State of Wisconsin

Labor and Industry Review Commission

Jacob H. Schultz, Complainant **Safelite Fulfillment, Inc.,** Respondent ERD Case No. CR202001057	**Fair Employment Decision**[1] **Dated and Mailed:** July 14, 2025 schultzja_rsd2.doc:101

The decision of the administrative law judge is **modified to conform to the following and, as modified, is affirmed**. 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 arrest record and perceived conviction record.

2. That the respondent 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 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.

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 $88,554.46. A check in that amount shall be made payable jointly to the complainant and his attorney, Daniel C. Schoenberger, and delivered to Attorney Schoenberger.

[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.

4. That within 60 days of the date this Order is issued,[2] 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

This case is before the commission to consider the complainant's allegation that the respondent discriminated against the complainant on the basis of arrest record and perceived conviction record, in violation of the Wisconsin Fair Employment Act

[2] For a discussion of the effective date of commission orders and an opposing view, see *Lorenz v. Woodman's Food Market*, ERD Case No. CR202002781 (LIRC Dec. 18, 2024).

(hereinafter "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 the respondent had discriminated against the complainant on the basis of arrest record and perceived conviction record and that ordered reinstatement. The respondent filed a timely petition for commission review of that decision, while the complainant filed a timely petition limited to the issue of attorney fees.

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, Safelite Fulfillment, Inc. (hereinafter "respondent"), is a business that replaces and repairs window glass in motor vehicles.

2. The complainant, Jacob Schultz (hereinafter "complainant"), graduated from high school in 2018. In December 2018, he began working as an auto glass technician (technician) for the respondent. The complainant worked at the respondent's shop in Eau Claire, Wisconsin, which for the respondent's administrative purposes is part of its Minneapolis market.

3. Before hiring any employee, the respondent runs a criminal and Division of Motor Vehicles background check. It also periodically re-runs background checks on its current employees. At the time of his hire, the complainant had no criminal record, and he passed his background check.

4. At the time of his hire, the complainant also underwent a pre-hire customer service aptitude profile, a kind of personality test used to determine how he would interact with the respondent's customers. He also took a mechanical aptitude test. He scored the highest possible rating in both tests.

5. When the complainant started work, the respondent sent him to Minneapolis for training with new employees from other shops. The training was the same for everyone, regardless of the location of the shop. The training lasted about a month. Trainee technicians received customer service training, which included acting out post-repair conversations with customers regarding the repair itself, post-repair use of the vehicle, warranty information, and the importance of conducting a post-repair survey.

6. The complainant worked 40 hours per week for the respondent, and averaged an additional four to five hours per week of overtime. He earned $14 per hour while training, with an increase to $18 per hour when he finished training. In addition, he received a bonus, based on the amount of work he performed, and on responses from the post-repair surveys done by his customers. The complainant earned

approximately $5,000-6,000 in bonuses in 2019. He also was eligible for a 401k plan with a match from the respondent. During his employment, the complainant contributed 3% of his pay to a 401k, which the respondent matched at 50 cents on the dollar. He earned $42,901.40 from the respondent in 2019, and he earned $10,412,05 in 2020 in the 11 weeks prior to his discharge on March 20, 2020.

7. The respondent classifies its technicians as either a "shop technician" or a "route technician." At the Eau Claire shop, a shop technician works exclusively in the shop and replaces approximately seven windshields a day. A route technician works one day in the shop, but otherwise travels from location to location, replacing or repairing windshields on location. A route technician typically has two types of customers: private (individuals who own their own vehicles) and commercial (companies that have fleet cars or vehicles). About 25 percent of a route technician's work is commercial work, done at the commercial customer's business place. A private customer more typically leaves his or her vehicle at a workplace parking lot or in a residential driveway or garage. A route technician might have four to six repair assignments per day, and spends a significant portion of time traveling to the locations of customer vehicles.

8. The complainant worked as a route technician throughout his employment with the respondent. His private customers were located primarily in rural areas, with travel times to reach a customer's location of up to one hour. He also did commercial work for two customers, Enterprise Rental and Ruan Trucking.

9. The complainant began his work day by reporting to the respondent's Eau Claire shop between 7:30 and 8:00 a.m. After clocking in, he would receive a paper list of assignments. The Eau Claire shop manager and supervisor, Steve Coyle, took steps to make certain that technicians had the proper materials, windshields, molding, etc., but the complainant would doublecheck the materials, then make certain they were properly loaded in the van assigned to him. After that, the complainant would call each of his customers for the day to give them his estimated time of arrival, verify that the vehicle was available for repair at the location that had been provided to him, and find out where the keys to the vehicle would be.

10. The complainant would again call his assigned customers when he was actually en route to the vehicle location to tell the customer that he was on his way and verify the key location. At times, he went into a customer's worksite or knocked on a customer's door to get the key to the vehicle. Some customers would give the complainant a code for a gate or garage door.

11. Prior to beginning the actual repair job, a technician was supposed to go over certain other information with a customer, including a sales pitch for windshield wipers, a check-in procedure which involved taking pictures of pre-existing damage, and an explanation of the work to be done. This could be done in person or over the

phone. The complainant generally did this over the phone, though the preference of the respondent's upper management was that those tasks be done in person. For commercial jobs involving Ruan Truck, the complainant simply went to the shop where the truck was located and began work without contacting anyone from Ruan Trucking. For Enterprise Rental jobs, the complainant would get the key from the office before beginning work.

12. After completing a replacement or repair, the complainant would again contact the customer to let him or her know the job was done. At this point, the customer could inspect the job, and the complainant would answer questions, go over warranty information, and go over post repair instructions such as removal of taping or when the vehicle could be run through a car wash. Occasionally, when a customer had not provided a credit card when arranging the service, payment would be made in person at the conclusion of the job. The complainant's preference was to do these steps over the phone.

13. Route technicians working from the Eau Claire shop generally would average about 25 to 30 minutes of face-to-face time per day with customers. However, that number was a rough estimate, as some customers may be present during the entire repair process, which could last from 45 minutes to an hour. While the respondent's upper management expected its technicians to spend relatively more time face-to-face with customers, the complainant himself averaged only 25 to 30 minutes a day in face-to-face customer contact.

14. The complainant was never disciplined for failing to spend more time with customers. His immediate supervisor, Steve Coyle, did talk with the complainant about taking more care to make sure customers were aware of the post-job survey, as that could affect his pay. However, Coyle did not tell the complainant that he should talk about the survey with customers face-to-face, and the complainant began sending his customers a group text at week's end to remind them to complete the survey.

