

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

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CREE, INC.,

Petitioner-Respondent,

v.

LABOR AND INDUSTRY REVIEW  
COMMISSION,

Respondent-Co-Appellant, and

DERRICK S. PALMER,

Respondent-Appellant.

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**ON APPEAL FROM JUDGEMENT 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**

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**NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND  
COMMERCE**

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## INTRODUCTION

This case revolves around whether the Labor and Industry Review Commission (LIRC) appropriately applied the substantial relationship test in an instance where an employer withdrew a conditional offer of employment once it came to light the applicant had a conviction history of physical violence, sexual violence, and property damage. LIRC deviated from Wisconsin Supreme Court precedent to find that these violent crimes did not substantially relate to the job Mr. Palmer applied for because he only violated the physical and sexual autonomy of his past domestic partners and therefore was unlikely to commit similar crimes in the workplace.

LIRC's erroneous interpretation of the substantial relationship test forces employers to defend themselves against charges of conviction discrimination that are not found in the history surrounding the Wisconsin Fair Employment Act (WFEA). This additional burden on employers is concerning to Wisconsin Manufacturers and Commerce (WMC) as a representative of job creators across the state. What is equally disturbing is that in implementing this erroneous analysis LIRC articulated a fiction – that has become a bright line rule for the Commission – that domestic violence convictions will never substantially relate to a wide variety of commercial or manufacturing jobs. This bright line rule is contrary to social science research

surrounding the issue of domestic abuse. It also places employers in the untenable position of choosing between putting themselves at risk of violating the WFEA or placing their employees and property at risk of injury and facing the moral and legal consequences of doing so.

As Wisconsin's chamber of commerce and manufacturers' association, WMC recognizes that maintaining the principles of certainty and practicality that surround the "substantial relationship" test is important to employers. More important is making sure employers can make the decisions necessary to keep their employees and property safe in an efficient manner that is compliant with longstanding state law. If the Circuit Court's decision is reversed and LIRC's heightened substantial relationship test stands, it will damage Wisconsin's business climate and paralyze employers' hiring ability as they struggle to apply the burdensome new law.<sup>1</sup>

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<sup>1</sup> Because this case is the first time an appellate court will weigh in on LIRC's "domestic context" rule, WMC respectfully requests that this case be published.



## ARGUMENT

### **I. LIRC Deviated From Established Precedent in the Application of the “Substantial Relationship” Test.**

#### **A. History of the substantial relationship test.**

The WFEA prohibits employment discrimination based on conviction record. Wis. Stat. § 111.321 & 111.322. The Legislature created an exemption to the WFEA prohibition on discrimination based on conviction record: “[I]t is not employment discrimination because of conviction record to refuse to employ any individual... convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.” Wis. Stat. § 111.335(3)(a)1.

The Wisconsin Supreme Court has interpreted this exemption as a balancing test to determine “when the risk of recidivism becomes too great to ask the citizenry to bear.” *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 823, 407 N.W.2d 908 (1987). The rationale behind the exemption is to balance the rehabilitation of ex-offenders with protecting citizens from ex-offenders who are “placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted,

will commit another similar crime.” *Milwaukee County*, 139 Wis. 2d. at 821.

Rather than a “detailed inquiry” into the “facts of the offense and the job,” a court should assess “whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed.” *Id.* at 823-24. The assessment should focus on the “circumstances which foster criminal activity” such as “the opportunity for criminal behavior” and “the reaction to responsibility.” *Id.* at 824. Examining the elements of the offenses the ex-offender is convicted of “help elucidate the circumstances of the offense.” *Id.* at 826.

Contrary to the Wisconsin Supreme Court’s decision in *Milwaukee County* and the Commission’s own precedent,<sup>2</sup> LIRC deviated from the substantial relationship test and engaged in a detailed inquiry into the facts of the offense and job. The LIRC majority opinion not-so-subtly changes the standard from *Milwaukee County* from “when the circumstances, of the offense and the particular job, are substantially related,” then “the risk becomes too great to ask the citizenry to bear,” to “a finding of a substantial relationship requires a conclusion that a specific job provides an *unacceptably high risk* of recidivism for a

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<sup>2</sup> See *Weston v. ADM Milling Co.*, ERD Case No. CR 200300025 (LIRC 01/18/06).

particular employee.” *Milwaukee County*, 139 Wis. 2d at 823; *Palmer v. Cree, Inc.*, p. 7, ERC Case No. CR201502651 (LIRC 12/3/2018) (emphasis ours). This court should not give any credence to LIRC’s deviation from *Milwaukee County*. Mr. Palmer’s criminal convictions and the characteristics they show bear a substantial relationship with the circumstances of the particular job Mr. Palmer applied for at Cree, therefore the exemption applies.

