State of Wisconsin

Labor and Industry Review Commission

Carlos R. Johnson Complainant **Rohr Kenosha Motors, Inc.** Respondent ERD Case No. CR201602571	**Fair Employment Decision**[1] **Dated and Mailed:** April 29, 2020 johnsca_err.doc:107

The commission **affirms** the decision of the administrative law judge (ALJ), but replaces the ALJ's Findings of Fact and Conclusions of Law with its own, to better reflect the basis of the commission's decision. Accordingly, the commission issues the following:

Order

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

2. The respondent shall make the complainant whole for all lost wages and benefits incurred as a result of its unlawful discrimination against the complainant by paying the complainant $3,222.00, the amount that he would have received in wages from May 12, 2016 to June 6, 2016, plus interest as set out in item 3 below.

3. The amount payable to the complainant as lost wages shall be increased at the rate of 12 percent per year, simple interest. For the calendar quarter ending June 30, 2016, interest shall be computed and paid from the last day of that calendar

[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.

quarter to the date of payment. Based on this formula, using a projected payout date of June 1, 2020, the respondent shall pay the complainant a total interest payment of $1,514.00. The respondent shall pay the complainant the total amount of $4,736.00 in lost wages and interest. See Worksheet appended to this decision.

4. The respondent shall pay to the complainant reasonable attorney's fees incurred in pursuing this matter, which consists of $18,200.00 for representation before the Equal Rights Division, plus $10,800.00 for representation before the commission, for a total of $29,000.00. A check for $29,000.00 shall be made payable jointly to the complainant and his attorney, and delivered to his attorney.

5. 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.

6. 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

This case is before the commission to consider the complainant's allegation that the respondent terminated his employment because of his arrest record and conviction record, in violation of the Wisconsin Fair Employment Act (hereafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision concluding that the respondent did not violate the Act with respect to the arrest record claim, but did violate the Act with respect to the conviction record claim. The respondent filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The complainant, Carlos Johnson, was convicted on a guilty plea of two charges, both relating to an incident on March 5, 2000: 4th degree sexual assault (sexual contact without consent), a misdemeanor A; and 3rd degree sexual assault (sexual intercourse without consent), a felony D. As a result he was required to register as a sex offender. The victim was Johnson's estranged wife, and the assault took place in her residence. The date of the convictions was January 5, 2001.

2. According to his judgment of conviction, Johnson was given a 5-year prison sentence on the felony count, which was stayed, and about one year and nine months in the Milwaukee County House of Corrections, some of which was stayed. He was also placed on a 7-year probation.

3. Johnson violated the conditions of his probation twice, and as a result served two prison terms, from 2003 to 2008 and from 2012 to March 2016.

4. Johnson applied for a job as new car sales manager with the respondent, an auto dealership known as Bob Rohrman Nissan, on April 26, 2016. He was interviewed that day by the general manager, Mike Krummick. Krummick offered Johnson the job at the interview, and Johnson and Krummick signed a compensation agreement by which Johnson would receive a draw of $1,500 per month and a monthly bonus of 2.75% of gross profit on new car sales, 2.75% of gross profit on used car sales, and 2% of gross profit on finance deals. As a sales manager, Johnson was the highest compensated salesman at the respondent.

5. Johnson started working for the respondent on April 27, 2016.

6. The dealership had approximately 40 employees, approximately 10 of whom were female. The main building of the dealership was about 38,000 square feet, and it had a second floor that was smaller than the first floor. There was a single staircase leading from the first floor to the second floor. There were no security cameras on the premises. The first floor was populated at all times the dealership was open, with salespeople and customers. Sometimes, at the end of the month, the office manager, a billing employee and a payroll clerk, at least two of whom were women, worked on the second floor until closing, which most nights was 9 p.m. Johnson occasionally worked until 9 p.m. The total workforce on the premises until 9 p.m. was about 15.

7. On April 27, 2016, the respondent's office manager, Gaby Carreno, requested a background screening report on Johnson from a company called ScreeningOne. The screening report was delivered to Carreno on May 3, 2016. It showed the two convictions for sexual assault in 2001 and the sex offender registration.

8. The person at the respondent whose job it was to evaluate criminal background reports was Mark Battista. His job title was director. Krummick reported to Battista. Battista received a copy of the background screening report on May 3rd.

9. Battista asked Krummick to get documents about Johnson's convictions. Krummick sent an email to Battista on May 3rd, telling him that Johnson "will get the judgment of conviction on Friday" (which would have been May 6th), and "I have attached the travel permit." Battista replied to Krummick on May 3rd "I need a complete file so I can interview him." The "travel permit" was a document Johnson had obtained from his parole officer on May 3rd to travel out-of-state in order to get a drug screening in Illinois as a condition of his employment. As it turned out, Johnson did not have to travel to Illinois to get his drug screening.

