State of Wisconsin
Labor and Industry Review Commission

William J. Smith, Complainant **State of Wisconsin Department of Workforce Development Division of Workforce Solutions**, Respondent ERD Case No. CR200602582 EEOC Case No. 26G200601557C	**Fair Employment Decision**[1] **Dated and Mailed:** January 4, 2019

The decision of the administrative law judge is **affirmed in part** and **reversed in part**. 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 arrest and conviction record.

3. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of $183,972.10. A check in that amount shall be made payable jointly to the complainant and his attorney, Timothy M. Scheffler, and delivered to Mr. Scheffler.

4. 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

[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.

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 History

On August 7, 2006, the complainant filed a complaint with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development (hereinafter "Department") alleging that the respondent discriminated against him in the terms and conditions of his employment because of his sexual orientation, creed, and arrest and conviction records, and that it terminated his employment on the same bases, all in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An Equal Rights Officer for the Division issued an initial determination on January 16, 2007, finding no probable cause to believe that the respondent violated the Act as alleged. The complainant filed a timely appeal of the adverse determination, and the matter was certified to hearing.

On November 2, 2007, the complainant filed a Motion to Disqualify, requesting that the matter be heard by an administrative law judge from outside of the Division. The motion was denied.

A hearing was held before an administrative law judge for the Division on March 18 through 21 of 2014, with a final day of hearing conducted on July 22, 2014. On December 30, 2014, the administrative law judge issued a split decision dismissing the complainant's claim that he was discriminated against in the terms and conditions of his employment and terminated from his employment based upon his sexual orientation and creed, but finding probable cause to believe that the complainant was discriminated against based upon his arrest and conviction records. The sexual orientation and creed allegations were dismissed, and the matter was certified to a hearing on the merits of the remaining issues.

The hearing on the merits of the arrest and conviction allegations was conducted by a different administrative law judge on January 25 through 29 of 2016, and incorporated portions of the testimony from the probable cause hearing. On September 29, 2017, the administrative law judge issued a decision dismissing the claims of arrest and conviction record discrimination. The administrative law judge held that the complainant was not discriminated against based upon his arrest record and that his conviction record was substantially related to the job. The complainant has filed a petition for commission review of both the December 30, 2014 and September 29, 2017 administrative law judge decisions. The complainant also challenges the pre-hearing ruling denying his Motion to Disqualify.

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, State of Wisconsin Department of Workforce Development Division of Workforce Solutions (hereinafter "respondent") is a governmental agency with offices throughout the State of Wisconsin.

2. The complainant, William J. Smith (hereinafter "complainant"), began working for the State of Wisconsin as a limited term employee in 1993. In 2000 he became a full-time employee at the University of Wisconsin-Madison. He transferred to a position with the respondent in 2004.

3. During the relevant time period the complainant identified his religious creed as Independent Catholic. The complainant was a priest in the Independent Catholic Church, and maintained a chapel in his home. The complainant often used a religious name, "Joseph," and referred to himself by a variety of religious titles including "Father" and "Abbot of the Abbey of the Incarnation."

4. The complainant's sexual orientation is homosexual.

5. In 1989 the complainant was convicted of two counts of the crime of second degree sexual assault of a minor, in violation of Wis. Stat. § 940.225(2)(e), which provides that it is a Class C felony to have "sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 16 years." The conviction arose out of a situation in which, in his role as an Episcopalian priest,[2] the complainant had sexual relations with a 15-year boy with whom he had a close, mentoring type of relationship. The complainant served a prison term and was released on probation and then placed on supervision. He was required to register on the Wisconsin Sex Offender Registry, which obligates him to notify the Department of Corrections (DOC) of any address or name changes and which prohibits the use of any alias.

6. In 2006 the complainant was charged with violating Wis. Stat. § 301.45(6)(a)(1) by failing to notify the DOC of his home address after a move and by using an alias, "Father Abbot Joseph," on a website he maintained related to his religious activities.

7. When the respondent hired the complainant in 2004 it did not conduct a criminal background check and was unaware of the complainant's conviction record. The complainant received excellent references from the University of Wisconsin regarding his work and his ability to get along with his co-workers.

8. The job for which the complainant was hired in 2004 was as an Employment and Training Specialist (ETS) at the Jefferson County Job Center. The job entailed assisting individuals who came into the Job Center looking for work. The

[2] The complainant was removed from the Episcopalian church following his conviction and was not affiliated with that church during his employment for the respondent.

complainant provided basic advice on job hunting and assisted clients (whom the respondent refers to as "customers") to use computers and equipment in the respondent's resource room. He also moderated the "Job Seeker's Network," a weekly support group where job seekers could share leads on jobs and give advice to each other. The Job Seekers met in the resource room, after which the complainant and other Job Center employees would provide individual assistance to clients who attended the meetings.

9. The individuals the complainant served were required to demonstrate financial eligibility for services. Client information was recorded in the ASSET system, where the complainant was also to track the services provided to clients as well as all client contacts.

10. When the complainant began his employment the position was primarily funded by the Workforce Investment Act (WIA), with a smaller amount of funding from the Wagner-Peyser Act. Wagner-Peyser Act funds were federal funds that could fund any job service bureau employee working with anyone seeking employment assistance. However, WIA funds had more restrictions on their use and were limited to services for adults over age 21. By 2006 the complainant's job was entirely funded by WIA funds.

11. The complainant was trained to issue work permits to minors. Although parents were not required to be present when minors submitted their work permit applications, as a practical matter, most applicants were accompanied by their parent or parents. During his employment for the respondent the complainant never issued a work permit to a minor who did not have a parent present. It took about 10 to 15 minutes to issue a work permit. Other than occasionally providing work permits, the complainant did not have any interactions with minors. Minors who wanted job hunting services were referred to a specific individual who worked out of the Job Center, but was employed by an organization called Opportunities, Inc., who was the case manager responsible for working with youths.

12. Children sometimes came into the Job Center with their parents. There was a play area available in the Job Center, which was clearly visible from the resource room. Children were not permitted to be in the play area without adult supervision.

13. Two or three times a year school groups would come to the Job Center for tours and information on how to seek employment. These groups would be accompanied by chaperones. It was not the complainant's responsibility to give tours to youth groups, although on one occasion he assisted with a workshop for high school students at the request of the organizer. Thereafter, the complainant's supervisor, Mary Pasholk, sent out a reminder to the complainant and other WIA employees that they were not to work with high school groups or provide "intensive services" to non-WIA clients. The complainant did not assist youth groups or

provide tours after receiving the reminder from Pasholk. However, the reminder did not specify that WIA employees should no longer issue work permits to minors, and the complainant continued to do so.

14. When the complainant began his employment in 2004, he signed a document acknowledging that he had received and was aware of the respondent's work rules, as well as other policies relating to conduct, including the Code of Ethics and Standards of Conduct. The Standards of Conduct state, among other things, that employees are prohibited from neglecting job duties, engaging in unauthorized personal activities during work time, possessing or seeking to gain access to confidential materials without proper authorization, unauthorized use of state equipment, including computers, and engaging in any outside activity that would impair the employee's judgment or ability to perform his or her duties.

15. The complainant was also made aware of the respondent's rules regarding the use of IT resources, including email and the internet. The respondent's IT policy in effect at the time allowed employees to make limited personal use of the respondent's IT resources consistent with the respondent's policies and rules, provided the personal use had a low-cost impact on the respondent, including with respect to employee time.

16. In January of 2006, Pasholk sent all ETSs, including the complainant, a list of open cases in which clients needed to be contacted and information updated. The complainant was directed to complete the task by close of business on February 3, but did not meet the deadline for completing his contacts.

17. In March of 2006, Pasholk became aware of the complainant's conviction record based on a tip from a Jefferson County employee. The complainant had no prior discipline nor any negative performance reviews, and Pasholk's only criticism of him up until that point was that he could be a little slow getting his paperwork done.

18. After hearing about the complainant's conviction record, Pasholk went online and confirmed the 1989 conviction and learned that the complainant was on the Wisconsin Sex Offender Registry. Pasholk then contacted an individual in the personnel department to explain the situation and to ask if the nature of the complainant's offense precluded him from working at the Job Center. This person, in turn, referred the matter to Ann Smith, the respondent's employment relations section chief, who determined that an investigation should be conducted.

19. During the investigation the respondent decided to temporarily transfer the complainant to the Madison office where he would be subject to closer supervision. The transfer took place on April 27, 2006. The complainant was assigned duties

that did not require contact with the public and was compensated for his extra travel time to and from Madison. His pay and benefits were otherwise unchanged.

