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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2019AP001671

CREE, INC.,

Petitioner-Respondent,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant, and

DERRICK S. PALMER,

Respondent-Appellant.

ON APPEAL FROM JUDGMENT ENTERED ON AUGUST 12, 2019, BY THE CIRCUIT COURT OF RACINE COUNTY, THE HONORABLE MICHAEL J. PIONTEK PRESIDING, CIRCUIT COURT CASE NO 19-CV-703

PETITIONER-RESPONDENT CREE, INC.'S RESPONSE BRIEF

Laura A. Lindner (SBN: 1021506)
Casey M. Kaiser (SBN: 1088881)
LITTLER MENDELSON, P.C.
111 East Kilbourn Ave., Suite 1000
Milwaukee, WI 53202
Telephone: 414.291.5536
Facsimile: 414.291.5526
llindner@littler.com
ckaiser@littler.com

ATTORNEYS FOR CREE, INC.

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INTRODUCTION

This case involves the Wisconsin Fair Employment Act's ("WFEA") prohibition against employment discrimination based on "conviction record." Wis. Stat. §§ 111.321 and 111.322. The WFEA provides that an employer cannot refuse to hire an applicant based on his conviction record unless, as relevant here, the circumstances of the offense(s) "substantially relate" to the circumstances of the job at issue. Wis. Stat. § 111.335(3)(a)1. This exception to conviction record discrimination is widely known as the "substantial relationship" test.

Petitioner-Respondent, Cree, Inc., rescinded a conditional offer of employment to Respondent-Appellant, Derrick Palmer, based on his violent criminal record, after which Palmer filed a discrimination complaint with the Equal Rights Division of the Wisconsin Department of Workforce Development ("ERD"). Following a hearing, an administrative law judge of the ERD determined that the substantial relationship test was satisfied. Palmer appealed to the Labor and Industry Review Commission ("LIRC"), and LIRC erroneously reversed the ERD's decision, significantly departing from Wisconsin Supreme Court precedent and its own prior authority. Cree petitioned for judicial review of LIRC's flawed decision, and the Racine County Circuit Court correctly reversed LIRC and dismissed Palmer's complaint. Palmer and LIRC have appealed that decision.

At the heart of this case is the interpretation and application of the WFEA's "substantial relationship" test. The Wisconsin Supreme Court recognized that in enacting this law, the Legislature "sought to balance at least two interests." *County of Milwaukee v.*

LIRC, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987). As the Court explained:

> On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process. On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations and opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

Id. The need to carefully balance these competing interests is even more critical in these times of increasing and catastrophic workplace violence, particularly by perpetrators, like Palmer, who have a history of habitual violence toward women.

Palmer is a violent criminal, and a proven recidivist, and the evidence presented at hearing established that his criminal history is predictive of workplace violence. LIRC's decision – that Palmer's conviction record does not substantially relate to the position with Cree for which he applied – and its arguments now on appeal are based on an erroneous interpretation and application of the statute. Palmer's conviction history unquestionably imposes an unreasonable risk of harm to Cree, its employees, and the citizens of Wisconsin. LIRC wrongly placed the interests of one individual, who chose to be a violent recidivist criminal, before the interests of many, who are at risk of harm from further recidivism, and punishes an employer

which reasonably seeks to protect its employees. In reaching its decision, LIRC misapplied the test the Wisconsin Supreme Court articulated to strike the proper balance between these competing interests. Accordingly, as set forth below, the circuit court correctly determined that LIRC's decision must be reversed and Palmer's complaint dismissed.

STATEMENT OF THE ISSUE

Do the circumstances of Derrick Palmer's many criminal convictions substantially relate to the circumstances of the job for which Cree refused to hire him?

The ERD answered: Yes.

LIRC answered: No.

The circuit court answered: Yes.

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Cree does not believe that oral argument is warranted because the relevant facts are uncomplicated and undisputed, and the application of those facts to the law will be adequately addressed in this brief.

Cree believes that publication of this Court's decision will be warranted because there are few modern, published appellate decisions involving the interpretation and application of the substantial relationship test, and Cree anticipates the decision will clarify the law and correct LIRC's inconsistent and erroneous interpretations of law. In addition, Cree believes this is the first case in which an appellate court will be analyzing LIRC's interpretation

of the substantial relationship test since the Wisconsin Supreme Court ended the practice of courts deferring to state administrative agencies' interpretations of the law.

STATEMENT OF THE CASE

I. The Evidentiary Record From The Administrative Hearing

A. Palmer's Disturbing Criminal Record

According to the criminal background check report that Cree received after making Palmer a conditional offer of employment, Palmer was convicted of eight offenses, including two felonies, in 2012: Strangulation and Suffocation (two counts); Fourth Degree Sexual Assault; Battery (four counts); and Criminal Damage to Property. (R-10 at 1-9; R-11 at 1-8; R-11 at 40, 44; App. 005-010; App. 042, 046; R.App. 085-086 [Tr. 57-58]).[1] The criminal statutes under which Palmer was convicted describe the elements of these crimes as follows:

- **Strangulation and Suffocation, Wis. Stat. § 940.235(1) (two counts):**

  > Whoever intentionally impedes the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person is guilty of a Class H felony.

[1] Citations to "App. ___" refer to pages of Petitioner-Respondent Cree, Inc.'s Appendix attached hereto. Citations to "R.App. ___ [Tr. ___]" refer to pages of the administrative hearing transcript as produced in Respondent-Appellant Palmer's Appendix to his Appeal Brief.

- **Fourth Degree Sexual Assault, Wis. Stat. § 940.225(3m):**

  Except as provided in sub. (3), whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

- **Battery, Wis. Stat. § 940.19(1) (<u>four counts</u>):**

  Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

- **Criminal Damage to Property, Wis. Stat. § 943.01(1):**

  Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor.

Palmer's eight convictions arose out of a series of disturbingly violent incidents directed at a former girlfriend, L.R. (R-11 at 5-7; App. 007-009). During the particular incident that caused L.R. to contact law enforcement authorities, Palmer pushed L.R. with so much force that she fell onto a bed, bounced off, and hit her head on the floor; he then forcibly used his hand to cover her nose and mouth rendering her unable to breath. Palmer's violent assault of L.R. culminated and concluded by him forcing sexual intercourse with her without her consent. (Id. at R-11 at 6; App. 008). L.R. also reported a history of violence by Palmer, disclosing that there had also been two prior incidents where Palmer used violence against her. (Id. at R-11 at

6-7; App. 008-009). On one of those traumatic occasions, Palmer hit L.R. so hard with the palm of his hand that she believed her nose had been broken and she was left with black and blue bruising and swelling on her eyes and face. (Id. at R-11 at 6; App. 008). On another occasion, Palmer got angry with her, grabbed her by the neck and squeezed so hard she could not breathe, proceeded to viciously beat her with a belt, and then raped her. (Id. at R-11 at 7; App. 009).[2]

The background check report obtained by Cree only revealed part of Palmer's lengthy criminal history and pattern of violence against women. Prior to his 2012 convictions, Palmer was criminally convicted for violence against two other women:

> Q. And it's, in fact, true that you've been criminally convicted with respect to incidents of violence with three different girlfriends, correct?
>
> A. Yes.

