No. 94-2178

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

CAROL PETERSON,

Plaintiff-Appellant,

v. **ERRATA SHEET**

MARQUETTE UNIVERSITY and RONALD ORMAN,

Defendants-Respondents.

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PLEASE TAKE NOTICE that the attached pages 5, 9, 10, 11 and 12 of the majority opinion and page 3 of the concurrence/dissent are to be

substituted for the original of such pages of the above-captioned majority opinion and concurrence/dissent which was released on June 13, 1995.

Dated this 11th day of December, 2006.

Once her case was assigned to the Honorable Michael J. Barron's court, Peterson requested by correspondence that Judge Barron voluntarily recuse himself from the case because he was a graduate of Marquette University Law School. Judge Barron declined to voluntarily recuse himself, explaining that he attended law school thirty-three years ago, this case did not specifically involve the law school, and he believed he could be impartial. No formal motion for recusal or request for substitution was made.

The case was tried to a jury, which found that Peterson had been constructively discharged and the motivation for the discharge was her age and her religion. Peterson was forty years old at the time of her resignation and a member of the Jewish faith. Marquette moved for a directed verdict or judgment notwithstanding the verdict, which was granted by the trial court. Peterson now appeals.

II. DISCUSSION

Because this case involves resignation rather than discharge, Peterson first needed to prove that her resignation was in actuality a constructive discharge. *See* ***Chambers v. American Trans Air, Inc.***, 17 F.3d 998, 1005 (7th Cir.), *cert. denied*, 115 S. Ct. 512 (1994). The trial court determined that Peterson did not satisfy her burden of proof on this issue and that there was no evidence to support a

The budget cuts leading to restructuring of the Residence Life department may have created a difficult working environment. Peterson's receipt of "work expectations" memos from a new supervisor may have been unpleasant. The offer of a four-month provisional contract in place of the usual one-year renewal certainly was not pleasing to Peterson. Nevertheless, there is no substantiation in the record documenting "intolerable conditions"—conditions that are physically impossible or so grossly demeaning that a reasonable person in Peterson's shoes would be forced to quit instead of seeking redress while continuing to work. We conclude, therefore, that the record does not contain any evidence that Peterson's resignation was a result of intolerable working conditions. Accordingly, we are not convinced that the trial court's determination was clearly wrong.

B. Recusal.

We consider next whether the trial court erred in refusing to voluntarily recuse itself from presiding over this case. Peterson claims that Judge Barron should have recused himself because he was a graduate of Marquette University Law School.

Section 757.19(2),[1] STATS., governs when a judge should disqualify himself or herself. Our standard of review is an objective one, although under

[1] This statute provides:

(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(c) When a judge previously acted as counsel to any party in the same action or proceeding.

(d) When a judge prepared as counsel any legal instrument or paper whose

subsection (g), the trial judge makes a subjective determination as to impartiality, and the objective review is limited to establishing whether the judge made a determination requiring disqualification. *See* ***State v. American TV & Appliance***, 151 Wis.2d 175, 181-86, 443 N.W.2d 662, 664-66 (1989). Peterson contends that recusal of the trial judge in this case was required under subsections (f) and (g).

We first address subsection (f). Section 757.19(2)(f), STATS., requires a trial judge to recuse himself or herself: "[w]hen a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party." The question for our consideration is whether the trial judge in this case had a "personal interest in the outcome" because he graduated from Marquette University Law School. Judge Barron pointed out two additional factors to counter Peterson's argument: (1) he graduated thirty-three years ago; and (2) the law school was not a defendant. Our search of the record reveals that the *only* factor suggesting that Judge Barron may have a personal interest in the outcome is the fact that he graduated from the law school. This factor standing alone is insufficient to require recusal under § 757.19(2)(f), especially in light of the length of time that has passed since his graduation. *See* ***Goodman v. Wisconsin Elec. Power Co.***, 248 Wis. 52, 58, 20 N.W.2d 553, 555 (1945) (personal interest must be substantial and not remote to require disqualification). Accordingly, we reject Peterson's argument based on § 757.19(2)(f).

Our consideration under subsection (g) is limited: (1) to reviewing whether Judge Barron subjectively believed he could be fair and impartial; and

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validity or construction is at issue.

(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

(2) to establishing whether the judge made a determination requiring disqualification. ***American TV***, 151 Wis.2d at 183, 443 N.W.2d at 666. Section 757.19(2)(g), STATS., requires a trial judge to recuse himself or herself: "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." "The basis for disqualification under sec. 757.19(2)(g), STATS., is a subjective one. Accordingly, the determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make." ***American TV***, 151 Wis.2d at 183, 443 N.W.2d at 665. We first consider whether the trial judge subjectively believed he could be fair and impartial. Correspondence from Judge Barron to both parties clearly established his subjective belief that his graduation from Marquette University Law School thirty-three years ago would not color his ability to be fair and impartial. Further, Peterson has offered no evidence that demonstrates Judge Barron subjectively believed that he could not be fair. We conclude that the trial judge satisfied the subjective standard under § 757.19(2)(g).

Our final consideration under § 757.19(2)(g), STATS., is to establish whether the trial judge made a determination requiring disqualification and failed to heed his own finding. Consideration of this point in light of the foregoing is futile. The trial judge in this case clearly made a determination that he was *not* required to disqualify himself. Accordingly, we reject Peterson's contention that the trial court erred in refusing to recuse itself.

By the Court.—Judgment affirmed.

decision under doctrine of *stare decisis*); *see also* § 752.41(2), STATS., ("Officially published opinions of the court of appeals shall have statewide precedential effect.").

Applying the correct standard of review to this case, we should examine the record to determine whether there is credible evidence to sustain the jury's verdicts. In doing so, we should be mindful that when more than one reasonable inference may be drawn, we *must* accept the inference drawn by the jury. ***Macherey*** at 8, 516 N.W.2d at 436. The majority's summary of the evidence, however, is incomplete, misleading, and in total disregard of the inferences the jury was entitled to draw.

The majority ignores the testimony of Father Leahy who, in describing the reasons he wanted Orman as dean, added that "[i]t was a bonus that he was Catholic." The majority also ignores the evidence that Father Leahy advised James Forrest that he wanted a "younger" person in Forrest's position. The trial court decision granting judgment notwithstanding the verdict minimized the former testimony as an "illtempered remark," and similarly dismissed the latter by saying, "Age was never mentioned at the trial except by Fr. Leahy on why he wanted Orman as dean." Then, apparently referring to both comments, the trial court wrote, "a mere isolated or ambiguous remark is not in itself sufficient to show discrimination on the part of the employer." Perhaps, but Peterson offered more than these remarks.