State of Wisconsin Labor and Industry Review Commission

Armando L. Kelly Complainant	Fair Employment Decision ¹
Multi-Serve, Inc. Respondent	Dated and Mailed:
ERD Case No. CR201402923	August 13, 2019 kellyar_rsd.doc:107

The decision of the administrative law judge is **affirmed but modified as set out below.** Accordingly, the commission issues the following:

Order

- 1. 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.
- The complainant's claim that the respondent violated the WFEA by refusing to employ the complainant because of the complainant's conviction record is dismissed.
- 3. The respondent shall cease and desist from discriminating against the complainant because of the complainant's arrest record.
- 4. The respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of \$30,437.64 (attorney's fees of \$29,565 plus costs of \$872.64). A check in that amount shall be made payable jointly to the complainant and his attorney, Sheila Sullivan, and delivered to Attorney Sullivan.
- 5. 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

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.

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.

actions it has taken to comply with this Order. The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complianant at the same time it is submitted to the commission.

6. A failure to timely submit the Compliance Report is a separate and distinct violation. 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 that \$100 for each offense. See Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:	
	/s/
	Michael H. Gillick, Chairperson
	<u>/s/</u>
	David B. Falstad, Commissioner
	/s/
	Georgia E Maxwell Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent barred him from employment and failed to hire him because of arrest record and conviction record in violation of the Wisconsin Fair Employment Act (hereinafter "WFEA"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision dismissing the claim of discrimination based on conviction record but holding the respondent liable for discrimination based on arrest record. The administrative law judge issued an order that the respondent cease and desist from discriminating against the complainant because of his arrest record, and that the respondent pay attorney's fees and costs set at 80% of the amount requested by the complainant. Both parties filed timely petitions for the commission review.

The commission has considered the petitions 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 it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modifications

- 1. On page 7 of the decision, in paragraph 31 of the Findings of Fact, delete the passage from the beginning of the paragraph through the phrase "arrest and conviction discrimination," so that the paragraph starts with the phrase "When Cassini submitted".
- 2. On page 7 of the decision, in the second sentence of paragraph 33 of the Findings of Fact, delete the word "the" immediately preceding the word "Cassini's".
- 3. On page 8 of the decision, delete paragraph 34 of the Findings of Fact, and replace it with the following:

Kelly's arrest record was a motivating factor for Cleveland and Sloan in deciding not to hire Kelly as a repair carpenter for Multi-Serve, but the decision not to hire Kelly would have occurred in the absence of that motivating factor.

4. On page 8 of the decision, delete paragraph 35 of the Findings of Fact, and replace it with the following:

Kelly's conviction record was a motivating factor for Cleveland and Sloan in deciding not to hire Kelly as a repair carpenter for Multi-Serve.

- 5. On page 9 of the decision, in Conclusion of Law 2, insert the phrase "in part" immediately preceding the phrase "because of the Complainant's arrest record."
- 6. On page 9 of the decision, delete Conclusion of Law 3 and replace it with the following:

The Complainant has proven by a preponderance of the evidence that the Respondent barred and failed to hire the Complainant in part because of the Complainant's conviction record, but the Respondent has proven by a preponderance of the evidence that a substantial relationship existed between circumstances of the Complainant's conviction record and circumstances of the job for which he applied, therefore the Respondent has not unlawfully discriminated against the Complainant because of conviction record.

7. The Memorandum Opinion of the administrative law judge is deleted and replaced with the Memorandum Opinion below, to clarify the reasoning of the commission.

Memorandum Opinion

Introduction

Summary of the facts

The respondent was a business that provided building repair services. Most of its work was on houses that either had experienced insurable damage or had been repossessed through foreclosure and needed repair to make them marketable. Usually, at the time repair services were performed the houses were unoccupied. The complainant applied to be a repair carpenter. He had a record of convictions that included: misdemeanor possession of marijuana; misdemeanor disorderly conduct; felony possession with intent to deliver five or less grams of cocaine; misdemeanor operation of a motor vehicle with a revoked license; and misdemeanor bail jumping. There is no allegation in this case that the complainant failed to honestly disclose his conviction record in the course of applying for employment.

