**STATE OF WISCONSIN**
**SUPREME COURT**

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CREE, INC.,

Petitioner-Respondent-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

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**APPEAL NO. 2019AP001671**
**On Appeal from the Racine County Circuit Court,**
**The Honorable Michael J. Piontek, Presiding,**
**Racine County Case No. 19-CV-703**

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# PETITION FOR REVIEW

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# TABLE OF CONTENTS

*Page*

## TABLE OF CONTENTS

*Page*

## TABLE OF CONTENTS

*Page*

## TABLE OF AUTHORITIES

*Page(s)*

*Cases*

*Statutes*

## PETITION FOR REVIEW

Pursuant to Wis. Stat. §§808.10 and 809.62, Petitioner-Respondent Cree, Inc. ("Cree") petitions the Wisconsin Supreme Court to review the December 9, 2020 Court of Appeals, District II decision in *Cree, Inc. v. Labor and Industry Review Commission and Derrick Palmer*, Appeal No. 2019AP1671.

## ISSUES PRESENTED FOR REVIEW

1. Whether the Labor and Industry Review Commission ("LIRC") and the Court of Appeals erred in their interpretation and application of the Wisconsin Fair Employment Act's ("WFEA") substantial relationship test when they found that there was not a substantial relationship between Derrick Palmer's ("Palmer") multiple convictions for assaulting and battering women and the employment he sought at Cree, through which he would have regular, unsupervised interaction with women.

*Answer by the Court of Appeals*: The Court of Appeals found that Cree did not establish a substantial relationship between Palmer's multiple violent convictions and the Applications Specialist position he sought, and therefore affirmed LIRC's decision that Cree unlawfully discriminated against Palmer.

In so holding, the court acknowledged that Palmer's criminal record demonstrated a "tendency and inclination…to be physically abusive toward women" and that Palmer would "almost certainly" again be violent toward a woman. Nevertheless, the court—like LIRC before it—refused to acknowledge that such violent tendencies and inclinations were likely to appear on the job.

2. Whether LIRC and the Court of Appeals erred in disregarding the uncontested testimony of Cree's fact and expert witnesses concerning the nature of the position to which Palmer applied and the substantial relationship between his numerous domestic violence convictions and the potential for violence against those with whom he would interact if employed at Cree.

*Answer by the Court of Appeals*: Upon concluding in a footnote that "both the ALJ and LIRC" found the unrefuted testimony of multiple Cree witnesses concerning the stress of the work environment to not be credible, the Court of Appeals concluded that it was "not at liberty to consider the testimony related to stressful aspects of the work environment at Cree."

In a second footnote, the Court of Appeals concluded that LIRC gave the uncontroverted testimony of Cree's expert, Dr. Darald Hanusa, "no weight," and that it was "restrained by LIRC's determinatio[n]."

## STATEMENT OF CRITERIA WARRANTING REVIEW

### I. First Issue: Application Of The Substantial Relationship Test To Domestic Violence Crimes

This case presents a legal question of paramount importance to Wisconsin employers and employees: How should employers interpret and apply the substantial relationship test to convictions for egregious and repeated domestic violence.

This Court has only addressed the WFEA's substantial relationship defense three times since the inception of the Act's prohibition against conviction record discrimination. In doing so, the Court provided a "practical" test that allowed employers to determine in a "confident, timely, and informed way" whether a substantial relationship between the conviction and the employment existed. *Milwaukee County v. LIRC*, 139 Wis. 2d 805, 806-807, 407 N.W.2d 908 (1987). Rather than require an employer to assess the unique circumstances related to an individual's conviction record, the test assumed that the risk was "unreasonable" and need not be undertaken by an employer if the *general* character traits and inclinations to behave in a certain way reflected by the elements of the criminal conviction(s) could reappear in the workplace. *Id.*

But a slew of irreconcilable decisions from LIRC—which have inconsistently applied the substantial relationship test to convictions for violent domestic crimes against women and which, contrary to this Court's admonition, have required an individualized assessment of the specific underlying circumstances of the crimes—have paralyzed employers, confounded reviewing tribunals, and created unreasonable risk of harm to employers, employees, and the public.

This case's procedural history confirms the problem. When answering the question of whether a substantial relationship existed between Palmer's numerous convictions for violence against women and Cree's Applications Specialist position the four reviewing tribunals responded as follows: yes, no, yes, no. LIRC and the Court of Appeals—both of whom said no—improperly interpreted the substantial relationship test to require an identity between *the context in which the offenses were committed* and *the context in which the job duties would be carried out*. In doing so, they not only disregarded the Court's "practical" test, but they advanced an inappropriate, unsupported, and harmful belief that egregious violence committed against women away from work cannot carry into the workplace.

Absent this Court's intervention, both confirming and clarifying the substantial relationship test, employers will remain confounded in limiting the risk of harm in the workplace created by individuals who engage in egregious domestic violence against women. Accordingly, the criteria set forth in Wis. Stat. §§809.62(1r)(b), (c)(2) and (3), and (d) fully support granting this petition.

## II. Second Issue: The Authority To Reject Unrefuted Evidence

The Court should also accept review to correct LIRC's erroneous exclusion—uncorrected by the Court of Appeals—of uncontradicted, relevant witness testimony.