15. The complainant was arrested in mid to late January of 2019 by the Eau Claire police department at an apartment he shared with his girlfriend, following an incident between the couple. Following the arrest, the complainant spent the night at the Eau Claire County jail. He tried unsuccessfully to call his parents, but was able to reach his coworker, Carl Judkins. The complainant asked Judkins to tell Coyle that he would not be in to work the next morning because he had been arrested.

16. When the complainant was released from jail, he spoke to supervisor Coyle about the arrest personally. By then, the complainant's mother had already told Coyle that the complainant had been arrested. The complainant told Coyle that the arrest stemmed from an incident involving his girlfriend, that he had hired an attorney, and that he would keep Coyle up to date. He also told Coyle that the

incident, the arrest, or both, "was a bunch of BS." The complainant has never admitted wrongful conduct to anyone who worked for the respondent.

17. Following the January 2019 incident, the complainant was charged with one count of felony strangulation, two counts of misdemeanor domestic disorderly conduct, and two counts of misdemeanor domestic battery. The complainant continued to work for the respondent after the arrest. He kept supervisor Coyle informed of his periodic court dates so he could get time off.

18. The charges all remained pending until November 2019, when the complainant and an assistant district attorney entered into a "Deferred Acceptance of a Guilty Plea Agreement" (DAGP agreement). The agreement was filed with the Eau Claire County circuit court on November 26, 2019, and it provides:

> The State of Wisconsin … and the defendant, with his attorney Brian Braziel, hereby agree that the defendant will plead GUILTY (no contest plea is not acceptable) to Counts Two and Four: Misdemeanor Battery - Domestic … on the condition that the court will accept the plea(s), but will not enter a judgment of conviction during his thirty-six (36) month Deferred Acceptance of a Guilty Plea Agreement.

19. Under the DAGP agreement, the complainant was required to report to his DAGP coordinator for any scheduled or unscheduled appointments, and he had to keep the district attorney apprised of any change in address. He was required to pay a "service fee" of $250, a "domestic abuse surcharge" of $100, and restitution (with surcharge) of $1,385.20. He also had to perform 40 hours of community service (which resulted in another surcharge) and complete a "domestic abuse intake" program. The agreement was conditioned upon the complainant committing no crimes during the pendency of the agreement.

20. The DAGP agreement also provided that if the complainant failed to satisfy the conditions of the agreement, the State would request that the guilty pleas be entered and sentencing take place. It concluded:

> In the event the defendant satisfies these conditions, the State will, at the end of the thirty-six (36) months, move to dismiss Count Four: Misdemeanor Battery - Domestic without cost and with prejudice. In addition, the State will move to amend Count Two : Misdemeanor Battery – Domestic to a forfeiture violation of County Disorderly Conduct, contrary to Eau Claire ordinance number 9.44.010. Upon such amendment, the amount deposited with the Office of the Clerk of Court … shall be taken as a total payment for this offense.

21. Upon execution of the DAGP agreement, the then-pending felony strangulation and two misdemeanor domestic disorderly conduct charges against the complainant were dismissed. The complainant told supervisor Coyle about the agreement, as he had to request time off work for the court appearance, and he spoke with Coyle about the deferment of his charges in general several times. He also told the "guys in the shop" that the felony had been dismissed.

22. As stated above, the respondent not only does pre-employment background checks, but re-runs them periodically on all of its current employees. The background checks are conducted by a company named Sterling, in batches.

23. Sally Montel, a services risk analyst employed by the respondent, reviews background checks for the respondent. When reviewing a background check, Montel applies a matrix used by the respondent to determine eligibility for hire. Under the respondent's matrix, a felony or misdemeanor conviction for a crime involving an act of violence within the past seven years is an automatic bar to employment as a technician. In that event, a job applicant would not be hired; a current employee would be discharged.

24. A Sterling background check was done on November 11, 2019, shortly before the complainant entered into his DAGP agreement. That check showed the then-pending felony strangulation charges and the four misdemeanor charges related to domestic battery and domestic disorderly conduct.

25. Montel testified that the misdemeanor domestic battery charges, and certainly the felony strangulation charge, would qualify as charges of a "crime involving an act of violence." Under the respondent's general policy, if a current employee was arrested for a crime involving an act of violence he or she would be placed on unpaid leave pending the resolution of the charges, or, depending on the nature of the charges, the respondent might transfer him or her to other work. However, instead of taking steps to have the complainant placed on an unpaid leave pending resolution of the charges, Montel took a "wait and see" approach, and she flagged the report as requiring follow up. The complainant continue to work for the respondent.

26. On March 9, 2020, Sterling re-ran a background check on the complainant. The resulting report, completed on March 10, 2020, states it was "rerun[] due to active case with past court date." The report also included notations indicating that the case was "not disposed" and "in active status," and it described the "case level" as "Misdemeanor." It also indicated that the charges from the January 2019 incident were "Misdemeanor "Battery – Domestic Abuse Assessments," that the disposition was "deferred," and that the sentence for each was "Fine Amount: $218.50." Finally, the report includes as a "Case Comment":

> Sentences:

Type: Probation
Suspended: No
Length: 3 years
Other: accepts 3 year DAGP agreement

27. Because the complainant had pleaded guilty and because the Sterling report showed a sentence of a fine and probation, Montel came to the conclusion that the complainant had been "convicted" of crimes involving an act of violence, even though the report still showed the case as "pending."

28. Montel then "asked that there be a conversation" with the complainant to see if he had a dispute with the accuracy of the report. She asked Myrna Murphy, a "People Business Partner," for the respondent, whose duties included providing human resources services to for the respondent's shops in Wisconsin and the Midwest. Murphy then contacted Geoff Brubaker (the district manager who supervised shop manager Coyle), and told Brubaker about the complainant's criminal record and asked him to find out from the complainant if the report was accurate.

29. Brubaker contacted Coyle on or about March 17, 2020, and told him that "we were going to have to talk with Jacob and look at termination." That same day, Coyle spoke with the complainant and relayed the following to Brubaker by email the next day, March 18, 2020:

> I spoke with Jacob yesterday regarding the pending felony. He didn't go into details as to what actually happened but explained the charge is pending for 3 years. There is no further court date. It was part of the plea deal he settled on. His attorney said he could spend more money to fight it but advised to accept. So long as he stays out of trouble the felony charges will be dropped at the end of the 3 year period.

30. Brubaker then forwarded the email from Coyle to human resources representative Murphy. She forwarded the email to another human resources worker, Daryhl Pisano, and Montel (who again is responsible for obtaining background checks on the respondent's employees generally). In her forwarding email, still on March 18, 2020, Murphy indicated that she felt termination of the complainant's employment was warranted.

