

State of Wisconsin



Labor and Industry Review Commission

Karen M. Lane, Complainant

Bellin Memorial Hospital, Respondent  
d/b/a Bellin Medical Group

ERD Case No. CR201801229

Fair Employment Decision<sup>1</sup>

Dated and Mailed:

March 16, 2023  
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The decision of the administrative law judge is **reversed**. Accordingly, the commission issues the following:

**Order**

1. *Time within which respondent must comply with Order.* 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.
2. That the respondent shall cease and desist from discriminating against the complainant based upon her arrest record.
3. That the respondent, if it has not already done so, shall offer the complainant reinstatement to a position substantially equivalent to the position she held prior to her suspension. This offer shall be tendered by the respondent or an authorized agent

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<sup>1</sup> **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>.

and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford her all seniority and benefits, if any, to which she would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

4. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the amount she would have earned as an employee, including pension, health insurance and other benefits, from July 6, 2017, the date of the suspension, until such time as the complainant resumes employment with the respondent or would have resumed such employment but for her 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 insurance 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 Compensation Reserve Fund or the applicable welfare agency. Additionally, the amount payable to the complainant after all statutory set-offs 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.

5. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of \$30,444.35. A check in that amount shall be made payable jointly to the complainant and her attorney, Joshua A. Newville, and delivered to Mr. Newville.

6. That 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 this 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 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

### **Procedural Posture**

This case is before the commission to consider the complainant's allegation that the respondent discriminated against her based upon arrest record, 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 complainant filed a timely petition for commission review of that decision.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing, which consists solely of a set of stipulated facts agreed upon by the parties and does not include any witness testimony. Based on its review, the commission makes the following:

### **Findings of Fact**

1. The respondent, Bellin Memorial Hospital (hereinafter "respondent"), is a hospital doing business in Wisconsin.
2. The complainant, Karen M. Lane (hereinafter "complainant") began working for the respondent in December of 2001 as a physician specializing in pediatric care.
3. During her employment the complainant was subject to an employment agreement and addendum, a set of bylaws, a staff code of conduct, and a code of ethics.<sup>2</sup> (Specific provisions of those documents may be referred to in more detail in the memorandum opinion.)

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<sup>2</sup> No evidence was presented to suggest that, during the course of her employment, the complainant ever engaged in any conduct that was inconsistent with the respondent's code of conduct or code of ethics.

4. On July 6, 2017, the complainant was arrested based upon a domestic dispute with her husband that took place in her home and was charged with the following offenses:

Obstructing an officer – Wis. Stat. § 946.41(1)  
Battery, domestic abuse – Wis. Stat. § 940.19(1) and § 968.075(1)(a)  
Criminal damage to property, domestic abuse – Wis. Stat. § 943.01(1)  
Disorderly conduct, domestic abuse – Wis. Stat. § 947.01(1) and § 968.075(1)(a)

5. According to the police report related to the incident, the complainant had discovered calls from her husband to another woman and believed he was cheating on her. The complainant's husband came home to find the complainant intoxicated and playing very loud music. The complainant's husband had two unsecured handguns in the bedroom, which he decided to remove and place in the gun safe. While he was doing so, the complainant grabbed one and threw it on the floor. She then started hitting her husband and accused him of cheating on her. The complainant grabbed her husband's cell phone and threw it against the fireplace, breaking it. She demanded that her husband give her the combination to the gun safe, but he refused. The complainant then called the police and stated that her husband had pulled a gun on her. When the police arrived the complainant told them that her husband had pulled a gun on her and had pushed her. She later backpedaled and stated that her husband had not really pulled a gun on her. The police officers arrested the complainant and charged her with the offenses referenced above.

6. When the respondent learned of the arrest it immediately suspended the complainant's employment pending resolution of the charges against her.<sup>3</sup>

### **Conclusions of Law**

1. The respondent discriminated against the complainant based upon her arrest record, within the meaning of the Wisconsin Fair Employment Act.

### **Memorandum Opinion**

The Wisconsin Fair Employment Act (hereinafter "Act") prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of arrest record. *See*, Wis. Stat. § 111.322. However, the law contains the following relevant exception:

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<sup>3</sup> While not in the record, during the hearing the attorneys for the parties indicated that the charges against the complainant were eventually dismissed and that at some point the respondent offered to reinstate the complainant to her job. However, the complainant did not return to work for the respondent.

Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity. . . .

Wis. Stat. § 111.335(2)(b).

The burden of proving that a statutory exception applies is on the proponent of the exception, and the respondent has the burden of establishing that the complainant's arrest record was substantially related to the job. *Moran v. State of Wisconsin*, ERD Case No CR200900430 (LIRC Sept. 16, 2013), citing *Robertson v. Family Dollar Stores*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), *Chicago & Northwestern R.R. v. LIRC*, 91 Wis. 2d 462, 467, 283 N.W. 2d 603 (Ct. App. 1979).

