

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2006

Cornelia G. Clark
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. 2005AP1806

Cir. Ct. No. 2004CV859

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GPI CORPORATION,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

ROGER KURTZWEIL,

RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Affirmed.*

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

¶1 CANE, C.J. GPI Corporation appeals an order affirming a decision of the Labor and Industry Review Commission, which found that GPI terminated Roger Kurtzweil's employment because of his age, contrary to WIS. STAT. § 111.321.¹ GPI contends the commission's decision was not supported by substantial evidence. It also claims the circuit court erred when it affirmed the commission's order for reinstatement, back pay, and reasonable attorneys' fees and costs. We reject GPI's arguments and affirm the order.

BACKGROUND

¶2 GPI manufactures chemical storage tanks, air scrubbers, piping, and other industrial products. It is owned by George and Mary Ann Zinser, who were in their sixties at the time Kurtzweil was terminated. They have two sons who work for GPI. Brian Zinser was thirty-five years old at the time and Kevin Zinser was thirty-two.

¶3 Kurtzweil was initially hired by GPI as a part-time draftsman in 1988 and began working full-time in 1989. For most of his time at GPI, he was its only draftsman. In 1996, GPI, with Kurtzweil's input, began to explore using computer aided drafting (CAD) technology. In 1999, GPI purchased computers and a CAD system and began producing drawings using the CAD system. Initially, Kurtzweil was inefficient with CAD, and some of his drawings contained mistakes. In April 2000, GPI hired another draftsman, Mark Gabriel, who was twenty-five years old, to assist with drafting responsibilities. Gabriel worked in what was Kurtzweil's office, while Kurtzweil worked from home, where he had

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

CAD on his home computer. After April 26, 2000, Kurtzweil requested more projects, but was told by Brian Zinser that he had nothing for Kurtzweil to do. Approximately a week later, Kurtzweil was informed that Gabriel was working full-time and Kurtzweil should apply for unemployment. On May 10, 2000, Kurtzweil was told that his employment with GPI had ended. He was sixty-five years old.

¶4 The commission found that the decision to terminate Kurtzweil was made primarily by Brian Zinser and that age was a determining factor in that decision. GPI appealed the commission's decision to the circuit court, which affirmed the commission. GPI appeals.

DISCUSSION

¶5 In an appeal from a circuit court's review of a commission decision, we review the decision of the commission, not the circuit court. *Virginia Surety Co. v. LIRC*, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 654 N.W.2d 306. The commission's findings of fact will be upheld if supported by credible and substantial evidence. *See id.*

¶6 In an action alleging age discrimination under WIS. STAT. § 111.321, the initial burden is on the complainant to make a prima facie case to raise a presumption of discrimination. *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis. 2d 168, 172, 376 N.W.2d 372 (Ct. App. 1985). To make a prima facie case, the complainant must show that he or she: (1) was forty years old or older and thereby a member of a protected age group under WIS. STAT. § 111.33; (2) was discharged; (3) was qualified for the job; and (4) was either replaced by someone not within the protected class or others not in the protected class were treated more favorably. *Id.* at 173. Once a prima facie case is made, the employer can rebut

the presumption by articulating a legitimate nondiscriminatory reason for the action taken. *Id.* at 172. If the employer does so, the complainant must then prove that the proffered reason is merely a pretext for discrimination. *Id.* Pretext may be established directly by showing that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered explanation is unworthy of credence. *Id.* at 175.

¶7 GPI's first claim is that the commission's finding of age discrimination was not supported by substantial evidence. GPI attacks this issue on several fronts. It first argues that Kurtzweil failed to make a prima facie case of discrimination because he failed to prove that Gabriel replaced him and that he and Gabriel were similarly situated. GPI contends that Gabriel did not replace Kurtzweil because Gabriel was not *hired* to replace him. It relies on the fact that Gabriel was hired before Kurtzweil was terminated. GPI, however, cites no case law to support this distinction. We see no reason why the full-time Kurtzweil could not be replaced by the previously part-time Gabriel. Further, the commission could reasonably infer that GPI hired Gabriel with the expectation that he would eventually replace Kurtzweil.

¶8 GPI asserts that Gabriel was not similarly situated to Kurtzweil because he was more efficient and had a smoother relationship with George Zinser than Kurtzweil. While Kurtzweil's testimony conceded that he had problems adjusting to using CAD and had verbal disputes with George Zinser, the commission questioned GPI's credibility as to the purported magnitude of these problems. The commission noted that Kurtzweil's personnel file was free of any negative notations and that while GPI had a system of progressive discipline, that system was never used with Kurtzweil.

