State of Wisconsin

Labor and Industry Review Commission

David Vega Complainant **Preferred Sands of WI, LLC** Respondent ERD Case No. CR201503290	**Fair Employment Decision**[1] **Dated and Mailed:** January 17, 2020 vegadav_err.doc:107

The decision of the administrative law judge is **reversed in part,** and **affirmed in part**. Accordingly, the commission issues the following:

Order

1. The respondent shall cease and desist from discriminating against the complainant based on conviction record.

2. The respondent shall pay to the complainant reasonable attorney's fees incurred in pursuing this matter, totaling $18,419.10, and reasonable costs, totaling $218.98, together totaling $18,638.08. A check for $18,638.08 shall be made payable jointly to the complainant and his attorney, and delivered to his attorney.

3. 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

[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.

affirmed by a reviewing court and the decision of that court is not timely appealed.

4. 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 the 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 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 action 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 comply with any order of the commission constitutes 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

On May 20, 2015, the complainant filed a complaint with the Equal Rights Division (hereinafter Division) of the Department of Workforce Development (hereinafter Department) alleging that the respondent violated the Wisconsin Fair Employment Act, Wis. Stat §§ 111.31 – 111.395, by terminating the complainant's employment because of his arrest record and because of his conviction record. An Equal Rights Officer for the Division issued an initial determination on June 1, 2016, finding probable cause to believe that the respondent had violated the WFEA as alleged in the complaint.

A hearing was held on January 18, 2017 before an administrative law judge for the Division. On November 30, 2017 the administrative law judge issued a decision concluding that the respondent had violated the WFEA by terminating the complainant's employment because of his conviction record and because of his arrest record. The administrative law judge ordered the respondent to reinstate the complainant with back pay, and awarded attorney's fees and costs to the complainant.

The respondent filed a timely petition for commission review of the administrative law judge's decision. The commission has considered the petition and the briefs of the parties, and has reviewed the evidence submitted at the hearing. Based on its review the commission makes the following:

Findings of Fact

1. The respondent, Preferred Sands of Wisconsin, LLC, is a sand mining business. It has facilities in Bloomer and Blair, Wisconsin. It is a sister company to Preferred Sands of Minnesota, LLC, which is engaged in sand mining in Minnesota. Preferred Proppants, LLC is the holding company of Preferred Sands of Wisconsin and Preferred Sands of Minnesota

2. The complainant, David Vega, was hired by Preferred Sands of Minnesota in September 2010 as a Lead Quality Control Technician at its plant in Woodbury, Minnesota. Vega was promoted to Quality Control Supervisor about four months later.

3. In November 2010 Vega was charged in Buffalo County, Wisconsin with having had sexual intercourse with a child under the age of 16. The child was one of Vega's two daughters. That charge culminated in a Deferred Prosecution Agreement signed by Vega on April 29, 2011, in which it was stated that Vega was reported to have committed the felony of third degree sexual assault on or about November 2010, by having sexual intercourse with the daughter without her consent, contrary to Wis. Stat. §§ 940.225(3) and 939.50(3)(g).

4. Also on April 29, 2011, Vega was charged in Buffalo County with two counts of fourth degree sexual assault, a misdemeanor under Wis. Stat. § 940.225(3m), for having had sexual contact with the daughter. One count was alleged to have

happened in early November 2010 and the other in mid-November 2010. Sexual contact is defined separately from sexual intercourse in Wis. Stat. § 940.225.

5. The two misdemeanor charges resulted in convictions on May 2, 2011 as a result of guilty pleas. Vega was sentenced to 90 days in jail and three years of probation. He was required to pay any uninsured counseling expenses for the daughter, to maintain employment or education, to attend individual counseling and to comply with a sex offender program, to write a letter of apology to the daughter and the daughter's mother, and to have no contact with his minor children without permission.

6. By the terms of Vega's Deferred Prosecution Agreement in Buffalo County, Vega pleaded guilty to the felony charge, but acceptance of the plea was withheld during the life of the agreement, which was six years, and the felony charge was to be dismissed upon successful completion of the agreement. The terms of the Deferred Prosecution Agreement were similar to the terms of probation ordered as a result of convictions on two misdemeanor sexual assault charges that were filed the same day as the agreement.