After a job interview in which the complainant told the interviewer about a "12-year old conviction for possession of a controlled substance with intent to deliver," the respondent offered him a job contingent on a background check by a security company. The background check was received and reviewed by Kelly Cleveland, stationed in the respondent's headquarters in Michigan. Cleveland was temporarily performing the human resource function for the respondent. She received the report on September 15, 2014. It showed criminal convictions and arrests, but no pending

criminal charges. Cleveland was disturbed by the length of the report and bothered by the complainant's arrests for battery and possession of a concealed weapon, and was concerned by arrests that she believed charged the complainant with abusive behavior. She was also bothered by the complainant's convictions for possession of marijuana and possession of cocaine with intent to deliver. Cleveland discussed the background report with Bill Sloan, the director of the respondent's services on foreclosed properties. Sloan and Cleveland decided to revoke the job offer based on the criminal background report. The complainant was informed of this on or about September 22, 2014.

On September 29, 2014, the complainant filed a complaint charging the respondent with discrimination in hiring based on his arrest record and conviction record. On November 5, 2014 the respondent filed with the ERD a response to the complaint that included the statement that the respondent made the decision not to hire the complainant based on the "11 arrests that directly go against the Employee Handbook." The letter also expressed concern that the complainant had a "history of (1) Battery and (2) Disorderly Conduct charges along with a (3) Concealed Weapons charge..." The letter also expressed concern about "several infractions relating to (1) Possession of illegal drugs and (2) Possession with intent to distribute." The letter of November 5, 2014 was drafted by Lisa Cassini, a human resources specialist who began working for the respondent on October 21, 2014.

Elements of a prima facie case

The WFEA prohibits employers from taking a variety of actions against an individual because of that individual's arrest record or conviction record (Wis. Stat. § 111.322). One of the prohibited actions is the refusal to hire. In such a case, a complainant may prove a *prima facie* case by showing that he or she: 1) is a member of a protected class (i.e., has an arrest record or conviction record); 2) applied for and was qualified for a position; and 3) was rejected under circumstances that give rise to an inference of unlawful discrimination. *Kalsto v. Village of Somerset*, ERD Case No. 199802509 (LIRC Oct. 3, 2000).

The substantial relationship defense

If a complainant succeeds in making a *prima facie* case of discrimination in hiring because of arrest record or conviction record, an employer may avoid liability by proving one of the exceptions to liability. (Wis. Stat. § 111.335). The burden of proving that a statutory exception applies is on the proponent of the exception. *Robertson v. Family Dollar Stores*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), citing *Chicago & Northwestern R. R. v. LIRC*, 91 Wis. 2d 462, 467, 283 N.W.2d 603 (Ct. App. 1979). An often-used exception is known as the substantial relationship defense. The applicability of that defense is much more restricted in cases of arrest record discrimination than in cases of conviction record

discrimination. In cases of arrest record discrimination, the substantial relationship defense is only available if the refusal to hire the complainant was based on the complainant's "pending criminal charge." Wis. Stat. § 111.335(2)(b). If the refusal to hire was based simply on an arrest record and not a pending criminal charge, the employer has no recourse to a substantial relationship defense. On the other hand, to the extent the employer's decision was based on a conviction record the employer may defend its action by proving a substantial relationship between the circumstances of the conviction and the circumstances of the job. Wis. Stat. § 111.335(3)(a)1.

Application of the substantial relationship defense presupposes that the complainant has made a *prima facie* case, including proof that the complainant's arrest or conviction record motivated the employer to take some action against the complainant. A unique feature of the substantial relationship defense, however, is that it is not necessary for the respondent to prove that it actually considered the possibility of a substantial relationship at the time it made its decision. A substantial relationship is proven objectively:

The "substantial relation" test provided for in s. 111.335, Stats., is an objective, legal test, not a test of the employer's motives. It is an affirmative defense, and if it is demonstrated at hearing to have been applicable as a matter of law to a challenged decision, it operates as a bar to any finding of liability whether or not, at the time of the challenged decision, the employer had a conscious intention or belief that it was acting because of a "substantial relationship" between certain offenses and the job. Such a belief on the part of the employer would not shield the employer, no matter how strongly and honestly the employer held the belief, if it were not a legally appropriate conclusion under all of the circumstances. By the same token, where a finding of a "substantial relation" is legally appropriate, it does not matter whether this was the basis on which the employer subjectively acted.

<u>Black v. Warner Cable Communications Company of Milwaukee</u>, ERD Case No. 8551979 (LIRC July 10, 1989).

