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STATE OF WISCONSIN
SUPREME COURT

CREE, INC.,

Petitioner-Respondent-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

District: 2
APPEAL NO. 2019AP001671
Racine County Circuit Court Case No. 19-CV-703
The Honorable Michael J. Piontek, Presiding

BRIEF FOR PETITIONER CREE, INC.

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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 battering and sexually assaulting women and the employment he sought at Cree, Inc. ("Cree"), through which he would have regular, unsupervised interaction with women.

Answer by the Court of Appeals and LIRC: 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 and LIRC: In a footnote the Court of Appeals noted that "both the ALJ and LIRC" found the unrefuted testimony of multiple Cree witnesses concerning the stress of the work environment not to be credible, and it therefore 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 CONCERNING ORAL ARGUMENT AND PUBLICATION

Cree respectfully requests oral argument before the Court. Discussion with the Court regarding the interpretation of the WFEA's substantial relationship test, the application of the test to domestic violence convictions (including those present here), and the consideration to be afforded uncontested testimony of fact and expert witnesses will ensure that the Court has a thorough basis upon which to render its decision in this case.

So too, Cree respectfully requests publication of the Court's opinion. In deciding this case, LIRC and the Court of Appeals improperly interpreted the substantial relationship test to require an identity between the context in which Palmer's offenses were committed and the context in which the job duties would be carried out. In part relying upon this improper interpretation of the test and what is relevant under it, LIRC made barebones, after-the-fact findings on the credibility and weight to be afforded uncontested key fact and expert testimony, which the Court of Appeals left intact. The analysis and holdings of LIRC and the Court of Appeals disregarded the "practical" test called for by this Court and advanced an inappropriate, unsupported, and harmful presumption that egregious violence committed in the home against a purported girlfriend or wife does not carry into the workplace. A published opinion of this Court is necessary to provide crucial guidance to employers—who are tasked with applying the substantial relationship test under the WFEA—regarding its application to domestic violence convictions, and to provide guidance to the Equal Rights Division ("ERD") and LIRC

concerning whether they may make unsupported credibility and weight determinations which disregard undisputed testimony.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal 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 convictions for egregious physical and sexual violence against women.

The WFEA provides that an employer may refuse to hire an applicant based on his conviction record if the circumstances of his offenses "substantially relate" to the circumstances of the position sought. Wis. Stat. §111.335(3)(a)(1). In interpreting the substantial relationship test, this Court has emphasized the need for practicality, not requiring employers to demonstrate an identity between the context in which a complainant's offenses were committed and the context in which the job duties are carried out, but instead instructing that the test is whether the *general* character traits and inclinations to behave in a certain way reflected by a complainant's criminal conduct and convictions could reappear in the workplace.

Notwithstanding this Court's admonition, LIRC misinterpreted and misapplied the substantial relationship test in this case, effectively holding that men convicted of battering and sexually assaulting women with whom they once had a relationship will confine their violence to a limited context—i.e., a domestic setting—and therefore the circumstances of their violent crimes can have no "substantial relationship" to the workplace. To justify this conclusion, LIRC rejected uncontroverted evidence that the inclination of Palmer—an admitted recidivist batterer of women—to react violently *was* likely to reappear in Cree's workplace. Specifically, with no support in the record or elsewhere,

LIRC substituted its belief in place of the unrefuted testimony of both an admitted expert in domestic violence that Palmer's repeated in-home use of violence against women did have a direct relationship to violence in the workplace, as well as of Cree employees that Palmer's sought-after job at Cree—which would have provided him with frequent and unsupervised interactions with women—was highly stressful.

Because LIRC has erroneously interpreted and applied the substantial relationship test, and at the same time explicitly rejected unrefuted, relevant testimony which proved that Palmer's repeated and violent sexual assault and battery of women would have created an unreasonable risk of harm at Cree, this Court must reverse LIRC's decision and dismiss Palmer's complaint in its entirety.

II. Statement of Facts Compelling Reversal of LIRC's Decision

A. Cree's Applications Specialist Position

When in 2015 Palmer sought employment with Cree as an Applications Specialist, it manufactured and marketed lighting components and products throughout the world. Cree's 600,000 square foot location in Racine, Wisconsin—where Palmer would have worked—was home to approximately 1,100 employees, about half of whom were women. The Racine location included assembly operations, administrative offices, and communal social spaces—such as a cafeteria, dining areas, and a fitness center—where employees interacted outside their designated work environments. The Company's female employees held positions that were physically located all over its vast facility.[1] (P-App. 070-071, 112).

Cree's Applications Specialists were chiefly responsible for designing and recommending the installation of appropriate

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

lighting systems for its customers. As a result—in addition to working with other employees such as Cree's engineering teams—the job entailed at least daily 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. (P-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 and did not cover the many isolated areas throughout the building. Further, in its various assembly areas—which encompassed much of the 600,000 square foot facility—there were many "nooks and crannies" where foot traffic was low, employees could be unobserved and isolated, and noise levels were so loud that it would not be possible to hear someone, even if they were screaming. (P-App. 071,112).

The Applications Specialist position was fast-paced and demanding and involved the need to balance multiple projects and meet customer deadlines, which were often of short duration. As a part of meeting customer demands, Applications Specialists worked in a high-stress environment. To that end, Cree's Senior Recruiting Specialist, Lee Motley ("Motley"), and its Associate General Counsel, Melissa Garrett ("Garrett"), provided unrefuted testimony that the pressure in the job of satisfying customer needs and resolving quality issues often resulted in "blunt" and abrasive communications between employees. As a result, Cree needed its

Applications Specialists to have "thick skin" and take and give direction in a calm and even-keeled manner. (P-App. 073-072,113).

B. Cree Learns of Palmer's Violent Criminal Record and Rescinds Its Conditional Offer

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

When Cree then searched for Palmer's criminal history, it was only able to obtain Palmer's convictions in Wisconsin during the preceding seven years. The criminal history revealed that in 2012—less than three years before seeking employment with Cree—Palmer was convicted of the following eight separate crimes:

- 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 in prison and 30 months of extended supervision for his strangulation and suffocation convictions, and to four years of probation for his battery, sexual assault, and criminal damage to property convictions. (P-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. (P-App. 067,081,112-113).

Cree later learned that Palmer's convictions arose out of a series of particularly violent acts against a former girlfriend, L.R., with whom Palmer said he had been "fighting really bad." During the incident that caused L.R. to call the police, Palmer pushed her with so much force that she fell onto a bed, bounced off, and hit her head on the floor. After he then pushed his hand over her nose and mouth, rendering her unable to breathe, Palmer forced sexual intercourse upon her. (P-App. 059, 148-149).

In her report to the police, L.R. also described Palmer's other acts 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, after Palmer grabbed L.R. by the neck and squeezed so hard she could not breathe, he proceeded to viciously beat her with a belt, and then raped her. *Id.*

C. Palmer's Other Convictions for Violence

The criminal history report Cree obtained did not reveal other horrific acts of violence against women for which Palmer was convicted. At the August 30, 2016 ERD hearing, however, Palmer

admitted that L.R. was not the only woman who he sexually abused and battered, but that he was in fact a proven criminal recidivist in his behavior toward women. Due to his convictions for violently assaulting at least *three different women* (the last of whom he abused on at least three separate occasions), in addition to his prison sentence for his crimes against L.R., Palmer was placed on Wisconsin's sexual predator registry.[2] (P-App. 065-066).

D. Dr. Hanusa's Unrefuted Expert Testimony

At the ERD hearing, Cree presented unrefuted testimony from Dr. Darald 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. He 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. (P-App. 096-097,133-140).

Based on his expertise, training, and substantial first-hand experience counseling batterers—further supported by the academic research in his field—Dr. Hanusa testified 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. (P-App. 097-098). Dr. Hanusa elaborated, testifying that male domestic batterers are violent in other settings—including at work—because they see violence 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

[2] As the Court of Appeals noted in its decision, the parties agree that the substantial relationship test "allows for consideration of Palmer's pre-2012 criminal record even if such record was not known to Cree at the time it made the challenged employment decision…." (P-App. 004).

Dr. Hanusa noted, the best predictor of future violence is past violence. *Id.*

Because of the proven link between a batterer's willingness to engage in domestic violence and his 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. (P-App. 097-098,100-101).

III. Procedural History

A. Disposition Before the ERD

At the ERD hearing, the Administrative Law Judge ("ALJ") admitted the undisputed testimony of Motley and Garrett regarding the circumstances and responsibilities of the Applications Specialist job, and of Dr. Hanusa regarding the correlation between domestic violence and workplace violence. (P-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—explicit 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 workplace setting. (P-App. 042-049).

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 regarding the direct correlation between violence at home and in the workplace and the risk of recidivism. Nor did it provide any assessment of the credibility of these witnesses. *Id.*

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 considered it not sufficiently elaborate or credible. More specifically, in a note following its decision LIRC stated it conferred with the ALJ—nearly three years after the hearing—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." LIRC acknowledged that the ALJ offered "no specific demeanor impressions" to support the witness credibility determinations. (P-App. 031-032,038).

LIRC also rejected the undisputed testimony of Dr. Hanusa regarding the observable and studied correlation between the willingness to engage in violence in an intimate relationship and the willingness to use violence in other settings, and in an inexplicable outcome-determinative comment, stated 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." (P-App. 032).

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 also referenced 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. On August 12, 2019, the Circuit Court reversed LIRC's 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." (P-App. 017-018).

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 [c]ourt 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. (P-App. 011-019).

D. Disposition Before the Court of Appeals

LIRC and Palmer appealed the Circuit Court's decision to the Court of Appeals. On December 9, 2020, the Court of Appeals reversed the Circuit Court, concluding 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 stated it did not believe that Palmer's violent tendencies and inclinations could occur on the job. It therefore disregarded the unrefuted testimony of Motley and Garrett about the stresses of the Applications Specialist position, and that of Dr. Hanusa regarding the correlation between domestic and generalized violence. (P-App. 001-010).

ARGUMENT

I. LIRC Erroneously Interpreted and Applied the Substantial Relationship Test

A. What Constitutes a Substantial Relationship Within the Meaning of the WFEA is a Question of Law Reviewed *De Novo*

In this appeal, the Court must review LIRC's decision as affirmed by the Court of Appeals. *See Milwaukee County v. LIRC,* 139 Wis. 2d 805, 808, 407 N.W.2d 908 (1987). Judicial review of LIRC's decisions is governed by Wis. Stat. §111.395, which provides that "[f]indings and orders of the commission under this subchapter are subject to review under ch. 227." *Wis. Bell, Inc. v. LIRC*, 2018 WI 76, 28, 382 Wis. 2d 624, 914 N.W.2d 1. Wisconsin Statute §227.57(5) provides that "[t]he court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law."

The first issue before the Court is whether the WFEA's substantial relationship defense bars Palmer's claim of conviction record discrimination because his numerous and repeated convictions for battering and sexually assaulting 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 meet its burden of proof is a conclusion of law). As a result, this Court must review LIRC's "interpretation and application" of the

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 (reversing the nearly half-century practice of deferring to administrative agency interpretations of the laws they are responsible for enforcing); *see also* Wis. Stat. §227.57(11) ("Upon review of any agency action or decision, the court shall accord no deference to the agency's interpretation of law.").

LIRC concedes that its interpretation of the WFEA is not entitled to deference. It contends, however, that given "its background with the subject matter"—which it dubs a specialized statute—its legal interpretation of the substantial relationship test is entitled to due respect. *Tetra Tech EC*, 2018 WI 75, ¶77. (*See, e.g.,* Court of Appeals Brief of Co-Appellant Labor and Industry Review Commission ("LIRC COA Br.") at 7-8). Yet LIRC fails 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 at ¶77. Given the facts here, as well as LIRC's flagrantly inconsistent application of the substantial relationship test in the cases discussed below, LIRC cannot offer any requisite explanation as to why its view of the WFEA's substantial relationship defense is entitled to any weight. As a result, this Court must review this matter without affording due respect or deference to LIRC. *Id.*

B. The Substantial Relationship Test is a Practical One that Focuses on "General" Facts and Character-Related Circumstances

The statutory language creating the substantial relationship defense is succinct: "[I]t is not employment discrimination because of conviction record to refuse to employ…any individual if…the individual has been convicted of any felony, misdemeanor, or other

offense the circumstances of which substantially relate to the circumstances of the particular job." Wis. Stat. §111.335(3)(a)(1).

The statute 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. *Id.* Given this ambiguity, this Court provided the framework in which to apply it. On each of the three occasions that it has done so, the Court has prescribed a necessarily simple and practical test 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)[3]; *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

[3] In *Lyndon Station*, the Law Enforcement Standards Board ("LESB") directed the Village to discharge the recently hired Chief of Police after learning that he had been convicted of felony falsification of public records. LESB asserted that Wis. Adm. Code LES §2.01(1) prohibited the employment of a convicted felon as a law enforcement officer. When the Village refused to adhere to LESB's directive, LESB petitioned for a writ of mandamus compelling discharge or a showing of cause. In response, the Village contended that it could not lawfully discharge the Chief because doing so would violate the WFEA's prohibition against employment discrimination. In determining that Wis. Adm. Code LES §2.01(1) could be harmonized with the WFEA's prohibition on conviction record discrimination, the Court found—without examining the particular context in which the crimes were committed—that the Chief's falsification convictions substantially related to his position, stating "[E]mployment of a nonpardoned felon in a law enforcement capacity would only serve to undermine the public's trust in its police officers as well as the ability of such persons to adequately perform the duties of officers of the law." *Lyndon Station*, 101 Wis. 2d at 484-493.

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.

The Court found the elements of Gibson's armed robbery conviction "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 Gibson had previously robbed school children or that the children on any school bus Gibson might drive would possess the sort of "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 to 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 its latest word on the matter, in *Milwaukee County*, the Court addressed "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—and 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 assessment of 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 employers 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).

C. As Required in *Gibson* and *Milwaukee County*, LIRC has Properly Applied the Substantial Relationship Test in Cases Involving Non-Domestic Violence Convictions

To its credit, in deciding non-domestic violence cases after *Gibson* and *Milwaukee County*, LIRC has refrained from considering superficial matters relating to the context of the criminal conviction(s) and has held 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 the complainant's convictions for sexual assault and aggravated battery and his desired factory pack and load position. Applying the "common sense approach" required under *Gibson* and *Milwaukee County*, LIRC looked at the elements of the crimes and determined that the traits associated with them were: the 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; and the inability to control anger or other emotions. LIRC also determined that these tendencies and inclinations *were* likely to reappear on the job, which entailed unrestricted access to unsecured property, work with little supervision in close proximity to others (including

female employees), and a vast facility with many hiding places and high noise levels. LIRC therefore held that a substantial relationship existed and dismissed Weston's discrimination claim. *Id.*

Notably, in reaching its conclusion, LIRC flatly rejected the complainant's argument that because none of his crimes occurred in an employment setting, the substantial relationship test could not be met. Citing *Milwaukee County*, LIRC stated 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 context of the offense and the job duties are identical is a misstatement of the substantial relationship test.").

So too, LIRC used the same approach and came to the same conclusion in *Hoewisch v. St. Norbert Coll.*, ERD Case No. CR200800730 (LIRC Aug. 14, 2012). There, the complainant—an associate professor for teacher education—was responsible for instructing college students on how to teach elementary, middle, and high schoolers. The job also required the complainant to periodically visit and observe at the elementary and secondary schools where her college students taught. She lost her job after she was convicted of child abuse for spanking her foster daughter with a spatula. *Id.*

In determining that the complainant's conviction substantially related to the associate professor position, LIRC did not analyze whether the familial relationship between the complainant and her foster daughter was similar to that which she would have with the children she would encounter in her job. Nor did it question whether the complainant was likely to engage in violent conduct outside her home. Rather, using the "common sense" analysis this Court requires, LIRC looked to the elements of the crime; determined that its associated character traits

included inability to control anger and frustration, disregard and failure to accept responsibility for the health and safety of children, and poor self-control; and concluded that they substantially related to the circumstances of the complainant's associate professor position, including because the complainant "would not be able to guarantee that she would not find herself alone with a child under 12 years of age." *Id.* LIRC thereby acknowledged that the character traits associated with the complainant's in-home crime do not "disappear outside of the domestic context." *Id.*

Finally, in its recent decision in *Billings v. Right Step, Inc.*, ERD Case No. CR201501613 (LIRC June 10, 2020), LIRC applied the same analysis in holding that the complainant's convictions for battery and robbery substantially related to her security job at a military school. As in *Weston* and *Hoewisch*, LIRC stated "the appropriate method for evaluating whether a substantial relationship exists is to look first and foremost at the statutory elements of the criminal offenses involved [and] then decide what character traits are revealed from those elements, and what their relationship is to the individual's employment." Using this analysis, LIRC concluded that the complainant's convictions evidenced character traits of willingness to plan and threaten another individual with harm, actually inflict bodily harm on another, and plan and take another individual's possessions by force or threat of force. LIRC found that such traits were likely to reappear in the complainant's job, which involved providing security, implementing physical training and ceremonies, and assisting with daily searches. *Id.*

Notably, LIRC did not require proof that the context in which the convictions occurred—i.e., her nearly two decades' prior participation in the "Gangster Disciples street gang"—were similar to the context in which the complainant's job duties would occur. Indeed, it did not matter to LIRC whether the complainant had engaged in violence outside her gang affiliation. Instead, acknowledging the need for an "easy-to-use formula for showing a substantial relationship" which does not require "a lot of factual

analysis," after looking at the general traits associated with the complainant's crimes and whether the job presented temptation for the complainant to again exhibit them, LIRC concluded that it did and therefore found a substantial relationship between the crime and the job. *Id.*

D. When Properly Applied, the Substantial Relationship Test Compels the Finding that Palmer's Convictions were Substantially Related to the Applications Specialist Position

The close relationship between Palmer's convictions and the job he sought at Cree is arguably even more pronounced than existed in *Weston*, *Hoewisch*, and *Billings*. Like those complainants, not long before seeking employment with Cree, Palmer was convicted of and imprisoned for committing violent crimes which he perpetrated in a non-employment setting. (P-App. 023-024). Palmer's convictions included not only sexual assault (as in *Weston*) and battery (as in *Weston, Hoewisch*, and *Billings*), but also felony strangulation and suffocation and criminal damage to property. (P-App. 024). Further, LIRC said nothing about whether Weston or Hoewisch were recidivists and specifically noted that Billings was not. In contrast, it acknowledged that Palmer *had* been repeatedly convicted of committing violent crimes against numerous women. (P-App. 024).

Under this Court's required substantial relationship analysis, LIRC was to first look to the elements of Palmer's convictions and the general character traits associated with them. *See Gibson*, 106 Wis. 2d at 27-28. LIRC did so, finding that the character traits associated with Palmer's crimes include the use of violence to achieve control over others (as in *Weston*, *Hoewisch*, and *Billings*); disregard for the health and safety of others (as in *Weston* and *Hoewisch*); the inability to control anger or other emotions (as in *Weston* and *Hoewisch)*; and the willingness to obtain sexual gratification by the use of force (as in *Weston*). (P-App. 028-029).

LIRC was next required to examine the relationship of these character traits to the job at issue. *See Gibson*, 106 Wis. 2d at 28; *Milwaukee County*, 139 Wis. 2d at 823. As was true in *Weston* and *Hoewisch,* there is no dispute that the job at Cree would have provided Palmer with largely unsupervised access, in a cavernous and principally unmonitored facility, to those he previously and repeatedly victimized—i.e., women. (P-App. 070-071,112). Indeed, nearly half of Cree's 1,100 employees were women and they worked throughout Cree's Racine facility. *Id.* Palmer's job also entailed unsupervised meetings, road trips, and overnight hotel stays in which he would interact with Cree's clients, potential clients, and the public (all of whom include women). (P-App. 072-073). And the work environment at Cree was fast-paced and high-stress, under which Palmer would have experienced significant pressures to meet customer demands and friction in communication with his peers.[4] (P-App.072-073,113). Unfortunately, this was just such a work environment that would have provided Palmer with ample, particular, and significant opportunities to demonstrate anger, use violence to control others, disregard their health and safety, and obtain sexual gratification by the use of force.

Had LIRC properly applied this Court's substantial relationship test in this case, it would have come to the same conclusion it did in *Weston*, *Hoewisch*, and *Billings*. Instead, LIRC ignored the very elements, general traits, and general workplace

[4] As noted in Section II below, LIRC improperly found insufficient the undisputed witness testimony regarding the stressful nature of the workplace. But even if Cree had not proven the stressful nature of the job, that does not change the substantial relationship between Palmer's crimes and the job. To the contrary, the question is not whether the work environment was stressful, but whether it presented the opportunity for Palmer's demonstrated criminal characteristics to happen again. To that end, it is noteworthy that in *Weston*, *Hoewisch*, and *Billings*, LIRC never found (nor required the employer to prove with specificity) that the complainants would be working under stressful conditions in order to conclude that there was a substantial relationship between their convictions and the positions they held. *See Billings* (LIRC June 10, 2020); *Hoewisch* (LIRC Aug. 14, 2012); *Weston* (LIRC Jan. 18, 2006).

characteristics it previously held dispositive, and inexplicably concluded that Palmer's convictions *did not* substantially relate to the Applications Specialist job. (P-App. 032-033).

E. Rather than Using this Court's Substantial Relationship Test, LIRC Conducted a Fact-Specific Analysis Related to Palmer's Crimes

In *Milwaukee County* this Court admonished that, "[w]hat is important…is *not the factual details* related to such things as the hour of the day the offense was committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen, or whether the robber wanted money to buy drugs or to raise bail money for a friend." *Milwaukee County*, 139 Wis. 2d. at 824 (emphasis added). Instead, "[i]t is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person." *Id.*

Yet, in analyzing this case LIRC improperly fixated on just such irrelevant details, repeatedly emphasizing *who* Palmer victimized (numerous "live-in girlfriend[s]"), *what* allegedly motivated his egregious violence (he and his girlfriend "were fighting really bad" and "wanted to break up"), and *where* Palmer's crimes occurred ("at home"). (P-App. at 024,032-033,038; Labor and Industry Review Commission's Response to Petition for Review ("LIRC PFR Response") at 10). Its faulty legal analysis led to its equally faulty (and profoundly misguided) conclusion that Palmer's criminal record demonstrated *only* the "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." And after having so minimized the egregious nature of Palmer's repeated violence toward women, LIRC went on to conclude—without any basis—that this tendency and inclination would not reappear in the work setting. (P-App. 009,013).

LIRC reached its conclusion that no substantial relationship existed between Palmer's convictions and the Applications Specialist role not by using the substantial relationship analysis this Court has established, but instead using the one it created and applies in cases in which the complainant battered or sexually assaulted his wife or girlfriend. For instance, in *Robertson v. Family Dollar Stores, Inc.*, ERD Case No. CR200300021 (LIRC Oct. 14, 2005), LIRC reversed the ERD's conclusion that a substantial relationship existed between the complainant's conviction for sexual assault and his stocker position. LIRC acknowledged—just as it had in *Weston*—that the character traits of one convicted of sexual assault included the "willingness to engage in a nonconsensual sexual act." *Id.* But unlike in *Weston*, LIRC went on to analyze the particular context in which the complainant's offense occurred—i.e., it "stemmed from a domestic incident which occurred in his home and involved his girlfriend"—and then noted that there was no evidence suggesting that he "pose[d] a general danger to all females." *Id.* And while LIRC considered it sufficient in *Hoewisch* that the complainant could not "guarantee that she would not find herself alone with a child under 12 years of age," in *Robertson,* LIRC held that "the mere fact that there could conceivably be a scenario in which [the complainant] could assault someone without being heard *d[id] not* warrant a conclusion that the job presented a substantial opportunity to do so." *Hoewisch* (LIRC Aug. 14, 2012); *Robertson* (Oct. 14, 2005) (emphasis added).

Likewise, in *Knight v. Wal-Mart Stores East LP*, ERD Case No. CR200600021 (LIRC Oct. 11, 2012), LIRC offered lip service to this Court's requirement that "the circumstances of the offense are gleaned from a review of the elements of the crime" and therefore acknowledged that the elements of the complainant's sexual assault, reckless endangerment, and false imprisonment convictions revealed character traits including the "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." But LIRC then went on to analyze the underlying details of the crime:

> [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.