7. Although Buffalo County used the same probable cause statement in support of the two misdemeanor charges and the felony charge, the two misdemeanor convictions and the felony charge related to separate events. The two misdemeanors, one in early November and one in mid-November, related to separate incidents of sexual contact, as defined in § 940.225(5)(b). The felony charge related to an allegation of sexual intercourse, as defined in § 940.225(5)(c).

8. On October 16, 2012 Vega was charged in Pierce County, Wisconsin with sexual assault of a child under the age of 13, a class B felony in violation of Wis. Stat. § 948.02(1), and misdemeanor sexual assault in violation of Wis. Stat. § 940.225(3m). The Pierce County assaults were alleged to have happened between February 1, 2002 and August 31, 2002, and the victim was Vega's other daughter.

9. In support of the charges in Pierce County, Tom Gunderson, a sheriff's investigator, filed a report describing video interviews of the daughter and Vega conducted by an investigator from Red Wing, Minnesota, and a report summarizing an interview of Vega conducted by Gunderson. The reports described multiple incidents of Vega's having had sexual contact with the daughter, and multiple incidents of his having had sexual intercourse with her.

10. On December 4, 2012, Vega, having pleaded guilty, was convicted in Pierce County of the misdemeanor of fourth degree sexual assault. He was sentenced to probation concurrent with the probation he was serving as a result of the

Buffalo County convictions, and he was required to comply with lifetime sex offender registration, abide by other conditions similar to those in the Buffalo County convictions, and abide by the terms of the Deferred Prosecution Agreement in Buffalo County.

11. Also on December 4, 2012 Vega entered into a Deferred Prosecution Agreement with respect to the felony charge in Pierce County. In the agreement, Vega pleaded guilty to the charge, but prosecution on the charge was suspended for six years, during which Vega agreed to comply with the terms of the probation resulting from his conviction of the misdemeanor sexual assault charge.

12. Like the Buffalo County convictions, the misdemeanor conviction in Pierce County under Wis. Stat. § 940.225(3m) related to sexual contact as distinguished in § 940.225 from sexual intercourse. The factual allegations supporting the charge of a class B felony for sexual assault of a child under the age of 13, based on the Pierce County investigator's reports, included multiple incidents of sexual intercourse.

13. Vega was required to register as a sex offender because of his misdemeanor conviction in Pierce County.

14. Vega began his jail time as a result of the Buffalo County convictions in the spring of 2011. He obtained work-release privileges, and informed his supervisor at Preferred Sands of Minnesota, Todd Murchin, about his sexual assault convictions and requested permission to arrive an hour later for work, and to leave work as necessary to attend mandatory sex offender treatment.

15. Murchin granted Vega's requests. Vega began reporting to different supervisors in late 2011 (Jason Allen) and in 2013 (Brian O'Connor), who likewise granted Vega's requests to accommodate his work-release hours and therapy sessions.

16. In January 2014 Vega was laid off from Preferred Sands of Minnesota due to the shut-down of sand mining operations.

17. In May 2014, however, Preferred Sands of Minnesota offered Vega the position of Quality Control Manager, which he accepted.

18. In July 2015, through transfer, Vega became an employee of the respondent, Preferred Sands of Wisconsin, LLC, at its Blair, Wisconsin plant.

19. Jesse Johnson also became an employee of the respondent around this time. Johnson was its Northeast Regional Human Resources Manager.

20. On July 22, 2015 Johnson sent an email to the respondent's Office Manager at the Blair plant, Amanda Bauer, requesting that she contact several employees,

including Vega, for completion of a background check form. The information was needed by an insurance agency as part of a periodic check of motor vehicle records for those who drove company vehicles.

21. On or about that same day a Preferred Sands employee, Mike Meyer, asked Bauer if the company knew that Vega was a registered sex offender. Bauer communicated this information to Johnson. In addition, Vega himself informed Johnson of his status as a registered sex offender.

22. Vega asked Johnson who would have access to information about his background. Johnson told Vega that he would notify Lauren Boegner, the Vice President of Human Resources, and get back to him.

