

Current Issues Under an Old Law: Wisconsin's Arrest and Conviction Record Protected Classification

Labor & Employment Law Update

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Although the Wisconsin Fair Employment Act (WFEA) has included arrest and conviction record as a category protected from discrimination since 1977, a decision of the Wisconsin Supreme Court last year demonstrates that the contours of protection under the law are still being developed. In general, the law requires any Wisconsin employer (with some limited exceptions such as schools dealing with unpardoned felons) to establish that a "substantial relationship" exists between the circumstances of the arrest or charge (in order to suspend an employee) or the conviction (to refuse hiring or terminate employment).

In *Cree, Inc. v. LIRC*, 2022 WI 15, the Wisconsin Supreme Court explained that "Wisconsin's laws regarding employment discrimination based on conviction record serve two important, and sometimes competing interests – rehabilitating those convicted of crimes and protecting the public from the risk of criminal recidivism." In *Cree*, an offer of employment to Derrick Palmer was rescinded after the company learned that Palmer had been convicted of eight domestic violence crimes. The primary issue in the case became whether the nature of such crimes presented enough of a danger in the workplace to satisfy the substantial relationship test. The Administrative Law Judge who conducted the hearing ruled that it did, the Labor and Industry Review Commission (LIRC) said it did not, the Racine County Circuit Court said it did, then the Wisconsin Court of Appeals ruled LIRC was correct and reversed the Circuit Court. Much of the discussion in the seesaw of decisions focused on whether Palmer's history of domestic violence was more likely to be an isolated threat in Palmer's intimate personal relationships, rather than a broader threat to customers or co-workers encountered in the workplace. The Wisconsin Supreme Court ultimately reversed the Court of Appeals and concluded the purpose of the substantial relationship test is to assess whether "tendencies and inclinations" to behave in a certain way would be likely to reappear later in similar contexts. The decision makes clear that domestic violence convictions must be assessed the same way as other convictions involving violent behavior. It rejected the notion that because domestic violence perpetrators have a relationship with their victims, there is not as much of an indicator of generally violent tendencies as would be the case with a conviction involving the assault of strangers. Undertaking that analysis, the

Supreme Court focused on similar opportunities for Palmer to isolate victims in the Cree workplace and the character trait of a willingness to use violence against others when angry. The Court reasoned that interpersonal relations with co-workers in the employment at Cree, coupled with minimal day-to-day supervision of that particular job, could provide opportunities for violent behavior if disputes arose in the workplace.

At the same time, the Supreme Court emphasized that its holding was based on the specific circumstances of the job at Cree stating, “Nothing in this opinion condemns all domestic violence offenders to a life of unemployment.” A vigorous dissent argued that the majority opinion inappropriately interjected “character traits” into the analysis when that factor is not referenced in the WFEA.

This case underscores the need for Wisconsin employers to carefully apply the substantial relationship test by assessing the underlying circumstances of an employee’s criminal convictions and the type of conduct engaged in by the employee which led to the conviction—rather than simply relying on the name or category of the crime. Those factors then need to be juxtaposed with the actual day-to-day functions and factors at play in the workplace, and not merely compared to a position’s title or job description. The more sensitive the work environment (e.g., vulnerable customers or patients encountered in the job) the more likely a wider range of offenses could be argued to present a risk sufficient to satisfy the substantial relationship test as viewed in *Cree*.

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