**State of Wisconsin**

**Labor and Industry Review Commission**

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| **Jacqueline Billings**<br>Complainant<br><br>**Right Step, Inc.**<br>Respondent<br><br>ERD Case No. CR201501613<br>EEOC Case No. 26G201500949C | **Fair Employment Decision**[1]<br><br><br>**Dated and Mailed:**<br><br>June 10, 2020<br>billija_rsd.doc:107 |

The decision of the administrative law judge is **affirmed**. 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 allegation of the complainant, Jacqueline Billings, that the respondent, Right Step, Inc., terminated her employment because of her conviction record in violation of the Wisconsin Fair Employment Act (hereinafter "WFEA").[2] An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision dismissing her complaint. Billings 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.

## Memorandum Opinion

Billings makes two arguments in her petition for review – first, that the ALJ erred by not allowing telephone testimony from witness Raymond Gomez, and second, that the ALJ erred by finding a substantial relationship between the circumstances of Billings' conviction record and the circumstances of her job. Right Step argued that the ALJ made no error on these two issues, and also argued that Right Step's co-founder and CEO, Rebecca Fitch, was motivated to fire Billings not because of her criminal record, but because she did not disclose her conviction record directly to Fitch during the hiring process.[3]

Testimony from Gomez

After this case was certified for a hearing on the merits the ALJ assigned to the case held a pre-hearing conference with the parties' attorneys, and filed a Pre-hearing Conference Report and Scheduling Order on October 18, 2017, which included the following:

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[2] Billings, in addition to raising the charge of discrimination because of conviction record, brought to hearing claims of retaliation and discrimination in terms and conditions of employment because of sex. The administrative law judge dismissed those claims in her decision, and Billings abandoned them by not raising them in her petition for commission review or in her brief to the commission. *Hentges v. State of WI, Dept of Regulation and Licensing*, ERD Case No. 9203077 (LIRC Jan. 12, 1996), citing *Reiman Assoc. v. R/A Advertising*, 102 Wis.2d 305, 306 n.1, 306 N. W. 2d 292 (Ct. App.); *Becker v. Automatic Garage Door Co.*, 156 Wis.2d 409, 419, 456 N.W.2d 888 (Ct. App. 1990).

[3] To the extent Fitch was motivated by Billings' failure to disclose her conviction record to her during the hiring process, that would have been a non-discriminatory motive. The ALJ found this to be the case (Finding of Fact No. 36), but did not apply *Hoell v. LIRC,* 186 Wis. 2d 603, 522 N.W.2d 234 Ct. App. 1994), to compare the strength of this motive to Fitch's motive based on conviction record because the success of the respondent's substantial relationship defense eliminated the need to consider any remedy. Likewise, it is not necessary for the commission to apply *Hoell*.

> At the hearing, the parties may present their cases through witnesses. Generally, witnesses **must** be present at the hearing to testify so that they can be examined and cross-examined by the parties.

This is consistent with the standard practice in the ERD that hearings be held in-person. There is no provision in administrative rules permitting telephonic hearings. Although in individual cases an ALJ may permit a witness to testify by telephone, the expectation is that witnesses will testify in person.

Right Step listed Gomez on its witness list, indicating that it might call him as a witness. By putting a witness on a witness list, a party is simply informing the opposing party that the witness might be called. As it turned out, Right Step did not seek to have Gomez testify.

Billings, however, sought to have Gomez testify. It had become clear prior to hearing that Right Step denied knowing anything about Billings' criminal record until long after it had hired her. Billings' position was that in 2010, prior to being hired, she asked Right Step's three drill sergeants, Lucatero, Gomez and Dietrich, about the possibility of working for the school, and disclosed at that time that she had committed crimes and served time in jail. Lucatero denied that Billings made that disclosure. Billings therefore wanted to elicit Gomez's apparent recollection that she had made that disclosure. Billings had not listed Gomez on her witness list, but stated on her witness disclosure that she reserved the right to call any witness on Right Step's witness list.

The responsibility for having witnesses appear at hearing falls on the party wanting to call the witness to testify. The administrative rule gives the parties' attorneys the power to subpoena witnesses to compel their attendance:

> (1) Subpoenas. The department or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents.

Wis. Admin. Code § DWD 218.15(1). Billings' attorney had the power to subpoena Gomez, but he did not do so. Instead, he asked the ALJ, on the first day of hearing, for permission to call Gomez by telephone. He wanted to call Gomez to have him testify about his 2010 conversation with Billings. When the request was made at the beginning of the hearing the ALJ stated:

> ALJ Brown: Okay. Off the record we had some discussion in particular about one of the witnesses that was disclosed by the respondent on its witness list. Let's make sure. Raymond Gomez.

