

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 27, 2000

Cornelia G. Clark  
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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-1151**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**ELIZABETH A. CONNOR,**

**PETITIONER-APPELLANT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Chippewa County:  
RODERICK A. CAMERON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Elizabeth Connor appeals a judgment affirming a decision of the Labor and Industry Review Commission rejecting her claim that she was discharged from employment by Heckel's restaurant because of her age or in retaliation for an age discrimination complaint. She argues that the commission

did not adequately explain its reasons for reversing the administrative law judge's findings of fact and conclusions of law, improperly drew an adverse inference from Connor's failure to introduce a journal into evidence and erroneously interpreted the law by failing to allow Connor to indirectly prove Heckel's improper motive by showing that its proffered reasons for discharging her were not worthy of belief. Connor also argues that she met her burden of proving age discrimination and retaliation, and the commission's findings are not supported by the record. We reject these arguments and affirm the judgment.

¶2 Connor alleged that she was fired from her position as a waitress due to age discrimination or retaliation for complaining about age discrimination. Heckel's presented evidence that Connor was fired because she provided poor service, was rude to customers and had a spiteful attitude. The ALJ believed the testimony of Connor and her witnesses. The commission, however, after consulting with the ALJ, overruled his finding on the witnesses' credibility and found that Connor was fired for legitimate, nonpretextual reasons.

¶3 An employer's motivation for firing an employee presents a question of ultimate fact. *See St. Joseph's Hospital v. ER Board*, 264 Wis. 396, 401, 59 N.W.2d 448 (1953). The commission's findings of fact must be affirmed if they are supported by substantial evidence. *See Chicago, M., St. P. & P. R.R. Co. v. ILHR Dept.*, 62 Wis. 2d 392, 396, 215 N.W.2d 443 (1974). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Gateway City Transfer Co. v. Public Service Comm.*, 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948). The weight and credibility of evidence are matters for the commission to determine, not the reviewing courts. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

¶4 The commission adequately reviewed the ALJ's findings. It consulted with the ALJ to glean his impressions of the witnesses' credibility and adequately explained its disagreement with his findings in its memorandum decision. *See Carley Ford, Lincoln, Mercury v. Bousquette*, 72 Wis. 2d 569, 575, 241 N.W.2d 596 (1976). The commission reasonably discredited Connor's testimony in part because she failed to introduce a journal into evidence after she testified that she kept the journal to document problems in the workplace. *See* 2 WIGMORE, EVIDENCE § 285, at 162 (3d ed. 1940). Connor did not offer a satisfactory explanation for her refusal to present the journal even though she had it with her at the hearing. She argues on appeal that the journal was inadmissible hearsay. The journal would have been admissible under WIS. STAT. § 908.01(4)(a)<sup>1</sup> as a consistent statement admitted to rebut an inference of a recent fabrication. She also argues that the journal was equally available to Heckel's. Heckel's had no entitlement to the journal. In addition, it would have been "more natural" for Connor to offer it as evidence. *See Carr v. Amusement, Inc.*, 47 Wis. 2d 368, 375, 177 N.W.2d 88 (1970). Therefore, the commission properly drew an adverse inference from Connor's failure to introduce the journal into evidence.

¶5 The commission also rejected the ALJ's credibility determinations on three other witnesses. One of the witnesses equated a comment that Connor was "slower than molasses in January" to a comment on her age. The commission discredited another witness's testimony on the ground that she considered Connor to be her friend and had known her for years before Connor was employed at Heckel's. It discredited a third witness for exaggerating the number of times she

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

heard comments on Connor's age. Connor criticizes the commission for ignoring the testimony of three other witnesses. The commission is not required to make specific findings on the credibility of particular witnesses. *See Bowen v. Industrial Comm.*, 239 Wis. 306, 312, 1 N.W.2d 77 (1941). The ALJ did not expressly mention their testimony, and there was no reason for the commission to make specific credibility findings regarding those witnesses. Therefore, the commission adequately explained its reasons for overturning the ALJ's decision.

¶6 The commission's decision does not reflect any misunderstanding of the law. Based on its determination of the witnesses' credibility, the commission found that the reasons recited by Heckel's were not a pretext for age discrimination or retaliation. Even though Connor made a *prima facie* case for age discrimination, the commission reasonably found that Heckel's met its burden of showing a legitimate, nondiscriminatory, nonretaliatory reason for her termination.

*By the Court.*—Judgment affirmed.

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

