State of Wisconsin

Labor and Industry Review Commission

Christopher Swift, Complainant **Swift Transportation Co of Arizona LLC**, Respondent ERD Case No. CR202002534	**Fair Employment Decision**[1] **Dated and Mailed:** April 15, 2025 swiftch_err.doc:111

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

Order

1. That the respondent shall cease and desist from discriminating against the complainant on the basis of his conviction record.

2. 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from November 9, 2020, the date the complainant would have begun working for the respondent had the respondent not rescinded its offer of employment, through the date the complainant began working at PC Logistics.[2] The back pay for the period shall be computed on a calendar quarterly basis with an offset during each calendar quarter for any interim earnings from work the complainant would not have performed had he been employed with

[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.

[2] The complainant has limited his requested remedies to this time period and has waived reinstatement.

the respondent. 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.

3. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred in pursuing this matter in the total amount of $22,862.20. A check in that amount shall be made payable jointly to the complainant and his attorney, James M. Payne, and delivered to Mr. Payne.

4. That within 60 days of the date this Order is issued, the respondent shall comply with all terms of this Order and file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. Pursuant to Wis. Stat. § 227.54, the institution of a proceeding for judicial review shall not stay enforcement of the commission decision unless a stay is ordered by the reviewing court. The commission will not pursue enforcement while a motion for such a stay is pending.

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

/s/

Marilyn Townsend, Commissioner

Procedural Posture

The complainant filed a complaint with the Equal Rights Division (hereinafter "Division") of the Department of Workforce Development alleging that the respondent discriminated against him by refusing to employ him because of his conviction record. An equal rights officer for the Division issued an initial determination finding probable cause to believe that discrimination occurred, and the matter was certified to a hearing on the merits before an administrative law judge. At the hearing a jurisdictional issue was raised for the first time. The administrative law judge took testimony on both the jurisdictional issue and on the merits of the case and accepted briefing on both issues, after which he issued a decision dismissing the complaint based on a lack of jurisdiction. 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, Swift Transportation Company of Arizona, LLC (hereinafter "respondent") is a commercial trucking company doing business throughout the United States including in the state of Wisconsin.

2. The complainant, Christopher Swift (hereinafter "complainant"), is an individual with a conviction record. In June of 2000, the complainant committed a robbery and an act of battery for which he was later convicted. In 2018, his conviction was sealed.

3. In 2020, the complainant attended a commercial driving school in Kenosha, WI to obtain his commercial driver's license. Recruiters visited the school in person to recruit drivers for their employers. One such recruiter, Scott Hanley, worked for the respondent. Mr. Hanley gave a presentation about the respondent

that the complainant found compelling. The complainant approached him after the presentation and spoke to him. Mr. Hanley gave the complainant a business card.

4. On November 3, 2020, the complainant completed an application for employment with the respondent and exchanged emails with Mr. Hanley about the job and application. He also spoke on the phone with Mr. Hanley and completed additional paperwork that Mr. Hanley sent him. Mr. Hanley informed the complainant that the position he was applying for was a regional driving job and would involve driving in the Midwest region. No additional details about the work location were provided to the complainant.

5. The complainant indicated on the application for employment that he had been unemployed from July through November of 2020 and from September of 2010 through September of 2014. He also indicated he had attended Carthage College from September 2014 through July 2020. He did not report any verifiable employment on the application.

6. The application asked whether the complainant had been convicted of a criminal offense, but included instructions not to disclose information regarding arrests, charges, and/or convictions that had been sealed, expunged, annulled, erased, statutorily eradicated, or judicially dismissed. In response to the question, "Have you ever been convicted of a criminal offense?" the complainant answered "No."

7. Mr. Hanley had a practice of thoroughly reviewing applications for employment and denied any application he reviewed if he found that the applicant did not meet the respondent's hiring criteria. Mr. Hanley reviewed the complainant's application and did not deny it. Instead, he passed it on to the next step in the respondent's hiring process and it was assigned to another recruiter, Sonya Pantoja.

8. On November 4, 2020, Ms. Pantoja sent the complainant an email informing him that he had been scheduled for new driver orientation. Her email included the message: "Welcome to the Team!"

9. On November 5, 2020, at 8:44 a.m., Ms. Pantoja sent the complainant a message asking him to contact the background department for a phone interview. Half an hour later, the respondent sent the complainant an email indicating that he was scheduled for orientation on November 9, 2020, in Gary, Indiana. The paid orientation was to last two days and the respondent offered to provide overnight accommodations.