10. Before Battista ever communicated with Johnson, then, he asked for documentation in addition to the screening report regarding Johnson's criminal convictions. His concern, based on the fact that the criminal charges had to do with sexual assault, was for the safety of the women who worked on the premises. On or about May 3rd, Battista telephoned Johnson. Johnson told Battista that the incident that led to his convictions involved his wife, and Battista asked Johnson to provide documents about the convictions.

11. On May 4th, Johnson reported to his parole agent, Jennifer Kostrzewa. He told her he was hired by respondent on April 26th, and asked Kostrzewa to contact Krummick, the general manager at respondent.

12. On May 4th Kostrzewa telephoned Krummick. Krummick asked her to provide documents about Johnson's convictions. Kostrzewa noted in a log that she provided "additional information on Johnson's conviction and sentence structure." The sentence structure included information about the timing of Johnson's sentence and his probation revocations. She sent an email on May 4th to Krummick saying that "if there is anything else you need, let me know."

13. At some point before May 10th, Battista came to understand that as a condition of parole Johnson needed to get Krummick to sign a release to allow him to leave the state.

14. On May 10th at 1:29 p.m., Battista emailed Krummick and told him that he still had not received the information he wanted about Johnson's conviction record, and that if he didn't have it by "tomorrow, he has to go."

15. On May 10th Krummick sent Johnson from work to the courthouse to make arrangements for getting court records, primarily transcripts of any court hearings regarding Johnson's criminal prosecution in 2000 and 2001. Johnson attempted to get the court transcripts. He returned to the dealership that day and reported to Krummick that it would take 30 days for the transcripts to be produced. He gave Krummick a receipt showing that he paid the court the cost of obtaining the transcripts. Krummick reported Johnson's attempt to Battista.

16. At 4:15 p.m. on May 10th, Krummick sent an email to Kostrzewa stating:

> My H.R. Dept needs more information in regards to Carlos Johnson.
>
> - Total transcript
> - Records from the Arrest

> I apologize for the last minute requests, but Carlos is an asset to the dealership, but I answer to Mr. Rohrman.
> Thanks

17. Kostrzewa did not have transcripts of any court hearing that Johnson attended. As to the arrest record, Kostrzewa opined that it was property of the Milwaukee Police Department and would have to be ordered from the department.

18. The next day, May 11th, Johnson met with Kostrzewa, and Kostrzewa reported the following in her log:

> [Johnson] very upset and concerned that Nissan will not keep him employed. He has to produce a copy of the court transcripts and police reports for some hiring investigator with Nissan. He went to Clerk's office and it would cost him a lot of money because it is 120 pages of nothing. Agent questions why is [sic] would be needed as court transcripts tell very little about the offending behavior. [Johnson] has shown his attempts to get the information that is needed and will produce that information and hopefully that will be enough...

19. The next day, May 12th, Krummick called Kostrzewa. She summarized the call in her log as follows:

> Agent received a call from Mike at Nissan of Kenosha. He explained that the investigator with HR wants more information on why [Johnson's] case is still active. I again explained he was revoked and that time information document was in the first email that was sent. There is not an explanation of why he was revoked only that he was. Agent further explained that [Johnson] was forthcoming with his offense description and his revocations and agent is unclear why she needs to give any further information. They are aware of his arrest and criminal record and hired him knowing this information...

17. Battista, on behalf of Rohr Kenosha Motors, made the decision to discharge Johnson on May 12, 2016. Battista's reason for deciding to discharge Johnson was his conviction record. Krummick informed Johnson of the discharge on May 12th.

18. Kostrzewa noted in her log that on May 12th Johnson called her and told her that he had been fired.

19. Kostrzewa sent an email to Krummick at 10:48 a.m. on May 12th stating:

> I have received a call from Carlos stating that he was let go today. You have been given all information on his current case, his judgment of conviction and his incarceration time documentation. It is unfortunate that he will not be given this opportunity.

20. Johnson was unemployed from May 12, 2016 until June 6, 2016. On June 6, 2016 he began working as a salesperson for another auto dealership, Metro Kia of Madison, and thereafter at Russ Darrow Kia.

21. Johnson's earnings at Metro Kia of Madison and Russ Darrow Kia exceeded the earnings Johnson would have received from Rohr Kenosha Motors. Had Johnson remained employed for Rohr Kenosha Motors he would have earned approximately $3,222.00 from May 12, 2016 to June 6, 2016.[2]

Conclusions of Law

1. Carlos Johnson was entitled to certain protections under the Wisconsin Fair Employment Act due to the fact that he had a conviction record as defined in the Act.

