COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP608 **Cir. Ct. No. 2009CV251**

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

SUPERIOR BEVERAGES, LLC,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND JERRY AXTELL,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Superior Beverages, LLC, appeals an order affirming a decision of the Labor and Industry Review Commission. The Commission determined Superior owed lost wages to its former employee, Jerry Axtell, because it terminated him without reasonable cause after he suffered a

workplace injury, contrary to WIS. STAT. § 102.35(3).[1] Superior argues it had a valid business reason for terminating Axtell, which amounts to reasonable cause. However, because the Commission reasonably concluded Superior's business justification was pretextual, we affirm.

BACKGROUND

¶2 Superior, a wholesale beer distributor, hired Axtell in July 2004 to work as a route salesperson or driver. Axtell was responsible for delivering beer to Superior's customers. His duties included driving a delivery truck, unloading product, and cultivating relationships with customers to promote increased sales.

¶3 On March 18, 2006, Axtell injured his back while hauling two kegs of beer. He missed approximately six weeks of work due to the injury, and when he returned he was placed on light duty status for six additional weeks. After that, Axtell was cleared to work without restrictions. However, on September 11, 2006, he strained his back while bending over to pick up cases of beer from a pallet. He was off of work for one week, but he returned without restrictions on the morning of September 18. That afternoon, his employment was terminated.

¶4 Axtell's supervisor, Ray Haaker, told Axtell he was being laid off for "lack of work" stemming from a drop in sales. Haaker told Axtell that Superior "may be in touch with him in the event that we would need him back at some point." Superior never contacted Axtell about coming back to work.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

However, in April 2007, Superior ran an ad in a local newspaper seeking to hire "a full-time driver/route delivery person."

¶5 Axtell filed a claim with the Department of Workforce Development, contending Superior unreasonably refused to rehire him following a workplace injury, contrary to WIS. STAT. § 102.35(3). At a hearing before the administrative law judge (ALJ), Axtell testified that Superior's sales are stronger in the summer months and drop off every winter. Despite this seasonal fluctuation, Superior did not lay off any drivers during the winter of 2004-05 or the winter of 2005-06. Furthermore, when Axtell was hired, he was told Superior "prided themselves on never having to [lay off] a driver; that no matter what, they find something for you to do when it's slow …. [b]ecause they will always need [you] in the spring." Axtell testified he was the only driver fired in September 2006, even though two other drivers had less seniority.

¶6 Haaker also testified at the hearing. He admitted that Superior experiences seasonal fluctuation in sales but that business "always pick[s] up in the summer." Haaker also conceded Axtell was the first driver ever laid off because of a seasonal downturn. However, he contended that things were different at the time of Axtell's termination because sales were down "substantially." Don Warmington, Superior's owner and manager, similarly testified that the company faced unique economic challenges in 2006:

> [T]he business climate has changed. Our sales have been down the last three years. We went from unparalleled growth of 10 to 15 percent to [sic] we hit a .08 alcohol for driving, we've got smoking bans, we've got increased fuel costs, we've got people switching from beer to wine, we've got people deciding that they're going to be healthier. Our sales have started to go down[.]

The thrust of Warmington's testimony was that, due to unprecedented economic challenges, Superior had a valid business reason to terminate Axtell's employment. Yet, despite these economic challenges, Haaker conceded Superior terminated just one driver, which represented only a five-percent reduction in its driving workforce.

¶7 When questioned about why Superior chose to fire Axtell, instead of another driver, Haaker admitted Axtell had received good performance reviews and was not fired for poor performance. Warmington testified Superior fired Axtell because Axtell no longer had a regular delivery route when he returned to work in September 2006. Axtell's previous routes had been given to other employees, and Axtell was "essentially a fill-in" driver. Warmington testified it is crucial for a driver to have a regular route in order to develop and maintain rapport with customers. However, Haaker conceded Superior fired Axtell instead of another driver who also lacked a regular route. Furthermore, that other driver had only been hired five months before Axtell's termination and was still in training at the time.

¶8 The ALJ concluded Superior's business reason for firing Axtell was pretextual and therefore determined Superior terminated him without reasonable cause. The Commission affirmed the ALJ's decision. Superior appealed to the circuit court, which affirmed the Commission. Superior now appeals the circuit court's order.