10. After receiving Ms. Pantoja's message, the complainant called the background department as requested and had a conversation with Michelle Adamson, a background investigator for the respondent. Ms. Adamson asked the complainant whether he had any felony convictions or other criminal issues to

report, and he responded that he did not. Ms. Adamson then informed the complainant that she had a record indicating he had a robbery conviction in 2000. The complainant informed her that the case had been sealed. Ms. Adamson requested documentation confirming that the case was sealed, and the complainant emailed that documentation to her after the phone call.

11. Later that day, at 1:53 p.m., the respondent sent the complainant another email indicating his recruiter had changed the complainant's orientation date and that he should contact her. The complainant attempted to contact Ms. Pantoja multiple times by phone as well as by email, but was unsuccessful in reaching her.

12. On November 10, 2020, Ms. Pantoja notified the complainant he was no longer being considered for a position with the respondent.

13. Ms. Pantoja had the authority to deny the complainant's application for employment if she found that the complainant did not meet the respondent's hiring criteria. However, she did not make the decision to deny the complainant's application for employment. Instead, Autumn Matte, the corporate safety leader[3] for the respondent, reviewed the complainant's application after the complainant spoke to Ms. Adamson and made the decision not to hire him.

14. The respondent rescinded the offer of employment it had made to the complainant because of the complainant's conviction record.

15. The complainant was a resident of the state of Wisconsin during all relevant time periods: when he attended driving school in Kenosha, when he was recruited by the respondent, when he applied for employment with the respondent, when the respondent offered the complainant employment, and when the respondent rescinded its offer of employment. The respondent did not inform the complainant that he would need to relocate outside of Wisconsin to accept employment with it.

16. Following the respondent's decision to rescind the offer of employment it had made to the complainant, the complainant was unemployed for approximately one week. He then accepted a job working for a different company as a truck driver and earned approximately $62,000 per year. After working for that company for approximately one year, the complainant accepted employment elsewhere.

17. Based on representations made to him by the respondent's staff, the complainant reasonably expected to earn approximately $71,000 in his first year of employment with the respondent.

Conclusions of Law

[3] Ms. Matte's job title is not referenced in the hearing transcript. However, the initial determination indicates that her title was "corporate safety leader," which is consistent with the description of her work she provided at the hearing.

1. The Wisconsin Fair Employment Act is applicable to the complainant's allegations of discrimination affecting his potential employment with the respondent.

2. The respondent rescinded an offer of employment because of the complainant's conviction record, in violation of the Wisconsin Fair Employment Act.

Memorandum Opinion

Geographical Jurisdiction

Following a full hearing on the merits of the complainant's complaint, the administrative law judge dismissed the complaint due to a lack of geographical jurisdiction. The commission does not agree that the Division lacked jurisdiction over this complaint, for the reasons set forth below.

Although the Wisconsin Fair Employment Act (hereafter "Act") is silent regarding geographical limitations to its application, the commission has held that the Act applies when the employment affected by the alleged discrimination occurs, to a more than *de minimis* extent, in Wisconsin. *See Peterson v. RGIS Inventory Specialists*, ERD Case No. 199703982 (LIRC Oct. 19, 2001) (citing *Hatfield v. Aurora Building Maintenance*, ERD Case No. 9302756 (LIRC Nov. 17, 1995)). Because this case involves a complaint of discrimination arising during the hiring process, no employment relationship existed. However, in addition to protecting employees from discrimination during their employment, the Act also protects applicants from discrimination during the hiring process. *See* Wis. Stat. §§ 111.31(2) and 111.322(1). Therefore, in determining whether the Act applies, the commission has considered the events that occurred during the hiring process and their connection to the state of Wisconsin, as well as the employment relationship that would have existed had the offer of employment not been rescinded. Both show a significant connection to Wisconsin.

The complainant was a resident of Wisconsin during all relevant times, and no evidence was presented to suggest that he planned to move in order to begin working for the respondent or that the respondent expected him to do so. The respondent was conducting business in Wisconsin when it sent a recruiter, in person, to a commercial driving school in Wisconsin to recruit new drivers. The respondent described the employment it offered to the complainant as a "Midwest regional" driving job. Wisconsin is part of the Midwest, and the respondent provided no detail, either to the complainant at the time of the job offer or at the hearing, to suggest that the services would all be performed outside of Wisconsin. Given that the complainant was a Wisconsin resident, who was recruited in Wisconsin for a Midwest regional driving job, the commission infers that the job at issue would have included driving in the state of Wisconsin.

At the hearing, the respondent provided evidence that the complainant likely would have been assigned to a "home terminal" in Indiana, but did not elaborate on the significance of this fact. The respondent clearly did not expect all drivers who were likely to have a "home terminal" in Indiana to reside in Indiana, as evidenced by the fact that it provided overnight accommodations for the orientation that was scheduled to take place there. Further, the recruitment process clearly indicates that the respondent was engaged in hiring Wisconsin residents in the state of Wisconsin and the respondent communicated no expectation that Wisconsin residents relocate to begin their employment. All of this demonstrates a more than *de minimis* connection to the state of Wisconsin and subjects the respondent to the jurisdiction of the state with regard to the Act.

