STATE OF WISCONSIN COURT OF APPEALS
DISTRICT II

CREE, INC.,

Petitioner-Respondent,

v. Appeal No. 2019AP001671

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

ON APPEAL FROM AN ENTRY OF JUDGMENT IN FAVOR OF THE PETITIONER-RESPONDENT ENTERED BY THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE MICHAEL J. POINTEK PRESIDING

APPELLATE BRIEF OF DERRICK PALMER, RESPONDENT-APPELLANT

Alan C. Olson, WBN: 1008953
Nicholas M. McLeod, WBN: 1057988
Attorneys for Respondent-Appellant
Alan C. Olson & Associates, S.C.
2880 S. Moorland Rd.
New Berlin, WI 53151

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did Cree meet its burden to prove that Mr. Palmer's criminal convictions substantially related to the position of Lighting Schematic Layout Applications Specialist?

Circuit Court's answer: Yes.

STATEMENT AS TO WHETHER ORAL ARGUMENT IS NECESSARY AND WHETHER THE OPINION SHOULD BE PUBLISHED

The Respondent-Appellant, Derrick Palmer, requests oral argument in this case where the law is unsettled as to at least one issue and the questions for the panel involve interpretations of facts in the record. The opinion should be published because upon reasonable search and inquiry, the issue of whether a felon who has been successfully rehabilitated and trained by the State of Wisconsin, can be categorically excluded from all jobs, including cleaning toilets and scrapping gum off the floor. This case involves issues of ongoing public concern.

STATEMENT OF THE CASE

In the public record of a recent evidentiary hearing on Mr. Palmer's Motion For Post-Conviction Relief, his former live-in girlfriend, the alleged "victim", admitted that she lied to the investigating sheriff that her kinky sex with Mr. Palmer was not consensual:

> Q And you told the sheriff's deputies that everything on there that involved restraints was against your will.
> A Well, that's not true. So I must have lied.
> Q Okay.
> A I lied because that is not true.

Kenosha County Circuit Court Case No. 2012CF001188; Document 213; Page 40 of 115, lns. 6-9).

As a result of that lie, Mr. Palmer's conviction will likely soon be overturned and his record cleared; however, that's only part of Mr. Palmer's brave and arduous journey through rehabilitation. (R.App. 67:22-25). While incarcerated, Mr. Palmer made great strides toward bettering himself through education and rehabilitation. Through the Wisconsin Department of Corrections ("WI DOC") education program, Mr. Palmer earned his mechanical design certification from the Moraine Park Technical College while in prison. (R.App 51-52:20-25, 1-13). Mr. Palmer earned A's and B's in the certification program. (R.App. 43:7-9). So impressed was Mr. Palmer's professor that he hired him to be his class tutor after graduation. (R.App. 42-43:22-25, 1-6). Mr. Palmer worked as the class tutor to other students for a 15-16 month period. *Id.* This, too, was successful and Mr. Palmer was offered an apprenticeship by the Department of Workforce Development. *Id*. During the apprenticeship, Mr. Palmer tutored students in AutoCAD and SolidWorks software. *Id.* In regard to anger control and healthy relationships, Mr. Palmer has been successfully rehabilitated. (R.App. 307-09:12-25, 1-25, 1-14). Moreover, he has not exhibited dishonesty or lack of trustworthiness. Mr. Palmer's rehabilitation entitles him to a second chance.

Mr. Palmer filed an arrest conviction compliant against Cree, Inc. ("Cree") with the State of Wisconsin Department of Workforce Development's Equal Rights Division ("Division") on September 21, 2015. On January 6, 2016, the Division issued an Initial Determination finding Probable Cause to believe that Cree may have violated the Wisconsin Fair Employment Law ("WFEA") by refusing to hire or employ Mr. Palmer because of his conviction record. The Division held a Hearing on

the Merits of Mr. Palmer's claim on August 30, 2016 before Administrative Law Judge John Gelhard. On May 5, 2017, Judge Gelhard dismissed Mr. Palmer's complaint. Mr. Palmer filed a Petition for Review on May 10, 2017. In a well-balanced analysis with reliance on long-standing Wisconsin Supreme Court precedent, the Labor and Industry Review Commission ("LIRC") reversed the ALJ's decision on December 3, 2018. (R.App. 10). The ALJ offered no specific demeanor impressions to LIRC, however, he indicated that he did not find Cree's witnesses credible with respect to the amount of stress in the workplace – a finding with which LIRC agreed. (R. App. 20). LIRC decided that Cree failed to prove the affirmative, substantial relationship defense. *Id*. The circuit court reversed and dismissed the case on August 12, 2019. (R.App. 1).

STATEMENT OF FACTS

On June 19, 2015, Mr. Palmer applied for a Lighting Schematic Layout Applications Specialist position with Cree. (R.App. 40:18-23; Ex. 1-R.App. 324). Mr. Palmer listed his training that qualified him for the position with Cree. (R.43:10-18; Ex. 2-R.App. 325). On June 22, 2015, Lee Motley, a recruiter with Cree, contacted Mr. Palmer confirming receipt of his application and requesting that he complete a pre-interview questionnaire. (R.App. 44:5-17; Ex. 3-R.App. 326). Mr. Palmer completed and returned the questionnaire the same day, along with a letter of recommendation from his instructor at Moraine Park Technical College. (R.App. 45:3-20; Ex. 4-R.App. 327-29). Mr. Motley had a favorable impression of Mr. Palmer and thought he was a good potential fit for the job. (R.App. 188:17-19; 189:14-25).

