

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 12, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-1356**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**CHARLES A. POLESKY,**

**PLAINTIFF-APPELLANT,**

**V.**

**LABOR & INDUSTRY REVIEW COMMISSION AND  
UNITED BRAKE PARTS, INC.,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from a judgment of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed.*

Before Brown, Anderson and Mawdsley,<sup>1</sup> JJ.

PER CURIAM. Charles A. Polesky appeals from a judgment affirming a determination by the Labor and Industry Review Commission (LIRC)

---

<sup>1</sup> Circuit Judge Robert G. Mawdsley is sitting by special assignment pursuant to the Judicial Exchange Program.

that Polesky was not terminated from his employment with United Brake Parts, Inc., on account of either age or handicap discrimination. We conclude there was substantial and credible evidence to support LIRC's decision. We affirm the judgment.

Beginning December 5, 1977, Polesky was employed as a district manager by United Brake. He was responsible for making sales calls and servicing auto parts stores. In 1989, Polesky was placed under the supervision of a different regional manager, Bruce Reames. Reames identified deficiencies in Polesky's job performance and required additional training for Polesky. In November 1990, Polesky was placed on a sixty-day probation program and given job performance goals to meet. Additional job goals were established in 1991. Polesky was terminated on January 6, 1992. He was forty-seven years old at that time. Polesky later discovered that he suffered from dyslexia, a developmental reading disorder which manifested itself by making it difficult for him to learn about, retain and make sales presentations on the design, technical function and operation of various auto parts and to learn United Brake's detailed pricing structure.

Polesky filed a discrimination claim with the Equal Rights Division of the Department of Industry, Labor and Human Relations. An examiner issued an initial determination of probable cause to believe that United Brake had violated §§ 111.31-.34, STATS. After a hearing, the administrative law judge dismissed Polesky's claim, and LIRC affirmed.

Polesky contends that all the issues he raises on appeal involve purely questions of law that should be considered de novo. This is not so. The real issue raised by Polesky's appeal is whether there is substantial evidence to

support LIRC's decision.<sup>2</sup> The following statement of our standard of review is pertinent:

An employer's motivation is a factual determination. LIRC's factual findings must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. Rather, it must examine the record for credible and substantial evidence which supports the agency's determination.

*Currie v. DILHR*, 210 Wis.2d 380, 386-87, 565 N.W.2d 253, 256-57 (Ct. App. 1997) (citations omitted).

We first address Polesky's claim of handicap discrimination. LIRC found that based on the undisputed fact that Polesky's dyslexia was not diagnosed until after his discharge, United Brake did not perceive Polesky as having a handicap. Polesky contends that under § 111.32(8)(a), STATS., which defines a handicapped individual as one who "[h]as a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work," it is sufficient that he had suffered from the impairment all of his life even though it was not diagnosed or known during his employment with United Brake. However, the causal connection between the actual impairment and the reason for discharge is completely lacking because United Brake did not have actual knowledge of an impairment. See *Boldt v. LIRC*, 173 Wis.2d 469, 477-78, 496 N.W.2d 676, 679 (Ct. App. 1992) ("General Motors could not have terminated Boldt's employment because of his record of depression, nor could it have

---

<sup>2</sup> Polesky characterizes the issues as whether LIRC ignored relevant evidence, failed to consider the record as a whole, failed to weigh the conflicts in testimony, and improperly focused on only one side of the question. He also argues that he proved his claim of age or handicap discrimination as a matter of law.

perceived Boldt as having a mental illness because there is no evidence that General Motors knew of Boldt's depression.”).

Polesky's claim must rest on a perceived handicap under § 111.32(8)(c), STATS.<sup>3</sup> Simply because a person is unable to perform a particular job because of an individual characteristic or mental inaptitude does not automatically mean that the employee must be deemed to be handicapped.<sup>4</sup> See *American Motors Corp. v. LIRC*, 119 Wis.2d 706, 716, 350 N.W.2d 120, 125 (1984). Given that Polesky had sufficiently performed his job prior to Reames being assigned his supervisor, there was nothing to suggest that an impairment was to be suspected for Polesky's inability to meet the job goals set by Reames. Polesky himself acknowledged that Reames disliked him and that there were personality differences between himself and Reames. “A personality conflict doesn't ripen into [a discrimination] claim simply because one of the parties has a disability.” *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1137 (7<sup>th</sup> Cir. 1997). An employer cannot be found to have acted with a discriminatory purpose when it had no knowledge or reason to believe that the person suffered from some restricting impairment. We sustain LIRC's finding that United Brake was not motivated by handicap discrimination.