The Equal Rights Division ("ERD") Administrative Law Judge ("ALJ") admitted the un-objected-to testimony of Cree's Senior Recruiting Specialist Lee Motley ("Motley") and Associate General Counsel Melissa Garrett ("Garrett") that the Applications Specialist position was a fast-paced, high pressure job, with "very high expectations," and requiring quick turnaround, and as a result entailed "blunt" communication in which people "g[o]t yelled at occasionally." So too, the ERD admitted their un-objected-to testimony that the job involved outside, unsupervised travel to visit customers and interact with the public. (App. 073,113).[1]

With no contrary evidence, LIRC ignored this testimony, concluding that there was "*nothing* in the record regarding the types of interactions with co-workers or with the public that might raise a concern that the complainant would act in a violent manner." In a post-decision note, LIRC attempted to justify its disregard of this undisputed evidence by citing to the ALJ years-later conclusion that—*only with respect to the amount of stress in the workplace*—Cree's witnesses were not credible. (App. 031,038) (emphasis added).

The Court of Appeals adopted this unsubstantiated and after-the-fact "credibility finding" and—based on it—likewise disregarded Motley and Garrett's undisputed testimony, all while acknowledging that it "may have made a difference" in the case. (App. 006).

LIRC and the Court of Appeals similarly and inappropriately disregarded Dr. Hanusa's undisputed expert testimony. The ERD admitted Dr. Hanusa's expert opinion—supported not only by his own observations, but also scholarly articles and statistics—that the best predictor of future violence is past violence and that a man's willingness to use violence in an intimate setting has a "direct relationship" to his willingness to use violence in other settings, such as the workplace. (App. 097,101). Yet, engaging in

[1] Citations to "App. ___" refer to pages of Cree's Appendix.

the individualized assessment which the Supreme Court held was not contemplated by the substantial relationship test, LIRC gave no weight to Dr. Hanusa's opinion, deeming it "unhelpful" because he did not personally evaluate Palmer or account for the anger management and criminal thinking courses he took after his third conviction for violence toward a woman. Worse, LIRC then offered its own unsupported and highly questionable belief that crimes perpetrated against women in a domestic setting are unlikely to recur outside that setting. (App. 032).

These decisions—which found no substantial relationship—have no support in the record. Further they entirely disregard the unrefuted testimony of Motley, Garrett, and Dr. Hanusa, and erroneously attempt to do so relying upon barebones, after-the-fact credibility findings and weight decisions. Pursuant to Wis. Stat. §809.62(1r)(a) and (c)(3), the Supreme Court should accept review of this case to resolve the question of whether LIRC may adopt—and a reviewing Court may then accept—unsupported credibility and weight determinations which disregard undisputed testimony. In the absence of intervention by this Court, such disregard of relevant and undisputed evidence is likely to recur and will—as occurred here—deprive parties of the fundamental due process right to rely upon relevant, undisputed witness testimony.

## STATEMENT OF THE CASE

### I. Nature Of The Case

This action involves Palmer's claim that Cree violated the WFEA's prohibition against employment discrimination based on conviction record when it rescinded his conditional offer of employment upon learning of his violent criminal record, which included numerous acts of egregious physical and sexual violence against a woman.

While the WFEA provides that an employer may refuse to hire an applicant based on his conviction record if the circumstances of the offense(s) "substantially relate" to the

circumstances of the position sought (Wis. Stat. §111.335(3)(a)(1)), LIRC and the Court of Appeals effectively found that the circumstances of violent crimes perpetrated against a woman in a domestic setting can have no "substantial relationship" to the workplace.

In addition to the important questions regarding the interpretation and application of the "substantial relationship" test, this case also involves significant questions regarding the authority to, in the absence of any legal or factual support, reject uncontroverted evidence as incredible or unworthy of weight.

## II. Statement of Facts

### A. Cree's Applications Specialist Position

When in 2015 Palmer sought employment with Cree, it manufactured and marketed lighting components and products throughout the world. Its 600,000 square foot location in Racine, Wisconsin—where Palmer applied for an Applications Specialist position—was home to approximately 1,100 employees—about 50 percent of whom were female—and included both assembly operations and administrative offices.[2] (App. 070).

Applications Specialists were chiefly responsible for designing and recommending the installation of appropriate lighting systems for Cree customers. Accordingly—in addition to working with other employees—the job entailed regular direct contact with customers, including travel to customer facilities to meet and discuss lighting site plans, building code requirements, and related issues. Cree also expected its Applications Specialists to travel to and represent the Company at multi-day trade shows, which often included overnight hotel stays. The Applications Specialist position was fast-paced and demanding, including as the

[2] Cree sold its Lighting Products business unit—including its Racine facility—to Ideal Industries, Inc. on May 13, 2019.

result of the need to balance multiple projects and meet customer deadlines, which were often of short duration. (App. 072-073).

Cree did not closely supervise its Applications Specialists but instead expected them to apply their own project management skills to independently drive projects to completion. When traveling to meet with customers or attend trade shows, Applications Specialists were entirely unsupervised. *Id.*

Applications Specialists had access to virtually the entire Racine facility, excepting only a secured research and development area. While the facility had some security cameras, coverage was limited primarily to points of entry and exit and certain high-traffic areas but did not cover many isolated areas throughout the building. Further, in its various assembly areas—which encompassed much of the 600,000 square foot facility—noise levels were so loud that it would not be possible to hear someone, even if they were screaming. (App. 071,112).

