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DISTRICT IV

December 3, 2020

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

2018AP1679

Nancy Marquardt v. Labor and Industry Review Commission and
UW Medical Foundation (L.C. # 2017CV1844)

Before Kloppenburg, Graham, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nancy Marquardt, pro se, appeals a circuit court order upholding a decision by the Labor and Industry Review Commission that dismissed Marquardt's discrimination claims against her former employer, the University of Wisconsin Medical Foundation. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2017-18).¹ We affirm.

The Medical Foundation terminated Marquardt's employment as an urgent care nurse in September 2012. Marquardt claimed that the Medical Foundation discriminated against her based on her age, disability, arrest record, and military service, and in retaliation for having filed a previous discrimination complaint. The Commission determined that Marquardt was terminated solely because of performance deficiencies and a failure to execute her duties, not for any discriminatory reason. The Commission also determined that the Medical Foundation did not discriminate against Marquardt in the terms or conditions of her employment based on her age, disability status, arrest record, military service, or the previous discrimination complaint. As noted, the circuit court upheld the Commission.

We review the Commission's decision, not the circuit court's decision. *See Mueller v. LIRC*, 2019 WI App 50, ¶17, 388 Wis. 2d 602, 933 N.W.2d 645; *Hill v. LIRC*, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994).

The first issue that Marquardt raises is whether the Medical Foundation discriminated against her for the reasons alleged, contrary to the Commission's determinations. "An employer's motivation is a factual determination." *Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). As such, we review the Commission's determinations that the Medical Foundation did not act on a discriminatory basis as findings of fact.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

“With respect to LIRC’s findings of fact, we are bound by those findings if there is credible evidence to support them.” *Hill*, 184 Wis. 2d at 110. “We may not substitute our judgment for LIRC’s as to the credibility of witnesses or the weight to be accorded to the evidence.” *Id.* at 111. “[E]ven 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.*

Here, the Commission’s findings are supported by substantial and credible evidence. Without summarizing all of that evidence, we provide some examples. There was evidence that Marquardt: failed to properly prep patients; had difficulty placing IVs; lacked a sense of urgency in performing her duties; on one occasion, appeared to be sleeping on the job. There was evidence that a clinic manager met with Marquardt fourteen times in twenty weeks to review specific areas of concern, including Marquardt’s lack of attentiveness and lack of initiative “since day one.” One provider described Marquardt’s affect as being like a “deer in headlights,” and stated that Marquardt “cannot react to a given scenario of patient care.”

Marquardt does not direct our attention to contrary evidence in the record that would have supported a finding that the Medical Foundation acted on a discriminatory basis. Regardless, the existence of such evidence would not change our analysis. When reviewing a Commission decision, “[w]e do not evaluate conflicting evidence to determine which interpretation should be accepted.” *Town of Russell Volunteer Fire Dep’t v. LIRC*, 223 Wis. 2d 723, 732, 589 N.W.2d 445 (Ct. App. 1998). Rather, as already noted, “[w]e will affirm if there is credible evidence to support LIRC’s inference.” *Id.*

The second issue that Marquardt raises is whether she was improperly deprived of discovery. An administrative law judge denied Marquardt’s motion to compel discovery, finding

that the Medical Foundation complied with Marquardt's discovery requests. The Commission determined that Marquardt had not shown that the Medical Foundation failed to comply with her requests and that, even if she had made such a showing, there was no reason to believe that the lack of compliance was prejudicial to Marquardt.²

Marquardt makes a number of factual assertions relating to her claim that she was deprived of discovery. However, she does not provide record citations that support these assertions. Accordingly, we decline to overturn the Commission's decision based on any claimed discovery violation. See *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶10 n.1, 305 Wis. 2d 658, 741 N.W.2d 256 ("We have no duty to scour the record to review arguments unaccompanied by adequate record citation.").

The third and final issue that Marquardt raises is whether the circuit court applied the proper level of deference in reviewing the Commission's decision. Marquardt relies on *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, the case in which our supreme court ended the practice of deferring to an administrative agency's conclusions of law. See *id.*, ¶¶3, 84. As noted above, we review the Commission's decision, not the circuit court's decision. Thus, Marquardt's argument directed at the circuit court's decision is misplaced. *Tetra Tech* does not change the level of deference that we give to the Commission's findings of fact. As a result, *Tetra Tech* does not affect our review of the Commission's decision here.

² Among other underlying findings, the Commission found that the Medical Foundation allowed Marquardt to access her complete personnel file, that the Medical Foundation offered to make copies of documents from the file upon Marquardt's request, that Marquardt reviewed the file, and that Marquardt did not identify any items that she wanted copied.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals