platten Developments' business reorganization was motivated *wholly* or *solely* by a desire to avoid liability under § 102.35(3). Accordingly, we turn our attention to whether the Commission properly determined that Platten Developments' business reorganization was, at least in part, a pretext to justify its refusal to rehire Olson.

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<sup>5</sup> Platten Developments also argues that its business reorganization provided "reasonable cause" under WIS. STAT. § 102.35(3) for its refusal to rehire Olson. We do not address this argument separately because it is based on the reorganization and resulting elimination of Olson's position and, therefore, adds nothing to the unavailability-of-suitable-employment argument we do address.

Platten Developments' appellate briefing might be read as arguing, in the alternative, that Olson was required to formally reapply for her position on or after October 29, 2001, when she no longer had work restrictions. If Platten Developments means to make this argument, we are not persuaded. A terminated employee is not required to report to work or to reapply for the same position in order to recover under WIS. STAT. § 102.35(3). See *L & H Wrecking Co. v. LIRC*, 114 Wis. 2d 504, 510, 339 N.W.2d 344 (Ct. App. 1983); cf. *Hill*, 184 Wis. 2d at 111-12 (the Commission reasonably interpreted § 102.35(3) to require that an employee express interest in employment in a *different* capacity when that employee remains unable to resume a previous position).

Similarly, if Platten Developments is arguing that it was justified in refusing to rehire Olson because she failed to fulfill some responsibility to inform Platten Developments when she became free of restrictions, it has failed to sufficiently develop such an argument. We note that Olson testified that she "kept giving [Peter Platten] the notices I was supposed to give him from the doctor." Platten Developments does not explain why Olson was required to do more than what she did.

¶12 The Commission’s pretext determination is a finding of fact. *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis. 2d 118, 124, 519 N.W.2d 713 (Ct. App. 1994). Our review of the Commission’s findings of fact is significantly limited by statute. *Heritage Mut. Ins. Co. v. Larsen*, 2001 WI 30, ¶24, 242 Wis. 2d 47, 624 N.W.2d 129. “The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive.” WIS. STAT. § 102.23(1)(a). The Commission’s fact findings are “conclusive” so long as they are “supported by credible and substantial evidence and [the Commission] did not act fraudulently or in a manner which exceeds its powers.” *Wisconsin Elec. Power Co. v. LIRC*, 226 Wis. 2d 778, 786, 595 N.W.2d 23 (1999).

¶13 The reviewing court may not substitute its judgment for that of an agency in a contested case as to the weight of evidence on any disputed finding of fact. *Crystal Lake Cheese Factory v. LIRC*, 2003 WI 106, ¶27, 264 Wis. 2d 200, 664 N.W.2d 651. Similarly, the credibility of witnesses is a matter for the Commission, not the reviewing court. *Link Indus., Inc. v. LIRC*, 141 Wis. 2d 551, 558, 415 N.W.2d 574 (Ct. App. 1987); *see also West Bend Co. v. LIRC*, 149 Wis. 2d 110, 118, 438 N.W.2d 823 (1989) (the supreme court “cannot substitute [its] judgment for that of the commission in respect to the credibility of a witness or the weight to be accorded to the evidence supporting any finding of fact”).

¶14 This standard of review for Commission fact findings is often expressed in capsule form as whether there is “any credible evidence” to support the Commission’s findings. *See, e.g., West Bend Co.*, 149 Wis. 2d at 118; *L & H Wrecking Co. v. LIRC*, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). A reviewing court will search the record for credible evidence that supports the Commission’s findings. *Mireles v. LIRC*, 2000 WI 96, ¶36, 237 Wis. 2d 69, 613 N.W.2d 875.

¶15 Platten Developments asserts that “no evidence exists” that its reorganization was a pretext. We disagree. The Commission’s pretext finding is based on a number of subsidiary findings, and each of these is directly supported by the record or constitutes an inference that the Commission could reasonably draw from the available evidence.<sup>6</sup>

¶16 The Commission found that Olson’s testimony was credible and that it was un rebutted because the person who might have rebutted it, Peter Platten, did not testify. Olson testified, and the Commission found, that from the moment Olson was injured her relationship with Peter soured. Olson testified that she had a close relationship with Peter, who was her “best friend,” but that this changed “immediately” after her injury. She explained that “[h]e was angry from the time I asked him if I could go to the doctor. And he was upset, and he said I’ll just pay it out of my own pocket.”

