COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1902 **Cir. Ct. No. 2009CV401**

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

TOWN OF ROME POLICE DEPARTMENT,

PETITIONER-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-CO-APPELLANT,

JOLENE JOY ORLOWSKI,

RESPONDENT-APPELLANT,

COMMUNITY INSURANCE CORPORATION,

INTERVENOR.

APPEAL from an order of the circuit court for Adams County: CHARLES A. POLLEX, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Jolene Orlowski and the Labor and Industry Review Commission (LIRC) each appeal a circuit court order setting aside LIRC's determination that the Town of Rome Police Department terminated Orlowski's employment in violation of the Wisconsin Fair Employment Act (WFEA). For the reasons discussed below, we reverse the circuit court order and reinstate LIRC's decision in favor of Orlowski.

BACKGROUND

¶2 In January 2006, Orlowski began field training during a period of probationary employment as a patrol officer in the Town of Rome Police Department. She was the only woman in the department at that time, and the first to go through the recently established training program. Three different field training officers—Mark Stashek, Jason Lauby, and David Lewandowski—trained and evaluated Orlowski at various times, ranking her performance on a daily basis in a series of categories on a 7 point scale, with 1-3 being unacceptable, 4 acceptable, and 5-7 superior. All three field training officers gave Orlowski a mixture of acceptable and unacceptable scores, but Stashek gave her lower scores than the others.[1]

¶3 Over the following months, Orlowski complained to both Lewandowski and Chief of Police Adam Grosz about her discomfort with Stashek's training methods—particularly his manner of orally quizzing her, and

[1] LIRC went into considerably more detail about the history of Orlowski's training and evaluation period and complaints. However, since most of that history is either undisputed, or not necessary to our decision, we do not repeat it here.

making her try to answer questions that she had posed. She said she thought that he was treating her unfairly, without explicitly saying that she believed his treatment was gender based. On April 14, 2006, Orlowski asked to meet privately with Grosz, and told him that she felt intimidated and harassed by Stashek's training methods, and thought he was setting her up to fail. On April 16, 2006, Grosz met with both Orlowski and Stashek. During the meeting, which was recorded, the following exchange took place:

> ORLOWSKI (to Stashek): I think a lot of the things that you do in treating me are wrong, and I feel like I'm being abused or whatever the word is, discriminated, whatever. It's not—I don't feel that I am being treated fairly.
>
> GROSZ: Do you feel harassed … because that is something that needs to be addressed right now ….
>
> ORLOWSKI: I don't really feel that I'm coming across.
>
> STASHEK: You're coming across. You're being harassed and you're being discriminated against.

LIRC found that Grosz understood by the end of the meeting that "Orlowski's complaint about her treatment by Stashek was in part a complaint that he was treating her unfairly because of her sex." It further found that Orlowski's reference to being discriminated against "was based on a good faith belief that it was discriminatory based on her sex."

¶4 On April 17, Chief Grosz wrote a memorandum advising the Chairperson of the Rome Police and Fire Commission that he was recommending that Orlowski's employment be terminated prior to the completion of her probationary period. In addition to citing concerns about Orlowski's decision-making ability and problem-solving skills that had been documented in her daily evaluations, Grosz explained:

> Furthermore, I am disturbed by Officer Orlowski's attitude toward the field training program and other officers currently employed by the Rome Police Department. Officer Orlowski is argumentative with certain Field Training Officers who are trying to teach her proper law enforcement procedures. She has accused, without merit, field training officers of "setting her up to fail," and has outright ignored recommendations and instructions given to her by field training officers.
>
> I strongly feel that retaining Officer Orlowski could be detrimental to the morale of the Rome Police Department.

¶5 LIRC determined that Grosz had the authority to decide whether to terminate Orlowski's employment; that his decision was based "in part by Orlowski's complaint about Stashek's treatment of her, which Grosz understood to include a complaint of discriminatory treatment based on her sex;" and that Orlowski's employment would not have been terminated in the absence of the motivation to do so based upon her expressed opposition to alleged discrimination.

¶6 Accordingly, LIRC found in Orlowski's favor on the WFEA retaliation complaint she filed with the Wisconsin Department of Workforce Development. The Town of Rome Police Department petitioned for judicial review pursuant to Chapter 227. The circuit court held that LIRC's ultimate findings that Grosz's decision to terminate Orlowski was caused in part by her complaint of discriminatory treatment by Stashek, and that she would not have been terminated in the absence of her expressed opposition to discrimination were not supported by substantial evidence in the record. The court reasoned there was "no direct evidence that she alleged that the discrimination was based upon her gender. Any circumstantial evidence upon which inferences might be made does not, in the opinion of the court, meet the [relevant evidentiary burden]." Both Orlowski and LIRC appeal the circuit court's decision.

STANDARD OF REVIEW

¶7 Judicial review of administrative proceedings pursuant to Chapter 227 is in many respects akin to common law certiorari review. *See* ***Williams v. Housing Auth. of the City of Milwaukee***, 2010 WI App 14, ¶10, 323 Wis. 2d 179, 777 N.W.2d 185. We review the decision of the administrative agency rather than that of the circuit court, applying the same standards of review set forth in WIS. STAT. § 227.57. *See* ***Currie v. DILHR***, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). We may not substitute our judgment for that of the agency as to the weight or credibility of the evidence on a finding of fact.[2] WIS. STAT. § 227.57(6); ***Currie***, 210 Wis. 2d at 387. Rather, we must examine the record for any substantial evidence that supports the agency's determination. ***Id.***

¶8 The substantial evidence test does not require a preponderance of the evidence, merely that "'reasonable minds could arrive at the same conclusion as the agency'" based on the record, including inferences drawn therefrom. ***Kitten v. DWD***, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (citation omitted); ***Hamilton v. DILHR***, 94 Wis. 2d 611, 618, 288 N.W.2d 857 (1980). Where more than one inference reasonably can be drawn, the finding of the agency is conclusive. ***Vocational Tech. & Adult Ed., Dist. 13 v. DIHLR***, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977).