2. Rohr Kenosha Motors, Inc., is an employer for purposes of the Wisconsin Fair Employment Act.

3. Carlos Johnson did not establish by a preponderance of the evidence that Rohr Kenosha Motors, Inc. discriminated against him by terminating his employment because of his arrest record in violation of the Wisconsin Fair Employment Act.

4. Carlos Johnson established by a preponderance of the evidence that Rohr Kenosha Motors, Inc. discriminated against him by terminating his employment because of his conviction record, in violation of the Wisconsin Fair Employment Act.

Memorandum Opinion

There are two stages to this case. The first is whether the complainant, Carlos Johnson, has shown that he was discharged because of his conviction record. The respondent denied that the complainant's conviction record was a motivating factor, and asserted a non-discriminatory reason for discharge, namely, the complainant's failure

[2] An exact figure for lost wages was not in evidence. The back pay amount is based on the average monthly wage of manager 1 in Respondent's Ex. 14 (the highest of the three managers), over the 7 months listed for calendar year 2016, multiplied by .79 (24 days of unemployment (5/12 to 6/6) is .79 of 30.4, the average number of days in a month).

to provide requested documentation about his convictions in a timely manner. The second stage is whether the respondent has shown either of two affirmative defenses – first, that it would have discharged the complainant regardless of its discriminatory motive, based on a belief that he was unqualified for employment due to his need to get permission from his parole agent to leave the state,[3] and second, that his convictions were substantially related to the circumstances of his job.

The ALJ determined that the respondent was liable for conviction record discrimination. As to the respondent's proffered non-discriminatory reason for discharge, the ALJ found it to be pretextual on its face, considering that the documentation the respondent requested was from court proceedings that took place 16 years in the past. As to the respondent's defense that the complainant was not qualified because he could not cross state lines without permission, the ALJ concluded that the respondent failed to establish that Johnson would have been unable to get permission to cross state lines so as to allow him to perform his job. As to the respondent's substantial relationship defense, the ALJ concluded that Johnson's employment did not provide him with a substantial opportunity to commit sexual assault at work, and that the circumstances of his convictions (an assault of his estranged wife in a private setting) did not show a predilection to commit sexual assault in a work setting.

The Complainant's Case

Because the respondent proffered a non-discriminatory reason for firing Johnson, the crucial issue is whether the complainant has shown that reason to be a pretext for discrimination. Pretext is proven by showing that the proffered reason: (1) has no basis in fact; (2) did not actually motivate the adverse employment action; or (3) was insufficient to motivate the adverse employment action. *Sult v. Jerry's Enterprises, Inc.,* ERD Case No. CR200402634 (LIRC Feb. 8, 2008), citing *Davis v. Wis. Dept of Corrections,* 445 F. 3d 971 (7th Cir. 2006).

There is some basis in fact for the respondent's asserted reason for discharge. It is clear that Battista was demanding to see a lot of documentation about Johnson's convictions, including arrest records and transcripts of any court hearings, and in an email two days before Battista discharged Johnson he linked a possible failure to provide documentation to a decision to discharge him ("I still have not received the information from the employee you wish to hire. If I don't have it by tomorrow, he has to go." Ex. 11). And it is clear that Johnson did not provide the requested documents in time. Johnson's failure to provide the documentation by Battista's deadline, however, did not actually motivate the firing, and was insufficient to motivate the firing. Battista, in setting his deadline for Johnson, was acting on an assumption that court transcripts and arrest records, even from 16 years ago, would be retrievable "at the flick of a switch":

[3] The respondent argued that as a sales manager, the complainant would have had to leave the state at a moment's notice to pick up cars at the respondent's affiliated dealerships.

> Years ago, they [documents such as police records and court transcripts] were very difficult documents to get. I know, because I was a flat-foot police officer to try [sic] to get these documents. But today everything is automated. Today everything is different. It's a flick of a switch, and you have all the documents spit out right in front of you.
>
> If you're a member of the Circuit Court, and you're a court officer, whether you're an attorney or prosecutor or public defender, you're on a record, you hit a button, you're registered...

(Tr., pp. 162-163). The complainant's attorney made a foundation objection which was sustained, but Battista confirmed that the above testimony was his understanding.