Position of the respondent at hearing, and the ALJ's decision

At hearing, the employer did not contest that the complainant had made a *prima* facie case on his conviction record claim. Its defense to that claim was that the complainant's drug convictions – for possession of marijuana and for possession of cocaine with intent to deliver – were substantially related to the circumstances of the job. As to the arrest record claim, the respondent denied that the complainant's

arrest record was a motivating factor in its rejection of his application, and therefore disputed that the complainant had made a *prima facie* case on that claim.

The ALJ found that the complainant's arrest record was a primary reason for the non-hire (Finding of Fact No. 34), and that his conviction record was a primary reason for the non-hire (Finding of Fact No. 35). She assessed liability against the respondent on the arrest record claim, but because she found that the complainant's drug convictions were substantially related to the job, she assessed no liability against the respondent on the conviction record claim. She awarded only a cease and desist order and attorney's fees on the arrest record charge. The ALJ awarded 80% of what the complainant requested, on the grounds that most of the attorney's work was necessary to prove the arrest record claim.

Both parties appealed. The complainant challenged the ALJ's determination that the respondent had proven its substantial relationship defense on the conviction record charge. The respondent appealed the amount of attorney's fees awarded to the complainant on the grounds that the fees should have been reduced to a greater extent for the limited success achieved, or for a lack of detailed, intelligible billing records. During the course of briefing these issues expanded: the complainant devoted a small portion of her brief to unnecessarily asking the commission to affirm the ALJ's finding of liability on the arrest record claim. In reply, the respondent argued that this opened the door to allow it to argue that the ALJ's liability determination on the arrest record claim be reversed, and therefore that no attorney's fees whatsoever be awarded.

Analysis

Arrest record was a motivating factor

The ALJ found that the complainant's arrest record was a factor that motivated the respondent to reject his application. The commission agrees.

The most powerful evidence of this is the respondent's own position statement to the ERD (Exhibit 16), submitted by the human resources manager, Lisa Cassini. The statement included the following:

Client based its hiring decision on the Claimants actions and the threat this brings to Client, its Customers and its Employees. 11 *arrests* that directly go against the Employee Handbook for Client...

Complainant has a history of (1) Battery and (2) Disorderly Conduct *charges* along with a (3) Concealed Weapons *charge* that we feel would put both our employees and our clients at risk.

(Emphasis added). This statement clearly links the respondent's decision to reject the complainant's application to his arrests. The complainant's attorney correctly argued that the position statement was an admission of a party opponent under Wis. Stat. § 908.01(4)(b). It was a statement of assertion of fact offered against a party, qualifying as an admission under the statute in two ways: as a "statement by a person authorized by the party to make a statement concerning the subject" (§ 908.01(4)(b)3); and as a "statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship" (§ 908.01(4)(b)4).

The respondent made several arguments that Cassini's statement should not be treated as an admission: (1) that Cassini was not yet employed at the time the decision not to hire the complainant was made, and therefore not part of the decision-making process; (2) that Cassini's supervisor, Cleveland, did not review the statement before it went out; (3) that Cassini essentially ad-libbed her references to the complainant's arrests playing a role in the respondent's decision, going beyond Cleveland's alleged advice to her; and (4) that Cassini did not have hiring authority. These arguments fail. They are irrelevant to the statutory elements of an admission under § 908.01(4)(b). In addition, as to the third argument above, the ALJ found the testimony of Cleveland and Cassini incredible, and the commission agrees. Cassini was not ad-libbing, but instead faithfully following Cleveland's method of reviewing criminal background checks. See Finding of Fact No. 33.

In addition to the admission in the respondent's position statement, there are other pieces of evidence supporting the finding that the complainant's arrests were a motivating factor. Cleveland, one of the decision-makers, testified that, in reviewing the criminal background report, she was concerned about several arrests, namely for battery, possession of a concealed weapon, and arrests that she believed charged the complainant with abusive behavior. Although she testified that these concerns did not play a role in her decision not to hire the complainant, and that only her concerns about drug convictions did, that testimony is not credible. She offered no explanation as to why she differentiated her concerns about arrests from her concerns about convictions, not even the obvious one that arrests do not signify any guilt, while convictions do. The absence of an explanation, coupled with the fact that Cleveland was unaware that Wisconsin law prohibited rejecting an applicant based on arrest record, casts doubt on Cleveland's denial that she took the complainant's arrests into consideration in rejecting his application.