23. Johnson contacted Boegner and informed her that Vega had told him that he was a registered sex offender. Boegner then told Johnson to run a criminal background check on Vega.

24. The respondent ordered a criminal background check on Vega on July 27, 2015 and received the results on July 29, 2015. Johnson and Boegner reviewed the report.

25. The background report showed that Vega had misdemeanor convictions for fourth degree sexual assault in Buffalo county and Pierce County. and two open, pending charges for felony sexual assault with deferred prosecution agreements, one for felony first degree sexual assault in Pierce County, and one for felony third degree sexual assault in Buffalo County.

26. On August 3, 2015 Johnson sent Vega a letter in which he confirmed that Vega had notified hm of his sexual offender status on July 22, 2015.

27. The respondent requested certified copies of criminal records from the Pierce County and Buffalo County circuit courts. Boegner received copies of the criminal complaints, convictions and deferred prosecution agreements relating to Vega.

28. After consulting with legal counsel, Boegner directed Johnson to set up an interview with Vega. She typed a list of questions for Johnson to use in his interview. Boegner included a script which advised Johnson to say: "For purposes of this meeting, we are going to avoid any focus on your prior fourth degree sexual assault convictions. Instead, we want to talk with you and get a complete understanding of your two open deferred prosecution matters involving your daughters…"

29. Johnson met with Vega in Johnson's office on August 18. 2015. Jamie Shaffer, Human Resources Manager for Preferred Proppants., LLC, participated by telephone and took notes of the meeting. Johnson had with him documents

from the Buffalo County and Pierce County circuit courts, including the charging documents, the reports of investigator Gunderson of Pierce County, and the deferred prosecution agreements. Johnson asked Vega about the sexual assaults of Vega's daughters. Vega admitted that he sexually assaulted them. Johnson asked for any details he could give. Vega replied that he touched them inappropriately. Johnson then told Vega he had in front of him detective statements from Pierce County, at which point Vega realized that Johnson had all the details of the allegations involving the felony charge in Pierce County. Johnson asked him if the facts in the statements were true. Vega replied that they were. Johnson asked Vega if he told the detectives what was reported, and Vega said he did. Johnson asked Vega if he admitted to this, and Vega said he did.

30. Shaffer took notes of the meeting and provided them to Boegner.

31. After the meeting Boegner informed Johnson that she had decided to terminate Vega's employment. Johnson drafted a termination letter, but Boegner gave him the language to put in the first paragraph regarding Vega's felony charges.

32. Johnson called Vega on August 22, 2015 and requested a meeting. Vega met with Johnson on August 24, 2105. Johnson handed Vega a termination letter at the meeting which stated in part:

> As we discussed during our conversation, the meeting was part of an internal review to gather facts and gain an understanding of your two open pending deferred prosecution cases relating to 1st Degree Sexual Assault and 3rd Degree Sexual Assault. For the purpose of the meeting, you were told we would avoid any focus on your prior 4th Degree Sexual Assault convictions. During our meeting, in reference to both open pending deferred prosecution agreement matters, you admitted to committing sexual assault.

33. In Vega's discharge information form Johnson filled out the reason for discharge as:

> Employee has two open pending deferred prosecution criminal cases which he admitted to and said the facts in both cases were true. Based on his admissions relating to both of the open cases, a decision was made to terminate his employment.

34. The respondent's motivation for terminating Vega's employment was in part based on its knowledge that Vega was a registered sex offender. That knowledge constituted information indicating that Vega had been convicted of an offense.

35. The respondent's motivation for terminating Vega's employment was in part based on the information it obtained from its interview with Vega about his pending criminal charges, in which Vega admitted that he had sexually assaulted his daughters as described in arrest record documents from Buffalo County and Pierce County, including statements of investigator Gunderson from Pierce County.

36. The respondent did not terminate Vega's employment because of his arrest record.

37. The respondent would have terminated Vega's employment based solely on the information it obtained from its interview with Vega about his pending criminal charges.

