

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2030

Cir. Ct. No. 2012CV12393

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KENNETH J. KRAEMER,

PETITIONER-APPELLANT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

MILWAUKEE COUNTY,

RESPONDENT-INTERESTED PARTY.

APPEAL from an order of the circuit court for Milwaukee County:
KEVIN E. MARTENS, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Kenneth J. Kraemer appeals an order of the circuit court, affirming a decision by the Labor and Industry Review Commission. We affirm.

BACKGROUND

Factual History.

¶2 According to the facts in the record, in May 2005, Kraemer began working as the Deputy Director at General Mitchell International Airport in Milwaukee County. Kraemer worked under the supervision of Barry Bateman. Bateman worked under the supervision of George Torres, the Director of Transportation and Public Works. Kraemer, Bateman and Torres were all employees of Milwaukee County (“the County”).

¶3 At all times relevant, Kraemer, and other county employees, were bound by a “Use of Technologies Policy,” which provided, in relevant part:

Electronic Mail

...

Receipt of Inappropriate Material. Users are not permitted to print, display, download or send sexually explicit messages, cartoons, jokes or any other material disparaging or harassing to anyone on the basis of race, sex, disability, age, religion, or national origin. If such material is received, and if feasible, recipient shall immediately advise sender that receipt of such transmission is not permitted and must stop. If assistance is needed in responding to the receipt of inappropriate material, the matter is to be referred to the user’s supervisor or the information Management Services Division Manager.

...

Personal Use of Technologies

Users may be permitted, at management’s discretion and with prior approval, to use the County’s technologies for personal activities. Nonetheless, users are reminded that use of technologies may directly reflect on the County, and must be used with sound judgment so as not to embarrass the County. Prior to engaging in personal activities, users must ascertain which equipment, if any, may be used for personal activities, as designated by management.

...

Prohibited Uses of Technologies

...

Accessing or distributing indecent material, obscene material, child pornography or any material that violates [the] County’s affirmative action principles or the civil rights (race, age, gender, sexual orientation, religious beliefs, national origin, health or disability) of an individual.

(Some formatting altered.)

¶4 On February 23, 2007, Kraemer was arrested and incarcerated based on allegations that Kraemer sexually abused a minor, physically abused a minor, and had child pornography on his computer. Bateman learned of Kraemer’s arrest when Kraemer called Bateman on February 27, 2007, to confirm that he had been arrested. Bateman told Kraemer not to return to work until further notice and that Kraemer should take some time off to clear the matter. Shortly after the arrest, Milwaukee police seized Kraemer’s work computer.

¶5 On February 28, 2007, Kraemer was released from jail and again contacted Bateman. Kraemer told Bateman that two of the charges—possession of child pornography and physical abuse of a minor—had been dropped, but that the allegation of sexual abuse of a minor was still under investigation. Bateman told Kraemer that Kraemer could not return to work until the “black cloud” was lifted.

¶6 Kraemer was eventually suspended while the investigation into the allegations of sexual abuse continued. Local media began reporting about Kraemer's arrest, and the County Executive's office began expressing concern about Kraemer's employment. Rob McWilliams, a member of then-County Executive Scott Walker's staff, told Torres that Kraemer should be dismissed.

¶7 At some point between February 28, 2007, and March 22, 2007, Bateman and Torres met with Milwaukee County Corporation Counsel, Mary Ann Grimes, asking what action should be taken against Kraemer. McWilliams also called Grimes and suggested that Kraemer be discharged. Grimes told Bateman, Torres and McWilliams that no action could be taken at that point because the allegations against Kraemer were not connected to Kraemer's employment.

¶8 On or about March 22, 2007, Milwaukee police returned Kraemer's work computer to the County. A police officer told Grimes that police did not find child pornography on Kraemer's computer, but suggested that County authorities still look at the computer. Kraemer's computer was sent to a private digital forensics company.

¶9 The forensic report revealed that Kraemer viewed pornographic images at work and that Kraemer used his private email on his work desktop to set up sexual encounters.

