

State of Wisconsin



Labor and Industry Review Commission

Brynton C. Foston
Complainant

Time Warner Cable
Respondent

ERD Case No. CR201501902

Fair Employment Decision¹

Dated and Mailed:

January 30, 2020

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The decision of the administrative law judge is **affirmed, subject to the following modifications**. Accordingly, the complaint is dismissed.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

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>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent refused to hire him because of his conviction record in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. The complainant filed a timely petition for the 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 it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modifications

1. In Finding of Fact No. 22, delete the first sentence and replace it with the following:

Brynton Foston received an employment background report, including the results of a criminal history search, dated April 3, 2015 from General Information Services.

2. Delete Conclusion of Law No. 3 and Conclusion of Law No. 4.
3. Delete the Memorandum Decision.

Memorandum Opinion

The complainant, Brynton Foston applied to be a customer service representative (CSR) for Time Warner Cable (TWC). By March 2015, he had successfully passed a telephone screening and an in-person interview. TWC gave him an employment offer, contingent on his passing a drug test and a background check. For the background check Foston had to complete a questionnaire asking him to list all his misdemeanor and felony convictions. It included the following statement:

I certify that the facts set forth in my information provided to Time Warner Cable are true and complete. I understand that if I am employed by the Company, any false or misleading information or omission shall be considered sufficient cause for dismissal.

(Es. 13). Foston disclosed that in February 2010 he was convicted of felony robbery party to crime, misdemeanor battery party to a crime, and misdemeanor battery, and that in November 2014 he was convicted of misdemeanor resisting or obstructing an officer. Foston failed to disclose one of his convictions, a 2010 misdemeanor conviction for disorderly conduct.

TWC contracts with a third-party vendor, General Information Services (GIS) to conduct criminal background checks. GIS completed a criminal record search on Foston on March 28, 2015. GIS found and reported to TWC the convictions that

Foston had disclosed, but missed the same disorderly conduct conviction that Foston had omitted from his disclosure.

David Lee, a pre-employment consultant for TWC, was responsible for reviewing the criminal records of applicants who had contingent offers of employment. In his initial review, he had no reason to believe Foston's disclosure of his conviction record was inaccurate, because it matched the report from GIS. Lee had authority to decide whether a candidate's conviction record was disqualifying, but he occasionally consulted with TWC's legal team if he was undecided. Lee was undecided about whether Foston's robbery conviction should be disqualifying, so he consulted with the legal team, after which he contacted Foston and got a description from him about the robbery. Lee came to the opinion that there was a substantial relationship between Foston's conviction for robbery and the circumstances of the CSR job. He gave that opinion to the legal team but did not convey it to Foston. On April 2, 2015, the day before Foston was scheduled to report to TWC for job training, TWC's senior counsel provided Lee with a copy of a report from Wisconsin Circuit Court Access (formerly CCAP) showing the disorderly conduct conviction that Foston had failed to disclose and GIS had failed to find. The senior counsel instructed Lee to rescind Foston's contingent offer because he had failed to disclose his disorderly conduct conviction. (Tr., p. 265). Lee told Foston by telephone the evening of April 2, 2015 that his offer was rescinded, but did not give him a reason.

Positions of the parties and decision of the ALJ

Foston alleged that TWC refused to hire him because of his conviction record, and that TWC failed to prove the affirmative defense that there was a substantial relationship between his conviction record and the circumstances of the CSR job. TWC argued that it refused to hire Foston not because of his criminal record but because he falsely answered TWC's question about his criminal record by omitting his disorderly conduct conviction. TWC also argued that even if it were found that it had refused to hire Foston because of his conviction record, there was a substantial relationship between Foston's robbery conviction and the CSR job.

The ALJ found that TWC's decision not to hire Foston *was* based on his conviction record, not on his failure to disclose his disorderly conduct conviction. The ALJ went on to find, however, that TWC was not liable to Foston because it proved that Foston's conviction record, particularly his robbery conviction, was substantially related to the circumstances of the CSR job.

Analysis

The commission affirms the ALJ's decision, not because of TWC's substantial relationship defense, but because Foston failed to prove his *prima facie* case that TWC's refusal to hire him was based on his conviction record. TWC produced evidence that it was motivated by a belief that Foston had failed to fully disclose his conviction record in his application materials, and Foston did not show that that evidence was a pretext for discrimination. It is therefore unnecessary to consider TWC's affirmative defense, which was the basis for the ALJ's dismissal of the complaint.