DISCUSSION

¶9 To recover under WIS. STAT. § 102.35(3), an employee must show that he or she sustained an injury in the course of employment and was subsequently terminated or denied rehire. ***Ray Hutson Chevrolet, Inc. v. Labor &***

Indus. Review Comm'n, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994). "If the employee makes [this] showing, the burden shifts to the employer to show a reasonable cause for the refusal to rehire." ***Id.*** The employer may meet this burden by showing "that it refused to rehire an injured employee because the employee's position [was] eliminated to reduce costs and … increase efficiency[.]" ***Id.*** at 123.

¶10 Here, the only disputed issue is whether Superior met its burden of showing reasonable cause for terminating Axtell. We review the Commission's decision, not the circuit court's. *See* ***Stafford Trucking, Inc. v. Department of Indus., Labor & Human Relations***, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). The reasonable cause inquiry presents a mixed question of fact and law. ***Ray Hutson***, 186 Wis. 2d at 122. We sustain the Commission's findings of fact if they are supported by substantial and credible evidence. ***Id.***; *see also* WIS. STAT. § 102.23(6). Whether the employer's purported reason for refusing to rehire was pretextual is a question of fact. ***Ray Hutson***, 186 Wis. 2d at 124. "Once the facts are established, whether they give rise to reasonable cause is a question of law." ***Id.*** at 122.

¶11 The parties dispute what level of deference we should apply to the Commission's reasonable cause determination. Citing ***Ray Hutson***, Superior argues the Commission is not entitled to any deference. There, we reviewed the Commission's reasonable cause determination without deference because we concluded, "Nothing in [the Commission's] decision shows it has had other occasions to construe the phrase 'reasonable cause' in [WIS. STAT. § 102.35(3)] when a refusal to rehire was based on elimination of an employee's position to reduce expenses." ***Id.*** at 123.

¶12 However, we agree with Axtell that the Commission is entitled to great weight deference. We give great weight deference when:

> (1) the agency was charged by the legislature with the duty of administering the statute; (2) ... the interpretation of the agency is one of long-standing; (3) ... the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) ... the agency's interpretation will provide uniformity and consistency in the application of the statute.

Harnischfeger Corp. v. Labor & Indus. Review Comm'n, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995). We have previously held, as a general matter, that the Commission's interpretation of WIS. STAT. § 102.35(3) is entitled to great weight deference because of "the experience [the Commission] has acquired in interpreting the statute since its enactment in 1975[,]" the existence of "sufficient case law to guide [the Commission] in its application of the statute[,]" and the Commission's "expertise in administering cases under the worker's compensation statutes." *See* ***Hill v. Labor & Indus. Review Comm'n***, 184 Wis. 2d 101, 110, 516 N.W.2d 441 (Ct. App. 1994). Moreover, since ***Ray Hutson*** was decided in 1994, the Commission has had ample opportunity to construe the phrase "reasonable cause" in § 102.35(3). A search of the Commission's decisions on the Department of Workforce Development's website indicates that the Commission has had at least seventy-four opportunities to review unreasonable refusal to rehire claims, forty-nine of which were related to the question of whether the employer had "reasonable cause." At least five of these cases dealt directly with the issue of

whether an employee was terminated for a legitimate business reason.[2] Thus, the concern we expressed in ***Ray Hutson*** about the Commission's lack of experience applying § 102.35(3) is no longer present, and the Commission's reasonable cause determination is entitled to great weight deference.

¶13 Superior nevertheless contends we should not defer to the Commission because its "decision in the present case does not indicate that the Commission has had the opportunity to review the reasonable cause standard as it applies to layoffs in a drastic economic downturn." Superior's position appears to be that, because the Commission has never before seen the narrow, specific facts of this case, the Commission is not entitled to deference. However, "[t]he correct test under Wisconsin law is whether [the Commission] has experience in interpreting a particular statutory scheme, not whether it has ruled on precise, or even substantially similar, facts before." ***Town of Russell Volunteer Fire Dep't v. Labor & Indus. Review Comm'n***, 223 Wis. 2d 723, 733, 589 N.W.2d 445 (Ct. App. 1998). As outlined above, the Commission has considerable experience interpreting WIS. STAT. § 102.35(3). *See supra*, ¶12 n.2. Accordingly, we apply the great weight deference standard and uphold the Commission's reasonable cause determination as long as it is reasonable. *See* ***Harnischfeger Corp.***, 196 Wis. 2d at 661.

