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DISTRICT IV

December 12, 2017

To:

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2106

Donn Nowlan v. LIRC (L.C. # 2015CV699)

Before Sherman, Blanchard and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Donn Nowlan appeals a circuit court order that affirmed the Wisconsin Labor & Industry Review Commission's dismissal of his employment discrimination complaint against Per Mar Security and Research Corp. Specifically, Nowlan challenges the commission's determination that "Nowlan's age was not a factor in Per Mar's decision to terminate him." After reviewing the

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).¹ We affirm for the reasons discussed below.

We first note that an employer's motivation for an employment decision is a factual determination. *Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). When reviewing an administrative decision under Chapter 227, we may not substitute our judgment for that of the administrative agency as to the weight or credibility of the evidence on a finding of fact. WIS. STAT. § 227.57(6); *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). Rather, we must examine the record for any substantial evidence that supports the agency's determination. WIS. STAT. § 227.57(6); *Currie*, 210 Wis. 2d at 387. The substantial evidence test does not require a preponderance of the evidence, merely that "reasonable minds could arrive at the same conclusion as the agency" based on the record before the agency. *Kitten v. DWD*, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (quoted source omitted).

By Nowlan's own account, on January 30, 2013, Nowlan was providing uniformed security services at the Monroe County Courthouse, when Lieutenant Ronald Radar of the Monroe County Sheriff's approached him to express concern that another Per Mar security officer had spoken about a defendant's past criminal history in front of a juror. Radar identified the Per Mar security officer who had breached confidentiality as Aaron Thesing.

That evening, Nowlan sent an email to a Per Mar manager Toni Furan relating the complaint that Radar had made about Thesing, advising Furan that the Sheriff's department was

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

looking into the potentially “very serious” matter, and asking how to proceed. The following morning, Furan called Nowlan and instructed him to place Thesing on administrative leave.

Furan testified that she then contacted the Monroe County’s Sheriff’s office to get more information. Lieutenant Rob Conroy returned Furan’s call, and advised her that it was actually Doug Fleming, rather than Thesing who had made the comments. Conroy also told Furan that Nowlan already knew that it was Fleming who made the statements, and he asserted that Nowlan had a grudge against Thesing.

On February 5, 2013, Furan called Nowlan into a meeting to question him about when he had discovered that Thesing was not the officer involved in the incident at the Monroe County Courthouse, and why Nowlan had never informed her of it. Furan testified that, after Nowlan gave evasive answers and did not acknowledge that he had provided inaccurate information, she terminated his employment for violating a company policy against mispresenting facts or lying to management.

On this appeal, Nowlan contends that the asserted motive for his termination was pretextual, and that there was other evidence from which the commission could have found probable cause to believe that his age played a role in his termination. That contention ignores this court’s standard of review and essentially asks this court to overturn a credibility determination. We will not do so. We conclude that Furan’s testimony constituted substantial evidence to support the commission’s determination that Per Mar had a non-discriminatory motive for terminating Nowlan’s employment—namely, that “Per Mar legitimately believed – albeit incorrectly – that Nowlan had misrepresented facts with the intent of implicating an innocent person against whom he held a grudge.”

IT IS ORDERED that the circuit court's order is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals