

**State of Wisconsin
Labor and Industry Review Commission**

Armando L. Kelly
Complainant

Multi-Serve, Inc.
Respondent

ERD Case No. CR201402923

Fair Employment Decision¹

Dated and Mailed:

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.
2. 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

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>.

actions it has taken to comply with this Order. The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time 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 than \$100 for each offense. See Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
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.