(R.App. 091-092 [Tr. pp. 63-64]; R-11 at 28; App. 030 (noting Palmer may not have contact with his three women victims and must register as a sex offender for a period of 15 years)). Palmer testified that among his earlier convictions was a conviction for battery against another girlfriend, J.Z. (R.App. 093 [Tr. p. 65]). Thus, Palmer was convicted of crimes involving violent assaults of *three different former girlfriends*, and was involved in *three separate incidents of*

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[2] Palmer represents to this Court that the victim of his crimes testified during a hearing related to his motion for post-conviction relief that she was into "kinky sex[,]" that she initially lied to investigating law enforcement officers, and that his "conviction[s] will likely soon be overturned and his record cleared [as a result.]" (Palmer's Appeal Brief pp. 1-2). However, on November 5, 2019, *before* Palmer filed his brief, the Kenosha County Circuit Court denied Palmer's motion for post-conviction relief in full, leaving all eight of his 2012 criminal convictions intact on his record, including both felony counts. *State of Wisconsin vs. Derrek S. Palmer*, Kenosha County Case Number 2012CF001188.

abusing the last one. Palmer is a proven recidivist, a habitually violent and dangerous criminal, and one who relies on victim-blaming to justify his actions.[3]

LIRC gives only passing mention of the entire scope of Palmer's conviction record in a footnote in its brief to this Court, effectively discounting his obvious and demonstrated pattern of violence. (LIRC's Appeal Brief p. 5 n.1; *see also* R-8 at 6, LIRC's Finding of Fact #11). Even worse, Palmer seems to represent to this Court that the *only* conviction on his record is for fourth degree sexual assault, which he argues is not *that* serious of a crime simply because it is classified as a misdemeanor. (See Palmer's Appeal Brief p. 5). LIRC's and Palmer's attempts to downplay or conceal Palmer's lengthy criminal record reveals the flimsiness of their arguments.

B. The Job At Issue

Cree is an LED lighting component and application business. (R.App. 107 [Tr. p. 79]). Cree's global headquarters are in Durham, North Carolina. (R.App. 108 [Tr. p. 80]). At the time of the hearing,

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[3] Palmer's pre-2012 convictions were not included in the background check report obtained by Cree because Cree limited the geographic scope of its check to Wisconsin and the temporal scope to seven years, despite Wisconsin law not imposing such limitations on pre-employment background checks. (See R-10 at 1-9; R.App. 091-093 [Tr. pp. 63-65]). Cree submitted as hearing exhibits records relating to the pre-2012 convictions, and attempted to introduce at the hearing the records and Palmer's testimony about the convictions, but the ERD incorrectly precluded much of this evidence of the earlier convictions on the grounds that the convictions were not listed in Cree's initial background check report. (R.App. 079-080 [Tr. pp. 51-52]; R.App. 091-094 [Tr. pp 63-66]). Cree raised this issue during LIRC's review of the ERD's decision, and LIRC correctly ruled that the ERD erred in excluding relevant evidence of the previous convictions because Palmer's *entire* conviction record is relevant to the substantial relationship defense. (R-8 at 9 n.4). However, LIRC also held that the error was harmless and did not warrant remand for further evidentiary proceedings. (Id.). This is inconsequential as the hearing record contains sufficient evidence to establish that Palmer is a violent recidivist. (Id.; R.App. 091-093 [Tr. pp. 63-65]).

the company employed approximately 6,700 employees globally. (R.App. 107 [Tr. p. 79]).

When Palmer applied for employment, Cree operated a facility in Racine, Wisconsin. (R.App. 107, 109 [Tr. pp. 79, 81]). There were about 1,100 employees working out of Cree's Racine facility, with about 50 percent of those employees being women. (Id.). The Racine facility was primarily an assembly facility for lighting fixture products, but it also officed many non-manufacturing employees, including engineers, accountants, human resources, and marketing personnel. (R.App. 109 [Tr. p. 81]).

Cree's Racine facility was approximately 600,000-plus square feet in size. (R.App. 109 [Tr. p. 81]). The facility was so large that the company provided employees with bicycles so that they could move around the facility more quickly. (R.App. 110 [Tr. p. 82]). The facility was made up of manufacturing space, inventory/materials storage, offices, conference rooms, a large cubicle farm, a fitness center, an employee lounge, and a cafeteria. (R.App. 111 [Tr. p. 83]). There were areas within the facility where the noise level was so loud that even if someone was screaming, they would not be heard. (R.App. 276 [Tr. p. 246]). Employees generally had full access to the entire facility, with the exception of a small secured research and development area. (R.App. 113 [Tr. p. 85]).

The facility had some security cameras, but the coverage was limited and was primarily focused on points of entrance/exit to the facility and high-traffic areas. (R.App. 111-113 [Tr. pp. 83-85]). There was generally little supervision of employees. The facility had many isolated areas where employees could go and be unobserved, including in the cubicle area in which Palmer would have spent some of his time if he had been hired. (R.App. 113 [Tr. p. 85]).

Given the large, gender-diverse employee population, Cree's Racine facility presented an opportunity for employees to form intimate relationships. Cree does not have a policy that prevents coworkers from being in relationships, except for those in direct chain of command. (R.App. 283 [Tr. p. 253]). Many employees date and some have even gotten married. (Id.).

In 2015, Palmer applied for the position of Lighting Schematic Layout Applications Specialist at Cree's Racine facility. The position is responsible for helping customers determine where to install Cree's internal lighting products. (R.App. 115 [Tr. p. 87]). The job entails working closely with Cree's customers as well as other Cree employees, male and female, including in a physically close, large cubicle area. (R.App. 116 [Tr. p. 88]; R.App. 119-120 [Tr. pp. 91-92]). The position requires traveling to customers' facilities and trade shows unsupervised, and some of the travel may be for extended periods necessitating car rentals and hotel stays. (R.App. 116-118 [Tr. pp. 88-90]). Such travel, including time spent in hotel stays and shared cars, would have put Palmer in the company of other male and female employees. The position is fast-paced and demanding, due in large part to the need to balance multiple projects and meet customer deadlines, which are often of short duration. (R.App. 120-121 [Tr. pp. 92-93]; R.App. 282 [Tr. p. 252]). Under the pressure of missing deadlines or quality issues, communication can be abrasive, requiring lighting specialists to have "thick skin" and to be willing to take direction. (R.App. 120-121 [Tr. pp. 92-93]).