¶10 In early April 2007, Bateman met with Kraemer and inquired about the status of Kraemer's criminal investigation. When Kraemer told Bateman that the investigation was still pending, Bateman told Kraemer that Kraemer's employment with the County was terminated. Bateman advised Kraemer to resign before being terminated. Kraemer resigned, but indicated that he was "resigning under duress."

¶11 The allegation of sexual abuse of a child was dropped in December 2007. No criminal charges were ever filed against Kraemer.

Procedural History.

¶12 On January 25, 2008, Kraemer filed a complaint with the Equal Rights Division of the Department of Workforce Development, alleging that Milwaukee County discriminated against him based on his arrest record. Specifically, Kraemer argued that the County violated the Wisconsin Fair Employment Act (“WFEA”) by suspending and then terminating his employment. An Administrative Law Judge (“ALJ”) remanded the matter for additional investigation on the suspension claim.

¶13 After a hearing, the ALJ issued a decision dismissing Kraemer’s complaint. The ALJ decided that the County did not unlawfully suspend Kraemer because the conduct for which Kraemer was arrested was “substantially related” to his job within the meaning of WIS. STAT. § 111.335(1)(b) (2007-08).¹ The ALJ further determined that the County terminated Kraemer’s employment solely because he violated the Use of Technologies Policy, not because of his arrest record.

¹ WISCONSIN STAT. § 111.335(1)(b) provides:

Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. The current text of WIS. STAT. § 111.335(1)(b) does not differ in any significant way from the text of the 2007-08 statute.

¶14 Kraemer petitioned the Labor and Industry Review Commission (“LIRC”) to review the ALJ’s decision. LIRC reversed the ALJ’s decision, in part, stating:

The administrative law judge found that [the County] could lawfully suspend [Kraemer’s] employment because the circumstances of his alleged crime were substantially related to the circumstances of the job. The commission disagrees with this analysis.... [T]he statutory exception allowing an employer to suspend an employee’s employment during an arrest only applies where the employee has pending charges against him that are substantially related to the job. In this case, it is undisputed that [Kraemer] was never charged with a crime and, further, that [the County] was aware [Kraemer] had not been charged. Consequently, the “substantial relationship” defense is unavailable to [the County].

¶15 LIRC also determined, based on the evidence before it, that additional factors contributed to the County’s decision to discharge Kraemer, namely, Kraemer’s violation of the Use of Technologies Policy. However, LIRC also concluded that regardless of Kraemer’s arrest, his employment would have been terminated based upon his violation of the technology policy. Specifically, LIRC stated:

[T]he commission believes that [the County] was motivated to discharge [Kraemer] because of the fact of his arrest and that the decision to do so was made before it became aware of [Kraemer’s] alleged violations of its Use of Technologies Policy. [The County’s] actions in that regard were in violation of the Wisconsin Fair Employment Act.

However, while the commission is convinced that [Kraemer’s] violation of the Use of Technologies Policy provided [the County] with a convenient rationale for terminating the employment relationship, it does not believe that the alleged violation of the policy was entirely a pretext for discrimination. To the contrary, the commission is persuaded that [the County] was genuinely concerned about the inappropriate materials it found on [Kraemer’s] computer and that his employment would have

been terminated once those materials were discovered, even in the absence of a troubling arrest record.

.... The commission can see no reason to doubt that [the County] had a good faith belief that [Kraemer] was engaging in activities in the workplace in violation of its Use of Technologies Policy that were serious enough to warrant discharge. Such belief, even if mistaken, constitutes a legitimate, non-discriminatory reason for terminating the employment relationship.