Also, a few days after Cleveland decided to reject the complainant's application, she sent an internal email to Sloan on the subject of the complainant's request to know what it was about his background check that was disqualifying. In the email she referred to the background report as being "a couple of miles long." Much of that length, of course, was devoted to arrests that did not result in convictions.

Cleveland's unguarded statement makes no distinction between the complainant's arrests and convictions as being reasons to reject the complainant's application.

Conviction record was a motivating factor

The commission also agrees with the ALJ that the complainant's conviction record was a motivating factor in the respondent's rejection of his application. As noted above, Cleveland testified that she was concerned about the drug convictions. And Cassini, in her position statement, cited the drug convictions along with the history of arrests. There is no reason in the record to doubt that the respondent's concern about the drug convictions was equal to its concern about the arrests. The only piece of evidence suggesting that the drug convictions were not a motivating factor in the rejection of the complainant's application was the fact that the individual who had interviewed the applicant, Kevin Bye, site manager in Milwaukee, told Sloan that the complainant was a great candidate, even after the complainant had told him in the interview that he had a 12-year-old conviction for possession of a controlled substance with intent to deliver. By e was not a decision-maker, however, and there is no evidence that either of the decision-makers, Sloan or Cleveland, shared Bye's opinion that the complainant's drug convictions were not disqualifying. It appears that the applicant's arrest record and conviction record, together, motivated Sloan and Cleveland to reject the complainant's application.

The substantial relationship defense

As noted above, discrimination in hiring because of arrest record has no exception to liability based on substantial relationship other than with respect to a refusal to hire because of a "pending criminal charge," which does not exist in this case. The ALJ was correct, therefore, in finding the respondent to be in violation of the WFEA on the arrest record claim.

As to the conviction record claim, however, the WFEA states that notwithstanding the general prohibition against discrimination on the basis of conviction record, it is "not employment discrimination" to refuse to employ an individual if he or she has been "convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job..." Wis. Stat. § 111.335(3)(a)1. The question for this case is whether the circumstances of the complainant's drug convictions were substantially related to the circumstances of the job of repair carpenter.

In *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), the Wisconsin Supreme Court established a rationale and some guidance for the application of the substantial relationship defense. The Court stated:

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.

. . .

Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed, is the purpose of the test...It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.

Id. at 823-825.

The Commission, applying County of Milwaukee, has stated that the mere possibility that a person with a criminal record could reoffend at a particular job does not create a substantial relationship, and that the question is whether the circumstances of the job provide "a greater than usual opportunity for criminal behavior," Moore v. Milwaukee Bd. Of School Directors, ERD Case No. 199604335 (LIRC July 23, 1999), or "a particular and significant opportunity for such criminal behavior." Herdahl v. Wal-Mart, ERD Case No. 9500713 (LIRC Feb. 20, 1997). Often, the question comes down to how much unsupervised time an individual has during the work day. So, in *Robertson v. Family Dollar Stores, Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), the commission found that the job of a stocker at a Family Dollar store did not provide a particular or significant opportunity to deal drugs, given that the employee was never alone in the work place, there was always a security guard and a manager present, and the store was monitored by security cameras. And in *Herdahl*, although an employee with a conviction for drug possession and drug dealing worked as a stocker in a large store with little direct supervision, she was subject to a continuing possibility of drug testing, subjected to daily security checks of purses and bags when exiting the facility, and worked in a highly regimented environment that offered little free time to ingest drugs or sell them. In these cases, a substantial relationship was not established.

But in cases where the employee enjoyed more unsupervised time, the commission found a substantial relationship. So, in <u>Black v. Warner Cable Communications</u> <u>Company of Milwaukee</u>, ERD Case No. 8551979 (LIRC July 10, 1989), involving a conviction for possession of cocaine with intent to deliver, the commission stated:

The Commission has concluded that the offenses of possession of cocaine with intent to distribute and distribution of cocaine are substantially related to the occupation of being a door-to-door salesman for Warner Cable not merely because both the offenses and

the job involved selling activity (although the Commission considers this to be a legitimate consideration), but principally because the circumstances of the job are such that it would present a particular opportunity, and thus a potential temptation, for a person with a demonstrated inclination to engage in conduct such as the sale of illegal drugs.