Even if it is accepted that Battista thought it was easy to retrieve these documents, the complainant's attempt to retrieve them should have caused him to question his assumption. On May 10, 2016, the respondent's general manager, Mike Krummick, sent the complainant from work to the courthouse to get "court transcripts" that Battista was seeking. Johnson reported back to Krummick:

> Q: Did the employer ask you to provide any documentation regarding your conviction record?
>
> A: Yes.
>
> Q: What were they asking for?
>
> A: They were asking for transcripts of my Judgment of Conviction, my police report, court transcripts, things like that.
>
> Q: To your knowledge, did you provide the documents that were requested?
>
> A: Yes.
>
> Q: Were there any that you were unable to provide?
>
> A: Yes. Court transcripts.
>
> Q: Did you attempt to secure the court transcripts?
>
> A: Yes. They said that the case was so old that they didn't keep the files down at the courthouse, that I would have to pay for them because

they're in a micro file, and they would have them sent to me, and it could take up to 30 days.

Q: Did you arrange for delivery of the transcripts?

A: Yes.

Q: What happened after that?

A: I reported back to my manager, which was Mike Krummick, explained to him that I could not get them. I was at work when they sent me to go get them. Mike Krummick sent me to the courthouse to get them from work because Mr. Battista was requesting them.

So, when I got back to the dealership, I told him the scenario. He called or emailed Mr. Battista and explained to him, I don't know if it was an email or phone call, explained to him that I could not get them, and the following day I was walked out of work.

(Tr., pp. 14-16). And further, on cross examination:[4]

Q: And what paperwork did you provide him [Battista]?

A: I provided him my Judgment of Conviction, my revocation papers. I was attempting to get the sentencing transcripts, and that's the one that I could not get, the sentencing transcripts that he requested.

Q: Because there was a 30-day lag period, is that what you're—

A: They said it could take up to 30 days to get them. They didn't have the papers at the courthouse, that they would have to get them off of micro chip or micro whatever it is, and that I could pick them up and make copies of the file or whatever.

Q: Did you do that?

A: Yeah.

Q: So where are they right now?

A: What do you mean? I didn't pick them up. I got fired.

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[4] On cross examination, the term "court transcripts" became "sentencing transcripts." If it really was 120 pages of material it would have been more than a sentencing transcript.

Q: Earlier you testified that you made payment for them, correct?

A: Yeah. I signed on a piece of paper the date and time that I was down there, and I showed Mike Krummick what I had did, gave him the receipt that I had paid for it to show that, hey, I'm in good faith with this. I went down there, did everything I had to do. Here's a receipt from where I went, here's the number.

Q: Where is that right now?

A: I gave it to Mike Krummick.

(Tr., pp. 51-52). Both Krummick and Battista testified after Johnson gave the above testimony, and neither one disputed it. Johnson's report that the court told him it would take 30 days to retrieve the documents would have given Battista good reason to question his assumption about how easy it was to get the documents he was requesting. The fact that Battista proceeded to fire Johnson less than two days later in the face of that reported information, without doing anything to test the truth of his assumption, indicates that Johnson's failure to provide the documentation by his deadline was not the real motivation for the firing, nor was it a sufficient motivation for his firing.

Showing that the articulated reason for an adverse employment action is pretextual does not necessarily mean the complainant must prevail. The evidence must be persuasive that the articulated reason is a pretext for discrimination. The commission may make this inference based simply on its disbelief of the articulated reason. *Kovalic v. DEC International,* 186 Wis. 2d 162, 167-168 (Ct. App. 1994). In this case, a lack of credibility in Battista's testimony provides an additional reason to conclude that the articulated reason was a pretext for discrimination. Battista testified that his decision to terminate Johnson's employment "had nothing to do" with the sexual assault charges he was convicted of. (Tr., pp. 164). This testimony is not credible. First, Battista was clearly concerned that the convictions themselves might disqualify Johnson from working for the respondent. He testified:

I did have some concerns because of the type of charges. As a manager, he would have access to the second floor office, and there are girls that work up there that are alone, and I wanted to make sure that their rights were protected as well.

But I also wanted to make sure that Carlos had the opportunity to work for us...

(Tr., p. 158). Second, the claim that the information Battista requested "never came" is an overstatement. Clearly, some information was provided to the respondent – the

judgment of conviction, the fact that Johnson was a registered sex offender and was on probation, and the fact that he served prison time because his probation was revoked.

Another problem with Battista's credibility is that his hearing testimony does not line up with his pre-hearing statements made in November 2016 and August 2017. In his letter to the Equal Rights Division's investigator on November 8, 2016 (Ex. 18), Battista claimed that from April 26, 2016 through May 10, 2016 management asked Johnson several times for documents associated with his sexual assault charges. But in his testimony Battista stated that he only learned of Johnson's criminal record on May 3, 2016 and therefore could not have asked for documents at least until then. The letter to the ERD then, compared to Battista's testimony, approximately doubles the period of time that Battista claimed to be waiting for Johnson to come up with the requested documents.

