State of Wisconsin

Labor and Industry Review Commission

Steven L. Armus, Complainant **Natural Landscapes, Inc.**, Respondent ERD Case No. CR201601334	**Fair Employment Decision**[1] **Dated and Mailed:** October 30, 2023 armusst_err.doc:103

The decision of the administrative law judge is **affirmed in part and reversed in part**. The complainant's complaint that he was discriminated against based upon disability is dismissed. The complainant's complaint that he was discriminated against based upon conviction record is sustained. 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 his conviction 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 he held prior to his discharge. This offer shall be tendered by the respondent or an authorized agent

[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.

and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford him all seniority and benefits, if any, to which he 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 he would have earned as an employee, including pension, health insurance and other benefits, from May 5, 2016, the date of the termination, until such time as the complainant resumes employment with the respondent or would have resumed such employment but for his refusal to accept 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 $30,766.08. A check in that amount shall be made payable jointly to the complainant and his attorney, Jeffrey Leavell, and delivered to Atty. Leavell.[2]

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

[2] The parties have stipulated to the amount of the complainant's attorney fees in this case and the commission does not find the fee amount unreasonable.

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 him by terminating his employment based upon disability and conviction record, in violation of the Wisconsin Fair Employment Act (hereinafter "the 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 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. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, Natural Landscapes, Inc., (hereinafter "the respondent" or "NLI"), is a landscaping company that provides prairie and wetland restoration services, doing business in Wisconsin. The respondent is owned by Keirston Peckham (hereinafter "Peckham"), who started the business in or around 2001.

2. The respondent's business is highly seasonal. The work starts in early May and typically ends in late October. During the active months, Peckham generally works approximately 20 hours per week doing vegetation management.

3. In 2012, Peckham hired his first employee, Sheri Lieffring (hereinafter, "Lieffring") to handle the business's wetland delineation work.

4. In 2015, Peckham hired two casual workers, who he would call in on an infrequent as-needed basis to help with weed whacking and other physical labor. In 2015 and 2016, the two casual employees worked a total of approximately 60 to 70 hours each per year doing vegetation management.

5. Peckham performed a total of approximately 150 hours in 2016 and approximately 170 hours in 2017 of vegetation management.

6. The complainant, Steven L. Armus, (hereinafter "the complainant"), was a customer of the respondent's, beginning in 2005 or 2006. The complainant engaged NLI to manage and restore his prairie each year thereafter for approximately 9 or 10 years. The complainant was a prairie enthusiast and often joined Peckham while he was working on the complainant's prairie to learn more about prairie restoration.

7. In 2009, the complainant was arrested and charged in state court for drug related offences. In 2011, his case was moved to federal court. The complainant entered into a plea agreement to work as an informant in exchange for a reduced sentence. Under the terms of the agreement, the complainant pled guilty to two charges: Conspiracy to distribute cocaine, and possession with intent to distribute cocaine. His conviction became final on December 11, 2015, when judgment was entered against him on the two charges.

8. Prior to his arrest, the complainant was addicted to cocaine. He bought, sold, and shared cocaine with a circle of friends who were also users. He never made any profit by selling cocaine. Soon after his arrest in 2009, the complainant entered a drug rehabilitation program. He successfully completed the program and has not used cocaine since. After completion of his treatment, the complainant, a physician, was placed on a restricted medical license. As part of that restriction, the complainant agreed to undergo random drug testing for five years.

9. In April of 2015, the complainant sold his business, Great Lakes Dermatology, to another doctor. As part of the sale, the complainant agreed not to practice medicine in southeast Wisconsin for a period of two years.

10. The complainant's restricted medical license was restored to a full license after his sentencing. However, he lost his license completely in December of 2015 for two years, as a result of grievances filed against him by patients for turning them in to law enforcement authorities as part of his informant activities. He was not eligible to reapply for a medical license until December of 2017.

11. On March 15, 2016, the complainant sent a text to Peckham that stated in part, "if you are looking for help or other business ideas I am available as I am in forced retirement due to the sale of my business." Peckham replied immediately, "you're hired."

12. The respondent hired the complainant to assist in the performance of vegetation management jobs for existing NLI customers. The complainant's primary duties were weed whacking and herbicide application, which the respondent intended him to perform independently. The complainant was hired to work limited part-time seasonal hours. Peckham and two other NLI employees also performed vegetation management work.

13. Most of the work was to be performed alone, with no supervision, generally in wide open prairies. The respondent's customers included developers, contractors, and municipalities. The complainant would have had interactions with those customers.

14. The respondent asked the complainant whether he would be interested in performing wetland delineation work like Lieffring did, and the complainant said that he was not interested. Prior to beginning work for the respondent, the complainant obtained pesticide application training, in order to be certified to perform vegetation management work.

15. The respondent hoped that the complainant would eventually bring in additional customers, but no immediate plans were made for the complainant to assume greater duties than the vegetation management that he was hired to perform.