After the interview process, Cree offered Palmer the job conditioned upon him passing a background check and a drug test as

per Cree's standard practice. Cree thereafter rescinded its offer based on Palmer's conviction record.

C. The Unrefuted Expert Testimony Presented By Cree Regarding The Characteristic Traits Of Male Batterers, Like Palmer

Cree presented unrefuted expert testimony from Dr. Darald Hanusa, a highly-qualified and respected expert in the field of domestic violence. In 1993, Dr. Hanusa obtained a Ph.D. in Social Work from the University of Wisconsin – Madison, with a specialty in domestic violence. (R.App. 211-212 [Tr. pp. 181-182]; R-10 at 66-73). He is a board-certified and licensed clinical social worker and has been practicing for nearly 40 years. (R.App. 212 [Tr. p. 182]). He has served as a senior lecturer at the School of Social Work at the University of Wisconsin – Madison since 1978. (R.App. 213 [Tr. p. 183]). Dr. Hanusa co-developed the State of Wisconsin's certification program for batterer treatment providers and at the time of the hearing, was the Wisconsin Batterers Treatment Providers Association's Chairperson. (R.App. 215-217 [Tr. pp. 185-187]; R-10 at 66-73). In his years as a practicing social worker, he has counseled approximately 4,000 male batterers. (R.App. 260 [Tr. p. 230]).

Based on his expertise, training, and substantial amount of first-hand experience counseling batterers, Dr. Hanusa testified that using violence in an intimate relationship has a **"direct relationship"** to using violence in other settings, such as in the workplace. (R.App. 218-219 [Tr. pp. 188-189]). In other words, in Dr. Hanusa's experience, those who use violence in the domestic setting often use violence in the workplace as well. (R.App. 218 [Tr. p. 188], R.App. 229-230 [Tr. pp. 199-200]). Dr. Hanusa's vast

clinical experience regarding the relationship of domestic violence and workplace violence matches the academic research in his field. (R.App. 220-221 [Tr. pp. 190-191]).

Dr. Hanusa explained that men who use violence in a domestic situation often use violence in the workplace because they see violence generally as a means of asserting power and control over others. (R.App. 220-222 [Tr. pp. 190-192]). They will feel the need to assert power and control in the workplace when they are frustrated, angered, or need to solve a problem. (Id.). As Dr. Hanusa explained:

> If you're in a workplace situation and you have an employer who you think is overbearing, you have coworkers who you don't understand you, you feel pretty powerless, helpless; what can you do? You can overuse the power you have, that is, to be defiant, to create fights, to sabotage the workplace environment, to set people up for failure, that's what I am talking about. And it doesn't just stick to the intimate relationship, it goes into the workplace as well.

(R.App. 221-222 [Tr. pp. 191-192]).[4] Because male batterers' underlying problems with anger and violence extend beyond

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[4] Palmer devotes a full seven pages of his brief discussing Dr. Hanusa's testimony and the *Daubert* standard for admissibility of expert opinions, as codified by Wis. Stat. § 907.02. However, Palmer waived any objection based on *Daubert* and Wis. Stat. § 907.02 when he only made the objection for the first time in his reply brief to LIRC on appeal; he failed to raise the issue before, during, or even after the administrative hearing before a decision was issued. *State v. Cameron*, 2016 WI App 54, ¶ 12, 370 Wis. 2d 661, 885 N.W.2d 611 (holding that the "'[f]ailure to raise a *Daubert* challenge at trial causes a party to waive the right to raise objections to the substance of expert testimony post-trial.'") (citations omitted). Regardless, as argued further below, Palmer misconstrues the importance of Dr. Hanusa's expert testimony regarding the character traits of male batterers with convictions similar to Palmer's, and it is irrelevant to the substantial relationship test that Dr. Hanusa did not individually analyze Palmer or consider his supposed rehabilitation. It can further be

resorting to violence in intimate relationships, the treatment protocol developed by Dr. Hanusa and used by the Wisconsin Department of Corrections is broadly focused on moral development, improved social skills, and conflict resolution. (R.App. 231-232 [Tr. pp. 201-202]). As Dr. Hanusa explained, the best predictor of future violence is past violence. (R.App. 232 [Tr. p. 202]).

As discussed further in this brief, it was essential for Cree to present this evidence because, in a number of past cases, LIRC has endorsed the incorrect and factually unsupported view that employers can *never* satisfy the substantial relationship test when the applicant's or employee's crimes occurred in the "domestic context" against a person with whom he or she had a personal relationship.[5] By regurgitating this opinion again and again in its decisions, LIRC has effectively created a bright-line rule that men who have been convicted of beating wives, girlfriends, or other women with whom they have a domestic relationship can never be denied employment based on their crimes – such arbitrary guidance significantly places at risk of harm many Wisconsin employers and their employees. Drawing from his vast experience, Dr. Hanusa demonstrated, however, that the personal views of LIRC's Commissioners – that abusers can confine their violence to a limited context – is not based in reality or on factual support.

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reasonably assumed that Palmer's counsel would never have consented to such an analysis by Dr. Hanusa given the lack of relevance.

[5] *See, e.g., Robertson v. Family Dollar Stores*, ERD Case No. CR200400021 (LIRC 10/14/05) (App. 099-111); *Rowser v. Upper Lake Foods*, ERD Case No. 200300509 (LIRC 10/29/04) (App. 112-116); *McKnight v. Silver Spring Health and Rehabilitation*, ERD Case No. 199903556 (LIRC 02/05/02) (App. 086-098).

II. Procedural History

Following a hearing on August 30, 2016 before an administrative law judge, the ERD issued a decision in Cree's favor. The ERD correctly determined that Cree did not violate the WFEA because Palmer's convictions are substantially related to the position for which Cree refused to employ him. (R-8 at 105). The ERD found that the nature and size of Cree's facility, the lack of supervision, and Cree's large female population with which Palmer would regularly interact were substantially related to the character traits associated with Palmer's crimes. (R-8 at 103, 108-109).

Palmer sought review by LIRC, and LIRC reversed the ERD in a decision issued on December 3, 2018. LIRC concluded that Cree did not satisfy its burden of proving a substantial relationship between Palmer's conviction record and the job for which Cree refused to hire him. LIRC's decision was fractured, with Former Chairperson Georgia Maxwell concurring with the outcome, but disagreeing with the other Commissioners' interpretation and application of the substantial relationship defense. (R-8 at 2-20).