20. The respondent began its investigation by asking an employment relations specialist for the department, Jerry French, to investigate the complainant's IT activity and to provide a report about his computer activity at work. French ultimately prepared four separate written reports for the respondent's consideration. French's investigation concluded that the complainant used his work computer extensively to conduct a religious ministry and that he mixed his ministry work with his work for the respondent. French estimated that half of the complainant's email inbox contained personal and ministry related emails, that he often signed emails "Father Joseph, OSB," and that he ended an email to a client by telling the client that he remains in "our thoughts and prayers." French also noted that the complainant had several aliases he used for his email accounts, that he had assembled a PowerPoint related to the subject of criminal profiling, that he had asked a client to sign a medical release for psychiatric reports to be released to him, and that the complainant was registered as a user of an anti-depressant drug, Remeron, which according to the drug's website, may increase sexual desire. French's search found photographs on the "H drive" of the complainant's computer, mostly related to visits to churches, and including "pictures of young men who either appear to be traveling with Mr. Smith or in one case possibly staying with him." French noted that between February and April the complainant deleted all the photographs. French also noted that the complainant had an hour or more of internet usage on 19 days out of 74, usually not during his recorded lunch break, and identified some of the specific websites the complainant had visited, including religious websites and one related to forensic science and law enforcement which included diagnostic features about homicidal sex offenders.

21. In his first memo, dated April 7, 2006, French made reference to the fact that several of the emails showed that the complainant had "an active, though disguised, homosexual lifestyle." However, this observation was deleted from a subsequent draft of the same memo. French also opined that he had "significant reservations about whether Mr. Smith can or should be able to perform his duties, keeping separate his private and religious ministry."

22. In addition to French's investigation, the complainant's supervisor, Mary Pasholk, examined the complainant's work area and records. Pasholk discovered in the complainant's cubicle four books that dealt with topics related to sex offenders out in plain view, as well as a wooden plaque with a cross burned into it that said "Father Will's Place." Pasholk's review of the complainant's files also revealed some things she considered inappropriate. For example, Pasholk discovered that some of the complainant's clients referred to him as "Pappa" or "Pops."

23. During her investigation Pasholk also spoke with the complainant's former lead worker, Mike Beck, who brought various concerns to her attention. In a written statement, Beck indicated, among other things, that on one occasion he observed the complainant touch a client's face, stating that he was fascinated by the client's tattoos. Beck stated that he later asked the complainant what that was about and the complainant responded that the young man had had a horrible childhood, that he was helping him with those issues, and that he liked him very much. Beck did not report the incident to Pasholk at the time it occurred, but only raised it after he became aware of the complainant's conviction record.

24. During the investigation the respondent learned that the complainant had invited clients to his home to prepare meals on several occasions, and had taken clients out for pizza on one occasion. The complainant paid for the groceries and pizza. In addition, the complainant had given his personal telephone number to clients and had called clients at home on their personal phones.

25. The respondent discovered that the complainant had obtained clients' signatures on releases for medical and psychiatric documentation and that he had left some of that material on his desk rather than putting it in a secure file cabinet. The complainant had also obtained releases from individuals who visited the Job Center but who were not his clients. While investigating the complainant's work area Pasholk saw confidential client records, including information about a client's conviction record, as well as psychological reports about clients and notes about a client's medications, that were kept out in the open where they could be seen. Pasholk's search of the complainant's desk also revealed notes indicating that the complainant had attended a client's Individual Plan for Employment (IPE) meeting with him, although this was not part of the complainant's duties.

26. On May 8, 2006, the respondent placed the complainant on paid administrative leave pending the completion of its investigation. Thereafter, the respondent held two meetings with the complainant, an investigatory meeting on May 10, and a pre-disciplinary meeting on May 16, to discuss his arrest and conviction record and to ask questions about his conduct in the workplace. During these meetings the complainant disclosed that the 2006 arrest was for failing to inform the DOC of his new address, but did not mention that it also involved allegations of using an alias on his church website.

27. During the May 10 and May 16, 2006 meetings the complainant provided a variety of explanations for his conduct. The complainant explained that he invited clients to his home for meals in order to provide food for clients who were homeless. He agreed that clients called him "Pops" or "Pappa," but stated that he had asked them to stop. He explained the books in his cubicle regarding sex offenders by stating that they were reference materials, since several of his clients were sex offenders. (The respondent later sought to confirm this information and found it be incorrect.) He also stated that the books were not in view of clients. With regard to

the confidential records, the complainant told the respondent that some of the individuals he worked with had volunteered their confidential records or information to him and that he did not enter them into the system because the clients did not follow through. The complainant stated that he did not file the records thereafter because he was too busy. The complainant admitted to surfing the internet at work, but stated that he was just killing time and that in his former state job this had been acceptable behavior. He explained that the pictures found on his "H drive" came from clients from the Ukraine and denied specific knowledge of their contents.

28. On May 18, 2006, the complainant was called into a meeting and given a letter, dated May 17, indicating that his employment was being terminated because of multiple work rule violations and because of his arrest and conviction record. In the 5-page discharge letter, the respondent explained that the complainant had violated multiple work rules and that it believed the complainant's rule violations bore a direct relationship to the circumstances of his criminal arrest and conviction. With regard to those violations, the respondent contended that the complainant had:

> 1) Failed to follow instructions or carry out work assignments and neglected responsibilities or engaged in unauthorized personal activities during work time (in violation of work rules A1 and A2) by failing to enter and update client information into the ASSET system, failing to contact clients in a timely manner, and continuing to issue work permits to minors after being told not to provide youth services without supervisory approval.
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> 2) Violated the conflict of interest policy and internet resource use policy (work rules C1 and A5) by using the respondent's computer system to conduct personal business, accessing numerous religious websites, sometimes at length, sending personal emails relating to religious activities, some of which used a religious name, including at least one email sent to a client, storing pictures on the "H drive" of his computer, many of which were deleted, including pictures of young men and movies of the men at a private work site, and storing and modifying a PowerPoint presentation on criminal profiling.
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> 3) Violated its rule against disclosing confidential information and records without authorization, possessing or seeking access to confidential records and documents, and engaging in intimidating, harassing or abusive treatment or language towards clients and the public (work rules A3, C3, and D2) by obtaining signed releases from clients, including some who were no longer working with the complainant, to obtain confidential information that was not necessary

> to make job referrals, leaving confidential information out on his desk, attending an IPE (Individual Plan for Employment) meeting with a client, and leaving the IPE information out in the open. Further, the respondent contended that the complainant had two job service clients attend religious ceremonies, invited three clients to his home for meals on four or five occasions, had books about sexual abuse on display in his cubicle that were not related to his work, allowed clients to call him "Pappa" or "Pops," had calendar entries for clients after hours and on weekends, and called clients at home or had them call him at his home.

In the discharge letter the respondent accused the complainant of intermingling his religious activities with his work and described his conduct towards his young male clients as "grooming" behavior that replicated his previous criminal conduct.

29. Attached to the discharge letter was a list of 11 specific examples of instances in which the complainant had violated the respondent's policies regarding confidentiality or had acted inappropriately with respect to confidential information.

30. The discharge letter did not include any reference to the allegation that the complainant touched a client's face or to the "Father Will's Place" sign in his cubicle. The complainant's use of the drug Remeron was also not mentioned.

31. The discharge letter was drafted by Gerald Guenther, the respondent's human resources director, and Ann Smith, the employment relations section chief, who together made the discharge recommendation. The ultimate decision to accept the recommendation and go ahead with the discharge was made by Bill Clingan, the administrator for the Department of Workforce Solutions, who signed the letter along with Micabil Diaz-Martinez, the Department deputy secretary.

Conclusions of Law

1. There is no probable cause to believe that the respondent discriminated against the complainant based upon his sexual orientation or creed, within the meaning of the Act.

2. The respondent discriminated against the complainant based upon his arrest and conviction records, within the meaning of the Act.

Memorandum Opinion

Motion for Disqualification

In his petition for commission review the complainant argues that the Division erred in failing to grant his pre-hearing Motion to Disqualify and therefore denied him his constitutional right to a fair and unbiased adjudicator. The complainant contends that the Division's interest in enforcing the law is at odds with its position

as a defendant in these proceedings and violates the common law principle that a party should not be the judge of its own case. The complainant also indicates that the Division "thumbed its nose at the principle of due process" by denying his motion without making any findings or conclusions about the existence of a conflict. He states that thereafter his case was handled in a manner that systematically denied him access to a fair hearing by delaying the process for so long that some witnesses no longer could remember the events at issue or were no longer available.

