

State of Wisconsin



Labor and Industry Review Commission

James Kaufman
Complainant

Consumer's Cooperative Assoc.
Respondent

ERD Case No. CR201501637

Fair Employment Decision¹

Dated and Mailed:

September 28, 2017

The decision of the administrative law judge (copy attached) is **affirmed**. Accordingly, the dismissal of the complainant is affirmed.

By the Commission:

/s/

Laurie R. McCallum, Chairperson

/s/

David B. Falstad, Commissioner

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>.

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. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. A timely petition for commission review was filed. The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing.

Findings of Fact and Conclusions of Law

The commission makes the same findings of fact and conclusions of law as stated in the administrative law judge's decision and incorporates those findings and conclusions by reference into the commission's decision.

Memorandum Opinion

The Wisconsin Fair Employment Act prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of arrest or conviction record. 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. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 824, 407 N.W.2d 908 (1987); *Goerl v. Appleton Papers, Inc.*, ERD Case No. 8802099 (LIRC Oct. 5, 1992). As a general rule, the circumstances of the offense are gleaned from 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*, at 823-824.

A finding of a substantial relationship requires a conclusion that a specific job provides an unacceptably high risk of recidivism for a particular employee.

Nathan v. Wal-Mart, ERD Case No. CR201400689 (LIRC Oct. 20, 2015). The relevant question is whether the job presents a “greater than usual opportunity” for criminal behavior. *Herdahl v. Wal-Mart*, ERD Case No. 9500713 (LIRC Feb. 20, 1997).

In this case, the complainant had a criminal record including felony convictions for possession of child pornography, child sexploitation videos, and 1st degree sexual assault of a child, and sought work as a clerk/cashier at a convenience store. Therefore, the resolution of this matter requires an analysis of the connection between the circumstances of the offenses of possession of child pornography, child sexploitation videos, and 1st degree sexual assault of a child and the job of clerk/cashier at the respondent’s store.

The commission has held that the character trait most revealed by a conviction for possession of child pornography is the gross objectification of children. *Holze v. Security Link*, ERD Case No. CR200200629 (LIRC, Sept. 23, 2005). In addition, the elements of the offense of possession of child pornography reveal a willingness to act on a desire to see minors engaged in sexually explicit conduct, to the extent of going to the effort to obtain depictions of that conduct. *Moreno v. County of Racine*, ERD Case No. CR201100660 (LIRC June 27, 2014). The commission has also considered cases involving individuals convicted of the crime of sexual assault of a child and has held that the character traits revealed by having committed that crime include untrustworthiness with children, lack of judgment and inability to accept responsibility over children, and placing of one’s own selfish desires ahead of the welfare of children. *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); *Matousek v. Sears Roebuck & Co.*, ERD Case No. 200302571 (LIRC Feb. 28, 2007).

The commission has not previously considered the question of what character traits are revealed by having been convicted of the crime of “sexploitation” of a child.² Therefore, the commission begins its analysis by considering the elements of the offense in question, as set forth in § 948.05 of the statutes, which provides, in relevant part:

948.05 Sexual exploitation of a child.

(1) Whoever does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child may be penalized under sub. (2p):

² Although both the complainant’s testimony and the background check documents contained in the record refer to the crime as “sexploitation,” the Wisconsin Criminal Code includes no offense containing that term. Presumably, the statutory section which the complainant is found to have violated is Wis. Stat. § 948.05, “sexual exploitation” of a child.

(a) Employs, uses, persuades, induces, entices, or coerces any child to engage in sexually explicit conduct for the purpose of recording or displaying in any way the conduct.

(b) Records or displays in any way a child engaged in sexually explicit conduct.

(1m) Whoever produces, performs in, profits from, promotes, imports into the state, reproduces, advertises, sells, distributes, or possesses with intent to sell or distribute, any recording of a child engaging in sexually explicit conduct may be penalized under sub. (2p) if the person knows the character and content of the sexually explicit conduct involving the child and if the person knows or reasonably should know that the child engaging in the sexually explicit conduct has not attained the age of 18 years.

