

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 1, 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. 2005AP1452

Cir. Ct. No. 2004CV9478

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DEBRA SPEARMAN,

PETITIONER-APPELLANT,

v.

**LABOR & INDUSTRY REVIEW COMMISSION AND
BURLEIGH DENTAL,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Debra Spearman appeals *pro se* from a circuit court order affirming a decision of the Labor & Industry Review Commission (LIRC), which determined that Burleigh Dental did not unlawfully retaliate against Spearman when it terminated her employment. Because there is

substantial credible evidence to support LIRC's finding that Spearman was terminated on grounds *other than* racial discrimination or retaliation, we affirm.

BACKGROUND

¶2 In February 1993, Burleigh Dental hired Spearman as a dental assistant. By 1999, Spearman was the senior dental assistant. In 1999, Spearman received an annual pay raise and an end of the year bonus. In 2000, the dentists decided not to give employees a pay increase due to decreased revenues expected from relocation. The only exception was for an employee who had been promised a raise for satisfactorily completing her probationary period.

¶3 Spearman believed that all white employees were given a raise and that all black employees were not given a raise. When Spearman confronted one of the dentists, Dr. Michael Donohoo, about her concerns, he started to explain the reasons behind not increasing employees' salary. Spearman walked out of the room. Subsequently, Spearman had additional conversations with Donohoo and another dentist, Dr. Monica Hebl, wherein Spearman requested a pay increase. Ultimately, Spearman was told she would not receive an increase in pay at that time.

¶4 On August 18, 2000, Spearman filed a complaint with the Department of Workforce Development/Equal Rights Division (DWD/ERD) alleging a violation of the Wisconsin Fair Employment Act (WFEA). *See* WIS. STAT. §§ 111.31-111.395 (1999-2000). Spearman asserted that she had been discriminated against on the basis of race because white employees had received pay increases in 2000, and she, as a black employee, had not received a pay increase in the year 2000.

¶5 On October 30, 2000, Spearman submitted her two-week notice that she would be leaving Burleigh Dental. On November 13, 2000, Spearman met with Donohoo and Hebl and stated that she wanted to rescind her notice and continue to work at Burleigh Dental. The dentists permitted her to continue employment at the office.

¶6 On December 1, 2000, the ERD issued an initial determination finding that “no probable cause” existed to believe that Burleigh Dental had engaged in racial discrimination. On December 29, 2000, Spearman appealed from the initial determination of the ERD.

¶7 In the meantime, Spearman continued to work at Burleigh Dental. In January 2001, Spearman received a pay increase. In February 2001, Hebl received complaints from Spearman’s co-workers that Spearman was not willing to communicate with them. On March 5, 2001, a newly hired dental assistant named Sarah Rajkovic, told Donohoo and Hebl that Spearman had phoned her the previous Friday evening. Rajkovic reported that Spearman said the following things: (1) receptionist Diane Rossman had tried to poison Spearman with a bag of cookies; (2) Rossman might steal from Rajkovic’s purse; (3) Rajkovic would be terminated in the near future because she was becoming too involved in the office; (4) the employers had video cameras hidden in the office; and (5) Rajkovic should not talk to Spearman or ask Spearman any questions at work. On March 6, 2001, the dentists spoke with Spearman about what Rajkovic had reported. Immediately thereafter, Spearman was discharged from employment at the dental clinic.

¶8 On March 20, 2001, Spearman filed a second complaint with the ERD, asserting that Burleigh Dental had terminated her employment in violation of the WFEA in retaliation for her filing the first complaint. On August 22, 2001,

a DWD equal rights officer issued an amended initial determination, concluding that there was probable cause to believe that Burleigh Dental unlawfully retaliated against Spearman, but that there was not probable cause to believe that the employer terminated Spearman's employment because of her race.

¶9 On September 5, 2001, Spearman appealed the part of the initial determination that there was no evidence to believe that Spearman's termination was based on racial discrimination. On January 14, 2001, however, Spearman withdrew her appeal and charge of racial discrimination and the earlier filed pending appeal on racial discrimination in order to expeditiously resolve the retaliation claim.

¶10 In September 2002, November 2002, and February 2003, a DWD examiner conducted a hearing on the retaliation complaint. The examiner issued a decision on February 13, 2004, ruling that Burleigh Dental did not unlawfully retaliate against Spearman when it terminated her employment. The examiner found that Spearman's termination was based on the phone call to Rajkovic and the termination was not because of any of the ERD filings or appeals.

¶11 On February 27, 2004, Spearman petitioned LIRC for an administrative review of the examiner's rulings. LIRC affirmed the examiner's decision on September 30, 2004. On October 28, 2004, Spearman filed an appeal with the circuit court to review LIRC's determination. The circuit court entered an order affirming LIRC's decision. Spearman now appeals from the circuit court order.

DISCUSSION

¶12 Spearman contends that the circuit court erred in affirming LIRC's decision. She argues that her termination was retaliatory in violation of the WFEA and asks us to reverse the circuit's order, reverse LIRC's findings, and "reinstate" her case. We reject Spearman's arguments and affirm the order of the circuit court.

¶13 We review the decisions of the administrative agency, not those of the trial court. *See WPSC v. Public Serv. Comm'n*, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6) (2003-04).¹ Credible evidence is that evidence which excludes speculation or conjecture. *See Bumpas v. DILHR*, 95 Wis. 2d 334, 343-44, 290 N.W.2d 504 (1980). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). In the context of an employment discrimination case, an employer's motivation for termination presents a factual question. *Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). Thus, LIRC's finding regarding Burleigh Dental's motivation for firing Spearman must be affirmed if it is supported by substantial evidence in the record. *See* WIS. STAT. § 227.57(6).

¶14 Because we conclude that LIRC's findings of fact in this case are supported by credible and substantial evidence in the record, we are bound by

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

them. The circuit court's decision on this issue provides an apt analysis in reviewing LIRC's findings, in assessing the credible and substantial evidence in the record to support LIRC's findings, and in concluding that LIRC's decision must be affirmed. We adopt the circuit court's decision as our own opinion in this case. See Wis. Ct. App. IOP VI(5)(a) (Oct. 14, 2003) (court of appeals may adopt trial court's opinion).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