Pursuant to Wis. Stat. § 227.53, Cree filed a petition for judicial review with the Racine County Circuit Court on January 2, 2019. On August 12, 2019, Judge Michael Piontek reversed LIRC's decision and ordered that Palmer's complaint be dismissed. The circuit court held that the circumstances of Palmer's convictions substantially relate to the circumstances of the job at Cree. With respect to the testimony of Dr. Hanusa and LIRC's "domestic setting" rule, the circuit court wrote: "LIRC has demonstrated no expertise in predicting future criminal activity by an individual, and, in fact, totally disregarded the testimony of a witness who was a

respected expert in the area of inquiry." (R-25 at 15). LIRC and Palmer both filed timely notices of appeal.

ARGUMENT

I. Standard Of Review

In this appeal, the Court is charged with reviewing LIRC's decision, rather than those of the circuit court, although the circuit court's reasoning may be instructive. *Grafft v. Dep't of Nat. Res.*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897.

A. LIRC'S Interpretation And Application Of Law Is Reviewed De Novo And Is Owed No Deference

Judicial review of LIRC's decisions is governed by Wis. Stat. § 111.395, which provides that "[f]indings and orders of the commission under this subchapter are subject to review under ch. 227." *Wis. Bell, Inc. v. Labor & Indus. Review Comm'n*, 2018 WI 76, ¶ 28, 382 Wis. 2d 624, 914 N.W.2d 1. Wis. Stat. § 227.57(5) provides that "[t]he court *shall* set aside or modify the agency action if it 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." (emphasis added). The sole issue in this review is one of statutory interpretation and application requiring de novo review – *i.e.*, does the substantial relationship defense to conviction record discrimination set forth in Wis. Stat. § 111.335(3)(a)1 operate to bar Palmer's discrimination claim?

Courts review LIRC's "interpretation and application of statutes de novo." *Id.* ¶ 29 (citing *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 2d 496) ("[W]e will

review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law – de novo.")). In *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 2d 496, the Wisconsin Supreme Court reversed its nearly half-century practice of deferring to state administrative agencies' interpretations of the laws that the agencies are responsible for enforcing. The Court instructed lower courts to no longer defer to agencies' interpretations of law. *Id.* ¶ 108. The Legislature endorsed the Court's pronouncement in *Tetra Tech* and subsequently made significant revisions to ch. 227 to make clear that agencies' interpretations of law are owed no deference. 2017 Wis. Act 369 § 35, 80; Wis. Stat. § 227.57(11) (2017-2018) ("Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law."); Wis. Stat. § 227.10(2g) (2017-2018) ("No agency may seek deference in any proceeding based on the agency's interpretation of any law.").

While LIRC agrees that this Court should not give deference to its interpretation of law, it notes that "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." (LIRC's Appeal Brief at 7-8 (quoting Wis. Stat. § 227.57(10) and *Tetra Tech EC*, 2018 WI 75, ¶¶ 71, 75-75)). But to gain any benefit from due weight deference under Wis. Stat. § 227.57(10), LIRC would have needed to "explain how its experience, technical competence, and specialized knowledge give its view of the law a significance or perspective unique amongst the parties, and why that background should make the agency's view of the law more persuasive than others." *Tetra Tech EC*, 2018 WI 75, ¶ 77. LIRC has not even attempted to explain that during the course of

this matter. Instead, LIRC "brings to court nothing but a rote recitation of its background with the subject matter[,]" and as a result, its interpretation of law is not owed even due weight deference. *Id.*

B. The Case Is Not About Substantial Evidence

Realizing that it has an uphill battle defending its interpretation and application of the substantial relationship defense in a de novo review, LIRC attempts to style this case as one about "substantial evidence." The "substantial evidence standard" is derived from Wis. Stat. § 227.57(6), which provides:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, 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**. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

(emphasis added).

LIRC cannot hide behind the substantial evidence standard and Wis. Stat. § 227.57(6) in this review because there is no relevant "disputed finding of fact." The only facts that are relevant to the substantial relationship test articulated by the Wisconsin Supreme Court – the extent of Palmer's conviction record and the circumstances of the job at Cree – are undisputed. It is LIRC's erroneous interpretation of law and its application of the undisputed facts to the law which are at issue, and that are reviewed de novo. *Wis. Bell*, 2018 WI 76, ¶ 29; *Tetra Tech EC*, 2018 WI 75, ¶ 14 n.12 (quoting *DOR v. Exxon Corp.*, 90 Wis. 2d 700, 713, 281 N.W.2d 94

(1979) ("The question of whether the facts fulfill a particular legal standard is itself a question of law.")). As such, LIRC and Cree are on a completely level playing field before this Court.

II. The Wisconsin Supreme Court's Interpretation Of The Substantial Relationship Test

The statutory language creating the substantial relationship defense is succinct: "[I]t is not employment discrimination because of a conviction record to refuse to employ . . . any individual [who] . . . 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. In *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), the Wisconsin Supreme Court addressed the scope and meaning of the WFEA's "substantial relationship" defense. *County of Milwaukee* is routinely cited as the Supreme Court's key case involving the substantial relationship defense. The Court in *County of Milwaukee* determined "what the [Wisconsin] legislature intended when it chose to phrase the exception in terms of 'circumstances' of the offense and 'circumstances' of the particular job." *Id.* at 818. In interpreting that phrase, the Court ruled that the WFEA should be "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 record show them to have the 'propensity' to commit similar crimes long recognized by courts, legislatures and social experience." *Id.* at 823. The Court found that in balancing these competing interests, the legislature adopted a test for determining "when the risk of recidivism becomes too great to ask the citizenry to bear." *Id.*

The Supreme Court "reject[ed] an interpretation of this test which would require, in all cases, a detailed inquiry into the facts of the offense and the job." *Id.* at 823-24. Instead, ruled the Court, the purpose of the test is to "assess[] whether 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." *Id.* at 824. This was consistent with the Court's ruling two years earlier in *Gibson v. Transportation Commission*, 106 Wis. 2d 22, 315 N.W.2d 346 (1983), that the test does not require an investigation into the detailed circumstances of the crimes. In *County of Milwaukee*, the Court further clarified that "[i]t 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. The Court also instructed that focusing on the elements of the crime helps "elucidate the circumstances of the offense." *Id.* at 826.

