COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1616 **Cir. Ct. No. 03-CV-294**

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

MARY A. MERTA,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND JOHNSON CONTROLS,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mary A. Merta appeals a judgment[1] affirming a Labor and Industry Review Commission's decision under the Wisconsin Fair Employment Act. The commission decided there was no probable cause to believe Johnson Controls, Inc., unlawfully discriminated against Merta on the basis of her gender regarding the terms, conditions, or termination of her employment.

¶2 Merta argues: (1) the commission erroneously disregarded her prima facie case of gender discrimination and substantial evidence showing that Johnson Controls treated similarly situated male maintenance technicians more favorably than her; (2) the commission erroneously concluded that the human resources manager was the decision maker; and (3) the commission erroneously disregarded Merta's claim that Johnson Controls' proffered reason for terminating her employment was baseless and pretextual. Because credible and substantial evidence supports the commission's decision, we affirm the judgment. .

BACKGROUND

¶3 Merta filed a complaint with the Equal Rights Division of the Department of Workforce Development alleging that her employer, Johnson Controls, violated the Wisconsin Fair Employment Act (WFEA) when it subjected

[1] We interpret the document labeled "Memorandum Decision" as the final judgment because it disposes of the proceedings. WISCONSIN STAT. § 808.03(1) provides that only final orders or judgments may be appealed as a matter of right. We must examine the document to determine if the trial court intended it to be the final determination in this matter. If so, the document is final. ***Harding v. Kumar***, 2001 WI App 195, ¶10, 247 Wis. 2d 219, 633 N.W.2d 700. Here, the record indicates the "Memorandum Decision" was intended to be the final document.

All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

her to less favorable terms and conditions of employment and terminated her employment because of her gender. An investigator for the division concluded that there was no probable cause to believe the WFEA was violated as alleged. Merta appealed and following a hearing, the administrative law judge agreed with the investigator's initial decision and dismissed her complaint. Merta filed a petition for review and, with some modifications, the commission agreed with the administrative law judge's decision. It concluded that Merta failed to sustain her burden to prove that she was discriminated against on the basis of gender as alleged in her complaint.

¶4 The commission reached its conclusion upon the following factual findings. Johnson Controls, a manufacturing facility, employed Merta as a maintenance technician from January 1997 to August 12, 1999. Her immediate supervisor was Pat Grutter. Merta was a well-qualified technician and always did a good job, but "tended … to be confrontational and refused a directive with a resolute 'no' rather than explain the reason for her position."

¶5 In January 1999, Johnson Controls directed Merta, Grutter and others to attend a training meeting required as part of a certification program. Because Merta and Grutter believed they had previously attended the requisite training, they met with the human resources manager, Marge Young, who explained that this particular training was required and, if their training records did not indicate its completion, they must attend.

¶6 Merta argued with Young to the extent that Young informed Merta that a refusal to attend the mandatory training was a category 2 violation that would ultimately result in the termination of Merta's employment. Thereafter,

Merta sent an e-mail with a derisive tone to the human resources department but ultimately attended the meeting. Grutter also attended.

¶7 In April and May, two additional meetings were scheduled. Merta attended the April meeting, and practice dictated that Merta attend, if possible, the follow-up May meeting. On May 5, Merta advised Grutter by telephone that she would not attend the May meeting. Grutter responded that she was required to attend and if she continued to refuse, he "would have to write her up." Merta responded "well, bring your pencil and paper" and hung up on Grutter.

¶8 Grutter contacted Young, who arranged a meeting with the three of them. Merta continued to voice her objection to attending the meeting, saying, "I hope you guys have fun talking about me" as she left the meeting and slammed the door. She did, however, attend the required meeting.

¶9 On May 10, Merta signed a "Last Chance Agreement" required for her continued employment. The agreement required Merta to participate in and successfully complete a program to resolve her behavioral problems, to give Johnson Controls complete access to all information regarding her participation and resign or be terminated should she fail in any of the terms or conditions of the program.