On June 24, 2015, Cree requested Mr. Palmer to complete an online pre-screen form. (R.App. 46:4-10; Ex. 5-R.App. 330-33). On the form, Mr. Palmer accurately disclosed his conviction record, as prompted. *Id*. In two places on the form, Mr. Palmer indicated that he had "charges", in plural. (R.App. 154-55:20-25, 1-18).

Beginning on July 1, 2015, Cree conducted a series of interviews with Mr. Palmer. Mr. Motley and the two hiring managers all concluded that Mr. Palmer had the technical qualifications and the customer service experience necessary to do the job. (R.App. 159-60:12-25, 1-13).

On July 23, 2015, Cree offered Mr. Palmer employment. (R.App. 49: 20-25; 49:20-23; Ex. 6-R.App. 334-35). Mr. Palmer accepted the offer. (R.App. 51:2-4; Ex. 7-R.App. 336-39). Mr. Motley called Mr. Palmer to congratulate him and to set up drug testing, a background check and a start date. (R.App. 50:8-14; 127:13-25; 129:9-19; Ex. 7-R.App. 336-39). Mr. Palmer asked if Mr. Motley was aware of his felonies, to which Mr. Motley replied he was not. (R.App. 53:1-8). Mr. Palmer disclosed that there were multiple charges arising from a dispute with a live-in girlfriend. (R.App. 132-33:5-25, 1-16). Mr. Palmer told Mr. Motley that they were both going through major divorces, it was a recipe for disaster, and there were multiple charges on his record. (R.App. 280:17-23). In addition to written notice, Mr. Palmer accurately described his convictions to Mr. Motley orally as "domestic related charges," again indicating that there were multiple. (R.App. 47:7, 96:8-12; 156-57:1-25, 1-5). Mr. Motley did not request additional detail or explanation from Mr. Palmer. (R.App. 133:14-17; 190:1-11). Mr. Motley informed the hiring managers by email that Mr.

Palmer had been "honest" with him in disclosing multiple charges, both in writing and orally. (R.App. 151:3-15; 172:12-25; 173:1-3; Ex. 19). Mr. Motley told Mr. Palmer to hold off on the drug test until the background check came back. (R.App. 54:2-9).

There are four degrees of sexual assault in Wisconsin, the most serious being first degree sexual assault. (R.App. 19-R.App. 351-52). Fourth degree sexual assault, the crime of which Mr. Palmer was convicted, is the least serious and the only one which is not a felony. *Id*.

Mr. Motley conferred with Melissa Garrett, General Counsel, and then proceeded with the background check. (R.App. 136:10-19; Ex. 18-R.App. 350). Ms. Garrett and the legal team use a matrix for evaluating the hiring of people with conviction records. (R.App. 294:7-25; ; Ex. 26-R.App. 357-80). The matrix is printed on Cree letterhead and became effective on August 12, 2015. (Ex. 30-R.App. 381-83). The matrix was discussed in a presentation by Ms. Garrett to 15 employees in Cree's Durham corporate offices, including recruiters and the recruiter coordinator, and she gave them copies of the matrix. (R.App. 291:18-19; 292:22-25; 293:1-11; 299:11-13). The matrix was used as a tool in making hiring decisions. (R.App. 294:7-14; Ex. 30-R.App. 381-83). The term, "the Company," in the document refers to Cree. (R.App. 295:13-17). "RC" refers to the Recruiting Coordinator. (R.App. 295-96:24-25, 1). Ms. Garrett created the matrix with her colleagues at a former employer and filled-in the check marks for each of the crimes listed. (R.App. 300:18-25; 301:1-21; Ex. 26-R.App. 357-80). All of Mr. Palmer's convictions are under the column in the matrix identified as "Fail". (R.App. 299:24-25; 300:1-2; Ex. 26-R.App. 357-80). Ms. Garrett

could not identify any felons who were hired to work in Cree's offices. (R.App. 303:21-25).

On August 5, 2015, Mr. Motley informed Mr. Palmer by email that Cree would no longer consider him for employment due to its hiring criteria and the content of Mr. Palmer's background check. (R.App. 58:21-25; 59:1-3; Ex. 12-R.App. 340; Ex. 16-R.App. 341-49). There was no follow-up communication from Mr. Motley. (R.App. 59:4-6). No inquiry was made to determine whether the charges were in fact domestic-related. (R.App. 173:9-25; 174:1-6). Ms. Garrett made the final decision not to hire Mr. Palmer. (R.App. 187:22-24). She did not ask Mr. Motley for his opinion of Mr. Palmer as a candidate. (R.App. 188:13-16). Cree does not hire felons. (R.App. 160-61: 24-25, 1).

All employees have a badge and log-in electronically when they enter the work premises, and log-in separately to their computer. (R.App. 166:3-25; 167:1-3). Cree would not hire someone with Mr. Palmer's background for even the lowest level, minimum wage job, cleaning toilets or scraping gum off the floor. (R.App. 163:9-19; 164:20-25; 165:1-3).

The job that Cree denied Mr. Palmer was given to Chris Schlitz. (R.App. 167:4-11). Mr. Schlitz lacked the educational background and experience for the job. (R.167:12-25; Ex. 21-R.App. 353; Ex. 22-R.App. 354-356). Mr. Schlitz does not have a criminal record. (R.App. 170:17-20).

