

# Wisconsin Supreme Court Eases the Burden for Employers Defending Arrest and Conviction Record Discrimination Claims Under State Law

By Michael Gotzler and Casey Kaiser on March 11, 2022

The Wisconsin Fair Employment Act (WFEA) prohibits employers from discriminating against applicants and employees on the basis of their arrest and conviction records.<sup>1</sup> Generally, an employer cannot make decisions on the basis of an arrest or conviction record unless the crimes “substantially relate” to the circumstances of the job at issue.<sup>2</sup> For many years, the state agencies responsible for enforcing this law—the Wisconsin Department of Workforce Development (DWD) and the Labor and Industry Review Commission (LIRC)—have taken the view that crimes of domestic violence do not substantially relate to any type of job. Their reasoning was that crimes committed in a so-called “domestic setting” or that involve a victim with whom the criminal had a personal relationship do not suggest that the criminal would engage in violence in the workplace. In the recent case Cree, Inc. v. Palmer, the Wisconsin Supreme Court provided much-needed relief to Wisconsin employers by clarifying the law, easing employers’ burden for proving a substantial relationship, and rejecting LIRC’s view that domestic violence crimes cannot be substantially related to employment.<sup>3</sup>

## Background

In 2013, a job applicant was convicted of committing eight crimes of domestic violence against his girlfriend. He pled no contest to two counts of felony strangulation and suffocation, four counts of misdemeanor battery, one count of fourth degree sexual assault, and one count of criminal damage to property. Two years later, after serving out his prison sentence, the applicant applied to Cree for a lighting applications specialist position. In that role, the applicant would have worked at Cree’s sprawling 600,000 square foot facility along with approximately 1,100 other employees. The

applicant would have needed to work with Cree's customers, sometimes on location at customers' facilities. He also would have occasionally traveled for tradeshow, potentially overnight. During these customer visits and tradeshow, the applicant would have worked independently without much supervision. Cree made the applicant a conditional offer of employment, but after obtaining a background check and learning of his extensive criminal record, Cree withdrew the offer. The applicant then filed a complaint with the DWD alleging conviction record discrimination. Years of litigation and appeals ensued, with both parties prevailing at different points along the way.

LIRC, following its pattern in prior domestic violence cases, classified the applicant's crimes as having occurred in a "domestic setting" and determined they were not substantially related to the position at Cree. Cree petitioned the Wisconsin Supreme Court for review. The court had not reviewed a case involving the substantial relationship test since 1987, and so was primed to correct LIRC's interpretations of law that had developed in the interim, particularly those related to domestic violence.

### **Wisconsin Supreme Court Weighs In**

In a notable decision, the Wisconsin Supreme Court reversed LIRC and held that Cree sufficiently established that the circumstances of the applicant's convictions were substantially related to the circumstances of the job at Cree. The court began its analysis by providing a simplified reformatting of the substantial relationship test: the test requires an employer show that the facts, events, and conditions surrounding the crime materially relate to the facts, events, and conditions surrounding the job. Turning to LIRC's "domestic setting" analysis, the court commented that LIRC had essentially created an exception to the substantial relationship test for all domestic violence crimes based on the common, but unsupported, assumption that domestic batterers have a tendency to be violent only towards intimate partners. The court reinforced that these details of the crime—such as the domestic context of the offense or an intimate relationship with the victim—are immaterial to the test. Instead, the relevant inquiry is into the circumstances material to fostering criminal activity. As the court explained, 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 case.

Examining the traits exhibited by domestic violence perpetrators like the applicant, the court found that they engage in violence under circumstances where their victims are isolated away from those who might intervene. They are also willing to use violence to exert power and control over others. Specific to the applicant, the court considered the serious nature of his crimes, the fact that he was convicted only two years prior to his application for employment, and his pattern of criminal behavior pre-dating his 2013 convictions. The court considered the seriousness of the convicted

offense because “the more serious the offense, the less we can expect an employer to carry the risk of recidivism.”<sup>4</sup> The court also specifically recognized an employer’s legal obligations to protect customers and other employees. As to the recency of the applicant’s convictions, the court noted: “If significant time has passed since a potential employee’s last conviction, then that tends to indicate rehabilitation and reduces the likelihood of recidivism. But the existence of convictions with similar elements that predate the most recent conviction undermine an inference of rehabilitation, increasing the recidivism risk.”<sup>5</sup>

In the job at Cree, the applicant would have been challenged by supervisors, coworkers, and customers, and these interactions could lead the applicant to react, consistent with his past behavior, in a violent manner in order to exert his own power or control. The absence of regular supervision would have created further opportunities for the applicant to engage in violence. With these considerations in mind, the court held that the applicant’s conviction record was substantially related to the job at Cree.

### **What this Means for Employers**

With the *Cree* decision, Wisconsin employers will be able to make more confident decisions when assessing whether an employee’s or applicant’s crimes are substantially related to a job. Employers will also be able to base employment decisions on domestic violence crimes, which before *Cree*, would have entailed significant risk. While the enforcement agencies could still decide that domestic violence crimes do not substantially relate to other types of jobs, the agencies’ determinations can no longer be based on LIRC’s past unsupported “domestic setting” assumptions, but instead must be based on the Wisconsin Supreme Court’s reformatted, common sense approach to the test. While Wisconsin employers must still engage in an individualized assessment of an applicant’s or employee’s pending charges or convictions, they no longer need to consider treating those from a domestic setting any differently than other types of charges or convictions.

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<sup>1</sup> Wis. Stat. § 111.32(1), (3); Wis. Stat. § 111.321; Wis. Stat. § 111.322.

<sup>2</sup> Wis. Stat. § 111.335(2)(a), (3)(a).

<sup>3</sup> 2022 WI 15, issued March 10, 2022.

<sup>4</sup> *Id.* at ¶ 32.

<sup>5</sup> *Id.* at ¶ 33.

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