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[2] *See* ***Legler v. JComp Technologies Inc.***, Wis. LIRC WC Decision, Claim No. 2003-030691, http://dwd.wisconsin.gov/lirc/wcdecsns/1171.htm (April 22, 2008); ***Fettig v. Tools Inc.***, Wis. LIRC WC Decision, Claim No. 2002-003379, http://dwd.wisconsin.gov/lirc/wcdecsns/1059.htm (Feb. 8, 2007); ***Groh v. Alyson Tool Corp.***, Wis. LIRC WC Decision, Claim No. 2004-002455, http://dwd.wisconsin.gov/lirc/wcdecsns/1048.htm (Nov. 30, 2006); ***Kinlow v. Acro Metal Stamping***, Wis. LIRC WC Decision, Claim No. 2005-009368, http://dwd.wisconsin.gov/lirc/wcdecsns/1032.htm (August 31, 2006); ***Jenkins v. Modern Bldg. Materials Inc.***, Wis. LIRC WC Decision, Claim No. 1995-067462, http://dwd.wisconsin.gov/lirc/wcdecsns/567.htm (May 4, 2001).

¶14 The Commission made the following factual findings in support of its conclusion that Superior did not have reasonable cause to terminate Axtell: (1) Superior's business was cyclical and slowed down every year; (2) Superior had dealt with the cyclical nature of its business in the past without laying off drivers; (3) Superior had a history of shifting workers around to avoid layoffs, but did not try to do so in Axtell's case; (4) Axtell was the only driver laid off in 2006; (5) Axtell was laid off the same day he returned to work without restrictions; (6) Superior discharged Axtell instead of a similarly situated employee with less seniority; and (7) Superior made no attempt to rehire Axtell when it was seeking drivers in 2007, despite the fact that Axtell had received good performance reviews. Substantial and credible evidence supports these factual findings. *See supra*, ¶¶3-7.

¶15 The Commission also made the factual finding that Superior's purported business reason for terminating Axtell was pretextual. In so doing, the Commission noted that the ALJ "did not credit" Warmington and Haaker's testimony, and the Commission's review of the record did not indicate any reason to overturn the ALJ's credibility finding. We must accept the Commission's determination that Warmington and Haaker's testimony was not credible. *See* ***Link Indus., Inc. v. Labor & Indus. Review Comm'n***, 141 Wis. 2d 551, 558, 415 N.W.2d 574 (Ct. App. 1987).

¶16 Based on these factual findings, the Commission reasonably determined that Superior terminated Axtell without reasonable cause. The only reason Superior presented for Axtell's termination was "lack of work" stemming from a business slowdown. However, the Commission found this reason pretextual. Although Warmington and Haaker testified Superior needed to terminate Axtell because of unprecedented economic conditions, the ALJ and

Commission found their testimony incredible. The evidence indicated Superior's business fluctuated seasonally, but Superior had never before laid off a driver due to seasonal downturns. Moreover, several months after Axtell was terminated, Superior's business picked up enough that it advertised for a full-time delivery driver. Superior did not contact Axtell about this position, despite having told him that it might be in touch about future employment opportunities. These facts support the Commission's determination that Superior did not terminate Axtell for a valid business reason, and therefore did not have reasonable cause.

¶17 Furthermore, even if Superior legitimately needed to terminate a single employee to remedy a decline in sales, it would be reasonable to conclude Axtell was chosen as a result of his work injury. Superior chose to terminate Axtell instead of a similarly situated employee with less seniority. Like Axtell, that employee did not have a regular delivery route. Additionally, the other employee was still in training. Superior never articulated a reason for choosing to fire Axtell instead of the less-senior employee. Based on this evidence, the Commission could reasonably conclude Superior chose Axtell because of his workplace injury, and therefore terminated him without reasonable cause.

By the Court.—Order affirmed.

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