Finally, the commission notes that the respondent argues in its brief that dismissal due to a lack of jurisdiction is appropriate because the individual who made the decision not to hire the complainant was located in Arizona. However, the commission has rejected the location of the individual making the hiring decision as being a determinative factor, because basing a decision on that factor would lead to anomalous results. *See Peterson v. RGIS Inventory Specialists*, ERD Case No. 199703982 (LIRC Oct. 19, 2001) (citing *Hatfield v. Aurora Building Maintenance*, ERD Case No. 9302756 (LIRC Nov. 17, 1995)). An employer cannot avoid being subject to the Act by locating its human resources department outside of the state, nor is the mere presence of the decision maker in Wisconsin at the time the decision is made sufficient to subject an employer to the Act if the relevant events occurred elsewhere. *Id.*

Conviction Record Discrimination

Having concluded that there is jurisdiction over this claim under the Wisconsin Fair Employment Act, the question to decide is whether the complainant was discriminated against on the basis of conviction record. The Act provides that it is prohibited discrimination to refuse to hire an individual because of the individual's conviction record. Wis. Stat. §§ 111.321, 111.322. The respondent argues that it rescinded the offer of employment it made to the complainant, not because of his conviction record, but because the complainant did not meet its hiring criteria, specifically because he did not have any verifiable employment within the last three years. Indeed, the respondent's hiring criteria specifies that an applicant should have no more than 12 months of unemployment or unverifiable employment within the past three years, and the complainant in this case had no verifiable employment within the last three years, as he had been attending college or otherwise not working outside the home for approximately 10 years. However, for a variety of reasons, the commission finds that this asserted non-discriminatory reason for rescinding the complainant's job offer is a pretext for discrimination.

First, the respondent was aware of the complainant's lack of verifiable employment from the time he submitted his application for employment. However, with that information available to it, the respondent nevertheless offered the complainant a job and scheduled him for orientation. The commission considered the possibility that the respondent simply overlooked this lack of employment history, but concludes it did not. To the contrary, Mr. Hanley testified that he thoroughly reviewed applications for employment and would have denied any application that did not meet the respondent's hiring criteria. At least one additional staff member for the respondent, Ms. Pantoja, also had access to the complainant's application, and had the authority to deny the application if she found the complainant did not meet the respondent's hiring criteria, but did not do so. Instead, Ms. Pantoja chose to move forward with hiring the complainant. Both Mr. Hanley and Ms. Pantoja's actions indicate that the respondent's requirement regarding work history was not strictly applied and that the complainant's lack of verifiable work history was not disqualifying.

Second, the respondent provided conflicting evidence about its reason for rescinding the job offer. Ms. Matte, the corporate safety leader who made the decision that the respondent would not hire the complainant, testified that the reason for that decision was the complainant's lack of verifiable employment history. However, Ms. Pantoja, the recruiter who communicated the decision to the complainant, provided a different reason for the decision: She testified that she was informed the respondent would not hire the complainant because there were better qualified applicants, and the respondent's internal notes indicate that this was the reason Ms. Matte provided to Ms. Pantoja for the decision to rescind the job offer. The respondent has provided no explanation for this shifting rationale.

The fact that the respondent extended a job offer and scheduled the complainant for orientation based upon his application for employment – which included no verifiable work history – but later chose to rescind the offer after learning about the complainant's conviction record leads the commission to conclude that the respondent's actual reason for rescinding the offer was the complainant's conviction record. Between the time the respondent made the job offer and rescinded it, the only new information it gained about the complainant was information regarding his conviction record. The respondent's attempt to explain its decision with an assertion that is in conflict with its own internal documentation and witness testimony is unpersuasive.

For the reasons set forth above, the commission concludes that the complainant's conviction record was the reason the respondent refused to hire him and that its actions were in violation of the Act.

Attorney's Fees and Costs

The complainant is entitled to payment of his reasonable attorney's fees incurred in pursuing this matter. *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 2001). In calculating reasonable attorney's fees, the most useful starting point is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This figure is commonly referred to as the "lodestar" figure. *Hensley v. Eckerhardt*, 461 U.S. 424, 31 FEP Cases 1169 (1983). The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. *Olson v. Phillips Plating*, ERD Case No. 8630829 (LIRC Feb. 11, 1992) (citing *Hensley*). Here, the complainant's attorney, James M. Payne, has requested an award of $22,780.50 in attorney's fees and $1,291.70 in costs related to litigating this matter.

