

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT II

**RECEIVED**

**11-25-2019**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Case No. 19AP1671

---

CREE, INC.,

Petitioner-Respondent,

v.

LABOR AND INDUSTRY  
REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

---

APPEAL FROM A FINAL ORDER OF THE CIRCUIT  
COURT FOR RACINE COUNTY, THE HONORABLE  
MICHAEL J. PIONTEK, PRESIDING

---

**BRIEF AND APPENDIX OF CO-APPELLANT  
LABOR AND INDUSTRY REVIEW COMMISSION**

---

JOSHUA L. KAUL  
Attorney General of Wisconsin

ANTHONY D. RUSSOMANNO  
Assistant Attorney General  
State Bar #1076050

Attorneys for Respondent-Co-  
Appellant, Labor and Industry  
Review Commission

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 267-2238  
(608) 267-2223 (Fax)  
russomannoad@doj.state.wi.us

## TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
STATEMENT OF THE ISSUE .....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION .....	2
STATEMENT OF THE CASE.....	2
I. Statutory background. ....	2
II. Factual and procedural background. ....	2
STANDARD OF REVIEW .....	7
ARGUMENT.....	8
The Commission properly concluded that the circumstances of Palmer’s convictions did not substantially relate to the circumstances of Cree’s position. ....	8
A. The substantially-related inquiry here turns on Commission findings about the circumstances, as contemplated by the legal test. ....	9
B. The Commission’s findings are conclusive because they are supported by substantial evidence, and those findings support no substantial relationship. ....	11
C. The circuit court’s decision incorrectly applied the substantial evidence standard and substantially-related test. ....	14
CONCLUSION.....	17

Page

## TABLE OF AUTHORITIES

### Cases

<i>Bethards v. DWD</i> , 2017 WI App 37, 376 Wis. 2d 347, 899 N.W.2d 364 .....	8
<i>Chi. &amp; N. W. R.R. v. LIRC</i> , 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979).....	9
<i>Conradt v. Mt. Carmel Sch.</i> , 197 Wis. 2d 60, 539 N.W.2d 713 (Ct. App. 1995).....	15
<i>Wis. Ins. Sec. Fund v. LIRC</i> , 2005 WI App 242, 288 Wis. 2d 206, 707 N.W.2d 293 .....	14
<i>Gibson v. Transp. Comm'n</i> , 106 Wis. 2d 22, 315 N.W.2d 346 (1982).....	10
<i>Hamilton v. DILHR</i> , 94 Wis. 2d 611, 288 N.W.2d 857 (1980).....	8
<i>Knight v. LIRC</i> , 220 Wis. 2d 137, 582 N.W.2d 448 (Ct. App. 1998).....	7–8
<i>Law Enft Standards Bd. v. Vill. of Lyndon Station</i> , 101 Wis. 2d 472, 305 N.W.2d 89 (1981).....	10, 13
<i>Milwaukee Cty. v. LIRC</i> , 139 Wis. 2d 805, 407 N.W.2d 908 (1987).....	9, <i>passim</i>
<i>Rice Lake Harley Davidson v. LIRC</i> , 2014 WI App 104, 357 Wis. 2d 621, 855 N.W.2d 882.....	8, 11
<i>Tetra Tech EC, Inc. v. DOR</i> , 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 .....	7
<i>Town of Holland v. PSC</i> , 2018 WI App 38, 382 Wis. 2d 799, 913 N.W.2d 914 .....	7
<i>Xcel Energy Servs., Inc., v. LIRC</i> , 2013 WI 64, 349 Wis. 2d 234.....	7

	Page
<b>Statutes</b>	
Wis. Stat. § 111.31.....	2
Wis. Stat. § 111.321.....	2
Wis. Stat. § 111.322(1).....	2, 11
Wis. Stat. § 111.335(3)(a)1.....	2
Wis. Stat. § 111.395.....	2
Wis. Stat. § 227.57(2).....	8
Wis. Stat. § 227.57(6).....	8, 15
Wis. Stat. § 227.57(10).....	7

## INTRODUCTION

The Labor and Industry Review Commission administratively reviewed Derrick Palmer's complaint about his employer, Cree, Inc. Cree's witness admitted that it denied Palmer a job offer because of his criminal history. Ordinarily, that is unlawful. The question posed to the Commission was whether an exception to the rule applied, where the applicant's offense "substantially relates" to the job.