STANDARD OF REVIEW

Wis. Stat. § 227.57(5) provides: "The court shall set aside or modify the agency action if the court finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." *See Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶ 11, 77, 382 Wis. 2d 496, 914 N.W.2d 21. Judicial review is *de novo* and an agency's interpretation of a statute is entitled to "no deference at all." *Id*. at ¶¶ 16, 76. But, while a reviewing court does not defer to an agency's interpretation of a statute, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as the discretionary authority conferred upon it." *See Wis. Stat*. § 227.57(10); *Tetra Tech EC, Inc*., 2018 WI 75, ¶ 71, 75-76.

State agencies develop "a valuable perspective, unique to them, as they administer the laws within their portfolios." *Id*. at ¶ 77. Giving "due weight" to an agency's experience, technical competence, and specialized knowledge means giving "respectful, appropriate consideration to the agency's views" while the court exercises independent judgment in deciding questions of law. *Id.* at ¶ 78. "Due weight" is a "matter of persuasion, not deference." *Id*.

LIRC's findings of fact must be affirmed if they are supported by substantial evidence in the record. *Milwaukee Symphony Orchestra, Inc. v. Wis. Dep't of Revenue,* 324 Wis. 2d 68, 781 N.W.2d 674 (2010).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DETERMINING THAT PALMER'S CRIMINAL CONVICTIONS WERE SUBSTANTIALLY RELATED TO THE POSITION OF LIGHTING SCHEMATIC LAYOUT APPLICATIONS SPECIALIST.

There are four degrees of sexual assault in Wisconsin, the most serious being first degree sexual assault. (R.App. 19). "Fourth degree sexual assault, the crime of which the complainant was convicted, is the least serious and the only one which is not a felony." *Id*.

A. The Substantial Relationship test.

In *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), the Wisconsin Supreme Court stated, in relevant part:

> This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the 'propensity' to commit similar crimes long recognized by courts, legislatures and social experience. In balancing the competing interests, and structuring the [statutory] exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.

Id. at 823.

County of Milwaukee is routinely cited as the Supreme Court's key case involving the substantial relationship test. The circuit court in the present case was very critical of LIRC, claiming at one point that it ruled based upon only a "hunch" because "LIRC did not analyze the uncontroverted expert opinion citing other evidence, scholarly articles, statistics relating to recidivism, or even common sense";

it was, "not in the best position to evaluate the credibility of witnesses"; and it, "cited no substantial history of rehabilitative conduct by Mr. Palmer following his release from prison". (R.App. 8). To the contrary, LIRC repeatedly cited and discussed the application of *County of Milwaukee* to the accurate facts in the present case. (R.App. 15, 16, 25 and 27). The substantial relationship test is an objective legal test which is meant to be applied after the fact by a reviewing tribunal. (R.App. 16).

B. Cree has the burden to prove substantial relatedness.

The burden is on the employer to prove that the complainant's conviction record is substantially related to the job. *Robertson v. Family Dollar Stores*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), citing (*Chicago & Northwestern R.R. v. LIRC*, 91 Wis. 2d 462, 467, 283 N.W.2d 603 (Ct. App. 1979)).

Dr. Hanusa testified that 53% of men who complete their treatment will succeed and not harm anyone in the future. (R.App. 251:11-25; 252:1-9). While Dr. Hanusa's percentage indicates Mr. Palmer's likely success, Mr. Palmer fares even better under the extensive statistics and detailed analysis developed by the WI DOC. The WI DOC recidivism interative dashboards display recidivism rates for thousands of offenders released from prison between 2000 and 2014. https://doc.wi.gov/Pages/DataResearch/RecidivismDashboard.aspx. In addition, the August 2016 Recidivism after Release from Prison Report provides extensive data and analysis. https://doc.wi.gov/DataResearch/InteractiveDashboards/RecidivismAfterReleaseFromPrison_2.pdf.

Controlling for Mr. Palmer's gender, age and race, the WI DOC's dashboard statistics reveal that he is actually 68-73% likely to *not* reoffend. https://doc.wi.gov/Pages/DataResearch/RecidivismDashboard.aspx. According to all of the objective data and unbiased analysis compiled by the WI DOC, the conclusory opinion given by Cree's "hired gun" at the hearing, is wrong. The circuit court criticized LIRC because it did not analyze Dr. Hanusa's opinion "citing other evidence, scholarly articles, statistics relating to recidivism, or even common sense." (R.App. 8). It was the burden of Hanusa, not LIRC, to present such evidence, but he did not.

In regard to rehabilitation, Mr. Palmer successfully completed two courses on criminal thinking which equipped him to deal with conflict, high-risk situations, effective communication, and have healthy relationships of all types, including in the workplace. (R.App. 306:25; 307:12-25; 308:1-25, 309:1-14). In addition, Mr. Palmer successfully completed his two anger management courses. (R.App. 309:2-21). Based on the statistics of the WI DOC, and even the testimony of Dr. Hanusa, Mr. Palmer is more likely to not harm someone than he would be to harm someone. Dr. Hanusa did not testify that his program was more effective than the programs that Mr. Palmer successfully completed.

Mr. Palmer's convictions are not related to the position at Cree. As such, Cree has failed to meet its burden to prove that "the tendencies and inclinations to behave a certain way in a particular context are *likely* to reappear in a related context, based on

the traits revealed." *County of Milwaukee, supra,* 139 Wis. 2d at 824. (emphasis added).

C. Cree cannot meet its burden to prove substantial relatedness.

The simple fact that a person could *potentially* engage in harmful behavior in the workplace is not enough to establish a substantial relationship between his conviction record and the circumstances of the job.