Then, on August 21, 2017, Battista provided sworn answers to interrogatories in preparation for hearing. (Ex. 16). There for the first time Battista explained that his reason for wanting to see documentation about Johnson's convictions had to do, essentially, with a claim of innocence by Johnson:

> ...the complainant was asked numerous times to provide paperwork regarding his conviction record that showed up on his background check because he contended that it was an error and that the Court had dismissed and/or expunged said charges and therefore, the Respondent should not be concerned about them. The Respondent responded that if he were to bring in the Court paperwork, the Respondent would review them and let him know of their decision.

(Interrogatory No. 3; emphasis added). And again, in response to Interrogatory No. 4, asking for all reasons that factored into respondent's decision to terminate Johnson:

> The respondent's decision to terminate the Complainant's employment with the Respondent was a result of his misleading information that the criminal convictions that showed up on his record were either mistaken or had been dismissed or expunged by the Court, the Complainant's failure to provide documentation to support those assertions despite repeated requests by the Respondent and repeated assurances by the Complainant that he would, and the fact that Mr. Johnson's criminal convictions are substantially related to the circumstances of his position of a Sales Manager at the Respondent.

(Emphasis added). The evidence at hearing is at odds with this explanation. Battista asked for the "complete file" on Johnson's convictions before he ever talked to him

(Ex. 12), therefore he could not have been asking for it because of some claim of innocence by Johnson.

Second, Battista's allegation that Johnson claimed his convictions were a mistake and were dismissed or expunged is itself not credible. It is unlikely that Johnson would have made such a claim or that Battista would have considered it plausible enough to cause him to request documents about it, given that Battista: 1) had in his possession records indicating that he was a registered sex offender; 2) knew that Johnson still had a parole agent 15 years after the convictions; 3) knew that he had served time in prison; and 4) knew that he still needed permission to travel out of state.[5]

Johnson had credibility problems, but they were on collateral issues. For example, his resume claimed he was skilled in Microsoft Office, but he was not. His resume gave incomplete and inaccurate information about his job history. According to Krummick, Johnson indicated he could speak Spanish, but he could not (Johnson denied that he claimed he could speak Spanish but Krummick is more credible on this point). Even granting that Johnson was not credible on these issues, there was no evidence that respondent knew that at the time, or that these issues would have made any difference in whether the respondent would have hired Johnson. More importantly, Johnson's credibility problems did not go to the central issue in this case. Battista's credibility, not Johnson's, is critical to the contention that Battista fired Johnson for failing to provide requested documentation about his convictions.

The affirmative defenses

There are a few cases holding that an employer who is liable for a discriminatory firing may reduce or eliminate the remedy to the fired employee by proving that the employee's job would have ended anyway, in the absence of the discriminatory motive. For instance, an employer who committed discrimination by discharging a part-time employee because she was pregnant was allowed to limit the period of her back pay award by proving the date on which the duties of the job were phased out. *Rech v. Glearson,* ERD Case No. 7505107 (LIRC Oct. 26, 1977). Also, if a respondent can show that it would have discharged an employee for a legitimate reason at some point after it had actually fired her for a discriminatory reason, it may be able to eliminate reinstatement as a remedy and cut off back pay as of the date it discovered information that would have caused the legitimate discharge. *McKnight v. Silver Spring Health & Rehabilitation,* ERD Case No. 199903556 (LIRC Feb. 5, 2002).

Here, the respondent argued that Johnson was disqualified for the job of sales manager because he needed to get permission from his parole officer to leave the state.

[5] In briefing, the respondent's attorney acknowledges that it would have been obvious to Battista that any claim of innocence by Johnson would have been a lie, given all the information he had signifying Johnson's guilt. (Respondent's brief, p. 8).

Krummick testified that sales managers need to travel to other dealerships at a moment's notice to pick up cars and deliver them to customers, and that often the other dealerships are in other states, and that an inability to cross state lines would have been disqualifying. (Tr., pp. 104-105). The exact status of Johnson's ability to leave the state, however, was not established. Johnson testified that he could cross state borders if he had permission from his parole officer (Tr., p. 42). Kostrzewa, his parole officer, testified that Johnson would have to get permission each time he wanted to travel to another state and that permission might take a day or two to obtain. (Tr., pp. 76-77). The travel permit form in evidence (Ex. 5), however, indicates the possibility of a "blanket" permission. And Battista, of all people, testified that Krummick told him that he, Krummick, could sign a release allowing Johnson to leave the state. (Tr., p. 165), which would seem to resolve the problem.[6] Battista also testified that he knew about Johnson's travel restrictions *before* he fired Johnson, yet he never offered travel restrictions as a reason for firing him. In sum, the respondent fell well short of proving that Johnson's travel restrictions, whatever they were, would have caused it to fire Johnson independent of his conviction record.