¶16 LIRC's decision denied Kraemer reinstatement and backpay stemming from his termination, but LIRC ordered the following:

1. That [the County] shall cease and desist from discriminating against [Kramer] on the basis of [the] arrest record.
2. That [the County] shall restore to [Kraemer] the paid leave time [Kraemer] used during his unlawful suspension from February 27, 2007, the day on which he was notified he was suspended, through April 2, 2007, the day on which he was notified of his discharge.
3. That [the County] shall pay [Kraemer's] reasonable attorney fees incurred in pursuing this matter, in the total amount of \$70,587....

(Some spacing altered.)

¶17 Kraemer sought judicial review of the part of LIRC's decision denying his reinstatement and backpay. The County did not separately petition for judicial review.

¶18 On August 13, 2013, the circuit court entered a decision and final order affirming LIRC's decision. Specifically, the circuit court found that LIRC reasonably applied the "mixed motives" test when it determined that the County terminated Kraemer's employment in part because of his arrest record and in part

because he violated the technology policy, and that the County would have terminated Kraemer's employment in the absence of Kraemer's arrest.

¶19 The circuit court also found that LIRC's factual findings were supported by substantial evidence in the record.

¶20 This appeal follows. Additional facts are included as relevant to the discussion.

DISCUSSION

Standard of Review.

¶21 When an appeal is taken from a circuit court order on administrative review, we review the decision of the agency, not the circuit court. *See Zip Sort, Inc. v. DOR*, 2001 WI App 185, ¶11, 247 Wis. 2d 295, 634 N.W.2d 99. We must affirm LIRC's findings of fact if they are supported by any credible and substantial evidence in the record, even if they are contrary to the great weight and clear preponderance of the evidence. *The West Bend Co. v. LIRC*, 149 Wis. 2d 110, 117-18, 438 N.W.2d 823 (1989); *see also* WIS. STAT. § 227.57(6).

Mixed Motives.

¶22 The WFEA, WIS. STAT. §§ 111.31-111.395, prohibits discrimination in employment on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force or military reserves, or the use or nonuse of lawful products off the employer's premises on the employee's personal time. WIS. STAT. § 111.321. The specific sections of the WFEA implicated here,

§§ 111.321² and 111.322, prohibit an employer from discriminating against an employee on the basis of an employee's arrest record.

¶23 Kraemer contends that in denying reinstatement and lost wages stemming from his termination, the County improperly used the Use of Technologies Policy as a pretext for discrimination, in violation of the WFEA. Consequently, Kraemer contends that LIRC erroneously applied the “mixed motives” test to the facts of his case. We disagree.

¶24 A mixed motive case is one in which the adverse employment decision resulted from a mixture of legitimate business reasons and prohibited discriminatory motives. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989), *superseded by statute as stated in Burrage v. United States*, ___U.S.___, 134 S. Ct. 881 (2014). LIRC has previously described the “mixed motives” test as follows:

[I]f an employe is terminated solely because of an impermissible motivating factor, the employe normally should be awarded a cease and desist order, reinstatement, back pay, interest, and attorney's fees under the Wisconsin Fair Employment Act. If an employe is terminated in part because of an impermissible motivating factor and in part because of other motivating factors, but the termination would not have occurred in the absence of the impermissible motivating factor, the Commission has the discretion to award some or all of the remedies ordinarily awarded. Finally, if an employe is terminated in part because of an impermissible factor and in part because of other motivating factors, and the termination would have taken place in the absence of the impermissible motivating factor, the employe should be awarded only a cease and desist order and attorney's fees.

² WISCONSIN STAT. § 111.321 provides: “Subject to ss. 111.33 to 111.365, no employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of ... arrest record.”

Hoell v. LIRC, 186 Wis. 2d 603, 609-610, 522 N.W.2d 234 (Ct. App. 1994) (citation and emphasis omitted; brackets in *Hoell*).