In *Knight v. Walmart Stores East* (LIRC, 10/11/12), the applicant had been convicted of third-degree sexual assault, use of a dangerous weapon, first-degree reckless endangerment of safety, and false imprisonment. *Id*. Knight's several convictions were based on a single incident with an individual with whom he had a personal relationship. *Id*. LIRC found that the context of Knight's crimes was distinct from the context of his work environment and the position did not provide him with a significant opportunity to re-offend. *Id.*

Like the complainant in *Knight*, all of Mr. Palmer's convictions stemmed from a personal relationship with his live-in girlfriend at the time. He has no history of violence towards strangers or co-workers. Given the isolated and personal nature of his crimes, it is extremely unlikely that he would behave in a violent manner in the workplace. Furthermore, the fact that the Lighting Schematic Layout Applications Specialist must use a badge and log-in electronically when he enters the work premises, and log-in separately to his computer and then work in a large area with several employees around, makes it all the less likely that Mr. Palmer would even have the opportunity to engage in criminal activity. *Id*. Therefore, Cree's claim that

Mr. Palmer's conviction record evidenced a risk that he would attack others or otherwise act violently in the workplace, is belied by its own expert witness, as well as the WI DOC data. While Mr. Palmer's convictions are obviously upsetting to Cree and the circuit court judge, this is not sufficient for an employer to categorically exclude an applicant. "Whether the crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job." *See*, https://dwd.wisconsin.gov/er/civil_rights/discrimination/arrest_conviction.htm

Under the WFEA, an employer may only refuse to hire an applicant based on his conviction record if the circumstances of his crime substantially relate to the circumstances of the particular job he seeks with the employer. *See, Wis. Stat*. § 111.335(1)(c)2. Generally, the circumstances of an offense can be determined based upon a review of the elements of the crime, but at times it is appropriate to consider the factual details of the specific offense committed. *Knight, supra* (LIRC, 10/11/12). Ultimately, "[t]he question is whether the circumstances of the employment provide a greater than usual opportunity for criminal behavior or a particular and significant opportunity for such criminal behavior ... The mere possibility that a person could re-offend at the particular job does not create a substantial relationship." *Robertson, supra* (LIRC, 10/14/15)(emphasis added). The WFEA does not allow a circuit court or employers to speculate in this manner. *Id*.

II. THE CIRCUIT COURT ERRED IN USING JUNK SCIENCE TO CATEGORIZE MR. PALMER AS INHERENTLY DANGEROUS.

The circuit court placed Mr. Palmer in the same category as a totally blind man attempting to use "slicing instruments and machines" in a delicatessen. (R.App. 5). That type of discrimination, the circuit court reasoned, is allowed under Wisconsin Law because of the risks associated with placing that person into an "environment inherently dangerous to them or others." *Id*. Not only is *inherently dangerous environment* the wrong legal standard, the facts do not support the circuit court's conclusion that Mr. Palmer was as certain to attack a coworker at Cree, as would a blind man cutting his finger on a meat slicer.

The circuit court recited myriad character traits indicated by Mr. Palmer's convictions, with no consideration for his rehabilitation. Instead, the circuit court placed its full reliance on the opinion of Darald Hanusa, PhD, erroneously claiming that the testimony was "uncontroverted". (R.App. 7). The circuit court latched onto Dr. Hanusa's statement that using violence in an intimate relationship is "related to" using violence in the workplace. *Id.* Yet, Dr. Hanusa could not say how often men convicted of a violent domestic crime will later engage in workplace violence. (R.App. 262:2-25). Unfortunately, the circuit court completely ignored Dr. Hanusa's cross-examination during which he admitted that he never interviewed Mr. Palmer, did not conduct an evaluation, did not test him, and did not consider Mr. Palmer's successful post-conviction treatment and rehabilitation. (R.App. 243:12-25; 244:1-23; 248:1-21; 250:4-9).

A. The Daubert reliability standard.

Wisconsin Statute Section 907.02 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

§ 907.02(1), *Wis. Stats*.

This amended statute governing the admissibility of expert evidence was enacted in 2011. When the Wisconsin legislature amended the statute, it adopted the federal evidentiary standard codified in Federal Rule of Evidence 702 (2000), which in turn adopted the reliability standard explicated in *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

The *Daubert* aspect of *Wis. Stat*. § 907.02(1) requires that expert testimony be based on sufficient facts or data and that the expert testimony be the product of reliable principles and methods. *Seifert v. Balink*, 372 Wis. 2d 525 ¶7 (2017) 888 N.W.2d 816, 2017 WI 2. The expert witness must also apply the principles and methods reliably to the facts of the case. *Id.* These three aspects of the *Daubert* standard are often referred to as the "reliability standard." *Id.* Although the *Daubert* court focused its discussion on scientific testimony, the Supreme Court later clarified that *Daubert's* inquiry applies not only to scientific evidence, but to all expert opinions, "whether the testimony reflects scientific, technical, or other specialized knowledge." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167,

143 L.Ed.2d 238 (1999). The reliability standard "entails a preliminary assessment of whether the reasoning or methodology is scientifically valid." *Daubert*, 509 U.S. at 592–93, 113 S.Ct. 2786. Reliability depends "solely on principles and methodology, not on the conclusions that they generate." *Id*. at 595.

To guide the reliability analysis, the *Daubert* court provided a non-exhaustive list of factors that make scientific evidence sufficiently reliable for admission: "(1) whether the methodology can and has been tested; (2) whether the technique has been subjected to peer review and publication; (3) the known or potential rate of error of the methodology; and (4) whether the technique has been generally accepted in the scientific community." *Heller v. Shaw Indus., Inc*., 167 F.3d 146, 152 (3d Cir. 1999), citing *Daubert*, 509 U.S. at 592–93, 113 S.Ct. 2786.