The commission has considered the complainant's argument, but does not find it persuasive. Administrative law judges are entitled to a presumption of impartiality, and there is no reason to assume that they are unable to render fair and unbiased decisions, even where their own employer is the named respondent. Although the delay in this process is certainly troubling, it appears to have prejudiced both parties equally and does not reflect bias or partiality on the part of the Division. More importantly, the commission sees no reason to believe that the complainant was denied a full and fair hearing before either of the two administrative law judges who presided over this matter or that the decisions issued by those administrative law judges reflected bias on their parts. (Indeed, the administrative law judge who held the probable cause hearing demonstrated his neutrality by resolving some issues in the complainant's favor.) Finally, the commission has independently reviewed this matter, and it has done so objectively and without bias. Under all the circumstances, the commission sees no reason to believe that the complainant was prejudiced as a result of the Division's decision to deny his Motion to Disqualify.

Discrimination based upon creed/religion

The complainant describes his religion as Independent Catholic. The evidence does not establish that the complainant's supervisor or any of the respondent's decision-makers held negative opinions about the complainant's religion or were biased against him because of it. While the record does indicate that the respondent took issue with the complainant's actions in signing documents drafted on his computer at work with a religious name and conducting religious ministry work from the workplace, that it objected to his actions in inviting clients to attend religious services in his home, and that it considered it inappropriate that the complainant posted a sign in his work station that had a cross on it and said "Father Will's Place," these objections were not premised on hostility towards the complainant's specific religious beliefs or practice but upon its reasonable concern that the complainant was comingling activities related to his religious ministry with his work at the Job Center and had improperly allowed his religious practice to intrude into the work place.

In his brief to the commission the complainant argues that it is clear the respondent found many aspects of his religious practices objectionable. For example, he

contends that the fact the respondent was concerned about his "Father Will's Place" sign, but not with the statute of Buddha that he had in his cubicle, indicates that it was the complainant's own religion and not religion in general that the respondent opposed. However, as one of the respondent's witnesses explained at the hearing, the sign designating the complainant's work area as "Father Will's Place" had the effect of suggesting that clients were coming to the complainant in his capacity as a priest and that the services he provided were religious in nature. (The respondent's concern in this regard was borne out by the fact that the complainant actually invited some of his clients to attend religious services in his home and told another client that he was "in our thoughts and prayers.") By contrast, the mere presence of a statute of a Buddha in the complainant's work space, unaccompanied by any statement to imply a religious intent, would not have had the effect of suggesting that the services being provided were religious in nature. The commission also notes that, although the respondent made reference at the hearing to the "Father Will's Place" sign, the discharge letter made no mention of it, and it is not clear what, if any, role the sign played in the discharge decision.

In his brief the complainant also maintains that, to the extent he brought his religious practice into the workplace, he did not exceed or abuse the freedom the respondent provides other employees for self expression or inclusion of their non-religious activities in the workplace. The commission disagrees. The complainant was not simply allowing his religious identity to be part of his workplace persona or expressing himself through the use of religious imagery, but was using the respondent's time and resources to promote and maintain a religious practice and--more seriously--allowed his religious practice to cross over into his work with the respondent's clients. His actions in this regard went beyond what could be reasonably be viewed as permissible self-expression.

Finally, in his petition the complainant attempts to cast the issue in terms of failure to grant a religious accommodation. However, the complainant did not establish that his religious beliefs required him to engage in any of the activities at issue. An employee cannot expect an accommodation where there is no legitimate conflict between the employee's religious practice and the employment. *Kramer v. Leath Furniture*, ERD Case No. 9304547 (LIRC March 26, 1997), aff'd sub. nom *Kramer v. LIRC* (Dane Co. Cir. Ct., Dec. 3, 1997). Further, even if the complainant could make an argument to the contrary, the fact remains that he never asked the respondent to grant him an accommodation and never informed the respondent that his religious beliefs compelled him to engage in the conduct at issue in this case.

Discrimination based upon sexual orientation

In his petition the complainant argues that the record was "rife with homophobic presumptions" as well as direct evidence of anti-homosexual bias on the part of Jerry French. The complainant also points out that the discharge letter makes

reference to a concern that the complainant might enter into relationships with young men, and accused him of "grooming" male clients. The commission has considered these arguments, but does not find them persuasive. While French did include some statements in his report that might arguably be construed as homophobic, at the hearing French denied any animus against the complainant based upon his sexual orientation, and the administrative law judge found that testimony to be credible. Moreover, French played no role in making the decision to discharge the complainant, and there is no reason to believe that the decision-makers (Guenther, Smith, Diaz, and Clingan) harbored any animus against the complainant because of his sexual orientation or would have treated him differently but for that fact. While, as the complainant points out, the discharge letter expresses concerns about the complainant's potential or actual relationships with adult men, the commission is satisfied that those concerns are not related to the fact of the complainant's homosexuality, but rather, to the possibility that, in light of his conviction for sexual assault of a male teen with whom he had a mentoring relationship, the complainant might be abusing his position to engage in inappropriately personal relationships with some of his male clients. Although such concerns might be relevant to the complainant's contention that he was discriminated against based upon his conviction record, the commission agrees with the administrative law judge that they do not warrant a conclusion that the respondent was motivated to discharge the complainant because of his sexual orientation.

In his brief to the commission the complainant also suggests a possible "cat's paw" analysis, in which Guenther and Smith played the role of the proverbial "cat's paw," manipulated by French to terminate the complainant because of French's animus against him based upon his homosexuality. However, the facts do not support such a theory. The test for the application of the "cat's paw" analysis is whether the nominal decision-maker was "decisively influenced" by information and recommendations received from other individuals, and the record shows that those others were prejudiced against the complainant. *Tohl v. CUSA ES, LLC*, ERD Case No. CR200701939 (LIRC Nov. 21, 2013). In this case, the respondent relied upon French's findings with respect to the extent and content of the complainant's IT use. However, even concluding that French's reports included some extraneous comments and opinions that may have reflected hostility towards the complainant based upon his sexual orientation--and, again, it should be noted that French testified he harbored no animus against the complainant on that basis--there is no reason to believe that the respondent considered those comments when making its decision about the complainant's employment status or that they influenced its belief that the complainant should be discharged. Moreover, the respondent did not rely solely on French's report as a basis to terminate the complainant's employment; it also relied upon Pasholk's investigation of the complainant's work area and the information she gleaned regarding the complainant's workplace activities, including his actions in obtaining confidential records that were not required to perform his

job, and then leaving that information out in the open in his workspace. Under the circumstances, the commission sees no basis to conclude that, in deciding to terminate the complainant's employment, the respondent's decision makers were "decisively influenced" by an individual who was shown to harbor prejudice against the complainant based upon his sexual orientation.

Discrimination based upon arrest and conviction record

The 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. *See*, Wis. Stat. §§ 111.321 and 111.322. However, there are two exceptions. First, with respect to arrest record, the Act provides:

> [I]t is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

Wis. Stat. § 111.335(1)(b)(emphasis added).

Per the statute above, the only action an employer may lawfully take against a current employee based upon the employee's arrest record is to suspend that employee if he or she is subject to pending charges for a crime that is substantially related to the job. An employer may not under any circumstances lawfully discharge an employee because of an arrest record.

While it is unlawful to discharge an employee because of the fact of the employee's arrest, an employer's decision is not considered to be "because of arrest" when it is motivated by the employer's belief that the employee has, in fact, engaged in certain unacceptable conduct, and when that belief arises from some source other than the mere fact of the arrest. *City of Onalaska v. LIRC*, 120 Wis.2d 363, 354 N.W.2d 223 (Ct. App. 1984).

The Act also contains an exception with respect to conviction records:

> 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:
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> 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.

Thus, a current employee may be discharged based upon his or her conviction record if the conviction record is for a crime that is substantially related to the job.

In drafting the substantial relationship exception contained in the two statutory exceptions set forth above, the legislature sought to strike a balance between society's interest in rehabilitating those who have been convicted of crime and its interest in protecting citizens. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987). In *County of Milwaukee* the Wisconsin Supreme Court stated, in relevant part:

> 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.
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> In balancing the competing interests, and structuring the [statutory] 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.

Id. at 823.