Certainly, any such person whose job involved any degree of contact with any other persons could conceivably attempt to sell illegal drugs to them, if they were so inclined. The mere possibility that this could happen because of some contact with other person, however, seems to the Commission inadequate in the absence of other factors to justify a finding of "substantial relation." Such a broad approach could conceivably result in a finding that offenses such as those involved here would be substantially related to virtually all jobs, since virtually all jobs entail some degree of contact with other persons. The overwhelming breadth of this conclusion is in itself a suggestion that it is not what the statute anticipates.

In this particular case, however, there is not merely the normal, incidental contact with others that can be expected to be present in most jobs. There is a degree of freedom from supervision that is relatively uncommon in most types of employment, and a degree of unsupervised public contact in public areas that is also relatively uncommon in most employment contexts. A Warner Cable salesman is basically out on the street all day. As long as he or she meets the employer's requirements as to minimum number of sales calls, the salesman can essentially go anywhere or do anything, at any time.

And in <u>Villareal v. S C Johnson & Son, Inc.</u>, ERD Case No. CR199903770 (LIRC Dec. 30, 2002), also involving possession of cocaine with intent to deliver, the commission concluded that working in a large production facility presented a substantial opportunity to repeat that behavior:

...the respondent has organized its production employees into self-directed work teams who in essence supervise themselves; a site manager, the lone management representative present during the second and third shifts, does not directly supervise the employees, but instead oversees the entire facility and its operations; production employees schedule their own breaks, have complete access to the entire Waxdale facility and are free to leave their production area without permission; the Waxdale facility is approximately 2,000,000 square feet, and the main part of the production facility consists of seven large, interconnected buildings, plus there are a number of

outlying buildings; the facility has more than 50 restrooms and 15 break rooms; the site manager tries to visit each department in the main buildings at least once during his shift but is not always able to do so; and there are no surveillance cameras inside the Waxdale facility.

Turning to the facts of this case, the ALJ provided the following description of the daily circumstances of the job of repair carpenter for the respondent (Finding of Fact No. 36):

If Kelly had been hired as a repair carpenter for Multi-Serve, Kelly would have been expected to arrive at Multi-Serve's Milwaukee office at 7:00 a.m., Monday through Friday. Each morning, Kelly would be given one or more work orders by the site manager. Kelly would not be given a choice of where he wanted to go and he would be expected to complete any work assigned in the time designated on the work order. Kelly would be able to decide the order in which he completed work orders at multiple sites to which he was assigned. Kelly would also be free to take his lunch breaks and work overtime without getting prior approval from his site manager. Kelly would be expected to account for his time by entering information into Multi-Serve's computer system to show the work he performed and the amount of time it took him to complete the work. Multi-Serve management tracked the work of repair carpenters in the computer to see if the repair carpenter was completing the work in a timely manner. Kelly would be expected to drive a Multi-Serve vehicle, equipped with global positioning satellite (GPS), from Multi-Serve's office to any work site where he was assigned to work. Kelly would be expected to be in contact by cell phone with the office if anyone from Multi-Serve needed to contact him, since Multi-Serve does not keep track of their repair carpenter's sic using the GPS on Multi-Serve's vehicle. Most of Kelly's work would involve him working alone at a vacant repossessed or returned residential home that was being repaired to be sold. However, sometimes the home may be occupied while being repaired by Multi-Serve, so the repair carpenter would have to coordinate with the occupants of the property being repaired. As a repair carpenter, even working on a vacant property, Kelly would not know when he would encounter other workers from Multi-Serve at the vacant building or when he might encounter subcontractors, real estate brokers or inspectors at the vacant building he was repairing. Typically, at the end of the work day, a repair carpenter is expected to return the Multi-Serve vehicle and equipment to Multi-Serv's office every night.

The ALJ made an additional finding (Finding of Fact No. 37) about the circumstances of the job:

While typically repair carpenters working for Multi-Serve's Milwaukee office would be expected to return Multi-Serve's truck to the Milwaukee office every night, there were occasions that a repair carpenter from the Milwaukee office would be assigned to perform work that would require the repair worker to be out of town overnight. On those occasions, the repair carpenter would have Multi-Serve's vehicle and equipment overnight while out of town. While the repair carpenter would be required to submit to the same supervision of the repair carpenter's time while working out of state, the repair carpenter would be free to use Multi-Serve's vehicle after work hour when no work was being performed while the repair carpenter was out of town overnight.