In describing the scope of the substantial relationship test, the Supreme Court made clear that the test must necessarily be simple and practical, as employers must also use it in making employment decisions:

> [T]he test must serve not only the judicial system's purposes but the employer's . . . as well. What test the courts must employ will determine what employers . . . will do when making employment decisions. Therefore, there must be a semblance of practicality about what the test requires. A full blown factual hearing is not only unnecessary, it is impractical. Employers . . . should be able to proceed in their employment decision in a confident, timely and informed way. The inquiry envisioned under the statute would enable the employers . . . to do this.

Id. at 826-27. Thus, the test does not require an individualized risk assessment, but rather "is limited to general facts" and "general, character-related circumstances." *Id.* at 825; *see also Gibson v. Transportation Commission*, 106 Wis. 2d 22, 315 N.W.2d 346 (1983) (holding that applying the test requires the tribunal "go no further than determining the elements of the offense for which petitioner was convicted"). Rather than require an employer to assess the level of risk associated with a particular individual's conviction record, *the test assumes* that the risk is "unreasonable" and need not be assumed by an employer if the general character traits and inclinations to behave in a certain way reflected by the individual's criminal conduct and convictions could reappear in the workplace. As the Supreme Court explained, "the legislature has had to determine how to assess when the risk of recidivism becomes too great for the citizenry to bear. ***The test is*** when the circumstances, of the offense and the particular job, are substantially related." *County of Milwaukee*, 139 Wis. 2d at 823 (emphasis added). This Court has also held that the WFEA does not impose an affirmative duty on employers to accommodate an individual's conviction record, for example, by modifying the job duties to reduce the substantial relationship of the convictions at issue. *Knight v. LIRC*, 220 Wis. 2d 137, 154-55, 582 N.W.2d 448 (Ct. App. 1998).

The substantial relationship test also does not require an identity between the context in which the offenses were committed and the context in which the job duties are carried out. *County of Milwaukee*, 139 Wis. 2d at 823-24. For that reason, if an individual was convicted of robbing a bank, his conviction would substantially relate to a variety of jobs which present an opportunity for theft, and

not just to jobs located at a bank. *See id.* Along those lines, and consistent with Dr. Hanusa's expert testimony in this case, it is not relevant that the individual's crimes might have occurred outside of the employment setting. In past cases, LIRC has agreed with the Wisconsin Supreme Court's conclusion that just because the crimes occurred outside of the employment setting does not necessarily mean that the opportunity to subsequently reoffend in the workplace is unlikely. *See, e.g.*, *Weston v. ADM Milling Co.*, ERD Case No. CR200300025 (LIRC 01/18/06) (App. 131-133) (citing *County of Milwaukee* and rejecting complainant's argument that because none of his crimes occurred in an employment setting, the substantial relationship test was not met); *Hoewisch v. St. Norbert's College*, ERD Case No. CR200800730 (LIRC 08/14/12) (App. 049-057) (finding that "although the complainant's crime took place in a domestic setting that does not mean that the character traits associated with that crime disappear outside of the domestic context.")[6].

Finally, the substantial relationship test is an objective test to be applied after the fact by the reviewing tribunal, not a subjective test of the employer's intent at the time of the employment decision. *Staten v. Holton Manor*, ERD Case No. CR201303113 (LIRC 01/30/18) (App. 122-130); *Wilson v. New Horizon Ctr., Inc.*, ERD Case No. 200002129 (LIRC 09/11/03) (App. 134-135). The test "is a legal test, not a test of the employer's motives." *Zeiler v. State of Wisconsin Dept. of Corr. Jackson Correctional Institute*, ERD Case No. 200302940 (LIRC 09/16/04) (App. 136-139). Thus, the "substantial relationship defense does not require the employer to

[6] Cree has included copies of all LIRC decisions cited in this brief in its Appendix.

demonstrate that it concluded at the time of the employment decision that the circumstances of the offense were substantially related to the circumstances of the job." *Id.*

III. LIRC Ignores The Importance Of Dr. Hanusa's Testimony

LIRC and Palmer try to make much of the fact that Dr. Hanusa did not individually examine and assess Palmer prior to offering testimony at hearing. However, the purpose of Dr. Hanusa's expert testimony was not to opine on Palmer's *individualized* suitability for the position at issue or the efficacy of his supposed rehabilitation efforts. Indeed, pursuant to *County of Milwaukee*, any testimony about Palmer's individualized suitability would have been irrelevant because "it is not the individual's unique character traits which are relevant to determining whether the substantial relationship test is satisfied but instead the character traits necessarily exhibited by an individual who commits a particular offense, as gleaned from an examination of the elements of the offense." *Sheridan v. United Parcel Service*, ERD Case No. CR20024955 (LIRC 07/11/05) (App. 117-121) (citing *County of Milwaukee*) (holding that the ALJ properly excluded testimony from the complainant's treating psychologist as to the complainant's individual character traits and his likelihood of re-offending); *see also Jackson v. Summit Logistics Services Inc.*, ERD Case No. 2000200067 (LIRC 10/30/03) (App. 058-065) (citing *County of Milwaukee*) ("[A] detailed analysis of a particular applicant's risk for recidivism into the substantial relationship test would be inconsistent with the recognition that the test must be practical for employers.").

Rather, the purpose of Dr. Hanusa's testimony was two-fold. First, Dr. Hanusa provided scientific support for the general

character traits associated with the crimes of male batterers like Palmer (*e.g.*, using violence to achieve power or solve problems) – evidence which LIRC agrees is relevant to the substantial relationship test articulated in *County of Milwaukee*. Second, Dr. Hanusa addressed LIRC's view that male batterers only commit violence in the so-called "domestic setting" – an unscientific and still unsupported opinion that it appears to have adopted not from expert testimony in this hearing record, or any past hearing record for that matter, but rather from personal assumption. Unlike Dr. Hanusa, LIRC: does not have a Ph.D. in social work with a specialty in domestic violence; does not have nearly 40 years of experience researching and treating male batterers; has not developed the State of Wisconsin's certification program for batterer treatment providers; and has not treated approximately 4,000 male batterers. Dr. Hanusa discredited LIRC's "domestic setting" analysis, and LIRC has articulated no reason why Dr. Hanusa's expert opinions are not to be credited beyond its desire not to expose the unscientific fallacy behind many of its rulings in cases involving convictions for domestic violence.

IV. The Substantial Relationship Test As Interpreted By The Wisconsin Supreme Court Was Satisfied In This Case

There is a substantial relationship between Palmer's numerous convictions, the traits associated with them, certainly including their habitual nature, and the circumstances of the job he sought at Cree. As required by *County of Milwaukee*, the inquiry begins by examining the elements of Palmer's crimes and the character traits associated with those crimes. The extent and nature of Palmer's crimes is undisputed, but in their briefs, LIRC and

Palmer both failed to analyze Palmer's many criminal convictions and their associated character traits.