Conclusions of Law

1. The respondent is an employer within the meaning of the Wisconsin Fair Employment Act.

2. The complainant was an employee of the respondent.

3. The documents the respondent received and reviewed pertaining to the complainant's misdemeanor convictions, which included an order compelling him to register aa a sex offender, constituted a conviction record within the meaning of the WFEA.

4. The documents the respondent received and reviewed pertaining to the complainant's felony charges, including the investigator's reports from Pierce County and the Deferred Prosecution Agreements, constituted an arrest record within the meaning of the WFEA.

5. The complainant has not shown by a fair preponderance of the evidence that the respondent violated the WFEA by terminating his employment because of arrest record.

6. The complainant has shown by a fair preponderance of the evidence that the respondent violated the WFEA by terminating his employment in part because of conviction record.

7. The complainant is entitled to a reduced amount of attorney's fees and costs, and a cease and desist order, but no other remedy, because his termination would have taken place even in the absence of the impermissible motivating factor of his conviction record.

Memorandum Opinion

The WFEA generally makes it unlawful for an employer to terminate the employment of an individual because of his or her conviction record (Wis. Stat. § 111.321). The term conviction record is defined:

> "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. § 111.32(3).

The law makes an exception to liability when an individual has been convicted of an offense the circumstances of which "substantially relate to the circumstances of the particular job…" Wis. Stat. § 111.335(3)(a)1. This "substantial relationship" defense is an affirmative defense, which may be considered to be waived if the employer neither raises it in its answer to the complaint nor otherwise gives adequate notice that it intends to present the defense prior to hearing. *Wilson v. Burnett County Sheriff's Department,* ERD Case No. 9202769 (LIRC Sep. 29, 1995); *Oelhke v. Moore-O-Matic, Inc.,* ERD Case No. 8401191 (LIRC July 26, 1988).

The WFEA also makes it unlawful for an employer to terminate an employee because of his or her arrest record. Wis. Stat. § 111.321. Arrest record, like conviction record, is defined in the WFEA:

> "Arrest record" incudes, 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.

Wis. Stat. § 111.32(1).

There is an arrest record exception that applies to cases in which the employee is subject to a pending criminal charge, the circumstances of which substantially relate to the employee's job, but that exception only allows for the suspension of the employee; it does not permit the employer to terminate such an individual. Wis. Stat. § 111.335(2)(b). *Maline v. Wisconsin Bell,* ERD Case No. 875138 (LIRC Oct. 30, 1989);[2] *Mielke v. Orkin Exterminator Company, Inc.,* ERD Case No. 8500540 (LIRC Apr. 11, 1988).

[2] In *Maline,* the employer illegally terminated the employee for an arrest that substantially related to his job; but since the employer could have suspended the employee without pay, the employer had no

The Wisconsin Court of Appeals carved out another exception to liability that allows an employer to terminate an employee who has an arrest record – it is the defense created in *City of Onalaska v. LIRC*, 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984):

> If, as here, the employer discharges an employe because the employer concludes from its own investigation and questioning of the employe that he or she has committed an offense, the employer does not rely on information indicating the employe has [an arrest record], and therefore does not rely on an arrest record…

After *Onalaska* was decided, the commission began handing down a number of decisions fine-tuning the determination of when a discharge of an employee is based on the employee's arrest record and when, in the alternative, it is based on the employer's own "investigation and questioning." In *Delapast v. Northwoods Beach Home Caring Homes, Inc.,* ERD Case No. 8901907 (LIRC Feb. 17, 1993) it provided a brief catalogue of its decisions:

> While it is unlawful to discharge an employe because of the fact of that employe's arrest, an employer's decision to discharge is not because of the arrest when it is motivated by the employer's belief that the employe has in fact engaged in certain unacceptable conduct and when that belief arises from some source other than the mere fact of the arrest. *Onalaska v. LIRC,* 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984). That source may be an admission by the employee, see, e.g., *Levanduski v. Visiting Nurses Association* (LIRC, February 10, 1988), or statements to the employer by others who witnessed the conduct, *Reamon v. Milwaukee* (LIRC, February 22, 1990), or direct observation made by the employer while joining in a police search, *Seever v. Catholic Charities Bureau* (LIRC, September 20, 1990) or an investigation by the employer that made use of information obtained from a contemporaneous police investigation, *Williams v. Northeast Technical College* (LIRC, July 9, 1991)…

