STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 19AP1671

CREE, INC.,

Petitioner-Respondent,

v.

LABOR AND INDUSTRY
REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

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

# REPLY BRIEF OF CO-APPELLANT LABOR AND INDUSTRY REVIEW COMMISSION

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## INTRODUCTION

The question posed is whether the exception to the rule applies: whether, despite a prohibition on using convictions when making hiring decisions, Cree could refuse to hire Derrick Palmer because his convictions substantially relate to a lighting specialist job.

The Commission properly concluded that Cree did not satisfy this test, and Cree's counterarguments do not show otherwise. Rather, at bottom, it proposes a generalized-risk standard, even though the statute requires looking at the particular circumstances of the convictions and job. The controlling *Milwaukee County* decision confirms that those circumstances, and whether they are similar, are key.

Because the Commission properly applied that test to the circumstances presented here, the circuit court's decision should be reversed and the Commission's decision affirmed.

## ARGUMENT

### I. The Commission properly applied the substantially-related test to the circumstances presented.

As explained in the first brief, the circumstances presented did not support that Palmer's convictions and Cree's job were substantially related. In particular, the evidence supported that Palmer's crimes solely stemmed from personal relationships and were committed at home. (R. 8:14, A-App. 22.) And the evidence supported that there were no particular circumstances at Cree that related to those convictions' circumstances. For example, the job was not in a setting with a specially vulnerable population. Rather, all signs pointed to the job being in an everyday industrial workplace. (R. 8:13, A-App. 21.)

In turn, the Commission correctly concluded that the substantially-related test was not met. Cree did not meet its

burden to show a connection between the convictions and the particular "employment settings." *Milwaukee Cty. v. LIRC*, 139 Wis. 2d 805, 823, 407 N.W.2d 908 (1987). It showed no "temptations or opportunities . . . *similar to* those present in the crimes for which [Palmer] had been previously convicted," such that there was "an unreasonable risk" he will commit "a similar crime." *Id.* at 821 (emphasis added).

That basic analysis shows why the Commission's decision should be affirmed.[1]

## II. Cree's counterarguments are incompatible with the statute and would allow the exception to swallow the rule.

Cree points to no error in the Commission's reasoning. Rather, when addressing the Commission's decision, Cree quibbles with phrasing: it takes issue with the Commission's use of "unacceptably high risk" and "significant opportunity for repeat criminal behavior" in a footnote. (Cree Br. 30–31.)

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[1] Cree contends that the Commission's decision was "fractured," but it was not fractured in a way that is relevant here. (Cree Br. 13.) Rather, all three commissioners agreed the substantially-related test was not met. (R. 8:16.) One concurring commissioner posited that, in addition to criminal acts, the substantial relationship test may also contemplate other types of misbehavior. (R. 8:19.) However, the majority opinion explained that Cree had not raised that argument and also that the most recent supreme court opinion (*Milwaukee County*) discussed only the risk of similar criminal activity. (R. 8:8 n.3.) And, relatedly, *Milwaukee County* made clear that "[w]hether an individual can perform a job up to the employer's standards is not the relevant question." *Milwaukee Cty. v. LIRC*, 139 Wis. 2d 805, 827, 407 N.W.2d 908 (1987). In any event, just like it was not preserved before the Commission, this issue is not preserved here. And, even had it been preserved, this topic did not need to be addressed because the substantially-related analysis would be the same no matter which view is adopted, as the concurring commissioner's opinion reflected. (R. 8:19–20.)

However, *Milwaukee County* does discuss an "unreasonable risk" under the circumstances; and it also discusses "employment settings where experience has demonstrated the likelihood of repetitive criminal behavior." *Id.* at 823. The Commission did not purport to change those standards but rather applied them in substance.

Instead of taking the governing standard head-on, Cree proposes what is, in effect, a different test. Its concept of substantially-related boils down to a generalized risk to society—the same kind of connection that would exist for nearly any job involving other people. That proposal is not allowed by the statute or the analysis stated in *Milwaukee County*.