¶9 GPI also attempts to reframe the “similarly situated” analysis by arguing that it was Kevin Zinser, not Gabriel, who replaced Kurtzweil. GPI then asserts that Kevin Zinser was not similarly situated to Kurtzweil because he is the son of GPI’s owners. However, the fact that Kevin Zinser took over the drafting responsibilities after Gabriel left GPI does not change the fact that Gabriel immediately succeeded Kurtzweil as GPI’s full-time draftsman.

¶10 GPI’s next argument is that Kurtzweil failed to prove that its purported reasons for terminating his employment were pretextual. GPI asserts that it terminated Kurtzweil because of a slowdown in drafting work, combined with Kurtzweil’s relative inefficiencies and the difficulty of supervising him. GPI therefore contends that there was not substantial evidence to support a finding that these were not the actual reasons for Kurtzweil’s termination.

¶11 The commission cited multiple reasons for finding that GPI’s purported nondiscriminatory reasons for terminating Kurtzweil were pretextual.² The commission was first influenced by two sets of “logs,” which purported to contain notations of problems with Kurtzweil. The commission was skeptical of these logs Brian and George Zinser created because, despite how closely these family members worked together, both claimed that neither knew the other was keeping such a log. The commission also relied on evidence suggesting that these

² GPI argues that the commission erroneously shifted the burden of proof from Kurtzweil to GPI because the commission noted that GPI failed to offer specific evidence to support its contention that Kurtzweil took too long to complete drawings. The commission noted that GPI could have introduced such evidence because the CAD software kept track of how long a given project was “in editing.” GPI also relies on the commission’s statement that GPI failed to produce evidence of its alleged backlog of drafting projects, which was allegedly the result of Kurtzweil’s inefficiencies. While we agree that GPI did not have the burden of proof in this regard, we conclude there was otherwise substantial evidence to support the commission’s finding regarding pretext.

logs were made after-the-fact, including a notation of a problem with Kurtzweil that was dated at a time when Kurtzweil was not at work, but was instead in a hospital. GPI minimizes the commission's concerns with the logs, noting that Kurtzweil's own testimony did not dispute that he had performance problems. However, the commission was entitled to infer from the questionable aspects of the logs that GPI was exaggerating Kurtzweil's performance problems and such exaggerated problems were merely a pretext for terminating Kurtzweil. This inference was further supported by the lack of any negative information in Kurtzweil's personnel file and GPI's failure to utilize its system of progressive discipline with Kurtzweil.

¶12 The commission's finding regarding pretext is also supported by testimony of Brian Zinser, who at two points stated that some of the interpersonal friction between himself and Kurtzweil likely resulted from the age difference between them. GPI challenges the commission's labeling of this testimony as direct evidence of discriminatory intent because it was not made in reference to the decision to terminate Kurtzweil. Nevertheless, insofar as pretext may be proven by direct or indirect evidence, the commission's mislabeling of this evidence does not affect the result. The testimony was relevant to the commission's ultimate finding of discrimination.

¶13 GPI also criticizes the summary of proceedings on which the commission relied in making its findings. The summary of proceedings was typed by a legal assistant, who apparently based the summary on audiotapes of the proceedings. GPI points to discrepancies between the summary and the actual transcripts and contends that, as a whole, the summary provides a biased view of the hearing testimony. The commission concedes that there are discrepancies between the actual testimony and what was reported in the summary, but contends

that its findings were ultimately supported by the record. GPI's most profound quarrel with the summary was its characterization of Brian Zinser's testimony. The summary refers to Brian Zinser as stating "I terminated [Kurtzweil] because of his performance." In its decision, the commission relies on this portrayal of Brian Zinser's testimony, stating that he "directly and unmistakably testified that he made the decision to terminate Kurtzweil." The transcript reveals, however, that Brian Zinser referred to "we," not "I," in reference to the decision to terminate Kurtzweil. We therefore agree that this portion of the summary misrepresents the hearing testimony, and the commission clearly relied upon this misrepresentation. However, the finding that Brian Zinser decided to terminate Kurtzweil is still supported by substantial evidence. George Zinser testified that Brian Zinser was effectively managing the company, though Brian Zinser consulted with him constantly.

¶14 GPI's second claim that the commission's remedial order was erroneous insofar as it did not end the accrual of back pay at the time Kevin Zinser took over GPI's drafting responsibilities. GPI notes that Kevin Zinser undertook these responsibilities when Gabriel left, which was approximately three and a half months after Kurtzweil was terminated. The problem with GPI's argument is that it assumes Kurtzweil would have been terminated for a nondiscriminatory reason had he not been terminated because of his age. The record indicates that GPI initially intended to hire another draftsperson to replace Gabriel after he left. Before hiring a replacement, GPI discovered that Kevin Zinser was capable of handling both the drafting responsibilities and his other responsibilities. It then decided to have Kevin Zinser do both. It is not clear that this chain of events would have occurred had Kurtzweil not been terminated.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

