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STATE OF WISCONSIN COURT OF APPEALS
DISTRICT II

01-30-2020

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CREE, INC.,

Petitioner-Respondent,

v.

Appeal No. 2019AP001671

LABOR AND INDUSTRY REVIEW
COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

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

APPELLATE REPLY BRIEF OF DERRICK PALMER, RESPONDENT-APPELLANT

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ARGUMENT

I. LIRC'S DECISION IS CONSISTENT WITH WISCONSIN'S PUBLIC POLICY TO REHABILITATE AND EMPLOY FELONS.

Cree's Brief completely ignores that Mr. Palmer has paid his debt to society and has been rehabilitated through the WIDOC. In October 2015, five months after Palmer applied for work at Cree, the WIDOC issued the Becky Young Community Corrections Recidivism Reduction Fiscal Year 2015 Report¹ ("the Report"). The Report identifies § 301.068(2)(d), *Wis. Stats.*, which requires the WIDOC to utilize offender reentry treatment and services that evidence has shown to be successful and to reduce recidivism. (The Report, p. 3). The COMPAS system provides actuarial risk and need information that allows WIDOC staff to create more effective, evidence-based case plans and supervision strategies. (*Id.* at p. 4). Risk scores of general and violent recidivism enable staff to operationalize the risk principle, targeting medium and high risk offenders for service. (*Id.*) Likewise, criminogenic need profiles allow staff to prioritize and focus on the driving need factors behind criminal behavior. (*Id.*) COMPAS also provides a comprehensive case management module, which allows WIDOC to document and store social history information (education, employment, substance use history, etc.), violation disposition information, rewards and incentives, drug testing, and rules of supervision. (*Id.*) COMPAS identifies both the risk and criminogenic needs of the assessed offender. Risk ratings demonstrate the likelihood

¹ <https://doc.wi.gov/Documents/AboutDOC/Reentry/2015BeckyYoungReport.pdf>

that the offender will recidivate within the next three years in the community. (*Id.*) WIDOC completed 53,912 COMPAS assessments during FY15. (*Id.* at p. 5). By the end of FY19, 280,370 case plans have been created in COMPAS.² “The studies have shown that the more re-entry training and opportunities that you can provide those that have served time in correctional facilities, the more likely it is that those folks will not reoffend and cost taxpayers money in the long run.” (*Id.* at p. 9). The Department of Corrections contracts with the Workforce Development Boards to deliver Windows to Work programming³, and as a result participants are often able to leverage resources from various partner agencies and programs. (*Id.* at p. 15).

The three-year rate for release from prison recidivism decreased substantially from 47.1% for those released in 2005, to 38.1% for those released in 2015. (*Id.* at p. 27). The WIDOC considers employment to be an important element in successfully transitioning individuals from incarceration to the community. (*Id.* at p. 28). The data presented below is a result of a collaboration with the Department of Workforce Development (DWD) in which DOC receives regular extracts of employment-related

² (<https://doc.wi.gov/Documents/AboutDOC/Reentry/FiscalYear2019BeckyYoungCommunityCorrectionsRecidivismReductionReport.pdf> (at p. 7)).

³ The Windows to Work Program provides Cognitive Intervention designed to help participants recognize their thoughts, feelings, attitudes, and beliefs. The focus is to reduce anti-social cognitions, recognize risky thinking and feelings, build problem solving, self- management, and coping skills. This intervention is specifically designed to teach participants strategies for identifying and managing high risk situations related to obtaining and maintaining employment. Emphasis is placed on skill training with directed practice. (<https://doc.wi.gov/Documents/AboutDOC/Reentry/WindowsWorkManual.pdf> (at p. 47)).

data from DWD. (*Id.*) Using a combination of this data and information collected from individuals on community supervision, DOC is now able to report on employment outcomes for individuals released from prison. (*Id.*) Of the 7,498 people who were released in calendar year 2015, a total of 6,280 (83.8%) obtained employment within three years of release. (*Id.*) With a focus on training and technical assistance, WIDOC promotes public safety, reduces recidivism, and improves service delivery to promote long-term client behavior change. (*Id.* at p. 30, citing § 301.068, *Wis. Stats.*)

There is substantial evidence in the record to support LIRC's conclusion that Mr. Palmer has been rehabilitated, thereby reducing his chance of recidivism. To wit, in the past four years since his release from prison, Mr. Palmer has not committed an offense of any kind. As the WIDOC predicted, Mr. Palmer's success is due in large part to the programs he successfully completed while in prison. (R.App. 41-42:20-25, 1-13; 42-43:22-25, 1-6). These extensive and expensive efforts by the WIDOC to help Mr. Palmer succeed, have been recognized by the Wisconsin Supreme Court:

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

Milwaukee Cty. v. Labor & Indus. Review Comm'n, 139 Wis. 2d 805, 823, 407

N.W.2d 908, 915 (1987), holding modified by *State ex rel. Girouard v. Circuit Court*

for *Jackson Cty.*, 155 Wis. 2d 148, 454 N.W.2d 792 (1990). In 2015 alone, the WIDOC spent \$10,012,206.31 to prepare past offenders for successful employment in legitimate jobs.⁴ Cree's categorical exclusion of all felons from all jobs undermines this important public policy and is a huge waste of public monies. (R.App. 303:9-10).

II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT LIRC'S DISREGARD OF DR. HANUSA'S OPINION.

All of LIRC's findings of fact are supported by substantial evidence in the record. As such, LIRC's action cannot be set aside or remanded, pursuant to *Wis. Stat.* § 227.57(6), as follows:

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.**

Wis. Stat. § 227.57(6)(emphasis added).