It should be noted that although employers have argued that *Onalaska* also ought to apply to conviction record cases, the commission has been adamant that the *Onalaska* defense cannot be imported into claims of discrimination based on conviction record. *Swanson v. Kelly Services*, ERD Case No. CR200203683 (LIRC Oct. 13, 2004). In other words, an employer cannot escape liability for a conviction record claim by arguing that it discharged an employee not because of his or her conviction, but because it became convinced that the employee committed the crime he or she was

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duty to return the employee to work as long as the criminal charge against him was pending. Whether the employer would have a duty to reinstate the employee depended on whether he was convicted of the pending charge.

convicted of based on its own investigation. In the normal case, the fact of the employee's conviction would make an employer's investigation into the employee's guilt unnecessary. In addition, allowing an *Onalaska* defense to a conviction record claim would eviscerate the requirement that the employer show a substantial relationship between the conviction and the circumstances of the job. See, *Sheridan v. United Parcel Service*, ERD Case No. CR200204955 (LIRC July 11, 2005) ("…it would require a tortured interpretation of the underlying rationale in *City of Onalaska* to extend it beyond arrest record cases to conviction record cases.").

The ultimate factual question in disparate treatment cases under the WFEA is whether the employer's adverse action against an individual had a discriminatory motive. *Kelly v. Sears Roebuck & Company*, ERD Case No. CR201000439 (LIRC May 30, 2014). In this case, Vega asserted that Preferred Sands was motivated to fire him from his job because of his conviction record and his arrest record, in violation of the WFEA. Preferred Sands acknowledged that it was aware of Vega's misdemeanor convictions for sexual assault, but maintained that it took no action against him because of his convictions. Preferred Sands also acknowledged that it had information about Vega's arrests for sexual assault felonies. Furthermore, it acknowledged that it discharged Vega because of its belief that he had committed those offenses. But it maintained that it did not discriminate on the basis of arrest record because its motive for discharge was based on its own investigation of investigation of Vega's guilt, not on his arrest record. In other words, Preferred Sands made an *Onalaska* defense with respect to the arrest record claim. The administrative law judge found Preferred Sands liable for discrimination based on conviction record and arrest record.

Conviction record discrimination

Vega made two arguments for a finding of discrimination on the basis of conviction record. First, he argued that his Deferred Prosecution Agreements relating to his felony charges ought to be considered conviction records, not arrest records, making an investigation into Vega's felony charges unnecessary, and the *Onalaska* defense unavailable to Preferred Sands.

This argument is centered on the fact that the Deferred Prosecution Agreements required Vega to plead guilty to the felony charges. Commission decisions, however, have classified deferred prosecution agreements as part of an arrest record, not a conviction record, even though as part of the agreements the person under arrest admitted guilt. *Lovejoy v. Auto-Wares WI, Inc.*, ERD Case No. CR200703609 (LIRC Feb. 24, 2011); *Delapast v. Northwoods Beach Home Caring Homes, Inc.*, ERD Case No. 8901907 (LIRC Feb. 17, 1993). The idea that deferred prosecution agreements should be considered convictions is contrary to the design of the agreements, which is to provide a negotiated path for a charged party to avoid having a conviction and for the prosecution to efficiently obtain corrective conduct from the charged party.

Vega's argument also ignores the fact that in his case the agreements require the withdrawal of the guilty pleas at the conclusion of the agreements, if Vega complies with the terms. The commission does not consider Vega's Deferred Prosecution Agreements to be conviction records.

The other argument that Vega makes for conviction record discrimination is more straightforward, in that it asserts that the employer was actually motivated to discharge him because of his misdemeanor convictions for sexual assault, despite its insistence that it ignored the misdemeanor convictions and focused only on the felony charges.

In part this argument is based on the assertion that the facts underlying the misdemeanor convictions and the felony charges are identical. That argument does not succeed. Preferred Sands convincingly argued in briefing that the acts for which Vega was convicted were not the same as those for which he faced felony charges.