In determining whether the statutory exception applies the first consideration is the “circumstances of the charge.” As a general rule, the “circumstances of the charge” 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 v. LIRC*, 139 Wis. 2d 805, 823-824, 407 N.W.2d 908 (1987).

The elements of the crimes with which the complainant was charged, as gleaned from the statutes, are as follows:

Obstructing an officer: knowingly providing false information to a police officer or knowingly placing physical evidence to mislead an officer while the officer is acting in an official capacity

Battery: intending to cause bodily harm to another person without that person's consent

Criminal damage to property: intentionally causing damage to the property of another without that person's consent

Domestic abuse: engaging in intentional infliction of physical pain, physical injury or illness towards one's spouse

Disorderly conduct: engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to cause or provide a disturbance

The “character traits revealed” by having engaged in the criminal offenses listed above include, generally, a tendency to solve problems with violence (battery, domestic abuse), an inability to control anger (battery, domestic abuse), a disregard

for the health and safety of others (battery, domestic abuse), *see, McClain v. Favorite Nurses*, ERD Case No. 200302482 (LIRC April 27, 2005); a lack of respect for the property of others (criminal damage to property), *see, Palmer v. Cree*, ERD Case No. CR201502651 (LIRC Dec. 3, 2018); a lack of respect for authority (obstructing an officer) and dishonesty (obstructing an officer), *see, Lillge v. Schneider National, Inc.*, ERD Case No. 199604807 (LIRC June 10, 1998). With regard to the crime of “disorderly conduct,” the court has noted that the character traits revealed will vary depending upon the individual circumstances. *See, County of Milwaukee*, 139 Wis. 2d 805, 825. Given the facts of this case, the disorderly conduct charge against the complainant reflected poor judgment and a willingness to engage in violent and loud conduct causing a disturbance.

Having reviewed the circumstances of the offenses, the decision-maker must then consider the circumstances of the job. The record in this case does not contain much information about the job apart from the fact that the complainant is a physician specializing in pediatric care and was subject to the respondent’s codes of conduct and ethics, which indicate generally that all staff members must treat patients and persons involved in their care with courtesy, dignity and respect, and that those who fail to conduct themselves appropriately will be addressed in accordance with the policy. In addition, terms of the complainant’s employment were set forth in an employment agreement and addendum and in a detailed set of bylaws. While no specifics were emphasized in the stipulated facts or by the parties at the hearing, there can be little doubt that the job of pediatric physician is one entailing a high level of responsibility.<sup>4</sup>

How, then, do the crimes with which the complainant was charged relate to the circumstances of the job of physician specializing in pediatric care? It is tempting to discount the complainant’s actions as being uniquely related to a domestic altercation involving her husband and, therefore, something that would not be likely to play out in the workplace. However, in a recent decision, *Cree, Inc. v. LIRC*, 400 Wis. 2d 827, 970 N.W.2d 837 (2022), the Wisconsin Supreme Court made it clear that the fact that a crime took place in the context of a domestic relationship (at home, with a partner or family member with whom the complainant was intimately involved) could not be a mitigating factor in the analysis. The court expressed the opinion that an individual who behaves violently at home may well behave violently in other settings. That said, the court did not base its analysis solely on a recitation of the negative character traits associated with the charged crimes, but stated that, in analyzing substantial relationship, one must consider “other relevant and readily ascertainable circumstances of the offense such as the seriousness and number of offenses, how

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<sup>4</sup> In her decision the administrative law judge also found that the job was a stressful one based on the facts that the employment agreement required the complainant to work at least 40 hours per two-week pay period with 28 hours spent on patient appointments and that she was expected to have 85% or better coding accuracy. The commission, however, does not believe these factors warrant a conclusion that the complainant worked in a stressful environment.

recent the conviction is, and whether there is a pattern of behavior.” *Id.*, at 850. The court further indicated that the plain language of the substantial relationship test “requires that the employer show that the facts, events, and conditions surrounding the convicted offense materially relate to the facts, events, and conditions surrounding the job,” and that to find a substantial relationship “the circumstances must materially relate to each other, not merely superficially relate.” *Id.*, at 839-40 (emphasis in original). The court opined, “In applying this framework, we first ask whether there are opportunities in a workplace that would allow a domestic violence perpetrator to recidivate.” *Id.*, at 846.

