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DISTRICT II

September 25, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP2759

Debra L. Brosman v. LIRC (L.C. #2012CV589)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Debra L. Brosman, pro se, seeks judicial review of a decision of the Labor & Industry Review Commission (LIRC) concluding that she had a wage restriction rendering her unavailable for work within the meaning of WIS. ADMIN. CODE § DWD 128.01(4)(a) (Sept. 2010). She appeals from the circuit court order affirming LIRC's decision. Because our review of an agency decision is so highly deferential, we affirm. Based on our review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS STAT. RULE 809.21 (2011-12).¹

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Brosman formerly worked as a communication technician for the City of Appleton. She worked up to thirty-four and a half hours a week at \$16.03 an hour. She quit and took a job with Delta Airlines. When Delta laid her off, she filed for unemployment benefits. Since she expected to be recalled when business picked up, the Department of Workforce Development (DWD) waived her work-search requirement. *See* WIS. STAT. § 108.09(2)(b).

In September, the city offered Brosman a temporary position performing her prior duties at the same pay rate but for only eight hours a week. Brosman declined the offer. The DWD determined that she had good cause to reject the city's offer and so remained entitled to unemployment benefits. The city appealed the decision.

At the hearing, the DWD administrative law judge (ALJ) also concluded that Brosman had good cause to decline the position. The remaining issue, and the only one before this court, was whether Brosman was "available for work" beginning the week she declined the city's offer of work. *See* WIS. ADMIN. CODE § DWD 128.01(4)(a).² The ALJ questioned Brosman, who

² WIS. ADMIN. CODE § DWD 128.01(4)(a) provides:

Available for work means that the claimant maintains an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market area.... During any week, a claimant is not available for suitable work if he or she has withdrawn from the labor market due to restrictions on his or her availability for work. In determining whether a claimant has withdrawn from the labor market, the department shall consider one or more of the following factors:

1. 'Salary or wages.' A claimant is considered to have withdrawn from the labor market if he or she is not available for full-time suitable work at a wage reasonably comparable to the usual wage that was paid to the claimant while working in the claimant's usual occupation. The claimant's usual wage is determined by evaluating the wage rates that

(continued)

appeared pro se, about her hours of availability and the distance she was willing to travel. It also queried about the lowest rate of pay Brosman would accept to work:

Q [A]s of the time period beginning in [m]id-September of 2011, what is the lowest rate of pay you would accept to work?

A ... I don't know if there is a lowest rate of pay I would accept.... I guess it just depended on the job, you know, what the job was. I—you know, I guess I never thought about what a lower of—you know, I'd like to stay where I am. I always like to stay where, you know—

Q If you had a job, for example, in retail what would be the lowest rate of pay you would accept?

A Oh, I guess in retail, I don't know, \$15 an hour. I'm not—you know, retail's different so.

....

Q All right. Now, when I asked you the lowest rate of pay you would accept, it really doesn't depend on the type of work. It's what amount of money per hour will it take to get you to go out of the house everyday [sic] and work.

A Seventeen dollars an hour[], I guess....

Q Okay. All right.

A I don't know, I really don't know how to answer that question.

Based on this, the ALJ found that Brosman had a wage restriction of \$17 per hour. Because she had earned \$16.03 per hour from the city, the ALJ found her unavailable for work and ineligible for unemployment benefits, retroactive to September 2011, and was ordered to repay the \$3696 she already had received. Brosman petitioned for review. LIRC affirmed the

were paid to the claimant in one or more previous jobs since the start of the claimant's base period....

ALJ's findings and conclusions. The circuit court confirmed LIRC's decision. Brosman appeals.

On review of the decision of an administrative agency, we review the agency's decision directly, not the circuit court's decision. *Estate of Szleszinski v. LIRC*, 2007 WI 106, ¶22, 304 Wis. 2d 258, 736 N.W.2d 111. Absent fraud, LIRC's findings of fact are conclusive. WIS. STAT. § 102.23(1)(a). This court may not substitute its judgment for LIRC's as it relates to the weight or credibility of evidence. Sec. 102.23(6). If the factual findings are supported by credible and substantial evidence, we will affirm them. *See id.* Indeed, the level of deference is such that we must uphold LIRC's findings even if they are against the great weight and clear preponderance of the evidence. *L & H Wrecking Co. v. LIRC*, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983).

Brosman argues that, since she is only on furlough from Delta and her work *search* was waived, she does not have to show *availability* for other work. That is incorrect. A waiver does not dispense with the availability requirement. A claimant still is eligible for benefits only if the person also is able to work, is available for work, and has registered for it. WIS. STAT. § 108.04(2)(a).

Brosman also asserts that the ALJ wrongly determined a \$17 wage restriction. To the ALJ's questions about her lowest acceptable wage, Brosman variously answered that she did not know, it depended on the job, she would like to "stay where I am," and she "guess[ed]" she would require \$15 an hour for retail and \$17 an hour to go out of the house every day and work. From these answers, the ALJ chose to base its decision on \$17 an hour. This court has no power

to weigh the evidence and disturb that finding. *See Wis. Ins. Sec. Fund v. LIRC*, 2005 WI App 242, ¶22, 288 Wis. 2d 206, 707 N.W.2d 293.

Brosman also complains that the ALJ's repetitive questioning and failure to define the specifics behind the questions impaired her ability to present meaningful testimony, thus depriving her of due process. Brosman had the due process rights to seasonably know the charges; (2) to meet the charges by competent evidence; and (3) to be heard by counsel. *State ex rel. Messner v. Milw. Cnty. Civil Serv. Comm'n*, 56 Wis. 2d 438, 444, 202 N.W.2d 13 (1972).

The hearing notice advised Brosman that her availability for work was at issue and directed her to WIS. ADMIN. CODE ch. DWD 128. At the start of the hearing, the ALJ identified the issues as good cause for refusing the city job and availability for work. After the above-described colloquy, the ALJ explained that the questions about rate of pay and the hours Brosman could work were asked because her eligibility for unemployment benefits depended on her being able and available for work. We cannot say that there was a due process violation.³

³ We have some concern, however, that despite being provided with legal citations, this pro se claimant did not fully grasp that the lowest acceptable rate of pay impacted the "available for work" requirement. She argues on appeal that she was denied due process because she did not have a meaningful understanding as to how the questions asked by the ALJ had anything to do with her unemployment benefits. The answer to her argument is that litigants, even pro se litigants, are bound to know the statutes and code provisions at issue. Still, it is not the job of an ALJ to try and catch people who are unaware of the consequences of their answers. To do so comes dangerously close to acting as an advocate rather than a neutral tribunal. While we do not cast aspersions on the ALJ, this appeal could have been avoided had the ALJ summarized at the outset and in laypersons terms the meaning and impact of "availability."

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals