COURT OF APPEALS
DECISION
DATED AND FILED

February 11, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1886

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

GARY ROWLAND,

PETITIONER-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT,

WEYERHAEUSER COMPANY,

INTERESTED PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

PER CURIAM. Gary Rowland appeals a circuit court order which affirmed, on certiorari review, the Labor and Industry Review Commission's

(LIRC) dismissal of his age discrimination complaint against his former employer, the Weyerhaeuser Company. Rowland challenges the admission of statements made by Weyerhaeuser employees who did not testify at the hearing and the sufficiency of the evidence to support LIRC's determination. Weyerhaeuser, as an interested-party-respondent, moves for an award of costs and attorney fees as a sanction for a frivolous appeal under RULE 809.25(3), STATS. We affirm the circuit court order but deny Weyerhaeuser's motion for costs and attorney fees.

BACKGROUND

Rowland began working for Weyerhaeuser as a vice president of manufacturing in 1992, when he was fifty-five years old. Within months, a number of employees in the human resources department and in the plant where Rowland was assigned began to complain about Rowland's abrasive management style. The complaints continued even after company officials warned Rowland that he needed to modify his behavior, and Rowland's employment was terminated in 1993.

Rowland filed a complaint under the Wisconsin Fair Employment Act (WEFA), alleging that Weyerhaeuser had discriminated against him on the basis of age. After a hearing on the merits, the administrative law judge dismissed the complaint, and LIRC affirmed. Rowland then sought certiorari review under § 227.52, STATS. The circuit court affirmed LIRC's determination, but declined to award Weyerhaeuser costs and attorney fees under § 814.025, STATS.

STANDARD OF REVIEW

Although the circuit court order is before us on appeal and we may benefit from the lower court's analysis, LIRC's decision is the subject of our

review on certiorari. ***Currie v. DILHR***, 210 Wis.2d 380, 386, 565 N.W.2d 253, 256 (Ct. App. 1997). We are bound by an agency's factual findings, including any determinations regarding an employer's motivation, so long as there is substantial evidence in the record to support them. ***Id.*** at 386-87, 565 N.W.2d 256-57. By substantial evidence, we refer to relevant, credible and probative evidence upon which reasonable people could rely to reach a conclusion. ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983).

The application of hearsay rules to undisputed facts presents a question of law. ***State v. Peters***, 166 Wis.2d 168, 175, 479 N.W.2d 198, 200-01 (Ct. App. 1991). While we will defer to agency conclusions of law when the agency has been charged with administering the statute in question or has some special expertise in a particular area, *see* ***Currie***, 210 Wis.2d at 387-88, 565 N.W.2d at 257, we note that agencies are not strictly required to apply statutory rules of evidence at their hearings. Section 227.45(1), STATS. Thus, LIRC is in no better position than this court to determine whether certain statements constitute hearsay, and we will examine such questions independently.

ANALYSIS

Employee Statements

Under § 227.57(5), STATS., we may set aside or modify an agency action which was based upon an erroneous view of the law. Rowland contends that by allowing Weyerhaeuser executives to testify that other employees had told them that Rowland used profanities, managed by fear, and shouted in the faces of subordinates, LIRC based its determination solely on evidence which the agency erroneously failed to categorize as hearsay. We disagree.

A statement made outside of the presence of a hearing examiner is not hearsay unless it is offered to prove the truth of the matter asserted. Section 908.01(3), STATS. The statements about which Rowland complains were not offered for the truth of the matter asserted by the Weyerhaeuser employees who did not testify—that is, that Rowland was actually abusive. Rather, they were offered to show that the reason for the termination set forth by the Weyerhaeuser employees who did testify was not pretextual. There was nothing to prohibit Weyerhaeuser executives from basing their termination decision upon actions which occurred outside of their presence, and their testimony about the information upon which their decision was based was not hearsay.

Sufficiency of the Evidence

In order to prevail on his discriminatory discharge claim, Rowland first needed to show: (1) that he was a member of a protected class; (2) that he was performing at or above the employer's reasonable expectations; (3) that he was discharged; and (4) that either he was replaced by someone outside the protected class or others outside of the protected class were treated more favorably than he. ***Puetz Motor Sales, Inc. v. LIRC***, 126 Wis.2d 168, 173, 376 N.W.2d 372, 375 (Ct. App. 1985). Once he did so, the burden shifted to Weyerhaeuser to provide a legitimate non-discriminatory motive for the termination. ***Id***. We agree with the circuit court that Weyerhaeuser provided substantial evidence that the discharge was based upon Rowland's management style, rather than his age. Thus, the record supports LIRC's determination that Rowland was not discharged contrary to WEFA.

Costs and Attorney Fees

RULE 809.25(3), STATS., authorizes an award of costs and attorney fees to a respondent when an appeal is frivolous. Weyerhaeuser argues that this appeal was frivolous because Rowland or his attorney should have known that it lacked any reasonable basis in law or equity. However, the fact that Rowland's application of the hearsay rules to the facts of this case was erroneous does not mean that it was unreasonable. We conclude that costs and attorney fees are not warranted in this matter.

By the Court.—Order affirmed.

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