As a part of meeting customer demands, Applications Specialists worked in a high-stress environment. Per Motley and Garrett's undisputed testimony, the pressure of meeting customer deadlines and resolving quality issues resulted in often "blunt" and abrasive communications between employees. The Company expected its Applications Specialists to have "thick skin" and take direction in a calm and even-keeled manner. (App. 073,113).

### B. Palmer Receives A Conditional Employment Offer

After completing the interview process related to Palmer's application, in June of 2015 Cree offered Palmer the Applications Specialist position subject to him passing a standard background check and drug test. After he received the offer, Palmer disclosed to Motley that he had a criminal record stemming from a domestic dispute with a former live-in girlfriend. (App. 053,056-057,076).

### C. Cree Learns Of Palmer's Violent Criminal Record And Rescinds Its Conditional Offer

The criminal history which Cree obtained for Palmer included only convictions in Wisconsin during the preceding seven years. It revealed that in 2012, less than three years before seeking employment with Cree, Palmer was convicted of eight separate offenses:

- Strangulation and Suffocation (two counts)
  Wis. Stat. §940.235(1) – 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.

- Battery (four counts)
  Wis. Stat. §940.19(1) – 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.

- 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.

- Criminal Damage to Property
  Wis. Stat. §943.01 – Whoever intentionally causes damage to any physical property of another without the person's consent is guilty of a Class A misdemeanor.

Palmer was sentenced to 30 months prison time and 30 months extended supervision for his strangulation and suffocation convictions, and to four years' probation for his battery, sexual assault, and criminal damage to property convictions. (App. 124-132).

After reviewing Palmer's criminal history report, Cree determined that his convictions disqualified him from holding the Applications Specialist position and it therefore rescinded his employment offer. (App. 067,081,112-113).

Cree later learned that Palmer's convictions arose out of a series of disturbingly violent acts against a former girlfriend, L.R. During the incident that caused L.R. to contact law enforcement, Palmer pushed her with so much force that she fell onto a bed, bounced off, and hit her head on the floor. After he forcibly used his hand to cover her nose and mouth, rendering her unable to breathe, Palmer forced sexual intercourse upon her. (App. 148-149).

L.R. also reported Palmer's history of violence against her. On one occasion, 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. On another occasion, Palmer grabbed L.R. by the neck and squeezed so hard she could not breathe, proceeded to viciously beat her with a belt, and then raped her. *Id.*

### D. Palmer's Other Convictions For Violence

The criminal history report Cree obtained revealed only a portion of Palmer's lengthy pattern of violence against women. At the August 30, 2016 ERD hearing, Palmer acknowledged that he was a proven recidivist who had been convicted of battering two other women. Due to his violent assault of *three different women* (the final of whom was abused on at least three separate occasions), in addition to his prison sentence, Palmer was sentenced to prison and also placed on Wisconsin's sexual predator registry. (App. 065-066).

### E. Dr. Hanusa's Unrefuted Expert Testimony

At the ERD hearing, Cree presented unrefuted testimony from Dr. Hanusa, a highly qualified and respected expert in the field of domestic violence. Dr. Hanusa obtained a Ph.D. in Social

Work from the University of Wisconsin with a specialty in domestic violence, is a board-certified and licensed clinical social worker who has been practicing for nearly 40 years, and has counseled approximately 4,000 male batterers. Dr. Hanusa also co-developed the State of Wisconsin's certification program for batterer treatment providers and, at the time of the hearing, was Chairperson of the Wisconsin Batterers Treatment Providers Association. (App. 096-097,133-140).

Dr. Hanusa testified based on his expertise, training, and substantial first-hand experience counseling batterers—further supported by the academic research in his field—that using violence in an intimate relationship has a "direct relationship" to using violence in other settings. Specifically, those who use violence in a domestic setting often use violence in the workplace as well. (App. 097-098).

Dr. Hanusa also testified that male domestic batterers are violent at work because they see it generally as a means of asserting power and control over others (regardless of gender), including when they are frustrated, angered, or need to solve a problem. As Dr. Hanusa explained, the best predictor of future violence is past violence. Because of this proven link between the willingness to engage in domestic violence and the willingness to engage in generalized violence, the treatment program developed by Dr. Hanusa and utilized by the Wisconsin Department of Corrections is broadly focused on moral development, improved social skills, and conflict resolution. (App. 097-098,100-101).

## III. Procedural History

### A. Disposition Before The ERD

At the hearing, the ALJ admitted the undisputed testimony of Motley and Garrett regarding Cree's Applications Specialist job and of Dr. Hanusa regarding the correlation between domestic violence and workplace violence. (App. 072-073,097-098,100-101,113).

In its May 5, 2017, decision, which dismissed Palmer's complaint with prejudice, the ERD held that because Palmer's convictions *did* substantially relate to the Applications Specialist position, Cree did not unlawfully discriminate against Palmer when it revoked his employment offer for that job. The ERD considered and then rejected the contention—implicit in some LIRC decisions—that the character traits associated with crimes that occur in a private setting cannot satisfy the substantial relationship test in a work place setting.

The ERD's decision did not specifically reference Motley or Garrett's undisputed testimony regarding the stressful nature of the Applications Specialist position, or that of Dr. Hanusa's regarding correlation and risk of recidivism. Nor did it provide any assessment of the credibility of these witnesses. (App. 042-049).

