State of Wisconsin
Labor and Industry Review Commission

Derrick S Palmer, Complainant **Cree, Inc**, Respondent ERD Case No. CR201502651	**Fair Employment Decision** [1] **Dated and Mailed:** December 3, 2018

The decision of the administrative law judge is reversed. Accordingly, the commission issues the following:

Order

1. *Time within which respondent must comply with Order.* The respondent shall comply with all of the terms of this Order within 30 days of the date on which this decision becomes final. This decision will become final if it is not timely appealed, or, if it is timely appealed, it will become final if it is affirmed by a reviewing court and the decision of that court is not timely appealed.

2. That the respondent shall cease and desist from discriminating against the complainant based upon conviction record.

3. That the respondent shall offer the complainant instatement to a position substantially equivalent to the position he applied for in June of 2015. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford him all seniority and benefits, if any, to which he would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

4. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the amount he would have earned as an employee from August 10, 2015, the approximate date on which the lighting specialist job would have commenced, until such time as the complainant begins employment with the respondent or would begin such employment but for his refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment compensation or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (*i.e.*, the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

5. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter.

6. That within 30 days of the date on which this decision becomes final, the respondent shall file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. The Compliance Report shall be prepared using the Compliance Report form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. *See*, Wis. Stat. 111.395, 103.005(11) and (12).

By the Commission:

/s/
Laurie R. McCallum, Commissioner

/s/
David B. Falstad, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him based upon his conviction record, in violation of the Wisconsin Fair Employment Act. On January 6, 2016, an equal rights officer with the Equal Rights Division of the Department of Workforce Development issued an initial determination finding probable cause to believe that discrimination occurred. The matter was therefore certified to hearing on the merits. On August 30, 2016, an administrative law judge for the Equal Rights Division held a hearing and, on May 5, 2017, the administrative law judge issued a decision finding that no violation of the statute was established and dismissing the complaint. The complainant filed a timely petition for commission review of the administrative law judge's decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, Cree, Inc. (hereinafter respondent), is a company that manufactures and sells lighting products. The respondent has facilities in a variety of locations, including one in Racine, Wisconsin.

2. In or around June of 2015, the respondent posted an online job announcement for the position of Lighting Schematic Layout Applications Specialist. The job posting described the position, as follows:

> performs a mixture of design, presales and post sales customer support responsibilities. In this role you will design and recommend the installation of appropriate lighting equipment and systems, create lighting site plans and 3D models, use local building code requirements to perform energy calculations, and also interact directly with customers. You will be part of a team, while applying project management skills to drive your own projects to completion.

The job posting indicated that the qualifications for the position included, among other things, an associates degree in a technical field, such as engineering or mathematics, and the ability to operate computer assisted lighting software.

3. The individual hired for the position would be working at an assembly facility for lighting fixture products. There are over 1100 employees (including about 500 women) at the facility, which is over 600,000 square feet in size. The facility includes a manufacturing space, storage areas with racks of parts, plus

offices, conference rooms, ﷺcubicle farms,ﷺ break rooms, and the like.ﷺ The lighting applications specialist would be primarily assigned to work in the ﷺcubicle farmﷺ area, but would have access to the rest of the facility.ﷺ There are security cameras in the facility, primarily in areas where people tend to get injured on the job and at the entries and exits to the facility, although office areas and conference rooms tend not to be covered by cameras.

4. Part of the job is to help customers determine where lighting products should go.ﷺ The position interacts with engineering teams to understand the technical aspects of products, and interacts with clients to create drawings and deliver them to the clients.ﷺ There is regular customer interaction, typically by telephone or email, although local clients might travel to the facility because the respondent has demonstration rooms.ﷺ The job also entails occasional travel to a client location in order to do design work.ﷺ In addition, the job includes some trade show travel, which involves car rental, staying at a hotel, and interacting with clients on the trade show floor.ﷺ There is no supervision when traveling.

5. On June 19, 2015, the complainant, Derrek [2] Palmer (hereinafter ﷺcomplainantﷺ), applied for the position.ﷺ The complainant submitted a copy of his resume showing that he had the technical skills required by the respondent.

6. On June 22, 2015, a recruiter from the respondent, Lee Motley, contacted the complainant to confirm the receipt of his application and to ask him to complete an online questionnaire.ﷺ The complainant did so the same day.