A finding of a substantial relationship requires a conclusion that a specific job provides an unacceptably high risk of recidivism for a particular employee. 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); *Nathan v. Wal-Mart,* ERD Case No. CR201400689 (LIRC Oct. 20, 2015). *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).[3]

Arrest record/*Onalaska* defense: The complainant was arrested in 2006 and charged with violating the sex offender registry statute by failing to update his address and by using an alias. The discharge letter the respondent sent the complainant specifically referenced the fact of his arrest as a reason for discharge, noting the complainant's "current behavior of violating the Sex Offender Registry law" and the complainant's criminal history, including the fact that he was "presently charged" with violation of the Sex Offender Registry law. In the discharge letter the respondent stated, "In considering your compliance with work rules we have also considered the following circumstances of your employment work rule violations in relation to the circumstances of your criminal arrests and convictions." The respondent then went on to detail a list of work rule violations that it claimed had been committed by the complainant. Among them was an allegation that the complainant violated the respondent's internet resource use policy by sending emails related to his personal religious activities, including two occasions when he sent emails to people from the state computer system signed by his religious name. The respondent also noted that several documents were found on the complainant's desk related to his religious activities with variations on his religious name. The respondent stated, "Working under so many different names constitutes misrepresentation of your identity on work time and excessive intermingling of state and personal business or outside activities." None of the work rule violations referenced in the discharge letter specifically related to the complainant's actions in failing to update his address with the DOC.

The discharge letter constitutes direct evidence that the respondent considered the complainant's arrest and the pending charges against him in making the decision to discharge him. However, as stated above, while it is unlawful to discharge an employee because of the fact of the employee's arrest, an employer's decision is not "because of the arrest" when it is motivated by the employer's belief that the employee has, in fact, engaged in certain unacceptable conduct, and when that

[3] In her dissent, the chairperson 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. 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.

belief arises from some source other than the mere fact of the arrest. *City of Onalaska v. LIRC*, 120 Wis.2d 363, 354 N.W.2d 223 (Ct. App. 1984). The respondent contends it conducted its own investigation into the details of the complainant's arrest and concluded that he had engaged in unacceptable conduct and that it was therefore permissible to discharge him as a result. The administrative law judge agreed. The administrative law judge found that the respondent learned from speaking to the complainant that he had failed to update his address, and that its independent investigation revealed his use of an alias. The administrative law judge stated that, given these facts, the respondent could terminate the complainant's employment for engaging in this conduct without violating the prohibition against arrest record discrimination.

The commission disagrees with this analysis. While there is sufficient evidence in the record to warrant a conclusion that the respondent learned about the complainant's violations of the Sex Offender Registry law based upon its own investigation--the complainant admitted to the respondent's investigators that he failed to notify the DOC of an address change when he moved from Milwaukee to Fort Atkinson, and the respondent's investigation of the complainant's computer and desk area revealed instances in which he had signed emails using variations of a religious name--the *Onalaska* test requires not only that the respondent have determined that the complainant engaged in the conduct for which he was arrested, but that it discharged him for that reason. *Onalaska* applies where the respondent acted out of concern over the conduct and its belief that such conduct might mean the complainant was not well suited for the job. *See*, *Levanduski v. Visiting Nurse Assoc. of Sheboygan, Inc.,* ERD Case No 8551685 (LIRC Feb. 10, 1988). In this case, the respondent did not establish that the complainant's actions in violating the Sex Offender Registry law were the reason for the discharge. Although the use of a religious alias is a matter related to the job, which, at least arguably, constituted a violation of the respondent's internet resource use policy--by contrast, there is nothing in the record to suggest that the respondent believed the complainant's failure to update his sex offender registration violated one of its work rules or that it was conduct which would interfere with his acceptable performance of the job--it is clear from the discharge letter that the fact of the complainant's arrest and pending charges played a role in the discharge decision separate and apart from what the respondent learned about the complainant's conduct. Consequently, the commission is unpersuaded that the *Onalaska* defense can be applied to these facts.

Conviction record/Substantial relationship defense: It is undisputed that the complainant's discharge was due, at least in part, to his conviction record. However, a question arises as to whether that record was substantially related to the circumstances of the job.[4] The administrative law judge found that it was, reasoning:

[4] The complainant has argued that the respondent waived the substantial relationship affirmative defense by failing to file an answer. However, failing to raise this defense in an answer does not

Although it was not the Complainant's primary job to work with juveniles under 18 years of age, there were a number of opportunities at the Jefferson Job Center for the Complainant to interact with juveniles. Since there was no Job Service Bureau manager or supervisor in the Jefferson Job Center, there was no one available onsite to closely oversee the complainant's exercise of his discretion in fulfilling his ETS job duties. Without supervision, the Complainant had to be trusted to maintain a professional distance from his clients and any juveniles he met in performing his job duties and to avoid abusing his power and authority in how he interacted with his clients and any juveniles he met in performing his job duties. The complainant would have the opportunity while working at the Jefferson Job Center, if he chose to maneuver a juvenile with whom the complainant had developed some type of relationship to be alone with him and to engage in a sex act.

While there is no evidence that the complainant ever engaged in any sexual conduct with a client or juvenile while he worked for the Respondent, the issue to be considered is whether the complainant would have a greater than normal opportunity to commit the offense of second degree sexual assault of a child while working for the respondent. The respondent was not required to wait to see if the Complainant attempted to commit the crime of second degree sexual assault of a child before terminating the complainant's employment. The substantial relationship test allows an administrative law judge to make the decision that the risk of recidivism in the ETS position is too high to require an employer to have to bear the risk of hiring or retaining the Complainant as an ETS employee. In the present case, the administrative law judge finds that the position as an ETS employee at the Jefferson Job Center provided a greater than normal for the Complainant to once again commit the crime of second degree sexual assault, given the lack of onsite supervision, the Complainant's demonstrated tendencies to stray from a strictly professional relationship with the DWD clients whom he served and the opportunities for the Complainant to have contact, possibly private

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constitute a waiver if the failure was not unfair or prejudicial to the complainant. *See*, *Oehlke v. Moore-O-Matic, Inc.*, ERD Case No. 8401191 (LIRC July 26, 1988)(the purpose of pleading an affirmative defense is to provide notice of that defense and to prevent surprise or other injustice to the other party). The substantial relationship defense, which was hinted at in the discharge letter, came up at the probable cause hearing (the administrative law judge found that it was not adequately developed), and the complainant was aware or should have been aware that it would be an issue at the hearing on the merits. Consequently, there is no reason to believe that the complainant was unprepared to address that defense or that he was prejudiced by the respondent's failure to raise it in an answer.

> contact, with juveniles at the Jefferson Job Center. Therefore, the Respondent met the Respondent's burden to show that the Complainant's conviction record is substantially related to the ETS position the Complainant had at the Jefferson Job Center and the respondent did not violate the WFEA's prohibition against conviction record discrimination when the Respondent terminated the Complainant's employment in May of 2006.

This reasoning is not supported by the facts. Although the administrative law judge states that there were a number of "opportunities" for the complainant to interact with juveniles and to have private contact with them, the record does not indicate that the complainant actually had such opportunities. The complainant's job did not require him to work with minors, nor did it provide him with opportunities for unsupervised contact with minors. As an ETS counselor funded by the WIA, the complainant was assigned to work only with clients ages 21 and over. Individuals ages 14 through 21 who came into the Job Center seeking assistance were referred to an employee who specialized in providing assistance to individuals in that age group. The complainant's only contact with individuals under age 18 was related to providing work permits. This function took only about 15 minutes, and although there was no requirement that a parent be present, the complainant testified without rebuttal that the minors he helped were always accompanied by a parent.

While the record did indicate that school groups sometimes visited the Job Center to obtain information about employment, the school groups were accompanied by chaperones, and the complainant was not responsible for giving presentations to these groups or otherwise interacting with students. The record revealed only a single instance where the complainant assisted a group of high school students, after which he and other WIA employees were notified that, because of their funding source, they were not to provide youth services except with supervisory approval. The complainant did not do so again.[5]

Finally, although the administrative law judge found that children sometimes accompanied their parents to the Job Center and that the complainant might have an opportunity to form relationships with these children, there is no evidence to suggest that these children were ever left unsupervised or that the complainant had occasion to interact with them one on one. Although there was a room for children to play in, the play area was clearly visible from other parts of the Job Center, and children in the play room were required to be accompanied by a responsible adult.

[5] After receiving this notification the complainant did continue to issue work permits to minors, a matter which the respondent contended constituted a violation of his supervisor's directive that he was not to provide "youth services." However, the complainant's supervisor's email, which used the subject line "Tours and Services to Schools," specified only that people working under WIA funding should not do presentations to high school groups, and did not make any reference to work permits.

Given all the above, the commission can see no basis to conclude that the complainant would have had the type of opportunities for repeat criminal behavior that the administrative law judge believed would exist. (Indeed, even the respondent's own witnesses refused to say otherwise: when asked at the hearing whether the job involved enough time to develop inappropriate relationships with someone under age 18, the respondent's human resources director, Jerry Guenther, testified that he did not know.) The facts in this record simply do not permit a conclusion that the job would provide the complainant with any opportunity, to say nothing of a "greater than usual opportunity," to engage in the sexual assault of a child.