> The complainant stated that she wanted to have the witness appear by telephone and testify. I'm hesitant to allow the witness to appear by phone just because it sounds like he is an important witness, and I think his credibility is going to be key here. So I have no problem having the complainant call him as a witness, if she chooses, but I think the witness needs to testify – be here in testify by phone. [sic] So we've planned a three-day hearing, so hopefully one of those three days the witness can come here to testify.

(Tr., p. 8-9).

As it turned out, the hearing lasted only two days. On the second day, Billings' attorney renewed his request to have Gomez testify by phone:

> Mr. Fox: ...I would ask the Court to reconsider the decision not to allow him to testify by telephone. I think this is a situation that does fit what Wisconsin Statutes – the factors considered under Wisconsin Statutes for allowing telephonic or video conference testimony.
>
> Certainly Mr. Gomez's testimony should not be a surprise to the respondent. He was named on their witness list. We were unable to get him here. He lives two hours away and could not make arrangements to have him get here.
>
> The cost to have him take a train or some other method is prohibitive for him, and, quite frankly, there are no documents for him either on his direct or cross-examination, at least I can't imagine, so I don't -- any of the inconveniences of having him appear by phone just aren't' present in this situation.

(Tr., p. 279-80).

The ALJ responded:

> Right. And I'm going to maintain my decision to not allow him to testify by phone. I just think that there was [sic] ways of getting him – at least giving him notice prior to last week, if you wanted him to testify. And I think that his credibility would be at issue here, just because I've heard, at least based on the offer of proof that you made yesterday, that his testimony would contradict some of the witnesses' testimony that I've heard so far, and I just think that I would need to be able to assess his credibility to be able to determine truthfulness. So I think just having him testify by phone would be insufficient.

(Tr., p. 280-81).

The ALJ's refusal to allow Gomez to testify by telephone falls into the category of rulings concerning the conduct of hearings that are within the ALJ's discretion to make. (See, e.g., *Johnson v. Kelly Services,* ERD Case No. CR200304138 (LIRC Apr. 21, 2009) (within the ALJ's discretion to *allow* a witness to testify by phone); *Edmonds v. Operating Engineers Local 139,* ERD Case No. CR200601395 (LIRC Aug. 27, 2010) (within ALJ's discretion to deny the re-calling of an adverse witness who could have been fully questioned earlier in the hearing). The standard for determining whether an ALJ acted within his or her discretion has been stated by the commission as follows:

> Under this "abuse of discretion" standard, the commission asks whether the ALJ "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." *Loy v. Bunderson*, 107 Wis.2d 400, 415, 320 N.W.2d 175 (1982); *Paytes v. Kost,* 167 Wis.2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992) (cited by LIRC in *Kutschenreuter and Schoenleber v. Roberts Trucking*, Inc., ERD Case Nos. 200501465 & 200501422 (LIRC April 21, 2011).

*Welke v. Luther Hospital,* ERD Case No. CR201200652 (LIRC May 30, 2014). Here, the ALJ clearly was persuaded by the probability that Gomez's credibility would need to be closely examined, given that he was expected to directly contradict the testimony of Lucatero concerning a conversation in which they both participated, and the ALJ reached a reasonable conclusion that a fair comparison of the credibility of Gomez and Lucatero would best be obtained by observing the demeanor of both of them while testifying. She considered the relevant fact that Billings had reason to know in advance of the hearing that she would like to have Gomez testify, and drew a reasonable inference that there were ways to attempt to compel his live attendance prior to hearing that Billings' attorney did not try, most importantly the process of subpoenaing him. Unlike *Johnson, supra,* where the ALJ allowed telephone testimony for an out-of-state witness who was in effect beyond the power of subpoena, Gomez was in Wisconsin and subject to subpoena. Billings made an argument that Wis. Stat. § 807.13, which lists appropriate considerations for a court to allow telephone testimony, weigh in favor of allowing Gomez to testify by phone. Section 807 is a rule for Wisconsin trial court, not for the ERD. Even so, two factors in Wis. Stat. § 807.13 support the ALJ's refusal to allow telephone testimony: "whether the proponent has been unable, after due diligence, to procure the physical presence of the witness" (Wis. Stat. § 807.13(2)(c)2); and "the importance of presenting the testimony of the witness in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully" (Wis. Stat. § 807.13(2)(c)5).

Billings also made the argument that Gomez should be allowed to testify by phone because the cost of traveling two hours to the site of the hearing was prohibitive for him. But again, the solution for that was to subpoena him, then he would not have to bear the costs of travel:

> Witness' fees, prepayment.
> (1) Except when subpoenaed on behalf of the state, of a municipality in a forfeiture action, or of an indigent respondent in a paternity proceeding, no person is required to attend as a witness in any civil action, matter or proceeding unless witness fees are paid or tendered, in cash or by check, share draft or other draft, to the person for one day's attendance and for travel.

