State of Wisconsin

Labor and Industry Review Commission

Gregory L. Cota, Complainant **Jeffrey M. Cota**, Complainant **Oconomowoc Area School District**, Respondent ERD Case No. CR201700245 (Gregory) ERD Case No. CR201700246 (Jeffrey)	**Fair Employment Decision**[1] **Dated and Mailed:** July 30, 2021 cotagrje_rsd.doc:103

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

Order

1. That the respondent shall cease and desist from discriminating against the complainants because of their arrest records.

2. That the respondent shall immediately offer the complainants reinstatement to a position substantially equivalent to the positions they held prior to their discharge. This offer shall be in writing and shall be tendered by the respondent or an authorized agent. It shall provide reasonable notice of the time and place at which the complainants are to appear for work and shall allow the complainants a reasonable time to respond. Upon either complainant's acceptance of such position, the respondent shall afford that complainant all seniority and benefits, if any, to

[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.

which he would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

3. That the respondent shall make the complainants whole for all losses in pay the complainants suffered by reason of its unlawful conduct by paying to each complainant the sum that complainant would have earned as an employee from April 27, 2016, until such time as the complainant resumes employment with the respondent or would resume such employment but for the complainant's refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment compensation or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable but shall be withheld by the respondent and paid to the Unemployment Insurance Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory setoffs have been deducted shall be increased by interest at the rate of 12 percent simple. For each calendar quarter, interest on the net amount of back pay due (i.e., the amount of back pay due after set-off) shall be computed from the last day of each such calendar quarter to the day of payment. Pending any and all appeals from this Order, the total back pay will be the total of all such amounts.

4. That the respondent shall pay to the complainants reasonable attorney's fees of $79,957.50 and costs of $3,824.32 for a total of $83,781.82 in reasonable attorney's fees and costs associated with this matter. A check in that amount shall be made payable jointly to the complainants and their attorneys, Nicholas M. McLeod and Alan C. Olson, and delivered to Attys. McLeod and Olson at Alan C. Olson & Associates, S.C.

5. That within 30 days of the expiration of time within which an appeal of the commission's decision may be taken, the respondent shall comply with all terms of this Order and file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. Pursuant to Wis. Stat. § 227.54, the institution of a proceeding for judicial review shall not stay enforcement of the commission decision unless a stay is ordered by the reviewing court.

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 complainants 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 complainants, the complainants shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions 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 observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. See, Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

Procedural Posture

This case is before the commission to consider the complainants' allegation that the respondent terminated their employment in violation of the Wisconsin Fair Employment Act. An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that no discrimination occurred. The complainants 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 Oconomowoc Area School District ("the district" or "the respondent") is a governmental entity located in Oconomowoc, Wisconsin.

2. Gregory Cota and Jeffrey Cota ("complainants") were employees of the district. Gregory Cota began working for the district as a grounds crew member in 2006 and was later promoted to head of the grounds crew. Jeffrey Cota began working for the district in 2009 as a grounds crew member. Gregory Cota and Jeffrey Cota are brothers.

3. In September of 2011, the district began recycling scrap metal, in conjunction with the closure of one of its schools. The grounds crew was charged with handling scrap recycling for the district.

4. The district used Waukesha Iron and Metal (WIM) as its scrap metal processor. WIM maintained a list of accounts for all individuals who recycled scrap with them. WIM paid cash for materials valued at less than $500 and paid by check made out to "cash" for materials valued at more than $500.

5. Garret Loehrer began working on the grounds crew with the district in October of 2012. Loehrer was hired at the recommendation of Gregory Cota, which whom he had previously worked.

6. Jeffrey Cota, Gregory Cota and Garret Loehrer all had accounts with WIM for recycling scrap. They used their accounts both for materials that were recycled for the district as well as for their own materials which they recycled for themselves.

7. The practice in the district was for money received as a result of recycling scrap to be given to Gregory Cota, who in turn gave the money to his supervisor, Matt Newman, the general manager of the department.

8. The complainants frequently raised concerns about Loehrer's work performance. In 2012 and 2013, Loehrer received negative performance reviews, in part due to complaints that had been made about him by the complainants.

