COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2001

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-2844 **Cir. Ct. No. 99-CV-327**

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

MENARD, INC.,

PETITIONER-RESPONDENT,

V.

LABOR & INDUSTRY REVIEW COMMISSION,

RESPONDENT,

DAVID C. LARSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

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

¶1 PETERSON, J. David Larson appeals an order reversing a decision of the Labor and Industry Review Commission. The commission held that Menard, Inc., had discriminated against Larson because of his arrest record in

violation of WIS. STAT. § 111.31, the Wisconsin Fair Employment Act. The circuit court reversed because Larson did not establish a prima facie case and there was no substantial evidence in the record supporting the commission's decision. We agree with the circuit court and affirm the order.

BACKGROUND

¶2 Larson owned and operated a car dealership known as Capitol Corvette. On July 3, 1996, he was arrested and charged with theft because he had failed to pay for a car. There was a great deal of publicity regarding the arrest. However, the charges were eventually dropped. Larson subsequently declared bankruptcy.

¶3 On January 9, 1997, Larson applied for employment at Menard. On the pre-employment questionnaire, Larson indicated that he had been self-employed for the last fifteen years and had been engaged in sales for twenty-five years. He also noted that he had worked as a painter. During an oral interview with Dale Muesbeck, the store manager, Muesbeck asked Larson what kind of work he had done during his self-employment. Larson stated that he had been a painter. Muesbeck thought Larson had been self-employed as a painter for fifteen years. Larson did not make any mention of Capitol Corvette on the application or during the interview.

¶4 Larson was hired as a sales clerk in the wall covering department and started work on February 21, 1997. On February 25, Muesbeck received an anonymous telephone call. The caller stated that there was a lot of public animosity against Larson and that he had owned Capitol Corvette. As a result of the call, Muesbeck pulled Larson's employment application and saw that Capitol Corvette was not listed under his work history. Muesbeck then did research and

determined that Larson, instead of being self-employed as a painter for the past fifteen years, had owned and operated Capitol Corvette.[1]

¶5 On February 27, Menard terminated Larson's employment, claiming that he had falsified his employment application by not listing Capitol Corvette under his work history.

¶6 Larson filed a complaint with the Department of Workforce Development alleging discrimination on the basis of his arrest record. A person with an arrest record is considered a member of a protected class under the Fair Employment Act. *See* WIS. STAT. § 111.31(1). Following a hearing, the department concluded that Menard terminated Larson because his application did not mention Capitol Corvette. Larson's complaint was dismissed.

¶7 Larson petitioned the commission for administrative review of the department's decision. The commission reversed the decision, finding that Menard's decision to discharge Larson was motivated by his arrest record. The commission ordered that Larson be reinstated and be paid back pay and interest.

¶8 Menard filed a petition for review of the commission's decision with the circuit court. The court held that Larson had failed to prove a prima facie case and that there was no substantial evidence to support the commission's finding that Menard discharged Larson because of his arrest record.

[1] On February 26, 1997, a local television news program reported that several people were losing their cars as a result of Larson's bankruptcy. The broadcast also stated that Larson had previously been arrested because of his business dealings at Capitol Corvette. However, the commission did not rely on this fact in its decision.

STANDARD OF REVIEW

¶9 We review the commission's decision and not the circuit court's. ***Town of Russell Vol. Fire Dept. v. LIRC***, 223 Wis. 2d 723, 729, 589 N.W.2d 445 (Ct. App. 1998). We may only reverse the commission's decision if: (1) the commission acted without or in excess of its powers; (2) the decision was procured by fraud; or (3) the commission's findings of fact do not support its decision. ***Eaton Corp. v. LIRC***, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985).

¶10 An employer's motivation for discharge of an employee presents a factual determination. ***Currie v. DILHR***, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). The commission's findings of fact will be upheld on appeal if they are supported by credible and substantial evidence in the record. ***North River Ins. Co. v. Manpower Temp. Servs.***, 212 Wis. 2d 63, 69, 568 N.W.2d 15 (Ct. App. 1997). Substantial evidence is relevant, credible, probative evidence upon which reasonable people could rely to reach a conclusion. ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

¶11 The weight and credibility of the evidence are matters for the commission, and not for the reviewing court, to evaluate. We may not substitute our judgment for that of the commission on issues of fact. ***Currie***, 210 Wis. 2d at 387. Where more than one inference can reasonably be drawn, the findings of the commission are conclusive. ***VTAE Dist. 13 v. DILHR***, 76 Wis. 2d 230, 239-240, 251 N.W.2d 41 (1977).