31. About this time, Murphy, Pisano, and Montel all spoke by phone. Montel believed the DAGP agreement involving the two misdemeanor domestic battery charges alone warranted discharge as they were crimes involving violence against another person. Pisano and Murphy agreed with Montel, or at least they relied on her judgment. They all agreed that the complainant should be discharged.

32. Murphy relayed that decision to Brubaker who then relayed it back to Coyle. On Friday, March 20, 2020, Coyle told the complainant at the Eau Claire shop that his employment was terminated because of the background check and stated that "the felony showed up." Coyle added that it was human resource's decision, not his. The complainant then left the premises. However, later that day the complainant texted Coyle to confirm the reason for his discharge, as the complainant's mother was convinced he had been fired for attendance reasons. Coyle texted back:

> Because they ran a background check and the felony shows up. Because of that you cannot be insured therefore can not [sic] be an employee. It was not because of the late issues…

33. Coyle was satisfied with the complainant's performance and would not have discharged the complainant if the decision had been left to him. When Coyle completed the discharge paperwork dealing with the discharge, he marked the "eligible for rehire" box.

34. On March 20, 2020, the respondent sent the complainant a letter providing a copy of the Sterling background check, informing him that the respondent was considering "denying continuation of employment" based on his Eau Claire County criminal record, and inviting him to dispute the accuracy of the criminal record check. By this time the complainant had been discharged, and he had already explained the Sterling background report to Coyle, though he had not seen it.

35. On March 30, 2020, the respondent sent the complainant another letter explaining that he had been discharged based on information provided in a "consumer report."

36. After his separation from the respondent, the complainant was unemployed until September 2020. He did work briefly at U.S. Union Tool during this period, but quit that job soon after starting because he found the work unchallenging. He earned $324.19 from U.S. Union Tool. He also received a total of $17,735 in unemployment compensation insurance of benefits.

37. In September 2020, the complainant accepted a job at Post Glass and Mirror, LLC, doing the same type of auto glass repair and replacement work as he had done for the respondent. However, he also performed some in-home work and commercial work for Post Glass and Mirror, installing shower door glass or window glass. The complainant initially was paid $17 per hour and received a pay raise to $21 per hour, but he did not receive overtime hours, a bonus, a 401k match as he had with respondent, or any other benefits. He also worked fewer hours than he had for the respondent. He left Post Glass and Mirror in September or October of 2021. He considered it a toxic work environment, explaining that the owner called him vulgar names, docked him two hours' pay for being a half hour late, and effectively denied

him lunch breaks. The complainant earned $15,707.25 from Post Glass and Mirror in 2020 and $26,866.88 in 2021.

38. The complainant then started work at White City Glass doing the same type of glass repair work. He was paid $21 per hour with no overtime, bonus, or benefits, earning $6,140 in 2021. At some point, the complainant asked the owner of White City Glass to reduce or modify his hours to accommodate day care for his child. The owner responded by putting the complainant in an "on call" status, but in reality gave him no further assignments.

39. The complainant then began his own glass repair business, Mobile Glass and Dent, LLP. The paperwork establishing the limited liability partnership was prepared in December 2021, but the complainant did not begin operating the business until February 2022. His 2022 taxes show a net business loss of over $10,000. The complainant's start-up costs in that year were substantial, including vehicle and equipment expense, a dent repair training class expense, and other miscellaneous experiences such as developing a website.

40. On November 23, 2022, when the 3-year period of the DAGP agreement ended, one of the remaining misdemeanor domestic battery charges, Count 4 of the original criminal complaint, was dismissed. At the same November 23, 2022 court hearing, the other remaining domestic battery charge, Count 2, was converted to an Eau Claire County ordinance violation, specified as Eau Claire ordinance number 9.44.010 (Disorderly conduct and annoying telephone calls prohibited) in the DAGP agreement.

41. The complainant's business income from Mobile Glass and Dent, LLP, in 2023 up to the concluding hearing on November 14, 2023, exceeded expenses by $8,971.59 .

Conclusions of Law

1. The respondent discriminated against the complainant, within the meaning of the Act, by discharging him based on arrest record.

2. The respondent discriminated against the complainant, within the meaning of the Act, by discharging him because of a perceived conviction record.

Memorandum Opinion

1. Discrimination on the basis of arrest record and perceived conviction record

The primary issue in this case is whether the complainant's guilty pleas to misdemeanor domestic battery charges, made as part of the Deferred Acceptance of Guilty Plea (DAGP) agreement he entered into with the Eau Claire County district attorney, constitute "convictions" of those offenses for the purposes of the Fair Employment Act. The administrative law judge correctly answered that question "no" and concluded that, when the complainant was discharged on March 20, 2020, the discharge was based on the complainant's arrest record and perceived conviction record.

No Wisconsin appellate case directly holds that pleas under DAGP agreements are not "convictions." However, the commission has consistently held that a deferred prosecution agreement generally is part of a complainant's arrest record, not a conviction record. *See, Lovejoy v. Auto-Wares of Wisconsin, Inc.*, ERD Case No. CR200703609 (LIRC Feb. 24, 2011); *Vega v. Preferred Sands of WI, LLC,* ERD Case No. CR2015003290 (LIRC Jan. 17, 2020); and *Cota et al. v. Oconomowoc School Area District*, ERD Case Nos. CR201700245 and CR2017000246 (LIRC July 30, 2021), *aff'd sub nom. Oconomowoc Area School District v. Cota, et al.*, 2025 WI 11, _Wis. 2d_, _N.W.3d_. To hold otherwise in this case would mean that the complainant was somehow "convicted" of charges that were ultimately dismissed outright or converted from a crime to a county code violation involving a different offense entirely (disorderly conduct).

On review, the respondent argues that the administrative law judge erred in concluding that the complainant did not have a conviction record, but only a *perceived* conviction record, based on the misdemeanor domestic battery charges. The respondent contends that the March 2020 Sterling background report is an actual "conviction record," as defined by statute. Under Wis. Stat. § 111.32(3), "'[c]onviction record' includes, but is not limited to, *information indicating* that an individual has been convicted of any felony, misdemeanor or other offense, …, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled … *[emphasis added]*." The respondent points out that the Sterling background report stated that the complainant had pleaded guilty to the misdemeanor domestic battery charges, had been fined, and was placed on probation.

However, despite what the final Sterling background report stated, the complainant was not actually convicted, sentenced, fined, placed on probation, or even given extended supervision with respect to the misdemeanor domestic battery charges. Sentencing under Wis. Stat. ch. 973 occurs after or upon judgment of conviction, Wis. Stat. § 972.13(2), and here no judgment of conviction was entered on the misdemeanor charges because they were instead dismissed. Likewise, a person is only placed on probation after conviction of a crime. *Id.* and Wis Stat. § 973.09(1)(a). And as noted above, the DAGP agreement assessed fees against the complainant; it

did not impose a fine as part of a sentence following conviction. *See*, Wis. Stat. § 973.05. Finally, extended supervision occurs after a release from prison, *see*, Wis. Stat. §§ 302.113 and 973.01(2), and the complainant in this case was never imprisoned.