Here, based on its evaluation of the evidence, the Commission found that Palmer's domestic offenses did not substantially relate to the lighting specialist job. The position primarily was housed in industrial locations and required interactions in a work setting or else through emails and phone calls. In contrast, Palmer's assault and related offenses were committed at home and stemmed from a romantic relationship. The Commission thus found that Cree could not rely on the exception, as the circumstances of the offenses and job lacked a substantial connection.

However, on judicial review, the circuit court reversed, largely based on its own assessment of the evidence. That was erroneous. The Commission's underlying decision should be affirmed, and the circuit court's decision should be reversed.

## STATEMENT OF THE ISSUE

On judicial review, the courts do not reweigh the evidence or select between available factual inferences; rather, that is the province of the agency. Here, the Commission credited evidence supporting that Palmer's offense history did not substantially relate to the job position he applied for at Cree. Should the Commission's decision be affirmed?

The circuit court answered, no.

This Court should answer, yes.

## **STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Neither oral argument nor publication is warranted, as this case turns on application of established legal doctrines, and the issues may be adequately addressed in the briefs.

### **STATEMENT OF THE CASE**

#### **I. Statutory background.**

This chapter 227 judicial review arises under Wisconsin's Fair Employment Act ("WFEA"), Wis. Stat. §§ 111.31–.395. Under WFEA, "it is an act of employment discrimination to . . . refuse to hire [or] employ . . . any individual . . . because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322(1). The unlawful bases in Wis. Stat. § 111.321 include a "conviction record."

There are statutory exceptions to that default rule. Relevant here, it is not employment discrimination to deny employment on the basis of a conviction if "the individual has been convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job." Wis. Stat. § 111.335(3)(a)1.

#### **II. Factual and procedural background.**

In September 2015, Derrek Palmer filed a discrimination complaint with the Department of Workforce Development. (R. 11:100–101.) He alleged that he applied for a job with Cree, Inc., which offered him employment subject to a background check. (R. 11:101.) However, after the background check, the offer was rescinded. Palmer alleged that violated Wis. Stat. § 111.321's prohibition on refusing to hire because of a conviction record. (R. 11:101.)

The Department found probable cause of a violation sufficient to proceed to an administrative hearing before an

administrative law judge (ALJ). (R. 11:110–13.) After that August 2016 hearing, the ALJ ruled that Cree had not discriminated unlawfully. In the ALJ's view, Palmer's convictions, which included strangulation and fourth-degree sexual assault, were substantially related to the position. (R. 8:102–09.) The ALJ acknowledged that Palmer's domestic offenses "occurred in a private setting," but concluded that the Cree position may involve "one-on-one work with customers" and further hypothesized that Palmer might develop a relationship with a female co-worker. (R. 8:108–09.)

Palmer appealed to the Commission, which reversed the ALJ. That decision required Cree to offer Palmer a position and awarded back pay. (R. 8:2–3, A-App. 10–11.) The facts relevant to the decision are summarized as follows.

Cree manufactures and sells lighting products. It employs roughly 1100 employees at an assembly facility, including about 500 women. (R. 8:4–5, A-App. 12–13; R. 12:81.)

Cree posted a job announcement for the position of Lighting Schematic Layout Applications Specialist. (R. 8:4, 113; R. 12:86–87.) It described the position as,

a mixture of design, pre-sales and post-sales customer support responsibilities. In this role you will design and recommend the installation of appropriate lighting equipment and systems, create lighting site plans and 3D models, use local building code requirements to perform energy calculations, and also interact directly with consumers. You will be part of a team, while applying project manage skills to drive your own projects to completion.

(R. 8:113.) It additionally stated that the employee would "study lighting requirements of clients," "design layouts" and provide "designs verbally or through computer assisted lighting layouts," respond to customer questions, "occasionally promote products and represent company at trade shows," "maintain information" about projects, and

“visualize and interpret blueprints.” The posting also listed various qualifications, including an associate degree in engineering or mathematics. (R. 8:113.)