¶10 On the same day, Merta was given a written warning regarding her May 5th insubordination, which Merta appealed to the plant manager, Lee Ferris. Merta disputed the reference to "numerous occasions" of inappropriate behavior as undocumented. Merta then cancelled two of her employment assistance program appointments without discussion with anyone at Johnson Controls. Following her second cancellation, Johnson Controls terminated Merta's employment for violating the Last Chance Agreement.

¶11 The administrative law judge stated:

> Ms. Merta completely ignores her own behavior, which is what got her fired. … She pushed Ms. Young to the point that Ms. Young felt it necessary to remind Ms. Merta that her continued insubordination could endanger her employment. With that warning ringing in her ears Ms. Merta found it appropriate to send an e-mail to Ms. Young the next day which can only be described as insolent.[2] … [S]he refused a directive, by her supervisor, to attend the meeting by daring him to carry through on a threat to write her up and then hanging up on him. ….
>
> … [I]t cannot be argued that the termination of Ms. Merta's employment had anything at all to do with her gender.

¶12 The commission found that two male employees had resisted Grutter's directives on certain occasions but indicated that their resistance was milder, shorter-lived and, on one occasion, with a reasonable basis. It rejected Merta's claims and determined "[t]he evidence strongly supports Mr. Grutter's claim that he tried to treat [the employees] equally."

¶13 Merta appealed the commission's decision to the circuit court, which affirmed. This appeal follows.

DISCUSSION

¶14 We reject Merta's argument that the judgment must be reversed because the commission disregarded Merta's prima facie case of gender discrimination and substantial evidence showing that Johnson Controls treated similarly situated male maintenance technicians more favorably than it treated Merta. It is undisputed that Merta was a member of a protected class, was

[2] This sentence reflects modifications made by the commission.

qualified for her job, and was discharged. *See* ***Currie v. DILHR***, 210 Wis. 2d 380, 390 n.4, 565 N.W.2d 253 (Ct. App. 1997). The only dispute, therefore, is whether others not in the protected class were treated more favorably. *See* ***id.***

¶15 The scope of appellate review is identical to that of the circuit court under WIS. STAT. § 227.57; the appellate court reviews the agency's decision, not the circuit court's.[3] ***Barakat v. DH&SS***, 191 Wis. 2d 769, 777, 530 N.W.2d 392 (Ct. App. 1995). Because this is an appeal from a probable cause hearing, Merta has the burden of proof, but the standard of proof is low. *See* ***Boldt v. LIRC***, 173 Wis. 2d 469, 476, 496 N.W.2d 676 (Ct. App. 1992).

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[3] WISCONSIN STAT. § 227.57 provides in part:

> (2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.
>
> (3) The court shall separately treat disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion.
>
> (4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure. (5) The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law.
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> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

¶16 Probable cause is defined as "a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of [the WFEA] probably has been or is being committed." WIS. ADMIN. CODE § DWD 218.02(8). This section "focuses on probabilities, not possibilities." ***Boldt***, 173 Wis. 2d at 475-76. If the department initially determines that there is no probable cause to believe that employment discrimination occurred as alleged in the complaint, it may dismiss the allegations. WIS. ADMIN. CODE § DWD 218.07(3).

¶17 Merta relies on the evidence she produced at the hearing to support her view that discrimination has occurred. For example, Merta testified that Grutter gave her more clerical assignments than her male colleagues were assigned and failed to provide her with "daily information" as he would with male colleagues. She also testified that Grutter would not listen to her and made sarcastic remarks, but that she did not recall whether he made sarcastic comments to male employees. Merta also testified that Grutter gave male employees overtime projects, but did not give her overtime.

¶18 Also, Merta denied allegations of insubordination. She disputed that her January 1999 meeting with Young and Grutter ended on less than a civil note. In addition, Merta disputed the door slamming incident. Merta stated that while male technicians attended meetings, they also initially refused and were not disciplined. Merta further disputed Young's notes of the May 1999 meeting. Merta also testified to instances when male technicians refused directives, violated orders and made offensive remarks but were not disciplined. On cross-examination, she could not identify any instance when the male technicians refused to attend a meeting at Young's directive.