The Federal Rules Advisory Committee added five factors to those stated in *Daubert* to guide decisions about reliability. Two of them are relevant to the present case:

> (1) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 146 [118 S.Ct. 512] (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").
> (2) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc*., 104 F.3d 940, 942 (7th Cir. 1997). *See Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) (holding that *Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

The trier of fact may consider some, all, or none of the factors listed to determine whether the expert evidence is reliable. Federal Rule of Evidence 702 Advisory Committee's Note (2000).

B. Dr. Hanusa's arbitrary opinion was not based on sufficient facts or data.

Cree called Dr. Hanusa to opine on what risk, if any, Mr. Palmer would pose in the workplace at Cree. Dr. Hanusa always uses a battery of 11 tests in his protocol to determine an employee's risk of future violence. (R.App. 240:22-25; 241:1-25; 242:1-5). However, Dr. Hanusa never evaluated Mr. Palmer or performed any tests on him. (R.App. 242:3-10). Another very important part of the risk assessment is an eight-hour interview of the individual. (R.App. 242:11-17). Dr. Hanusa failed to interview Mr. Palmer. (R.App. 242:18-25; 243:1-16). Each and every individual for whom Dr. Hanusa has created a "profile," was subjected to an extensive face-to-face interview, as well as his battery of 11 tests. (R.App. 243:17-20; 244:1-46; 248:22-25; 249:1-3). Because Dr. Hanusa did not evaluate, interview or test Mr. Palmer, he could not determine the reliability of his opinion regarding Mr. Palmer. (R.App. 242:3-25; 243:1-20; 249:15-20). Lacking facts and data, Dr. Hanusa's opinion was not reliable. Dr. Hanusa was controverted by his own testimony. Dr. Hanusa knew what he had to do to provide a valid opinion in this case, but failed to do so.

An expert cannot establish that a fact is generally accepted merely by saying so. Triers of fact do not have "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Seifert v. Balink, supra* 372 Wis. 2d at ¶7.

Such an application is unreliable because "there is simply too great an analytical gap between the data and the opinion offered." *Gen. Elec. Co. v. Joiner, supra* 522 U.S. at 146.

C. Dr. Hanusa's worthless opinion was not based on reliable principles and methods.

Because Dr. Hanusa always uses a battery of 11 tests in his protocol to determine risk of future violence, but did not do so for Mr. Palmer, Dr. Hanusa's opinions regarding Mr. Palmer were not based on reliable principles and methods. The reliable principles and methods identified by Dr. Hanusa to assess risk are an eight-hour interview of the individual, a battery of 11 tests and a profile he creates. (R.App. 240:22-25; 241:1-25; 242:1-25; 243:1-20). As a result of the three deficiencies in the risk-assessment process, Dr. Hanusa could not identify the reliability of his opinion. (R.App. 243:21-25; 248:2-9). Dr. Hanusa's opinion fails the *Daubert* test for lack of reliable principles and methods.

D. Dr. Hanusa failed to apply the principles and methods reliably to the facts of the case.

To apply the principles and methods reliably to the facts of Mr. Palmer's case, Dr. Hanusa needed to conduct an eight-hour interview of Mr. Palmer, have him perform a battery of 11 tests, and create his profile. Dr. Hanusa did none of these things, so he could not have applied them to the facts of Mr. Palmer's case. In the absence of data, there is an analytical gap between the data and the opinion proffered by Dr. Hanusa. *See General Elec. Co., supra* 522 U.S. at 146.

E. Dr. Hanusa failed to employ in the hearing room the same level of intellectual rigor that characterizes the practice of an expert in his field.

Daubert requires the tribunal to assure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *See Kumho, supra* 119 S.Ct. at 1176. It should be determined whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan, supra* 104 F.3d at 942.

Dr. Hanusa did not exercise his normal rigor of conducting the required eight-hour interview, performing the battery of 11 tests, and creating a profile for Mr. Palmer. As such, Dr. Hanusa's testimony that Mr. Palmer poses "a risk" has no bearing on this litigation and was properly rejected by both the ERD and LIRC. Further, Dr. Hanusa did not identify a greater than 50% risk. Less than a 50% risk is a mere possibility, not a probability, and does not permit exclusion of the employee from the workplace under Wisconsin law. Upon cross-examination, Dr. Hanusa could not even assert that his opinion was reliable, much less ascertain the level of risk. (R.App. 242:3-25; 243:1-20; 249:15-20). Moreover, Dr. Hanusa could not say how often men convicted of a violent domestic crime will later engage in workplace violence. (R.App. 262:2-24). Without reliability, Dr. Hanusa's opinion has failed to meet the *Daubert* standard.

Given the defective testimony of Hanusa, and the circuit court's failure to even mention *Daubert,* the following conclusion is obviously wrong:

> The evidence presented by Cree to establish that the circumstances of Derrick Palmer's criminal offenses "substantially relate" to the circumstances of his anticipated duties if hired at Cree was uncontroverted. That is, there is no evidence in opposition to the above evidence.

(R.App. 7).