The position would be at the assembly facility, which included manufacturing space, storage areas, offices, conference rooms, cubicles, and break rooms. The employee would work in the cubicle area but would have access to the rest of the facility. There were security cameras in the facility, but not necessarily in office areas and conference rooms. (R. 8:5, A-App. 13; R. 12:81–85.) The position included interaction with teams and clients. Customer interaction would typically be by telephone or email, although local clients might appear in person and there might be occasional travel to a client. The job also included some trade show attendance and interacting with clients on the trade show floor. (R. 8:5, A-App. 13; R. 12:87–91.)

In June 2015, Palmer applied for the job, and he satisfied its specifications. (R. 8:5, A-App. 13; R. 12:96.) At the request of a Cree recruiter, Lee Motley, Palmer then completed online and pre-interview questionnaires. The latter asked whether he had ever been convicted of a felony or a misdemeanor. Palmer checked the “yes” box as to both, indicating “domestic related charges.” (R. 8:5–6, A-App. 13–14; R. 12:18–19, 25; R. 9:1–2.) After interviewing, Cree offered the position to Palmer, contingent on a drug screen and background check, and Palmer accepted. (R. 8:6, A-App. 14; R. 12:22–23; R. 9:7–10.) When Motley contacted Palmer about the background check, Palmer asked Motley if he was aware of his criminal convictions. Motley said he was not, even though Palmer had checked the boxes on the questionnaire. Palmer explained to Motley that he had been convicted of domestic-related offenses against a live-in girlfriend. (R. 8:6, A-App. 14; R. 12:18–19, 25; R. 9:1–2.)

The criminal background check came back and showed that Palmer had been convicted in October 2012 of felony



strangulation and suffocation and three misdemeanors—battery, fourth degree sexual assault, and criminal damage to property—resulting in a 30-month prison sentence and 30 months of extended supervision. (R. 8:6, A-App. 14; R. 12:37–38; R. 9:34–36; R. 11:19–20, 33–34, 37.)<sup>1</sup>

Cree’s recruiter, Motley, forwarded the background check to Melissa Garrett, Cree’s associate general counsel. After receiving it, Garrett discussed the position with Motley. (R. 12:246.) Garrett also consulted a matrix for evaluating types of criminal convictions. Palmer’s convictions for sexual assault, battery, strangulation, and criminal damage to property were designated “fail” on the matrix. (R. 8:6, A-App. 14; R. 13:8, 21–22.) Garrett testified that applicants in the “fail” category had been hired by Cree, but she identified no one in particular. (R. 13:25.) The recruiter, Motley, could not recall having hired someone with a felony. (R. 12:131.)

Garrett made the decision to rescind the offer to Palmer and, in August 2015, Motley notified Palmer by email that the offer was rescinded “based on our hiring criteria and the contents of the background report”; the rescinding also was memorialized in a letter. (R. 9:24, 41.) Motley testified that the decision was based solely on the background investigation report. (R. 12:160.)

In reaching its decision here, the Commission reviewed this evidence and found that the circumstances did not satisfy the substantially-related exception to conviction-based discrimination. The Commission explained that Cree had “presented no evidence indicating that [Palmer] would be supervising or mentoring female employees, nor is there anything to suggest that he would be working closely with female employees.” (R. 8:13, A-App. 21.) The Commission thus

---

<sup>1</sup> Palmer also had a 2001 battery conviction from a domestic dispute with a girlfriend, but it was not included in the criminal history report. (R. 8:6, A-App. 14; R. 12:65.)

declined to infer that Palmer would “have had significant personal interactions with female employees in the context of his job.” (R. 8:13, A-App. 21.) Further, the evidence supported that client contacts largely would be electronic or by phone and, when in person, “would take place either at trade shows or at the customer’s site,” which were in the “industrial setting,” not in homes or other personal space. (R. 8:13, A-App. 21.) And, although Cree generally characterized the job as “high stress,” it did not specify an aspect that connected up with Palmer’s particular offenses. (R. 8:13–14, A-App. 21–22.)

In addition, the Commission explained that the ALJ went astray when speculating that Palmer might become involved romantically with a female co-worker and, in turn, might engage in the same behaviors. (R. 8:12, A-App. 20.) It found that connection required “a high degree of speculation and conjecture” that went beyond “job-related conduct,” which was what mattered. (R. 8:12–13, A-App. 20–21.)

