

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 3, 1996

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

NOTICE

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No. 95-2584

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

HEALTH ENTERPRISES OF WISCONSIN, INC.,

Petitioner-Respondent,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent,

ALOYS N. LECONTE,

Respondent-Appellant.

APPEAL from judgment of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Reversed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

DYKMAN, J. Aloys N. LeConte appeals from a judgment reversing an order of the Labor and Industry Review Commission (LIRC). The trial court concluded that there was no substantial evidence to support LIRC's

finding of constructive discharge. We reverse, concluding that there was substantial evidence in the record to support LIRC's order.

BACKGROUND

LeConte interviewed for the maintenance supervisor position at Janesville Health Care Center (JHCC). He submitted a resume, which included his age of fifty-four, to Mary Ann Wright, the administrator at JHCC. At the job interview, Wright stated to LeConte that she would like to hire a younger person, but that LeConte qualified for the position. Wright hired LeConte on the day of the interview, July 5, 1990.

As a new employee of JHCC, LeConte was subject to a ninety-day probationary period. He faced a substantial backlog of work when he started. In addition, JHCC was undergoing a major renovation project, resulting in large amounts of additional work for LeConte.

Frequently, Wright kept LeConte from finishing assigned tasks by pulling him off one job before completion in order to start another. Wright also delayed LeConte's work by not providing appropriate maintenance materials for him to adequately complete assigned jobs.

Wright made her preference for female employees clear. On several occasions she told Charlene Reis-Wittleif, the director of nursing and assistant administrator, that female employees were better than men. During LeConte's employment, Georgia Dutcher, a licensed practical nurse at JHCC, said that she overheard Wright state, "If I had my way, I would have an all female staff." Further, Wright started and participated in an organization called WAM, "Women Against Men." One of the goals of WAM was to get the male employees at JHCC fired.

Within the first month of LeConte's employment, Wright informed Reis-Wittleif that she wanted to get rid of LeConte. Wright informed Reis-Wittleif of a plan to hire a female housekeeper with some maintenance experience who would take over for LeConte once she got rid of him. On

August 6, 1990, Wright hired Denise Anderson, who was under forty, into the housekeeping department. On August 8, 1990, Anderson replaced LeConte.

On the same day Anderson was hired, Wright drew up a negative evaluation of LeConte and attached it to his time card. LeConte received the evaluation when he came to work on August 8, 1990. The evaluation of LeConte, which took place thirty days into his employment, did not follow the normal review procedures standardized at JHCC, which provided for review after ninety days and then on a yearly basis.

Prior to this evaluation, Wright had not expressed any concerns or criticisms to LeConte about his work. Further, Dutcher testified that she customarily discussed problems about JHCC's operations with Wright and that Wright made no complaints about LeConte to her.

LeConte disagreed with the criticisms contained in the evaluation. For example, Wright specifically told LeConte to stop writing the water heater temperatures on the calendar, but then criticized LeConte for failure to perform this task.

After receiving the review, LeConte approached Wright to discuss the evaluation. Although Wright indicated to LeConte that she did not have time to discuss it, Wright also informed LeConte that if he did not like the evaluation, he was terminated. According to LeConte, he believed his employment was terminated when Wright made the negative evaluation of him. LeConte testified that Wright compelled him to leave because she was unhappy with his performance and because she thought a younger person could do the job and that LeConte's age was a restriction. After his conversation with Wright, LeConte left his keys and beeper on the table and left JHCC.

Two days later, LeConte approached Reis-Wittleif and informed her that Wright had verbally fired him and requested his job back. Reis-Wittleif stated that she could not help him. LeConte also contacted Wright about returning to work, but Wright informed him that once an employee leaves JHCC, he cannot return.

Reis-Wittleif testified that once Wright learned of LeConte's legal claims, Wright told her that she better hire another male maintenance person just to "cover her butt." Wright then hired John Bowen, who was thirty years old. Bowen testified that, after his hire, Wright told him she should have hired someone in his or her forties to help her case.

Based on its findings of fact and conclusions of law, LIRC determined that JHCC constructively discharged LeConte based on his age and gender.

STANDARD OF REVIEW

Our standard of review is governed by §102.23(6), STATS., which provides that deference must be accorded to LIRC's findings of fact and that a reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence.