There is no dispute about the fact that Foston was convicted of disorderly conduct in 2010 or about the fact that he failed to disclose that conviction to TWC on his background check form. There is also no question that falsification on an employment application can be a legitimate basis for refusing to hire an applicant

(*Haynes v. National School Bus Service*, ERD Case No. 8751901 (LIRC Jan. 31, 1992)), and that in this case Foston was specifically warned that a false or misleading answer or omission would be cause for dismissal.

The ALJ was inclined to believe that Foston's omission was unintentional. When Foston was asked at hearing why he failed to disclose the disorderly conduct conviction on the background check form he testified "I don't know if I forgot to put it on the paper or what happened." (Tr., p. 30). The ALJ reasoned that if Foston was willing to acknowledge convictions for felony robbery and battery it was unlikely that he would have intentionally omitted the less serious crime of disorderly conduct.

The commission finds it unlikely that Foston forgot his disorderly conduct conviction. First, that conviction happened around the same time as his disclosed convictions for robbery and battery—party to a crime; second, he had no trouble remembering his disorderly conduct conviction earlier in the application process, having testified that he volunteered to TWC interviewers that he had been convicted of disorderly conduct along with his other crimes;² and third, he provided no specific reason why he might have forgotten this conviction at a time when he was presented with a formal request to provide a complete list of his crimes, with a warning that if he gave a false, misleading or incomplete answer it could cost him his job.

But the question of whether Foston intentionally failed to list his disorderly conduct conviction as opposed to forgetting to do so is not the critical question. As in all discrimination cases, the critical question is what motivated the *employer* to act. Did it honestly believe that Foston gave a false answer, and did that belief motivate its decision not to hire him? The sincerity, not the correctness, of its belief governs. As the commission stated in *Turner v. Manifold Services, Inc.*, ERD Case No. 20000679 (LIRC Jan 31, 2002):

Even if the complainant had no further crimes on his record [than the ones he reported], the critical question is whether the respondent believed he did. *See, Moncrief v. Gardner Baking* (LIRC, July 1, 1992) (the question of whether an employer's asserted nondiscriminatory reason is true can be considered irrelevant if it appears that the employer genuinely believed it to be true). Thus, if the respondent genuinely believed that the complainant had concealed his criminal convictions, this could provide a legitimate nondiscriminatory reason for the complainant's discharge.

See also, Rase v. Interim Health Care, WERD Case No. CR200900791 (LIRC July 6, 2013)

² Foston testified that, without being asked, he divulged his entire conviction record, including his disorderly conduct conviction, to his interviewers in the screening process. The one management witness who participated in the interviews credibly testified that she had no recollection of Foston's disclosure, and in any case would have ignored the information. That witness did not participate in the hiring decision. TWC does not begin to consider the subject of conviction records until/unless a contingent job offer is made.

As it happens in this case, TWC was correct in its belief that Foston failed to disclose his disorderly conduct conviction. The question is whether that belief was the motivation for not hiring Foston, or was simply a pretext for rejecting Foston based on his conviction record.

The ALJ thought it was a pretext. In his memo he stated that "[t]he evidence suggested that Time Warner's legal department seized on the omission as a 'technical' reason for rescinding which it believed was more defensible than a substantial relationship analysis." This is without evidentiary support. The evidence was that TWC's legal department instructed Lee, the pre-employment consultant, to rescind Foston's contingent offer because he failed to disclose his disorderly conduct conviction. There is no evidence about the legal department's deliberations—nothing about its considering the non-disclosure as a "technicality", or about coming to the belief that relying on the non-disclosure was more defensible than relying on a substantial relationship defense. TWC's position that it acted on the basis of Foston's non-disclosure and not on his conviction record is in line with historical evidence presented by TWC showing that it had rejected applicants for providing false application materials and had hired applicants who had criminal backgrounds similar to Foston's. As the respondent's attorney argued, TWC appears to have treated Foston like others who had failed to disclose information requested in their application materials.

The commission affirms the ALJ's decision because the complainant failed to prove that his conviction record was the reason for TWC's rejection of his application.

cc: Colin B. Goode
Warren Buliox