Put differently, the evidence would have required the Commission to infer that the mere interaction with other people in an unsupervised setting had a substantial relationship to Palmer’s domestic violence and assault convictions. (R. 8:14, A-App. 14.) The Commission declined to make that broad assumption without a greater factual connection to Palmer’s convictions’ circumstances. (R. 8:14, A-App. 22.) The Commission noted that Cree attempted to use an expert to make its case, but that the ALJ did not rely on that opinion. (R. 8:14, A-App. 22.) Neither did the Commission, as the expert “did not meet with or personally evaluate” Palmer and did not address the particular circumstances of how his convictions related to the job, but rather more generally opined that someone willing to engage in domestic violence may also be willing to engage in violence in other settings. (R. 8:14 n.6, A-App. 21; R. 12:187–88, 199, 202, 211, 230–32.)

While acknowledging the concerning nature of Palmer's convictions, the Commission found that there was insufficient evidence to support the inference that the circumstances of Palmer's crimes were substantially related to the circumstances of the Cree position. (R. 8:14–15, A-App. 22–23.)

Cree sought judicial review of the Commission's final decision (R. 1), and the circuit court reversed in favor of Cree (R. 25, A-App. 1–9). In reaching its conclusion, the court stated that the Commission erred because, according to the circuit court, Cree's evidence of a connection was "uncontroverted" and the record was "devoid of substantial facts" supporting the Commission's findings. (R. 25:11, 13, A-App. 6–7.) The court also faulted the Commission for not giving weight to Cree's expert. (R. 25:15, A-App. 8.)

Both Palmer and the Commission appealed. (R. 28, R. 30.)

### STANDARD OF REVIEW

"Judicial review of a decision by an administrative agency requires that this court review the decision of the agency, not the circuit court." *Town of Holland v. PSC*, 2018 WI App 38, ¶ 21, 382 Wis. 2d 799, 913 N.W.2d 914. That review is of the Commission's final administrative decision, not the decision or findings of the ALJ. See *Xcel Energy Servs., Inc., v. LIRC*, 2013 WI 64, ¶ 56, 349 Wis. 2d 234.

For questions of law, no "deference" applies to administrative interpretations of statutes. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21. However, where an agency interprets a specialized statute it administers, its interpretation is entitled to due "respect." Wis. Stat. § 227.57(10); *Tetra Tech*, 382 Wis. 2d 496, ¶¶ 77–78, 108. Here, the Commission has long been "charged with the interpretation and application of WFEA," *Knight v.*

*LIRC*, 220 Wis. 2d 137, 150, 582 N.W.2d 448 (Ct. App. 1998), including its “substantially related” test, as reflected in the case citations below and the administrative decisions cited in the Commission’s order. (R. 8:7–14.) Its interpretation of the statute is therefore entitled to due respect

For questions of fact, the “substantial evidence” standard applies. The Commission’s “findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence.” *Rice Lake Harley Davidson v. LIRC*, 2014 WI App 104, ¶ 46, 357 Wis. 2d 621, 855 N.W.2d 882. “Substantial evidence ‘does not constitute the preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion [the Commission] reached.’” *Id.* (citation omitted). The court’s “role on appeal is to search the record for evidence supporting [the Commission’s] factual findings, not to search for evidence against them.” *Id.* In addition, “this court cannot evaluate the credibility or weight of the evidence on any finding of fact.” *Knight*, 220 Wis. 2d at 149; Wis. Stat. § 227.57(6). In other words, “[t]here may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept.” *Hamilton v. DILHR*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980) (citation omitted).

## ARGUMENT

**The Commission properly concluded that the circumstances of Palmer’s convictions did not substantially relate to the circumstances of Cree’s position.**

The burden is on the challenger—here, Cree—to show that the Commission’s decision was made in error. *See* Wis. Stat. § 227.57(2); *Bethards v. DWD*, 2017 WI App 37, ¶ 16, 376 Wis. 2d 347, 899 N.W.2d 364. It also was Cree’s burden to show that the substantially-related exception to conviction-

based discrimination applied. *See Chi. & N. W. R.R. v. LIRC*, 91 Wis. 2d 462, 467, 283 N.W.2d 603, 606 (Ct. App. 1979) (stating that the employer had the burden to show an exception to WFEA discrimination applied), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980). The circuit court erred when it concluded that Cree had done so.

