State of Wisconsin
Labor and Industry Review Commission

Michael D. Immel Complainant **Arbor Vitae Woodruff School District** 11065 Old Highway 51 N. Woodruff, WI 54568-9721 Respondent ERD Case No.CR201501501	**Fair Employment Decision**[1] **Dated and Mailed:** June 27, 2019

The decision of the administrative law judge is **affirmed**, subject to **modification.** Accordingly, the complainant's complaint of discrimination is dismissed.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

Procedural History

The complaint in this matter alleges discrimination in employment based on arrest and conviction record. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision dismissing the complaint, concluding that the complainant had not shown

[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.

discrimination by a preponderance of the evidence. The complainant filed a timely petition for commission review.

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 agrees with the decision of the administrative law judge and adopts the findings and conclusions as its own, except that it makes the following:

Modifications

1. In paragraph 27 of the Findings of Fact, the phrase "that other women had obtained restraining orders against the Complainant" is deleted, and the following is inserted in its place:

   > "that other women had brought actions for restraining orders against the Complainant."

2. In paragraph 29 of the Findings of Fact, the phrase "the restraining orders against the Complainant" is deleted and the following is inserted in its place:

   > "the number of actions for restraining orders against the Complainant."

3. Paragraph 47 of the Findings of Fact is deleted, and the following is inserted in its place:

   > The Respondent decided not to hire the Complainant because it believed that the Complainant was not truthful when Fortier asked him at the conclusion of their telephone conversation whether he had anything else he needed to tell him."

4. Page 10 of the decision, except for the third paragraph, is deleted.

Memorandum Opinion

In March 2015 the complainant, Michael Immel, applied to the Arbor Vitae Woodruff School District, the respondent, for the position of Director of Special Education. He was offered a job contingent on a background check. After the background check the offer was rescinded. The complainant alleged that the respondent had refused to hire him because of his arrest and/or conviction record, in violation of the WFEA.

Scope of Protected Class

Part of a complainant's *prima facie* case of discrimination on the basis of arrest record and conviction record is proof that the complainant was a member of the protected class, that is, that he had an arrest and conviction record. *Zunker v. RTS Distributors*,

ERD Case No. CR201004089 (LIRC June 16, 2014). It is undisputed that the complainant had an arrest and conviction record,[2] but an unusual argument between the parties arose over the scope of that record. The complainant urged the ALJ to rule that in addition to his record of arrests and convictions for several misdemeanors, the complainant's arrest and conviction record ought to also include *all the civil actions* brought against him for temporary restraining orders (TROs). There appear to be seven of these.

1. A petition for a domestic abuse TRO filed by Korrine Koch (O'Malley) on February 8, 1996, granted on February 15, 1996, Lincoln County Case No. 1996CV000029:

2. A petition for a harassment restraining order filed by Jeanne Jacobus on July 22, 1997, granted on July 30, 1997, Marathon County Case No. 1997CV000399;

3. A petition for a harassment restraining order filed by Jaynne Jacobus on July 23, 1997, dismissed on July 30, 1997, Marathon County Case No. 1997CV000402;

4. A petition for a domestic abuse TRO filed by Jaynne L. Jacobus on July 24, 1997, granted on July 30, 1997, Marathon County Case No. 1997CV00400;

5. A petition for a domestic abuse TRO filed by Charity Hoff on April 7, 1999, dismissed on May 3, 1999, Marathon County Case No. 1997CV000197;

6. A petition for a harassment TRO filed by Coreen Hebert on March 24, 2000, dismissed on April 4, 2000, Marathon County Case No. 2000CV000177; and

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[2] As noted by the ALJ (Findings of Fact 36 and 37), the complainant was arrested for:

- Violating a domestic abuse restraining order in Lincoln County in February 1996
- Disorderly conduct in Marathon County in March 1997
- Violating a harassment restraining order in Marathon County in August 1997
- Violating a harassment restraining order in Marathon County in November 1997
- Bail jumping in Marathon County in November 1997
- Speeding in marathon County in June 2013

The complainant was convicted of:

- Violating a domestic abuse restraining order in Lincoln County in October 1996, a misdemeanor U
- Disorderly conduct in Marathon County in September 1997, a forfeiture U
- Two counts of violating a harassment restraining order in Marathon County in May 1999, a misdemeanor U
- Speeding in Marathon County in July 2013, a forfeiture U

7. A petition for a domestic abuse TRO filed by Charity Hoff on May 3, 2001, dismissed on May 10, 2001, Eau Claire County Case No. 2001CV000225.

The definitions of arrest record and conviction record in the WFEA read as follows:

> "Arrest record" includes, but is not limited to, information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor *or other offense pursuant to any law enforcement or military authority*.
>
> "Conviction record" includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor *or other offense*, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled *pursuant to any law enforcement or military authority*.

Wis. Stat. § 11.31(1) and (3). (Emphasis added).