¶19 In addition, Merta called as a witness a male technician who testified that he formerly worked with Merta at Johnson Controls. He stated that he refused to run an errand, pack some tools, adjust a sensor and attend certain meetings, but was not disciplined as a result. He agreed, however, that Grutter talked to him about the meetings and eventually attended as required. On two occasions, he also threw a drill against a wall in frustration; Grutter spoke to him about it but no discipline resulted. Also, he made a derogatory statement at a meeting and was called into a supervisor's office to discuss it. No discipline resulted.

¶20 In contrast, Grutter gave testimony that contradicted Merta and her witness. Grutter testified that the two male technicians never refused to attend a meeting, never slammed a door following a meeting with him and did not refuse to follow a directive.[4] He denied assigning Merta more clerical work and denied her allegation that he said she sounded "like my wife." He stated that he had no problem with her technical skills or her job performance. He testified that the overtime project that she did not participate in was "a last minute thing" and he did not understand why Merta was not there to do the work. He did not believe that Merta was treated differently on the basis of her gender.

¶21 Merta's allegation of error is resolved by the application of our standard of review. An employer's motivation is a factual determination. ***Currie*****,** 210 Wis. 2d at 386. "LIRC is entitled to make credibility determinations at probable cause hearings." ***Boldt***, 173 Wis. 2d at 475. "[A]dministrative agency decisions are based on testimony[;] … [s]ome credible evidence of discrimination

[4] Grutter explained that although the male technician did not adjust a machine when requested, the technician had concerns and Grutter did not interpret the conduct as a refusal. He further explained that a male employee had concerns about attending certain meetings but did not refuse to attend.

might exist, but LIRC could still conclude that upon all of the evidence produced … it was not probable that discrimination had occurred." ***Id.***[5] This administrative procedure contrasts with criminal preliminary hearing and civil summary judgment procedure where credibility is not an issue. *See* ***id.***[6] In making its probable cause determination, the commission may make credibility determinations based on the testimony and should adopt the viewpoint of a prudent person contemplating the ordinary, everyday concepts of cause and effect, given all the available evidence. ***Id.*** at 476.

¶22 Accordingly, proof of a prima facie case does not necessarily equate with proof of probable cause. *See* ***Puetz Motor Sales, Inc. v. LIRC***, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view is credible. *See* ***Robertson Transp. Co. v. PSC***, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). On review, a court does not make independent factual determinations nor make credibility evaluations. *See* ***Knight v. LIRC***, 220 Wis. 2d 137, 147, 582 N.W.2d 448 (Ct. App. 1998); *see also* ***Hixon v. PSC***, 32 Wis. 2d 608, 629, 146 N.W.2d 577 (1966). The court must confine its review to determine whether substantial evidence supports the agency's decision. ***Knight***, 220 Wis. 2d at 149-50.

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[5] The commission observed that credibility determination may be made at a probable cause hearing. *See* ***Boldt v. LIRC***, 173 Wis. 2d 469, 475, 496 N.W.2d 676 (Ct. App. 1992). The Commission reviewed the administrative law judge's credibility determinations and found no reason to overturn them.

[6] Merta's reliance on ***Russell v. Board of Trustees***, 243 F.3d 336 (7th Cir. 2001), for its procedural context is misplaced, because Russell's appeal was from a summary judgment in a civil proceeding initiated in federal court.

> [T]he term "substantial evidence" should be construed to confer finality upon an administrative decision on the facts 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, might have reached the decision; but, on the other hand, if a reasonable [person], acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.

Muskego-Norway Consol. Sch. v. WERB, 35 Wis. 2d 540, 558, 151 N.W.2d 617 (1967) (citation omitted; emphasis deleted).