As to the respondent's substantial relationship defense, the commission has held that it does not depend on the motives or thought processes of the respondent at the time of the alleged discriminatory act, but instead is an after-the-fact objective assessment by the tribunal. *See Santos v. Whitehead Specialties, Inc.,* ERD Case No. 8802471 (LIRC Feb. 26, 1992); *Schroeder v. Cottage Grove Cooperative,* ERD Case No. 199903353 (LIRC June 27, 2001), *aff'd sub nom. Schroeder v. LIRC* (Dane Co. Cir. Ct., 01/31/2002).

The seminal case interpreting the WFEA's substantial relationship provision is *County of Milwaukee v. LIRC,* 139 Wis. 2d 805, 407 N.W.2d 908 (1987). The following excerpts from *County of Milwaukee* are key:

> 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.
>
> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.

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[6] Krummick implausibly testified that he wasn't even aware that Johnson's ability to leave the state was limited (Tr., p. 103), even though his own email dated May 3,2016 refers to an attached travel permit. (Ex. 12).

> We reject an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job. Assessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear latter 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.
>
> The full assessment of what may be termed the "fostering" circumstances may, at times, require some factual exposition...such factual inquiry would have as its purpose ascertaining relevant, general, character-related circumstances of the offense or job.

Id. at 823-825.

Applying these guidelines, the commission has focused on two variables affecting whether an individual's past criminal conduct would be "likely to reappear" in the workplace—first, the individual's *propensity* to exhibit that conduct in the work environment, and second the individual's *opportunity* to do so. As to propensity, the commission has recognized that some "factual exposition" regarding certain sexual assault offenses is helpful to ascertaining the degree of substantial relationship that exists. Specifically, the commission has recognized that a sexual assault in a domestic setting or within a personal relationship would tend to create a weaker propensity to repeat that conduct in the workplace, compared to a sexual assault committed outside that context. For instance, in *Knight v. Wal-Mart Stores,* ERD Case No. CR200600021 (LIRC Oct. 11, 2012), the commission stated:

> Turning to the instant case, while the complainant and Gearing did not have a "domestic relationship," they did have a personal relationship; they had been dating for some time and were in the process of breaking up. The complainant's crime occurred in response to Gearing's attempts to break off the relationship, and it occurred at his home. The commission considers this domestic setting and personal relationship relevant, and it agrees with the administrative law judge that the context of the complainant's crimes was distinct form the context of his work environment at Wal-Mart.

And in *Robertson v. Family Dollar Stores,* ERD Case No. CR200300021 (LIRC Oct. 14, 2005), the commission stated:

> ...it has not been established that the complainant has the propensity to lure random victims in order to perpetrate assaults upon them, and the mere fact of his conviction for second degree sexual assault does not warrant such a conclusion. The complainant's conviction stemmed from a domestic incident which occurred in his home and involved his girlfriend. No evidence was presented to suggest that the complainant is inclined to use force or violence against strangers, nor does a single conviction for second degree sexual assault establish that the complainant poses a general danger to all females.

And in *Rowser v. Upper Lakes Foods,* ERD Case No. 200300509 (LIRC Oct. 29, 2004), the commission stated:

> The commission agrees with the administrative law judge that the employer has failed to show how engaging in a violent act during a domestic dispute would bear any relationship to the duties and responsibilities of the subject driver position. Although drivers have unsupervised access to the employer's assets and customers, the elements of the offense for which the complainant was convicted do not include...violence toward individuals with whom the complainant has no personal relationship.

Finally, in *McKnight v. Silver Spring Health & Rehabilitation,* ERD Case No. 199903556 (LIRC Feb. 5, 2002), the commission stated:

> ...it has not been demonstrated how a disorderly conduct offense arising in connection with a domestic violence incident where [the complainant] was attempting to defend herself, bore a substantial relationship risk to the position of a CNA.

For comparison, see *Weston v. ADM Milling Co.,* ERD Case No. CR200300025 (LIRC Jan. 18, 2006), in which a substantial relationship was found, and in which the complainant's sexual assault crimes, while not committed in an employment setting, were also not committed in a domestic setting.[7]

The only detail about the incident that led to the sexual assault convictions in this case was the criminal complaint (Ex. 18). It is clear from this document that this was an assault within the context of a marital relationship and occurred in a domestic setting. In light of the above cases, these facts weigh against finding that they demonstrated a propensity to repeat that conduct outside that context.