Wis. Stat. § 886.06. The ALJ did not abuse her discretion by denying telephone testimony from Gomez.

Substantial relationship defense

The substantial relationship defense is an after-the-fact objective assessment by the hearing tribunal, the purpose of which is to assess "whether the complainant's tendencies and inclinations to behave in a certain way in a particular context are likely to reappear in a related context, based on the traits revealed." *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 824, 407 N.W.2d 908 (1987). The state of mind of the respondent is irrelevant. It does not matter whether, at the time of the alleged discrimination, the employer consciously acted in the belief that there was a substantial relationship between the complainant's conviction record and the circumstances of the job in question. *Wilson v. New Horizon Ctr.*, ERD Case No. 200002129 (LIRC Sep. 11, 2003); *Zeiler v. State of WI – Dept of Corrections,* ERD Case No. 200302940 (LIRC Sep. 16, 2004).

As a general rule, the circumstances of the criminal offense are gleaned from a review of the elements of the crime, and an inquiry into the factual details of the specific offense is not required. *County of Milwaukee*, at 823-824. Based on *County of Milwaukee,* the commission has stated that the appropriate method for evaluating whether a substantial relationship exists is to look "first and foremost" at the statutory elements of the criminal offenses involved. *Lillge v. Schneider National, Inc.,* ERD Case No. 199604807 (LIRC June 10, 1998). The tribunal then decides what character traits are revealed from those elements, and what their relationship is to the individual's employment. *Murphy v. Autozone, Inc.*, ERD Case No. 200003059 (LIRC May 7, 2004).

The ALJ followed this analysis. Although the specific elements of the crimes in this case are not known because the criminal statutes violated were not identified, the ALJ made a reasonable assessment of the traits revealed based on the names of the crimes for which Billings was convicted:

> The Complainant was convicted of assault consummated by battery, conspiracy to commit assault consummated by battery, robbery, and conspiracy to commit robbery. She pled guilty to carrying a concealed weapon. The Complainant's convictions were related to her leadership relationship with the Gangster Disciples street gang.
>
> The character traits of an individual convicted of such activities include a willingness to threaten another individual with bodily harm, a willingness to plan such threatened bodily harm with other individuals, a willingness to take another individual's possession[s] by force or threat of force, a willingness to plan such taking of another individual's possessions by force or threat of force with other individuals, and the willingness to carry a hidden weapon in public.

(ALJ Decision, p. 10). Since the assault conviction was "consummated by battery" the commission amends the ALJ's list of character traits by adding a willingness to actually inflict bodily harm on another, over and above a willingness to threaten bodily harm.

The job assignments that Billings had over her five years with Right Step gave her authority to supervise, discipline and conduct searches of students. From the findings of fact, Billings was engaged in:

> assisting with daily searches of students
> implementation of physical training, drills and ceremonies
> providing security throughout the school
> responding to security-related incidents

The ALJ, citing *Manning v. Cedarburg High School,* ERD Case No. CR201100165 (LIRC Oct. 31, 2013), reasoned that the character traits of someone convicted of Billings' crimes were "incompatible with" her employment in these roles for Right Step.

Billings took issue with the ALJ's use of the phrase "incompatible with," and argued that the appropriate question was whether the character traits and tendencies revealed by the commission of a crime "are likely to reappear" in the context of the employee's job." It should be noted, however, that in *County of Milwaukee* the idea that certain criminal propensities were inconsistent with the duties of a job was a sufficient rationale to find a substantial relationship:

> The twelve misdemeanors [committed by the employee] indicate a pattern of neglect of duty for the welfare of people unable to protect themselves. The propensities and personal qualities exhibited are *manifestly inconsistent* with the expectations of responsibility associated with the job. We agree with the County's analysis.

*County of Milwaukee,* 139 Wis. 2d at 828. (Emphasis added).

Even accepting that the test ought to focus on criminal propensities that were "likely to reappear" on the job, Right Step has proven its case. *Manning,* the commission case cited by the ALJ, involved the termination of a school debate coach who had marijuana possession convictions. The commission stated:

> In this case, the respondent school district placed a special responsibility on its staff to "observe that all school sponsored events are smoke, alcohol and drug free and that all school district properties are smoke, alcohol, and drug free zones." In addition, employees were charged with the responsibility to enforce the rules of the school board and the rules of student conduct.
>
> The respondent argued that the complainant's drug convictions, which demonstrated a propensity for illegal drug use, were "fundamentally inconsistent with supervising students to ensure a drug-free environment." (Respondent's Hearing Brief, p. 2). The commission agrees. The complainant's propensity for illegal drug use revealed a character trait and an attitude that made it reasonable to suspect how faithfully he would carry out his responsibility to monitor and enforce the school's drug-free policies.