When an appeal is taken from a circuit court judgment on administrative review, we review the decision of the agency, not the decision of the circuit court. *Hoell v. LIRC*, 186 Wis.2d 603, 612, 522 N.W.2d, 234, 238 (Ct. App. 1994). We must affirm the agency's findings of fact if they are supported by any credible and substantial evidence in the record. *Id.* Alternatively, we will set aside an agency's action or remand the case to the agency if we find that the agency's action depends on any finding of fact not supported by substantial evidence in the record. *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 417, 280 N.W.2d 142, 146 (1979).

In applying this standard, we have held that evidence will be considered substantial if it is relevant, probative and credible so that a reasonable fact-finder would find it adequate to support a conclusion. *Advanced Die Casting Co. v. LIRC*, 154 Wis.2d 239, 249-50, 453 N.W.2d 487, 491 (Ct. App. 1989). Substantial evidence does not require a preponderance of the evidence; rather, as long as a reasonable person, after reviewing the entire record, might have reached the same decision, the evidence is sufficient. *Bucyrus-Erie Co.*, 90 Wis.2d at 418, 280 N.W.2d at 147.

DISCUSSION

To prove a prima facie case of discrimination, the plaintiff must show that he was discharged based on his age or sex. *Douglas v. PHH Fleetamerica Corp.*, 832 F. Supp. 1002, 1009 (D. Md. 1993). The plaintiff may establish this by showing either actual or constructive discharge. *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994). Constructive discharge occurs when an individual's working conditions are made so miserable that a reasonable person in his or her position would have felt compelled to resign. *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 314 (7th Cir. 1986).

Wisconsin courts have held that it is appropriate to consider federal decisions when interpreting the constructive discharge doctrine. *Marten Transport, Ltd. v. DILHR*, 176 Wis.2d 1012, 1020, 501 N.W.2d 391, 395 (1993). The federal courts have been liberal in defining actions amounting to constructive discharge, including even situations in which an employer simply made plain its desire to be rid of a particular employee. See, e.g., *Christensen v. Equitable Life Assurance Soc'y of the U.S.*, 767 F.2d 340, 343 (7th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); *Downey v. Southern Natural Gas Co.*, 649 F.2d 302, 305 (5th Cir. 1981). However, the plaintiff still must show that the discharge was based on discrimination. *Kovalic v. DEC Int'l, Inc.*, 161 Wis.2d 863, 874, 469 N.W.2d 224, 229 (Ct. App. 1991).

The issue here is whether there is substantial evidence to support LIRC's finding that LeConte was constructively discharged by Wright based on his age or sex. We hold that there is.

From the first day of LeConte's employment, Wright made clear her preference for a younger, female employee. She told LeConte at his interview that she would prefer a younger person to fill the position, but that LeConte was qualified. The record is also replete with testimony that Wright preferred female over male employees. Reis-Wittleif testified that Wright constantly spoke of her preference for female employees. Wright was a member of a group against men. Further, Wright was overheard saying that if she had it her way, she would have an all female staff.

It is undisputed that Wright made no express complaints about LeConte's work prior to finding Denise Anderson to take over LeConte's position. It was only after Wright hired Anderson that Wright gave LeConte the negative review, even though LeConte was not due for review for another sixty days. When LeConte attempted to speak to Wright about this review, she refused. However, Wright told LeConte that if he did not like the review, he would be terminated. LIRC accepted LeConte's testimony that, based on that conversation with Wright, he believed that he was fired on August 8, 1990.

To further establish the intended discrimination, LIRC credited the testimony of Reis-Wittleif, who claimed that once Wright learned about LeConte's legal claims, she said that she should hire another male maintenance man to "cover her butt." Wright then hired John Bowen, who testified that, after his hire, Wright told him she should have hired someone older to help her case.

Based on these findings, LIRC concluded that LeConte had been constructively discharged from JHCC by Wright's clear desire to be rid of LeConte and replace him with a younger, female employee. In so finding, LIRC rejected Wright's contention that LeConte voluntarily quit because he was unhappy with his review.

We will affirm LIRC's order if the findings of fact are supported by any credible and substantial evidence in the record. *See Hoell*, 186 Wis.2d at 612, 522 N.W.2d at 238. It was reasonable for LIRC to conclude that Wright was setting LeConte up for termination. The evidence in the record discloses Wright's explicit desire to be rid of LeConte and replace him with a younger, female employee. There is a clear implication that Wright induced LeConte to quit by writing the negative review, which she knew contained false contentions. This inducement could reasonably be construed as a constructive discharge. Accordingly, we reverse the judgment of the circuit court.

Because we are reversing the circuit court judgment, we need not address the issue of attorney fee reduction.

By the Court. — Judgment reversed.

Not recommended for publication in the official reports.