

State of Wisconsin



Labor and Industry Review Commission

Michael Geiger, Complainant

Fair Employment Decision¹

Milwaukee Area Technical College,
Respondent

Dated and Mailed:

ERD Case No. CR201602707
EEOC Case No. 443-2017-00200

April 28, 2023
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The decision of the administrative law judge is **affirmed**. Accordingly, the complainant's complaint is dismissed.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, 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 complainant's allegation that the respondent suspended his employment in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge (hereinafter "ALJ") for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision, finding that the respondent did not violate the Act when it suspended the complainant. The complainant 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 agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own.

Memorandum Opinion

The commission reviews *de novo* the decision of the administrative law judge. The question before the commission in this case is whether the respondent violated the Act when it suspended the complainant because he had been charged with embezzlement.

The Wisconsin Fair Employment 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:

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). The complainant argues that there is no substantial relationship between the crime for which he was charged (embezzlement, pursuant to Wis. Stat. § 943.20(1)(b)) and the complainant's job as a plumbing instructor. The commission disagrees.

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 complainant in this case was charged with a violation of Wis. Stat. § 943.20(1)(b), commonly referred to as embezzlement. The elements of the crime with which the complainant was charged, as gleaned from the statute, are as follows:

By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. ...

The commission next considers the character traits revealed by the offense. *See, County of Milwaukee*, 139 Wis. 2d 805, 825. One character trait revealed by having engaged in embezzlement includes, generally, a tendency to take things that belong to others without the owner's consent. Embezzlement requires a theft arising out of one's position with an organization. One convicted of embezzlement exhibits the character traits of disregard for the property rights of others; dishonesty and lack of trustworthiness; and a willingness to abuse one's position for personal gain.

Having reviewed the circumstances of the offense, the decision-maker must then consider the circumstances of the job. The record in this case establishes that the complainant's job required that he place orders for tools and supplies to be used in teaching his class. The complainant would usually receive the items that he ordered, although they would occasionally be delivered to another office, which would check them in. The complainant often taught students at an offsite location and was allowed to take tools and supplies with him from the school to the job site.

These circumstances provided the complainant with a greater than usual opportunity to reoffend. He had great autonomy in his position and had the opportunity to personally select which tools and supplies to order and how much to order. Although the complainant did not work completely free of oversight, the job provided great freedom to exercise his judgment in procurement and with that, great opportunity to abuse his position for personal gain and to disregard the property rights of his employer.

The complainant was suspended from his job first with pay and later without pay, as a direct result of having been charged with embezzlement. Where, as here, the circumstances of the charge substantially relate to the circumstances of an individual's particular job, it is not employment discrimination to suspend the individual while the charges are pending.

The respondent need not establish a particular motive for the complainant to reoffend. It must simply show that the circumstances of the job put the complainant at an increased opportunity to reoffend. The facts established in this case are sufficient to persuade the commission that the circumstances of the complainant's job did afford him that greater than usual opportunity.

The respondent did not violate the Act when it suspended the complainant while a charge of embezzlement was pending. Accordingly, the complainant's complaint is dismissed.

cc: Attorney James A. Walcheske
Attorney Bethany C. McCurdy