9. In late March of 2014, Jeffrey Cota complained to Nadine Wiencek, the custodial operations supervisor, that he felt Loehrer was not doing his job adequately. Wiencek relayed Jeffrey Cota's complaint to Loehrer.

10. On April 7, 2014, Loehrer sent an email to Wiencek to report a conversation he had had with Wiencek's supervisor, Newman. Loehrer asserted that the Cota brothers had complained to Newman about him and that Newman had reported the complaint to Loehrer, and had instructed Loehrer that it was important for him to get along with the Cota brothers. Loehrer felt he was being singled out.

11. Shortly after Loehrer's email to Wiencek, Jeffrey Cota asked Wiencek if Loehrer had turned in money from a recent scrap delivery. The money had in fact been turned in. Nonetheless, Wiencek reported the inquiry to Loehrer. Loehrer responded, "If I'm going down, they are too!" Loehrer then asserted, for the first time, that in the fall of 2012, he and Jeffrey Cota and Gregory Cota had delivered scrap to WIM and that after payment was received, Gregory Cota had distributed the proceeds between them, with Loehrer accepting $80 as part of the split.

12. Wiencek reported Loehrer's allegation to Beth Sheridan, the district's director of business services, and Pam Casey, the district's human resources director.

13. On May 8, 2014, the district began a formal investigation into Loehrer's allegation of theft from the district. The investigation was conducted by Casey and the district's outside counsel, Mark Olson. Casey and Olson interviewed individuals and reviewed documentation regarding the scrap transactions involving the district.

14. The district's investigation revealed that, between September of 2011 and August of 2013, WIM paid over $10,613.13 to Loehrer, Newman, and the Cota brothers. However, only $4,929.35 had been turned over to the district. The district was not able to account for $5,683.81, which was considered missing. Scrap money that had been originally given by WIM to Garret Loehrer ($2,154), Gregory Cota ($2,883) and Jeffrey Loehrer ($646) had not been received by the district. Jeffrey Cota reported that $415 of the money he received from WIM had been from his scrapping of his own personal property, which Casey accepted as true.

15. While being interviewed as part of the district's the investigation, the complainants informed the district that Gregory Cota had previously authorized the use of district vehicles for the transportation of personal scrap material to WIM. Both Gregory Cota and Jeffrey Cota took personal scrap to WIM using district trucks. Casey believed the complainants were being honest about their use of district

vehicles, and about using flextime in order to handle their personal scrap delivery off the clock.

16. Gregory Cota was interviewed on June 3, 2014. During his interview, he turned in a bag of petty cash containing $406.20. He explained that he had kept the petty cash at home for instances when his district credit card could not be used, such as when district vehicles were washed at a car wash. Casey considered the petty cash explanation to be "suspicious" at the time it was made.

17. During the course of the investigation, Loehrer made additional allegations including an allegation that the complainants had retained funds from the scrapping of a district snow plow and an allegation that two other district employees, Lonnie LaPaz and Jon Nickelbein, had kept money from district scrap sales. The district concluded that both of those allegations were without merit.

18. At the close of the district's investigation, Casey completed a thorough report, dated June 19, 2014. The report concluded:

> It appears that there are untruths being told by someone or by more than one person. The fact of the matter is that $5,683.81 of the District's money is missing. The recommendation being made is to keep Greg Cota, Jeff Cota, and Garret Loehrer on administrative leave (pay status to be determined) and turn this over to the Town of Oconomowoc for potential investigation. The District does not have the investigation authority to carry this investigation further, at this point. Employment-related disciplinary decisions can be better made following the conclusion of any criminal investigation. There can be no question that some employment action (and perhaps criminal action) is necessary here, in view of the evidence that this investigation has produced. However, it is also clear that the ability of the Administration to determine which employee or employees are responsible for this cash shortfall is limited by the conflicting allegations which have been produced to the District during the course of this investigation.

19. As a result of the district's internal investigation, Loehrer was suspended for thirty working days for his admitted theft of approximately eighty dollars from the district. Jeffrey Cota was given a 3-day unpaid suspension for using the district's truck to transport personal property. Gregory Cota was given a 3-day suspension, demoted from his position as head of the grounds crew, and his salary was reduced by one dollar per hour, as discipline for his unauthorized use of the district vehicle.