### B. Disposition Before LIRC

Palmer appealed and in its December 3, 2018 decision LIRC reversed the ERD. While acknowledging that Cree's witnesses testified regarding the "high stress" nature of the Applications Specialist position, LIRC decided, of its own volition, to disregard this uncontested testimony because it believed it was not sufficiently elaborate or credible. More specifically, LIRC's note following its decision stated it conferred with the ALJ regarding his impressions of the demeanor of Motley and Garrett and that the ALJ "indicated that he did not find the respondent's witnesses credible with respect to the amount of stress in the workplace." The ALJ offered "no specific demeanor impressions," to support the witness credibility determinations.

LIRC also rejected the undisputed testimony of Cree's expert regarding the observable correlation between the willingness to engage in violence in an intimate relationship and the willingness to use violence in other settings, inexplicably commenting that it was "unhelpful in deciding whether the complainant's conviction

record made him likely to commi[t] a criminal offense at the job at issue."

After rejecting Dr. Hanusa's unrefuted testimony, LIRC stated that "finding a substantial relationship in this case would require a conclusion that unsupervised contact with other people is in and of itself a circumstance that might lead the complainant to engage in violent conduct." It then went even further, offering its entirely unsupported belief 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 workplace." (App. 020-033,038).

### C. Disposition Before The Circuit Court

Cree appealed LIRC's decision to the Racine County Circuit Court, which on August 12, 2019, reversed the decision. Referencing Cree's testimony regarding the stressful nature of the work environment, the court stated, "[w]hile everyone experiences stress at work, not everyone reacts the same to stress…Palmer clearly demonstrated how he reacts to stress given the specific nature of his crimes."

The Circuit Court also took issue with LIRC's rejection of Dr. Hanusa's undisputed testimony and its articulated "domestic setting" rule, noting that although "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," it nevertheless "ruled based upon what the Court would term a 'hunch' that…Palmer will not reoffend while employed at Cree." The Circuit Court rejected LIRC's unsupported belief, and instead found that the circumstances of Palmer's convictions *did* substantially relate to the circumstances of the job and therefore dismissed Palmer's complaint. (App. 011-019).

### D. Disposition Before The Court of Appeals

LIRC and Palmer appealed the Circuit Court's decision to the Court of Appeals, which on December 9, 2020 reversed the Circuit Court and concluded that Cree failed to satisfy the substantial relationship test. While acknowledging that Palmer would "almost certainly" again be violent toward another woman, the Court of Appeals did not believe that these violent tendencies and inclinations could occur on the job. In reaching this conclusion, the Court of Appeals chose not to consider the unrefuted testimony of Motley and Garrett regarding the stresses of the Applications Specialist position, and that of Dr. Hanusa regarding the correlation between domestic and generalized violence. (App. 001-010).

## ARGUMENT

## I. The Court Should Review LIRC's And The Court Of Appeals' Erroneous Interpretation And Application Of The Substantial Relationship Test

### A. What Constitutes A Substantial Relationship Within The Meaning Of The WFEA Is A Question Of Law Reviewed *De Novo*

Under the WFEA, "it is not employment discrimination…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." Wis. Stat. §111.335(3)(a)(1). As applied here, the first issue for review is whether this substantial relationship defense bars Palmer's claim because his numerous and repeated convictions for assaulting and battering women substantially related to Cree's Applications Specialist position (which entailed regular, unsupervised interaction with women).

Both the meaning and the application of the WFEA's substantial relationship defense are questions of law. *Applied*

*Plastics, Inc. v. LIRC*, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984); *see also Keeler v. LIRC*, 154 Wis. 2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990) (holding that where—as here—the facts are uncontradicted, LIRC's determination that a party failed to bear its burden of proof is a conclusion of law). As a result, courts are to review LIRC's "interpretation and application" of this statutory defense "*de novo*." *Wis. Bell, Inc. v. LIRC*, 2018 WI 76, ¶29, 382 Wis. 2d 624, 914 N.W.2d 1 citing *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 496. To that end, in *Tetra Tech EC, Inc. v. DOR*, this Court reversed its nearly half-century practice of deferring to administrative agency interpretations of the laws they are responsible for enforcing. *Id.* ¶108. Subsequently, the Legislature endorsed the Court's holding and made significant revisions to Wis. Stat. Ch. 227 to make clear that agency interpretations of the law are owed no deference. *See, e.g.,* Wis. Stat. §227.57 (11) ("Upon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law.").

In this case, LIRC has argued that its interpretation of the WFEA—which it dubs a specialized statute—is entitled to due respect. But to receive such deference, LIRC would need 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 and—particularly in light of its inconsistent decisions—cannot offer any requisite explanation as to why its interpretation and application of the WFEA's substantial relationship defense is entitled to any deference. Rather, LIRC offers "nothing but a rote recitation of its background with the subject matter," and as a result this Court must review this matter giving no deference to LIRC. *Id.*

### B. Review Is Necessary To Clarify And Harmonize The Interpretation and Application Of The Substantial Relationship Test To Domestic Violence Convictions

#### 1. *The Court's Interpretation Of The Substantial Relationship Test*

The statutory language creating the substantial relationship defense is succinct. It does not define what it means for the circumstances of a conviction to "substantially relate" to the circumstances of a particular job, nor does it instruct employers regarding how to make that determination. Wis. Stat. §111.335(3)(a)(1). Given this ambiguity, the Supreme Court has interpreted this statutory provision and established a framework in which to apply it. On the three occasions that it has done so—none of which involved underlying convictions regarding domestic violence against women—the Court has prescribed a necessarily simple and practical methodology for determining when a substantial relationship exists. *See generally Law Enf't Stds. Bd. v. Lyndon Station*, 101 Wis.2d 472, 305 N.W. 2d 89 (1981); *Gibson v. Transp. Comm'n*, 106 Wis.2d 22, 315 N.W.2d 346 (1982); *Milwaukee County*, 139 Wis. 2d 805.

