COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2748 **Cir. Ct. No. 01-CV-296**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

HAROLD J. MATIS,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND PURPOSE EXTRUDED ALUMINUM,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County: PATRICK M. BRADY, Judge. *Affirmed*.

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

¶1 PER CURIAM. Harold Matis appeals a judgment affirming a decision of the Labor and Industry Review Commission that rejected his claim that he was terminated from Purpose Extruded Aluminum (PEACO) because of his age. He argues that the trial court should have taken judicial notice of a work

sharing agreement between the United States Equal Employment Opportunity Commission and the Equal Rights Division of the Wisconsin Department of Workforce Development. He contends that this agreement superimposes federal substantive and procedural law on the commission, modifying the burden of proof and this court's deferential standard of review. He also argues that the evidence established that PEACO's reasons for discharging him were pre-textual as a matter of law. We reject these arguments and affirm the judgment.

¶2 Matis's argument that the work sharing agreement modifies substantive and procedural law regarding his claim fails for several reasons. A work sharing agreement is not a manner in which laws and administrative rules are changed. The Federal Civil Rights Act was not incorporated into the Wisconsin Fair Employment Act. *See* ***AMC v. ILHR Dept.***, 101 Wis. 2d 337, 353, 305 N.W.2d 62 (1981). WISCONSIN STAT. §§ 111.395 and 227.57(6) make the commission's findings reviewable under WIS. STAT. ch. 227 and provide a "substantial evidence" standard for reviewing its findings. The less deferential standard of review Matis proposes was expressly rejected in ***Robertson Transport v. PSC***, 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968). Finally, nothing in the language of the work sharing agreement is inconsistent with the manner in which the commission decided this case.

¶3 The law is well settled. This court defers to the commission on questions of fact that are supported by substantial evidence and on all questions involving the credibility of witnesses. *See* ***Bucyrus-Erie Co. v. DILHR.***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979); ***Muskego-Norway C.S.J.S.D. No. 9 v. WERB***, 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967).

¶4 Regardless of the burden of proof and standard of review, the record does not support Matis's claim of age discrimination. He was hired as a consumer service representative at age fifty-two and discharged one year later. His superior testified that PEACO was dissatisfied with Matis's performance, including complaints from customers that he was not answering their inquiries on time with correct information and that his faxes were illegible. He failed to maintain a tidy work station and that was detrimental to his performance. Matis himself admitted that the work did not turn out as he expected.

¶5 Matis's claim of pre-textual discharge is based on three contentions. First, the PEACO controller told Matis when he was discharged that "it was not for anything he did, [PEACO] was just changing direction." The commission found that the controller was not being honest with Matis. The controller's statement is consistent with a nonconfrontational management style. Even if it were true that PEACO was "changing direction," there is nothing in that statement that suggests age discrimination.

¶6 Matis's second contention is based on four employees discharged in 1997 and 1998 who were replaced with younger employees. The record shows that PEACO hired a substantial number of employees in the protected (over forty) age group, and one fifty-four-year-old discharged worker was replaced with a fifty-seven-year-old. Nothing in PEACO's employment practices suggests that age was a factor in its employment decisions.

¶7 Matis's third proof of pretextual firing is based on the fact that no non-union employees had reached age sixty-two to sixty-five and retired from the company. From this, he suggests that older employees are systematically removed before retirement. PEACO does not have a pension plan. Its 401-K plan includes

a number of managers over age fifty. The record does not establish any advantage to PEACO that would arise from discharging older employees before they retire.

¶8 Matis argues that PEACO never viewed him as a long-term employee and that he was hired to "develop the position" and then dismissed when he was no longer needed. Even if that is true, that does not constitute age discrimination. Discrimination statutes are not intended as a vehicle for judicial review of business decisions. *See* ***Kephart v. Inst. of Gas Tech.***, 630 F.2d 1217, 1223 (7th Cir. 1980).

By the Court.—Judgment affirmed.

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