The commission's resolution of this matter is consistent with prior decisions in which it rejected a conclusion that a person who is convicted of a crime involving a minor cannot do any job in which he or she might come into contact with minors, no matter how tangentially or peripherally. For example, in *Murphy v. Autozone, Inc.*, ERD Case No. 200003059 (LIRC May 7, 2004), the commission found that there was no substantial relationship between the crime of second degree sexual assault of a child and the job of district sales manager at an auto parts store, explaining:

> The complainant was charged with and ultimately convicted of second degree sexual assault of a child. Wis. Stat. § 948.02(2) provides, as follows, "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 is guilty of a Class C felony." As the administrative law judge indicated in his decision, the use of force is not an element of this crime. Rather, the key element of the crime is sexual contact with a minor, and the character traits revealed by having engaged in the crime are essentially those described by the administrative law judge: 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. While these are certainly reprehensible traits, a question is presented as to whether or not they are substantially related to the complainant's ability to safely perform the job of district manager of an AutoZone. The commission concludes they are not.
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> As district manager, the complainant was responsible for overseeing eight of the respondent's stores in Northern Illinois. Although the complainant had supervisory responsibilities over female employees, none of these employees was under age sixteen, nor was it shown that any were minors. The complainant also had some customer contact but, again, this did not involve juveniles. While one might assume that children occasionally do come into the store, considering the nature of the business it is reasonable to presume that they would be accompanied by their parents or other adults. Given that contact with

> children is the key element of the crime for which the complainant was convicted, it is hard to see how any job not involving contact with minors would lend itself to the opportunity for repetition of the criminal behavior in question.
>
> . . . Indeed, as was noted by the administrative law judge in the *Thorson* case, the sexual assault of a minor is a separate criminal act that involves its own special circumstances and conduct, and is not related to the ability to work with female co-workers.
>
> The respondent does not employ minors, and it concedes that juveniles are not generally present in the store and, to the extent they are on the premises at all, are accompanied by their parents or other adults. Moreover, the crime at issue in this case does not involve child enticement or indecent exposure to children, and there is no reason to presume that the mere proximity of children is a circumstance likely to foster criminal behavior for the complainant. The complainant's crime was perpetrated in a home setting and involved a victim with whom he had a close personal relationship. While a conviction for sexual assault of a minor would clearly be related to the types of jobs in which one would work closely and in a position of trust with minors, a sales manager coming into incidental contact with children at a store has little opportunity to engage in the type of conduct for which the complainant was arrested and convicted and is unlikely to reoffend in that context. . .

Similarly, in *Fink v. Sears Roebock & Co.*, ERD Case No. 200404227 (LIRC March 1, 2007), the commission found no substantial relationship between a conviction for sexual assault of a minor and the job of assistant manager at a Sears automotive store:

> . . . the evidence in the record does not support a conclusion that such a [substantial] relationship exists. The complainant began his employment as a service technician, a job in which he would not generally be expected to come into contact with children. He was then promoted to assistant manager. As an assistant manager the complainant would not have direct contact with children, although it was possible that children would come into the store accompanied by their parents. The complainant's former supervisor, Michael Stych, testified that there was no reason to believe unaccompanied children would be in the store and that the complainant was very unlikely to have contact with children. Mr. Stych allowed that children could be left in a waiting area, but was not asked and did not elaborate on how often this might occur, or where the waiting area was located in

> relation to the complainant's work place and in relation to the children's parents or other customers. There is no evidence to establish that children would actually be left unattended in a waiting area to which the complainant might have access.

By contrast, in *Kaufman v. Consumer's Cooperative Assoc.*, ERD Case No. CR201501637 (LIRC Sept. 28, 2017), the commission found that convictions for possession of child pornography, child sexploitation videos, and first degree sexual assault of a child were substantially related to the job of clerk/cashier at a convenience store where unaccompanied minors were often present, where customers and employees often chatted, and where the complainant sometimes would work alone. The commission concluded that the job in question would present the complainant, a person who had a demonstrated tendency to sexually exploit children and who was untrustworthy around children and put his own desires in front of their welfare, with a greater than usual opportunity to reoffend. In so finding, the commission emphasized the facts that the store was a hangout for children after school and that the complainant would sometimes be the only employee in the store.

The instant case is factually much closer to *Murphy* and *Fink* than to *Kaufman*, and the commission does not believe that the mere presence of children in the Job Center is sufficient to create a substantial relationship between the complainant's conviction and the job.

It must be noted that the respondent did not assert in the discharge letter, at the hearing, or in its post-hearing brief to the administrative law judge that the job gave the complainant an opportunity to sexually assault children. Rather, the respondent has at all times prior to the administrative law judge's decision based its substantial relationship argument on a contention that the complainant was "grooming" young adult males clients for inappropriate relationships. The commission has therefore considered the question of whether it could be found that the complainant's crime was substantially connected to his work with young adult males. The commission concludes it cannot.

As the Wisconsin Supreme Court noted in *County of Milwaukee v. LIRC*, cited above, the intent of the substantial relationship exception is to ensure that employers do not have to "assume risks of repeat conduct by those whose conviction records show them to have the 'propensity' to commit similar crimes," and requires a determination of when "the risk of recidivism becomes too great to ask the citizenry to bear." The court stated:

> 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*.

County of Milwaukee v. LIRC, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987) (emphasis added).

The Court's decision in *Milwaukee County* suggests that the statutory exception was intended to protect employers and the public from repeated, similar, criminal conduct. Even concluding, however, that the definition of substantial relationship can be expanded to encompass *all* crimes, and not merely the same or similar crime to that of which the complainant has been convicted, it is unclear how the negative character traits associated with the complainant's actions in sexually assaulting a child could lead to criminal conduct in the course of performing his duties as an ETS. As the commission noted in *Thorson v. Rockwell International*, ERD Case No. 199404138 (LIRC Aug. 13, 1998), the crime of second degree sexual assault of a child requires that the victim be a minor and, therefore, unable to consent, and the same acts perpetrated upon an adult would not be considered criminal. In *Murphy v. Autozone,* the commission reiterated that analysis, stating:

> . . . [T]he sexual assault of a minor is a separate criminal act that involves its own special circumstances and conduct, and is not related to the ability to work with [adult] female co-workers.

In this case, the complainant's conduct was criminal by virtue of the age of the individual towards whom it was directed. Even concluding that the complainant has shown himself likely to prey on vulnerable people (including adults), there does not seem to be any basis to find that the job provided him with a greater than usual opportunity to engage in criminal conduct. The respondent acknowledged as much in the discharge letter, in which it stated, "While consensual social relationships with men over the age of 18 do not constitute a violation of law, it is strongly against the public interest for Job Center customers to be subject to "grooming" behavior from an Employment and Training Specialist." Although the respondent has expressed concern about the complainant's potential "grooming" of young adult male clients, intimate relationships with those clients would be inappropriate, and possibly unethical, but not criminal. Under the circumstances, it cannot be found that employing the complainant presented a risk of recidivism or repeat criminal conduct such as would warrant a finding that a substantial relationship exists between his conviction record and the job.

Mixed motive

In its brief to the commission the respondent contends that, whether or not it considered the complainant's arrest and conviction records, he would have been discharged for legitimate, nondiscriminatory reasons. The respondent points out

generally that its internal investigation revealed improper use of state resources for the benefit of the complainant's religious enterprise, in disregard for the respondent's IT policy, as well as numerous other IT violations; the complainant exploited the relationships he made with clients at work into his personal ministry, solicited clients to attend his chapel and displayed a sign in his cubicle that read "Father Will's Place," in violation of the public trust; the complainant obtained personal health information from some of his clients for no work-related purpose, in violation of confidentiality rules; and he engaged in gross neglect of job duties. Thus, the respondent contends that it had a "mixed motive" for discharging the complainant. The mixed motive test is applied in cases where:

> . . . an employer has made an employment decision in part due to a prohibited discriminatory reason and in part due to a legitimate business reason. *Hoell v. LIRC*, 186 Wis. 2d 603, 608, 522 N.W.2d 234 (Ct. App. 1994). An employer who has made such an employment decision is liable under the Act, but the remedy may be modified depending upon whether the termination would have taken place in the absence of the impermissible motivating factor. *Under the mixed motive test, if the employer would have made the same employment decision in the absence of the impermissible discriminatory reason, then the complainant should be awarded only a cease and desist order and attorney's fees.* If, however, the employment decision would not have been made in the absence of the prohibited discriminatory reason, the complainant can be awarded all of the remedies ordinarily allowed, such as back pay, reinstatement and attorney's fees.

Miles v. Regency Janitorial Service, ERD Case No. 199803666 (LIRC Sept. 26, 2002) (emphasis added).