In *Gibson*, the Court addressed the question of what type of investigation was required before the Department of Transportation ("DOT") could refuse to grant a school bus driver's license to an individual convicted of armed robbery. Prior to denying the license, the DOT ascertained the elements of the crime for which Gibson was convicted and determined that the conviction substantially related to the circumstances of the school bus driver position. The Court concluded that the DOT's approach was the right one and expressly rejected Gibson's contention that an "inquiry into the specific factual circumstances of the crime upon which the…conviction was based" was required. *Gibson*, 106 Wis. 2d. at 28.

After reviewing the elements of Gibson's armed robbery conviction, it found they "indicate[d] a disregard for both the personal and property rights of others" and a "propensity to use force or the threat of force to accomplish one's purposes." *Id.* Without requiring the DOT to present proof that children on any school bus Gibson might drive would possess "articles of value" which might reignite Gibson's penchant to rob, the Court held that Gibson's conviction substantially related to the job because it indicated personal characteristics "contradictory to the extreme patience, level-headedness and avoidance of the use of force" necessary in a school bus driver. *Id.* at 27-28. The Court's holding implicitly rejected the notion that the substantial relationship test requires an identity between the context in which the offenses were committed and the context in which the job duties are carried out.

In *Milwaukee County*, the Court addressed the questions "what is the nature of the inquiry required by [the substantial relationship test]?" and "[w]hat procedure is required in order that courts may assess the 'circumstances' in [a] particular case?" *Milwaukee County*, 139 Wis.2d at 818. It held that there must "be a semblance of practicality about what the test requires" so that employers using it can "proceed in their employment decisions in a confident, timely, and informed way." *Id.* at 826-827. As a result—as it did in *Gibson*—the Court rejected any interpretation of the test that would require "a full blown…hearing" regarding the unique facts surrounding the conviction and instead instructed employers and reviewing tribunals to focus on the "general facts" and "general, character-related circumstances." *Id.* at 825. Further, the Court did not require an employer to assess the level of risk associated with a particular individual's conviction record, but instead *assumed* that the risk was "unreasonable" and need not be shouldered by an employer if the general character traits and inclinations to behave in a certain way reflected by the convictions could reappear in the workplace. *Id.* at 823 ("[T]he 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.") (emphasis added).

### 2. *LIRC's Inconsistent Interpretation And Application Of The Substantial Relationship Test*

#### a. **LIRC's Focus On General Facts And Character Circumstances Involving Non-Domestic Violence Convictions**

In a number of cases following *Gibson* and *Milwaukee County*, LIRC has properly avoided considering superficial matters relating to the context of the offense. Rather it has concluded that simply because the conduct for which the individual was convicted occurred *outside* the employment setting did not mean that the conviction was not substantially related to the job.

For instance, in *Weston v. ADM Milling Co.*, ERD Case No. CR200300025 (LIRC Jan. 18, 2006), LIRC found that a substantial relationship existed between Weston's convictions for second degree sexual assault and aggravated battery and the circumstances of the factory pack and load position he sought. Applying the "common sense approach" required under *Gibson* and *Milwaukee County*, LIRC found that the traits associated with the convictions—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 resolve conflicts; the inability to control anger or other emotions—substantially related to the circumstances of the position, which entailed unrestricted access to unsecured property, work with little supervision in close proximity to others (including female employees), and location in a vast facility with many hiding places and high noise levels. *Id.*

Notably, LIRC flatly rejected the argument that because none of Weston's crimes occurred in an employment setting, the substantial relationship test could not be met, concluding instead

that the test did not "requir[e] an identity between the context in which the offenses were committed and the context in which the job duties are carried out." *Id.; see also Benna v. Wausau Ins. Cos.*, ERD Case No. 8401264 (LIRC July 10, 1989) ("[T]he Complainant's suggestion that the substantial relationship test can be met only if the contexts of the offense and the job duties are identical is a misstatement of the substantial relationship test.").

LIRC reached a similar conclusion in *Hoewisch v. St. Norbert Coll.*, ERD Case No. CR200800730 (LIRC Aug. 14, 2012). There, an associate professor for teacher education instructed college students on how to teach elementary, middle, and high school students and visited the elementary and secondary schools where her college students taught. *Id.* She lost her job when she was convicted of child abuse for spanking her foster daughter with a spatula. *Id.*

In determining that Hoewisch's conviction substantially related to her job, LIRC did not analyze whether the familial relationship between Hoewisch and her foster daughter was similar to that between Hoewisch and the children she encountered in her job, or whether Hoewisch was likely to develop such a relationship with them. Rather, it utilized the "common sense" approach this Court requires and held that the character traits associated with the offense—inability to control anger, frustration, or other emotions toward children; disregard and failure to accept responsibility for the health and safety of children; poor self-control, etc.—were substantially related to the circumstances of Hoewisch's associate professor position, which required regular contact with children. *Id.* As would have been true for Palmer's employment at Cree, LIRC concluded that Hoewisch "would not be able to guarantee that she would not find herself alone with a child under 12 years of age" (or in Palmer's case, alone with a woman).

