**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

June 13, 1995



**No. 94-2178**

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

**CAROL PETERSON,**

**Plaintiff-Appellant,**

**v.**

**MARQUETTE UNIVERSITY and RONALD ORMAN,**

**Defendants-Respondents.**

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. BARRON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. Carol Peterson appeals from a judgment dismissing her complaint against Marquette University. Peterson claims that the trial court erred in granting judgment notwithstanding the jury verdict. The jury verdict found that Peterson was constructively discharged and that such discharge was motivated by age and religious discriminatory practices. Peterson also claims that the trial court erred: (1) in refusing to voluntarily recuse itself; and (2) in its assessment of attorney fees. Because the trial court was not clearly wrong in granting judgment notwithstanding the verdict, and because the trial court did not err in refusing to recuse itself, we affirm. Because

of our resolution on these issues, it is unnecessary for us to consider whether the trial court was clearly wrong in concluding there was no credible evidence of age or religious discrimination and whether the trial court erred in its attorney fees assessment.[1]

## I. BACKGROUND

Peterson began her employment with Marquette in July 1980 as an Assistant Dean of Residence Life. During her employment, Peterson was governed by a series of annual contracts, which commenced on September 1 of each year. Prior to December 1991, James Forrest held the position of the Dean of Residence Life and served as Peterson's supervisor. Each year, Forrest recommended that Peterson's contract be renewed. Also during this time period, Ronald Orman held the position of Associate Dean of Residence Life. The associate dean was second in command to the dean, but did not hold supervisory roles over the assistant deans. The last member of the Residence Life central staff holding a dean position was Bill McCartney. His position was equivalent to Peterson's—his title was also Assistant Dean of Residence Life.

During the fall of 1991, Marquette was experiencing enrollment declines. As a result, certain budget cuts and restructuring of departments were contemplated. In December 1991, Father William Leahy, the Executive Vice-President of Marquette, informed Orman that he was being promoted to the position of Dean of Residence Life, that Forrest was retiring, and that the promotion would be effective July 1, 1992. Orman was informed that he was given full responsibility for Residence Life staffing decisions for the 1992-93 school year. Although Orman would not receive the official title until July 1, 1992, he was to assume the role immediately for purposes of evaluating the current staff.

Based on negative feedback from residence hall directors and his own personal observations, Orman informed his supervisors that he would not recommend Peterson for renewal. His supervisors informed him that he would

[1] *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

need sufficient cause not to renew Peterson. On March 3, 1992, Orman sent written "performance expectations" to both assistant deans, Peterson and McCartney. The expectations for each were similar, stating that Orman expected them to: (1) display a commitment to professional development; (2) be professional and positive in interactions with staff and students and parents; (3) maintain standard working hours in the office; (4) monitor absences from the office to conform with the University's policy on vacation, sickness and personal time; and (5) carry out assigned duties in a timely and professional manner. McCartney attempted to comply with the expectations and was offered a nine-month provisional contract.

Peterson responded to the expectations memo, questioning the need for each of the expectations and asking for further clarification. Orman provided a revised and more specific memo to Peterson on April 24. Orman also offered Peterson a provisional contract, which would extend her employment until December 31, 1992. Orman also requested that Peterson meet with him weekly or bi-weekly so that he could give her feedback on her performance. On April 27, Peterson submitted her resignation, effective May 31, 1992.

Peterson did not file a grievance through Marquette's procedures, instead choosing to file a complaint alleging that she had been constructively discharged on the basis of her age, sex and religion in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Age Discrimination Employment Act, 29 U.S.C. § 621, *et seq.* Her allegations were based in part on a statement the new President of Marquette, Father Albert DiUlio, made in 1990 indicating his intent to return Marquette to the Jesuit Catholic tradition. Peterson also alleges that a December 1990 questionnaire that asked Marquette employees to indicate their religious affiliation supports her contentions. She does not dispute that the questionnaire was entirely voluntary and anonymous.

Once her case was assigned to the Honorable Michael J. Barron's court, Peterson requested by correspondence that Judge Barron voluntarily recuse himself from the case because he was a graduate of Marquette University Law School. Judge Barron declined to voluntarily recuse himself, explaining that he attended law school thirty-three years ago, this case did not specifically

involve the law school, and he believed he could be impartial. No formal motion for recusal or request for substitution was made.

The case was tried to a jury, which found that Peterson had been constructively discharged and the motivation for the discharge was her age and her religion. Peterson was forty years old at the time of her resignation and a member of the Jewish faith. Marquette moved for a directed verdict or judgment notwithstanding the verdict, which was granted by the trial court. Peterson now appeals.

