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Employment Update

ARREST AND CONVICTION RECORDS: SO WHY AREN'T THE FELONS JELLIN'?

Recently, there has been significant media attention with regard to prior arrest and conviction records for public employees. For example, in the Village of Greendale, Wisconsin, a candidate was approved by the Police & Fire Commission to be on the eligibility list as a patrol officer. While the Village Fire & Police Commission later removed the candidate from the eligibility list, the case generated significant controversy. The patrol officer had the following prior criminal record:

- " His Wisconsin drivers license was suspended because of a D.U.I. and hit and run and the earliest he could seek reinstatement of his license is March 21, 2007;
- " Off-duty crash in July, 2005, in which he rear-ended another car then left the scene (plead guilty to misdemeanor of hit and run and causing an injury while under the influence);
- " Disorderly conduct - firing a gun after a night of drinking in Racine County (plead no contest in 1998) and;
- " Driving while impaired in Michigan (plead no contest).

State legislators have focused on the presence of felons working on campus at institutions of higher education and the manner in which these issues are dealt with by both policy and practice.¹ The Legislative Audit Bureau reports highlight what employers in Wisconsin have long recognized, that is, these cases provide many complex legal issues.

Aside from media attention, why should employers be concerned about hiring employees with criminal records? Since at least 1998, Wisconsin employers have faced liability for hiring convicted criminals. In *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 264-265, 580 N.W. 2d 233 (1998), the Wisconsin Supreme Court recognized the tort of negligent hiring/negligent retention. In Wisconsin, if employers perform no background check, or an inadequate background check, and hire someone who goes on, for instance, to harm someone, or steal from someone, the employer can be sued for negligently hiring the employee, or for negligently retaining the employee. In such cases, public opinion *is* important, because the "public" would be the jury who would decide if the employer made a mistake by hiring or retaining an employee with a criminal record. Employers have a lot to lose by making a mistake.

¹ Additionally, Legislative Audit Bureau ("LAB") report, dated June, 2006, "Employment of Felons by the Wisconsin Technical College System" and report dated February, 2006 "Employment of Felons by UW System."



Wisconsin employers are in a box, however. While employers are subject to potential liability if they **hire** someone with a criminal record, they are also subject to liability if they **refuse** to do so. The Wisconsin Fair Employment Act ("WFEA"), Section 111.321 Wis. Stats., generally prohibits employment discrimination on the basis of an arrest or conviction record. However, Wis. Stats. 111.335 (1)(c) states that employment can be terminated when a conviction is "substantially related" to the circumstance of an individual's job. Employers in Wisconsin can never base a decision on an "arrest" record. The "substantial relationship" test does apply to "pending charges," however. If an applicant/employee has a "pending charge" she has been charged, but the charge has not been resolved yet - an employer may lawfully *suspend* the applicant/employee pending resolution of the charge, but only if the charge is "substantially related" to the job.

What does the law require for a conviction or pending charge to be "substantially related" to a job? The answer depends on who is doing the asking.

In Wisconsin, arrest and conviction record discrimination claims are investigated by the Equal Rights Division ("ERD"). Following investigation, arrest/conviction record discrimination claims are heard by an Administrative Law Judge ("ALJ"), who holds an evidentiary hearing, at which witnesses are called, and evidence is taken. The ALJ's decision is then appealable to Wisconsin's Labor and Industry Review Commission ("LIRC"). The LIRC reviews the record made before the ALJ - no new hearing is held. The LIRC then makes its own findings of fact and law, and is not bound by the findings of the ALJ. Until several years ago, most crimes were found to be substantially related to most jobs. More recently, however, the LIRC has made a marked shift in favor of employees; and, now, employers often face an unpleasant surprise when what seems (to them) to be "substantially related" to a job is found by LIRC to be unrelated.