While the commission does not find all of the respondent's arguments on this point compelling--for example, although the complainant did not complete the task of updating client records as requested by his supervisor, the commission is not persuaded that this conduct amounted to "gross neglect" of job duties or that the complainant would have been disciplined for this oversight--its review of the record as a whole leads it to believe that the complainant would, in fact, have been discharged even in the absence of any consideration of his arrest or conviction record. The complainant engaged in a long list of rule and policy violations of varying degrees of seriousness. Although some of the rule violations taken on their own would undoubtedly have resulted in some lesser degree of discipline than discharge, the commission finds it credible that the aggregate sum of the complainant's violations was significant enough to convince the respondent that discharge was appropriate. By far the most serious conduct at issue was the complainant's actions with respect to confidential client information. On this point, Jerry Guenther, the respondent's human resources director, who made the

discharge recommendation and helped draft the discharge letter, testified that he was not sure he would have recommended discharge but for that matter. Guenther indicated that he regarded the complainant's actions in requesting confidential medical information for individuals who were not actually his clients or that was not related to any of the services that were being provided for the clients, and then leaving that confidential information out on his desk to be a very serious offense and a violation of the public trust.[6] The commission agrees, and it believes that the complainant's actions in this regard were serious enough to warrant discharge.

In his brief the complainant argues, without further elaboration, that other employees committed serious rule violations and received lesser discipline. Although the complainant did not provide any examples to support this argument, the commission nonetheless reviewed the comparative disciplinary information the complainant submitted at the hearing in order to determine how other employees were treated under similar circumstances. While it appears that other employees did engage in fairly serious rule violations, including violations of the respondent's IT rules, without being discharged, none of the employees breached the confidentiality of their clients as the complainant did, nor did any of them engage in the aggregate amount of rule violations that the complainant engaged in. On this point, Guenther testified that he did consider how other employees were treated with respect to discipline, but that the complainant's case was different than that of other employees because it involved so many types of conduct rolled together. While much of the complainant's objectionable conduct does not appear to be conduct that would warrant discharge when standing alone, his entire course of conduct, and particularly his actions with respect to client confidentiality, was serious enough to justify a discharge, even in the absence of any consideration of his conviction record.

In his petition the complainant also makes an argument that, had it not been for his arrest and conviction record, the respondent would never have embarked on the investigation that unearthed the information it relied upon to discharge him and that, therefore, the entire investigation is tainted with discrimination. The complainant's contention that damaging information revealed during an

[6] The complainant insists that he was trained to collect information and releases from both prospective and enrolled clients. However, the training materials supplied by the complainant at the hearing do not specify that he should obtain the type of information he did; at most, they suggest that a medical release might be appropriate on a case-by-case basis. Further, Guenther testified that he considered whether the complainant should have known that what he was doing was wrong, and that he received information from Pasholk indicating that the complainant received training and confirming that he knew what was expected of him with respect to confidential materials. When asked about the matter by the respondent at one of the pre-discharge meetings, the complainant did not contradict this and did not inform the respondent that he believed his actions were consistent with his training.

investigation that is undertaken with a discriminatory motive must be disregarded fails for two reasons. First, the argument assumes that the investigation itself was discriminatory. However, the respondent was entitled to engage in an investigation when it learned about the complainant's criminal background in order to make a determination as to whether that background was related to the job. Second, even if it could be found that the investigation was in and of itself an act of discrimination, as the complainant maintains, once the respondent discovered behavior by the complainant that warranted discharge, it could not reasonably be expected to disregard that behavior and retain an employee who would otherwise have been terminated for misconduct. *See*, *Kraemer v. County of Milwaukee*, ERD Case No. CR200800323 (LIRC Oct. 11, 2012), aff'd sub. nom *Kraemer v. LIRC*, (Milwaukee Co. Cir. Ct., Aug. 13, 2013), aff'd *Kraemer v. LIRC and Milwaukee County*, No. 2013AP2030 (Wis. Ct. App. May 20, 2014)(unpublished).

Attorney's fees

The complainant has requested a total of $460,840.75 in fees and costs for litigating this matter, beginning in July of 2006, when the complainant first contacted his attorney, and ending in December of 2018, when the complainant's attorneys submitted their fee statement to the commission. The fee request encompasses work by three attorneys, a law clerk, and a paralegal, including extensive discovery, research and preparation for two week-long hearings, post-hearing briefing, and an appeal to the commission of two separate administrative law judge decisions.

Complainant's entitlement to attorney fees against the State of Wisconsin: In its response to the complainant's fee petition the respondent argues that, due to sovereign immunity, the complainant cannot recover attorney's fees from the State. The respondent cites to a commission decision in support of this proposition, *Blunt v. State of WI DOC*, ERD Case No. CR200302691 (LIRC Feb. 4, 2005). In *Blunt*, which relied on a prior Wisconsin Supreme Court decision holding that attorney's fees and costs may not be taxed against the State without express statutory authority, *Wisconsin Dept. of Transportation v. Wisconsin Personnel Commission*, 176 Wis. 2d 731, 500 N.W.2d 664 (1993), the commission concluded that there was no authority for the commission to order a state agency to pay attorney's fees to a prevailing complainant.

However, subsequent to the commission's decision in *Blunt*, it has become settled law that, in fact, the State is liable for attorney's fees to prevailing complainants in equal rights cases. *See*, Rose Ann Wasserman, *A Guide to Wisconsin Employment Discrimination Law* (6th ed. 2016), § 7.21. Indeed, the matter was put to rest in *Wis. DOC v. LIRC and Suttle*, No. 09-CV-2988, No. 09-CV-3051 (Wis. Cir. Ct. Dane Cnty. May 14, 2010), in which the commission reversed its position on the payment of attorney's fees in cases involving the State, and the court agreed that such payments were recoverable as part of the "make whole" remedies authorized by the Act. *See*, *Watkins v. LIRC*, 117 Wis. 2d 753, 764 (1983). In *Suttle*, the court

distinguished *Wisconsin Dept. of Transportation v. Personnel Commission*, which dealt with costs related to a discovery dispute and not with "make whole" remedies under the Act, and, citing to a more recent Supreme Court decision, *German v. Wisconsin DOT*, 235 Wis. 2d 576, 589 (2000), noted that since state agencies are expressly included in the definition of "employer" under Wis. Stat. § 111.32(6), their sovereign immunity against liability under the Act has been waived. The State did not appeal that decision.

Since *Suttle* was decided, the commission has awarded attorney's fees against a state agency in at least one case, and it has done so without any opposition from the Wisconsin Department of Justice, which represented the respondent in that matter. *See*, *Anchor v. State of WI*, ERD Case No. CR200501702 (LIRC Jan. 4, 2012)(parties stipulated to the payment of attorney's fees by the agency to the prevailing complainant's attorney). In light of that precedent, and considering the decision in *Suttle*, the commission rejects the respondent's argument that sovereign immunity is a bar to the payment of attorney's fees by the State to a successful litigant under the Act, and it will award the complainant attorney's fees in this matter.

Reasonable hourly rates: In calculating reasonable attorney fees, the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This figure is commonly referred to as the "lodestar" figure. *Hensley v. Eckerhardt*, 461 U.S. 424, 31 FEP Cases 1169 (1983). A reasonable hourly rate is calculated according to the prevailing market rates in the relevant community. It is anticipated that, along with the fee petition, the attorney requesting payment will submit affidavits from other attorneys in the locality establishing that the requested rates are in line with those prevailing in the community for similar services for lawyers of comparable skill, experience and reputation. An hourly rate determined based on such affidavits is normally deemed to be reasonable. *Roytek v. Hutchinson Technology*, ERD Case No. 199903917 (LIRC Feb. 15, 2005).

The complainant has two attorneys, Timothy Scheffler and Sally Stix.[7] Both are based in Madison. Attorney Scheffler, who did most of the work in this matter, billed at $375 an hour. Attorney Stix, who had only a limited involvement in the case, billed at $500 an hour. In addition, services performed by a law clerk and paralegal were billed at $100 an hour. Attorney Stix submitted an affidavit indicating, among other things, that she has been a licensed attorney since 1979, has practiced law in Wisconsin since 1993, and has experience litigating before the Division and the United States Equal Employment Opportunity Commission. Attorney Scheffler submitted an affidavit stating that he has practiced law since 2002 and that his practice has been almost exclusively representing employees in labor and employment matters. The complainant's attorneys provided a supporting

[7] A third attorney, Attorney Andrea Sumpter, provided very limited services with respect to this matter. Her services were billed at the rate of $100 an hour.

affidavit from a Madison attorney with extensive experience in the area of employment law, who indicates that his own billing rates are higher than those charged by Attorneys Stix and Scheffler and that he considers their requested hourly rates to be reasonable. In his affidavit the attorney also indicated that his standard hourly charge for his paralegal and law clerks is $180 an hour, again higher than that charged by the complainant's attorneys.