There was no evidence about the probability that a repair carpenter would be assigned to overnight work, but the fact that it has happened on occasion was enough for the ALJ to conclude that on any such occasion, while a repair carpenter was "off the clock" and had access to the respondent's vehicle, he or she would have a particular, substantial opportunity to engage in the drug possession or sale, if he or she were so inclined.

As to the repair carpenter's normal duties, clearly the job is not subject to as much oversight and regimentation as the store stocker jobs in *Herdahl* and *Robertson*. There are no security cameras, no spot checks of possessions, no substantial risk of being subjected to a drug test. The job appears to be primarily a solitary one, usually performed in an empty house. The possibility that a homeowner, or a subcontractor, broker or banker might stop by without prior notice could have some chilling effect on the carpenter's opportunity to be carrying, using or trying to deal drugs, but that argument is weak, given that these potential surprise visitors generally would not be the carpenter's co-workers or supervisors, and may not pose any danger to the carpenter (they might even be potential drug customers). In any case, a carpenter who knew the possibility of having a surprise visitor had the option of using his or her vehicle to stash drugs for use or sale. Although the carpenter's supervisors could read computer reports written by the carpenter concerning the completion of assigned tasks, they did not independently verify the location of the carpenter or his truck, or the specific activities of the carpenter, throughout his or her work day.

It is also true that the job of repair carpenter is not as unsupervised as the job of the door-to-door salesman in *Black*. It cannot be said of the repair carpenter, whose work sites are defined for him, and whose performance is logged and measured, that

he or she can "go anywhere or do anything, at any time," as the commission said of the door-to-door salesman.

Of the above-cited cases, the one closest to this one is *Villareal*, where the employee was not directly supervised, could schedule his own breaks, had freedom to roam about a very large facility, and whose whereabouts and activities were not monitored by security cameras or any other means. The commission found that the environment in *Villareal* provided a real and substantial opportunity, not a merely hypothetical one, to commit a crime of drug possession or sale, for one inclined to commit such crimes. The commission determines that the opportunity in this case is present in about the same degree as it was in *Villareal*.

The additional aspect that swayed the ALJ, the possibility of overnight travel in the respondent's vehicle, adds weight to the conclusion that a substantial relationship exists in this case.

Remedy

This is a mixed-motive case, where the employer's adverse act, refusal to hire, has a discriminatory motive (the complainant's arrest record) and a non-discriminatory motive (the complainant's substantially related conviction record). The remedy in a mixed-motive case depends on which of two situations the case falls into: (1) where the adverse action was motivated in part by an impermissible factor and in part by non-discriminatory factors, and would not have happened in the absence of the impermissible motive; or (2) where the adverse action was motivated in part by an impermissible factor and in part by non-discriminatory factors, and still would have happened in the absence of the impermissible motive. Hoell v. LIRC, 186 Wis. 2d 603, 610, 522 N.W.2d 234 (Ct. App. 1994); Rase v. Interim Health Care, ERD Case No. CR200900791 (LIRC July 16, 2013).

In both of the two categories identified in *Hoell*, the employer's action would be unlawful discrimination, but the remedy would vary according to which of the two categories applied. Normal remedies, including instatement back pay, could be awarded in a case in the first category above, while only a cease and desist order and attorney's fees would be appropriate in a case falling into the second category.

The single document on which the respondent relied for its knowledge of the complainant's arrests and convictions was the background report provided to it. (Exhibit 9). Of all the prosecutions appearing in the report, the one for possession of cocaine with intent to deliver was the only charge prosecuted as a felony, the only one that resulted in a felony conviction, and the only one for which a prison sentence was ordered. By these measurements, it was clearly the most serious item in the complainant's background report. The background report points to no arrest record rivaling the cocaine conviction in seriousness, and there is nothing in the

testimony of the respondent's witnesses or in the admissions contained in Cassini's position statement indicating the complainant would have been hired despite his conviction for cocaine. For these reasons, the commission finds that although the respondent rejected the complainant's application in part because of his arrests, it would have rejected his application in the absence of his arrests, based only on his drug convictions, particularly his conviction for possession of cocaine with intent to deliver. Therefore, the complainant is entitled to a cease and desist order and attorney's fees, but not to back pay or instatement.