The commission has previously held that "an employment decision based on information indicating that an individual has a conviction record, even if the individual has no conviction record, is a decision based on conviction record within the meaning of the Act." *See, Miles v. Regency Janitorial Service*, ERD Case No. 199803666 (LIRC May 31, 2001). The employer in *Miles* argued that, if there was no actual proof of a conviction, it could not have discriminated against Miles on the basis of a conviction record and the conclusion that the Act prohibits discrimination on the basis of a *perceived* conviction was erroneous. The commission rejected that argument, explaining:

> []The respondent's arguments fail. It is not necessary that the word "perceived" appear in the definition of conviction record in order to conclude that discrimination on the basis of conviction record could occur even though the individual has no conviction record. This is so because the Act expressly defines the term "conviction record" to include "... *information indicating* that an individual has been convicted of any felony, misdemeanor or other offense." Wis. Stat. § 111.32(3). "Information indicating" does not mean absolute proof that a conviction record exists. Clearly, the police detective's oral communication to Kusch that Miles had a conviction … constituted "information indicating" that Miles has been convicted. No extra words need be read into the statute to conclude that the concept of conviction record under the Act is not limited to only situations where absolute proof exists that an actual conviction exists. [*Emphasis in original*.]

Because the respondent in this case relied on "information indicating" that the complainant had a conviction record, when in fact he did not at the time of the discharge, the administrative law judge correctly concluded that the respondent discharged the complainant based on a *perceived* conviction record as well as his arrest record.

The administrative law judge also correctly concluded that the discharge—whether based upon an arrest record or a perceived conviction record—was discriminatory under the Act. Because the complainant was discharged, not suspended, the respondent may not rely on the defense available under Wis. Stat. § 111.335(2)(b) to preclude a finding of discrimination. That statutory subsection provides that "it is not employment discrimination because of arrest record to refuse to employ … or to *suspend* from employment …, 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." However, no "substantially related" defense is available for a *termination* from employment (as opposed to a suspension) based on arrest record.

Wisconsin Stat. § 111.335(3)(a)1., by contrast, does provide that "it is not employment discrimination because of conviction record to …. *terminate* from employment … any individual … [who] has been *convicted* of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job." Notably, the second use of the word "conviction" in subsection (3)(a)1. refers to an actual conviction of a felony, misdemeanor, or other offense, not simply a record of such a conviction. Because the complainant was never actually convicted of the offenses for which he was discharged—the two misdemeanor battery charges—the statutory defense in subsection (3)(a)1. does not apply with respect to those offenses.[3]

The respondent contends otherwise, pointing to an unpublished Court of Appeals decision, *Employers Ins. of Wausau v. LIRC*, Appeal No. 88-0478 (Wis. Ct. App. Oct. 11, 1988). In that case, the Court of Appeals stated that it is "unreasonable to conclude that the Fair Employment Act applies without its affirmative defense because [the complainant] was not 'convicted' even though she has a 'conviction record.'" As an unpublished *per curiam* opinion, however, *Employers Ins. of Wausau* is not precedent. *See*, Wis. Stat. § 809.23(3).

Beyond that, the case is factually distinguishable. In *Employers Ins. of Wausau*, the complainant (Hart) was discharged when she informed her employer that she was convicted of shoplifting and paid a fine. Hart's conviction actually occurred the next day when she failed to appear in municipal court. Obviously, that presents a different situation than here, where the complainant never told the respondent that he was convicted of anything, and where, instead of being convicted of misdemeanor domestic battery one day after his discharge, the misdemeanor domestic battery charges on which the discharge was based were ultimately dismissed.

Further, in explaining its holding in *Employer Ins. of Wausau*, the court noted that Hart eventually was actually convicted, and that the issue was the timing of when the conviction occurred, not whether it had occurred:

> The legislative scheme behind the Fair Employment Act and its defenses is to balance society's interest in rehabilitating a criminal against its interest in protecting citizens from unreasonable risk of further

[3] The conclusion that, with respect to the dismissed misdemeanor domestic battery charges, the defenses available under Wis. Stat. § 111.35(2)(b) and (3)(a)1. are unavailable is further supported, as the administrative law judge noted in her decision, by *Shipley v. Town & Country Restaurant*, ERD Case No. 8502472 (LIRC July 14, 1987). *See also, Nunn v. Dollar General*, ERD Case No. CR200402731 (LIRC Mar. 14, 2008).

> crime. … *The precise timing of the discharge and formal conviction is not a factor that affects that balance. [Emphasis added.]*

The commission declines to read *Employers Ins.* to extend the substantial relationship defense under Wis. Stat. § 111.335(3)(a)1. to crimes or offenses of which an individual has never, in fact, actually been convicted, but his or her employer merely thinks he or she has.

In a final attempt to bolster its assertion otherwise, the respondent cites *Miles, supra,* for the proposition that "the Commission has recognized that the substantial relationship defense is not 'limited to only situations were absolute proof of conviction exists.'" In fact, *Miles* holds exactly the opposite.

In *Miles*, the commission did state that "the concept of conviction *record* under the Act is not limited to only situations where absolute proof exists that an actual conviction exists *[emphasis added].*" However, the commission did not state that the substantial relationship defense applies even when there is no actual conviction. Rather, in the very next paragraph of its decision, the commission stated:

> the commission concludes that the bondability exception to the prohibition against conviction record discrimination set forth in Wis. Stat. § 111.335(1)(c)2. is not applicable. The respondent has no basis to establish that Miles lacked bondability without first establishing that he has been convicted. *It is only the fact of actually having been convicted of a crime that would call into question Miles' bondability*. *[Emphasis added.]*

The "bondability" exception to conviction record discrimination now in Wis. Stat. § 111.335(3)(b)2. is the statutory twin of the "substantial relationship" exception in Wis Stat. § 111.335(3)(b)1. Just as it was "only the fact of actually having been convicted of a crime" that called bondability into question under subsection (3)(b)2., it would only be the fact of an actual conviction of a crime or other offense that would call the substantial relationship defense into question under subsection (3)(b)1. To state it directly, while an employer may be found to have discriminated against an individual based on an inaccurate perception that the individual had been convicted of a crime or other offense, it cannot raise the substantial relationship test under subsection (3)(b)1. to shield it from liability based on a conviction that never occurred.