7. The complainant was also asked to complete a separate online pre-interview questionnaire.ﷺ The pre-interview form contained a question asking if the applicant had ever been convicted of a felony or convicted in a military court martial and, if yes, to explain.ﷺ The complainant checked the box ﷺyesﷺ and wrote, ﷺdomestic related charges.ﷺﷺ The form also asked if the applicant had been convicted of a misdemeanor in the past seven years and, if yes, to explain.ﷺ The complainant checked the box ﷺyes ﷺand again wrote, ﷺdomestic related charges.ﷺ

8. The complainant had two interviews with recruiters from the respondent and, on July 23, 2015, was offered the job, conditioned on the successful completion of a pre-employment drug screen and background check.ﷺ The complainant accepted the job offer.ﷺ

9. When Lee Motley called the complainant to set up a drug test and background check, the complainant asked him if he was aware of his convictions.ﷺ Motley indicated he was not.ﷺ The complainant explained that he had multiple charges stemming from a domestic dispute involving a live-in girlfriend.ﷺ Motley told the complainant to delay the drug test until the results of the background check came back.

10. The background screening report was prepared for the respondent by an outside company called EBI.ﷺ The report revealed that on October 25, 2012, the complainant was found guilty of criminal damage to property (a misdemeanor), battery (a misdemeanor), strangulation and suffocation (a felony), and 4th degree sexual assault (a misdemeanor).ﷺ The report showed that the complainant was sentenced to 4 years probation with respect to battery, sexual assault, and criminal damage to property, and that he was sentenced to 30 months prison time along with 30 months extended supervision with respect to the strangulation and suffocation charge.

11. The complainant had an additional conviction for battery in 2001 stemming from a domestic incident involving a prior girlfriend.ﷺ The 2001 conviction was not included in the report prepared by EBI and was unknown to the respondent.

12. After receiving the background check information Motley forwarded it on to Melissa Garrett, the respondent's associate general counsel, to make the formal decision as to whether or not to rescind the job

offer. Garrett was new to the respondent and asked Motley to explain the job to her. Garrett also used a matrix that she had developed for use at a former employer for evaluating types of criminal convictions and how they related to an individual's employability. According to a respondent document entitled Criminal Record Check Guidelines, crimes designated Fail on the respondent's matrix would disqualify the candidate for employment. The crimes for which the complainant was convicted, sexual assault, battery, strangulation, and criminal damage to property, were all designated Fail in Garrett's matrix. After reviewing the complainant's conviction record, Garrett told Motley that the complainant's conviction record prevented him from meeting the criteria for the job.

13. Garrett was unable to identify anyone working for the respondent who had a felony conviction, although she indicated that people with felonies had been hired before [her] time.

14. On August 5, 2015, Motley notified the complainant by email that he was no longer being considered for employment with the respondent based on its hiring criteria and because of the contents of his background report.

Conclusions of Law

1. The complainant was discriminated against based upon his conviction record, in violation of the Wisconsin Fair Employment Act.

Memorandum Opinion

The Wisconsin Fair Employment Act (hereinafter Act) prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of arrest or conviction record. *See*, Wis. Stat. 111.321 and 111.322. However, the law contains the following exception:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license or to bar or terminate from employment or licensing, any individual who:
>
> 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity. . . .

Wis. Stat. 111.335(1)(c)1.

A determination as to whether the circumstances of a criminal offense are substantially related to a particular job requires assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. *Goerl v. Appleton Papers, Inc.*, ERD Case No. 8802099 (LIRC Oct. 5, 1992). As a general rule, the circumstances of the offense may be gleaned based upon a review of the elements of the crime, and an inquiry into the factual details of the specific offense is not required. *County of Milwaukee v. LIRC*, 139 Wis. 2d. 805, 823-824, 407 N.W.2d 908 (1987). However, there may be circumstances where it is necessary to consider additional factual information regarding the offense, or where it is appropriate to place the criminal offense in its proper context. *See*, *for example*, *Wiechert v. City of Shawano Housing Authority*, ERD Case No. CR201203327 (LIRC July 22, 2015) (additional detail is needed to understand the circumstances of a conviction for disorderly conduct); *Knight v. Wal-Mart*, ERD Case No. CR200600021 (LIRC Oct. 11, 2015)(the fact that a crime was committed at home in the context of a personal relationship is a relevant consideration in applying the substantial relationship test).

A finding of a substantial relationship requires a conclusion that a specific job provides an unacceptably high risk of recidivism for a particular employee.[3] On this point the commission has held:

> The question is whether the circumstances of the employment provide a greater than usual opportunity for criminal behavior or a particular and significant opportunity for such criminal behavior. It is inappropriate to deny a complainant employment opportunities based upon mere speculation that he might be capable of committing a crime in the workplace, absent any reason

> to believe that the job provides him with a substantial opportunity to engage in criminal conduct. ⁄The mere possibility that a person could re-offend at a particular job does not create a substantial relationship.

Robertson v. Family Dollar Stores, Inc., ERD Case No. CR200300021 (LIRC Oct. 14, 2005). *See, also*, *Moore v. Milwaukee Bd. of School Directors*, ERD Case No. 199604335 (LIRC July 23, 1999)(commission looks at whether the job presents a particular or significant risk of recidivism for the complainant); *Herdahl v. Wal-Mart*, ERD Case No. 9500713 (LIRC Feb. 20, 1997)(relevant question is whether the job presents a ⁄greater than usual opportunity⁄ for criminal behavior).