**B. Cree satisfied the substantial relationship test as expounded by the Wisconsin Supreme Court.**

There is a substantial relationship between Mr. Palmer’s long criminal record, the traits this record evinces, and the circumstances of employment he sought with Cree. Most recently, Mr. Palmer was convicted of eight criminal offenses including two counts of strangulation and suffocation (Wis. Stat. § 940.235(1)), fourth degree sexual assault (Wis. Stat. § 940.225(3m)), four counts of battery (Wis. Stat. § 940.19(1)), and criminal damage to property (Wis. Stat. § 943.01(1)). All of these convictions stem from a series of physically and sexually violent encounters with an ex-partner. (Cree Br. 4-5). These were not isolated events. Mr. Palmer has been convicted of physically violent crimes against two other previous partners. (Cree Br. 5-6).

Despite this long conviction record, LIRC determined there was not a substantial relationship between the job Mr. Palmer applied for and his convictions because his previous victims were past romantic partners. This opinion is the latest in a series of what has become a bright line rule that crimes committed in the “domestic context” can almost never be related to any job. (Cree Br. 12, n.5). LIRC’s dive into the factual context of Mr. Palmer’s convictions represents exactly the type of in-depth factual inquiry that will paralyze employers making hiring decisions. *Palmer v. Cree, Inc.*, p. 9-12, ERC Case No. CR201502651 (LIRC 12/3/2018). This is exactly the opposite of what the Legislature intended. *Milwaukee County*, 139 Wis. 2d at 826 (“Employers... should be able to proceed in their employment decisions in a confident, timely and informed way.”); *Law Enforcement Standards Board v. Lyndon Station*, 101 Wis. 2d 472, 305 N.W.2d 89 (Wis. 1981) (Encouraging a common sense approach to applying the substantial relationship test).

The character traits<sup>3</sup> exhibited by Mr. Palmer’s criminal convictions include:

- Disregard for the health and safety of others, particularly women;
- The use of violent force to obtain sexual gratification;

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<sup>3</sup> Mr. Palmer’s attorneys attempt to muddy the inquiry by highlighting Mr. Palmer’s educational record while incarcerated. (Palmer Initial Br. 26-28). However, this type of information is not at the core of the substantial relationship exception’s inquiry and is exactly the fact intensive analysis the court sought to avoid in *Milwaukee County*.

- The use of violence to achieve power, control, or to solve problems;
- The inability to control anger, frustration, or other emotions;
- The lack of respect for authority, the community, and bodily autonomy;
- Lack of good judgment; and
- The disregard for the property rights of others.

(Cree Br. 23-24). Many employers would be deeply hesitant to hire an individual *without a criminal conviction record* who had these character traits because they may lack the “soft skills”<sup>4</sup> necessary to work with others in a safe and productive way.

The character traits evinced by Mr. Palmer’s criminal convictions, combined with the potential job as a Lighting Schematic Layout Applications Specialist, create the circumstances for an opportunity to recidivate. The role Mr. Palmer applied for at Cree would provide him access to their 600,000 square foot Racine facility with many spaces where one could be unobserved by cameras or colleagues and where approximately half of their employees were women. The job itself would have required Mr. Palmer to work as a member of a team, would have

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<sup>4</sup> Mark Feffer, HR’s Hard Challenge: When Employees Lack Soft Skills, SHRM.ORG, (Apr. 1, 2016), <https://www.shrm.org/hr-today/news/hr-magazine/0416/pages/hrs-hard-challenge-when-employees-lack-soft-skills.aspx>.

involved face-to-face interaction with team members and customers, and would have involved off-site travel. Mr. Palmer would have had minimal supervision in this role.

LIRC has previously ruled in favor of an employer in a similar circumstance. In *Weston*, LIRC ruled it was not conviction discrimination when an ex-offender who had a history of sexual assault, battery, and theft was not hired for a job at a manufacturing facility with access to a large facility, little supervision, and in a role that required the ex-offender to work with colleagues. ERD Case No. CR 200300025 (LIRC 01/18/06). Similar to *Weston*, Cree's decision not to hire Mr. Palmer is not discrimination under current law. Through its erroneous decision, LIRC is breaking from the Supreme Court's practical test, which will paralyze employers' ability to hire with certainty.

**II. LIRC's Deviation Creates a Significant Burden on Employers Looking to Comply with Wisconsin's Fair Employment Law, Which Is Directly Contrary to the Legislature's Intent and Wisconsin Court's Precedent.**

LIRC's deviation from the substantial relationship test upends the practicality that is supposed to be infused in the test. The Wisconsin Supreme Court made clear the test is a practical one because employers need to be able to quickly use it when making employment decisions. *Milwaukee County*, 139 Wis. 2d at 826. The Court stated, "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 826-827. While the inquiry envisioned under the statute may have allowed employers to make employment decisions with confidence, the inquiry as envisioned by LIRC does not.