In summary, the complainant has met his burden of proving that the respondent discriminated against him in violation of the Act when it discharged him based on his arrest record and perceived conviction record.

2. Remedy for the period following discharge, while the misdemeanor domestic battery charges were pending under the DAGP agreement

The next issue is remedy, which in this case is appropriately divided into two periods. The first covers the period from March 20, 2020 (when the complainant was discharged) until November 23, 2023 (when the pending misdemeanor charges were dismissed and converted into a violation of the Eau Claire County code); that is, the period after the complainant's discharge when the misdemeanor domestic battery charges remained pending. The administrative law judge concluded that there is no back pay remedy available for this period of discrimination, during which the respondent could have, lawfully, *suspended* the complainant without pay based on a pending criminal charge under Wis. Stat. § 111.335(2)(b), even though it instead wrongly discharged the complainant. Notably, the complainant does not challenge this conclusion.

As the administrative law judge noted, the commission has previously explained:

> Sec. 111.39(4)(c), Wis. Stats., empowers the Commission to "order such action by the respondent as will effectuate the purpose of this subchapter, with or without back pay." The Commission is, therefore, vested with broad equitable discretion in fashioning a remedy. The Fair Employment Act is intended to make the victims of unlawful discrimination whole. *Anderson v. LIRC,* 111 Wis. 2d 245, 259, 330 N.W. 2d 594 (1983). The Fair Employment Act, like the analogous Title VII federal action, "is intended to make the victims . . . whole and . . . the attainment of this objective . . . requires that persons aggrieved . . . be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763, 12 FEP 549, 555-56 (1976).
>
> The position Complainant would have been in were it not for the unlawful discrimination would have been suspension from her employment…. Respondent did not want Complainant present on its premises working. Under sec. 111.335(1)(b), Wis. Stats., such suspension would not have been discrimination because of arrest record because Complainant was an individual who was at the time subject to a pending criminal charge and the circumstances of the charge substantially related to the circumstances of her job as a cashier in a restaurant.
>
> …
>
> As the position Complainant would have been in … was suspension without pay, no back pay is appropriate.

Shipley v. Town & Country Restaurant. The commission reached a similar result in *Maline v. Wisconsin Bell*, ERD Case No. 8751378 (LIRC Oct. 8, 1989) and *Moreno v. County of Racine*, ERD Case No. CR201100660 (LIRC June 27, 2014).

The issue of back pay during this first period, then, turns on whether the charges of misdemeanor domestic battery were substantially related to the complainant's job as route technician for the respondent . The elements of misdemeanor battery under Wis. Stat. § 940.19(1) are:

> **940.19 Battery; substantial battery; aggravated battery. (1)** Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

The administrative law judge concluded that these charges were substantially related to the complainant's job as a route technician with the respondent. Again, the complainant does not dispute this conclusion on appeal.

A determination as to whether the circumstances of a criminal offense are substantially related to a particular job requires assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. As a general rule, the circumstances of the offense 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*, 139 Wis. 2d 805, 823-824, 407 N.W.2d 908 (1987). It is the circumstances which foster criminal activity that are important, *e.g.*, the opportunity for criminal behavior, *County of Milwaukee v. LIRC*, 139 Wis. 2d at 824, 407 N.W.2d 908 (1987), as well as the opportunities in the workplace to recidivate. *Cree v. LIRC*, 2022 WI 15, 400 Wis. 2d 827, ¶26, 970 N.W.2d 837.

In cases involving domestic violence, the Supreme Court held that it applies the substantial relationship the same as it does to any other conviction, adding

> we must look beyond any immaterial identity between circumstances—such as the domestic context of the offense or an intimate relationship with the victim—and instead 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.

Cree v. LIRC, 400 Wis. 2d 827, ¶25. The court also explained that in cases involving domestic violence, particularly, a decision-maker should consider such factors as whether opportunities may exist which would allow a perpetrator to isolate a victim,

Cree, 400 Wis. 2d 827, ¶26, as where a job requires regular interaction with customers and coworkers in uncontrolled and unpredictable environments, *id.,* at ¶36, and in the absence of regular supervision, *id.*, at 38.

In light of these considerations, the commission affirms the administrative law judge's conclusion that the misdemeanor battery charges, while pending, were substantially related to the complainant's job with the respondent. The complainant's job as route technician involved at least some face-to-face interaction with customers each day. The circumstances of the offense of misdemeanor battery—causing bodily harm to another by an act done with intent to cause bodily harm—indicates a propensity to engage in physical violence. It a serious offense, with a concomitantly higher risk of recidivism by the complainant being placed on the respondent. *Cree*, 400 Wis. 2d 827, ¶¶32, 39. While it provides no defense to a finding of discrimination when the respondent discharged, rather than suspended, the complainant based on pending misdemeanor domestic battery charges, the substantial relationship defense does preclude the imposition of remedies for that discrimination while those charges remained pending.

3. Remedy after November 23, 2022, when the pending misdemeanor charges were dismissed or converted to a county code ordinance violation

a. County code violation and availability of substantial relationship defense

On November 23, 2022, the complainant was convicted of disorderly conduct in a violation of Eau Claire County code 9.44.010. The commission has previously held that the substantial relationship test for convictions under Wis. Stat. § 111.32(3)(a)1. "is not limited to criminal convictions, but also covers convictions for 'other offenses' that may be substantially related to a specific job." *Staten v. Holton Manor*, ERD Case No. CR201303113 (LIRC Jan. 20, 2018). *Staten,* like this case, involved municipal disorderly conduct convictions. And while the recent decision in *Oconomowoc Area Sch. Dist. v. Cota*, 2025 WI 11, ¶26, _Wis. 2d_, 20 N.W.3d 182, dealt with the term "other offense," as used in Wis. Stat. § 111.32(2)(b), not Wis. Stat. § 111.335(3)(a)1., it supports the conclusion that the term "other offense" includes county code or municipal ordinance violations as well as violations of state criminal statutes.

Thus, the question becomes whether the respondent has a defense under Wis. Stat. § 111.335(3)(a)1., once the complainant was convicted of the county code violation. That, in turn, depends upon whether the circumstances of that conviction were substantially related to the circumstances of his job as a technician for the respondent. While the complainant was not actually discharged in November 2022 because of the county code violation, but instead was discharged in March 2020 based on the mistaken belief the Sterling background check showed a conviction of criminal charges, the commission has previously indicated that the substantial relationship inquiry is not limited to an individual's conviction record as known at the time of the

discharge. *See, for example, Moore v. Amazon.com.DEDC, LLC*, ERD Case No. 202101684 (LIRC Dec. 18, 2024).