So, what about convicts working for schools? In 2001, the Wisconsin Court of Appeals affirmed a decision by LIRC, and reinstated a boiler attendant to work at a Milwaukee Public Schools ("MPS") grade school. The employee was convicted following events that occurred during an argument with his girlfriend. The employee ("Moore") threw a pan of hot grease at his girlfriend, which missed her, but hit her 20 month-old daughter who was standing between them. The hot grease severely burned the young girl, requiring extensive surgery, skin grafting and hospitalization. Following his conviction, Moore was hired as a Boiler Attendant Trainee in the MPS system. However, upon learning of his conviction, MPS terminated Moore for intentionally falsifying his employment application because he failed to disclose his conviction as required on the application. In *Milwaukee Board of School Directors v. Labor and Industry Review Commission*, 246 Wis. 2d 988, 632 N.W.2d 123, Wis. App., 2001 (Wis. App. 2001)(Unpublished), the Court of Appeals, agreeing with the LIRC, found no relation between Moore's crime and working in a grade school.

The "problem" of so many convicted criminals working for schools, or in the Technical College System, however, has turned out to be in the eye of the beholder. Not everyone sees a problem, and not everyone wants a change. There were several unsuccessful legislative efforts to amend the WFEA, after the Moore/MPS case, to exempt schools or otherwise grant greater latitude to employers to meet their duty to screen out employees/applicants with criminal records. Last year witnessed three different legislative efforts to amend the WFEA. 2005 Assembly Bill 284 would have exempted educational agencies from the WFEA for unpardoned felons. 2005 Assembly Bill 1147 would have done the same thing, but only for Technical Colleges and the University of Wisconsin System. 2005 Senate Bill 151, like Assembly Bill 284, would have exempted educational agencies from the WFEA for unpardoned felons. All three bills were unsuccessful. While recent LIRC decisions have outraged some, there is insufficient political support to change the law. And so, employers in Wisconsin, for the foreseeable future, at least, must continue to live in an environment in which they face significant liability if they *do* hire criminals, and also face liability if they refuse to hire criminals.



So What Is The Law? How Does An Employer Evaluate These Cases? And What Are The Employers Responsibilities?

I. Criminal Conviction and the Duty to Hire

A. Background

1. **Federal Law**

Federal law does not explicitly prohibit discrimination against individuals with conviction or arrest records. An employer's policy or practice of excluding individuals from employment on the basis of arrest or conviction records, however, may be found to be unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, ("Title VII") based on a theory that such a policy or practice has an adverse impact on minorities in light of statistics showing that they are arrested and convicted at a rate disproportionately greater than their representation in the general population. See Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd and vacated in part on other grounds*, 472 F.2d 631 (9th Cir. 1972); Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975); EEOC Compliance Manual, § 604, 2088.

Arrest Records. Courts closely scrutinize arrest inquiries because of their adverse racial impact and limited job relatedness. See Barbara Lindemann & Paul Grossman, 1 Employment Discrimination Law, at p. 185 (3d Ed. 1996) (citations omitted). The Equal Employment Opportunity Commission's ("EEOC") position is that an employer is precluded from asking about arrest records at all because requesting such information tends to discourage application by individuals with arrest records and tends to induce false or incomplete answers for which the applicant may be penalized. See Lindemann & Grossman, 1 Employment Discrimination Law, at p. 186 (citing EEOC Dec. F4-02, 6 FEP 830, 831 (1973)). Courts, however, have approved of employers basing employment decisions on the underlying conduct and circumstances that led to an arrest rather than the mere fact of an arrest. See Lindemann & Grossman, 1 Employment Discrimination Law, at p. 186 (citing cases).

Conviction Records. An employer may implement a policy that excludes individuals from employment based on conviction records without violating Title VII if the employer proves that minorities do not have a disproportionately greater rate of conviction, that the policy does not cause an adverse impact, or that the policy is consistent with business necessity, the last option being the easiest to prove. If an employer establishes that a policy that excludes individuals from employment based on conviction records is justified by business necessity, the employer may avoid being found in violation of Title VII. See EEOC Compliance Manual, § 604, 2088.