The complainant's argument is that an action seeking a harassment or domestic abuse TRO is an action for an "other offense pursuant to any law enforcement…authority."

The ALJ rejected the complainant's argument, as does the commission. Actions brought for domestic restraining orders are not pursuant to any law enforcement or military authority. They involve one individual suing another to obtain private relief. The complainant points to the fact that if a restraining order is issued the clerk of court shall notify the sheriff or other law enforcement agency of that fact, and law enforcement will have the authority to arrest the respondent if probable cause exists to believe he has violated the order. The very fact that the law enforcement agency's power to arrest arises *after* the restraining order has issued demonstrates that the TRO itself is not obtained *pursuant* to a law enforcement authority. The phrase "pursuant to any law enforcement authority" is interpreted to mean that whatever action is taken against an individual (questioning, apprehending, prosecuting, convicting, etc.), civil or criminal, must have been pursued *by* a governmental agency (local, state, federal) *carrying out its authority to enforce some law*, not by one individual against another seeking a private remedy.

The complainant also argues that he should be afforded the protection of the WFEA with respect to the respondent's alleged *perception* that the civil restraining order

actions were arrests or convictions. The commission does not accept this argument. Nothing in the wording of the WFEA indicates that an employer's perception that a person has an arrest or conviction record is equivalent to that person's actually having one. The absence of express wording about a perceived arrest or conviction record is persuasive evidence that the legislature did not intend to create such a protected category, considering that in the protected category of disability the WFEA *does* extend protections to one who is perceived to be disabled, by expressly including perceived disability in the definition of the protected class. The fact that no such express inclusion exists for an individual with an arrest or conviction record indicates that no such inclusion was intended.

The complainant pointed to the case of *Miles v. Regency Janitorial Service*, ERD Case No. 199803666 (LIRC Sep. 26, 2002), rev'd on other grounds sub. nom. *Regency Janitorial Service v. LIRC* (Milwaukee Co. Cir. Ct. 03/12/02) for the proposition that an individual can be considered to have a conviction record based on the employer's belief that he has been convicted, independent of proof that he actually has. While *Miles* is open to that interpretation, it is clear from the decision that the commission's mention of the employer's belief that the employee in *Miles* had a conviction record addressed the employer's defense that the employee had falsified his employment application; it did not serve the purpose of proving that the employee had a conviction record. Finally, even if an individual could come within the protection of the WFEA by being perceived to have an arrest or conviction record, there is nothing in the evidence in this case to support the finding that the employer perceived any of the civil actions for temporary restraining orders to be arrests or convictions.

Employer's motivation

The complainant's insistence that the TRO actions against him were part of his arrest and conviction record was a function of his acceptance of the idea that the respondent had rejected his application at least in part because of the multiple TRO actions. The evidence bears out the respondent's motivation. The primary decision-makers, Superintendent Jocelyn Smith and school principal Rich Fortier, discovered the TRO actions while viewing the complainant's CCAP data online, which, of course, listed civil as well as criminal court actions. Smith testified that while scrolling through CCAP, they kept seeing, apparently with growing alarm, "more and more names." (Summary of Proceedings, p. 8). Fortier testified that "[o]ut of all the men I know in my life, I cannot think of one guy who has two TROs, much less six brought against him." (Summary of Proceedings, p. 15). Clearly, Smith and Fortier were distressed by the number of TRO actions brought against the complainant, and that distress in part led them to rescind the job offer. The ALJ was correct in finding as a matter of fact that the School District decided not to hire the complainant in part because of the civil restraining orders individuals had sought and, in some cases, had obtained against him. (Finding of Fact No. 46). While one might argue the fairness of rejecting an applicant based on the number of domestic restraining orders sought against him,

especially considering that at least half of the actions were dismissed after the TRO hearing, the employer's honest reliance on that basis was not discrimination because of a protected category under the WFEA, and therefore not illegal. An honest belief in a nondiscriminatory reason, even if the reason is foolish or trivial or baseless, is a good defense. *Hartley v. Wisconsin Bell, Inc.,* 124 F.3d 887, 890 (7th Cir. 1997) citing *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 373 (7th Cir. 1992).

The commission still must address the question of whether the respondent rejected the complainant's application in part because of his actual arrest or conviction record, set out in footnote 2 above. The respondent argued that the complainant, in his written application, had given a false answer to a question about his convictions, and that this served as a reason to reject his application.

The complainant applied online through the Wisconsin Education Career Access Network (WECAN). The application contained the following questions regarding arrests and convictions:

> *Have you ever pled guilty, or no contest/nolo contendere, to or been convicted of an ordinance violation (other than minor traffic violations), misdemeanor, or felony?*
>
> *Do you have any pending criminal charges?*
>
> *If you answered yes to either of the above, please explain. Include date(s), location of court, nature and place of charge or conviction and disposition of the case.*

The complainant truthfully answered no to the question of whether he had any pending criminal charges. He acknowledged that he had been convicted, and added:

> In 1997 I pled no contest to violating a domestic violation [sic] of a restraining order, a class u misdemeanor in Marathon County. Related to this violation was a county disorderly conduct. These events were the result of a domestic issue.