## II. DISCUSSION

Because this case involves resignation rather than discharge, Peterson first needed to prove that her resignation was in actuality a constructive discharge. *See* ***Chambers v. American Trans Air, Inc.***, 17 F.3d 998, 1005 (7th Cir.), *cert. denied*, 115 S. Ct. 512 (1994). The trial court determined that Peterson did not satisfy her burden of proof on this issue and that there was no evidence to support a finding of constructive discharge. Our decision holds that the trial court was not clearly wrong in setting aside the jury's finding of constructive discharge. As a result, we need not address the allegations of discrimination in this case. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).[2]

*A. Constructive Discharge.*

Peterson claims that her working conditions were so intolerable that she was forced to quit. Marquette maintains that no such environment was created. The trial court determined that there was no evidence to support constructive discharge.

[2] Without specification, the dissent intemperately charges that the majority omits certain facts. Dissent at 3. The majority has stated the facts that are relevant to the first issue, which is dispositive. If the dissent believes the majority has omitted facts pertinent to that issue, he should state those facts with specificity. He does not. Rather, he lards his dissent with facts that are relevant to the discrimination issue, not whether there was evidence sufficient to show a constructive discharge.

## Standard of Review

In reviewing the trial court's decision to grant judgment notwithstanding the verdict, we will not reverse unless we are convinced that the trial court was clearly wrong. ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 110, 362 N.W.2d 118, 127 (1985); *see also* ***Olfe v. Gordon***, 93 Wis.2d 173, 185-86, 286 N.W.2d 573, 579 (1980). This standard is employed because "the trial court has such superior advantages for judging ... the weight of the testimony and its relevancy and effect." ***Id.***

We acknowledge that this court departed from our supreme court's holdings in ***Helmbrecht*** and ***Olfe***, as to the appropriate standard of review, concluding that the proper standard of review is whether there was "no credible evidence to sustain the verdict" rather than whether the trial court was "clearly wrong." *See* ***Macherey v. Home Ins. Co.***, 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994). ***Macherey*** creates a dilemma. That is, should we follow ***Macherey***, a court of appeals decision, or should we follow the longstanding precedent of our supreme court in ***Helmbrecht*** and ***Olfe***? We recognize that the court of appeals is bound by its own decisions. Section 752.41(2), STATS.; *see* ***In re Court of Appeals of Wisconsin***, 82 Wis.2d 369, 371, 263 N.W.2d 149, 150 (1978). However, when a court of appeals decision conflicts directly with supreme court decisions on an issue, which is the "more binding" precedent? The answer must be the supreme court's decisions. Accordingly, we examine the record to determine whether the trial court was clearly wrong in concluding that Peterson's resignation was not a constructive discharge.[3]

## Application

"[T]o state a claim for constructive discharge, a plaintiff needs to show that her working conditions were so intolerable that a reasonable person would have been compelled to resign." ***Chambers***, 17 F.3d at 1005. Further,

[3] As author of this opinion, I recognize that I was a part of the majority opinion in ***Macherey v. Home Ins. Co.***, 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994). However, upon reconsidering the standard of review issue in the present case, I am compelled to adhere to the Wisconsin Supreme Court precedent on this issue.

employees must put up with some injustices and disappointments in an employment setting and not be unduly sensitive to conditions that arise. ***Phaup v. Pepsi-Cola General Bottlers, Inc.***, 761 F. Supp. 555 (N.D. Ill. 1991). Although the record may demonstrate "some injustices or disappointments," it certainly does not demonstrate "intolerable" working conditions.

Peterson testified that she resigned because she felt she was being harassed, that the only reason Orman offered her a probationary contract was to find fault with her, and she felt she was constantly looking over her shoulder to see if she was being watched. She also stated that she resigned because she could not work for a person (Orman) that she did not respect and could not trust. Peterson's testimony is insufficient to establish constructive discharge. Constructive discharge cannot be established on the basis of an employee's dissatisfaction with her work assignments, or that she feels her work performance has been unfairly criticized or that working conditions are difficult or unpleasant. ***Stetson v. NYNEX Serv. Co.***, 995 F.2d 355, 360 (2d Cir. 1993).

The budget cuts leading to restructuring of the Residence Life department may have created a difficult working environment. Peterson's receipt of "work expectations" memos from a new supervisor may have been unpleasant. The offer of a four-month provisional contract in place of the usual one-year renewal certainly was not pleasing to Peterson. Nevertheless, there is no substantiation in the record documenting "intolerable conditions"—conditions that are physically impossible or so grossly demeaning that a reasonable person in Peterson's shoes would be forced to quit instead of seeking redress while continuing to work. We conclude, therefore, that the record does not contain any evidence that Peterson's resignation was a result of intolerable working conditions. Accordingly, we are not convinced that the trial court's determination was clearly wrong.