The elements of Strangulation or Suffocation are intentionally impeding the normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. Wis. Stat. § 940.235(1). The crime of Strangulation and Suffocation in the State of Wisconsin is a felony. *Id.* The elements of Fourth Degree Sexual Assault are non-consensually making sexual contact with a person. Wis. Stat. § 940.225(3m). The elements of Battery are intentionally and non-consensually causing bodily harm to another person. Wis. Stat. § 940.19(1). The elements of Criminal Damage to Property are intentionally and non-consensually causing damage to any physical property of another. Wis. Stat. § 943.01(1).

LIRC has held in prior cases – and the evidence at the hearing in this case further established – that the general character traits exhibited by these convictions include:

- Disregard for the health and safety of others, *particularly women*;
- The use of violent force to obtain sexual gratification;
- The use of violence to achieve power, control, or to solve problems;
- The inability to control anger, frustration, or other emotions;
- Lack of respect for authority, the community, and bodily autonomy;
- Lack of good judgment;
- The disregard for the property rights of others; and

- In the case of strangulation and suffocation specifically, willingness to use extreme violence to stop someone from breathing.[7]

These character traits are amplified in this case by the fact that Palmer was convicted of many violent crimes perpetuated on three different women, including the eight 2012 convictions. *See Lefever v. Pioneer Hi Bred International Inc.*, ERD Case No. CR200602178 (LIRC 05/14/10) (App. 069-072) (giving added consideration to complainant's multiple convictions for similar offenses). Dr. Hanusa also explained that a male batterer's failure to take responsibility for his actions and instead blaming the victim (R.App. 230-232 [Tr. pp. 200-202], R.App. 254-255 [Tr. pp. 224-225]) – as Palmer did in repeating his offenses and in victim-blaming at the hearing (R.App. 59-68 [Tr. pp. 31-40]) – is a trait consistent with recidivism, a trait that too is relevant to whether the Cree job at issue presented Palmer with an opportunity to reoffend. This victim-blaming further confirms Palmer's lack of remorse for his crimes; he therefore cannot be considered rehabilitated.

LIRC argues that the circumstances of Palmer's crimes are only demonstrative of "a relationship that turned bad and a domestic assault of Palmer's partner in a shared living space[,]" (LIRC Brief p. 13), but that narrow analysis and LIRC's refusal to focus on the general character traits exhibited by his crimes is contrary to *County of Milwaukee*. Moreover, Palmer was not in a relationship that passively "turned bad" – Palmer threw his girlfriend to the floor,

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[7] *See Weston v. ADM Milling Co.*, ERD Case No. CR200300025 (LIRC 01/18/06) (App. 131-133) (discussing traits associated with sexual assault); *McClain v. Favorite Nurses*, ERD Case No. 200302482 (LIRC 04/27/05) (App. 083-085) (discussing traits associated with battery); (R.App. 218-222 [Tr. pp. 188-192], R.App. 229-230 [Tr. pp. 199-200], R.App. 232-234 [Tr. pp. 202-204]).

tried to stop her from breathing, and raped her. He had physically assaulted and raped that same woman twice before and had assaulted two other women prior to that – these facts prove Palmer's penchant for violent recidivism.

The general character traits associated with Palmer's convictions being established, the next step of the inquiry is to examine their relationship to the job at issue. The circumstances of Palmer's convictions (for multiple counts of Strangulation and Suffocation, Fourth Degree Sexual Assault, Battery, and Criminal Damage to Property) against multiple women spanning across many years and the circumstances of the job he sought are substantially related. The nature of Cree's Racine facility creates a greater than usual opportunity for criminal behavior. The facility was 600,000-plus square feet with many unobserved "nook and crannies" where employees could isolate themselves. (R.App. 113 [Tr. p. 85]). There were areas that were so loud that someone could scream and not be heard. Cree's employees had open access to essentially the entire facility and it was not uncommon to not know the whereabouts of employees at various times. There was very little supervision of employees, and the facility's security camera coverage was minimal. The nature of this facility presented a person with Palmer's convictions and their associated traits greater opportunity than normal to commit additional crimes against persons and property.

The nature of Cree's workforce reinforces the substantial relationship between Palmer's convictions, the traits associated with them, and the position he sought. At the time, Cree employed about 1,100 people in Racine, about half of whom were female. Those employees have the opportunity for regular contact and as a result, can form personal, even intimate, relationships. Cree does not

prohibit employees from engaging in intimate relationships with each other and indeed, many employees do form such relationships. That Palmer would have had regular contact with Cree's large female workforce presented a greater than usual opportunity for him to form relationships with women and commit crimes against them, thus continuing his many-year pattern of physically abusive relationships with women.[8] The fact that he would have been engaging in unsupervised travel with male and female coworkers and meeting alone with customers, both male and female, in various potentially isolated locations also raises significant concerns.

Further, the nature of the particular position that Palmer sought further supports a substantial relationship to his convictions. This position is fast-paced and high-stress as there is a lot of pressure associated with meeting customer demands. There is virtually no supervision of the position, and the travel requirements would entail even less supervision. Given these working conditions, a person like Palmer possessing character traits of using violence to achieve power or to solve problems and an inability to control anger and frustration, especially when directed towards women, would be presented with a greater than usual opportunity to commit more crimes. Putting Palmer in Cree's work environment places all of

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[8] Palmer's opportunities to commit further crimes would have been presented both in and outside of the workplace. In *Matousek v. Sears Roebuck & Co.*, ERD Case No. 200302571 (LIRC 02/28/07) (App. 073-082), on remand after judicial review, LIRC held that there was a substantial relationship between a retail clerk position and the crimes of sexual assault of a child where the clerk could meet and interact with children while working and then assault them outside of work. LIRC noted that the Wisconsin Supreme Court in *County of Milwaukee* held that the risk to be considered is the risk to the community at large, and not just "simply whether certain criminal behaviors will or will not recur in a workplace in which someone may find employment." Thus, it is proper to consider that Palmer would have been regularly interacting with female coworkers whom he could later harm outside of work.

Cree's employees at risk of his overwhelming propensity for serious violence.