The burden of proving that a statutory exception applies is on the proponent of the exception, and the respondent has the burden of establishing that the complainant's conviction record was substantially related to the job.⁄ *Moran v.⁄ State of Wisconsin*, ERD Case No CR200900430 (LIRC Sept. 16, 2013), citing *R*obertson v. Family Dollar Stores, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), *Chicago & Northwestern R.R. v. LIRC*, 91 Wis. 2d 462, 467, 283 N.W. 2d 603 (Ct. App. 1979).⁄ However, the substantial relationship defense does not require the employer to demonstrate that it concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the job; the substantial relationship test is an objective legal test which is meant to be applied after the fact by a reviewing tribunal.⁄ *Zeiler v. State of Wisconsin DOC*, ERD Case No. 200302940 (LIRC Sept. 16, 2004), citing *Schroeder v. Cottage Grove Coop.*, ERD Case No. 199903353 (LIRC June 27, 2001), *aff'd sub nom. Schroeder v. LIRC* (Dane Co. Cir. Ct., Jan. 31, 2002).⁄

In this case, it is clear that the complainant was denied the lighting specialist job because of his conviction record.⁄ Thus, the only question to resolve is whether the respondent met its burden of proving that the complainant's conviction record was substantially related to the job.

The complainant was convicted of the following offenses:[4]

> Misdemeanor Battery, Wis. Stat. 940.19(1). Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.
>
> Misdemeanor Fourth Degree Sexual Assault, Wis. Stat. ⁄ 940.225(3m).⁄ Whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.
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> Felony Strangulation and Suffocation, Wis. Stat. ⁄ 940.235(1). ⁄Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.
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> Misdemeanor Criminal Damage to Property, Wis. Stat. ⁄ 943.01(1). ⁄Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor.

In previous cases involving the crime of misdemeanor battery, the commission has held that the central element of that offense is the intentional infliction of bodily harm on another person, and that the underlying traits evidenced by such conduct might include disregard for the health and safety of others, inability to control anger, frustration, or other emotions, and the use of violence to achieve power or to solve problems.⁄ *Moran v. State of Wisconsin*, ERD Case No. CR200900430 (LIRC Sept. 16, 2013), citing *McClain v. Favorite Nurses*, ERD Case No. 200302482 (LIRC April 27, 2005).⁄ The commission has found that the character traits associated with a record of battery are substantially related to the duties and responsibilities of a variety of jobs involving direct contact with vulnerable people, including the job of a police officer, *Robinson v. City of Milwaukee PFC*, ERD Case No. 200704546 (LIRC Aug. 27, 2010), a nurse, who was responsible for delivering direct care to hospital patients, many of whom were combative or disoriented, *McClain v. Favorite*

Nurses, ERD Case No. 200302482 (LIRC April 27, 2005), and a certified nursing assistant working in a nursing home, Williams v. Havenwood Health & Rehabilitation Center, ERD Case No. 200202280 (LIRC March 11, 2005). On the other hand, the commission has found that the traits revealed by a charge of battery were not substantially related to the responsibilities of the job of custodian at a university, Moran v. State of Wisconsin, ERD Case No. CR200900430 (LIRC Sept. 16, 2013), or a cashier at a department store. Nathan v. Wal-Mart, ERD Case No. 2014000689 (LIRC Oct. 25, 2015).

In Nathan, the commission noted that, although the cashier job required the complainant to come into contact with people, it was readily distinguishable from the type of jobs that the commission has found to be substantially related to the offense of battery in that:

> *The complainant did not work with vulnerable populations, was not in a position of trust, and was not alone with the people with whom she interacted, but performed her work in an open and public setting where other shoppers and employees were likely to be present. While in its petition the respondent emphasizes the fact there can be angry or irate customers that the complainant would need to deal with, and that patience was a requirement of the job, the evidence shows that the complainant was not required to interact directly with angry customers, but was expected to locate a manager to handle the situation. Further, as indicated above, a public encounter with an angry Wal-Mart shopper would not present the same risk as would, for example, an encounter with an elderly and agitated nursing home resident, possibly taking place in that resident's room and away from public scrutiny. Considering all the facts and circumstances, the commission believes that the complainant's job would not have provided her with a significant opportunity to engage in criminal conduct, and it agrees with the administrative law judge that the substantial relationship defense was not established.*