*B. Recusal.*

We consider next whether the trial court erred in refusing to voluntarily recuse itself from presiding over this case. Peterson claims that Judge Barron should have recused himself because he was a graduate of Marquette University Law School.

Section 757.19(2),[4] STATS., governs when a judge should disqualify himself or herself. Our standard of review is an objective one, although under subsection (g), the trial judge makes a subjective determination as to impartiality, and the objective review is limited to establishing whether the judge made a determination requiring disqualification. *See* ***State v. American TV & Appliance***, 151 Wis.2d 175, 181-86, 443 N.W.2d 662, 664-66 (1989). Peterson contends that recusal of the trial judge in this case was required under subsections (f) and (g).

We first address subsection (f). Section 757.19(2)(f), STATS., requires a trial judge to recuse himself or herself: "[w]hen a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or

[4] This statute provides:

**(2)** Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(c) When a judge previously acted as counsel to any party in the same action or proceeding.

(d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.

(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

taxing body that is a party." The question for our consideration is whether the trial judge in this case had a "personal interest in the outcome" because he graduated from Marquette University Law School. Judge Barron pointed out two additional factors to counter Peterson's argument: (1) he graduated thirty-three years ago; and (2) the law school was not a defendant. Our search of the record reveals that the *only* factor suggesting that Judge Barron may have a personal interest in the outcome is the fact that he graduated from the law school. This factor standing alone is insufficient to require recusal under § 757.19(2)(f), especially in light of the length of time that has passed since his graduation. *See* ***Goodman v. Wisconsin Elec. Power Co.***, 248 Wis. 52, 58, 20 N.W.2d 553, 555 (1945) (personal interest must be substantial and not remote to require disqualification). Accordingly, we reject Peterson's argument based on § 757.19(2)(f).

Our consideration under subsection (g) is limited: (1) to reviewing whether Judge Barron subjectively believed he could be fair and impartial; and (2) to establishing whether the judge made a determination requiring disqualification. ***American TV***, 151 Wis.2d at 183, 443 N.W.2d at 666. Section 757.19(2)(g), STATS., requires a trial judge to recuse himself or herself: "[w]hen a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." "The basis for disqualification under sec. 757.19(2)(g), STATS., is a subjective one. Accordingly, the determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make." ***American TV***, 151 Wis.2d at 183, 443 N.W.2d at 665. We first consider whether the trial judge subjectively believed he could be fair and impartial. Correspondence from Judge Barron to both parties clearly established his subjective belief that his graduation from Marquette University Law School thirty-three years ago would not color his ability to be fair and impartial. Further, Peterson has offered 9no evidence that demonstrates Judge Barron subjectively believed that he could not be fair. We conclude that the trial judge satisfied the subjective standard under § 757.19(2)(g).

Our final consideration under § 757.19(2)(g), STATS., is to establish whether the trial judge made a determination requiring disqualification and failed to heed his own finding. Consideration of this point in light of the foregoing is futile. The trial judge in this case clearly made a determination that he was *not* required to disqualify himself. Accordingly, we reject Peterson's contention that the trial court erred in refusing to recuse itself.

*By the Court.*—Judgment affirmed.

Recommended for publication in the official reports.

SCHUDSON, J. (*concurring in part; dissenting in part*). The majority has applied the wrong standard of review in concluding that "the trial court was not clearly wrong in granting judgment notwithstanding the verdict." *See* majority slip op. at 2. Further, in separating the issues of age and religious discrimination from the issue of constructive discharge, the majority has improperly limited the analysis and reached an unrealistic and legally unsupportable conclusion.

In ***Macherey v. Home Ins. Co.***, 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994), we attempted to carefully consider and answer a difficult question: in reviewing a trial court's decision to change a jury's answer, direct a verdict, or grant judgment notwithstanding a verdict, is our standard of review whether the trial court's decision was "clearly wrong," or whether there was "no credible evidence to sustain the verdict"? Judge Wedemeyer and I concluded that the "no credible evidence" standard applied and that when "more than one reasonable inference may be drawn from the evidence at trial, *this court must accept the inference drawn by the jury*." ***Id.*** at 8, 516 N.W.2d at 436 (emphasis added); *see also* § 805.14(1), STATS. Judge Fine, dissenting, concluded that the "clearly wrong" standard applied.[5] Although Judge Fine's dissenting position

