STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126
http://dwd.wisconsin.gov/lirc/

MICHAEL W IONETZ, Complainant

DOLGENCORP LLC, Respondent

FAIR EMPLOYMENT DECISION

ERD Case No. CR201102951

Dated and mailed:

August 6, 2015
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SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge administrative law judge for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the administrative law judge. Based on its review, the commission makes the following:

FINDINGS OF FACT

1. The respondent, Dolgencorp, LLC, (hereinafter "respondent"), is a retail chain that operates "Dollar General" stores throughout the United States.

2. The complainant, Michael Ionetz, (hereinafter "complainant"), was hired by the respondent in May of 2010 as the store manager of a Dollar General store located in a strip mall on 27th Street in Milwaukee, Wisconsin.

3. At the time the complainant was hired he underwent a background check, which he passed.

4. Per company policy, all store employees must be 18 years of age or older. However, because the store carries a variety of general merchandise, including soda, candy and snack foods, unaccompanied minors often come in to the Dollar General store to shop.

5. The complainant was scheduled to work alone in the store at least once a week, and sometimes more often.

.ober 28. The newspaper article contained some salacious background details, .nd noted that the complainant was not permitted to have any contact with persons under the age of 18. Ms. Sayles-Albers also looked at the Wisconsin Circuit Court Access website and saw a list of misdemeanor child pornography charges.

13. On November 5, 2010, Ms. Sayles-Albers sent a copy of the newspaper article she had found to Jeri Wilson, one of the respondent's human resources representatives. After conferring with Ms. Wilson, Ms. Sayles-Albers notified the complainant that his employment was being suspended pending further investigation. She asked the complainant to provide her with documentation regarding his criminal record and he agreed to do so. The respondent then hired a third-party contractor called GIS to conduct an investigation into the complainant's criminal record.

14. On the same day the respondent requested the background check, Ms. Sayles-Albers received a call from the complainant's probation agent, Ms. Meuer, who told her that one of the conditions of the complainant's probation was that he not have unsupervised contact with minors. Ms. Sayles-Albers informed Ms. Meuer that many of the respondent's customers are under 18 and that the complainant frequently worked alone in the store. Ms. Meuer asked Ms. Sayles-Albers whether she could accommodate the complainant's situation by guaranteeing that he would always work with another employee present who could supervise his contact with minors. Ms. Sayles-Albers stated that she could not do that, since the complainant worked at a low-volume store and, as the highest level manager in the store, was required to work alone on occasion.

15. On November 6, 2010, the complainant provided Ms. Sayles-Albers with copies of his judgment of conviction. Ms. Sayles-Albers sent that paperwork to the respondent's corporate office.

16. On November 9, 2010, GIS completed its background investigation of the complainant and sent a report to the respondent's corporate office. On the front page of the report GIS indicated, under the subject heading "Grade," that the complainant's "Grade" was "fail." The report noted that the child pornography allegations had been dismissed and that the complainant was convicted of five counts of computer crime. The report did not indicate that one count of child pornography was "read in" for sentencing and did not contain any information about the terms of the complainant's probation.

17. Ms. Sayles-Albers was not able to view the actual background check report. The only information she had was that the complainant had failed the background check.

18. When Ms. Sayles-Albers received the report she contacted the respondent's loss prevention department to ask if she should terminate the complainant's employment. She was directed to do so.

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/ Laurie R. McCallum, Chairperson
Laurie R. McCallum, Chairperson

/s/ C. William Jordahl, Commissioner
C. William Jordahl, Commissioner

/s/ David B. Falstad, Commissioner
David B. Falstad, Commissioner

MEMORANDUM OPINION

The question presented in this case is whether the respondent's actions in terminating the complainant's employment based upon his conviction record were undertaken in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). In finding that no unlawful discrimination occurred, the administrative law judge reasoned 1) that the complainant had not made out a *prima facie* case of discrimination, since the conditions of his probation rendered him unqualified for the job, and 2) that the complainant's conviction record was substantially related to the job because it meant the complainant could not have unsupervised contact with minors. The commission does not agree with this rationale and believes that a violation of the statute has been established.