LIRC found that Polesky's age discrimination claim failed because United Brake advanced nondiscriminatory reasons for terminating Polesky's employment. The record amply supports the finding that United Brake had

---

<sup>3</sup> Section 111.32(8)(c), STATS., defines an “individual with a disability” to include an individual who: “Is perceived as having such an impairment.”

<sup>4</sup> Reames, Polesky's supervisor, recognized that Polesky was slow at understanding some things and told Polesky he was stupid. While Reames' comments may be considered poor management style and insensitivity, they do not rise to the level of a perceived handicap.

identified problem areas in Polesky's performance and had engaged in remedial efforts to improve his performance in those areas.<sup>5</sup>

Polesky argues that because he received praise with respect to his sales figures and had received acceptable job reviews the four years prior to his discharge, United Brake's reasons for discharge were pretextual.<sup>6</sup> While it is true that Polesky adequately performed certain aspects of this job, he was found to have inadequate skills to perform other aspects. Polesky was warned about his lack of planning, lack of preparation, lack of purpose to sales calls, and poor public speaking skills for sales presentations and customer meetings. The need for continued improvement in these areas was noted on his employment evaluation preceding his discharge.

Polesky also claims that United Brake's failure to have uniform minimum job performance standards for his position allowed United Brake to hide its discriminatory purpose behind unfettered supervisor discretion. The failure to have job performance standards does not render a discharge based on identified weaknesses in job performance pretextual, even if those performance requirements

---

<sup>5</sup> Polesky contends that because the testimony of United Brake's own witnesses were in conflict about who actually made the decision to discharge him, all the testimony should be disregarded. Therefore, he posits, United Brake has not been able to articulate a legitimate and nondiscriminatory reason for the discharge. The testimony is not incredible as a matter of law. It is a matter of credibility and the weight to be accorded to the evidence. This court may not substitute its judgment for that of LIRC. See *West Bend Co. v. LIRC*, 149 Wis.2d 110, 118, 438 N.W.2d 823, 827 (1989). While Polesky challenges LIRC's failure to explicitly resolve the conflicts in testimony and identify the witnesses it found credible, those findings are implicit in LIRC's decision.

<sup>6</sup> After a complainant establishes a prima facie case and the employer has rebutted the presumption of discrimination by articulating legitimate, nondiscriminatory reasons, the complainant must be given the opportunity to prove that the proffered reasons are merely pretextual. See *Puetz Motor Sales, Inc. v. LIRC*, 126 Wis.2d 168, 172-73, 376 N.W.2d 372, 374-75 (Ct. App. 1985).

are arbitrary or individual to a particular supervisor. “The age discrimination law does not forbid arbitrary discharges ...” *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 275 (7<sup>th</sup> Cir. 1996). Here, there was no evidence that Polesky’s age was a determinative factor in his discharge.

Before the ALJ, Polesky moved to prevent supervisor Reames from testifying because Reames had never completed his deposition. The ALJ granted the motion based on Reames’ unavailability to complete the discovery process. Polesky argues that it was improper for LIRC to rely on Reames’ unfinished deposition testimony and the documents authored by Reames because Reames was not subject to cross-examination. He characterizes LIRC as rewarding United Brake’s “subversion of the truth-seeking process” and allowing United Brake to capitalize on its “obstructive tactics and fugitive witnesses.”

Polesky does not argue that it was error to admit the uncompleted deposition or the documents into evidence.<sup>7</sup> Rather, he complains that LIRC found Reames’ testimony or documents Reames authored to be credible. A credibility determination is exclusively for LIRC to make. *See West Bend Co. v. LIRC*, 149 Wis.2d 110, 118, 438 N.W.2d 823, 827 (1989). Once the evidence was offered, it could be assigned whatever weight and whatever purpose the finder of fact deemed appropriate. Moreover, LIRC was not required to draw an adverse inference from Reames’ failure to appear. *See Paulsen Lumber, Inc. v. Anderson*, 91 Wis.2d 692, 699-700, 283 N.W.2d 580, 583-84 (1979) (the inference is persuasive only). *See also Victorson v. Milwaukee & Suburban*

---

<sup>7</sup> Indeed, Polesky cannot complain because at the hearing he offered into evidence the transcript of Reames’ unfinished deposition. Many of the documents offered were produced during the investigative stage of the complaint proceeding.

*Transp. Corp.*, 70 Wis.2d 336, 355-56, 234 N.W.2d 332, 341-42 (1975) (suggestion that the possession and actual use of the deposition may in some cases bar the party seeking the adverse inference). LIRC did not find Reames' testimony credible simply because Polesky was offering it as evidence. Rather, Reames' testimony was corroborated by documents and Polesky's own testimony about Reames' criticisms. There is no basis to disturb LIRC's reliance on any of the evidence presented at the hearing.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