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[5] Judge Fine relied on ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 362 N.W.2d 118 (1985), in support of the "clearly wrong" standard. ***Helmbrecht***, however, sends mixed messages. First, citing § 805.14, STATS., ***Helmbrecht*** reiterated the "no credible evidence" standard and further emphasized that the "no credible evidence" standard "'applies to both the trial court on a motion after verdict and to this court on appeal.'" ***Id.*** at 109-110, 362 N.W.2d at 127 (citations omitted). Next, quoting ***Olfe v. Gordon***, 93 Wis.2d 173, 286 N.W.2d 573 (1980), ***Helmbrecht*** invoked the "clearly wrong" standard but also quoted authorities talking in terms of whether "there is or is not sufficient evidence upon a given question *to take the case to the jury*." ***Helmbrecht***, 122 Wis.2d at 110, 362 N.W.2d at 127 (emphasis added; citations omitted). Moreover, ***Helmbrecht*** went on to apply the "no credible evidence" standard in resolving several issues on appeal but, in one instance, added that the trial court decision *also* was "clearly wrong." *See* ***id.*** at 118, 362 N.W.2d at 131. Thus, ***Helmbrecht*** contributed to the confusion on this issue.

In resolving this issue in favor of the "no credible evidence" standard, ***Macherey*** preserved the distinction between a trial court's determination of whether there is "credible evidence" to *submit* to a jury (where, as ***Helmbrecht*** perhaps implied, we defer to the trial court's "superior advantages for judging of the weight of the testimony and its relevancy and effect," ***Helmbrecht***, 122 Wis.2d at 110, 362 N.W.2d at 127 (citations and inner quotations omitted)), and a trial court's decision on whether to *overrule* a jury's decision (where we, like the trial court, must defer to the jury's evaluation of credibility of witnesses and weight of evidence). Our conclusion in ***Macherey*** is consistent with that of the federal appellate courts, which show deference to a jury's evaluation of evidence:

did not prevail, the majority in this case has ignored ***Macherey's*** holding and applied the very standard of review that ***Macherey*** rejected. This the majority is not permitted to do. *See* ***Ranft v. Lyons***, 163 Wis.2d 282, 299 n.7, 471 N.W.2d 254, 260 n.7 (Ct. App. 1991) (court of appeals bound by its own decision under doctrine of *stare decisis*); *see also* § 752.41(2), STATS., ("Officially published opinions of the court of appeals shall have statewide precedential effect.").

Applying the correct standard of review to this case, we should examine the record to determine whether there is credible evidence to sustain the jury's verdicts. In doing so, we should be mindful that when more than one reasonable inference may be drawn, we *must* accept the inference drawn by the jury. ***Macherey*** at 8, 516 N.W.2d at 436. The majority's summary of the evidence, however, is incomplete, misleading, and in total disregard of the inferences the jury was entitled to draw.

(..continued)

> A court of appeals reviews *de novo* a district court's grant of judgment notwithstanding the verdict *and applies the same standard as the district court*. This standard is whether there is substantial evidence to support the verdict; *i.e.*, whether the evidence presented, combined with all reasonable inferences that may be drawn from it, is sufficient to support the verdict when viewed in the light most favorable to the party winning the verdict.

***Mathewson v. National Automatic Tool Co. Inc.***, 807 F.2d 87, 90 (7th Cir. 1986) (emphasis added).

Now, strangely enough, Judge Wedemeyer has done an abrupt about-face in reliance on what he labels "the longstanding precedent of our supreme court in ***Helmbrecht*** and ***Olfe***." Majority slip op. at 7. One year ago, however, he and I concluded that those very cases and others were unclear on this issue, thus generating the difficult question ***Macherey*** had to answer. The issue was a close one; ***Helmbrecht*** and ***Olfe*** did not resolve it, but ***Macherey*** did.

The majority ignores the testimony of Father Leahy who, in describing the reasons he wanted Orman as dean, added that "[i]t was a bonus that he was Catholic." The majority also ignores the evidence that Father Leahy advised James Forrest that he wanted a "younger" person in Forrest's position. The trial court decision granting judgment notwithstanding the verdict minimized the former testimony as an "illtempered remark," and similarly dismissed the latter by saying, "Age was never mentioned at the trial except by Fr. Leahy on why he wanted Orman as dean." Then, apparently referring to both comments, the trial court wrote, "a mere isolated or ambiguous remark is not in itself sufficient to show discrimination on the part of the employer." Perhaps, but Peterson offered more than these remarks.