### b. LIRC's Context-Specific Inquiry In Cases Involving Domestic Violence

Surprisingly, although LIRC's interpretation and application of the substantial relationship test in *Weston* and *Hoewisch* complied with the practical approach this Court requires, its decisions involving the domestic battery or sexual assault of women do not.

For instance, in *Robertson v. Family Dollar Stores, Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), LIRC reversed the ERD's decision finding that a substantial relationship existed between Robertson's conviction for second degree sexual assault and his stocker position. In so concluding, LIRC acknowledged that the character traits evidenced by a conviction for second degree sexual assault included "a willingness to engage in a nonconsensual sexual act." *Id.* Nevertheless, inexplicably analyzing the context in which Robertson's offense occurred—i.e., it "stemmed from a domestic incident which occurred in his home and involved his girlfriend"—LIRC found that there was no evidence suggesting that Robertson "pose[d] a general danger to all females." *Id.* In contrast to its holdings in *Weston* and *Hoewisch*, LIRC held that "the mere fact that there could conceivably be a scenario in which [Robertson] could assault someone without being heard does not warrant a conclusion that the job presented a substantial opportunity to do so."[3] *Id.*

Similarly, while offering lip service to this Court's general rule that "the circumstances of the offense are gleaned from a review of the elements of the crime," in *Knight v. Wal-Mart Stores East LP*, ERD Case No. CR200600021 (LIRC Oct. 11, 2012), LIRC nonetheless relied upon its analysis of the underlying facts and

[3] Even if LIRC's analysis of context was proper, which it was not, the facts are easily distinguishable from those here. Specifically, Robertson's work environment—unlike that of Palmer—included an always-present security guard and manager (such that he never worked alone) and well-positioned security cameras. *Id.*

context involving Knight's convictions for sexual assault, recklessly endangering safety, and false imprisonment in concluding that the circumstances of his convictions did not substantially relate to the circumstances of his warehouse position:

> [The] convictions were all based upon a single incident that took place in November of 1994. The victim…was an individual with whom the complainant had a dating relationship, but who was attempting to end that relationship. The incident took place in the complainant's home where [the victim] and the complainant were watching a movie together. The complainant threatened [the victim] with a gun and a knife, threatened to kill himself, and had sex with her against her will.

As was true in *Weston*, LIRC recognized that the elements of Knight's offenses revealed character traits including "willingness to obtain sexual gratification by use of force…willingness to restrain another against her…will, and a tendency to act recklessly without regard for the consequences for the safety and well-being of another." Nonetheless, LIRC inexplicably held that Knight's personal relationship with his victim and his decision to engage in criminal conduct in a "domestic setting" meant that "the context of [his] crimes was distinct from the context of his work environment at Wal-Mart."[4]

[4] Again, distinguishable from the facts here, LIRC found that Knight's work environment and his activities and movements *were* heavily monitored. *Id.* Relying on these factors, LIRC concluded that the circumstances of Knight's job did not provide a significant opportunity to reoffend and therefore it was "not necessary to rely on the so-called 'domestic setting' of the complainant's crimes in order to reach the conclusion that they are not substantially related to the circumstances of the job." *Id.*

### 3. *The Misapplication Of The Substantial Relationship Test In This Case*

With the exception of one common thread, the case at hand is far more akin to *Weston* and *Hoewisch* than *Robertson* and *Knight*. LIRC acknowledged that the character traits associated with the violent crimes Palmer committed included disregard for the health and safety of others, particularly women; willingness to obtain sexual gratification by use of force; use of violence to achieve control over others; and inability to control anger or other emotions. (App. 028-029). And like in *Weston* and *Hoewisch*, the uncontroverted evidence established that the Applications Specialist position would have provided Palmer with largely unsupervised access in a cavernous and largely unmonitored facility to those he repeatedly victimized, i.e., women. What's more, Palmer's job entailed unsupervised meetings, road trips, and overnight hotel stays in which he would interact with Cree's clients, potential clients, and the public.

Consistency is a virtue in administrative determinations and—in the context of the WFEA—allows employers to proceed in a "confident, timely and informed way." *Milwaukee County*, 139 Wis.2d at 826-827; *see also Johnson Controls, Inc. v. Employers Ins. of Wausau,* 2003 WI 108, ¶95, 264 Wis. 2d 60, 665 N.W.2d 257 (recognizing that frequent departure from prior case precedent undermines confidence in the reliability of decisions). Had LIRC properly and consistently applied the substantial relationship test in this case, the result would have mirrored that in *Weston* and *Hoewisch*. Instead, ignoring the very elements and workplace characteristics that have previously proven dispositive, LIRC and the Court of Appeals reached the opposite outcome.

Contrary to this Court's admonition concerning the substantial relationship test, through their decisions here (and in other cases) LIRC and the Court of Appeals have effectively required employers to engage in the untenable exercise of ascertaining and examining the factual underpinnings of an

individual's criminal convictions rather than looking at the elements of the crime and the opportunity to re-offend in the workplace. They then strayed even further off course to hold that the context in which the crimes were committed—i.e., where they occurred and against whom—was key. This faulty legal analysis led to the equally faulty holding that Palmer's criminal record demonstrated only a "tendency and inclination to behave a certain way in a particular context—to be physically abusive toward women in a live-in boyfriend/girlfriend relationship," which was not likely to reappear in the work setting.[5] (App. 009,013). And on top of all these errors, not only did this astounding conclusion have no support in the record, but it directly contradicted the unrefuted expert testimony that domestic batterers like Palmer are likely to be violent in the workplace.