### A. Cree's premise does not give meaningful effect to the "circumstances" and "similar to" inquiries.

Cree's premise aims at an incorrect, generalized target. For example, Cree asserts as important that these are "times of increasing and catastrophic workplace violence" and then asks this Court to conclude that Palmer poses too great a risk. (Cree Br. 2.) In another general vein, Cree describes the boilerplate elements of the offenses that Palmer was convicted of, suggesting that this is determinative. (Cree Br. 23.) However, while the employer is not expected to conduct a detailed investigation, the test does not turn on broad generalizations about criminality or on boilerplate jury instructions, at least not standing alone. Rather, "the elements simply help[ ] to elucidate the circumstances of the offense." *Milwaukee Cty.*, 139 Wis. 2d at 826.

So when Cree makes a leap—that it is irrelevant that Palmer's offenses occurred in the domestic setting—it finds no support in the statute or cases. It is not irrelevant where, as here, the test requires looking at the "circumstances" of both the convictions and the job. Wis. Stat. § 111.335(3)(a)1. The

way to meaningfully address whether a job contains "temptations or opportunities for criminal activity *similar to those present in the crimes* for which he had been previously convicted" is to actually consider the criminal circumstances. *Milwaukee Cty.*, 139 Wis. 2d at 821 (emphasis added). Thus, the supreme court recognizes that a basic "factual inquiry" is appropriate, "ascertaining relevant, general, character-related circumstances of the offense or job." *Id.* at 825, 828.

If any doubt remained, it would be dispelled by the analysis in *Milwaukee County* itself. In reaching its holding, the supreme court expressly relied on factual findings and the context of the offenses and job, holding that "[o]n the basis of the foregoing [factual findings] the Commission should have concluded that the County was justified in discharging [the petitioner]." *Id.* at 828–29. For example, the court's holding turned on the facts that "in both contexts [the applicant] was in a position of exercising enormous responsibility for the safety, health, and life of a vulnerable, dependent segment of the population"; and that the "responsibilities present in both jobs extended to a group of people similarly situated so that neglect or dereliction of duties in either job would likely have similar consequences." *Id.* at 828.

Here, too, the analysis must include the basic circumstances of Palmer's convictions. That requires no detailed investigation. Palmer told Cree that his convictions were domestic related, and the fact that Palmer's convictions stemmed from "domestic abuse" appears on the face of his judgment of conviction.[2] (R. 9:1–2; 11:33, 37.) On the other hand, there was no indication that Palmer was convicted or

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[2] Cree points out that Palmer testified to having past domestic convictions. (Cree Br. 6–7, 24.) The Commission likewise acknowledged the past offenses. (R. 8:9 n.4.) The fact that there were more remote offenses of the same nature does not change the analysis.

even accused of acts in the workplace, or of making threats related to a workplace or co-workers, or of doing anything of the sort to any member of the general public.

The Commission does not suggest that Palmer's crimes are not concerning. Its administrative decision made explicit that it is not intended to "minimize the severity of the complainant's prior criminal conduct." (R. 8:14.) But the question posed by the statute is not whether crimes are concerning but whether they have a substantial relationship to the particular job.

For its part, Cree points out that its facility has "nooks and crannies" and can be "loud,"[3] or that, conceivably, an employee might meet someone at work and then form a romantic out-of-work relationship. (Cree Br. 25–26.) But these points do not meaningfully forward its argument. The circumstances of Palmer's offenses did not involve lying in wait and assaulting someone. And the job duties at Cree do not involve forming a romantic relationship. Rather, what Cree proposes is more general: that someone who committed a violent act is, as a general matter, more risky to society than the baseline. That reasoning could apply to anyone with convictions with elements of violence and would allow barring them from most workplaces with other people. While a statute

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[3] Cree asserts that a 2006 Commission decision (*Weston*) determined that the substantially-related test was met in similar circumstances. (Cree Br. 27.) However, that contention is not helpful to Cree here. First, it is not relevant; the question is whether the standard is met under the circumstances presented in this case. Second, the *Weston* decision contains very little detail; it states that the offense was not at work but does not reveal anything else about it (whether it was in a park, etc.). (Cree App. 131–33.) Third, even if that decision stood for what Cree proposes, it would not represent the prevailing application by the Commission of the legal standard, which recognizes that the circumstances matter. (*E.g.*, R. 8:7–8, 11, 14, citing Commission decisions including *Knight*, *Robertson*, and *Murphy*.)

might be crafted with that prohibition, Wisconsin's does not contain it.