False or Incomplete Application. Courts have generally found the refusal of employers to hire applicants based on false or incomplete answers to inquiries about convictions to be lawful. See e.g. Avant v. South Central Bell Tel. Co., 549 F.2d 1158 (5th Cir. 1983); Osborn v. Cleland, 620 F.2d 195 (8th Cir. 1980).

2. **Wisconsin Law**

Employers are prohibited from discriminating against individuals based on arrest or conviction records (Wis. Stat. §§ 111.321, 111.322.) unless the circumstances surrounding the pending charge or conviction are substantially related to the circumstances of the particular job. Employers may not lawfully consider "arrests" at all.

The Substantial Relationship Test. The phrase "substantially related to the circumstances of the particular job" does not require, in all cases, a detailed inquiry into the facts of the offense and the job. Rather, the purpose of determining whether the circumstances of the crime substantially relate to the circumstances of the particular job is to assess whether tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. County of Milwaukee v. LIRC and Serebin, 139 Wis. 2d 805,

823-24, 407 N.W.2d 908 (1987). It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. Id.

In County of Milwaukee, the Wisconsin Supreme Court found that the circumstances involved in the plaintiff's convictions for homicide by reckless conduct in connection with a nursing home patient who wandered from the facility and died from exposure and for multiple misdemeanor charges for patient neglect were substantially related to the plaintiff's position of crisis intervention specialist with a mental health facility. The propensities and personal qualities exhibited in connection with those convictions were manifestly inconsistent with the expectations of responsibility associated with the job of crisis intervention specialist. The substantial relationship test does not apply to decisions based on resume or application fraud.

B. Sample Wisconsin Case Law

1. **Gregory Blunt v. State of Wisconsin Department of Corrections**, ERD Case No. CR203302691, EEOC Case No. 26GA202327 (Feb. 4, 2005).

Blunt was dismissed after being arrested for felony marijuana possession. After the arrest, the employer discovered that Blunt had several other arrests relating to marijuana and alcohol abuse, including a warrant out for his arrest for failure to pay a fine to settle a drug possession case. The issue was whether the circumstances of the pending charge were substantially related to Blunt's employment?

The union and Blunt claimed he was discriminated against based on his arrest record and race (the racial discrimination claim was dismissed by the commission). Blunt argued that the employer failed to perform an investigation and relied solely upon the arrest and pending criminal charge. Blunt also asserted that the arrest was not substantially related to his job requirements.

The employer contended that Blunt was dismissed because the circumstances of the multiple arrests were inconsistent with the duties of a juvenile correctional officer and counselor. Further, the employer held a meeting with Blunt and his union representative. The employer claims to have independently investigated and verified that Blunt indeed was guilty of the pending charges. The employer argued that Blunt's conduct violated employer policies and rendered him subject to suspension and subsequent dismissal.

The Commission decided that while Blunt was dismissed on the basis of his arrest record, and thus in violation of the law, the circumstances surrounding the charge were substantially related to Blunt's employment. Blunt's job entailed supervision and training of youth counselors and providing instruction and counseling to youth offenders, 75 percent of whom had drug and/or alcohol problems. If the employer conducts its own investigation and questioning and concludes that the employee did in fact commit the offense, then dismissal as a result is lawful. Here the employer failed to perform any substantial investigation independent of the criminal complaint filed against Blunt. The evidence failed to show that the employer ever questioned Blunt about marijuana use. Nevertheless, Blunt was not entitled to reinstatement or back pay because the circumstances surrounding the arrest were substantially related to Blunt's job as a juvenile correctional officer and counselor.

2. **Beverley A. McClain v. Favorite Nurses**, ERD Case No. 200302482 (April 27, 2005).

McClain, a registered nurse, was dismissed after being convicted of misdemeanor battery. The issue was whether the circumstances surrounding a battery conviction were substantially related to the duties required of a nurse and whether many years of satisfactory service should be considered when applying the substantial relationship test.



McClain claimed she was told that her dismissal was due to her arrest and conviction record. McClain wanted the Commission to take her 10+ years of satisfactory employment into account when applying the substantial relationship test.