In prior cases, LIRC has held that the substantial relationship test was satisfied in circumstances nearly identical to those before the Court. In *Weston v. ADM Milling Co.*, ERD Case No. CR200300025 (LIRC 01/18/06) (App. 131-133), the complainant had been convicted of sexual assault, battery, and theft, and brought a conviction record discrimination claim when he was not hired for a pack and load job. LIRC examined the character traits exhibited by the crimes, which included many of those stated above for Palmer's crimes: disregard for the health and safety of others, particularly women; the use of force to obtain sexual gratification; the use of violence to achieve control over others or to resolve conflicts; the inability to control anger or other emotions; and the disregard for the property rights of others; and dishonesty and lack of trustworthiness. LIRC then examined the circumstances of the job at issue to determine whether they fostered criminal activity in someone with those traits. Like the job at issue here, the position entailed "unrestricted access to unsecured property of significant value; work with little supervision in close proximity to others, including female employees; and location in a vast facility with many possible hiding places and with a high noise level which could prevent detection." Based on that factual record, LIRC concluded that the circumstances of the job created a greater than usual opportunity for criminal behavior given the nature of the complainant's convictions. LIRC therefore ruled in *Weston* that the elements of the crimes and the traits associated with them were substantially related to the pack and load position, and dismissed the complainant's conviction record

discrimination claim. In its decision in this case, LIRC offered no explanation for reaching a different conclusion from *Weston*.

LIRC has also ruled that child abusers should not be in work environments where they can meet and interact with children, providing the opportunity to then assault them inside or outside of work. *Matousek v. Sears Roebuck & Co.*, ERD Case No. 200302571 (LIRC 02/28/07) (App. 073-082). That practical outcome should have applied equally here to a situation with a habitual rapist and woman abuser seeking work in a largely unsupervised, huge facility with hundreds of women who are vulnerable to male abusers and could easily become his next victims. To find otherwise would be to force an individual with a violent criminal record – and character traits including the use of violence to achieve power, control, or to solve problems, and the inability to control anger, frustration, or other emotions – upon Cree and its employees. Demanding that Cree and its employees tolerate Palmer's conviction record would amount to requiring them to accommodate his violent character traits, but the WFEA does not obligate employers (or their employees) to accommodate individuals with conviction records. *Knight*, 220 Wis. 2d at 154-55.

As Dr. Hanusa testified, Palmer's convictions and the severe acts of violence associated with them demonstrate the extreme extent to which he is willing to go to assert power and control to make a point when he is frustrated or angered or to assert his will on others, particularly women. (R.App. 229-230 [Tr. pp. 199-200]). The collaborative and stressful work environment at Cree, the lack of supervision, the substantial female workforce, and the nature of Cree's facility would have provided a person with Palmer's convictions ample opportunities to form relationships with female

employees and commit similar crimes – therefore, a substantial relationship exists. As Dr. Hanusa succinctly put it, given the nature of Cree's business and this particular position, hiring a person with Palmer's convictions and their associated traits would have been "like putting an alcoholic behind the bar as a bartender; it's sort of like waiting for an accident to happen." (R.App. 232-233 [Tr. pp. 202-203]).

The Court need not be concerned that finding the test was met here would preclude habitual male batterers from employment. That is not the case. There are plenty of jobs where Palmer would not have to work around a large group of women, and would be supervised and observed if he did. Here, the number of women Palmer would encounter in a giant unsupervised facility and away at trade shows presents the substantial relationship in circumstances that allowed Cree to decline to take the risk of harm to its employees.

V. LIRC's Interpretation And Application Of The Substantial Relationship Test Deviated Significantly From The Wisconsin Supreme Court's *County of Milwaukee* Decision

LIRC significantly deviated from the Wisconsin Supreme Court's interpretation of the substantial relationship test in *County of Milwaukee* and erred in applying the test in this case. In its ruling in this case, LIRC held that "[a] finding of a substantial relationship requires a conclusion that a specific job provides an *unacceptably high risk* of recidivism for a particular employee." (R-8 at 8 (emphasis added)). However, the test as articulated by the Supreme Court in *County of Milwaukee* does <u>not</u> require a finding of an "unacceptably high risk." Rather, to maintain the test's

"practicality," *County of Milwaukee*, 139 Wis. 2d at 826, the test assumes that if the circumstances of criminal offense(s) and the job are substantially related, a risk exists that is "too great to ask the citizenry to bear." *Id.* at 823.

The Wisconsin Supreme Court made clear that the test is whether there is a substantial relationship, not whether there is a substantial risk or an unacceptably high risk. Indeed, the word "risk" is not even contained in the statute. If an employer were required to prove an "unacceptably high risk" of recidivism to prevail on a substantial relationship defense, the test would require what the Wisconsin Supreme Court expressly rejected – a detailed inquiry into the individual's offenses, his efforts at rehabilitation, and whether the individual "can perform a job up to the employer's standards." 139 Wis. 2d at 823-24, 827. As a practical matter, employers do not have the time or the resources to make such individualized risk assessments in making employment decisions. Moreover, an "unacceptably high risk" standard is too subjective for practical application – apparently so subjective that not even LIRC can apply it in a consistent, predictable manner. In defending its decision, LIRC makes no effort to show how its "unacceptably high risk" standard is consistent with the Supreme Court's insistence on practicality. LIRC does not explain from whose perspective the risk must be "unacceptably" too great – from the perspective of the persons put at risk, of the employer, or of LIRC's three Commissioners. What the women working at Cree's Racine facility or the citizens of Wisconsin might view as unacceptably risky is likely different than what the Commissioners might view as unacceptably risky, and without relying on an individualized risk assessment by experts, LIRC is not in a position to fairly, reliably,

and consistently make those judgments. Indeed, LIRC's own flip-flopping in applying the substantial relationship standard shows that it is not a reliable arbiter of risk.

LIRC also erred when it ruled that Cree could not prevail without demonstrating a "significant opportunity for repeat criminal behavior." (R-8 at 8 n.3). Again, the Wisconsin Supreme Court's interpretation of the substantial relationship test in *County of Milwaukee* does not require a finding of "significant" opportunity; it simply requires *an* opportunity to reoffend or otherwise engage in behavior inconsistent with the responsibilities of the position – *i.e.*, an identity between the crimes and the circumstances of the position.[9] Nor does the test require that the opportunity be "for repeat criminal behavior." Rather, the Supreme Court ruled that "[i]t is the circumstances which foster criminal activity that are important, *e.g.*, the opportunity for criminal behavior, the reaction to responsibility, or the characters traits of the person." *Id.* at 824.