The commission has also considered the question of whether and under what circumstances the character traits revealed by having engaged in the crime of sexual assault are related to specific jobs. [5] *In Robertson v. Family Dollar Stores, Inc., ERD Case No. CR200300021 (LIRC Oct. 14, 2005), the commission determined that a conviction for second degree sexual assault evinced the character trait of a willingness to engage in a nonconsensual sexual act, and found that it did not substantially relate to the job of stock clerk at a Dollar Store. The commission noted that it was not established that the complainant had the propensity to assault random victims and that the fact of his conviction for second degree sexual assault, which stemmed from an incident in his home involving his girlfriend, did not warrant such a conclusion. The commission further stated that, even assuming that the complainant had such inclinations, the mere fact that there could conceivably be a scenario in which he could assault someone did not warrant a conclusion that the job presented a substantial opportunity to do so.*

In Knight v. Wal-Mart, ERD Case No. CR200600021 (LIRC Oct. 11, 2015), a case involving convictions for third degree sexual assault, use of a dangerous weapon, first degree recklessly endangering safety, and false imprisonment, the commission found that that the offenses for which the complainant was convicted revealed the following character traits: willingness to obtain sexual gratification by use of force, weaponry or threat of violence, willingness to restrain another against his or her will, and a tendency to act recklessly without regard for the consequences for the safety and well-being of another. The commission concluded that those traits were not substantially related to the job of forklift driver at a Wal-Mart warehouse. The commission noted that the context of the complainant's crimes, which occurred at home and involved a personal relationship, was distinct from the context of the work environment. The commission also found that the physical setting of the job, which included monitoring by cameras and an intensive level of supervision, was not conducive to engaging in criminal conduct.

In a third decision, Weston v. ADM Milling, ERD Case No. CR200300025 (LIRC Jan. 18, 2006), a case involving second degree sexual assault, aggravated battery, and felony theft, the commission found that the traits associated with the commission of those crimes would include disregard for the health and safety of others, particularly women; the use of force to obtain sexual gratification; the use of violence to achieve control over others or to resolve conflicts; the inability to control anger or other emotions; disregard for the property rights of others; and dishonesty and lack of trustworthiness, traits which it concluded were substantially related to the job of "pack and load." The commission indicated that the job provided unrestricted access to unsecured property of significant value, work with little supervision in close proximity to others, including female employees, and location in a vast facility with many possible hiding places and a high level of noise which could prevent detection.

The commission has not issued prior decisions specifically addressing the crimes of strangulation and suffocation and criminal damage to property or their connection to specific jobs. The commission believes that the character traits associated with a conviction for felony strangulation and suffocation would include similar character traits to those associated with the crimes of battery and sexual assault; i.e. a disregard for the health and safety of others and the use of violence to achieve control over others or to resolve conflicts, while a conviction for criminal damage to property demonstrates a tendency to disregard the property rights of others.

Turning to the instant case, the administrative law judge found that the complainant's conviction record was substantially related to the job of Lighting Applications Specialist for the respondent. The administrative law judge reasoned as follows:

> *. . . [T]he position at Cree involved potentially one-on-one work with customers in private settings, completely unsupervised. . .*
>
> *In addition, Cree's large female population was potentially problematic in that Palmer would have to work with some of these females. If a relationship developed between Palmer and one of the females at Cree, and that relationship subsequently ended, Cree would potentially be faced with Palmer potentially exhibiting inappropriate behaviors just as he had when a former relationship dissolved leading to the criminal convictions at issue."*

The commission does not agree with this analysis. The fact that there are female employees in the plant with whom the complainant could potentially become involved in a personal relationship that might end badly is a scenario requiring a high degree of speculation and conjecture, and one that goes well beyond any reasonable concern about job-related conduct. Moreover, the ability to meet females and form personal relationships with them is not a circumstance unique to the job at issue, but describes virtually any employment situation in which female workers might be present. The commission does not believe that the mere presence of females in the work place can form the basis for finding a substantial relationship, absent any reason to believe that the complainant would have the type of contact with female employees that might raise a red flag for an employer considering whether to hire an individual with a record of having committed fourth degree sexual assault. The respondent presented no evidence indicating that the complainant would be supervising or mentoring female employees, nor is there anything to suggest that he would be working closely with female employees. While the record indicates that the job would entail occasional trade show travel, the evidence does not establish that the complainant would be traveling with females on business trips, and there is no basis to conclude that he would be sharing cars, staying at the same hotels, or socializing with females in the course of his business travel. It cannot be found based on this record that the complainant would have had significant personal interactions with female employees in the context of his job.