One aspect of the complainant's conviction record, however, appears to have provided a partial motivation for Preferred Sands' decision-maker, Boegner, to discharge Vega. In her testimony, Boegner appeared to acknowledge that she understood Vega's status as a registered sex offender to be attributable to his convictions of sexual assault, which it in fact was,[3] and she confessed to being motivated by that fact. Here are excerpts of Boegner's testimony that Vega's being a registered sex offender motivated her discharge decision:

> Q: You made a determination that he would pose a risk to employees based on the fact that he was a registered – he was on the registered sex offender list, true?
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> A: I made a decision that I wanted to protect my employees and didn't want to put them in a circumstance where they would be uncomfortable.
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> Q: Did you make a determination that he would pose a risk to employees based on the fact that he was on a registered sex offender list?
>
> A: Can you repeat the question?
>
> Q: Did you make a determination that Mr. Vega would pose a risk to employees based on the fact that he was on a registered sex offender list?

[3] In the judgment of conviction in Pierce County, one of the conditions was to "comply with lifetime sex offender registration." (Exhibit C-15).

A: That's a very subjective question. I wasn't sure if he would, and I didn't want to take that chance.

Q: Would you look at page 28, please of your deposition starting at Line 6? Let me know when you're there, ma'am.

A: I'm there.

Q: I'm going to read – I'll start at Line 6. I'm going to read the question, we'll go through Lines 6 through 14.

Question. "Did you ever make a determination that Mr. Vega did pose a risk to the safety of the employees of the Wisconsin facility based on the fact that he was a registered sex offender?"

Answer. "Yes, I made that determination."

Question: "And why did you believe he would be a risk to employees?"

Answer: "I felt that his background was one that would be potentially dangerous for our employees and where they wouldn't feel comfortable."

Q: And that's why he was terminated, true?

A: Yes, that is why he was terminated.

(Tr., pp. 112 – 113).

Preferred Sands argued that by using the word "background" above, Boegner was referring to conduct relating to Vega's felony charges, not his misdemeanor convictions. This is not credible. The most immediate and logical referent to "background" is Vega's sex offender registration. But in addition it must be noted that Boegner did not use the word "background" in her deposition. The transcript of the hearing seems to have confused Boegner's live testimony with her deposition testimony. Here's what the deposition actually says (p. 28, lines 6 through 14):

Q: Did – did you ever make a determination that Mr. Vega did pose a risk to the safety of the employees at the Wisconsin facility based on the fact that he was a registered sex offender?

A: Yes, I made that determination.

Q: And why did you believe he would be a risk to employees?

A: An individual who's committed a sexual crime, it's not acceptable in our society, and it's concerning and makes people feel unsafe.

Boegner's deposition testimony shows that she linked Vega's status as a registered sex offender to his commission of a crime, and that this served as partial motivation for discharging him. The fact that Vega was a registered sex offender was "information indicating" that he had a conviction. Wis. Stat. § 111.32(3). As discussed below, the commission accepts the conclusion that Boegner sincerely attempted to focus on the investigation into Vega's felony charges, but the commission cannot ignore her testimonial admission that she was also persuaded by the simple fact that Vega was a registered sex offender.

Preferred Sands argued that Vega's conviction record and his status as a registered sex offender were not factors in the discharge decision because even though Preferred Sands learned these facts no later than July 29, 2015, when Johnson and Boegner reviewed Vega's background report, Preferred Sands did not fire Vega until after Johnson conducted his interview with Vega on August 18, 2015, focusing on the felony convictions. But the delay in taking action from the time it received confirmation of Vega's convictions and his registration as a sex offender was less than one month. Preferred Sands cited *Williams v. Medical College of Wisconsin,* ERD Case No. CR200800850 (LIRC Oct. 10, 2011) for the proposition that an employer's awareness of an employee's conviction was not a sufficient reason to believe that it motivated a later decision to discharge, but *Williams* is distinguishable from this case. In *Williams,* the employer made a decision that the employee's conviction was not a bar to her continued employment, and "continued to employ the complainant for eight months after learning about the conviction, and only terminated the employment relationship when it received information…which it believed meant it could no longer do so." *Id.* Here, Boegner's testimony about being influenced by Vega's status as a registered sex offender, and the comparatively brief period of time between finding out that fact and deciding to discharge him, supports a conclusion that it was at least in part a motivation for the discharge.