The commission's assessment in *Manning* essentially was that the character trait revealed by Manning's conviction, a propensity for illegal drug use, was likely to reappear on the job in the sense that it would make it less likely Manning would faithfully carry out the job duty of monitoring and enforcing the school's drug-free policies.

Likewise, a person's willingness to threaten and inflict bodily harm and willingness to use force or threat of force to take others' property, make it less likely that that person, if given a position of authority in a military school, would execute that authority to drill students, physically train them, search them, and investigate their conduct for alleged security breaches consistently with the objectives of the school. Someone with investigative, disciplinary and command authority over students would have, along with that authority, a continual opportunity to threaten or inflict harm on them, or threaten the taking of their property.

Billings argued that the age of the criminal conduct, about 17 years prior to her discharge, without any subsequent crime, shows that she no longer has a propensity to exhibit the traits associated with her crimes. The commission has recently held that the amount of time that has elapsed since the last crime committed may, depending on the circumstances, be a factor bearing a reasonable relationship to the propensity to commit a similar crime in the workplace. *Johnson v. Rohr Kenosha Motors, Inc.,* ERD Case No. CR201602571 (LIRC Apr. 29, 2020). In *Johnson*, it was not only the length of time, but also the domestic nature of the crime, that together supported the conclusion that the propensity to engage in similar conduct in the workplace was minimal. Here, Billings' crimes were not confined to a domestic setting. The time elapsed since they were committed is not sufficient to outweigh the significant, continual temptation Billings had to exhibit traits associated with her crimes, due to her position of authority over the students.

Billings also argued that her good performance on the job for five years without engaging in inappropriate behavior shows that she does not have the propensity to exhibit, on the job, the traits associated with her crimes. The commission has ruled several times, however, that performance of the job is not relevant to the substantial relationship analysis. *Vanderkin v. Community Bio Resources,* ERD Case No. 200102738 (LIRC Sep. 30, 2003); *Nathan v. Wal-Mart,* ERD Case No. CR201400689 (LIRC Oct. 20, 2015); *Weston v. ADM Milling Co.*, ERD Case No. CR200300025 (LIRC Jan. 18, 2006); *Benna v. Wausau Insurance Companies,* ERD Case No. 8401264 (LIRC July 10, 1989); *McClain v. Favorite Nurses,* ERD Case No. 200302482 (LIRC Apr. 27, 2005). In *County of Milwaukee* the court expressly rejected this argument, stating that the commission was wrong to consider the prior satisfactory job performance as part of the substantial relationship inquiry:

> The Commission emphasized that [the employee] had "consistently received good to excellent job evaluations" as an intervention specialist.
>
> Whether an individual can perform a job up to the employer's standards is not the relevant question.

*County of Milwaukee,* 139 Wis. 2d at 827.

Similarly, the commission has ruled that evidence of the *individual* character traits of the complainant, as opposed to the traits revealed by considering the criminal offenses in question, is irrelevant. So, in *Sheridan v. United Parcel Service,* ERD Case No. CR200204955 (LIRC July 11, 2005), testimony from the complainant's treating psychologist to the effect that the complainant was rehabilitated was deemed irrelevant. In *County of Milwaukee,* the Court wanted to give employers an easy-to-use formula for showing a substantial relationship, without requiring them to engage in a lot of factual analysis:

> In determining the proper scope of the test, it must be kept in mind that the test must serve not only the judicial system's purposes but the employer's or licensing agency's purposes as well. What test the courts must employ will determine what employers and licensing agencies will do when making employment decisions. Therefore, there must be a semblance of practicality about what the test requires. A full-blown factual hearing is not only unnecessary, it is impractical. Employers and licensing agencies should be able to proceed in their employment decision in a confident, timely and informed way. The inquiry envisioned under the statute would enable the employers and agencies to do this.

*County of Milwaukee,* 139 Wis. 2d at 826-27.

The test set out in *County of Milwaukee* does not require the employer to factor in the personal characteristics of the employee or applicant for employment, including characteristics that indicate personal rehabilitation from past offenses, in order to reach a conclusion about the relationship between the conviction record and the job. Unfortunately, that fact seems to have worked to the detriment of the complainant here. The indications are that Billings has overcome her past criminal conduct and has appeared to turn her experiences into valuable teaching tools for vulnerable young people. The commission is constrained by court precedent to affirm the ALJ's decision that Right Step did not violate the law in terminating Billings' employment, but emphasizes that the affirmance is not a denial that Billings appears to have made admirable accomplishments following her criminal convictions.

cc: Peter Fox
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