In *Moore*, the complainant argued that the presiding administrative law judge erred by allowing the respondent—in making its case for the application of the substantial relationship test—to introduce evidence that related to convictions of which the respondent was unaware when it discharged the complainant. The commission disagreed, stating that it has consistently held that the substantial relationship test in Wis. Stat. § 111.335(1)(a)1 "is an objective legal test applied after the fact by a reviewing tribunal and the complainant's entire conviction record is relevant to this inquiry."[4] Among the cases cited by the commission in support of this proposition is *Santos v. Whitehead Specialties, Inc.*, ERD Case No. 8802471 (LIRC Feb. 26, 1992) in which the commission rejected the contention that the employer can only raise the substantial relationship defense if it inquired into the nature of the conviction and how it related to the job at the time the adverse employment decision was made. The commission explained in *Santos* that if that proposition were accepted:

> then situations could conceivably arise in which the Commission would be obliged to order a complainant hired into a position, notwithstanding that an after-the-fact analysis demonstrates conclusively that the individual has a conviction record substantially related to the position in question, simply because the decision-making employer did not undertake this analysis at the time of the decision.

The substantial relationship defense is an affirmative defense that an employer may waive by not raising. *Rick Jackson v. Summit Logistics Services Inc.*, ERD Case No. CR200200067 (LIRC Oct. 20, 2003), citing Wis. Admin. Code § DWD 218.12(2). However, a failure to raise the substantial relationship affirmative defense in a timely manner does not constitute a waiver of that defense where the failure to raise it was not unfair or prejudicial to the complainant. *Jackson, supra.*

In this case, the respondent did not specifically raise the disorderly conduct violation under the Eau Claire County code as a basis for its assertion that the complainant

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[4] In *Moore*, the commission noted that the commission's longstanding practice in this regard was given conditional support by the Supreme Court's note in *Cree*, ¶3, n.4, which indicated that the court "assumed without deciding that a conviction unknown to the respondent at the time of its adverse action should be considered by the court because the parties did not dispute that the court could consider the conviction."

Indeed, this explains the Court of Appeals' holding in *Employer's Ins. of Wausau*, discussed above. Rather than holding the substantial relationship defense applied to a conviction for a crime (such as domestic misdemeanor battery) that was never entered, the court applied the defense to the conviction for the municipal ordinance violation for shoplifting that actually was entered, even though the conviction occurred after the discharge.

had a conviction that substantially related to his job. It did, however, raise the substantial relationship defense with respect to the misdemeanor domestic battery charges, from which the Eau Claire County code evolved, in its July 10, 2020 statement of position in response to the complainant's complaint. Thus, this is not a case where an employer who, having never mentioned the substantial relationship defense in any manner, tries to first raise it at hearing or on review as a justification for a worker's discharge after previously giving an entirely reason.

Nor is the county code violation for disorderly conduct an unrelated conviction that the respondent happened upon by accident or fortuity. Rather, the county code violation arose out of the same sequence of events that led to the charges of misdemeanor domestic battery, for which the respondent terminated the complainant's employment. Under the facts of this case, the commission concludes that is not unfair or prejudicial to the complainant to consider the respondent's substantial relationship defense in the context of the offense for which the complainant was actually convicted.

b. County code violation conviction is not substantially related to the complainant's job.

As discussed above, in general, the "circumstances of the offense" for the purposes of the substantial relationship defense are gleaned from a review of the elements of the crime. *County of Milwaukee*, 139 Wis. 2d at 823-824. The elements of the code provision the complainant violated are:

> 9.44.010 Disorderly conduct and annoying telephone calls prohibited. Whoever … :
>
> A. In a public or private place engages in violent, abusive, indecent, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance unless other facts and circumstances that indicate a criminal or malicious intent on the person apply, a person is not in violation of this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried as set forth in Wis. Stat. § 947.01.

Because the elements of the crime of disorderly conduct reveal little about the underlying offense, some factual exposition may be necessary to "ascertain[] relevant, general character-related circumstances of the offense or job." *County of Milwaukee v. LIRC*, 139 Wis. 2d at 825. In this case, the hearing testimony establishes that the disorderly conduct arose from a dispute between the complainant and his girlfriend in their apartment.

The hearing evidence also established that the complainant had at most 30 minutes of face-to-face interaction with customers each day. Much of this contact was performed in commercial settings, on public streets, and in employer parking lots. The customer contact rarely, if ever, occurred in-person inside a home, and only occasionally occurred in a customer's garage. Keeping in mind that the Court's focus in *Milwaukee County* and *Cree* is on the risk of recidivism, not simply the risk of poor job performance, *Lane v. Bellin Memorial Hospital*, ERD Case No. 201801229 (LIRC Mar. 16, 2023), the commission concludes that the risk of recidivism arising from the complainant's opportunity to isolate a victim, *Cree,* 400 Wis. 2d 827, ¶26, in connection with the offense of disorderly conduct as opposed to misdemeanor domestic battery, fairly low.

On this point, it is significant is that the complainant was convicted of disorderly conduct, not actually engaging, or trying to engage, in violent physical contact. The *Cree* court noted the "seriousness of the convictions" as a factor weighing in favor of a substantial relationship between the circumstances of the offense and those of the job, *Cree*, 400 Wis. 2d 827, ¶¶34, 39, because the more serious the crime, the less an employer can be expected to carry the risk of recidivism, *id.* at ¶32. The offenses in *Cree*, which included convictions of strangulation, battery, and sexual assault, *id.* at ¶30, were unquestionably more serious than a conviction of a county code provision proscribing disorderly conduct.

Also among the factors considered by the Court in *Cree* with respect to the risk of recidivism was the recentness of the offense. *Cree,* 400 Wis. 2d 827, ¶33. The conduct leading to the complainant's arrest in January 2019 occurred nearly four years before his conviction for the county code violation that was entered in November 2022, and the record demonstrates that he had no brushes with the law in the interim. At the time of the event in January 2019, the complainant was 19 or 20 years old. Finally, in analyzing the recidivism risk, the *Cree* court found significant a *prior* battery conviction which the court felt suggested "an emerging pattern," *id.*, 400 Wis. 2d 827, ¶34. Here, of course, the complainant had no prior convictions.