¶17 When Olson returned to work with a light-duty restriction and Peter terminated her, he initially declined to give her a reason, saying only that she “no longer [had] a job here.” Later, Peter told Olson: “I cannot afford for you to be here injured up like this ....” Peter gave Olson a five-day eviction notice and, when Olson told him she did not know how she would get money to pay rent, Peter told her it was not his problem. He was cursing and acting upset.

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<sup>6</sup> “If more than one reasonable inference can be drawn from the facts, the drawing of that inference is still a finding of fact and conclusive on review.” *Dalco Metal Prods., Inc. v. LIRC*, 142 Wis. 2d 595, 601, 419 N.W.2d 292 (Ct. App. 1987), *abrogated on other grounds by West Bend Co. v. LIRC*, 149 Wis. 2d 110, 122, 438 N.W.2d 823 (1989). “The commission has leeway in determining and drawing inferences from conflicting evidentiary facts.” *Dalco*, 142 Wis. 2d at 601; *see also Beverly Enters., Inc. v. LIRC*, 2002 WI App 23, ¶16, 250 Wis. 2d 246, 640 N.W.2d 518 (Ct. App. 2001) (“[F]actual findings include the drawing of one of several reasonable inferences from undisputed facts.”).

¶18 The only other witness was Christopher Platten.<sup>7</sup> Christopher testified that it was not until October 2001 that Peter and his father decided to reorganize the company, primarily because his father wanted to get out of the property management business. Christopher also testified that the concept of getting Peter out of Platten Developments had been discussed “at least a month” before the November 1, 2001 reorganization and that his father had expressed an interest in getting out of the property management business for “[a]pproximately two months” before the reorganization. At another point, Christopher testified that he did not recall exactly how long the reorganization had been planned, but that it had been “[a] month or two” prior to November 1, 2001.

¶19 The evidence also showed that Peter, either individually or as Platten Management, Inc., continued to manage apartments previously managed by Platten Developments. In addition, the evidence showed that, after the reorganization, the apartments were owned in the form of a real estate limited partnership by Peter Platten, Christopher Platten, their sister, and Platten Developments.

¶20 The Commission was free to believe Olson and reject the part of Christopher’s testimony suggesting that the reorganization plans had nothing to do with Olson. Moreover, the Commission reasonably inferred that, if the refusal to rehire Olson was due to a reorganization, Peter Platten would have said as much to Olson. Thus, the Commission could and did find that “given the timing of [Olson]’s termination ... any determination to replace members in the limited

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<sup>7</sup> We find no explanation in the record for why the owners of Platten Developments, Peter and his father, did not testify.



liability company [Platten Developments] and to cease engaging in property management occurred after the fact and very probably as a result of [Peter Platten]’s action in terminating Olson with the attendant liability concerns resulting therefrom.”

¶21 In short, the Commission’s ultimate finding of pretext is supported by credible evidence in the record. Although a contrary finding may also have found support in the record, this does not affect our decision to uphold the Commission’s finding in light of the proper standard of review.

¶22 As a final matter, we address Platten Developments’ assertion that the Commission made a mathematical error in calculating Olson’s wages and, therefore, the Commission imposed a monetary penalty unsupported by the evidence. The Commission calculated the award based on Olson’s wage, *plus* an amount representing the value of the apartment Platten Developments provided to Olson as a part of her compensation.<sup>8</sup> Platten Developments points out that the parties stipulated that Olson’s wage averaged \$520 per week and contends that the penalty must be limited to an amount based on that wage alone. We disagree. The stipulation in the record does not purport to cover Olson’s *total* compensation. To the extent the parties stipulated to Olson’s wage, the stipulation is simply consistent with the penalty imposed, which takes into account Olson’s total compensation.

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<sup>8</sup> To be precise, it was *the ALJ’s* calculation that was based on Olson’s testimony of \$13 per hour plus rent. The Commission’s memorandum opinion mistakenly states that Olson’s testimony was \$11 per hour plus rent, rather than \$13 per hour plus rent. This mistake does not affect our decision, however, because the Commission adopted all of the ALJ’s findings as its own. In addition, the Commission concluded in its memorandum opinion: “The commission credits [Olson]’s testimony and finds that the administrative law judge correctly calculated the amount of the back pay due in this case pursuant to WIS. STAT. § 102.35(3).”

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