16. The complainant's first day of work for the respondent was on May 4, 2016. That morning, the complainant and Peckham visited several customer sites, where the complainant performed some weed whacker work.

17. At the end of the first day of work, Peckham asked the complainant why he was no longer practicing medicine. The complainant revealed that he had been arrested for possession of a large amount of cocaine. The complainant explained that he had been addicted to cocaine at that time but that he had completed a rehabilitation program and was no longer using cocaine. The complainant further explained that he had worked as an informant. The complainant suggested to Peckham that Peckham should search online for information about his case.

18. After this conversation, the complainant and Peckham agreed to meet on the morning of May 6, 2016, for the complainant's second day of work for the respondent.

19. On the evening of May 4, 2016, Peckham performed an internet search for the complainant and discovered that he had been convicted of possession of cocaine with intent to distribute, as opposed to mere possession.

20. On the morning of May 5, 2016, Peckham called the complainant and accused him of lying to him about his conviction history. The complainant replied that Peckham had not asked about his convictions and he was not obligated to offer that information. Peckham told the complainant that he could not have the complainant working for him anymore.

21. Immediately after hanging up the phone, the complainant sent a text message, which he had meant to send to his wife, but which accidentally went to Peckham. The message stated, "Just fired by Keir!!!!" Realizing his error, the complainant sent a second text which stated: "Sorry Keir, message was for my wife. I am just bumming. Sorry to put you through it." Peckham replied with a text: "I am really sorry how this went down also. :("

22. The complainant did not resign his employment with NLI.

23. The respondent terminated the complainant's employment with NLI.

24. The complainant's conviction record was a motivating factor in the respondent's decision to terminate his employment.

25. The complainant's convictions were not substantially related to his position performing vegetation management with the respondent.

26. The complainant's addiction to cocaine was not a motivating factor in the respondent's decision to terminate his employment.

Conclusions of Law

1. The respondent discriminated against the complainant based upon his conviction record, within the meaning of the Wisconsin Fair Employment Act. The complainant's conviction record was a substantial factor in the respondent's decision to terminate the complainant's employment, but the conviction was not substantially related to the complainant's position.

2. The respondent did not discriminate against the complainant based upon disability, within the meaning of the Wisconsin Fair Employment Act.

Memorandum Opinion

<u>The respondent terminated the complainant's employment.</u>

The respondent asserts that the complainant resigned when he hung up the telephone at the end of the phone call between Peckham and the complainant on May 5, 2016. The commission does not find this argument persuasive. After the phone call was complete, the complainant accidentally sent a text to Peckham that he had intended to send to his wife. The text said, "Just fired by Kier!!!" When he realized his mistake, the complainant sent a second text to apologize and explain the error. Peckham replied, "I [am] really sorry how this went down also." Peckham's responsive text is not consistent with Peckham's version of events regarding the separation. If Peckham had not intended to terminate the complainant's employment during the phone call, the commission would have expected Peckham to reply with clarification, as opposed to the text that he actually sent. The commission agrees with the ALJ's finding that the respondent terminated the complainant's employment, and the complainant did not quit.

<u>The respondent did not terminate the complainant's employment because of disability.</u>

The complainant alleges that he was discriminated against on the basis of disability, in violation of the Act, when the respondent terminated his employment. The complainant contends that his former addiction to cocaine constitutes a disability and that the respondent terminated his employment, at least in part, because of his

disability or perceived disability. The commission does not address whether the complainant established that he was actually disabled or perceived as disabled, because the complainant failed to establish that either of those characteristics, even if they were established, was a motivating factor in the respondent's decision to terminate his employment.

The complainant told the respondent about his addiction to cocaine during his first day of work. In spite of that knowledge, the respondent made plans to work with the complainant again two days later. Later that evening, the respondent reached out to the complainant again to discuss some additional work that he wanted the complainant to take on. It was not until after the respondent had learned of the complainant's conviction for distribution of drugs that it decided to terminate the complainant's employment. The timing of the decision, as reflected in the communications between the parties on May 5 and 6, 2016, leads the commission to the conclusion that the respondent's decision to terminate the complainant's employment was not motivated by the complainant's alleged disability or perceived disability. Accordingly, that portion of the ALJ's decision that addressed disability discrimination is affirmed, and the complainant's complaint regarding disability discrimination is dismissed.

The complainant's conviction record was a substantial motivating factor in the respondent's decision to terminate the complainant's employment.

After learning that the complainant had been arrested for drug use, and that the complainant had a history of cocaine addiction, the respondent continued to employ the complainant and even reached out to the complainant regarding additional potential work. However, once Peckham became aware of the complainant's conviction for possession with intent to deliver cocaine, he was no longer willing to keep him on as an employee. The respondent argues that Peckham decided to terminate the complainant's employment, not because of the conviction itself, but because when, after he was already employed by the respondent, the complainant volunteered information about his criminal past, he did not include the fact that his conviction was for dealing and not just possession of cocaine. The commission is not persuaded.