The commission has considered the administrative law judge's second rationale-- that client contacts would provide the complainant with a substantial opportunity to reoffend--but finds that reasoning similarly unpersuasive. To begin with, the conclusion that the complainant would be meeting one-on-one with clients

in private settings is not supported by the record. The evidence presented at the hearing indicates that most of the complainant's customer interactions would be by telephone or email, and while the complainant might occasionally meet personally with customers, these meetings would take place either at trade shows or at the customer's site, meaning a showroom or other industrial setting. The respondent's witness, Lee Motley, testified that the respondent's customer base consists of industrial accounts (i.e., a contractor building new facilities, such as an office building, a school, a retail establishment, or an automotive dealership) and that the people the complainant would interact with would be builders or construction companies. There is nothing in the record to suggest that the complainant would be performing his services in private homes or other isolated settings, nor did the respondent specify that the on-site meetings with clients would be conducted one-on-one.

In addition, there is nothing in the record regarding the types of interactions with co-workers or with the public that might raise a concern that the complainant would act in a violent manner. The respondent did not contend that the complainant would be required to deal with angry or irate customers or that there were any conflicts presented in his relationships with the public. Although the respondent attempted to portray the job as being high stress, it did not elaborate upon the nature of the stress other than to state that there are deadlines, and it did not identify any aspect of the work atmosphere likely to trigger criminal conduct in a person who has difficulty controlling anger or a propensity to resolve problems with violence.

Finding a substantial relationship in this case would require a conclusion that unsupervised contact with other people is in and of itself a circumstance that might lead the complainant to engage in violent conduct. However, the commission has consistently declined to conclude that the mere presence of other human beings is a circumstance that creates a substantial relationship. See, Black v. Warner Cable Communications Co. of Milwaukee, ERD Case No. 8551979 (LIRC July 10, 1989)(Such a broad approach could conceivably result in a finding that offenses such as those involved here [selling illegal drugs] would be substantially related to virtually all jobs, since virtually all jobs entail some degree of contact with other persons.)) Further, the commission has noted that, in situations such as this, where assault or battery convictions stem from personal relationships and the crimes are committed at home, it cannot necessarily be assumed that the individual is likely to engage in the same conduct with co-workers or customers at the work place. See, for example, Murphy v. Autozone, ERD Case No. 200003059 (LIRC May 7, 2004), aff'd. sub nom. Autozone v. LIRC and Murphy, No. 04-CV-1710 (Wis. Cir. Ct. Dane County Jan. 18, 2005).[6]

The complainant's conviction record is certainly concerning, and the commission does not wish to minimize the severity of the complainant's prior criminal conduct. However, as the complainant's attorney points out in his brief, the Equal Rights Division's published guidance on how to treat conviction records in the workplace cautions that, Whether the crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job. See, DWD webpage, answers to Frequently Asked Questions: https://dwd.wisconsin.gov/er/civil_rights/discrimination/arrest_conviction.htm. Because the commission is not persuaded that the respondent has met its burden of presenting evidence that would permit a conclusion that the complainant's conviction record was substantially related to the job he sought--for which he would clearly have been hired had it not been for his conviction record--the commission finds that the respondent discriminated against the complainant in violation of the Act.

Remedies

Where a complainant proves that he was denied a position for discriminatory reasons, instatement into the position and back pay should be ordered unless the respondent establishes by clear and convincing evidence that, even in the absence of discrimination, the rejected applicant would not have been selected for the open position. The commission will resolve any uncertainty against the discriminating employer. Moore v. Milwaukee Board of School Directors, ERD Case No. 199604335 (LIRC July 23, 1999); Silvers v. Madison

Metropolitan School District (LIRC, July 25, 1986), aff'd. Silvers v. LIRC, Dane Cty. Cir. Ct., Case #83-CV-3644, February 13, 1984.

In its brief to the commission the respondent argues that the complainant lied to it about his conviction record. The respondent states that the complainant told its senior recruiting specialist, Lee Motley, that his conviction was for a domestic incident with a live-in girlfriend and deliberately concealed the fact that he had multiple convictions. The respondent contends that, if it is concluded that the complainant's conviction record is not substantially related to the job, then his failure to be truthful in his application should provide independent grounds for limiting his remedies, since the complainant could be discharged for failing to disclose his conviction on his job application. This argument fails. The complainant accurately and adequately responded to the questions on the job application by disclosing the fact that he had both a felony conviction and a misdemeanor conviction within the past seven years and explaining that they were domestic related charges. The complainant later volunteered the same information to Lee Motley, even though he was not asked about it. The fact that the complainant provided something less than a fully comprehensive criminal history is not evidence of dishonesty on his part, particularly where the complainant himself volunteered the information about his criminal record and was not asked by the respondent to provide detailed information. Because the respondent has not shown any reason to believe that the complainant would not have been hired or, if hired, would not have remained employed in the absence of discrimination, the commission sees no basis to deny the complainant full, make-whole relief.

GEORGIA E. MAXWELL, Chairperson, (concurring):

I concur in the result reached by the majority in this case, and with much of the analysis. I write separately because I believe the majority's answer to the gating question of what type of risks of misbehavior in a new position can satisfy the substantial relationship test is flawed.