Under LIRC’s new incarnation of the test, the Commission dives into “additional factual information regarding the offense” and creates a new higher standard requiring a finding of “unacceptably high risk of recidivism from a particular employee.” *Palmer v. Cree, Inc.*, p. 6-7, ERC Case No. CR201502651 (LIRC 12/3/2018). Such a standard necessarily would require an individualized and detailed inquiry into the individual’s offenses, exactly what the Supreme Court did not want. *Milwaukee County*, 139 Wis. 2d. at 823-24, 827.

An individualized assessment would create uncertainty for employers who would have to both go through the time consuming and expensive process of analyzing the facts of every job applicant’s criminal convictions, and then attempt to apply LIRC’s subjective test to the job and the conviction history. Under LIRC’s heightened standard, a more in-depth and costlier review is likely necessary. For many Wisconsin small businesses, this could be prohibitively expensive. Even with a costly review, the subjective nature of the test means that

employers cannot be completely confident in the results. These employers would then be forced to risk running afoul of the WFEA or risk their businesses and the safety of their employees.

This creates a “damned if you do, damned if you don’t” situation for employers because on one hand, they risk a conviction discrimination claim if they do not hire an ex-offender, and on the other they risk legal liability (negligent hiring and retention claims, among others) if the ex-offender reoffends. An employer who knew upon hiring that an employee had a history of physical and sexual violence, of not controlling his emotions, and of not respecting authority and property may be an employer who created an unreasonable risk of injury or damage to a person or property by hiring that employee.

An employer juggling any or all of the concerns in this section is not an employer likely to be “proceeding in their employment decision in a confident, timely and informed way.” *Milwaukee County*, 319 Wis. 2d at 826. Rather, it is an employer incurring significant monetary costs to vet any serious job applicant with a criminal conviction record and despite that in-depth vetting may still face liability regardless of which path they choose. If LIRC wants a different substantial relationship test, the Commissioners can work with the Legislature to change the WFEA. Their unilateral imposition of a subjective and more demanding test degrades the rule of law and creates uncertainty, increases compliance



costs, and legal liability for Wisconsin employers. Harming Wisconsin employers does not advance either of the dual purposes of this statutory scheme: rehabilitating ex-offenders through employment and protecting society from criminal acts.

**III. LIRC's Deviation Ignores Social Science Data Regarding the Relationship Between Repeated Acts of Violence "in the Domestic Context" and Physically Destructive Acts Against Property and Violence in the Workplace.**

In *Milwaukee County*, the Wisconsin Supreme Court noted that employers should not be forced to assume the risks of repeat conduct by ex-offenders "whose conviction records show them to have the 'propensity' to commit similar crimes long recognized by courts, legislatures and *social experience*." *Milwaukee County*, 139 Wis. 2d at 823 (emphasis ours). Social experience, as laid out by Dr. Darald Hanusa's testimony in this case, scholarly articles, and the news media show that there is a direct relationship between repeated acts of physical and sexual violence against persons and the destruction of property in the domestic setting and the propensity to commit similar acts in the workplace. LIRC's creation of a bright line rule that physically and sexually violent crimes committed outside the workplace can never substantially relate to a job cuts against the very social experience the

Court indicated should be relied upon when weighing competing interests.

Cree showed during the hearing before the Equal Rights Division that LIRC's division between domestic violence and workplace violence is arbitrary. Dr. Darald Hanusa – a board-certified and licensed clinical social worker who specializes in treating male perpetrators of domestic violence – testified there is “absolutely” a connection between generalized violence and workplace violence. (Tr. p. 183-186, 188). He further stated that there is a “direct” relationship between using violence outside the workplace and being willing to use violence at the workplace. (T. p. 190-91). Dr. Hanusa also noted that men with a criminal history of “extremely severe violence” like Mr. Palmer present a risk in the workplace “because they’re willing to go that far to make their point.” (Tr. p. 199-200). They use violence as a way to assert power and control. (Tr. p. 200) Further, past acts of violence – i.e. Mr. Palmer's conviction history – are the best predictor of future violence. (Tr. p. 202).

Relevant literature agrees. For example, a literature review on predicting workplace violence found that violence against family members was a “substantial predictor” of aggression against coworkers. Julian Barling, *THE PREDICTION, EXPERIENCE, AND CONSEQUENCES OF WORKPLACE VIOLENCE, VIOLENCE ON THE JOB: IDENTIFYING RISKS AND*

DEVELOPING SOLUTIONS, 34 (G. R. VandenBos & E. Q. Bulatao, 1996), American Psychological Association. The author doubled down stating, “An individual’s past history of aggression in general will predict violence in the workplace.” *Id.* The science is clear: acts of violence “in the domestic context” like Mr. Palmer’s are good predictors of violence in the workplace and therefore LIRC’s delineation between workplace and domestic violence is unwarranted.