LIRC's inconsistent and haphazard application of the substantial relationship test in cases involving violent domestic crimes has hopelessly complicated what this Court requires to be a practical and straightforward test. Further, it has exposed employers, employees, and the public to unjustifiable risk of recidivism in the workplace, and has created a fog of uncertainty as to how employers are to determine whether an applicant's conviction(s) are substantially related to his employment. The Supreme Court must therefore grant review as necessary to harmonize the law, provide employers with appropriate guidance as to how to comply with it, and protect the public.

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[5] In so holding, LIRC and the Court of Appeals also ignored the many dissimilarities between this case and *Robertson* and *Knight*, including in the level of supervision and monitoring in the workplace. So too, they ignored Palmer's proven recidivism. Unlike in *Robertson*, here it cannot be said that "twenty years have elapsed since the conviction without the complainant's having reoffended" and therefore he "does not pose a general threat to all females, such that the mere presence of females in the workplace would create a risk of recidivism for him." *Robertson* (LIRC Oct. 14, 2005). Palmer had just been released from prison at the time he applied at Cree and his most recent convictions involved the *third* woman he had been convicted of brutally assaulting.

## II. The Court Should Review LIRC's Erroneous And Unsupported Credibility And Weight Determinations

Even ignoring LIRC's faulty application of the substantial relationship test—which the Court of Appeals adopted—its ultimate conclusion that Palmer's numerous and repeated convictions for violence against women were not substantially related to the Applications Specialist position required it to entirely disregard the undisputed evidence in this case. While it is generally not the function of a reviewing court to "judge the credibility of the witnesses or the weight of the evidence on review," LIRC's evidentiary decisions require the Supreme Court to either clarify the law or consider a change to its policy. *Samens v.* LIRC, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984). Specifically—in the absence of *any* conflicting evidence—may LIRC and reviewing courts disregard determinative testimony due to alleged credibility or evidentiary weight considerations?

### A. LIRC And The Court Of Appeals Improperly Disregarded Cree's Unrefuted Testimony Regarding The Nature of The Job And The Opportunity To Reoffend

Though it was not a specifically enumerated factual finding, LIRC's finding that Palmer's work environment would *not* be particularly stressful, and that it was not clear whether he would be traveling, interacting, or socializing with women when visiting Cree clients or at trade shows he would be required to attend, was key to its determination that the circumstances of Palmer's convictions did not substantially relate to the circumstances of the Applications Specialist job. Specifically, given that Palmer's convictions evinced underlying traits which included "inability to control anger, frustration, or other emotions" and "the use of violence to achieve power or to solve problems," the conclusion that the substantial relationship test was not satisfied holds *only if* the job was not stressful and would not provide opportunities for those traits to reappear. (App. 028).

The problem is, Motley and Garrett collectively testified that Cree was an employer with "very high expectations" that placed "a lot of pressure" on its employees, that the Applications Specialist work environment was fast-paced and required very quick turnaround, and that communication between and amongst employees was often "blunt." This testimony drew no objections and Palmer offered no contrary evidence that suggested, for instance, that the work environment was actually tranquil and undemanding. (App. 072-073,113).

Although it adopted as fact Motley and Garrett's testimony on a number of other topics, LIRC inexplicably concluded that—only as to this point—both Motley and Garrett were insufficiently credible and elaborate. *Id.* And it also disregarded their testimony about the required unsupervised travel to Cree's customers and trade shows, during which Palmer would inevitably interact with women. Disregarding these undisputed facts, or finding them "not credible," allowed LIRC to make the factual finding that the Applications Specialist position did not entail "the types of interactions with co-workers or with the public that might raise a concern that the complainant would act in a violent manner." *Id.*

LIRC's credibility determinations and associated findings of fact were subsequently—and erroneously—adopted by the Court of Appeals. While Wis. Stat. §227.57(6) provides that a reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on any *disputed* finding of fact," there were *no disputed facts here*. *See also Jaeger Baking Co. v. Kretschmann*, 96 Wis. 2d 590, 594, 292 N.W.2d 622, 624 (1980) (holding that no deference will be accorded an agency finding when the finding is based entirely on uncontroverted evidence). Rather, Cree's testimony regarding the stressful nature of the work environment, and the unsupervised outside meetings and travel required, was undisputed in every respect—no one objected to it and no one offered conflicting testimony. Just as a reviewing court is not bound to accept LIRC's decision as to the weight of an undisputed fact, so too due process and common sense dictate that

it should not be bound to accept LIRC's rejection of completely unrefuted testimony as either incredible or simply to be disregarded.