A. Hanusa's testimony has been properly challenged.

Cree argues that Dr. Hanusa's testimony cannot be challenged. (Cree Br. p.11, ft. nt. 4). This is not true because according to *Daubert*, cross-examination is a legitimate means to challenge an expert's testimony. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

⁴ (https://docs.legis.wisconsin.gov/misc/lc/study/2016/1495/010_july_13_2016_meeting_10_00_a_m_room_411_south_state_capitol/memmono2a_recid)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469 (1993), citing *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987). Palmer's challenges to Dr. Hanusa's testimony go to the weight of the evidence, not to its admissibility. *State v. Burgess*, 2010 VT 64, ¶ 13, 188 Vt. 235, 242, 5 A.3d 911, 916 (2010) ("concerns [about the reliability of retrograde extrapolation] relate to the proper weight to be afforded the evidence, not whether the evidence is admissible in the first place"). Palmer and LIRC remained free to challenge the accuracy of the expert's assumptions. Even when an expert's opinion is admissible, the challenging party still has the chance to undermine the assumptions that support the expert's opinion by introducing evidence or arguing in favor of competing inferences from the known facts. *State v. Giese*, 2014 WI App 92, 356 Wis. 2d 796, 854 N.W.2d 687 (2014).

B. LIRC reasonably rejected Hanusa's baseless opinion.

There was substantial evidence in the record upon which LIRC could completely disregard Dr. Hanusa's opinion. He admitted that he never interviewed Mr. Palmer, did not conduct an evaluation, did not test him, and did not consider Mr. Palmer's successful post-conviction treatment and rehabilitation. "Dr. Hanusa stated that someone who had successfully completed a domestic violence program would not pose a significant risk of workplace violence, but did not take into consideration the fact that the complainant successfully completed anger management classes as well as training on 'criminal thinking,' which focused on dealing with conflict, high risk situations, and effective communication, including in the context of work

relationships.” (R.App. 22; R.App. 243:12-25; 244:1-23; 248:1-21; 250:4-9). Cree’s entire defense is based on Dr. Hanusa’s opinion, which has no scientific foundation:

- 18 Q. And that complete profile, a very important
19 part is for you to interview the person who
20 committed the assault, true?
21 A. Yes.

R.App. 242.

- 1 Q. What they would say to you face-to-face in your
2 extensive interview of the person, yes? That's
3 number one?
4 A. Right.
5 Q. And number two, a battery of at least 11 tests,
6 yes?
7 A. Right. I mean, that's part of it, yes.
8 Q. And your experience?
9 A. And my experience.
10 Q. Those three components?
11 A. Right.
12 Q. All right. And two of the components are
13 missing here, right?
14 A. I have not interviewed this client.
15 Q. Right
16 A. And I have not tested this client.
17 Q. Right.

(R.App. 248.)

- 6 Q. And you never evaluated Mr. Palmer?
7 A. I did not. Not using any of those tests, no.

(R.App. 242.)

Dr. Hanusa seems to rely on his gut instinct, but when pressed for proof, he could not assess the reliability of his opinion:

- 15 Q. And so you can't offer an opinion about the
16 reliability of your opinion concerning Mr.

17 Palmer because you didn't do the tests, true?
18 A. Well, it's not -- it's not a question that can
19 be answered in the context of this
20 investigation that I did.

(R.App. 249.)

As to the ultimate question of whether domestic violence correlated with workplace violence, Dr. Hanusa could not say how often men convicted of a violent domestic crime will later engage in workplace violence, with or without rehabilitation:

21 Q. Had you ever actually compiled statistical
22 information about that or not?
23 A. No, I have not. I have the data, I just
24 haven't added it up.

(R.App. 262:2-24).

As such, Dr. Hanusa's testimony was not based on sufficient facts or data and the product of reliable principles and methods applied to the facts of the case. *Seifert v. Balink*, 372 Wis. 2d 525 ¶7 (2017) 888 N.W.2d 816, 2017 WI 2. (R.App. 240:22-25; 241:1-25; 242:1-25; 243:1-20; 244:1-46; 248:22-25; 249:1-3, 15-20). Indeed, Dr. Hanusa could not even assert that his opinion was reliable, much less ascertain the level of risk. (R.App. 242:3-25; 243:1-20; 249:15-20).

Dr. Hanusa did admit anecdotally, however, that someone like Mr. Palmer, who completed rehabilitation, was not at risk to offend in the workplace:

3 A. Right. I would like to think that if somebody
4 successfully completed a domestic violence
5 program that would also -- and they
6 demonstrated they weren't being violent in
7 their intimate relationship, I would like to

8 think that that also would reduce the risk in
9 the workplace.

(R.App. 252.)

This testimony refutes Cree's argument that "Dr. Hanusa discredited LIRC's 'domestic setting' analysis." (Cree Br. p. 22).

In addition to Mr. Palmer's rehabilitation, additional safeguards included use his badge, log-in electronic log-in to the facility, and log-in to his computer. Mr. Palmer would not be mentoring, supervising or traveling with female employees of Cree. In his communications with builders and construction companies, Mr. Palmer would not be working one-on-one, or in isolated settings.

LIRC was correct to conclude that Cree did not prove someone like Mr. Palmer was more likely than not to attack a co-worker. *Hoewisch vs. St. Norbert's College*, (LIRC, 8/ 14/2012)(The issue in this case is "whether the tendencies and inclinations of the complainant to behave a certain way ... are likely to reappear later in a related context.").

CONCLUSION

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

Dated this 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 *Wis. Stat.* § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The font is Times New Roman and the font size is 13-point. The length of this brief is 9 pages and 2,430 words.



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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of *Wis. Stat.* §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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



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