Arrest record discrimination --the *Onalaska* defense

As noted above, if an employer discharges an employee with an arrest record because of "its own investigation" and conclusion that the employee has committed an offense, the employer is not relying on the arrest record and has not violated the WFEA's prohibition against discharging an employee because of arrest record. *Onalaska, supra.*

Commission cases have made it clear that an employer's need to conduct "its own investigation" does not mean that it can have no information from the arresting

authority at all. For example, in *Mielke v Orkin Exterminator Co.*, ERD Case No. 8500540 (LIRC Apr. 11, 1988), the employer was in possession of a deferred prosecution agreement and criminal complaint, but satisfied *Onalaska* by conducting its own questioning of the employee about sexual assault charges. *See also, Sanford Lutheran Midelfort/Mayo Health Sys.*, ERD Case No. CR200704413 (LIRC Oct. 1, 2010).[4] Following *Onalaska,* the commission has had several opportunities to interpret what it means for an employer to conduct its own investigation and has most often found that if information it gathered was from a source independent of the arresting authority that information was from its own investigation. The commission discussed this at length in *Betters v. Kimberly Area Schools*, ERD Case No. 200300554 (LIRC July 30, 2004):

> Some decisions have held that the investigation must be independent of the arresting authority, that is, that the employer must act on the basis of information obtained from sources other than the arresting authority. The source most often recognized as being sufficient to justify a conclusion that the decision was made because of information learned in an independent investigation is an admission by the employee to the employer. Indeed, in *Mielke v. Orkin Exterminator Co.* (LIRC, 04/11/88), the commission stated, "*City of Onalaska* requires an employer to question an individual and to ascertain whether the individual has committed the offense." This focus on the employer's interview with the employee and the employee's admissions to the employer can also be seen in *Himmel v. Copps Corp.* (LIRC, 10/29/86), *McClellan v. Burns Int'l Security* (LIRC, 03/31/88) and *Lamb v. Happy Chef of Sparta* (LIRC, 09/29/95)…
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> The commission adhered to this formulation of what constituted sufficiently "independent" sources of information in *Greene v. Air Wisconsin* (LIRC, 02/02/95). In that decision, the commission found the *Onalaska* rule applicable because the information that formed the basis for the employer's conclusion that the employee had engaged in unacceptable behaviors had been acquired from communications directly from the employe to the employer which were "independent of the arrest and of the arresting authorities."
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> …
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> The approach described in *Delapast* and *Greene*, pursuant to which the question to be resolved is whether the employer's conclusion that the employee had engaged in unacceptable behaviors was based on

[4] As to the commissioner's comments on the green sheet, I therefore agree with the first point that an employer's knowledge of arrest records does not make the *Onalaska* defense unavailable.

> information "independent of the arrest and of the arresting authorities," is in the commission's view the proper approach.

Clearly, the employer here followed the process recommended by past commission decisions for conducting an independent investigation – it questioned Vega to ascertain whether or not he committed the offense. It was clear from the transcript of Johnson's testimony that his interview questions to Vega were intended to elicit statements from Vega regarding the conduct Vega was charged with in the investigative reports related to the felony prosecution in Pierce County, and were understood by Vega to be so. Vega argued that there was nothing left to investigate in this regard, because he had already been convicted of sexually assaulting his daughters and had pleaded guilty to the felony charges as part of his Deferred Prosecution Agreement. But the convictions were not based on the same specific acts upon which the felony prosecutions were based, and the fact that Vega pleaded guilty to the felony charges did not mean there was no value to directly asking Vega if he committed the acts he was charged with. The fact that the Counties entered into Deferred Prosecution Agreements, clearly a more favorable outcome for Vega than being convicted of the felony charges, might have reflected some uncertainty on the Counties' part about whether they could prove their cases. Vega's direct admission to Johnson could reasonably be taken by the employer as a more credible indication of Vega's guilt than the fact that he entered into a plea agreement. The commission does not agree with Vega's claim that there was nothing left to investigate.