Prima facie case

The *prima facie* case is part of a burden shifting analysis that is intended to provide a framework to assist the decision-maker in determining the real reason for the employment action taken. The commission has consistently held that once the respondent has articulated a legitimate nondiscriminatory reason for discharge the question of whether the complainant has established a *prima facie* case becomes moot. *See, Wilks v. St. Joseph's Rehabilitation Center,* ERD Case No. CF201002486 (LIRC Feb. 28, 2013), *and cases cited therein.* Where, as here, the respondent has conceded that the complainant was discharged because of his conviction record (because he "failed his background check"), it is unnecessary to apply the burden shifting analysis. *See, Lefever v. Pioneer Hi Bred International Inc.*, ERD Case No. CR200602178 (LIRC May 14, 2010).

Further, the commission does not believe it can reasonably be said that the complainant is not qualified for the job, which is a matter that speaks to his skills and abilities, and not to his probation status. The fact that the complainant was

> "The question is whether the circumstances of the employment provide a greater than usual opportunity for criminal behavior or a particular and significant opportunity for such criminal behavior. It is inappropriate to deny a complainant employment opportunities based upon 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 mere possibility that a person could re-offend at a particular job does not create a substantial relationship."

Robertson v. Family Dollar Stores, Inc., ERD Case No. CR200300021 (LIRC Oct. 14, 2005). *See, also, Moore v. Milwaukee Bd. of School Directors*, ERD Case No. 199604335 (LIRC July 23, 1999)(commission looks at whether the job presents a particular or significant risk of recidivism for the complainant); *Herdahl v. Wal-Mart*, ERD Case No. 9500713 (LIRC Feb. 20, 1997)(relevant question is whether the job presents a "greater than usual opportunity" for criminal behavior).

In this case, the complainant was convicted of the following offense:

> **943.70 Computer Crimes.**
>
> **(2)** OFFENSES AGAINST COMPUTER DATA AND PROGRAMS. (a) Whoever willfully, knowingly and without authorization does any of the following may be penalized as provided in par. (b) and (c):
>
> 4. Takes possession of data, computer programs or supporting documentation.

Wis. Stat. § 943.70(2)4.

The jury instruction for the offense indicates that the elements of the crime include:

1. Taking possession of computer data or programs
2. Without authorization
3. Intentionally

WI J.I.-Criminal 1504.

Thus, the character traits revealed by having been convicted of such offense include a willingness to unlawfully download data or programs without authorization.

The respondent has a computer at the work place, located in its office in the back of the stock room. However, the respondent's computer is only an internal computer for company e-mails and to download store reports. The respondent did not have Wi-Fi at the time the complainant was employed, and employees could

Moreover, in a previous case the commission noted that while a "no contact" order prohibiting a complainant from having any contact with two of her co-workers may have been a consequence of the complainant's conviction, it was not a circumstance relating to the underlying criminal charge. Thus, the commission indicated that even if it were to reach the question of substantial relationship, the focus of the inquiry would be upon the relationship between the circumstances of a charge of criminal damage to property and the complainant's job as a machinist, rather than on the relationship between the conditions of the complainant's bond and her employment.[1] *See, Schmid-Long v. Hartzell Manufacturing*, ERD Case No. 199701693 (LIRC March 26, 1999).

Unlike *Schmid-Long*, in which the respondent persuasively testified that it did not discharge the complainant because of her criminal record but based on the fact that it could not retain her in light of the conditions of her probation, in this case the respondent's district manager testified repeatedly that the complainant was discharged because he had failed the background check and emphasized that this was the sole reason for the discharge. Since the background check revealed no information about the terms of the complainant's probation, it appears that the complainant failed the background check based upon his arrest and conviction record status, and for no other reason. Absent any reason to believe that the complainant was convicted of an offense that was substantially related to the job, the respondent's actions in discharging the complainant based upon his record must be viewed as having been undertaken in violation of the statute.