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[7] The ALJ's findings of fact describe the complainant's two sexual assaults as having been committed against "a female acquaintance" and "a woman." The location of the incidents was not described; neither incident involved a marriage partner or a significant personal relationship.

As to opportunity, the commission has required that the circumstances of the employment offer more than the possibility that an individual could repeat criminal conduct in the workplace. In *Robertson, supra,* the commission stated:

> [T]he mere possibility that a person could reoffend at a particular job does not create a substantial relationship. Rather, the question is whether the circumstances of the employment provide "a greater than usual opportunity for criminal behavior," *Moore v. Milwaukee Bd. of School Directors* (LIRC, July 23, 1999), or "a particular and significant opportunity for such criminal behavior." *Herdahl v. Wal-Mart* (LIRC, Feb. 20, 1997). It is inappropriate to deny the complainant regular employment opportunities based upon a mere speculation that he might be capable of committing a crime in the workplace, absent any reason to believe that the job provides him with a substantial opportunity to engage in criminal conduct.

The respondent's evidence in this case about Johnson's opportunity to carry out a sexual assault at work is sketchy. The dealership had approximately 40 employees, approximately 10 of whom were women. The main building was approximately 38,000 square feet, with a second floor, the square footage of which was not in evidence. There were no security cameras on the premises. The respondent's argument about opportunity focused on the second floor. Presumably, this was because the first floor, which would have consisted mainly of the showroom, was populated at all times by salespeople and customers, and would have afforded little opportunity for anyone to commit a sexual assault without being detected.

There was evidence that, particularly at the end of the month, the office manager, a biller and a payroll clerk, who apparently were all women, may have had occasion to work upstairs until closing, at 9 p.m. There was also evidence that Johnson would occasionally be scheduled to work until 9 p.m., and that the total workforce on the premises until 9 p.m. would have been about 15.

There was a single staircase leading from the first floor to the second floor, and there was a door to the second floor area that had a lock on it. The evidence was conflicting about whether the second floor was generally locked or unlocked, and there was no evidence that Johnson possessed a key to the second floor. There was no evidence about whether or how often there would be one woman alone on the second floor, whether the second floor was partitioned, whether there would have been any private or locked rooms on the second floor, or whether sounds from the second floor, say, the sound of a woman screaming for help, could have been heard by the other dozen or so people in the building at 9 p.m. These factors, because they are relevant to the risk of detection, go to the question of whether anyone inclined to commit a sexual assault in the workplace would have had a "particular and significant" opportunity to do so. The respondent failed to prove that Johnson had such an opportunity.

Finally, the commission considers the age of the complainant's conviction record to be relevant to the substantial relationship analysis in this case. Johnson's sexual assault was 16 years prior, and his conviction 15 years prior, to his employment with the respondent, and there was no re-offense in the interim.

The commission recognizes that it has held the age of a conviction not to be relevant in some cases:

> The complainant argues that the ALJ erroneously decided that the date of the crime is irrelevant to the issue of whether a substantial relationship exists between the conviction and the job applied for, and that the case of *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), offered support for this position. These arguments fail. First of all, there is nothing in the statutory language of the conviction record provision which indicates that the length of time between the conviction record and the alleged discrimination is a relevant consideration. Section 111.335(1)(c)1., Wis. Stats., simply identifies the relevant concern as to whether or not the individual "has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job..." Secondly, the court's interpretation of this provision in *County of Milwaukee*, further indicates that the time elapsed since the offense occurred is not relevant. The court stated that the purpose of this language was the result of the legislature's assessment of how to balance the competing interests 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." Id. at p. 823. The court stated that what is important in this assessment is "not the factual details related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or gun was used...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 p. 824. Furthermore, in *County of Milwaukee* the court cited with approval at pages 814-815 its earlier decision in *Law Enforcement Standards Board v. Village of Lyndon Statio*n, 101 Wis. 2d 472, 305 N.W.2d 89 (1981), where the majority failed to consider, among other things, the time elapsed since William Jessen's conviction for falsification of uniform traffic citations and his employment as the chief of police by the village when considering whether the circumstances of his offense was substantially related to the duties of village chief of police. *Lyndon Station*, 101 Wis. 2d at 513-515.