Based upon the foregoing, the commission concludes that the circumstances of the complainant's conviction under Eau Claire County Code § 9.44.010 on November 23, 2022 are not substantially related to his job as technician for the respondent. The next question is whether the complainant is entitled to back pay as of that date.

c. Back pay is denied because of the complainant's failure to mitigate damages.
While it is within the commission's "discretion to award back pay, the availability of back pay is not unlimited." *Wingra Redi-Mix Inc. v. LIRC*, 2023 WI App 34, ¶109, 408 Wis. 2d 563, 993 N.W.2d 715. A discharged employee is expected to mitigate his or her damages during his or her period of unemployment, *id.,* and the award of back pay must be reduced for "interim earnings or amounts earnable with reasonable diligence." Wis. Stat. § 111.39(4)(c). It is an employer's burden to prove that an

employee failed to exercise due diligence in mitigating damages. *U.S. Paper Converters, Inc. v. LIRC*, 208 Wis. 2d 523, 529, 561 N.W.2d 756 (Ct. App. 1997). There are no *per se* rules regarding what constitutes reasonable diligence within the meaning of Wis. Stat. § 111.39(4)(c). *Id.* Rather, what constitutes reasonable diligence is to be determined from all of the circumstances of a given case. *Id.*

Here, the administrative law judge determined that the respondent met its burden of proving a lack of diligence in mitigating wage loss by the complainant. By November 2023, the complainant had been operating his own glass and dent repair business for almost two years, having left two glass repair jobs with other employers paying substantially more than he was earning in self-employment. In explaining her decision not to order back pay, the administrative law judge noted the commission's decision in *Fields v. Cardinal TG, Co.*, ERD Case No. 199702574 (LIRC Feb. 16, 1991). In that case, the commission began by noting that "[s]elf-employment is an acceptable method of mitigating damages." However, the commission further explained:

> While it might be reasonable to expect a new business to founder in its early days, there comes a point at which the complainant's self-employment efforts are recognized to be failing and can no longer be deemed a reasonable effort to mitigate damages. To do otherwise would put the respondent in the untenable and unfair position of subsidizing the complainant's failing business for a protracted period of time.

In *Fields*, Field's business showed a net operating loss of $3,483 during its first three months, and a net profit of only $7,688.20 in the following year. The complainant's earning history in self-employment in this case is quite similar. Further, the complainant's business earnings were substantially less than he had made working for other glass companies, but he chose not to continue that more lucrative work because of personality disputes with the companies' owners. On the other hand, he consistently voiced a desire to return to work for the respondent, supporting the conclusion that the complainant's self-employment venture is not a viable method for mitigating damages.

The commission thus concludes that the administrative law judge properly declined to award back pay following the dismissal or conversion of the pending misdemeanor domestic battery charges due to the complainant's failure to mitigate damages. Again, the complainant does not challenge this conclusion on appeal.

d. Reinstatement.

Reinstatement is among the remedies suggested by Wis. Stat. § 111.39(4)(c), *see*, *Masri v. LIRC*, 2014 WI 81, ¶81, 356 Wis. 2d 405, 850 N.W.2d 298. Indeed, reinstatement with back pay is the presumed remedy in a discharge case, and the discriminating employer bears the burden of establishing through clear and

convincing evidence that the remedy should not be awarded. *See*, *Gilbertson v. Wingra Redi-Mix, Inc.*, ERD Case Nos. CR201400424 and CR201700698 (LIRC Dec. 10 2020), *aff'd sub nom. Wingra Redi-Mix Inc. v. LIRC*, 2023 WI App 34, 408 Wis. 2d 563, 993 N.W.2d 715. *See also, Zunker v. RTS Distributors*, ERD Case No. CR201004089 (LIRC June 16, 2014).

Here, the respondent has established that back pay should not be awarded, for the reasons explained above. However, neither the defense to back pay available under *Shipley* during the pendency of the misdemeanor domestic assault charges nor the complainant's failure to mitigate his damages affect the complainant's right to reinstatement. As explained above, the county code violation is not substantially related to the complainant's job and does not provide a basis for denying restatement. Accordingly, the commission, like the administrative law judge, orders that the complainant be reinstated to his job as a technician for the respondent.

4. Fees

a. Fees at the hearing level

The complainant is also entitled to payment of his reasonable attorney's fees incurred in pursuing this matter. *Masri v. LIRC,* 356 Wis. 2d 405, ¶36. In determining the amount of reasonable attorney's fees, the commission looks to *Hensley v. Eckerhardt*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 40 (1983). In that case, the Court held that the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate, which provides an objective basis on which to make an initial estimate of the value of a lawyer's services. *Id.,* 461 U.S. at 433. In making this initial calculation, a trier of fact should exclude hours that were not reasonably expended—that are excessive, redundant, or otherwise unnecessary. *Id.,* 461 U.S. at 434.

The Court went on to hold that where a party's suit involves distinctly different claims for relief based on different facts and legal theories, no fee should be award for services on the work on an unsuccessful claim. *Hensley,* 461 U.S. at 435. The Court added that the trier of fact should focus on the significance of the overall relief to the hours reasonably expended on the litigation, *id.,* and should reduce a fee to account for services on an unsuccessful claim, even if claims are interrelated, nonfrivolous, and raised in good faith, *id.,* 461 U.S. at 436.

The Court further noted that there is no precise rule or formula for making these determinations. *Hensley*, 461 U.S. at 436. A trier of fact may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success or excessive billing, and it necessarily exercises discretion in making this judgment. *Id.,* 461 U.S. at 436-37. The commission itself has used a percentage reduction approach, both for excessively, unreasonably, or redundantly expended hours generally, *Geen v. Stoughton Trailers*, ERD Case No. 199700618

(LIRC Aug. 8, 2008) (25 percent reduction for unnecessary expenditure of time due to duplicative efforts of attorneys) and for deductions for partial success specifically, *Kraemer v. County of Milwaukee*, (ERD Case No. CR200800323 (LIRC Oct. 11, 2012) (noting that one approach that has been recognized as appropriate is to simply reduce the total award to account for the limited success).

In this case, the complainant's attorney sought payment of a total of $218,602.50 in fees for the work done at the hearing level. However, the administrative law judge significantly reduced the amount of the claimed fee.[5] She first addressed the issue of partial success. Noting that the complainant was unsuccessful on his back pay claim, she concluded that all charges from May 1, 2023 to November 14, 2023 (when a hearing on the issues of back pay and mitigation was held) related to that issue. This amount totaled $18,430, and the administrative law judge deducted it from the gross amount of the fees claimed. The complainant does not appear to challenge the deduction on appeal.

Next, the administrative law concluded that the number of hours expended in preparing the complainant's post-hearing main brief and reply brief, 172.1 hours in all, was excessive. She believed only half of that amount of hours should have been reasonably expended to the prepare those briefs. Accordingly, she reduced the amount billed for preparing the post-hearing briefs, $61,320, by one-half, resulting in an additional deduction of $30,660 from the bill.

