

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 21, 2010

A. John Voelker
Acting 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. 2009AP2412

Cir. Ct. No. 2008CV1057

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

UNIFIED MANAGEMENT COMPANY, LLC,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

GWENDOLYN KLAY,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

¶1 PER CURIAM. This is a worker’s compensation case that presents the issues of whether an employer improperly refused to rehire an injured employee, and whether the Wisconsin Labor and Industry Review Commission (LIRC) used the correct standard for determining the amount of lost wages due the employee. Unified Management Company, LLC, the employer, appeals the judgment of the circuit court that affirmed LIRC’s decision that found in favor of the employee, Gwendolyn Klay. Unified argues that LIRC erred when it found that Unified refused to rehire Klay without reasonable cause, and when it determined that the maximum amount of lost wages Klay could receive was the amount of her salary at the time of her injury, rather than the salary for the position she should have been hired to fill. Klay cross-appeals the portion of the judgment that determined the amount of weekly wages to which she was entitled. Klay argues that the amount of weekly lost wages she should receive is the amount of wages she was receiving at the time of her injury. LIRC argues that its decision is reasonable in all respects and must be affirmed.

¶2 We affirm LIRC’s determination that Unified improperly refused to rehire Klay. We also conclude that LIRC properly determined the weekly amount of lost wages Klay should receive, but that LIRC’s determination of the maximum amount of wages Klay could receive under WIS. STAT. § 102.35(3) (2007-08) was unreasonable.¹ Consequently, we reverse the portion of the judgment that set the maximum amount of lost wages and remand the case to the circuit court with directions. We affirm the judgment in all other respects.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 Klay was a full-time receptionist for Unified. In April and May 2007, Klay had surgery on her wrists for a work-related injury, carpal tunnel syndrome. On May 20, Klay informed her supervisor that she expected to be released from work restrictions in early June. On May 22, the president of Unified wrote Klay to tell her that the company was reducing its work force and no longer needed a full-time receptionist. In June, Unified hired a temporary part-time receptionist. In September and October, Unified advertised for and hired a permanent part-time receptionist. Unified did not offer this job to Klay.

¶4 Klay brought a worker's compensation claim. The administrative law judge found that Klay had sustained an occupational injury arising out of her employment, that Unified had unreasonably refused to rehire Klay for the part-time position, and that Klay was entitled to lost wages at the amount for the permanent part-time position, \$240 per week. LIRC affirmed the administrative law judge's decision, and held that the maximum amount of lost wages that Klay could receive was the annual amount of her salary at the time of her injury, \$35,152.00. Unified appealed to the circuit court, and the circuit court affirmed LIRC's decision in all respects. Unified now appeals to this court.

¶5 The parties do not dispute our standard of review.² We review LIRC's decision and not the decision of the circuit court. *Hill v. LIRC*, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994). We conclude, as we did in *Hill*,

² In its brief-in-chief, Unified argued that we should apply the great weight standard. The argument in Unified's reply brief related to prior allegedly inconsistent LIRC cases appears inconsistent with this standard of review and suggests that Unified may be arguing for a *de novo* standard of review. We do not address this line of argument because we do not consider an argument raised for the first time in a reply brief. See *Swartwout v. Bilsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

that the great weight deference standard applies to LIRC’s interpretation of the statute at issue, WIS. STAT. § 102.35(3). *Hill*, 184 Wis. 2d at 110. Under this standard, we affirm the agency’s interpretation of the statute “if it is reasonable, even though an alternative view is also reasonable.” *Id.* We are bound by LIRC’s findings of fact if there is credible evidence to support them. *Id.* Even if LIRC’s findings “appear contrary to the great weight and clear preponderance of the evidence, we must uphold them if they are supported by any credible evidence.” *Id.* at 111.

¶6 The first issue here is whether LIRC properly determined that Unified refused to rehire Klay without reasonable cause under WIS. STAT. § 102.35(3).³ There are four elements to stating a claim on this basis: (1) the claimant was an employee; (2) the employee sustained an injury on the job; (3) the employee applied to be rehired; and (4) the employer refused to rehire because of the injury. *Hill*, 184 Wis. 2d at 111. “[N]o affirmative reapplication [is] necessary when the employee is released by a physician to return to the same position without restrictions; informing the employer of the physician’s release [is] sufficient.” *Id.* “[E]xpressing to the employer the extent to which an employee is

³ WISCONSIN STAT. § 102.35(3) states:

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.

interested in working in a different capacity is necessary when the employee is precluded from returning to his or her previous job.” *Id.* at 111-12.