**A. The substantially-related inquiry here turns on Commission findings about the circumstances, as contemplated by the legal test.**

The substantially-related exception to conviction record-based discrimination requires the Commission to examine the circumstances. That is because the statutes balance society's "interest in rehabilitating one who has been convicted of crime" against "an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime." *Milwaukee Cty. v. LIRC*, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987). Thus, while generally seeking "to eradicate many sources of employment discrimination," *id.* at 819, it may still be done "in employment settings where experience has demonstrated the likelihood of repetitive criminal behavior" *id.* at 823.

To determine when that line is crossed properly involves some basic fact finding. "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.* at 824. This allows for a "factual inquiry" "ascertaining relevant, general, character-related circumstances of the offense or job." *Id.* at 825.

In turn, once the factual circumstances are found, the question is whether “[t]he propensities and personal qualities exhibited are manifestly inconsistent with the expectations of responsibility associated with the job.” *Id.* at 828. Put differently, it looks to whether the “opportunities for criminal activity” are “similar to those present in the crimes.” *Id.* at 821.

For example, the supreme court agreed that an armed robbery conviction was substantially related to a bus driver’s job duties, when credited evidence included that “[t]he armed robbery conviction indicates personal qualities which are contradictory to the extreme patience, level-headedness and avoidance of the use of force [testified to as] essential in a school bus driver.” *Id.* at 817 (second alteration in original) (quoting *Gibson v. Transp. Comm’n*, 106 Wis. 2d 22, 28, 315 N.W.2d 346 (1982)). Also, the court has concluded that a conviction and job were substantially related where the applicant had been criminally negligent when administering a nursing home and then sought employment as a crisis specialist at a medical facility. The findings revealed that “[t]he responsibilities present in both jobs extended to a group of people similarly situated so that neglect or dereliction of duties in either job would likely have similar consequences.” *Id.* at 810, 828–29 (listing findings). And, when a police officer “was convicted of misconduct in public office on . . . felony counts of falsifying uniform traffic citations,” those offenses were substantially related to a job as a police chief. *Law Enft Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 492, 305 N.W.2d 89 (1981).

As discussed next, the Commission made findings about the relevant circumstances of Palmer’s offenses and job here. Those findings revealed that that they lacked the requisite connection.

**B. The Commission's findings are conclusive because they are supported by substantial evidence, and those findings support no substantial relationship.**

Where, as here, the Commission's findings are those that a fact-finder could reasonably reach, they are binding. The evidence here amply supports the Commission's findings that there was an insufficient connection demonstrated between the circumstances of Palmer's convictions and the circumstances of Cree's job opening. Indeed, "substantial evidence" does not mean a preponderance of the evidence; it simply means there exists some evidence on which a fact-finder could reasonably rely. *Rice Lake Harley Davidson*, 357 Wis. 2d 621, ¶ 46. The Court's "role on appeal is to search the record for evidence *supporting* [the Commission's] factual findings." *Id.* (emphasis added).

As an initial matter, the recruiter involved in Palmer's hiring process testified that Palmer's background check was the reason he was not hired. (R. 8:7, A-App. 15; R. 12:22–23, 160; R. 9:7–10, 24.) To rescind that offer was, by default, prohibited. Wis. Stat. §§ 111.322(1), 111.321. The only question was whether the substantially-related exception to the rule applied.

When concluding that Cree did not make its showing, the Commission grounded its findings in the testimony that provided, at best, a generalized connection between Palmer's convictions and the job—one that would exist for nearly any job.

As for Palmer's convictions, testimony included that they related to incidents with "a live-in girlfriend" where they "were fighting really bad" and "wanted to break up," which led to the physical altercations. (R. 12:18–19, 31, 35–37; R. 9:1–2.) Palmer pled to "domestic abuse" counts for felony strangulation and suffocation, a Class H felony, and misdemeanor battery, fourth degree sexual assault, and

criminal damage to property, Class A misdemeanors. (R. 12:37–38; R. 9:34–36; R. 11:19–20, 33–34, 37.)

As for the job, the Commission found that the position lacked a connection to those domestic offenses. For example, Cree's recruiter, Motley, testified that typical interactions with customers were by "phone and email," or else in "demonstration rooms," in the "factory," "at a booth at a trade show," or "occasionally" through traveling to a client's location at a work site—"oftentimes it's a builder or construction company." (R. 12:88–90.) In a general sense, the work was done as "part of a team," but day-to-day work by the employee was to monitor and carry out his "own . . . book of business." (R. 12:91.) The employee typically would sit in the facility's "cubicle farm." (R. 12:92.) Motley also testified that an applicant's "temperament" mattered but in the general sense that the employee had to deal with "the pace and the stress." (R. 12:93.)