The employer argued that it was not aware of McClain's most recent arrest and was only apprised of the situation when she was convicted. The employer admitted to knowing about McClain's past arrest and charges records, including charges for driving while intoxicated and that she was once under a restraining order. The employer argued that the past offenses were not as serious as the present battery conviction. In addition, McClain was still on probation for the prior conviction. The employer argued that her conviction and the circumstances surrounding the conviction are substantially related to the required duties of a nurse.

The Commission found for the employer, stating that the dismissal was legal because there was a substantial relationship between McClain's duties and the offense of battery. The Commission stated that nurses provide direct bodily care to patients who can be difficult and combative. Further, nurses act under limited immediate supervision. The Commission distinguished an earlier case where a Certified Nurse Aide was convicted of disorderly conduct. In that case the Commission found that dismissal was not warranted because there was not a substantial relationship between the employee's actions and her work duties. The Commission reasoned that the seriousness of the two convictions differ substantially; disorderly conduct does not involve intentional infliction of bodily harm. Finally, the Commission said that years of satisfactory employment was not germane to the substantial relationship test.

3. **James L. Robertson v. Family Dollar Stores, Inc.**, ERD Case No. CR200300021 (Oct. 14, 2005).

The issue was whether the circumstances surrounding a second-degree sexual assault conviction, which occurred twenty years prior, were substantially related to Robertson's current position as a stocker in a retail store. Robertson filed out an application, stating that he had been convicted of a crime, and was offered employment contingent upon a background check. Robertson worked as a stocker in several of the employer's retail stores. He never worked alone or without a manager or assistant manager on duty. Over a month after extending Robertson a job, the background check results showed that he had been convicted of second degree sexual assault (1982) and possession of an illegal drug with intent to deliver (1986).

Robertson argued that he offered to discuss his conviction records on his application but was never asked about them. Robertson had not been charged with any other crime since his drug charge in 1986. Robertson claims that the employer only dismissed him based upon his criminal conviction records; there was no employer-driven investigation of any kind.

The employer argued that the majority of its employees were female, thus requiring Robertson to work with many women. The employer claimed that Robertson's history of sexual assault was germane to his current position because it entailed working with female employees. The employer contended that the dismissal was to protect the female employees. Further, the employer contended that as a stock-person Robertson would have many opportunities to deal drugs through a stockroom backdoor, which would negatively impact the store. The employer stated that the stockroom was not well supervised and any employee could see where the security cameras were located.

The Commission, overruling the Administrative Law Judge (ALJ), found for Robertson giving credence to "the fact that 20 years have elapsed since the conviction without the complainant's having reoffended..." In addition, the Commission decided that Robertson was not a general threat to female employees because he had not assaulted a woman for twenty (20) years and during those years he likely came into repeated



contact with many women. This history "would seem to indicate that he does not pose a general threat to all females, such that the mere presence of females in the workplace would create a risk of recidivism for him." Further, the sexual assault happened in Robertson's home with his girlfriend, which does not evidence a tendency to attack random women in random locations. The employer also used cameras and security guards to protect against illegal behavior. "The mere possibility that a person could reoffend at a particular job does not create a substantial relationship." Therefore, there was not a substantial relationship between the circumstances surrounding Robertson's convictions and the current job requirement. Robertson was entitled to reinstatement, back pay, and attorneys' fees.

Possible Suggestions or Considerations for Employers:

1. Develop written policies and procedures for new hires and possible discipline of existing employees.
2. Consider training of supervisors and employees regarding proper handling of arrest and conviction records (maintain an accurate signed attendance log).
3. Review and revise job applications regarding arrest and conviction records.
4. Identify positions impacted by arrest and conviction records for which criminal background checks should be conducted.
5. Conduct criminal background checks for all new hires, volunteers and existing employees.
6. If necessary, conduct full, fair and complete internal investigations.
7. Determine whether convictions are substantially job-related and whether any job action is appropriate?
8. Carefully consider the viability of requiring employees to self-report any possible violations of the policies and procedures.

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