DISCUSSION

¶12 Larson argues that he established a prima facie case and that there is substantial evidence to support the commission's finding that Menard terminated his employment because of his arrest record, not because Larson falsified his employment application.[2] We disagree.

¶13 The theory of employment discrimination at issue in this case is the disparate treatment theory. This theory is invoked when an employee claims an employer treats some people less favorably than others because of their membership in a protected class. ***Racine Unified Sch. Dist. v. LIRC***, 164 Wis. 2d 567, 594-95, 476 N.W.2d 707 (Ct. App. 1991). The disparate treatment theory requires that the employee prove discriminatory intent on the part of the employer in terminating the employee. ***Id.***

¶14 A burden shifting approach is utilized to determine discriminatory intent. ***Puetz Motor Sales v. LIRC***, 126 Wis. 2d 168, 172-73, 376 N.W.2d 372 (Ct. App. 1985). First, the employee must prove a prima facie case of discrimination. ***Currie***, 210 Wis. 2d at 390 (citation omitted). Once a prima facie case is established, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's treatment. ***Puetz***, 126 Wis. 2d at 173. If the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. ***Currie***, 210 Wis. 2d at 390.

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[2] We note that the argument section of Larson's brief is a copy of the commission's brief to the circuit court.

¶15 To establish a prima facie case, Larson must prove that: (1) he was a member of a protected class under the statute; (2) he was discharged; (3) he was qualified for the position; and (4) either he was replaced by someone not within the protected class or someone not within the protected class was treated more favorably. ***Id.***

¶16 Larson's argument that he established a prima facie case is that the elements are not fixed in stone but vary with the facts of each case. *See* ***Puetz***, 126 Wis. 2d at 173. However, Menard claims that Larson failed to present any evidence on the fourth element. Larson has not filed a reply brief and does not respond to Menard's argument. On that basis alone, we could affirm the circuit court. ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶17 Here, Larson proved only that: (1) he had an arrest record; (2) he was discharged; and (3) he was qualified for the position. He did not present any evidence to show the fourth element, namely, that he was replaced by someone without an arrest record or that someone without an arrest record was treated more favorably. Thus, Larson failed to establish a prima facie case of discriminatory intent on Menard's part.

¶18 Even if Larson had established a prima facie case, we conclude that there is no substantial evidence to support the commission's finding that Menard discharged Larson because of his arrest record.

¶19 Menard stated a nondiscriminatory reason for discharging Larson, that he falsified his employment application. The commission reviewed the record and determined that Larson proved that the legitimate reason Menard offered was not its true reason, but was a pretext for discrimination.

¶20 In its memorandum opinion, the commission conceded that Larson had failed to demonstrate the degree of Menard's knowledge of his arrest record. It stated that Larson did not specifically show that the anonymous telephone call mentioned his arrest record or that Muesbeck's investigation revealed his arrest record. Yet, the commission inferred that Menard had knowledge of Larson's arrest because of his reputation in the community. The commission found it inconceivable that Menard had not discovered Larson's arrest record either from the anonymous caller or from Muesbeck's investigation.

¶21 We conclude that these inferences were unreasonable. The burden is on Larson to prove that Menard discharged him because of his arrest record. However, there is no evidence that Muesbeck's research revealed information about Larson's arrest or that the anonymous telephone call mentioned Larson's arrest. In fact, there is no evidence in the record reflecting that anyone at Menard was aware of Larson's arrest record before he was discharged. On this record, it is simply too much of a leap for the commission to infer that Menard knew about Larson's arrest record. Without evidence to support a reasonable inference that Menard or any of its employees knew of Larson's arrest, the commission could not find that Larson was discharged due to his arrest record.

By the Court.—Order affirmed.

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