



***HR Heads-up***

## ***Wisconsin Supreme Court Addresses Substantial Relationship Test for Arrest and Conviction Record Discrimination***

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The Wisconsin Fair Employment Act (WFEA) generally prohibits employers from discriminating against individuals on the basis of their arrest and conviction records, subject to certain exceptions. One of those exceptions permits employers to refuse to hire or terminate an employee or applicant if the material circumstances of a pending charge or conviction bear a “substantial relationship” to the circumstances of the job at issue. Generally, a substantial relationship will exist if the circumstances of the workplace would present an unacceptable level of opportunity for the employee to reoffend in the workplace. It is the employer’s burden to prove the existence of a substantial relationship.

The Wisconsin Supreme Court, in a 4 – 3 decision, recently addressed the substantial relationship test in *Cree, Inc. v. Labor and Industry Review Com’n*, 2022 WI 15. In 2015, Derrick Palmer applied for the position of Applications Specialist with Cree, which at the time manufactured and marketed lighting components. His job duties would have included traveling to customers’ facilities for consultations, working collaboratively with customers and coworkers, and occasional travel with overnight stays in hotels. His job also required him to work largely independently without direct supervision. Additionally, he would have been working at facilities which were large and had certain secluded areas that were not monitored by security cameras.

Cree made Palmer a contingent job offer subject to a criminal background check. The background check revealed that Palmer had been convicted in 2013 of eight

violent crimes against his then-girlfriend, including sexual assault, felony strangulation and suffocation, misdemeanor battery, and criminal damage to property. After consulting with its legal counsel, Cree rescinded the job offer. In response, Palmer filed a complaint with the Wisconsin Equal Rights Division and alleged that Cree had unlawfully discriminated against him on the basis of his prior convictions. An Administrative Law Judge (ALJ) held that Cree did not violate the law. The Labor and Industry Review Commission (LIRC) reversed and held that Cree did violate the law by refusing to hire Palmer. The circuit court then reversed LIRC's decision. Finally, the court of appeals reversed the circuit court.

The Wisconsin Supreme Court held that Cree had met its burden of demonstrating the existence of a substantial relationship and addressed how courts, agencies, and employers should analyze whether a substantial relationship exists between a conviction and a job. The court reiterated that the relevant inquiry is whether the circumstances of the Applications Specialist position would have presented opportunities for Palmer to reoffend in the workplace. Applying that inquiry to this case, the court reasoned that the violent nature of his crimes demonstrated his propensity for exerting control and dominance which would have presented opportunities for him to reoffend in the workplace given the position's emphasis on interpersonal relationships.

The court criticized prior LIRC precedent that distinguished crimes of domestic violence from other types of crimes. Previous LIRC decisions had consistently held that domestic violence crimes, due to their nature as crimes related to personal, intimate relationships, were not substantially related to most jobs in workplace settings because such jobs would not present the opportunity for the applicant to reoffend in the workplace. Based on these decisions, in many circumstances it was legally risky to deny employment to applicants with convictions for crimes of domestic violence. The majority opinion in *Cree* emphasized that cases involving convictions for domestic violence needed to be analyzed in the same manner as any other conviction. The court stated the circumstances of the crimes and the circumstances of the opportunity to re-offend do not need to be identical.

Returning to Palmer's situation, the court said that the circumstances surrounding domestic violence, particularly of the severity of Palmer's actions, could present opportunities for an employee to reoffend in the workplace. The court identified "character traits" it believed were revealed by the elements of a crime of domestic violence as a means of trying to determine whether those traits were likely to resurface in the job. Such character traits included the propensity for exerting control and dominance which could also lead Palmer to reoffend through

professional relationships with customers and coworkers. The court did not narrowly view the circumstances of Palmer's convictions as only relating to personal, domestic relationships. The court also noted the lack of regular supervision, overnight stays in hotels, and lack of security cameras in secluded areas could present further opportunities for Palmer to reoffend.

The court emphasized that in addition to the character traits of the offense, one should also consider issues such as the seriousness and number of offenses; how recent the conviction is; and whether there is a pattern of behavior. The court's focus on these issues is a significant departure from prior Wisconsin law.

The court noted the more serious the crime, the less an employer should be expected to bear the risk of recidivism. For example, the risks associated with employing a convicted shoplifter who might steal again is less severe than employing a convicted violent offender who might be violent again. Likewise, the court stressed that the relatively short period of time between the conviction and the application for employment can be a relevant factor in determining the likelihood to reoffend in the workplace. Prior to this decision, the period of time between conviction and application for employment was generally irrelevant to the substantial relationship test. The court's focus on the nearness of the conviction in time suggests that an employer's reliance on an old conviction might raise legal risk under the substantial relationship test.

Taken as a whole, the court concluded that Cree had satisfied its burden of demonstrating the existence of a substantial relationship between Palmer's convictions and the job at issue. However, the court also stressed that its decision was based on the facts and circumstances of Palmer's convictions and the particular job, and should not be read as a basis for rejecting all domestic violence offenders. The dissenting justices suggested that the majority opened the door for employers to assert that anyone convicted of crimes of domestic violence are unfit to work in close proximity to other people.

*Cree* provides some guidance to employers faced with applicants who have prior convictions. This case's analysis of the substantial relationship test will have a broad and significant impact on how employers address applicants and employees with respect to conviction records going forward. While the decision seems to tip the analysis in favor of employers, this is not a carte blanche opportunity for employers to reject applicants with conviction records. The see-saw nature of this case shows just how difficult these cases can be.

Employers must conduct a case-by-case analysis of the circumstances of the position in question and to compare them to the material circumstances of the individual's prior offense(s) to determine whether a substantial relationship exists so as to justify an adverse employment action. This decision also underscores the importance of employers consulting with legal counsel prior to terminating an employee or revoking a job offer based on a pending charge or conviction record. We encourage employers to reach out to a member of the Boardman Clark Labor & Employment Practice Group with questions.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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