(2) A person responsible for a child's welfare who knowingly permits, allows or encourages the child to engage in sexually explicit conduct for a purpose proscribed in sub. (1) (a) or (b) or (1m) may be penalized under sub. (2p).

As a reading of the statute reveals, conviction of the crime of sexual exploitation of a child contemplates not just passive observation of images that sexually objectify children, but the actual participation in creating, displaying, or promoting that material, or in inducing children to participate in sexual conduct for the purposes of recording or displaying that conduct. It seems fair to say that the character traits revealed by engaging in the conduct prohibited by the statute include not only the gross objectification of children, and the willingness to act on a desire to see minors engaged in sexually explicit conduct (the character traits revealed by having been convicted of possession of child pornography), but also a willingness to actually participate in and/or profit from the sexual exploitation of children.

Having determined what character traits are revealed by virtue of convictions for the offenses that make up the complainant's criminal record, the next question to decide is whether those traits are likely to reappear in the context of the job of convenience store clerk/cashier for the respondent. The commission believes that they are, and it finds that the job in question would provide an unacceptably high risk of recidivism for the complainant. The respondent's store is located near a park with a baseball field, and close to apartment buildings. Consequently, unaccompanied children are often present in the store, especially after 3:00 p.m., when school lets out. The complainant, who applied to work beginning at 3:00 p.m., would sometimes be the only employee in the store at times when unaccompanied children were present. As a clerk/cashier, the complainant would not be merely stocking product in a back room, but would be in the front of the store, interacting with customers. According to the respondent's witnesses, many of the customers, including children, are regulars, and store employees often chat

with them and get to know them on a first-name basis. While the respondent's store is monitored by cameras, there are no cameras in the back of the store, a space which includes a locked and windowless utility room, to which all employees have access. Given these circumstances, it seems clear that the job in question would present the complainant—a person who has a demonstrated tendency to sexually exploit children and who is untrustworthy around children and puts his own desires in front of their welfare—with a greater than usual opportunity to reoffend.

In his petition for commission review the complainant disputes this and argues that his crimes took place on private property and under circumstances that would pose no risk to the respondent's customers. The complainant states that the respondent's concerns that he might commit a crime against a child in its store are premised on inaccurate assumptions about sex offenders, and not on facts or law. He asserts that there is no demonstrable relationship between where sex offenders work and their likelihood of reoffending and maintains that recidivism rates among sex offenders are lower than for people convicted of other felonies. These arguments fail. As set forth above, the application of the substantial relationship defense does not require consideration of the specific factual details of an offense, such as where and when the crime took place. Rather, it is contemplated that the circumstances of the offense may be gleaned from a review of the elements of the crime or crimes. *See, County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 823-824, 407 N.W.2d 908 (1987).³ Consideration of the elements of the crimes the complainant committed reflect, at minimum, a character for untrustworthiness around children and a tendency to sexually exploit children. One need not consider statistical evidence of recidivism—which, incidentally, was not presented at the hearing and is not contained in the hearing record—in order to reach the conclusion that an individual who displays such traits is unsuited for a job that places him in daily unsupervised contact with children. Considering the facts and circumstances, the commission agrees with the administrative law judge that the complainant's conviction record is substantially related to the job at issue and that the respondent's decision not to hire him for a clerk/cashier position did not amount to a violation of the Wisconsin Fair Employment Act. Accordingly, the dismissal of the complaint is affirmed.

cc: Attorney David Steffen

³ In his petition the complainant asserts, without benefit of citation, that the Equal Rights Division has issued "advice" regarding the substantial relationship test which states that the test "looks at the circumstances of an offense, where it happened, when, etc. – compared to the circumstances of a job – where is this job typically done, when, etc." (Complainant's brief, p. 4). The commission is unaware of any publication by the Equal Rights Division containing such a statement, which is contrary to the Wisconsin Supreme Court's decision in *County of Milwaukee*, cited above.