Nothing more is needed under the substantial evidence test. This live testimony was sufficient evidence on which a reasonable fact-finder could rely. For example, Palmer's testimony was evidence upon which the Commission could rely and find that his convictions "stem from personal relationships" that were "committed at home." (R. 8:14, A-App. 22.) And Motley's testimony was evidence upon which the Commission could rely and find that Palmer would not "have had significant personal interactions with female employees in the context of his job," but rather typical interactions would be in the context of a workplace, industrial site, or tradeshow. (R. 8:13, A-App. 21.)

In turn, the Commission properly concluded that Cree had not shown the convictions and the job were substantially related. There must be a connection between the convictions and the particular "employment settings." *Milwaukee Cty.*, 139 Wis. 2d at 823. This looks to the "general, character-related circumstances of the offense or job." *Id.* at 825. That



is what the Commission examined and made findings about. The credited evidence about the job lacked the required “temptations or opportunities . . . similar to those present in the crimes for which he had been previously convicted.” *Id.* at 821.

As the Commission found, the circumstances in play were a relationship that turned bad and a domestic assault of Palmer’s partner in a shared living space. However alarming, the Commission found that Cree offered no similar scenario in its lighting factory. Palmer’s offenses were not against members of the public or in a workplace but rather flowed from a romantic relationship and occurred in a domestic setting.

That result is consistent with the scenarios in the precedent. For example, Cree’s position did not involve a position of public trust involving a special population—Palmer is not like the armed robber seeking to be a school bus driver who, according to the credited testimony, needed qualities that were clearly absent. *Id.* at 828. He also is different than the criminally negligent nursing home administrator who sought similar employment as a crisis specialist. *Id.* at 810, 828–29. Likewise, he is unlike the police officer convicted of forging citations who then sought to be a police chief. *Law Enft Standards Bd.*, 101 Wis. 2d at 492. The clear connections or special circumstances present in those cases were not found to be present for the lighting specialist job here.<sup>2</sup>

Because its findings were proper, and its conclusion necessarily flowed from them, this Court should affirm the Commission’s decision.

---

<sup>2</sup> This result also is consistent with the Commission’s prior decisions discussed in its memorandum opinion. (R. 8:10–12, 14, A-App. 18–20, 22.)

**C. The circuit court's decision incorrectly applied the substantial evidence standard and substantially-related test.**

Although nothing more need be analyzed—this Court reviews the Commission's decision, not the circuit court's—it is worth noting where the circuit court's decision went astray in three main ways.

First, the circuit court erred in its analysis of factual findings. The court stated that the record was “devoid of substantial facts” supporting the Commission's findings. (R. 25:11, 13, A-App. 6–7.) In the court's apparent view, that meant it could essentially weigh the evidence *de novo*. (R. 25:15, A-App. 8.) However, as the foregoing demonstrates, the Commission's findings were grounded in the evidence. In those circumstances, the court may not override the Commission's findings or reweigh the evidence.<sup>3</sup>

The court also seemed to conclude that the Commission was not empowered to weigh the evidence because it “did not see the witnesses testify.” (R. 25:15, A-App. 8.) That is not the law. Rather, the Commission is vested with the authority to make credibility and weight determinations. *E.g.*, *Wis. Ins. Sec. Fund v. LIRC*, 2005 WI App 242, ¶¶ 18–19, 288 Wis. 2d 206, 707 N.W.2d 293. In any event, the Commission's decision did not turn on witness demeanor;<sup>4</sup> it turned on weighing the evidence and the lack of specific connections from Cree. That

---

<sup>3</sup> For example, the circuit court appeared to find that Palmer “would be in close contact with women” in a way that was similar to his crime, but that is contrary to the Commission's finding that there was no credible evidence that Palmer would have close, personal contact with women. (*Compare* R. 25:13, A-App. 7, with R. 8:13, A-App. 21.) It is the Commission's finding, not the circuit court's, that governs.

<sup>4</sup> The Commission explained that it consulted with the ALJ and the ALJ's decision did not turn on demeanor considerations. (R. 8:20, A-App. 28.)

was the Commission's province: "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat. § 227.57(6).