Citing several prior commission cases, [7] the majority states that for a substantial relationship to exist, the prior conviction must evidence a realistic possibility of criminal recidivism in the new role. In its previous decisions, the commission has generally relied on various parts of the following language from County of Milwaukee v. LIRC, 139 Wis. 2d 805, 821, 407 N.W.2d 908, 915 (1987):

> *There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime.*
>
> * [T]he legislature has clearly chosen to not force such attempts at rehabilitation in employment settings where experience has demonstated [sic] the likelihood of repetitive criminal behavior.*
>
> *This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the "propensity" to commit similar crimes long recognized by courts, legislatures and social experience.*

> *In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.*
>
> *�� It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.*

County of Milwaukee, 139 Wis. 2d at 821-824, 407 N.W.2d at 915-916 (footnotes omitted). This passage certainly lends weight to the majority's conclusion that only the risk of further criminal behavior can satisfy the substantial relationship test, and were that the only thing the Wisconsin Supreme Court has said on the subject, I might be inclined to agree. But the Court has, in fact, said much more. Considering the totality of the Court's jurisprudence, I am convinced that the commission is off the mark on its application of the substantial relationship test.

The Wisconsin Supreme Court has spoken on this topic in three cases: County of Milwaukee, and the earlier cases of Law Enforcement Stds. Bd. v. Lyndon Station, 101 Wis. 2d 472, 305 N.W.2d 89 (1981), and Gibson v. Transportation Comm., 106 Wis. 2d 22, 315 N.W.2d 346 (1983). In all three of these cases, the Court addressed the application of the substantial relationship provision in broader terms than simply the prevention of criminal recidivism. In Lyndon Station, for example, the Court stated that "common sense dictates" that prior convictions for falsifying traffic tickets bear a substantial relationship to the "duties of a police officer." Lyndon Station, 101 Wis. 2d at 492, 305 N.W.2d at 99. While Lyndon Station does not talk at all about the risk of repeated criminal behavior, I will acknowledge that such a link seems readily apparent in that case. Equally apparent, however, is the fact that the Court did not limit its analysis to only the risk of criminal recidivism, but spoke to the broader question of the individual's ability to effectively perform his job in light of his criminal background. For example:

> *If the state authorities through our court system have convicted someone of 26 felonies, it stands to reason that his effectiveness as a law enforcement officer will be greatly diminished. What impression would be given to an impartial jury when the police chief, as the prosecution's primary witness in a serious criminal case, has to explain on cross-examination that he stands convicted of 26 felonies?*

Id. at 492-493, 305 N.W.2d at 99. If, as the majority asserts, the substantial relationship test is confined to the question of whether there is an unreasonable risk of similar criminal behavior, then this part of the Lyndon Station analysis was entirely superfluous. Certainly, something else appears to be at work.

In County of Milwaukee, an administrator of a nursing home ("Serebin") had been charged with twelve counts "related to patient neglect." County of Milwaukee, 139 Wis. 2d at 810, 407 N.W.2d at 910.[8] He subsequently became employed as a social worker providing counseling to people with mental health issues, but upon his conviction was terminated from his counseling position. Although Serebin worked with vulnerable and dependent clientele in both of these positions, absolutely nothing in the Court's decision suggests that he would be subject to criminal sanction if he were to exhibit the same sort of neglect of those he served as a social worker as he did as an administrator of a nursing home.[9] Rather, County of Milwaukee rested on substantially broader considerations untethered to any suggestion that the risk of future failure in the new position might be criminal, specifically agreeing with the employer's argument that

the "propensities and personal qualities exhibited are manifestly inconsistent with the *expectations of responsibility* associated with the job." *County of Milwaukee,* 139 Wis. 2d at 828, 407 N.W.2d at 928 (emphasis added). Consequently, and notwithstanding the Court's language that the commission has historically relied upon, I read the *County of Milwaukee* decision as applying a substantial relationship test that goes well beyond situations where there is a risk of criminal recidivism in the new position.

But to the extent any doubts remain as to how the Court has applied the substantial relationship test, they can be safely put to rest by its decision in *Gibson.* In *Gibson*, the claimant was denied a license as a school bus driver following his conviction for armed robbery. Like *Lyndon Station* and *County of Milwaukee*, nothing in the Court's analysis ties the substantial relationship test to concerns about repeated *criminal* misconduct. Instead, the Court writes more broadly about what the conviction says about the individual's ability to effectively meet the expectations of the position:

> A conviction of armed robbery requires that the person be found to have participated in the taking of another's property by threatening to harm them with a dangerous weapon. It thus indicates a disregard for both the personal and property rights of other persons. It also indicates a propensity to use force or the threat of force to accomplish one's purposes. *The armed robbery conviction indicates personal qualities which are contradictory to the extreme patience, levelheadedness and avoidance of the use of force which [the employer] testified are essential in a school bus driver*.