In the instant case, the complainant was accused of committing a variety of offenses based upon a single incident, but did not engage in a pattern of violence or other criminal conduct. The complainant, while intoxicated, allegedly struck her husband and broke his cell phone. She also attempted unsuccessfully to gain access to a firearm by demanding from him the combination to the couple’s gun safe. When police arrived at the scene, which occurred at the complainant’s behest, she inaccurately indicated to police officers that her husband was the aggressor. While this conduct--if proven to have been committed--is certainly concerning, it pales in comparison to the conduct at issue in the *Cree* case, which involved extreme acts of violence perpetrated against more than one victim. Further, even finding that an individual who engages in a single instance of domestic abuse might abuse others in a completely different setting and context, it is difficult to imagine that occurring here. The record contains no evidence to indicate that there are specific opportunities in the workplace that would allow the complainant to recidivate, and the commission can see no reason to believe that the complainant, who worked for the respondent for 17 years without incident, is likely to become aggressive with a patient, a patient’s family member, or a co-worker, that she might destroy property, or that she might obstruct an investigation in the context of her work.

Indeed, it is not clear that the respondent was truly concerned the complainant might engage in criminal activity if allowed to continue working while the charges against her were pending. Rather, the respondent’s arguments appear to focus primarily on a concern that the crimes with which the complainant was charged indicated that the complainant lacked the good judgment, trustworthiness, integrity and other qualities required of the job. In her decision the administrative law judge found that the respondent offered no evidence to show a substantial risk of criminal recidivism, but concluded that the respondent did establish that the character traits revealed by having engaged in the crimes with which the complainant was charged were incompatible with good job performance. Further, the administrative law judge agreed with the respondent’s argument that this incapability created a substantial relationship. The commission has carefully considered this argument, but does not find it persuasive.

In its most recent decisions addressing the issue of substantial relationship, *County of Milwaukee* and *Cree*, both cited above, the Wisconsin Supreme Court focused on

the risk of criminal recidivism and not simply on the risk of poor job performance as evidenced by adverse personality traits. In *County of Milwaukee*, the court stated, in relevant part:

It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. *There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime.*

*Id.* at 821 (emphasis added).

It is highly desirable to reintegrate convicted criminals into the work force, not only so they will not remain or become public charges but to turn them away from criminal activity and hopefully to rehabilitate them. . . . However, the legislature has clearly chosen to not force such attempts at rehabilitation in employment settings where experience has demonstrated the *likelihood of repetitive criminal behavior*.

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 [statutory] 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.

*Id.* at 823 (emphasis added).

The court went on to say:

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 824 (emphasis added).

Relying on *County of Milwaukee* for guidance, the commission has repeatedly held that a finding of a substantial relationship requires a conclusion that a specific job provides an unacceptably high *risk of recidivism* for a particular employee:

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); *Nathan v. Wal-Mart*, ERD Case No. CR201400689 (LIRC Oct. 20, 2015). *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”).

The commission has specifically rejected the argument that adverse personality traits can, in and of themselves, form the basis for a finding of substantial relationship. In *Wiechert v. City of Shawano Housing Authority*, ERD Case No. CR201203327 (LIRC July 22, 2015), the commission stated:

The substantial relationship defense is aimed at preventing criminal recidivism. *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987). However, it is clear from this record that the respondent was not genuinely concerned that the complainant might commit a criminal, or even a non-criminal, offense on the job. Rather, the respondent appears to have formed a belief that the complainant’s arrest and conviction record, when taken as a whole, suggested that he lacked the judgment and maturity needed to be the Executive Director . . . However, the law requires an analysis of whether and how a specific offense is related to the circumstances of the job, and it does not permit an employer to deny an individual an employment opportunity based upon generalized conclusions about his character gleaned from a broad reading of his arrest and conviction record. As virtually all convictions for either criminal or civil offenses demonstrate to some degree an unwillingness to follow rules and a failure in judgment, while virtually

all jobs require employees to follow some rules and to exercise reasonable judgment, the effect of such interpretation would be to eliminate most individuals with conviction records from consideration for most jobs. Such a result would be inconsistent with the goals of the Fair Employment Act as well as with its plain language.

Similarly, in *Smith v. State of Wisconsin DWD*, ERD Case No. CR200602582 (LIRC Jan. 4, 2019), the commission declined to extend the substantial relationship defense to situations where a conviction record would not result in criminal behavior but arguably demonstrated a likelihood that the individual could not effectively perform the job. In that case, the commission noted that the Wisconsin Supreme Court’s most recent decision addressing substantial relationship stated that the substantial relationship test is meant to address the “likelihood of repetitive criminal behavior” and the “risk of recidivism,” *County of Milwaukee*, at 823-824, and that absent any more recent pronouncement from the Court, the commission could see no reason to deviate from its interpretation of the substantial relationship defense as applying only to situations presenting a significant opportunity for repeat criminal behavior.

