State of Wisconsin

Labor and Industry Review Commission

Raymond Gullan, Complainant **General Mills, Inc.**, Respondent ERD Case No. CR201702308	**Fair Employment Decision**[1] **Dated and Mailed:** September 29, 2023 gullara_rsd.doc:103

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This case is before the commission to consider the complainant's allegation that the respondent rescinded an offer of employment because of his conviction record, in violation of the Wisconsin Fair Employment Act (hereinafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. 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 Act prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of arrest or conviction record. *See*, Wis. Stat. §§ 111.321 and 111.322, subject to the following relevant exception:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual if any of the following applies to the individual:
>
> 1. Subject to sub. (4) (b) to (d), the individual has been convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.

Wis. Stat. § 111.335(3)(a).

The substantial relationship exception attempts to balance the goal of rehabilitation of offenders with the goal of protecting employers, who assume some degree of risk in hiring former offenders.

> 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.

County of Milwaukee v. LIRC, 139 Wis. 2d 805, 823, 407 N.W.2d 908 (1987).

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 conviction 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).

Following the direction of the court in *County of Milwaukee*, the commission has historically gleaned the circumstances of the offense from a review of the elements of the crime, and an inquiry into the factual details of the specific offense was not required. *Id.* at 823-824. After considering the circumstances of the offense, the commission would next look the circumstances of the job to determine whether the two were substantially related. Recently, however, the Wisconsin Supreme Court addressed the substantial relationship issue again in *Cree, Inc. v. Labor and Industry Review Commission,* 400 Wis. 2d 827, 970 N.W.2d 837 (2022), and held that the factual details of the offense may also be considered:

> The statute requires that these circumstances must "substantially relate" to each other. "Substantial" is defined in Black's Law Dictionary as "important, essential, and material; of real worth and importance." Substantial, Black's Law Dictionary 1728 (11th ed. 2019). We take this to mean that the circumstances must materially relate to each other, not merely superficially relate. We do not take "substantially relate" to mean that the circumstances must be nearly identical to satisfy the test. Indeed, elsewhere in the law "substantially" is used and interpreted to denote a middle ground——a heightened but not extreme standard. Therefore, 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.

Id. at ¶ 18. Under *Cree*, the substantial relationship test requires first inquiring into the character traits revealed by the elements of the offense, informed by the context of the offenses. *Id.* at ¶ 30. Specifically, the Court provided this guidance for determining the level of risk to the employer posed by the particular offense:

> In addition to these character traits, we consider other relevant and readily ascertainable circumstances of the offense such as the seriousness and number of offenses, how recent the conviction is, and

> whether there is a pattern of behavior. We consider the seriousness of the convicted offense because the more serious the offense, the less we can expect an employer to carry the risk of recidivism. …. The possible consequences to an employer of hiring a recidivist shoplifter is a matter of petty cash and missing property. The experience may be inconvenient and frustrating but is unlikely to result in any great harm to the employer, its staff, or its customers. In contrast, the possible consequences of an employer hiring someone who has committed strangulation, battery, and sexual assault include a threat to the very safety and bodily autonomy of employees and customers. If harm were to befall a customer or employee, an employer could face potential liability.

Id. at ¶ 32.

A finding of a substantial relationship requires a conclusion that a specific job provides an unacceptably high risk of recidivism for a particular employee. On this point the commission has held, that:

> 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 possession with intent to deliver or manufacture tetrahydrocannabinols (THC), which indicates a propensity to unlawfully possess, manufacture, and sell illegal drugs. *Robertson v. Family Dollar Stores, Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005). Police recovered 134 marijuana plants as part of their investigation. The complainant's offense was a serious one, involving not just use, but also manufacture and distribution. In addition, the complainant's actions were repeated. He had been selling marijuana for roughly one year prior to his arrest. The complainant was convicted in 2014 for acts

that occurred in 2011 through 2013, at which time he was arrested. The complainant was denied employment in 2017, four years after his arrest. Thus, the acts giving rise to the conviction were recent, having occurred just four years prior to his application for employment with the respondent.

The respondent employs a large number of temporary workers at the facility where the complainant would have worked. The respondent argues that the complainant would have had, "easy access to a vulnerable temporary worker population that has already revealed an appetite for drugs" and "who, in the Company's experience, demonstrated a propensity to engage in misconduct, including substance use and abuse." In support of this assertion, the respondent testified to a single incident in the Milwaukee facility of a temporary employee having overdosed while at work, and to the presence of drug paraphernalia in the respondent's Ohio facility. However, these isolated instances do not support a finding that temporary workers as a whole constitute a "vulnerable population" with "an appetite for drugs." Rather, the respondent's assertion relies on stereotypes with insufficient evidence in the record to indicate that temporary workers are more vulnerable to drug use than the general population. *See, Moran v. State of Wisconsin University of WI-Madison,* ERD Case No. CR200900430 (LIRC, Sept. 16, 2013). Accordingly, the commission declines to find a substantial relationship based upon the respondent's arguments with respect to the nature of temporary workers.

That said, the commission notes that the job at issue in this case was a second-shift mechanic position in a noisy manufacturing environment surrounded by many other workers, with no supervision and substantial access to private locations accessible only by the complainant. The complainant would have had the unique opportunity to meet colleagues in private with little risk of detection. The respondent's facility has private outdoor smoking areas which are not monitored by security cameras, as well as a large secondary facility where the complainant would have worked with few other individuals present and virtually no supervision. The complainant would have checked in with other maintenance workers at the start and end of his shift but otherwise would have worked almost entirely unsupervised, while in close proximity to many other workers and private meeting spots, in the primary location. Given these specific facts, the commission is persuaded that the position would have posed an unacceptably high opportunity for the complainant to reoffend.

Because the complainant's conviction was substantially related to the position he sought with the respondent, the respondent's action in rescinding its offer of employment was not in violation of the law. Accordingly, the commission finds that the administrative law judge's dismissal of the complaint was proper and affirms the administrative law judge's decision in this matter.

cc: Attorney Julia Arnold