Gibson, 106 Wis. 2d at 28, 315 N.W.2d at 349 (emphasis added). Most critically, not only did *Gibson* fail to tie its decision to any identified risk of repeated *criminal* behavior, but "common sense" dictates that no such nexus could have possibly been made unless one were to believe the crazy notion that the claimant would have been tempted to relieve children of their milk money at the point of a gun. Thus, *Gibson* teaches beyond any real doubt that the substantial relationship test is not limited to an assessment of the risk of criminal misbehavior in the new role. I do not see how *Gibson* can possibly be reconciled with the way the commission has applied the substantial relationship test and, as between the two, the commission's interpretation must yield.

Rather, what Wis. Stat. 111.335(1)(c)1 requires is a comparison of the circumstances of "any felony, misdemeanor or other offense" with the "circumstances of the particular job or licensed activity." The "circumstances of the offense" element has been discussed at length in *County of Milwaukee* and *Gibson*, and need not be revisited here. As the majority notes in its decision, both *County of Milwaukee* and *Gibson* generally allows the "circumstances of the offense" inquiry to be limited to an assessment of the elements of the crime for which the claimant was convicted, and from that certain "propensities," "character traits" and the like of the complainant can be gleaned. Where the majority and I part ways is on the question of what "circumstances of the particular job" the employer may consider. Contrary to the majority, I would read the "circumstances of the particular job" as broadly as its language and the Court's holdings (described above) suggest. In short, I believe that a conviction record that demonstrates a reasonable likelihood that the individual cannot efficiently and effectively meet the expectations and responsibilities of the position would be substantially related to the position, even if that failure would not rise to the level of criminal misbehavior.

Although I disagree with the majority in its analysis of what "circumstances of the particular job" may be considered, I agree with the majority's conclusion that the link between the individual's criminal record evidencing his or her propensity to engage in certain conduct and other character traits and the requirements of the new position cannot be speculative or fanciful in order to pass the substantial relationship test. Rather, that nexus must be real, and the risk of foreseeable behavior incompatible with the expectations of the job must be more than remote. I also agree with the majority that, in this case, that threshold has not been met. Particularly in light of the commission's previous decisions in *Robertson*, *Knight* and *Weston*, it cannot reasonably be concluded that the complainant's convictions, all of which arose out of a domestic dispute with his live-in girlfriend, create a substantial risk of similar violence in the business environment of respondent, even given the opportunity for substantial contact with women among respondent's employees and customer. Therefore, I join in that part of the majority's analysis and concur in

the conclusion that respondent discriminated against complainant based upon his conviction record, in violation of the Wisconsin Fair Employment Act.

/s/
Georgia E. Maxwell, Chairperson

NOTE: The commission conferred with the administrative law judge regarding his impressions of the demeanor of the witnesses who testified at the hearing. The administrative law judge indicated that he did not find the respondent's witnesses credible with respect to the amount of stress in the workplace--a finding with which the commission agrees--but had no specific demeanor impressions to impart. The commission's reversal does not rely upon a differing assessment of witness credibility but is because the commission is unpersuaded that the respondent met its burden of proving the affirmative defense of substantial relationship.

cc: Alan C. Olson
Laura Lindner

(Appealed to Circuit Court)

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[1] Appeal Rights: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you must name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

[2] In the caption of this case the complainant's first name is spelled Derrick. However, other documents in the file, including the complaint of discrimination, use the spelling Derrek. The commission has not modified the case caption, which both parties have consistently used throughout these proceedings, but notes the alternative spelling.

[3] The concurring commissioner argues that the statute should be interpreted more broadly to extend the substantial relationship defense to situations where a conviction record demonstrates a likelihood that the individual cannot efficiently and effectively meet the expectations and responsibilities of the position, even if the failure would not result in criminal behavior. The question of whether a substantial relationship contemplates only criminal behavior is not an issue that was raised by either party, nor is resolving that issue necessary to the outcome of this case. The majority notes, however, that the Wisconsin Supreme Court's most recent decision addressing substantial relationship clearly indicates that the substantial relationship test is meant to address the likelihood of repetitive criminal behavior and the risk of recidivism. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 823-824. Absent any more recent pronouncement from the Court, the commission sees no reason to deviate from its longstanding interpretation of the substantial relationship defense as applying only to situations presenting a significant opportunity for repeat criminal behavior.