20. As a result of information gleaned during in her investigation, Casey formed the belief that Gregory Cota and Jeffrey Cota had kept scrap money belonging to the

district. After the issuance of its June 2014 report, the district did not continue to interview witnesses, although it contends that its investigation remained open.

21. After issuing its June 2014 report, the district turned the matter over to the City of Oconomowoc police, which in turn handed the case over to the Town of Oconomowoc police department as the school is located in the township. Detective Kristen Wraalstad investigated the missing funds. Like the school district, Det. Wraalstad interviewed witnesses and reviewed documentary evidence.

22. At the conclusion of her investigation, Det. Wraalstad recommended that the complainants each be issued a municipal citation for theft. On May 15, 2015, the Oconomowoc Police Department issued citations for municipal theft to Jeffrey Cota and Gregory Cota.

23. Casey understood that Det. Wraalstad's recommendation of theft charges was based solely on Loehrer's allegation that he and the complainants had split scrap money on one occasion in 2012. No additional information regarding the complainants was produced by way of the police investigation.

24. On May 18, 2015, the district placed the complainants on unpaid suspension. In similar letters suspending the complainants, Casey explained, "the issuance of the municipal theft citation clearly calls into question the veracity and truth of the statement you made to the school district during our investigation into these thefts."

25. The district decided not to terminate the complainants' employment at the time they were charged with theft. That decision was made based on the internal investigation completed by the district, Det. Wraalstad's report, and the issuance of citations.

26. Once the citations were issued, Attorney Jeffrey Ek prosecuted the cases and stayed in touch with the district regarding the case.

27. The police investigation into the missing funds revealed that Matt Newman had cashed checks that had been issued for the district's scrap materials at a local tavern and kept the proceeds. The police department shared this information with the district.

28. In November of 2015, Newman was charged with disorderly conduct for his theft of funds from the district. By April 7, 2016, Newman had pled guilty. He was given a suspended jail sentence, ordered to pay a fine and perform community service. Newman resigned from his employment with the district.

29. Casey acknowledges that no new facts were unearthed during the police investigation that she had not already considered at the conclusion of her own

investigation, other than the fact that Newman had cashed checks for scrap belonging to the district.

30. On April 26, 2016, prosecutor Ek informed the district that he believed the case was able to be settled. Ek sought the district's acceptance of the proposed settlement terms. Ek told the district that he believed he could convict the complainants, but never said what evidence he possessed that he intended to use to do so. Ek told the district that he proposed dismissing the charges against the complainants in exchange for their payment of $500, which he characterized as "restitution." The district informed Ek that it was agreeable to the proposed terms.

31. On April 27, 2016, the district terminated the employment of Gregory Cota and Jeffrey Cota, by way of letters to each which stated, in part:

> The facts are as follows:
>
> 1. You were interviewed on [May 8/June 3], 2014 regarding the theft of the School District funds which were the proceeds of the sale of School District scrap metal to Waukesha Iron & Metal.
>
> 2. During that interview, you were told that you would be subject to disciplinary action, including possible termination of your employment, if you lied or misrepresented any facts during the interview which was being conducted by the School District.
>
> 3. The District has learned that you were, in fact, guilty of theft of funds from the School District, a theft which you had denied during your [May 8/June 3], 2014 interview.
>
> 4. This theft consisted of the retention of cash which had been received by you for the sale of School District scrap metal to Waukesha Iron & Metal.
>
> 5. Your employment in the Oconomowoc Area School District is on an "at will" basis and is at the sole discretion of the School District.

The letters terminated the employment of Jeffrey Cota and Gregory Cota, effective April 30, 2016.

32. Casey decided to discharge Gregory Cota and Jeffrey Cota because they had been cited for municipal theft and the prosecutor had told her that, although he believed he could convict the complainants, he anticipated being able to reach a settlement agreement with them in which they would pay restitution.