The circuit court proclaimed several times in its Decision that Dr. Hanusa was "uncontroverted", but did not analyze that testimony pursuant to *Daubert*, and did not consider Mr. Palmer's rehabilitation. The circuit court claimed that LIRC inexplicably rejected Dr. Hanusa's testimony. (R.App. 8). This, too, is erroneous based on what LIRC found here:

> The respondent brought an expert witness to the hearing who testified that people who are willing to use violence in their intimate relationships are also willing to use violence in other settings. The respondent's witness, Dr. Darold Hanusa, did not meet with or personally evaluate the complainant, but concluded based upon the complainant's conviction record that he was at risk for engaging in potential violence in the work place. The administrative law judge did not rely on Dr. Hanusa's opinion in reaching his decision and made no reference to it in his memorandum opinion. Like the administrative law judge, the commission finds Dr. Hanusa's testimony unhelpful in deciding whether the complainant's conviction record made him likely to commit a criminal offense at the job at issue. Among other problems, the commission notes that Dr. Hanusa stated that someone who had successfully completed a domestic violence program would not pose a significant risk of workplace violence, but did not take into consideration the fact that the complainant successfully completed anger management classes as well as training on "criminal thinking," which focused on dealing with conflict, high risk situations, and effective communication, including in the context of work relationships.

(R.App. 22).

III. THE CIRCUIT COURT ERRED IN ALLOWING CREE'S DISCRIMINATION AGAINST PALMER BY CATEGORICALLY EXCLUDING HIM FROM EMPLOYMENT.

A. Cree's 50% female population is not substantially related to Palmer's convictions.

The circuit court based its decision on Cree's employment of about 1,100 people in Racine, about half of whom are women. (R.App. 7). There is nothing in the anti-discrimination statute, nor the case law interpreting the law, to suggest that a large number of female coworkers would be more likely to incite a crime. Instead, common sense dictates that the more people that are in the workplace, the less likely it would be for an employee to violate the rules of decorum. As Cree stated about its workplace in the record below, "employees have the opportunity for regular contact".

The fact that there are female employees in the plant with whom the complainant could potentially become involved in a personal relationship that might end badly is a scenario requiring a high degree of speculation and conjecture, and one that goes well beyond any reasonable concern about job-related conduct. (R.App. 20). Moreover, the ability to meet females and form personal relationships with them is not a circumstance unique to the job at issue, but describes virtually any employment situation in which female workers might be present. (R.App. 20-21). Cree presented no evidence indicating that Mr. Palmer would be supervising or mentoring female employees, nor is there anything to suggest that he would be working closely with female employees. (R.App. 21). While the record indicates that the job would entail occasional trade show travel, the evidence does not establish that the complainant

would be traveling with females on business trips, and there is no basis to conclude that he would be sharing cars, staying at the same hotels, or socializing with females in the course of his business travel. *Id*. It cannot be found based on this record that the complainant would have had significant personal interactions with female employees in the context of his job. *Id*.

In *Moran v. State of Wisconsin*, ERD Case No. CR200900430 (LIRC Sept. 16, 2013), LIRC held that mere presence of other human beings in the workplace is not enough to show a substantial relationship. *See also*, *Black v. Warner Cable* (LIRC Jul. 10, 1989)(Such a broad approach could conceivably result in a finding that offenses such as those involved here would be substantially related to all jobs, since virtually all jobs entail some degree of contact with other persons.")

Mr. Palmer would have to use his badge, log-in electronically when he enters the facility, and log-in separately to his computer. Mr. Palmer would not be mentoring, supervising or traveling with female employees of Cree. In his communications with builders and construction companies, Mr. Palmer would not be working one-on-one, or in isolated settings. Moreover, Cree's expert testified categorically that someone like Mr. Palmer who has successfully completed his treatment, is unlikely to repeat the bad behavior.

B. The size of Cree's facility is not substantially related to Palmer's convictions.

The circuit court further emphasized that Cree has a 600,000 sq. ft. facility, suggesting that the size is substantially related to Mr. Palmer's convictions. The size

of Cree's facility is of no consequence because Mr. Palmer has worked for large employers with expansive facilities, worked with women, handled expensive equipment, and had customer interaction at work and in their homes— all without incident. (R.App. 99:17-25; 100:1-25; 101:1-25; 102:1-13; 103: 5-25; 104:1-13). Moreover, at Cree, all employees wear a badge and log-in electronically when they enter the work premises, and log-in separately to their computer. (R.App. 166:3-25; 167:1-3).

Mr. Palmer has never been accused of being aggressive toward a co-worker in 20 years of employment. (R.App. 309:15-21). His crimes were all classified by the court as domestic. There is no factual presumption that Mr. Palmer would repeat a domestic crime in the workplace. (R.App. 262:21-24). Mr. Palmer's work would have been performed after swiping-in, in an office setting (not a factory or warehouse) in the presence of supervisors. In regard to anger control and healthy relationships, Mr. Palmer has been successfully rehabilitated. (R.App. 307-09:12-25, 1-25, 1-14). Moreover, he has not exhibited dishonesty or lack of trustworthiness. Speculation or mere "potential" is not enough to render a job relevant to a crime.

The issue in this case is "whether the tendencies and inclinations of the complainant to behave a certain way ... are likely to reappear later in a related context." *Hoewisch vs. St. Norbert's College*, (LIRC, 8/ 14/2012)(emphasis added). The test of whether the employee's inclinations are *likely* to reappear later in a related context, means that it *probably* will happen. This test requires more than a possibility or speculation. The mere possibility that a person could reoffend at a particular job

does not create a substantial relationship. In the present case, the circuit court improperly adopted the ALJ's dismissal, which applied a speculative "potentially" or "possibility" test, instead of the proper "likely to reappear later in a related context" standard.