Attorney's fees

The ALJ reduced the complainant's attorney fees by 20%, stating that "much of the work, if not most of the work" was focused on proving that the respondent failed to hire the complainant because of his arrest record, which was the claim on which the complainant had prevailed. There is no indication that the ALJ precisely measured the time spent by the complainant's attorney on the separate claims, and the billing records do not allow for such a calculation. The commission sees the claims as related, and that the best way to arrive at a reasonable fee is to consider the degree of the complainant's success in the litigation *as a whole*. By this method, the fee reduction should be more on the order of one-half to two-thirds to be in line with previous commission decisions.

A prevailing complainant in a complaint under the WFEA is eligible for reasonable attorney's fees. *Watkins v. LIRC*, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). A complainant is "prevailing" if he or she succeeds on any significant issue in the litigation which achieves some of the benefit sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 31 FEP Cases 1169 (1983). Generally, the starting point for determining a reasonable attorney's fee is to consider the attorney's hourly rate multiplied by the hours spent on the case. *Id.* This fee is subject to adjustment based on various considerations, including an assessment of how successful the litigation was for the complainant. *Racine Unified School District v. LIRC*, 164 Wis. 2d 567, 608-611, 476 N.W.2d 707 (Ct. App. 1991). A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole:

[T]he extent of a plaintiff's success is a crucial factor in determining the proper about of an award of attorney's fees...Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award

only that amount of fees that is reasonable in relation to the results obtained.

Hensley, 461 U.S. at 440. The Supreme Court made it clear, however, that arriving at a fair amount of attorney's fees is a matter of judgment and discretion:

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment...

Hensley, 461 U.S. at 436-37.

In this case, the complainant's complaint consisted of related claims (arrest record discrimination and conviction record discrimination) in which the complainant achieved only limited success considering the litigation as a whole, because he did not achieve his make-whole remedies of instatement with back pay.

Nevertheless, the complainant succeeded on a significant issue – he established commission precedent prohibiting discrimination in hiring based on arrest record. There are few if any commission decisions assessing liability against an employer for refusing to hire someone because of arrest record. Even though the complainant did not achieve monetary success, his success in educating employers to avoid making hiring decisions on the basis of an applicant's arrest record has a social utility that justifies an award of attorney's fees. The Wisconsin Supreme Court has recognized this kind of achievement as significant:

...a complainant who files a complaint under the Fair Employment Act is acting as a "private attorney general" to enforce the rights of the public and to implement a public policy that the legislature considered to be of major importance. The aggregate effect of such individual actions enforces the public's right to be free from discriminatory practices in employment, which in turn effectuate the legislative purpose of outlawing such practices.

Watkins v. LIRC, 117 Wis. 2d 753, 764, 345 N.W.2d 482 (1984).

This case is similar in relevant particulars to the recent case of <u>Smith v. State of Wisconsin Dept of Workforce Development</u>, ERD Case No. CR200602582 (LIRC Jan. 4, 2019), in that the complainant prevailed on an arrest and conviction record claim (in a termination rather than a hiring case), but only was awarded a cease and desist order and attorney's fees, because the respondent proved that it would have terminated the complainant for non-discriminatory reasons (like this case, a

mixed-motive case). The fee reduction in *Smith* was 60%. In similar cases older than *Smith*, the commission's reduction in fees was more on the order of two-thirds. *Jones v. Dy-Dee Wash*, ERD Case Nos. 8551495 & 8551752 (LIRC Nov. 4, 1988); *Kraemer v. County of Milwaukee*, ERD Case No. CR200800323 (LIRC Oct. 11, 2012); *Felix v. Milwaukee County Behavioral Health Division*, ERD Case No. CR200801153 (LIRC Apr. 19, 2011).

Because of the similarity of this case to *Smith*, and the fact that *Smith* is the commission's most recent similar case, the commission has taken a 60% reduction as a reasonable starting point.

The factor that appears to have led the ALJ to award a higher fee was the extra effort required on the part of the complainant's attorney in this case to overcome incredible assertions by the respondent's witnesses denying that the complainant's arrest record was a motivating factor. The commission, having given some weight to the ALJ's judgment on this point, concludes that a 50% reduction in attorney's fees and costs is appropriate, yielding a total fee of \$29,565. The requested costs, \$872.64, are reasonable and are also awarded.

No additional fees and costs are awarded in connection with the appeal of this case to the commission because the complainant has not prevailed on that appeal.

cc: Sheila Sullivan, Attorney for Complainant Daniel Finerty, Attorney for Respondent