Cree's flawed premise also is seen in its contention that the Commission is proposing a bright-line rule. (Cree Br. 12.) That, again, ignores the statute: *it* contains the rule that an employer may not refuse to hire someone because of a conviction record. Wis. Stat. §§ 111.321, 111.322(1). There is an exception to that rule, but the fact that an exception may apply only occasionally is the nature of many exceptions.

And that exception certainly could apply, in the right circumstances. For example, the question posed would be different if Palmer had applied to work with a vulnerable population (for example, at a women's shelter) or in some other sensitive setting. Administrative decisions cited by Cree help illustrate this: for example, the exception was met when someone convicted of felony child abuse in the home then applied to be an education professor. The job tasked the applicant both with teaching others how to instruct elementary and middle school students and required the applicant to regularly go to elementary and middle schools "filled with children under 12 years of age." (Cree Br. 20, 32; Cree App. 049–57 (*Hoewisch* decision).) And Cree cites administrative decisions where someone with convictions for child sex assault would have unsupervised contact with children; that, too, was substantially related. (Cree Br. 34; Cree App. 073–083 (*Matousek* decision).) Those examples help demonstrate that circumstances *do* matter: *Matousek*, for example, describes an applicant who methodically groomed a child sex-assault victim. (Cree App. 074, 076.) Those examples likewise help illustrate that the Commission properly applies the standard to the circumstances. It imposes no bright-line rule that domestic offenses cannot disqualify an applicant.

The cases cited in the Commission's first brief also illustrate that the circumstances matter. Those cases do not rely on a generalized risk to society. For example, an armed

robber could be denied a job of special public trust involving the safety and supervision of children. *Gibson v. Transp. Comm'n*, 106 Wis. 2d 22, 28, 315 N.W.2d 346 (1982). Or someone criminally negligent when administering a nursing home could be denied employment at a medical facility where "neglect or dereliction of duties in either job would likely have similar consequences." *Milwaukee Cty.*, 139 Wis. 2d at 810, 828–29. And a police officer convicted of falsifying citations could be denied a job as a police chief. *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 492, 305 N.W.2d 89 (1981).

Those decisions do not rely on mere generalizations about criminality but rather look to the actual circumstances of an offense and compare it to the circumstances of the job, including whether it involves a relevant "vulnerable" population. *Milwaukee Cty.*, 139 Wis. 2d at 830. Here, Palmer applied to work in an industrial setting with no particular connection to his domestic convictions. Absent a showing that the exception applies, then the statutory rule controls and his convictions cannot be the reason he was not hired.

### B. Cree's resort to a proposed expert adds nothing to the inquiry required by the statute.

Cree's argument about its proposed expert similarly targets the wrong question and, in fact, creates an internal contradiction in its theory. On the one hand, Cree proposes that the inquiry should be "simple and practical." (Cree Br. 18.) On the other, it proposes that its expert's opinion should be dispositive. (Cree Br. 21–22, 32.) Those propositions are in significant tension with each other. It cannot be that employers (and the Commission and courts) are to make decisions about whether circumstances are substantially-related based on a commonsense analysis, but then an expert can trump that analysis, so long as that expert opines that

someone may pose a greater risk in some general way. An employer likely will always be able to find an expert who can say that at some level of abstraction.

Cree's reliance on this expert opinion, like the rest of its argument, is really a proposal for a legal rule: that the increased statistical risk that violent offenders pose for future crimes, relative to the general public, means that they can be denied employment where the setting involves other people.