The consequences of workplace violence for employers and employees are many. These include negative mood, cognitive distraction, and fear of violence among employees. *Id.* at 39-41. These “direct outcomes” from workplace violence can lead to “indirect outcomes,” which include negative “organizational functioning.” *Id.* at 43-44. These consequences do not include the actual injury and property damage itself. Creating a public safety risk and negatively impacting business productivity is exactly what the *Milwaukee County* Court attempted to avoid. 139 Wis. 2d. 823-24.

The media is full of instances of employees with prior violence conviction histories committing violence in the workplace. For example, early last year, an employee of Henry Platt Company shot and killed five co-workers upon finding out he would be terminated.<sup>5</sup> The shooter had a

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<sup>5</sup> Caitlin Yilek, “Mother of Aurora gunman who murdered five coworkers says he was ‘way too stressed out,’” *washingtonexmainer.com*, (Feb. 15, 2019),

previous conviction record that included felony aggravated assault among other domestic violence charges. *Id.* In instances similar to this, business security literature encourages employers to know the “profile” of perpetrators of workplace violence and have policies in place to protect their employees and property.<sup>6</sup> In this case, Cree did their due diligence and made an employment decision in compliance with the law to protect their employees and property.

To allow LIRC to muddy the legal standard and to further the fiction that repeated acts of domestic violence are not substantially related to any employment will make it harder for employers to comply with the law and have public safety and business consequences for employers and their employees. Both of these actions cut against the practicality and certainty the Wisconsin Supreme Court discussed in *Milwaukee County*.

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<https://www.washingtonexaminer.com/news/mother-of-aurora-gunman-who-murdered-five-coworkers-says-he-was-way-too-stressed-out>; Mitchell Armentrout, Tom Schuba, and Luke Wilusz, “6 Dead in Aurora factory shooting; mom says gunman was laid off, ‘stressed out,’” [Chicago.suntimes.com](https://chicago.suntimes.com/2019/2/15/18314048/6-dead-in-aurora-factory-shooting-mom-says-gunman-was-laid-off-stressed-out), (Feb. 15, 2019), <https://chicago.suntimes.com/2019/2/15/18314048/6-dead-in-aurora-factory-shooting-mom-says-gunman-was-laid-off-stressed-out>.

<sup>6</sup> Robert Siciliano, Workplace Violence: 12 Signs of a Dangerous Person, [AmericanExpress.com](https://www.americanexpress.com/en-us/business/trends-and-insights/articles/workplace-violence-12-signs-of-a-dangerous-person/) (Oct. 14, 2013), <https://www.americanexpress.com/en-us/business/trends-and-insights/articles/workplace-violence-12-signs-of-a-dangerous-person/>; Roy Maurer, When Domestic Violence Comes to Work, [SHRM.org](https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/domestic-violence-workplace-nfl-ray-rice.aspx), <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/domestic-violence-workplace-nfl-ray-rice.aspx> (last accessed Jan. 13, 2020).

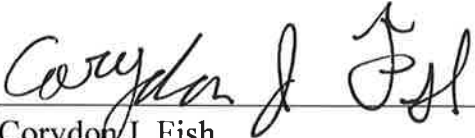
## CONCLUSION

For the foregoing reasons the substantial relationship test has been satisfied in this case. A contrary finding would make workplaces less safe, paralyze employer hiring decisions, create more litigation, and open up job creators to more liability. WMC respectfully requests the Court to reverse LIRC, dismiss Mr. Palmer's claims, and enter judgment in favor of Cree.

Respectfully submitted this 27th day of January, 2020.

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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,962 words.

Dated this 27th day of January, 2020.

By:

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**ELECTRONIC FILING CERTIFICATION**

I hereby certify that I have submitted electronic copies of this brief that complies with the requirements of Wisconsin Statutes §§ 809.19(12) and (13). I further certify that the electronic copies are 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 the brief and filed with the Court and served on all opposing parties.

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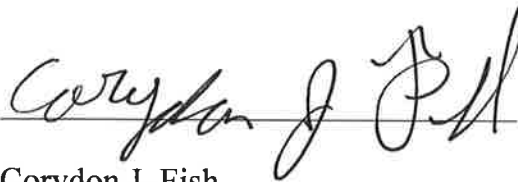
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**HAND DELIVERY CERTIFICATION**

I hereby certify that on January 27th, 2020, this brief was hand-delivered to the Clerk of the Supreme Court. I further certify that brief was correctly addressed.

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Corydon J. Fish