C. The circuit court failed to recognize Cree's use of its "Criminal Matrix" to discriminate based on protected status.

Cree's General Counsel, Melissa Garrett, and her legal team use a criminal matrix for evaluating the hiring of people with conviction records. (R.App. 294:7-25; Ex. 26-R.App. 357-80). The matrix was used as a tool in making hiring decisions. (R.App. 292:7-14; Ex. 30--R.App. 381-83). Mr. Palmer's convictions are under the column in the matrix identified as "Fail". (R.App. 299:24-25; 300:1-2; Ex. 26-R.App. 357-80).

Cree uses the matrix to systematically and categorically deny jobs to *all* felons. Ms. Garrett could not identify any felons who were hired to work in Cree's offices. (R.App. 303:9-10). Cree has denied employment to *all* felons, including Mr. Palmer. Cree would not hire someone with Mr. Palmer's background for even the lowest level, minimum wage job, cleaning toilets or scraping gum off the floor. (R.App. 165:9-16). Clearly the legislature cannot have intended the categorical exclusion of all felons from all office jobs, because such an approach tends to eviscerate the statute. *Milwaukee Cty. v. Labor & Indus. Review Comm'n*, 139 Wis. 2d 805, 831-32, 407 N.W.2d 908, 919 (1987). (The legislature could not have intended to adopt an eviscerated statute). The use of a matrix to exclude individuals based on protected

status, i.e., all felons, fails to take into account significant facts. As Dr. Hanusa testified in terms of categorical evidence, 53% of men who complete their treatment will succeed and not harm anyone in the future. (R.App. 251:11-25; 252:1-9). Mr. Palmer successfully completed his treatment and there was no reason why he could not have succeeded at Cree, had Cree not categorically excluded him. (R.App. 307: 12-25; 308:1-25; 309:1-14).

D. The circuit court made erroneous findings regarding witness credibility.

The circuit court found that LIRC was not in the best position to evaluate the credibility of the hearing witnesses. (R.App. 8). While it is unclear how the circuit court could supplant its own credibility determination for that of the ERD or LIRC, it also ignored the normal process that LIRC followed in this case when it conferred with the ALJ for his credibility determinations:

> The commission conferred with the administrative law judge regarding his impressions of the demeanor of the witnesses who testified at the hearing. The administrative law judge indicated that he did not find the respondent's witnesses credible with respect to the amount of stress in the workplace--a finding with which the commission agrees--but had no specific demeanor impressions to impart. The commission's reversal does not rely upon a differing assessment of witness credibility but is because the commission is unpersuaded that the respondent met its burden of proving the affirmative defense of substantial relationship.

(R.App. 28).

There is no evidence in this case to suggest that designing products on software programs, which is what Mr. Palmer is fully trained and qualified to do, would be any more stressful than any other job.

IV. THE CIRCUIT COURT'S RULING VIOLATES WISCONSIN AND U.S. PUBLIC POLICY TO REHABILITATE AND EMPLOY FELONS.

The circuit court also faults LIRC for the lack of evidence that Mr. Palmer was rehabilitated *after* his release from prison. (R.App. 8). There is no evidence that rehabilitation of an individual while in prison is less effective than later rehabilitation. In any event, Mr. Palmer did continue his rehabilitation after his release. (R.App. 314:3-5; 316:18-22). The circuit court's refusal to consider any positive aspects of Mr. Palmer's rehabilitation violates Wisconsin's public policy of helping felons return to the community.

A. WI DOC selected Palmer to succeed in its education and rehabilitation programs.

The Wisconsin DOC's Division of Adult Institutions offers six primary program areas to inmates: Anger Management, Substance Abuse, Cognitive Behavioral Program, Domestic Violence, Career Technical Education/Vocational and Sex Offender Treatment. https://doc.wi.gov/Pages/AboutDOC/AdultInstitutions/PrimaryTreatmentPrograms.aspx. Successful completion of such programs assists inmates to continue their rehabilitation in furtherance of successful reintegration into the community upon release. *Id*. Inmates are screened for program suitability using various screening tools and assessments, including the COMPAS risk and needs assessment. *Id*. The DOC utilizes evidence-based practices, supported by the Office of Program Services and in coordination with the DOC Reentry Unit. *Id*. This oversight promotes public safety and offender success from the point of

admission, through their confinement period, and continued through reentry and supervision in the community after release. *Id*.

The Wisconsin DOC's education program screened Mr. Palmer specifically for his training in mechanical design, AutoCAD and SolidWorks software in order to successfully return to the community, as follows:

> To reduce the chances of returning to criminal behavior after release, inmates must complete identified reentry, treatment, education and other programming needs and/or build job skills during their incarceration. It is important that friends and family support and encourage inmates to use their time wisely in order to gain the skills they need to be successful when they return to the community.

https://doc.wi.gov/Pages/AboutDOC/AdultInstitutions/OfficeofProgramServices.aspx

B. Palmer succeeded in the WI DOC education and rehabilitation programs.

While incarcerated, Mr. Palmer made amazing strides toward bettering himself through education and rehabilitation. Mr. Palmer earned his mechanical design certification from the Moraine Park Technical College while in prison. (R.App. 41-42:20-25, 1-13). Mr. Palmer earned A's and B's in the certification program. *Id*. at 15. So impressed was Mr. Palmer's professor that he hired him to be his class tutor after graduation. (R.App. 42-43:22-25, 1-6). Mr. Palmer worked as the class tutor to other students for a 15-16 month period. *Id.* This too was successful and Mr. Palmer was offered an apprenticeship by the Wisconsin Department of Workforce Development. *Id*. During the apprenticeship, Mr. Palmer tutored students in AutoCAD and SolidWorks software. *Id*. All of Mr. Palmer's efforts were consistent with Wisconsin public policy:

> It is highly desirable to reintegrate convicted criminals into the work force, not only so they will not remain or become public charges but to turn them away from criminal activity and hopefully to rehabilitate them. This is a worthy goal and one that society has shown a willingness to assume, as evidenced by the large sums of money expended in various rehabilitative programs.