The nature of the accusations made against the complainant, upon which his arrest and criminal charges were based, are very disturbing to the commission. But the language of the relevant statute requires the commission, in applying the substantial relationship test, to consider the elements of the offense for which the complainant was actually convicted, not the offense for which he was arrested or charged. It is also very disturbing to the commission that the complainant did not disclose to the respondent the restrictions imposed upon him when he was released on bond. However, the respondent made it very clear during these proceedings that the complainant was discharged because of his conviction record, not because he failed to disclose the restrictions of his bond.

Remedy

Having concluded that the respondent's actions constituted a violation of the Act, the next question to decide is what the appropriate remedy should be. While the standard remedy for a discriminatory discharge includes back pay and reinstatement, the commission has held that if circumstances unrelated to the

[1] The commission did not consider substantial relationship in *Schmid-Long* because the respondent did not discharge the complainant based upon her conviction record for criminal damage to property--which it was aware of yet continued to allow her to work-- but because it could no longer employ her once the no-contact order was issued. The commission held that this constituted a non-discriminatory reason for discharge that was unrelated to the complainant's criminal record.

Attorney's fees and costs

The complainant's attorneys have requested reimbursement in the total amount of $27,656.80 ($24,521.25 in attorney fees and $3,135.80 in costs) for their efforts with respect to this matter. The complainant is represented by the firm of Hippenmeyer, Reilly, Moodie & Blum, S.C., located in Waukesha, Wisconsin. The lead attorney on the case, Ronald English, charged an hourly fee of $175, while a senior partner, Robert Moodie, who performed only a very minimal amount of work on the matter, billed at a rate of $285. In addition, the complainant's attorneys utilized the services of a law clerk, at a rate of $25 an hour.

Although the complainant's attorneys have failed to submit affidavits from other attorneys practicing in the area regarding the reasonableness of their hourly rates, which is the preferred practice when requesting reimbursement for attorney's fees,[2] the commission has sufficient prior experience in evaluating attorney fee requests to conclude that the hourly rates requested by the complainant's attorneys are reasonable ones. Moreover, the fact that the respondent has voiced no objection to the hourly rates requested by complainant's counsel, notwithstanding its vigorous objections to other aspects of the complainant's fee petition, is further evidence of the reasonableness of the request.

The complainant's bill is for a total of 143.2 hours: 136.4 hours for Attorney English, 1.85 hours for Attorney Moodie, and 4.95 hours for their law clerk. After reviewing the bill and the file, the commission believes this expenditure of hours is reasonable for the services performed, which included drafting the complaint and amended complaint, responding to a motion to dismiss, preparing for and attempting settlement negotiations, preparing for a hearing, which entailed extensive discovery, including depositions, representing the complainant at the hearing, conducting research and drafting post-hearing briefs, preparing a petition for review by the commission, drafting briefs to the commission, and preparing the affidavit and attorney fee request.

The respondent has not argued that the complainant's fee request is excessive or unreasonable, either in terms of the hourly rate or the number of hours expended. Rather, the respondent requests reduction of the attorney fee award based on an argument that some of the billing entries are done in the form of "block-billing," are vague, or seek recovery of fees for administrative tasks. The commission has considered these arguments, but does not find them compelling, for the reasons discussed below.

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[2] "It is anticipated that, along with the fee petition, the attorney requesting payment will submit affidavits from other attorneys in the locality establishing that the requested rates are in line with those prevailing in the community for similar services for lawyers of comparable skill, experience and reputation. An hourly rate determined based on such affidavits is normally deemed to be reasonable." *Van Den Elsen v. County of Brown*, ERD Case No. CR200100007 (LIRC June 14, 2005).

However, counsel's actual entry for March 1, 2012, is as follows:

> "Review handwritten notes from client and complaint, letter from ALJ, pleadings filed by Respondent; draft Notice of Retainer, Notice of Motion and Motion to Amend Complaint, and Brief in Response to Respondent's Request to Dismiss; Conference with client regarding no need to file Affidavit at this point."