¶25 The Wisconsin Supreme Court previously recognized that the mixed motives test applies in claims arising under the WFEA. *See id.* at 610. The question, therefore, is whether LIRC properly determined that the County dismissed Kraemer in part because of his arrest record *and* in part because of his violation of the County’s technology policy. “The question of an employer’s motivation presents a question of ultimate fact.” *Id.* at 614. We will affirm LIRC’s findings if they are supported by substantial evidence. *Id.* “The substantial evidence standard is met when, upon examining the entire record, the evidence, including any inferences therefrom, is found to be such that a reasonable person might have reached the decision.” *Id.*

¶26 Our independent review of the record leads us to the conclusion that there is substantial evidence to support LIRC’s findings.³ Specifically, there is substantial evidence to support LIRC’s determination that Kraemer’s termination was partially motivated by his arrest, but also that Kraemer would still have been terminated for his blatant violation of the County’s Use of Technologies Policy.

¶27 It is undisputed that shortly after learning of Kraemer’s arrest, Bateman and Torres met with the County Executive, who expressed concern over the arrest and “hope[d] that the matter would be cleared up.” The County

³ Kraemer contends that LIRC erroneously relied on testimony from Bateman and Torres, and failed to consider that Bateman and another County employee also had pornography on their work computers. The record indicates that the County addressed the contents of those computers with the two individuals and that the amount of pornography found on their computers was far less than what was found on Kraemer’s. Because credibility determinations are made by LIRC, we conclude that LIRC’s reliance on Bateman’s and Torres’s testimony was not erroneous and we do not address the issue further.

Executive's office received multiple updates as to the status of the circumstances surrounding Kraemer's arrest after local media began reporting about Kraemer's arrest. McWilliams, Bateman and Torres discussed the situation with Corporation Counsel. McWilliams requested that Kraemer be discharged.

¶28 Although Kraemer was ultimately discharged following the forensic analysis of his work computer, Bateman did not mention Kraemer's violations of the technology policy when terminating Kraemer. At the hearing before the ALJ, Kraemer testified that Bateman "confidentially shared ... that it was coming from the very top, that it was coming from the County Executive, that it was the County Executive Scott Walker's decision that my tenure was – was not going to continue with Milwaukee County." Bateman and Torres both denied receiving pressure from the County Executive's office, but Torres testified that the County Executive's office was anxious about the allegations against Kraemer and that McWilliams may have said "[t]his guy has got to go." LIRC found this evidence credible when concluding that the County's decision to terminate Kraemer was made prior to receiving the forensic report and was motivated by Kraemer's arrest.

¶29 However, substantial evidence also supports LIRC's conclusion that the County "had a good faith belief that [Kraemer] was engaging in activities in the workplace in violation of its Use of Technologies Policy that were serious enough to warrant discharge." This serves as an independent, non-discriminatory basis for termination.

¶30 The forensic report provided two pages of detailed contents discovered on Kraemer's computer—much of which blatantly violated the County's Use of Technologies Policy. According to Bateman's testimony, the report caused the County concern based on "the email images [and] the

pornography that was found on the computer.” Bateman also said that the report revealed that Kraemer “surf[ed] to web sites of questionable nature ... [and] use[d] the computer for dating purposes.” LIRC found Bateman’s reliance on the forensic report reliable.

¶31 The County’s Use of Technologies Policy clearly restricts an employee’s use of a County computer for viewing sexually explicit images, for personal use, and for any use which may embarrass the County. Clearly the County has an interest in executing this policy and in terminating employees with considerable caches of questionable material on their County-issued computers. Although Kraemer contends that the County’s examination of his computer was prompted by his arrest and therefore led to his improper termination, Kraemer ignores the fact that a multitude of impermissible material was indeed found on his computer. Kraemer cannot dispute the fact that the contents described in the forensic report violate the County’s Use of Technologies Policy on multiple levels. Regardless of Kraemer’s arrest, the County would have discharged Kraemer whenever it discovered the materials on Kraemer’s computer.

¶32 The record supports LIRC’s determination that the County’s permissible reasons for terminating Kraemer were credible and not pretextual. Accordingly, LIRC’s limitation of Kraemer’s remedies to a cease and desist order, backpay for Kraemer’s suspension period only, and attorney fees was reasonable.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