Milwaukee Cty. supra, 407 N.W.2d at 915, holding modified by *State ex rel. Girouard v. Circuit Court for Jackson Cty.*, 155 Wis. 2d 148, 454 N.W.2d 792 (1990).

C. U.S. public policy is to give felons gainful employment.

At its heart, America is a nation of second chances. That's why the White House is calling on businesses and higher education institutions to invest in their communities and eliminate unnecessary hiring barriers for individuals with criminal records. https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge:

> Now, a lot of time, [a] record disqualifies you from being a full participant in our society -- even if you've already paid your debt to society. It means millions of Americans have difficulty even getting their foot in the door to try to get a job much less actually hang on to that job. That's bad for not only those individuals, it's bad for our economy. It's bad for the communities that desperately need more role models who are gainfully employed. So we've got to make sure Americans who've paid their debt to society can earn their second chance.

President Barack Obama, Rutgers University, November 2, 2015; https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge.

Attorney General Loretta Lynch, Senior Advisor to the President Valerie Jarrett, and other White House officials hosted 19 companies from across the American economy as founding pledge takers to launch the Fair Chance Business

Pledge. *Id.* The pledge represents a call-to-action for all members of the private sector to improve their communities by eliminating barriers for those with a criminal record and creating a pathway for a second chance. *Id.*

Each year, more than 600,000 inmates are released from federal and state prisons, and another 11.4 million individuals cycle through local jails. *Id.* Around 70 million Americans have some sort of criminal record — almost one in three Americans of working age. *Id.* Too often, that record disqualifies individuals from being a full participant in their communities — even if they've already paid their debt to society. *Id.*

D. WI DOC's investment in Mr. Palmer must not be squandered.

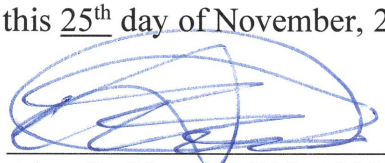
Mr. Palmer should not be excluded from continuing in the vocation that the State of Wisconsin entrusted and trained him to perform. The State of Wisconsin would not have screened Mr. Palmer for training and rehabilitation and then made such a substantial investment unless there was a reasonable expectation that he would use those learned tools to beome a productive member of society. Mr. Palmer held up his end of the bargain by serving his sentence, succeeding in all of his rehabilitation courses, mastering his technical skills, mentoring other students and winning a job offer. Now, Wisconsin law must protect Mr. Palmer from Cree's categorical exclusion of him from employment.[1]

[1] Recently, the Sheboygan County sheriff stood by his decision to hire a convicted killer as a radio technician, despite questions in the community about whether it is appropriate for someone with that type of record to be working for law enforcement. "It's horrible. I can't imagine. It's just horrific. But at the same time, I think he's very, very grateful that he's been given a second chance. He wants to prove to himself and others his wasn't a wasted life", the sheriff said.

CONCLUSION

Cree has failed to meet its burden to prove a substantial relationship between the circumstances of Mr. Palmer's convictions and the circumstances of the job for which he applied, Lighting Schematic Layout Applications Specialist. Since Mr. Palmer's convictions are not substantially related to the position he sought with Cree, LIRC was not erroneous in finding that Cree violated the WFEA.

Dated this 25th day of November, 2019.



Alan C. Olson, WBN: 1008953
Nicholas M. McLeod, WBN: 1057988
Attorneys for Respondent-Appellant
Alan C. Olson & Associates, S.C.
2880 S. Moorland Rd.
New Berlin, WI 53151
Telephone: (262) 785-9606
Fax: (262) 785-1324
Email: AOlson@Employee-Advocates.com

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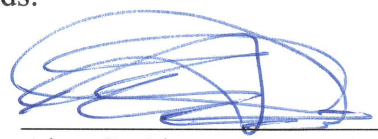
http://archive.jsonline.com/news/wisconsin/sheboygan-county-sheriff-defends-hiring-of-convicted-killer-b99647249z1-364446091.html. "As far as I'm concerned, he's a success story Mr. Palmer has demonstrated that he, too, could be a success story if given the chance.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The font is Times New Roman and the font size is 13-point. The length of this brief is 29 pages and 8,239 words.



Alan C. Olson, WBN: 1008953
Nicholas M. McLeod, WBN: 1057988
Attorneys for Respondent-Appellant
Alan C. Olson & Associates, S.C.
2880 S. Moorland Rd.
New Berlin, WI 53151
Telephone: (262) 785-9606
Fax: (262) 785-1324
Email: AOlson@Employee-Advocates.com

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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.

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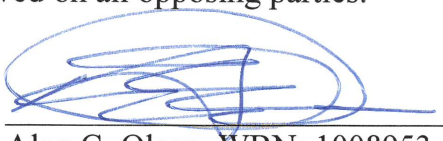

Alan C. Olson, WBN: 1008953
Nicholas M. McLeod, WBN: 1057988
Attorneys for Respondent-Appellant
Alan C. Olson & Associates, S.C.
2880 S. Moorland Rd.
New Berlin, WI 53151
Telephone: (262) 785-9606
Fax: (262) 785-1324
Email: AOlson@Employee-Advocates.com