Further, while Wis. Stat. §227.57(6) did not require the court to adopt LIRC's weight determination, it did obligate the court to affirmatively act "if it f[ound] that the agency's action depend[ed] on any finding of fact that [wa]s not supported by substantial evidence." *See also Universal Foods Corp. v. LIRC*, 161 Wis. 2d 1, 7, 467 N.W.2d 793, 795 (Ct. App. 1991) citing *Link Indust., Inc. v. LIRC*, 141 Wis. 2d 551, 558, 415 N.W.3d 574 (Ct. App. 1987) ("We are bound to accept the findings of the commission unless the evidence was insufficient or incredible as a matter of law."). LIRC's conclusions—which the Court of Appeals acknowledged "may have made a difference"—that the work environment was not stressful and provided no opportunity to reoffend finds *no* support in the record. Indeed, one can only reach that conclusion by ignoring all available evidence on these subjects.

Pursuant to Wis. Stat. §809.62(1r)(a) and (c)(3), the Supreme Court should accept review of this case to resolve the question of whether LIRC may make wholly unsupported credibility determinations which are contradicted by undisputed evidence, or otherwise completely disregard undisputed facts, and whether a reviewing court should accept such outcome determinative actions. In the absence of intervention by this Court, the disregard of relevant and undisputed evidence under the guise of "credibility determinations" will continue to occur and will deprive parties of the fundamental due process right to rely upon relevant and undisputed witness testimony.

### B. LIRC And The Court Of Appeals Improperly Disregarded Dr. Hanusa's Unrefuted Expert Testimony

In similar fashion, both LIRC and the Court of Appeals improperly rejected Dr. Hanusa's unrefuted expert testimony that

there *is* a correlation between a male batterer's willingness to engage in domestic violence and his willingness to engage in generalized violence, including in the workplace.

Though the record was devoid of *any* evidence (expert or otherwise) contradicting Dr. Hanusa's experientially and academically supported testimony, LIRC justified its decision to give it *no* weight—and to treat violence of male domestic batterers as only being relevant in a home setting—because Dr. Hanusa did not personally evaluate Palmer or consider his completion of anger management and criminal thinking courses. (App. 032). LIRC's "no weight" determination misapplied the substantial relationship test and what is relevant under it (i.e., the elements of the crime, not the unique factual underpinnings of the offense) and was therefore improper as a matter of law. Further, in rejecting Dr. Hanusa's testimony, LIRC once more deviated from its own prior decisions. Review by this Court is therefore necessary to correct this outcome-determinative error and clarify and harmonize the law.

Dr. Hanusa was not called upon to opine as to Palmer's *individualized* suitability for the position at issue or the efficacy of his supposed rehabilitation efforts. This is because—as this Court has admonished and LIRC has concluded in other decisions—any individualized assessment regarding Palmer's suitability for the position or unique risk of recidivism was irrelevant. *Milwaukee County*, 139 Wis. 2d at 823-824; *Sheridan v. United Parcel Serv.*, ERD Case No. CR20024955 (LIRC July 11, 2005) (holding that ALJ properly excluded testimony from complainant's treating psychologist as to the complainant's individual character traits and his likelihood of re-offending); *Jackson v. Summit Logistics Servs., Inc.*, ERD Case No. CR200200067 (LIRC Oct. 30, 2003) ("Incorporating 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.").

The critical analysis under the substantial relationship test is of "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*, (LIRC July 11, 2005). Dr. Hanusa spoke directly to this issue, offering 40 years of experience supported by the academic community regarding the general character traits associated with the crimes of male batterers—including their penchant to use violence to achieve power or solve problems, regardless of the physical setting in which they find themselves.

Though the agency has neither a Ph.D. in social work with a specialty in domestic violence, nor 40 years of experience researching and treating male batterers, and though it has not developed the State of Wisconsin's certification program for batterer treatment providers, LIRC nonetheless chose to disregard Dr. Hanusa's *undisputed* expert testimony in favor of its personal and wholly unsupported belief that domestic batterers never harm women in the workplace. But LIRC's belief finds *no* support in the hearing record, or any past hearing record for that matter. Accordingly, the Court of Appeals was not bound by and should have rejected both LIRC's weight determination and its related finding that the tendency of male batters to use violence to achieve power or solve problems is *not* likely to recur in the work setting. *Link*, 141 Wis. 2d at 558; Wis. Stat. §227.57(6). LIRC cannot be permitted to ignore uncontested evidence in order to make up its own facts. Rather, under Wis. Stat. §227.57(6), this Court (and any reviewing court) must set aside LIRC's action because it depends on findings not supported by substantial evidence in the record.

## CONCLUSION

For all of the foregoing reasons, Cree respectfully requests that the Court grant this petition in order to clarify the law, to establish guidelines necessary to allow employers to understand and competently and consistently apply the substantial relationship test, to ensure the proper consideration of undisputed,

outcome determinative evidence, and to otherwise protect the public from the unreasonable risk of placing criminals in work settings in which they have the real opportunity to reoffend.

Date: January 8, 2021.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§809.62(2), 809.62(4), and 809.81 for a petition and appendix produced with a proportional serif font. The length of this brief is 7,936 words, including footnotes.

Lindsey W. Davis

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## CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, including the appendix, which complies with the requirements of Wis. Stat. §809.19(12) and (13). I further certify that this electronic brief is identical in content to the printed form of the brief filed as of this date.

Lindsey W. Davis

Lindsey W. Davis

## APPENDIX CERTIFICATION

I hereby certify that filed with this petition, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. §809.62(2)(f). No portion of the record is required by law to be confidential.

Lindsey W. Davis

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## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 2021, I caused a copy of this Petition for Review and Appendix to be served upon each of the following persons via U.S. Mail, First Class:

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