Second, on the law, the court also erred. It did not apply the specific test from the cases, but rather cited only the more general policy of balancing rehabilitation against protecting citizens. (R. 25:13, A-App. 7.) While that is the purpose in broad strokes, it leaves out the standard for deciding which side of the balance a case lands on. That depends on the particular "employment settings" as compared to the circumstances of the crime, and it looks for "similar" "temptations or opportunities." *Milwaukee Cty.*, 139 Wis. 2d at 821, 825. In contrast, the circuit court's observation that "[v]iolence, power and control are all present in the crimes of sexual assault" does not address the question whether the circumstances present for Palmer's crimes also were present at Cree. (R. 25:13, A-App. 7.)

Third, the court appeared to rule that the Commission was required to credit Cree's proffered expert, Dr. Darald Hanusa, a licensed clinical social worker. (R. 25:15, A-App. 8; R. 12:183.) However, the court was mistaken. "[E]ven if . . . no contradictory evidence [is] presented, LIRC may still reject the expert opinion if it does not believe it to be true." *Conradt v. Mt. Carmel Sch.*, 197 Wis. 2d 60, 69, 539 N.W.2d 713 (Ct. App. 1995).

The court called Dr. Danusa's view an "uncontroverted expert opinion." (R. 25:15, A-App. 8.) However, he did not examine Palmer and applied no clinical risk tests to him (R. 12:211), but rather generally opined that people who are violent at home may be violent other places.

He opined, for example, "[I]s there a relationship between domestic violence, generalized violence, and workplace violence? The answer to that is yes." (R. 12:187.)

And, “Generalized violence isn’t relationship specific, those are the kinds of people who get into bar fights, get into fights with family members, have fights in high school, things of that nature. But that does spill over to the workplace.” (R. 12:188.) Dr. Danusa also opined that people like Palmer “present a certain risk to their families, to their intimate partners and in the workplace, because they’re willing to go that far to make their point.” (R. 12:199.) But he conceded that he had not compiled statistical information quantifying how often domestic offenders go on to commit an act of workplace violence. (R. 122:230–32.) He further suggested that Palmer “could foster a relationship with a coworker who’s female and then in turn become violent with that person.” (R. 12:202.) And he asserted that, “When someone is violent to the intimate partner, it’s not just violence against that woman, it’s violence to the community.” (R. 12:202.)

The Commission was not required to treat this testimony as credible on the dispositive issue, and did not. In explaining why, the Commission noted that Dr. Danusa opined that taking rehabilitative steps would matter to his analysis, but then he failed to address that Palmer indeed had taken steps, including taking anger management classes. (R. 8:14 n.6, A-App. 22; R. 12:187–88, 203; 13:29–31.) And, more fundamentally, Dr. Danusa’s opinions were based on general observations about violence—that someone who is violent at home is, on average, more likely be violent elsewhere—and hypotheticals that were irrelevant to the job—that Palmer might become romantically involved with a co-worker. Those premises seemingly would allow someone convicted of a violent offense to be rejected for any job that involves people. However, that leaves out the required analysis of the “character-related circumstances of the offense,” and the job’s “opportunity for criminal behavior” or exposure to “people similarly situated.” *Milwaukee Cty.*, 139 Wis. 2d at 824–25, 828.

The Commission's decision properly was grounded in the evidence and applied the test in the precedent. Its decision should be affirmed.

### CONCLUSION

The circuit court's decision should be reversed, and the Commission's decision should be affirmed.

Dated this 25th day of November, 2019.

Respectfully submitted,

JOSHUA L. KAUL  
Attorney General of Wisconsin



ANTHONY D. RUSSOMANNO  
Assistant Attorney General  
State Bar #1076050

Attorneys for Respondent-Co-  
Appellant, Labor and Industry  
Review Commission

Wisconsin Department of Justice  
Post Office Box 7857  
Madison, Wisconsin 53707-7857  
(608) 267-2238  
(608) 267-2223 (Fax)  
russomannoad@doj.state.wi.us

### CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,721 words.

Dated this 25th day of November, 2019.



ANTHONY D. RUSSOMANNO  
Assistant Attorney General

### CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 25th day of November, 2019.



ANTHONY D. RUSSOMANNO  
Assistant Attorney General