The hourly rates requested for Attorneys Stix and Scheffler, although at the higher end of what is generally awarded by the commission in similar cases, do not appear to be unreasonable for attorneys with their level of experience practicing in Madison in 2018. As noted above, the fee request is supported by the affidavit of an attorney practicing in the same locality and in the same field, providing further evidence of reasonableness. Finally, and perhaps most significantly, the respondent's attorneys, who have reviewed the fee request closely and have made numerous specific objections to items contained therein, have not opposed the hourly fee request, apparently conceding its reasonableness.

In considering the question of what the appropriate hourly rate at which to calculate the fees in this matter should be, the commission notes that the complainant's attorneys have requested the same hourly rate throughout the entire duration of this lengthy litigation. An argument could certainly be made that the hourly fees that are deemed reasonable in 2018 would not have been considered reasonable when this litigation began in 2006. However, the respondent has been given an opportunity to object to the complainant's fee request, but has not made this argument and has raised no challenge to the hourly rates proposed by the complainant's attorneys at any point in the process. Moreover, the commission recognizes that it may be appropriate to award more recent hourly rates to work performed earlier as a way of compensating the complainant's attorneys for the delay in receiving compensation. *See*, *Olson v. Phillips Plating,* ERD Case No. 8630829 (LIRC Feb. 11, 1992); *Watkins v. Milwaukee County*, ERD Case No. 7200640 (LIRC July 3, 1985)(awarding interest on the money the complainant paid in legal fees). Under all the circumstances, the commission is satisfied that the current hourly rate may reasonably be applied to the entire litigation.

Hours reasonably expended: The respondent points out that the complainant's attorney fee request includes some items that are not related to the litigation before the Division and that cannot be reimbursed in conjunction with this matter. First, there are several entries on Attorney Stix and Scheffler's billing statements that relate to a union arbitration. That matter may pertain to the termination, but is not relevant to the complainant's equal rights complaint, and the respondent is not required to pay those fees as part of this proceeding. Removing the time spent on union arbitration activities reduces the entire billing statement by $887.50. In addition, the respondent points out that the complainant's list of costs includes two meals, for a total of $22.99, for which the complainant's attorney cannot expect to be

reimbursed. Those items, totaling $910.49, will be deducted from the award of attorney's fees and costs.

Time spent on unsuccessful claims: In its brief to the commission the respondent argues that the time the complainant spent on his unsuccessful creed and sexual orientation claims should be disallowed. The respondent maintains that the complainant's various claims did not involve a similar core of facts and that litigating the creed and sexual orientation claims added to the litigation as a whole. It contends, therefore, that the commission should deny payment for those items on the complainant's billing statement that were specifically shown to relate to his creed and sexual orientation claims. The respondent further suggests that, because other items are general and not claim-specific, it would be "fair" to cut the remaining amount in half.

While the commission does generally reduce the fee award to reflect partial success --*see, for example, Harper v. Menard Inc.*, ERD Case No. CR200602401 (LIRC Sept. 18, 2009)(complainant awarded two-thirds of requested fees where she prevailed on her sexual harassment claim, but not on her discharge claim), *Foust v. City of Oshkosh Police Department*, ERD Case No. 9200216 (LIRC April 9, 1998)(complainant awarded 40 percent of her requested fees where she alleged that she was denied two promotions but prevailed only on the least significant of the two claims)--a partial success reduction is not usually applied in cases where the complainant contends that he or she was discriminated against on multiple bases but only establishes discrimination on a single basis. "Where Plaintiff has obtained excellent results the fee award should not be reduced simply because the Plaintiff failed to prevail on every contention raised in the lawsuit." *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 70 (Ct. App. 1991). In *Nunn v. Dollar General*, ERD Case No. CR200402731 (LIRC March 14, 2008), the commission held that the fact the complainant established that she was discriminated against based on her arrest record but not on her race did not weaken the success of her case and had no effect on her entitlement to a remedy. In reaching that conclusion, the commission noted that the addition of several potential bases for discrimination does not generally add much time to the overall litigation.

In this case, the respondent maintains that the complainant's various claims (discrimination based upon creed, sexual orientation, and arrest/conviction record) did not involve a similar core of facts and that litigating the creed and sexual orientation claims added to the litigation as a whole. However, the essential facts--the facts surrounding the job duties and work rules, French's investigation of the complainant's hard drive, Pasholk's investigation of his work station, followed by pre-disciplinary meetings and discharge--are basically the same under any of the theories of discrimination. It is hard to say that litigating alternate bases of discrimination added a significant amount of time to the preparation of the case as a whole. The commission also notes that the respondent's request for an across-the-board fee reduction of 50% does not take into account the fact that a large portion of

this litigation, most notably the hearing on the merits that was held before ALJ DeLao, concerned only the matters of arrest and conviction record discrimination, upon which the complainant has prevailed.

The respondent also argues that the time the complainant spent arguing the motion to disqualify should not be compensated because he was unsuccessful. The commission does not review each file to ensure that payment is ordered only for those arguments and motions that are found to be persuasive. Indeed, it stands to reason that, in the course of an otherwise successful claim, not every argument will prevail. Where, as here, the complainant made a reasonable request that the hearing be held before an administrative law judge from a different agency, the fact that the department denied that request does not mean that the complainant is not entitled to compensation for the time spent making it. The respondent's request to deny fees associated with the motion to disqualify is, therefore, denied.

Fee reduction for mixed motive: While, as noted above, the commission does not generally reduce attorney fees to reflect a failure to establish discrimination on multiple bases, the commission will reduce fees when the complainant has prevailed on only some of the substantive issues raised (i.e., has achieved only partial success). With respect to "mixed motive" cases, the commission traditionally orders less than full attorney's fees to reflect the fact that the complainant has achieved only partial success with respect to his successful claim. In this case, the complainant requested reinstatement and back pay related to his unlawful discharge, but received only a cease and desist order. While he succeeded in proving discrimination, and therefore is entitled to attorney's fees, a reduction in the fee award is appropriate where the complainant failed to achieve the relief he sought.

In *Kraemer v. County of Milwaukee*, ERD Case No. C4200800323 (LIRC Oct. 11, 2012), the commission discussed how to determine fees in mixed motive cases:

> In previous cases in which the commission has found that an employer had a mixed motive for discharging an employee, it reduced the total fee award by anywhere from 10% to two-thirds. See, for example, *Holman v. Empire Bucket & Mfg. Inc.*, ERD Case No. CR200101703 (LIRC Aug. 15, 2003)(fees reduced by 10% where the respondent demonstrated a legitimate motive for discharge, but the complainant succeeded in proving his main contention that a retaliatory animus played a role in his selection for layoff); *Miles v. Regency Janitorial Service*, ERD Case No. 199803666 (LIRC Sept. 26, 2002)(fees reduced 50%, commission noted that to the extent it may be appropriate to consider the unsatisfactory actions of the employee in influencing the termination decision, there was no proven unsatisfactory conduct on the part of the complainant which justified the action taken by the respondent); *Odya v. Captain Install, Inc.*, ERD Case No. 199705081

(LIRC May 19, 2000)(fees reduced 50%); *Jones v. Dy-Dee Wash*, ERD Case Nos. 8551495 and 8551752 (LIRC Nov. 4, 1988)(fee request cut by two-thirds).

In *Kraemer*, the commission decided to reduce the portion of the attorney fees attributable to the discharge issue by 25% based upon the complainant's partial success. The commission reasoned that, although the respondent had a legitimate reason for the discharge, the complainant nonetheless achieved significant success in establishing the unlawful motivation behind the discharge. Moreover, while the respondent established that it would have terminated the complainant's employment absent the impermissible discriminatory reason, due to an honest belief that the complainant violated its Use of Technologies Policy, it was not persuasively proven that the complainant actually engaged in conduct that violated the policy. Thus, the commission considered it appropriate to impose a lesser fee reduction than it had in some other cases.