[2] We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings, although we may still accord them some degree of deference. ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996); ***Begel v. LIRC***, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. We need not discuss what degree of deference would be appropriate here, because the parties are not disputing any questions of law under the Wisconsin Fair Employment Act.

DISCUSSION

¶9 The WFEA provides that it is an unlawful act of employment discrimination to "discharge or otherwise discriminate against any individual because he or she has opposed any discriminatory practice" under the Act. WIS. STAT. §§ 111.321 and 111.322(3). Here, Orlowski contends that she was discharged for complaining about what she perceived to be discriminatory treatment during her probationary training period.

¶10 In order to establish a retaliation claim, the employee must first make a prima facie showing that he or she engaged in protected activity, that he or she was subject to an adverse employment decision, and that there was a connection between the two. ***Kannenberg v. LIRC***, 213 Wis. 2d 373, 395, 571 N.W.2d 165 (Ct. App. 1997). LIRC cites one of its own past administrative decisions for the proposition that complaints or opposition to an employer's actions are protected so long as the employee has a good faith belief that the actions constitute prohibited discrimination. The police department does not dispute that standard. The parties also appear to be in agreement that the employer must have been aware that the claimed protected activity was related to prohibited discrimination in order to establish a connection between the protected activity and an adverse employment decision. The timing of an adverse employment decision is also relevant to determining whether there was a connection to the protected activity. ***Id.*** at 396.

¶11 An employer may attempt to rebut a prima facie showing of retaliation by articulating a legitimate, nondiscriminatory reason for its action. ***Id.*** In order to prevail, the employee must then present evidence to show either that the proffered reason was a pretext, or that there was a mixed motivation—i.e., that

even if the adverse employment decision was motivated in part by a legitimate reason, there was also a retaliatory component. ***Id.***; ***Hoell v. LIRC***, 186 Wis. 2d 603, 608-11, 522 N.W.2d 234 (Ct. App. 1994). An employer's actual motivation is a factual determination. ***Currie***, 210 Wis. 2d at 386.

¶12 Here, the bulk of LIRC's factual findings about the course of Orlowski's training, evaluations, or complaints are not at issue. The parties' dispute centers on the inferences that LIRC made in finding that: Orlowski complained of discrimination in good faith; Grosz understood Orlowski's complaints of discrimination to be gender based, and; Grosz would not have terminated Orlowski's employment but for those complaints. Under the standard of review discussed above, the question before us is not whether those are the strongest inferences that could have been made, but whether those inferences could reasonably have been made based upon the record. We are satisfied that there is substantial evidence in the record to support LIRC's inferences and factual findings on each of these points.

¶13 As to whether Orlowski made her complaints of discrimination in good faith, LIRC was entitled to credit Orlowski's own testimony that she genuinely believed Stashek was discriminating against her because of her gender, even if LIRC was somewhat concerned about exaggeration in some of her allegations against others in the department. We may not disturb this credibility determination.

¶14 Regarding whether Grosz understood Orlowski's complaints of discrimination to be gender based, Grosz acknowledged that he had never dealt with any claims of "intimidation, harassment, or discrimination" when attempting to resolve conflicts between two male officers. Given that Orlowski was the only

female patrol officer at the time, that she was the first to go through the training program, and that she had not mentioned any *other* basis on which she might be treated differently, it was reasonable to infer that when she referred to "discrimination" she was referring to gender-based discrimination. Moreover, Grosz's testimony that he had no basis to believe Orlowski thought she was being discriminated against based on her gender "other than what was said at the April 16th meeting" could fairly be taken as a concession that he did understand that Orlowski was raising a gender-based complaint at that meeting.

¶15 And finally, with respect to whether Grosz would have terminated Orlowski's employment even if she had not complained, Grosz explicitly cited his concern that Orlowski had raised a meritless accusation against Stashek—which in his view would have an adverse effect on the morale of the department—as one of the reasons for terminating her employment. LIRC also reasonably took into consideration the timing of the termination, less than two weeks after the meeting in which Grosz expressed a lack of concern over Orlowski's evaluation scores to date, during which time Orlowski had received improved scores, and while she still had another eighty hours of training left.

¶16 Because we conclude that there was substantial evidence in the record to support each of LIRC's factual findings, and because the police department does not dispute that LIRC's factual findings support its legal conclusion that Orlowski had met her burden of establishing a claim for retaliatory discharge, we reverse the order of the circuit court and reinstate LIRC's decision.

¶17 Orlowski asks us to remand the matter to LIRC for an adjustment of the amount of attorney fees and lost wages to which she is due. We agree that an award of attorney fees under the Wisconsin Fair Employment Act may encompass

fees incurred on appeal, and that LIRC has the authority to determine the amount of the award. *See* ***Watkins v. LIRC***, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). Since the parties have not briefed the question of remedies, we make no comment as to whether Orlowski is entitled to any additional lost wages. Therefore, consistent with our general practice, we will remand the matter back to the circuit court with directions that it return the record to LIRC to consider what if any adjustments should be made to the award.

By the Court.—Order reversed and cause remanded with directions.

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