The complainant challenges this deduction, asserting, among other things, that his attorney could have charged a higher hourly rate. However, the complainant's attorney charged what he charged per hour in fee, and it was not the hourly rate that the administrative law judge found excessive, but the hours spent on briefing. It also is true that, as the complainant asserts, this case presents myriad interesting and complicated issues. However, while the complainant's post-hearing briefs, which combined totaled over 100 pages, were helpful in resolving this complex case, the commission agrees that the hours billed exceed the number of hours reasonably expended on this aspect of the litigation. Accordingly, the commission affirms the $30,660 deducted from the fee charged for the post-hearing briefing.

The administrative law judge further reduced the fee remaining after the above-mentioned deductions, $169,512.50, by 60 percent to account for the complainant's limited or partial success, because the respondent successfully proved that the misdemeanor domestic abuse charges were substantially related to the complainant's work as a technician for the respondent. Under *Shipley*, as explained above, no back

[5] In doing so, the administrative law judge properly rejected the respondent's assertion that the fee should be lowered because the complainant's attorney employed block billing. While an award may be reduced if the documentation of hours is inadequate, *Hensley*, 461 U.S. at 433, in this case the activities of the complainant's attorneys and their staff were sufficiently discernable despite the use of block billing.

pay could be awarded following his discharge while those charges were pending. Further, after those charges were dismissed or converted, the respondent demonstrated that the complainant failed to prove reasonable efforts to mitigate his damages. Combined, the *Shipley* issue and the mitigation issue resulted in the denial of back pay it is entirety.

The complainant asserts that the administrative law judge erred in concluding that he achieved only partial or limited success. He contends that he achieved significant success before the administrative law judge, noting that he prevailed on the liability issues and was awarded reinstatement. The commission agrees that the complainant achieved significant success by proving discrimination entitling him to job reinstatement, making him a prevailing party entitled to a fee. *See, Hensley,* 461 U.S. at 433. However, *Hensley* further holds that "the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.*, 461 U.S. at 440.

It cannot seriously be disputed that where, as here, a complainant seeks both back pay and reinstatement as relief, an order for reinstatement only is limited success. Indeed, the commission has recognized that a complainant achieves only partial success where his or her remedy for back pay is reduced, *Carlson v. Wisconsin Bell Inc. d/b/a AT&T*, ERD Case Nos. CR201102363 and CR201200428 (LIRC Feb. 19, 2015), *rev'd on other grounds sub nom. Wis. Bell, Inc. v. LIRC*, 2018 WI 76, 382 Wis. 2d 624, 914 N.W.2d 1, and here it has been denied altogether. A reduction is appropriate; the question is the amount.

The complainant, pointing to other cases involving other facts where the commission imposed lower reductions, asserts the administrative law judge's 60 percent reduction for partial success is arbitrary and too high. However, the amount of the fee must be determined on the facts of each case. *Hensley*, 461 U.S. at 429. Thus, comparing results reached in prior commission decisions[6] is useful, but not dispositive. Notably, no fee at all was awarded in *Shipley*, where the commission held that a discharge (as opposed to suspension) based on arrest record resulted in a finding of discrimination, but that no remedy could be ordered while the charges remain pending (though it must be acknowledged that reinstatement was not ordered in that case). *See also, Maline v. Wisconsin Bell, supra*. In this case, having considered the standards set out in *Hensley* and giving appropriate weight to the fee reductions made by the commission in similar cases, the commission affirms and adopts the 60 percent reduction for partial success.

[6] In *Carlson*, the commission noted that in "cases in which the complainant prevailed on a claim that produced little or no monetary relief, but lost a claim for back pay, … fee reductions generally have ranged from 33% to 70%."

Next, the complainant challenges the reduced fee as insufficient to "deter a 'bad actor' from engaging in prohibited conduct." However the sum of the fee and costs awarded for the hearing portion of this case, $72,291.13, is hardly an insignificant amount, and it is entirely consistent with the purpose of deterring bad action. Finally, citing two federal district court cases, the complainant asserts that the commission should compel the respondent to produce its billing statements to serve as a "logical yardstick" in determining what fee is reasonable. Notably, in one of those cases, a federal anti-trust case, the district court itself cited a federal appellate court holding that "it is not an abuse of discretion to find that a defendant's costs and hours are irrelevant to the reasonableness of a plaintiff's claimed award." *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n.*, No. 90 C 6247, 1996 WL 66111, at *3 (N.D. Ill. Feb. 13, 1996) (citing *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.,* 776 F.2d 646, 659 (7th Cir. 1985)). The commission is satisfied that both it and the administrative law judge had an adequate basis to judge the reasonableness of the complainant's fee request without requiring the production of the respondent's billing statements.

b. Fees at the commission level

The final issue is the attorney's fees claimed by the complainant in connection with commission review. In its Brief in Support of Petition for Review of the Attorney's Fee Award, the complainant requested $12,730.50[7] in fees for 37.90 hours of attorney and paralegal time to the date of that brief. "It is well established that an attorney's time spent in establishing entitlement to fees is itself normally recoverable." *Donovan v. Graebel Van Lines Inc.*, ERD Case No. 8702539 (LIRC May 23, 1990). Still, the Court in *Hensley* admonished that "[a] request for attorney's fees should not result in a second major litigation," *id.*, 461 U.S. at 437. Notably, *Donovan* involved only 3.4 hours for the preparation of a fee petition, not time spent solely on a brief devoted to arguments for increasing an attorney fee above the amount allowed by the administrative law judge and which, as explained above, the commission did not find persuasive. Neither of the prior commission decisions cited by the complainant on this point[8] provide clear support for awarding legal fees for such a brief, and the commission declines to award any fee for that brief, as the time was not reasonably expended in pursuit of an unsuccessful claim.

The complainant also seeks an additional $24,395 for fees (34 hours of paralegal time at $205 per hour and 42.5 hours of attorney time at $410 per hour) for the preparation of the complainant's brief responding to the respondent's petition for review. The commission accepts the hourly rates as reasonable in light of the affidavits and supporting material submitted in connection with the request for fees at the hearing level. However, the time charged for response brief exceeds the amount reasonable

[7] Working from the billing statement itself, the commission calculated a slightly lower amount, based on 12.7 hours of paralegal time and 23.7 hours of attorney time, for a total of $12,320.50.

[8] *Krueger v. County of Waupaca*, ERD Case Nos. CR201300816 and CR201400425 (LIRC Aug. 22, 2018) and *Fields v. Cardinal TG Co.*, supra.

for the preparation of such a brief, and it reduces the fee charged for this purpose by one-third. As the complainant does not attempt to reassert a claim for back pay in his response brief, no additional reduction for partial success is warranted. Accordingly, a total fee for legal services incurred for representation before the commission is allowed in the amount of $16,263.33.

cc: David Schoenberger
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