¶7 Once the employee has established these elements, the burden shifts to the employer to show reasonable cause for failing to rehire. *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 123, 438 N.W.2d 823 (1989). Reasonable cause means “whether the conduct of the employer was ‘fair, just, or fit under the circumstances.’” *Id.* at 130 (citation omitted).

¶8 Unified does not dispute that Klay was an employee and was injured on the job. Unified argues that there is no credible evidence to support LIRC’s findings on the last two elements. Specifically, Unified argues that Klay did not apply to be rehired because she did not tell them that she would be interested in a different position and she did not apply for the advertised part-time position. Citing *Hill*, Unified argues that Klay’s phone call to them saying she would be released from work restrictions was not sufficient to meet the requirements for rehire for any position in the company.

¶9 *Hill*, however, is distinguishable on its facts. In *Hill*, the employee could not return to his previous position as a truck driver, but was willing to accept a different job in transportation. *Hill*, 184 Wis. 2d at 105-06. LIRC ruled that, when an employee is released by his or her physician with permanent restrictions “that all parties agree will preclude the employe from returning to the type of work he always did for the employer,” the employee has an obligation to communicate to the employer “the extent of his interests, if any, in returning to employment with that employer in a *different* capacity.” *Id.* at 108.

¶10 Klay, however, was not seeking a different job; she wanted to return to her position as a receptionist. Klay informed Unified that she would be released

from work restriction. Unified did not have a receptionist position available for her at that time, but did have a permanent half-time receptionist position within four months. Under these circumstances, Klay did not have an affirmative duty to contact Unified to say that she was willing to work in the same position but for fewer hours. Unified had a duty to rehire Klay when work in the same position became available. Klay established the third element.

¶11 Unified does not develop its argument on the fourth element, other than to say that LIRC was wrong when it found that Unified refused to rehire Klay because of her injury. We conclude that Unified has not established that LIRC's determination was wrong on this element. We affirm LIRC's decision that Klay established the prima facie case and that Unified did not establish reasonable cause for failing to rehire her.

¶12 The second issue is whether LIRC properly determined the amount of lost wages due to Klay as a result of the statutory violation. Klay argues in her cross-appeal that LIRC erred when it awarded her weekly wages in the amount paid to the part-time receptionist and not the amount Klay had earned at the time of her injury. Unified argues that LIRC erred when it used Klay's salary as a full-time receptionist as the maximum amount of lost wages. LIRC responds that both determinations were reasonable and that, under the great weight deference standard, we must affirm.

¶13 We agree with LIRC and Unified that it was reasonable for LIRC to award Klay the salary she would have received if she had been rehired as a part-time receptionist. LIRC determined that Unified eliminated the full-time receptionist position for legitimate business reasons. Consequently, the wages

Klay lost within the meaning of WIS. STAT. § 102.35(3) were the part-time wages she would have received had Unified not refused to rehire her.

¶14 We conclude, however, that once LIRC determined that Klay's former position had been eliminated for legitimate business reasons, it was not reasonable for LIRC to use Klay's previous full-time wages to set the maximum amount of lost wages. LIRC argues that establishing the maximum amount of lost wages by using her full-time salary "is consistent with the one-year limitation contained in WIS. STAT. § 102.35" and the case law. LIRC also relies on WIS. STAT. § 102.03(4), which states that the right to and amount of compensation "shall ... be determined in accordance with the provisions of law in effect as of the date of the injury." LIRC acknowledges, however, that WIS. STAT. § 102.35(3) recognizes that suitable employment might not be available for legitimate business reasons.

¶15 We agree that the statute recognizes that the employer might have legitimate business reasons for not rehiring the employee into their previous position. That is, in fact, what LIRC found here. LIRC determined that Unified was required to rehire Klay into the permanent part-time position. The permanent *part-time* position, therefore, is the position that Klay lost, and she is entitled to be compensated in accordance with wages for this position. LIRC has not offered a reasonable explanation for its decision to set the maximum amount of lost wages at the level of a full-time position. Consequently, we reverse that portion of the circuit court's order that affirmed LIRC's decision to award the maximum amount of lost wages. We remand the case to the circuit court to remand to LIRC, directing it to use the salary of the permanent part-time position to set the maximum. We affirm the circuit court's order in all other respects.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