¶23 Examination of the entire record demonstrates the commission's determination was one a reasonable person could have reached. Merta compares her conduct to that of her male co-workers and draws the inference that she was treated differently due to her gender. The commission, on the other hand, was entitled to rely on Grutter's testimony, as well as exhibits offered at the hearing, to conclude that Merta's treatment was unrelated to her gender. There was no testimony that any male employee slammed a door, sent a derisive email, challenged a supervisor to write up a disciplinary report, or hung up on a supervisor. There was no testimony that a male employee failed to comply with an agreement to attend an employee assistance program. While Merta draws inferences that the male employees' conduct was equally insubordinate in other ways, the commission was entitled to believe Grutter's testimony to the contrary. *See* ***Boldt***, 173 Wis. 2d at 475.

¶24 We reject Merta's contention that a prima facie case necessarily proves probable cause. *See* ***Puetz***, 126 Wis. 2d at 172-73. Here, Johnson Controls articulated a legitimate nondiscriminatory reason for Merta's discharge. *See* ***Currie***, 210 Wis. 2d at 394-95. The record supports the commission's implicit

determination that its reasons were credible and not pretextual. Merta's invitation to substitute opposing inferences for those drawn by the commission misperceives our standard of review. *See* ***Knight***, 220 Wis. 2d at 147.[7] Therefore, we reject Merta's contention that the commission erroneously disregarded substantial evidence.

¶25 Next, Merta contends that the commission's conclusion that Young was the decision maker erroneously ignored Grutter's involvement in the decision to discipline Merta and terminate her employment. She argues that the improper discriminatory motives of a supervisor who initiates and carries out the disciplinary process on which a termination is based must be imputed to those who make the final termination decision, even if they have no discriminatory motive themselves, citing ***Russell v. Board of Trustees***, 243 F.3d 336 (7th Cir. 2001). She complains that Grutter gave a false impression of the severity of Merta's behavior as compared to the male technicians' behavior. She argues that Grutter's discriminatory attitude set in motion and tainted the decisions regarding her employment.

¶26 Merta's argument relies on a faulty premise: that Grutter acted with a discriminatory motive. The commission found that the evidence "strongly supports Mr. Grutter's claim that he tried to treat [employees] equally." It further found that "Ms. Merta's gender was not a factor in any of the terms and conditions of her employment or in the termination of her employment." Merta's contention

[7] Merta's reliance on two cases, ***Gordon v. United Airlines, Inc.***, 246 F.3d 878 (7th Cir. 2001), and ***Russell*** suggests that she does not distinguish federal civil procedure from Wisconsin administrative procedure.

essentially recasts her previous argument. Because substantial evidence supports the commission's decision, we do not overturn it on appeal.

¶27 Finally, Merta argues that the commission erred "in disregarding Merta's claim that Johnson Controls' proffered reason for terminating employment (because she allegedly violated the [employee assistance program]) was factually baseless and a pretext for sex discrimination." She points out that when the sincerity of an employer's asserted reasons for discharging an employee is cast into doubt, a fact finder may reasonably infer that unlawful discrimination was the true motivation, relying on ***Gordon v. United Airlines, Inc.***, 246 F.3d 878 (7th Cir. 2001).[8] She asserts that she complied with the "Last Chance Agreement" and claims "Johnson Controls submitted no evidence on why it terminated Merta's employment."

¶28 Merta's argument ignores her own testimony at the probable cause hearing: "My understanding was it was for the [employee assistance [program] appointments that I canceled." Merta testified that the Last Chance Agreement required her to attend the employee assistance program appointments and that she canceled two of them, despite previous warnings her attendance was required. Because Merta's testimony is substantial evidence supporting the commission's decision, there was no need for Johnson Controls to offer cumulative testimony. Because substantial evidence supports the commission's determination, we do not overturn it on appeal.

[8] ***Gordon*** is an appeal from a summary judgment proceeding.

By the Court.—Judgment affirmed.

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