As explained, neither the statutory test nor supreme court precedent allows for that proposal. To the contrary, the statutory framework is designed *in light of* the general fact of recidivism. As background for the applicable test, *Milwaukee County* identified the general "well-documented phenomenon of recidivism." *Milwaukee Cty.*, 139 Wis. 2d at 821. That is the baseline. The substantially-related-circumstances test captures only a subset of potential recidivists: those "being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted," such that there is an "unreasonable risk" the person "will commit another similar crime." *Id.* at 821.

It is generally the case that the Commission is not required to credit a particular expert (*see* LIRC Opening Br. 14–15), and that is especially true when the opinion aims at the wrong target.

### C. Cree's remaining arguments also do not support reversal of the Commission's decision.

Cree's other contentions also do not support reversal of the Commission's decision.

First, Cree argues that the Commission's interpretation of the statute is not entitled to deference. (Cree Br. 14–16.) There is no disagreement on that point. However, the Commission's approach is nonetheless entitled to respect—it

should be considered, not adopted blindly—as it has considerable experience applying the substantially-related standard.[4] And, in any event, there is no serious statutory interpretation issue here. The Commission applied the statute as written and as interpreted by the supreme court, most recently in *Milwaukee County*.

Second, Cree asserts that this case is "not about substantial evidence." (Cree Br. 16.) That is not entirely correct. While the ultimate question is legal (whether the substantially-related test is met), to answer that question one must look at the circumstances. Circumstances involve facts, and the Commission found them, as outlined in the opening brief. (LIRC Opening Br. 10–13.) That fact-finding is binding where there is record support.

Third, as a point of clarification, Cree's brief cites the criminal complaint and otherwise characterizes Palmer's crimes as if everything originally alleged resulted in convictions. (*E.g.*, Cree Br. 5–6, citing R. 11:5–7.) However, not all of those charges and allegations resulted in guilt. For example, the criminal complaint charged second-degree sexual assault, a Class C Felony (R. 11:5), but that charge was later dismissed "on prosecutor's motion" (R. 11:32). It is not part of Palmer's conviction record. Rather, he was convicted of several misdemeanors, including fourth-degree sexual assault (R. 11:33), and Class H felonies for "Domestic Abuse" "Strangulation and Suffocation" (R. 11:37). Those are the convictions subject to the substantially-related analysis. Wis. Stat. § 111.335(3)(a)1. Offenses only charged are mere arrests, *see* Wis. Stat. § 111.32(1), and are not permissible

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[4] There is a significant history of the Commission applying the standard, and the first brief cited examples in the record (and, in fact, Cree's own brief cites several examples). (LIRC Opening Br. 8; Cree Br. 20, 32, 34; R. 8:7–14.) Thus, Cree is incorrect when it asserts that the Commission's experience with the statute is unsupported. (Cree Br. 15.)

bases to decline to hire someone unless there is "a pending criminal charge" that is "substantially related." Wis. Stat. § 111.335(2). Here, Palmer's other charges were not pending so they cannot form a basis for refusing to hire.

* * *

The basic question remains whether Cree established that the circumstances of Palmer's convictions were substantially related to the circumstances of the job. The Commission properly rejected Cree's generalized approach and so should this Court. It transforms an exception into the rule and does not meaningfully address the particular circumstances or similarities, as required by statute and *Milwaukee County*.

## CONCLUSION

This Court should reverse the circuit court and affirm the Commission's final decision.

Dated this 27th day of January, 2020.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2840 words.

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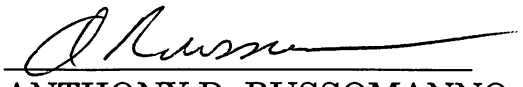

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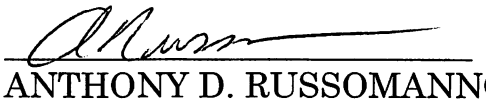

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