Conclusion of Law

1. The complainants were discriminated against based upon their arrest records, in violation of the Act.

Memorandum Opinion

The Wisconsin Fair Employment Act ("the Act") prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of arrest record. Wis. Stat. §§ 111.321-111.322. After hearing the evidence presented by both parties, the administrative law judge concluded that the respondent did not terminate the complainants' employment because of their arrest records, in violation of the Act. The commission concludes otherwise and reverses the decision of the administrative law judge.

The respondent conducted its own investigation into the missing funds from the sale of the district's scrap metal. The respondent interviewed witnesses and reviewed documents from the scrap metal processor, which it compared with the district's own internal records. The respondent completed the active portion of its investigation in 2014 and concluded at that time that it was not able to ascertain whether Jeffrey Cota or Gregory Cota had stolen money from the district.

At the conclusion of its investigation, the district disciplined each of the complainants for improper use of a district vehicle for personal use, and suspended Loehrer for his admitted theft of district funds. The district then referred the matter to the Oconomowoc Police Department and relied on the police investigation, believing that it would turn up additional information regarding the complainants. The police investigation, however, did not result in the discovery of any additional information regarding the complainants.

At the close of the police investigation, the complainants were each charged with municipal theft, based on the allegations of Loehrer. In response, the respondent suspended the complainants, pending the outcome of the court proceeding.

While the court case against the complainants was pending, the ongoing law enforcement investigation revealed that the complainants' supervisor, Newman, had cashed scrap checks belonging to the district at a local tavern and kept the funds. Newman pled guilty to a criminal charge arising out of the theft and resigned from his employment with the district.

On April 26, 2016, shortly after Newman's conviction, the prosecutor in the complainants' cases informed the district that it was seeking to settle the cases against the complainants and sought the district's approval of the terms. The prosecutor proposed dropping all charges against Jeffrey Cota and Gregory Cota in

exchange for the complainants' agreement to pay $500 into the court. Prosecutor Ek characterized the payment as "restitution." Casey agreed with the proposed resolution.

The next day, April 27, 2016, the district terminated the complainants' employment, stating that the district "has learned that you were, in fact, guilty of theft of funds from the School District." Nine days later, on May 6, 2016, the district learned that the complainants had accepted a settlement agreement.

An arrest record includes 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).

The respondent did not elect to terminate the complainants' employment until after it came to believe that the complainants were going to accept a plea agreement in which charges would be dropped in exchange for the complainants agreeing to pay restitution.

An exception to the prohibition against arrest record discrimination was created by the Court of Appeals 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…

In other words, if the employer's decision to discharge is based on its own internal fact-finding that reveals a situation inconsistent with continued employment, and the employer makes its decision to terminate based solely on its internal findings, without consideration of the arrest record, then arrest record discrimination has not occurred. The question for the commission is one of motive.

The respondent in this case asserts an *Onalaska* defense, arguing that it had already decided that the complainants were guilty of theft in 2014, at the conclusion of the active part of its internal investigation. The respondent also asserts that its investigation remained ongoing until the time of termination, although it took no steps on its own to gather any additional information during that time.

The respondent believed, as a result of its internal investigation, that the complainants may have stolen money belonging to the district. However, it was not

persuaded of that conclusion to the point of being motivated to act until it was told by a prosecutor that he believed the complainants were guilty and would enter into a plea agreement and pay restitution.

At hearing, Casey testified that, in combination with her personal belief that the complainants had stolen funds from the respondent, she relied on three new pieces of information that came to her attention during the course of the criminal proceedings: 1) that the complainants were cited for municipal theft, 2) that the prosecutor told her he believed he could convict them, and 3) that the prosecutor told her he anticipated a plea agreement involving restitution would be reached. Casey testified that these 3 new pieces of information are what pushed her to make the decision to terminate the complainants' employment.

Deferred prosecution agreements are part of an arrest record. *Lovejoy v. Auto-Wares WI, Inc*, ERD Case No. CR200703609 (LIRC Feb. 24, 2011). Likewise, the commission finds that the settlement agreements in this case were part of the arrest record of the complainants.