Although the complainant did not give all of the details of his criminal past, he did encourage the respondent to "google" him to learn more. Such a suggestion was an open invitation to learn about his convictions. The respondent acted on that suggestion, learned about the complainant's convictions, and the following morning called the complainant to confront him about the convictions. The commission does not find the respondent's assertion that it fired the complainant for being less than 100 percent forthcoming regarding his convictions to be credible, given that the complainant gave guidance to Peckham to find all of the information that he did. The commission believes it is more likely that the decision to terminate the complainant's employment was motivated, instead, by the convictions themselves.

The respondent discriminated against the complainant based on his conviction record, which was not substantially related to his employment.

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 at 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 (emphasis added). 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 at issue:

> 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 conspiracy to distribute cocaine, and possession with intent to distribute cocaine. The character traits revealed by these offenses includes a propensity to unlawfully possess and sell illegal drugs. *Robertson v. Family Dollar Stores, Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005).

The complainant was hired to provided vegetation management on prairies and open areas. He would have worked alone and largely unsupervised. A lack of close supervision is one factor to consider in analyzing the opportunity to reoffend. However, unsupervised work alone cannot form the basis of a finding of substantial relationship. The burden is on the respondent to show that the position would provide "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." *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 823, 407 N.W.2d 908 (1987). Unlike the complainant in *Villarreal v. S.C. Johnson & Son, Inc.* ERD Case No. CR199903770 (LIRC Dec. 30, 2002), a case in which the commission found that a conviction for drug related crimes was substantially related to a production job at the respondent's facility, the complainant here would not have had regular interaction

with the general public or coworkers. He would have performed most of his work alone in a prairie. The personal contact he would have had would primarily have been with the respondent's customers, who were municipalities, developers, and contractors.

This is not to say that the complainant would have had no opportunity to engage in illegal conduct if he were so inclined. However, the commission will find a substantial relationship based upon an individual's opportunity to possess or sell illegal drugs, "only after making an assessment that the circumstances of the job presented a particular and significant opportunity for such criminal behavior." *Herdahl v. Wal-Mart*, ERD Case No. 9500713 (LIRC Feb. 20, 1997). The position in this case afforded no such unique enhanced opportunity to reoffend.

Other factors that the commission may consider in evaluating whether a substantial relationship exists include the seriousness and number of offenses committed by the complainant, how recent the conviction is, and whether there is a pattern of behavior. *Cree, Inc. v. Labor and Industry Review Commission,* at ¶ 18. The complainant in this case was convicted of two serious offenses, involving not just use, but also the sale of cocaine. The complainant's actions, however, primarily involved the sharing of drugs with others in a circle of users who bought and sold to each other. The complainant did not have a money-making business enterprise.

The commission also notes that the respondent hired, and subsequently fired, the complainant in 2016, seven years after his arrest. During those seven years, the complainant underwent a rehabilitation program, lost his license to practice medicine, worked collaboratively with law enforcement, and underwent random drug testing. He has not used cocaine since his 2009 arrest. The ALJ found, and the commission agrees, that it is highly unlikely that the complainant will commit another similar offense, given his specific history.

Given the complainant's low likelihood of reoffending, combined with the fact that the vegetation management position provided no increased opportunity to reoffend, the commission finds that the complainant's convictions are not substantially related to his job with the respondent. The respondent's discharge of the complainant because of his conviction record did not fall within the exception created by Wis. Stat. § 111.335(3)(a) and was in violation of the Wisconsin Fair Employment Act. Accordingly, the decision of the ALJ is reversed with regard to the portion of the decision that addresses conviction record discrimination.

The complainant's lost wages are limited to the earnings he would have made performing seasonal part-time vegetation management, offset by any interim earnings.

The complainant argues that he expected to be a full-time employee of the respondent. The commission, however, accepts the testimony of the owner of the

respondent that the complainant was hired to work on a very limited basis as the most credible and consistent with the structure of the business. Although the parties discussed the potential of the complainant to bring in additional business in the future, no credible evidence was offered that additional hours or duties were an expectation of the job. The complainant was hired only to perform vegetation management, which was also performed by the owner and two other seasonal part time employees. Had the complainant remained employed with the respondent, his hours would have necessarily been less than the total number of hours of vegetation management performed by NLI. The complainant's lost wages must also be offset by his earnings in self-employment, which were substantial in comparison to the wages that he might have earned as a seasonal part-time employee of the respondent.

NOTE: The commission did not confer with the ALJ regarding demeanor impressions in this case because the decision of the commission overturning the decision of the ALJ turns on a different interpretation of the law, not the adoption of a different set of disputed facts.

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/
Marilyn Townsend, Commissioner

cc: Attorney Jeffrey Leavell
Attorney Christopher Nickels

Editor's Note: This case has been appealed to circuit court.