One other argument that Vega makes is that the employer, by consulting with legal counsel and setting up the interview focusing on Vega's arrest records, was simply going through the motions of conducting an investigation in order to satisfy statutory requirements to avoid liability, when in reality it was motivated entirely by Vega's arrest (and conviction) records. One could suspect that this was happening, but the record does not prove this. The record shows that Boegner was counseled not to discharge Vega based on his convictions for sexual assault, and that Boegner tried not to do so. The record also shows that once the employer conducted its interview of Vega and got his admissions of having had sexual intercourse with his daughters consistent with the felony charges against him, the employer was sincerely motivated to discharge him based on those admissions.

Mixed motive analysis

Preferred Sands was motivated in part by Vega's conviction record (primarily based on his registration as a sex offender), for which it made no "substantial relationship" defense, and in part by its own investigation that Vega had committed the felony offenses he was charged with (which under *Onalaska* is not discrimination because of arrest record). This requires applying the mixed motive analysis. In *Hoell v. LIRC,* 186 Wis. 2d 603, 522 N.W.2d 234 (Ct. App. 1994), the court adopted the following test

fashioned by LIRC in deciding remedies when an employee is terminated in part because of a permissible motive and in part because of an impermissible motive:

> [I]f an employe is terminated solely because of an impermissible motivating factor, the employe normally should be awarded a cease and desist order, reinstatement, back pay, interest and attorney's fees under the Wisconsin Fair Employment Act. If an employe is terminated in part because of an impermissible motivating factor and in part because of other motivating factors, but the termination would not have occurred in the absence of the impermissible motivating factor, the Commission has the discretion to award some or all of the remedies ordinarily awarded. Finally, if an employe is terminated in part because of an impermissible factor and in part because of other motivating factors, and the termination would have taken place in the absence of the impermissible motivating factor, the employe should be awarded only a cease and desist order and attorney's fees. [Citations omitted.]

Id. at 609-10.

This is a case in which the employer would have discharged Vega based on its interview of Vega, and in the absence of his conviction record and resulting sex offender status. The offenses which Vega admitted to in his interview with Johnson, including admissions to multiple occurrences of sexual intercourse, not just unwanted sexual contact, with his daughters, eclipse the misdeeds for which he was convicted, and provide ample reason on their own for the employer's termination decision. As a result, the appropriate remedy would be limited to a cease and desist order regarding terminating and employee because of conviction record, and some amount of attorney's fees.

At the hearing in this case, the parties stipulated to attorney's fees of $46,047.75 and costs of $547.45. As a result of the commission's decision here, the amount of attorney's fees and costs should be reduced. A fee award 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 amount 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 v. Eckerhart, 461 U.S. 424, 31 FEP Cases 1169 (1983). The Supreme Court made it clear 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 436-7.

In this case, Vega's claims were related, and Vega achieved only limited success. In similar cases, where back pay and reinstatement were sought, but only a cease and desist order was achieved, the commission has reduced fees, usually within a range of 50% to 70%. *See, e.g.,* *Kelly v. Multi-Serve, Inc.*, ERD Case No. CR201402923 (50%); *Smith v. State of Wisconsin, Dept of Workforce Development,* ERD Case No. CR200602582 (LIRC Jan. 4, 2019) (60%); *Jones v. Dy-Dee Wash*, ERD Case Nos. 8551495 & 8551752 (LIRC Nov. 4, 1988) (two-thirds); *Felix v. County of Milwaukee*, ERD Case No. CR200801153 (LIRC Apr. 19, 2011) (two-thirds). This case has some similarity to *Smith,* in that it also involved arrest and conviction record discrimination, and achieved only a cease and desist order, because the commission found that the employee would have been discharged for non-discriminatory reasons for his conduct. The commission therefore awards attorney's fees and costs reduced by 60% from the complainant's request.

cc: Peter Reinhardt
Dean Kelley

Editor's Note: reversed *Vega v. LIRC* (Wis. Cir. Ct. Dunn Cnty. Nov. 19, 2020), reversed *Vega v. LIRC*, 2022 WI App 21, 402 Wis. 3d 233, 975 N.W.2d 249.