When considering the entire unredacted entry for the date in question, for which the complainant's attorney billed a total of 1.3 hours, the commission can see no reason to question either the specificity of the bill or the reasonableness of the items contained therein. The same can be said of almost all of the items referenced by the respondent--with only a few expectations, the allegedly vague entries are culled from longer and more detailed descriptions of the tasks completed. While the fee statement does contain a handful of non-specific entries for reviewing correspondence from the client or conferring with the client, for which the complainant's attorney has not provided further explanation, the commission does not consider these entries problematic. Counsel is entitled to correspond with his client, and an argument could be made that an attorney is not required to provide detail about these communications, as long as it is clear that they were related to the case. Moreover, it is often possible to ascertain the relationship of such correspondence to the case based upon a review of the bill as a whole. On this point, the commission recently stated, with respect to billing entries simply entitled "write letter" and "telephone conference":

> "It is unsurprising that attorneys and clients have contact of the type such entries refer to, and it is readily inferable that the subject of the contact is the client's case, most particularly with reference to the issues presented or arising at or just prior to the time of the contact - issues which generally can be identified by other billing entries at that point. In other words, context can allow a sufficient understanding of the general topic of the contact."

Hill v. Stanton Optical, ERD Case No. CR201103151 (LIRC Sept. 26, 2014).

As in *Hill*, it is generally clear from the context of the bill what the correspondence or telephone calls to the complainant are about. Given these factors, and because the amounts charged for these items do not seem excessive or unreasonable, the commission declines to order a fee reduction based on vagueness.

In its brief in opposition to the complainant's attorney fee request, the respondent also submits a list of tasks that it characterizes as being purely administrative, and argues that those claims should be stricken. However, most of the items the respondent describes as clerical are the type of tasks for which the commission typically awards reimbursement. For example, filing the complaint, drafting the notice of retainer, conferring with the ERD office regarding case status, and correspondence to and from the court reporter are among the types of tasks that

"Under the Fair Employment Act, an award of reasonable attorney's fees may be made to a prevailing complainant. *Watkins v. LIRC*, 117 Wis. 2d 753, 345 N.W.2d 482 (1984). A complainant may be considered a prevailing complainant for attorney's fees purposes if she or he succeeds on any significant issue in the litigation which achieves some of the benefit sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 31 FEP Cases 1169 (1983). A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole. *Id.* ". . . (T)he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees. . . Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who was won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*

The complainant's complaint raised only one claim--that he was unlawfully discharged based upon his conviction record--and the commission found that the complainant was discriminated against in the manner he alleged. He therefore prevailed on the merits of his complaint. While the commission went on to decide that the complainant was not entitled to reinstatement or back pay because, even if the respondent had not discriminated against him based upon his conviction record, he would nonetheless have lost his job with the respondent due to his inability to work alone in the store with minors present, pursuant to the conditions of his probation, that is not a matter warranting a partial success reduction, to say nothing of a complete denial of any fees or costs, as the respondent requests.

It is well established law that the lack of a remedy does not preclude an award of attorney's fees. A party who proves discrimination on any issue is a prevailing party entitled to costs and attorney's fees, and it is not necessary to establish that the actual relief ordered materially altered the legal relationship between the parties by modifying the respondent's behavior in any way that directly benefited the complainant. *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 2001). Thus, even in cases where the only remedy sought and received was a cease and desist order, attorney's fees have been ordered. An employee may file a claim simply to vindicate his or her rights under the statute, even if there is no chance of a monetary recovery. While it is true that the complainant in this case was attempting to achieve more than a legal vindication--he clearly was hoping for reinstatement and back pay--the intent of the parties is not a factor in deciding whether fees are reasonable.

Editor's Note: Appealed to Circuit Court. Reversed sub nom. Ionetz and Dolgen Corp., LLC v. LIRC (Jefferson Co. Cir. Ct., 08/25/16), aff'd (Ct. App. Dist. IV, 07/14/17, summary decision).