The court’s newest decision on the subject of substantial relationship, *Cree*, does not provide the commission with a reason to depart from that reasoning. In *Cree*, the court stated:

Wisconsin’s laws regarding employment discrimination based on conviction record serve two important, and sometimes competing, interests—rehabilitating those convicted of crimes and *protecting the public from the risk of criminal recidivism*.

*Id.* at 838 (emphasis added).

. . . [We] examine the circumstances *material to fostering criminal activity*. The material circumstances are those that exist in the workplace that present *opportunities for recidivism* given the character traits revealed by the circumstances of a domestic violence conviction.

In applying this framework, we first ask whether there are opportunities in a workplace that would *allow a domestic violence perpetrator to recidivate*.

*Id.* at 846 (emphasis added).

. . . [the employer] sufficiently demonstrates that requiring it to employ [the complainant] would force it to carry too much *risk relating to his recent criminal behavior*.

*Id.* at 855 (emphasis added).

As indicated above, the Wisconsin Supreme Court interprets the statute as focusing on criminal recidivism and the risks associated with requiring employers to hire individuals who may be likely to commit criminal acts in the workplace. In *Cree*, the court emphasized the possible consequences to the employer of hiring an individual with a significant violent criminal history, which would place the safety of co-workers and members of the public at risk and potentially expose the employer to liability. *See, Cree*, at 851. In contrast to that scenario, if an employer hires someone who has been charged with or convicted of a crime demonstrating character traits that appear to be incompatible with good job performance, such as poor judgment or a lack of respect for authority, the risk to the employer and the public is relatively low. Further, the employer can resolve the issue by discharging that individual for poor performance, should those traits manifest themselves on the job, just as it would any employee with or without an arrest or conviction record whose performance was unacceptable. The risk to the employer of hiring or retaining an employee with objectionable character traits revealed by the employee's arrest or conviction record is substantially different when the risk in question is that the employee's behavior may be incompatible with good job performance as opposed to when the risk presented is that the employee may have a greater than usual opportunity to engage in criminal conduct while at work.

Finally, even assuming that adverse character traits could form the basis for a finding of substantial relationship in the absence of a concern about criminal recidivism, the commission would nonetheless be disinclined to find a substantial relationship in this case. The respondent contended that the charges against the complainant suggested a lack of honesty and integrity on her part, as well as a variety of other negative character traits including but not limited to poor judgment and a lack of respect for authority. It argued that a pediatric doctor must be trustworthy in the eyes of her patients, their parents, and the community, and that the trait of dishonesty is incompatible with that requirement, while the trait of lack of respect for authority is incompatible with the requirement that pediatricians follow rules and professional standards. However, as the respondent's attorney asserted repeatedly at the hearing, the legal standard for finding substantial relationship must be built on common sense. Putting aside the fact that the complainant had worked for the respondent for 17 years with no concerns arising regarding her honesty, trustworthiness or willingness to follow rules, the mere fact that the complainant has been charged with a crime implicating a lack of those qualities would not appear to relate more particularly to the job of pediatric doctor than it would to any other employment; honesty, trustworthiness, and a willingness to follow rules are important components of most any job, and there is nothing about the job of a pediatric physician that is unique in this regard. The fact that one has engaged in criminal conduct generally implies an unwillingness to follow rules, a lack of trustworthiness, poor impulse control, and a host of other unacceptable character traits that would be negatively

correlated with most types of employment. To find a substantial relationship based on such factors alone would allow the substantial relationship exception to swallow up the statutory protections for individuals with arrest and conviction records that the Act supposedly affords.

For the reasons set forth above, the commission concludes that the complainant's arrest record was not substantially related to her job and that the respondent's decision to suspend the employment relationship as a result was therefore in violation of the Act. Accordingly, the commission orders the respondent to cease and desist from discriminating against the complainant, to offer her reinstatement to her position with backpay and lost benefits, and to pay her reasonable attorney's fees associated with litigating this matter.<sup>5</sup>

NOTE: The commission did not consult with the administrative law judge regarding credibility prior to reversing. The administrative law judge's decision was not based upon an assessment of witness testimony, but upon a record consisting solely of stipulated facts.

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<sup>5</sup> The amount of attorney's fees and costs referenced in paragraph 5 of the commission's Order was agreed upon by the parties. Because those amounts appear to be reasonable, the commission has incorporated them into its decision.

MARILYN TOWNSEND, Commissioner, (concurring):

I write separately because, although I concur in the result and analysis reached by the majority in this case, I would draw the parties' attention, to §227.54, Wis. Stat., which provides:

The institution of the proceeding for review shall not stay enforcement of the agency decision. The reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. [196.43](#), [253.06](#), and [448.02 \(9\)](#).

/s/

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Marilyn Townsend, Commissioner

cc: Attorney Ross Townsend  
Attorney Joshua A. Newville