Mr. Payne's fee request is based on an hourly rate of $350 for work performed through the end of 2022 and $450 an hour thereafter. The respondent objects to these hourly rates and argues that a maximum billing rate of $315 would be appropriate. It bases this number on information from a legal billing software company, which indicates that the average rate for employment law in Wisconsin is $281 per hour. The respondent also cites recent LIRC decisions that awarded fees at hourly rates of $375, $395, and $400[4] for Milwaukee area attorneys with more experience than the complainant's attorney, as well as a recent award of fees at a rate of $260 per hour for an attorney with less experience than the complainant's attorney. *See Richards v. Milwaukee Transport Services, Inc.*, ERD Case No. CR201800861 (LIRC Jan. 31, 2025) and *Lorenz v. Woodman's Food Market*, ERD Case No. CR202002781 (LIRC Dec. 18, 2024).

Mr. Payne became licensed to practice law in 2012 and is currently a senior attorney at R.F. Wittmeyer, Ltd., a firm with offices in Kenosha, WI and Illinois. Mr. Payne provided affidavits from the managing partner of R.F. Wittmeyer, his current firm, and the vice president of Rizzo & Diersen, S.C., the firm he worked for when he began representing the complainant in this matter. Both affidavits indicate that the hourly rates charged by Mr. Payne were standard rates charged by the firms for the type of work involved in this case. Based on the commission's experience, the hourly rate of $350 is reasonable for the work performed by Mr. Payne through the end of 2022 because it is in line with the rates prevailing in the community for similar services for lawyers of comparable skill, experience, and reputation.

However, while increases in hourly rates are reasonable as an attorney gains experience and to account for inflation, Mr. Payne has not provided a justification

[4] Note that the commission has also recently awarded fees at a higher rate of $450 per hour for an attorney with more experience than the complainant's attorney. *See Schaefer v. Marcus Center for the Performing Arts*, ERD Case No. CR201900591 (LIRC Sept. 29, 2023).

for the significant increase in his hourly rate from $350 to $450 in 2023. Mr. Payne has not submitted any affidavits from practitioners in the field, outside his firm, to indicate that a rate of $450 per hour is reasonable for an attorney of comparable skill, experience, and reputation in the community. Further, while the affidavit from the managing partner at R.F. Wittmeyer, Ltd. indicates that Mr. Payne has charged $450 per hour since joining the firm, Mr. Payne's billing records show that he continued to charge the lower rate of $350 for several months after joining the firm, suggesting that the firm did not require that Mr. Payne charge an hourly rate of $450. Absent any justification for the substantial rate increase – an increase of over 25 percent – the commission considers it reasonable to award fees for the services performed beginning in January of 2023 at the slightly lower hourly rate of $400. The commission believes that this amount represents a reasonable rate increase based on Mr. Payne's experience and that it is in line with prevailing rates in the community for similar services performed by lawyers of comparable skill, experience, and reputation.

In addition to its objections to the complainant's attorney's hourly rate, the respondent also objects to the amount of time billed for certain tasks. The records provided by Mr. Payne indicate that Rizzo & Diersen, S.C. billed in six minute increments while R.F. Wittmeyer, Ltd. billed in 15 minute increments. Thus, email communications and other minor tasks were generally billed at 0.10 hours prior to June 2022, but were billed at 0.25 hours thereafter. Although the commission does not typically scrutinize firm billing practices and recognizes that minimum time increments may vary between firms, in this case, it is clear that Mr. Payne billed more time for similar tasks after changing firms. The commission agrees with the respondent that it is not reasonable that the respondent should be required to pay a higher amount for similar work simply because Mr. Payne's billing practices changed, when no justification for the increase in time spent has been provided. The commission therefore reduces the requested 0.25 hour entries to 0.10 hours. This results in an overall reduction of 1.35 billed hours.

Finally, the respondent objects to Mr. Payne's billing of 0.5 hours for reviewing the respondent's brief in opposition to the complainant's petition. The respondent asserts that the brief is short and should have taken less time to review. However, the commission finds half an hour to be a reasonable amount of time to spend reviewing opposing counsel's brief, and will not reduce the hours requested for this task.

The respondent has not opposed the complainant's request for costs and, based on the records submitted by Mr. Payne, his costs are reasonable and directly related to this matter. The requested costs of $1,291.70 are therefore awarded.

Applying the hourly fees and rate reductions described above, the complainant's attorney fee award is reduced to $21,570.50. Together with the awarded costs of $1,291.70, the total award for attorney's fees and costs is $22,862.20.

NOTE: Prior to reversing, the commission consulted with the administrative law judge who held the hearing to obtain his impressions as to the credibility of the witnesses, based on their demeanor, which were a factor in his decision. However, the administrative law judge had no demeanor impressions to impart.

cc: Attorney James M. Payne
Attorney Ryan G. Lockner