Furthermore, as it has in other cases, LIRC has again offered its unscientific, non-expert view that "where assault and battery convictions stem from personal relationships and the crimes are committed at home, it cannot necessarily be assumed that the individual is likely to engage in the same conduct with co-workers or customers in the work place." (R-8 at 14). There was absolutely no factual finding presented to support that conclusion, and as the circuit court correctly found, it is not supported by any "evidence, scholarly articles, statistics relating to recidivism, or even common

[9] What LIRC required in this case is directly contradicted by its interpretation of the test in another case: "The question is not whether the complainant had a significant opportunity to engage in a crime identical to that for which he was previously convicted – in this case, retail theft – but whether the circumstances of

sense." (R-25 at 15). Moreover, LIRC's view is inconsistent with and ignores the unrefuted expert opinion of Dr. Hanusa – bolstered by many tragic incidents of workplace violence by male batterers – that domestic violence is predictive of workplace violence. (R.App. 218-220 [Tr. pp. 188-190]). Based on his 40 years of experience, his counseling of nearly 4,000 male batterers, and his academic research, Dr. Hanusa testified that using violence in an intimate relationship has a "direct relationship" to using violence in other settings such as in the workplace. (R.App. 211-214 [Tr. pp. 181-184], R.App. 219-220 [Tr. pp. 189-192], R.App. 260 [Tr. p. 230]; R-10 at 66-73). Men who use violence in a domestic context oftentimes use violence in other aspects of their lives, including in the workplace, to assert power or control when they are frustrated, angered, or to solve problems. (R.App. 220-222 [Tr. pp. 190-192]). These traits do not simply disappear when the domestic abuser walks out the door of the house, which even LIRC has sometimes acknowledged in past cases, albeit in cases that do not involve violence directed towards women. *See, e.g., Hoewisch v. St. Norbert's College*, ERD Case No. CR200800730 (LIRC 08/14/12) (App. 049-057) (finding that just because the complainant abused her own child in a so-called "domestic setting" did not mean that those character traits would not translate to the workplace). Thus, contrary to LIRC, the domestic nature of Palmer's offenses does not reduce or negate in any way their substantial relationship to the position he sought. The direct correlation between domestic and workplace violence cannot be ignored by LIRC as it was in this case, and certainly not because LIRC has a misguided "hunch," as the

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the crime and the circumstances of the job are substantially related." *Lahey v. Kohler Co.*, ERD Case No. CR200701797 (LIRC 10/28/11) (App. 066-068).

circuit court phrased it, that Palmer will not reoffend in the workplace.

Finally, LIRC erred in concluding that finding a substantial relationship in this case requires "a high degree of speculation and conjecture." (R-8 at 12). This view is a departure from LIRC's earlier recognition that "[i]t is the *very* nature of the substantial relationship test, that it involves speculation. Any assessment of risk necessarily does so." *Matousek v. Sears Roebuck & Co.*, ERD Case No. 200302571 (LIRC 02/28/07) (App. 073-082) (emphasis in original). In *Matousek*, LIRC held on remand:

> [T]he [substantial relationship] test is not limited to asking simply whether certain criminal behaviors will or will not recur in a workplace in which someone may find employment. Rather, it asks whether having that individual in that workplace will likely result in reappearance of *the tendencies and inclinations to behave in a certain way*. The cause for concern is that if such tendencies and inclinations do arise, another crime may be committed. It is that possibility that another crime may be committed, rather than the matter of exactly where and when it may be committed, that is significant.

Id. (emphasis in original). Thus, in *Matousek*, LIRC properly focused on the relationship of the crimes to the circumstances of the job, not on assessment as to its probability (*e.g.*, high risk, moderate risk, low risk). Again, if the test required a probability assessment, it would not be the type of practical test that the Wisconsin Supreme Court held should apply. *County of Milwaukee*, 139 Wis. 2d at 826.

LIRC's application of the substantial relationship test in *Matousek* is instructive here. In that case, LIRC found a substantial relationship existed between a conviction for sexual assault of a

child and a sales clerk position at a Sears department store because placing that felon in that workplace would *possibly* result in the reappearance of his tendencies and inclinations to abuse children. Specifically, the complainant could meet and interact with young children at the store, leading to opportunities to assault them either in the store or outside the store later on. *See also Sheridan v. United Parcel Service*, ERD Case No. CR200204955 (LIRC 07/11/05) (App. 117-121) (finding a substantial relationship exists where an applicant for a delivery driver position who was convicted of sexually assaulting a child would have unsupervised contact with children, including children alone in their homes). The same reasoning applies to this case. Cree's 500+ female workforce and the lack of supervision in a huge facility and unsupervised travel would have presented Palmer with myriad opportunities for his criminal tendencies and inclinations and the related character traits to reappear in and outside of the workplace. Under these circumstances, the risk of Palmer's recidivism was "too great to ask the citizenry[,]" which includes Cree's employees and customers, to bear. *County of Milwaukee*, 139 Wis. 2d at 823.

CONCLUSION

Palmer's recidivist record of violent offenses specifically toward women demonstrates that he lacks good judgment, that he uses violence to achieve power and control and to solve disputes, that he has an inability to control his anger and frustration, and that he lacks respect for authority, the community, and others' safety and wellbeing. As Dr. Hanusa's unrefuted expert testimony supports, these traits do not disappear when he walks out the door of his home. Palmer's propensity to use violence and the personal qualities his

crimes reveal are inconsistent with working relatively unsupervised in a large community of women in a demanding, collaborative position. Based on the circumstances of the position Palmer sought at Cree – including its large facility with many isolated and noisy areas; the presence of more than 500 women with whom he could have regular contact; and the fast-paced, high-stress environment – had Cree hired him, Palmer would have had an opportunity to act in line with these traits and to reoffend every single day of his employment, exposing Cree's employees, customers, and property to serious harm. The purpose of the substantial relationship defense is to avoid forcing Cree's employees, customers, and the public at large to assume the type of risk presented in this case. When the substantial relationship test, as interpreted by the Wisconsin Supreme Court, is properly applied, the interests of protecting the many outweigh the interests of the one, a recidivist violent male predator. Any finding to the contrary would be a step backwards for the protection of women in the workplace and an even greater step backwards for the rights of women in general.

Thus, the substantial relationship test has been satisfied in this case, and Cree urges the Court to rightly reverse LIRC, dismiss Palmer's claim, and enter judgment in Cree's favor.

[Signature follows on the next page]

Respectfully submitted this 2nd day of January, 2020.

CREE, INC.

By: _____
One Of Its Attorneys

Laura A. Lindner
Casey M. Kaiser
LITTLER MENDELSON, P.C.
111 East Kilbourn Ave., Suite 1000
Milwaukee, WI 53202
Telephone: 414.291.5536
Facsimile: 414.291.5526
llindner@littler.com
ckaiser@littler.com

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. §§ 809.19(8)(B), (C)

I hereby certify that this brief conforms to the requirements contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 9,641 words.

Dated this 2nd day of January, 2020.

By: _____

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including 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 counsel of record.

Dated this 2nd day of January, 2020.

By: _____