Nelson v. The Prudential Insurance Company, ERD Case No. 9401390 (LIRC May 17, 1996). This holding was reaffirmed in *Borum v. Allstate Insurance Company,* ERD Case No. 199903542 (LIRC Oct. 19, 2001); *Villareal v. S.C. Johnson & Son, Inc.,* ERD Case No. CR199903770 (LIRC Dec. 30, 2002); and *Jackson v. Klemm Tank Lines,* ERD Case No. 200205060 (LIRC Feb. 19, 2010).

The commission no longer considers *Nelson* to be persuasive. First, *Nelson* points out that *County of Milwaukee* does not specifically mention the age of a conviction record as a factor in the substantial relationship analysis. *County of Milwaukee* does, however, state that the purpose of the substantial relationship test is to assess whether an individual's conviction record shows him or her to have a propensity to commit "similar crimes long recognized by courts, legislatures and social experience." Social experience might reasonably tell us that once an individual commits a crime, his or her propensity to commit a similar crime in the future goes down the longer he or she refrains from criminal behavior. *Nelson* also categorizes the age of a crime as one of those "factual details" about a crime that the court in *County of Milwaukee* suggested was unimportant. This is a mis-categorization. The factual details referred to in *County of Milwaukee* are details about the methodology of a crime ("such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used," etc., *Id.*at 824), as opposed to the circumstances that "foster" criminal activity. The age of a crime (or, to put it another way, the length of time during which there is no re-offense) goes more to whether or not the crime "fostered" future criminal activity than to the methodology of the crime. Finally, *Nelson* cites the fact that *County of Milwaukee*:

> ...cited with approval at pages 814-815 its earlier decision in *Law Enforcement Standards Board v. Village of Lyndon Station,* 101 Wis. 2d 472, 305 N.W.2d 89 (1981), where the majority failed to consider, among other things, the time elapsed since William Jessen's conviction for falsification of uniform traffic citations and his employment as the chief of police by the village when considering whether the circumstances of his offense was substantially related to the duties of village chief of police. *Lyndon Station,* 101 Wis. 2d at 513-515.

The minority opinion in *Lyndon Station* asserted that the majority failed to consider the time that elapsed (nine years) since the last of the employee's crimes, but the fact that the majority did not mention the age of the crimes does not necessarily mean the majority found it to be irrelevant. Instead, the majority opinion in *Lyndon Station* can be read as finding enough evidence of a substantial relationship based solely on the close affinity between the employee's convictions and the job he sought,[8] making it unnecessary to mention of the age of the crimes. The majority stated:

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[8] The employee was convicted of 26 instances of falsifying traffic citations when he was deputy sheriff for Juneau County; the job he sought was chief of police of Lyndon Station.

> Jessen [the employee] was convicted of misconduct in public office on 26 felony counts of falsifying uniform traffic citations. As a police officer for the village, Jessen would be charged with enforcing the traffic laws...Thus, under the facts of this case, it can hardly be said that the circumstances of the offense for which Jessen was convicted fail to meet the substantial relationship exception to the prohibition against employment and licensing discrimination on the basis of conviction record set forth in [the WFEA], as common sense dictates that a conviction of the felony of misconduct in public office for falsifying traffic tickets certainly bears a substantial relationship to the duties of a police officer who is called upon to issue traffic citations.

Lyndon Station, supra, at 492.

Finally, despite the commission's holding in *Nelson* and the cases that reaffirmed it, on at least one occasion the commission *did* consider the age of a crime as relevant to the complainant's propensity to re-offend at the workplace:

> The complainant's conviction stemmed from a domestic incident which occurred in his home and involved his girlfriend. No evidence was presented to suggest that the complainant is inclined to use force or violence against strangers, nor does a single conviction for second degree sexual assault establish that the complainant poses a general danger to all females. *Indeed, the fact that twenty years have elapsed since the conviction without the complainant's having reoffended, during which time it can be presumed that he has come into contact with females, would seem to indicate that he does not pose a general threat to all females, such that the mere presence of females in the workplace would create a risk of recidivism for him.*

Robertson, supra. (Emphasis added).

The commission no longer interprets *County of Milwaukee* or *Lyndon Station* to prohibit considering the amount of time that has elapsed since the last crime committed by an individual as a factor that may bear a reasonable relationship to the individual's propensity to commit a similar crime in the workplace. The commission considers it to be a factor that may be relevant in a particular case. In the present case, the commission concludes that the respondent has not established a substantial relationship because of the low propensity that Johnson would repeat his criminal behavior in the workplace, based on both the domestic nature of the crime and the 16 years that has elapsed without a repeat offense, and the lack of a particular and significant opportunity to re-offend presented by his employment.

cc: Ryan Kastelic
Brian M. Radloff

This case has been appealed to Circuit Court.