[4] At the hearing the respondent argued that the complainant had an additional conviction or convictions that it was unaware of until after the complaint was filed. The respondent attempted to introduce evidence on this point at the hearing, but the administrative law judge limited the evidence to the convictions that the respondent was aware of and based its decision on. The commission believes that the administrative law judge erred in excluding evidence of previous convictions. The question is not what the employer considered at the time it made the hiring decision but, rather, whether it established at the hearing that the complainant has been convicted of any offense that is substantially related to the job. The complainant's entire conviction record is relevant to that determination. That said, the commission sees no reason to find that the administrative law judge's refusal to accept the evidence was anything more than harmless error which resulted in no prejudice to the respondent's ability to present its defense. The respondent did not make an offer of proof at the hearing, and it is not clear exactly what it contends would have been revealed had it been permitted to introduce evidence of prior convictions or why it believes such convictions were substantially related to the job. *See*, *Sasich v. City of Milwaukee*, ERD Case No. 200201690 (LIRC June 18, 2004)(for there to be a conclusion that an erroneous exclusion of evidence was prejudicial there needs to be some indication as to what evidence it is claimed could have been presented but for that ruling, and an offer of proof is clearly the preferred method of providing that indication). The commission notes that the complainant acknowledged he had a 2001 conviction for battery in conjunction with an incident involving a former girlfriend, and it has made a factual finding consistent with that testimony. However, consideration of that

additional offense, the circumstances of which appear to be similar to the 2012 convictions, has no effect on the outcome of the case, and the commission sees no reason to believe that the respondent has evidence of other prior convictions that would change the result.

[5] There are four degrees of sexual assault in Wisconsin, the most serious being first degree sexual assault. Fourth degree sexual assault, the crime of which the complainant was convicted, is the least serious and the only one which is not a felony.

[6] The respondent brought an expert witness to the hearing who testified that people who are willing to use violence in their intimate relationships are also willing to use violence in other settings. The respondent's witness, Dr. Darold Hanusa, did not meet with or personally evaluate the complainant, but concluded based upon the complainant's conviction record that he was at risk for engaging in potential violence in the work place. The administrative law judge did not rely on Dr. Hanusa's opinion in reaching his decision and made no reference to it in his memorandum opinion. Like the administrative law judge, the commission finds Dr. Hanusa's testimony unhelpful in deciding whether the complainant's conviction record made him likely to committee a criminal offense at the job at issue. Among other problems, the commission notes that Dr. Hanusa stated that someone who had successfully completed a domestic violence problem would not pose a significant risk of workplace violence, but did not take into consideration the fact that the complainant successfully completed anger management classes as well as training on criminal thinking, which focused on dealing with conflict, high risk situations, and effective communication, including in the context of work relationships.

[7] *Robertson v. Family Dollar Stores, Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005); *Moore v. Milwaukee Bd. of School Directors*, ERD Case No. 199604335 (LIRC July 23, 1999); *Herdahl v. Wal-Mart*, ERD Case No. 9500713 (LIRC Feb. 20, 1997); *Goerl v. Appleton Papers, Inc.*, ERD Case No. 8802099 (LIRC Oct. 5, 1992).

[8] Specifically, Serebin was charged under Wis. Stat. 940.29(7) (1975-76), which provided that "[a]ny person in charge of or employed in any of the following institutions who abuses, neglects or ill-treats any person confined in or an inmate of any such institution may be fined not more than $500 or imprisoned not more than one year in county jail, or both: (7) A nursing home as defined in s. 50.02." *State v. Serebin*, 114 Wis. 2d 314, 316 n.3, 338 N.W.2d 855, 855 n.3 (App. 1983), *aff'd in part, rev'd in part*, 119 Wis. 2d 837, 350 N.W. 2d 65 (1984). Serebin had also been charged and convicted of one count of reckless homicide, but that conviction was overturned during the appeal.

[9] Serebin certainly could not have been charged with a crime under Wis. Stat. 940.29 since that only applied to abuse of patients who were committed to the care of certain identified institutions, such as a nursing home, prison, or mental hospital. Wis. Stat. 940.29(1)-(9) was subsequently amended to make violation thereof a felony, 1977 Act 173, 23, and ultimately repealed, although many of its protections were recreated as part of Wis. Stat. 940.295, which continues to apply to employees and patients of certain named institutions and would not apply to Serebin's conduct as a social worker counseling those with mental health issues. 1993 Act 445, 78-79. Serebin did not work in any similar kind of facility or with institutionalized patients. Rather, he receiv[ed] telephone calls on a publicized hot line' number from members of the public with acute mental health related problems [he] would talk to the caller and would then either counsel the caller over the phone, refer them to appropriate counseling or service agencies, or send out the mobile crisis team. Occasionally, he would go out into the field' to deal directly with persons seeking help. *County of Milwaukee*, 139 Wis. 2d at 829, 407 N.W.2d at 929 (internal quotations omitted). It is not apparent to me what other criminal sanction Serebin would have faced had he repeated the type of neglect he exhibited as a nursing home administrator, and the Court does not identify any.