As far back as April of 2014, the respondent had formed a belief that the complainants had retained scrap funds belonging to the district based on its own internal investigation. However, the respondent was not motivated to act on that belief alone. It was not persuaded to discharge the complainants until it received arrest record information from the prosecutor in 2016.

During the course of the police investigation, no additional facts were unearthed regarding the actions of the complainants. Nearly two years after the respondent had completed the active portion of its internal investigation, it decided to discharge the complainants. The respondent's own testimony made clear that its decision to terminate the complainants was the result of information it had received from the prosecutor. Each of the three determinative reasons cited by the respondent for discharging the complainants was a component of the arrest record. Thus, the respondent's reliance on those three facts in reaching the decision to discharge the complainants constitutes arrest record discrimination, in violation of the Act.

Attorney Fees

The complainants' attorney fee petition includes a request for reimbursement of 257.25 hours at rates ranging from $280 to $450 per hour. Affidavits support these rates and out-of-pocket costs, and the respondent does not challenge the rates or costs as unreasonable. The complainants request $79,957.50 in attorney fees and costs of $3,824.32, for a total of $83,781.82.

The respondents argue that the complainants' attorney fees should be reduced due to the partial success of the claims brought in this case, and for hours expended

representing the complainants in the employer's internal grievance procedure. The commission rejects both arguments.

The complainants initially asserted both arrest record and conviction record discrimination. However, the facts of the two claims overlap completely, so any work in developing one claim would have been work performed in furtherance of both claims. Moreover, the conviction record discrimination claim was abandoned very early in the process. The investigator found no probable cause to believe conviction record discrimination occurred and that finding was not appealed. The fact that the complainants did not establish they were discriminated against on multiple bases does not weaken the success of the case and has no effect on their entitlement to a remedy. "Where Plaintiff has obtained excellent results the fee award should not be reduced simply because the Plaintiff failed to prevail on every contention raised in the lawsuit." *Racine Unified School Dist. v. LIRC*, 164 Wis. 2d 567, 476 N.W.2d 70 (Ct. App. 1991). Accordingly, the attorney fees sought in this case are not reduced based on the respondent's theory of partial success.

The respondent also requests a reduction of fees for hours expended representing the complainants in the employer's internal grievance procedure. Generally, the commission does not approve fees for unrelated litigation such as unemployment claims. However, in this case, the factual issues addressed in the grievance process enabled the parties to avoid the use of depositions in the claims subsequently brought under the Act. Notably, transcripts of the grievance hearing were used to cross-examine witnesses at the hearing in this case, where deposition transcripts would otherwise have been used. As a result, the fees incurred in the grievance proceeding reduced the fees incurred after the claims in this case were filed. An award of attorney fees for the hours expended gathering information relevant to the claims in this case, during the grievance process laid out by the employer, is necessary to effectuate the Act's purpose that the complainants be made whole.

The attorney fees and costs contained in the complainants' fee petition are reasonable and necessary. Accordingly, the complainants' fee petition is approved without reduction.

NOTE: The administrative law judge noted that he found Garret Loehrer and Nadine Wiencek to be credible witnesses with demeanors that came across as reliable. The administrative law judge viewed the complainants as defensive, agitated, and consequently less believable. The issue before the commission in this case however, is the motive of the respondent in discharging the complainants. That decision was made by Pam Casey, the district's director of human resources. The commission accepts Casey's testimony at face value: that she questioned the veracity of the complainants but that she was not moved to discharge them until receiving arrest record information from the prosecutor. Because the commission

accepts as true her explanation for discharging the complainants, her credibility is not a factor in reversing the administrative law judge's decision.

cc: Atty. Claire E. Hartley
Atty. Mark L. Olson
Atty. Nicholas M. McLeod
Atty. Alan C. Olson

Editor's Note: Appealed to Circuit Court. Affirmed, June 14, 2022. Appealed to Court of Appeals. Reversed, *Oconomowoc Area School District v. Cota and LIRC*, 2024 WI App 8, 410 Wis. 2d 619, 3 N.W.3d 736. Appealed to Supreme Court. Reversed, *Oconomowoc Area School District v. Cota*, 2025 WI 11, 416 Wis. 2d 1, 20 N.W.3d 182.