In the instant case, by contrast, there is no doubt that the complainant engaged in conduct that contributed to the respondent's decision to terminate his employment. Consequently, a larger reduction than that ordered in *Kraemer* is justified. The question, then, is how large a reduction should be imposed. The respondent suggests that a 70% reduction in fees would be appropriate. The respondent bases that request on the commission's decision in *Swanson v. County of Chippewa*, ERD Case No. CR200304106 (LIRC May 11, 2007), in which the commission awarded only 30% of the total fees requested. However, in *Swanson*--which was not a mixed motive case--the complainant failed to establish that she was constructively discharged, the most significant portion of her complaint, and prevailed only on her claim that the respondent retaliated against her by giving her a negative performance review. The complainant succeeded on only a narrow portion of her case, and the commission concluded that, had Swanson only litigated the retaliation issue, the entire litigation would have been greatly reduced. The same logic does not apply here. The complainant in this case successfully demonstrated a discriminatory discharge, the most significant aspect of his complaint, and the time spent litigating the matter would not have been significantly reduced had he focused on only one issue or basis for discrimination. The commission, therefore, does not find the reasoning in *Swanson* to be applicable to the complainant's situation.

There is no precise formula that enables the commission to determine the appropriate fee reduction in any given case. However, based upon its prior experience, and considering all the unique facts and circumstances of this case, the commission concludes that a 60% fee reduction would be appropriate here. Although the complainant prevailed on the most significant aspect of his complaint, the discriminatory discharge, thereby entitling him to the payment of attorney's fees, the fact that the respondent proved it also had a non-discriminatory motive for

discharging him meant that the complainant was not awarded reinstatement or back pay, reducing the value of his success considerably. Unlike the situation in *Kraemer*, in which the respondent believed the complainant had violated a work rule but did not establish that he actually engaged in misconduct, the complainant in this case engaged in proven unsatisfactory conduct that warranted discharge even in the absence of any discriminatory motivation. Given all the circumstances, the commission concludes that it is appropriate to reduce the complainant's total attorney fee request (after reductions for the time related to the complainant's union arbitration and non-compensable meals) by 60% to account for his partial success. This results in a total award of $183,972.10 in compensable attorney's fees and costs.

GEORGIA E. MAXWELL, Chairperson (dissenting):

I join the majority's decision except for its (i) finding that respondent discriminated against the complainant based upon his arrest and conviction records (Conclusion of Law No. 2), and (ii) analysis in the section entitled "Discrimination based on arrest and conviction record."

Complainant, a defrocked Episcopalian priest, had a sexual relationship with a young male parishioner he had been mentoring. That relationship led to his 1989 conviction for the crime of sexual contact with a minor under Wis. Stat. § 940.225(2)(e). Among other things, the complainant was placed on the sex offender registry. Unaware of this conviction, the Department of Workforce Development (the "Department") hired Complainant as an employment training specialist ("ETS") for its Job Service bureau in 2004. In this role, Complainant was required to counsel out-of-work individuals who were attempting to enter or reenter the workforce. After learning of this prior conviction, apparently brought to the Department's attention due to his 2006 arrest for failing to update his address in the sex offender registry and his continued holding himself out as a priest (albeit now as a minister of the "Independent Catholic" church under the alias of "Father Abbot Joseph"), the Department terminated Complainant's employment.

The majority opinion finds that there was no substantial relationship between his conviction record and Complainant's role as an ETS, concluding that there was no realistic possibility of ***criminal recidivism*** in the new role. While I agree with the majority's conclusion that there was no real likelihood of complainant repeating his crimes in his role as an ETS (largely due to his lack of access to unsupervised minors), I have previously written about what I believe is the majority's erroneous application of the substantial relationship test. *See* *Palmer v. Cree, Inc.*, ERD Case No. CR201502651 (LIRC Dec. 3, 2018, Maxwell, concurring). As I stated in *Palmer*,

I would find 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 those foreseeable shortcomings might not rise to the level of ***criminal*** misbehavior.

Applying what I believe to be the proper analysis to the case before us, the crime for which the complainant was convicted demonstrates a propensity to neglect or cultivate an inappropriate personal relationship with those he was charged with serving, in particular young men.[8] Complainant's ETS position at Job Service likewise involved the exercise of substantial responsibility for the life and welfare of an at-risk population displaced from and seeking to reenter the workforce; many of these clients have cognitive or emotional disabilities. The substantial relationship – both in terms of opportunity and consequence – between the abuse of trust that the complainant exhibited as a priest and the expectations of complainant's ETS role are common-sensical, if not self-evident. And notwithstanding the language from *County of Milwaukee* relied on by the majority, it seems impossible to square the majority's application of the substantial relationship test in this matter to the Court's ultimate holding in that case. In fact, the following language from *County of Milwaukee* – which notably does not cite any risk of ***criminal*** recidivism – could have been written to apply to this very case:

> The [employer] argues that the "circumstances" of the offense and the job are similar since in both contexts [the complainant] was in a position of exercising enormous responsibility for the safety, health, and life of a vulnerable, dependent segment of the population. The [crimes for which the complainant was convicted] indicate a pattern of neglect of duty for the welfare of people unable to protect themselves. The propensities and personal qualities exhibited are manifestly inconsistent with the expectations of responsibility associated with the job. We agree with the [employer's] analysis.

County of Milwaukee, 139 Wis. 2d at 828, 407 N.W.2d at 928. I struggle to see how we can conclude differently in this case and, for that reason, dissent from the

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[8] As Commissioner Flynn noted in dissent in one of the cases cited by the majority, *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), the majority's fixation on the "elements" of the crime, and therefore the particular ages of the past and potentially future victims, is inconsistent with the language of the statute (comparing the "circumstances" – not elements – of the crime with the circumstances of the job) or the Wisconsin Supreme Court's directive to take a common sense and practical approach to applying the substantial relationship test. *See County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 826, 407 N.W.2d 908, 917 (1987); *Law Enforcement Stds. Bd. v. Lyndon Station,* 101 Wis. 2d 472, 492, 305 N.W.2d 89, 99 (1981). This case cannot and should not turn on the arbitrary distinction that the victims of his crime were minors while the young clients he may foreseeably neglect and/or take advantage of in his work as an ETS could be only slightly older than the age of majority.

majority's reasoning and its conclusion that the Department unlawfully discriminated against complainant on the basis of his criminal record.[9]

Indeed, this case should serve as a cautionary tale as to the unsoundness of the majority's application of the substantial relationship test. According to the majority, had the Department known of complainant's 1989 conviction when he applied, it would have nevertheless been obliged to hire him because the conviction was not substantially related to his job as an ETS in that it did not provide him a realistic possibility of repeating his ***criminal*** activity of sexual contact with a minor. But as the majority's opinion also acknowledges, it was appropriate for the Department to terminate his employment for the misconduct that it discovered upon investigation of his behavior after learning of his conviction, even though much of that misconduct was fully foreseeable given the earlier conviction. In light of that conviction, no one should be surprised that, for example, he took clients out and brought them home for dinner; cultivated inappropriate relationships with his clients in which they called him "Pappa," leveraging his status as a "priest in the Independent Catholic Church"; downloaded pictures and videos of young men on his work computer; touched the face of a client (a young man) because "he liked him very much" and was "fascinated by the client's tattoos"; and trolled his clients', former clients' and others' criminal, medical and psychiatric information for no business purpose. (Findings of Fact ¶¶ 3, 20, 22-25, 28) Yet that is what the majority's application of the substantial relationship requires – the employer ***must*** hire an individual notwithstanding his or her earlier conviction, even though it can fairly anticipate future misconduct, where that foreseeable misconduct is not criminal. Any rule that requires an employer to hire someone, aware that the individual's future behavior will likely be inconsistent with the reasonable expectations of the position, and then wait for the predictable – perhaps even inevitable – failures to actually manifest themselves needs to be rethought.

For the foregoing reasons, I would affirm the ALJs' ultimate decisions and dismiss the complaint in its entirety.

/s/_____
Georgia E. Maxwell, Chairperson

[9] Although I agree with the majority that the Department considered complainant's 1989 conviction when it discharged him, I do not agree that the 2006 arrest was a motivating factor in his discharge. While I acknowledge passing reference to the arrest record in the Department's termination letter, that letter – as well as the record as a whole – makes clear that (i) the 2006 arrest was but a gateway into the 1989 conviction that it did rely upon in terminating complainant's employment, rather than a separate consideration for the termination, and (ii) the Department's consideration of the facts that led to his 2006 arrest was based on its own investigation – which included certain admissions by Complainant – that he had engaged in the underlying conduct (among other things, holding himself out to his clients and others under the fictitious names "Father Abbott Joseph" or "Father Joseph"). In that regard, the majority errs in its analysis under *City of Onalaska v. LIRC*, 120 Wis.2d 363, 354 N.W.2d 223 (Ct. App. 1984).

NOTE: The commission did not confer with the administrative law judge who held the merits hearing about her impressions of the demeanor of the witnesses. To the extent that the commission reverses that decision, it does so as a matter of law and not based upon a differing assessment of witness credibility.

cc: Timothy M. Scheffler
Rachel L. Bachhuber