Peterson introduced evidence comparing the age and religious composition of her department before and after the point of alleged discrimination. Apparently it was undisputed that the Department of Residence Life came to be comprised exclusively of employees who were practicing Catholics and, with the exception of Orman, who were under thirty-two years of age. Peterson also introduced evidence that her performance evaluations were pretextual, and that the short term contract offered to her was "a required motion" to legitimize efforts to replace her. Even the respondents concede on appeal that "the jury apparently found that the reasons given by the Defendants-Respondents for their failure to renew Peterson's contract were pretextual." Thus, the jury was entitled to infer that the testimony that "[i]t was a bonus that he was a Catholic," and the testimony that Father Leahy wanted a "younger" person were more than "mere isolated or ambiguous remark[s]." Contrary to the trial court's characterization, neither comment was offered "in itself" to establish religious or age discrimination. How dubious for the trial court to effectively dismiss this evidence out of hand. How perplexing for the majority to not even mention any of this evidence of religious and age discrimination.

The majority somehow seems to believe that it can avoid the evidence and issues of age and religious discrimination by resolving this case on the basis of constructive discharge. The majority relegates Peterson's claims to the realm of minor, everyday misfortunes: "employees must put up with some injustices and disappointments in an employment setting and not be unduly sensitive to conditions that arise." Majority slip op. at 8. Thus, the majority concludes, the "injustices or disappointments" Peterson may have suffered "certainly do[ ] not demonstrate 'intolerable' working conditions" that forced her resignation.

The majority's legal separation of religious and age discrimination from constructive discharge is legally unsupportable. Indeed, the trial court's instructions recognized the inseparable nature of discrimination and constructive discharge, properly blending the two. The instructions explained that Peterson must prove, among other things, that the defendants "intentionally made [her] working conditions so intolerable that a reasonable person would feel forced to resign," and that age and/or religion "were motivating factors" in the defendants' conduct. Contrary to the instruction, however, the majority jettisons consideration of the alleged discrimination and, in so doing, avoids law and defies reality.

As the majority concedes, constructive discharge occurs when working conditions are "so intolerable that a *reasonable* person" is compelled to resign. ***Chambers v. American Trans Air, Inc.***, 17 F.3d 998, 1005 (7th Cir.), *cert. denied*, 115 S. Ct. 512 (1994) (emphasis added). Therefore, if, in fact, a *reasonable* person is suffering age, *or* religious discrimination at the hands of an employer, he or she certainly could *reasonably* conclude that resignation is compelled. In this case, the jury concluded that Peterson suffered *both*.

The jury returned verdicts concluding that the defendants "intentionally [made Peterson's] working conditions so intolerable that she was constructively discharged" and that religion *and* age were "more likely than not, [ ] motivating factor[s] in causing a constructive discharge." The majority fails to offer any law or logic to sever age and religious discrimination from those factors that would lead a *reasonable* person to feel compelled to resign. The majority fails to offer any law or logic to relegate such factors to the realm of minor "injustices or disappointments" beyond a jury's proper consideration.

In this case, I certainly do not know whether Carol Peterson suffered age and religious discrimination at the hands of Marquette University and Ronald Orman. I do know, however, that a jury had the opportunity to evaluate evidence and make that determination. As the trial court decision acknowledged:

> [T]he verdicts are not perverse. This jury was very discriminating in how it answered the verdict questions. This is shown by (1) finding no discrimination in the Failure to Promote claim, (2) finding no gender discrimination in the two claims upon which claimant prevailed, (3) recognizing the duplication in the damage claims for back pay and compensatory damages, and (4) awarding to the penny what was requested on the back pay award.

This was a case in which a citizen, after twelve years of employment, brought very serious claims against an esteemed university and one of its deans. A jury trial lasting four days and producing numerous witnesses and exhibits was thoroughly litigated. Evaluating the post-verdict motions, the trial judge considered several issues in a twenty-four page written

decision. On appeal, the parties effectively presented their arguments and directed our attention to relevant portions of a lengthy record. How sadly ironic, therefore, after so much effort from so many people in earnest pursuit of justice, that the majority has rendered a decision that carries an incomplete and misleading factual summary, an adoption of a dissenting position for the standard of review, and an obviously hurried decision recommended for publication.

Not only is the majority opinion wholly inappropriate as a published decision that would presume to offer clear guidance to others, but it can only be a disappointment to the parties in this case. The prevailing parties must know that the obvious deficiencies of the majority opinion leave this case ripe for further review, and Ms. Peterson must wonder why a jury's evaluation of her claims would be so unjustly ignored.

Accordingly, I respectfully dissent.