This answer was not accurate or complete. He correctly reported a misdemeanor disorderly conduct conviction in Marathon County in 1997, but incorrectly reported a single conviction for violating a restraining order in Marathon County in 1997; in fact, there was a Marathon County misdemeanor conviction for *two* counts of violating a restraining order, and the conviction occurred in *1999*, not 1997 (the *filing* of the charge was in 1997, but he pleaded not guilty at that time, and did not change his plea to guilty until 1999). In addition, the complainant failed to report a 1996 misdemeanor conviction in Lincoln County for violating a domestic abuse order. Finally, he failed to report a speeding forfeiture in 2013, but he may have legitimately

believed that such a conviction did not need to be reported, since the question excluded "minor traffic violations."

After reviewing the evidence, the commission does not believe that the discrepancies between the complainant's actual conviction record and his statement on the WECAN application were determining factors in the respondent's rejection of his application. The respondent made no argument that it was motivated by the complainant's failure to report his speeding ticket, or that it cared (or even knew) that the complainant's misdemeanor conviction in Marathon County for violating the harassment TRO involved two counts rather than one, or that the conviction occurred in 1999, not 1997.

The most serious inaccuracy in the complainant's WECAN statement was his failure to make any mention of the 1996 misdemeanor in Lincoln County. That case involved Korrine Koch. The complainant's troubles with Koch were a subject discussed in a telephone conversation between the complainant and Rich Fortier, the school principal, following up on the respondent's initial review of the complainant's CCAP records. In that telephone conversation, Fortier learned from the complainant that Koch was the mother of his twin boys, and that Koch had obtained a restraining order against him that resulted in his separation from the twins. The complainant told Fortier that Koch "kept the boys from me" and that he "didn't deal with that well." Apparently, his failure to "deal with it well" involved violating the restraining order in some way, leading to his conviction of a misdemeanor.

Fortier testified that by the end of his telephone conversation with the complainant he believed the complainant had been forthcoming in answering his questions about Korrine Koch. The complainant's failure to mention in his WECAN statement the misdemeanor involving Koch, then, seems to have been cured by the telephone interview. The commission, in view of the above, has deleted the ALJ's Finding of Fact No. 47, that the respondent's decision not to hire the complainant was motivated by his failure to disclose his entire conviction record on his WECAN application.

The evidence, however, does support a finding that the respondent's rejection of the complainant's application was motivated in part by a perception of the complainant's untruthfulness—this perceived untruthfulness, however, had to do with the failure to fully disclose the complainant's TRO actions, not his failure to fully disclose his arrest and conviction record. The evidence shows that after the employment offer was made, Smith, the School District superintendent, directed her assistant, Laurie Bybee, to check CCAP. Bybee reported temporary restraining order actions involving "two Coreens." (Summary of Proceedings, p. 5). (This would have been Korrine Koch and Coreen Hebert.) Smith then asked Fortier to call the complainant and question him about the "Coreens." (Summary of Proceedings, p. 11). Fortier did so.

The conversation about Korrine Koch is described above. With respect to Coreen Hebert, Fortier learned that Hebert was the complainant's current wife, and that she

had sought the TRO when they were dating; that a dispute between them arose concerning whether she had stolen his golf clubs; that there was no abusive or threatening behavior by the complainant; and that the petition for the TRO was dismissed. Fortier essentially confirmed this story in a follow-up call to Hebert, and appeared to be satisfied that the episode was not disqualifying.

At the end of the telephone conversation between Fortier and the complainant, Fortier asked if there was anything else the complainant needed to tell him. The complainant provided nothing further. Up until this point, the complainant's job offer was still intact. It was only after Bybee made another check of CCAP records that it fell apart. This time, Bybee, Fortier and Smith together looked at Bybee's computer screen and saw, as Smith put it, "more and more names." (Summary of Proceedings, p. 8). Fortier and Smith concluded that when Fortier asked the complainant if he had anything else to say, the complainant failed to disclose any other TRO actions against him, and that failure was dishonest.

Given that there were at least two additional TROs against the complainant that had merit (a harassment TRO—Marathon County Case No. 1997CV000399, and a domestic abuse TRO—Marathon County Case No. 1997CV000400, involving Jaynne and Jeanne Jacobus), and two more brought by Charity Hoff that were dismissed, it is likely that the complainant was aware that an honest answer to Fortier's question would have been to mention the additional TRO actions.

The commission concludes that Smith and Fortier were motivated to rescind the employment offer in part because they believed the complainant was less than honest when he failed to mention the Jacobus TROs to Fortier on the phone, and in part because of the sheer number of restraining orders that women had sought, and in some cases obtained, against him. Both motivations were non-discriminatory under the WFEA.