Id. Having abandoned this Court's elements-of-the-crime-only analysis, LIRC then perhaps not surprisingly concluded that Knight's convictions *did not* substantially relate to the circumstances of his warehouse position because "the context of [his] crimes was distinct from the context of his work environment at Wal-Mart." *Id.*

Finally, less than one year ago, in *Johnson v. Rohr Kenosha Motors*, ERD Case No. CR201602571 (LIRC Apr. 29, 2020), LIRC again used its own test—rather than the one this Court requires—in another case in which the complainant engaged in criminal violence against a woman in the home. So, while LIRC acknowledged the complainant's convictions for felony and misdemeanor sexual assault, it insisted that "certain sexual assault offenses"—apparently only those perpetrated in the home and against a wife or girlfriend—required "some factual exposition" to ascertain the degree of substantial relationship. In doing so LIRC violated this Court's admonition in *Milwaukee County* that going beyond the elements of a sexual assault conviction is not appropriate:

> The full assessment of what may be termed the 'fostering' circumstances may, at times, require some

> factual exposition. For instance, in 'disorderly conduct' cases the type of offensive circumstances *is not as explicit as it is in sexual assault*, armed robbery, theft, or embezzlement convictions for example.

Milwaukee County, 139 Wis.2d at 825 (emphasis added). And applying what has for all intents and purposes become its "violence against women at home does not matter" exception, in *Johnson*, LIRC concluded that since the complainant's violent crimes were against his estranged wife and in her home there was no substantial relationship between them and his car sales manager position. LIRC then tried to bolster this holding with its wholly unsupported belief that "a sexual assault in a domestic setting or within a personal relationship…create[s] a weaker propensity to repeat that conduct in the workplace, compared to a sexual assault committed outside that context." *Id.*

As faulty as was LIRC's legal analysis in *Robertson*, *Knight*, and *Johnson,* the facts here are easily distinguishable from those cases. For instance, in *Robertson*, LIRC contended that the complainant did not "pose a general threat to all females" because "twenty years had elapsed since [his] conviction without the complainant having reoffended."[5] *Robertson* (LIRC Oct. 14, 2005). Wholly dissimilar to the facts in *Robertson*, when Palmer applied to Cree he had already been convicted of brutalizing numerous women and had *just been released* from a three-year prison term for having battered and sexually assaulted a third one. (P-App. 065-066,124-132). And in *Knight* and *Johnson,* at least LIRC was able to point to some evidence to suggest that the complainants

[5] In contrast, in *Billings*—the non-domestic criminal conviction case previously discussed in which LIRC found a substantial relationship—"the time elapsed since [the complainant's crimes] were committed [wa]s not sufficient to outweigh the significant, continual temptation [the complainant] had to exhibit traits associated with her crimes." *Billings* (LIRC June 10, 2020). This too shows the glaring and unjustified inconsistency between how LIRC treats violent crimes against women in the home as compared to violent crimes against anyone else outside the home.

lacked meaningful opportunity to exhibit violent conduct in their particular workplaces. In *Knight* it found the complainant's activities and movements were heavily monitored, and in *Johnson* it found there was no evidence about whether there were private spaces in the workplace where "the sound of a woman screaming for help" could not have been heard by others in the building. *Knight* (LIRC Oct. 11, 2012); *Johnson* (LIRC Apr. 29, 2020). None of that is true here. To the contrary, Cree offered undisputed testimony about how the lack of supervision, substantial size of Cree's female workforce, and nature of Cree's facility all provided a person convicted of strangulation, battery, and sexual assault ample opportunity to reoffend. *Id.* (P-App. 023,070-071,112).

Ironically the factual distinctions here—much like the factual similarities to *Weston*, *Hoewisch*, and *Billings*—made no difference to LIRC given its agency-created "domestic crimes" exception which finds no support in either the WFEA or in this Court's interpretation of it. And since it was unable to justify its holding by the passage of time since Palmer's convictions or his lack of opportunity to reoffend in Cree's work environment, LIRC got even more granular, averring that Cree's substantial relationship defense must fail because it presented no evidence suggesting Palmer had been violent in a circumstance other than a live-in boyfriend/girlfriend relationship, had such a relationship that in any way stemmed from or was related to his employment, or would be supervising or mentoring the Company's female employees. (LIRC PFR Response at 6; P-App. 031).

But such evidence is *not required* to satisfy the substantial relationship test. Rather, the Court has made clear that in the normal course the test "does not turn on [such] superficial matters." *Milwaukee County*, 139 Wis. 2d at 830. This is why the Court did not require proof the complainant in *Gibson* had robbed, or would even be tempted to rob, the school bus children he would encounter if provided a school bus driver's license. *Gibson*, 106 Wis. 2d at 28. And to its credit, for the same reason LIRC did not require the employer in *Billings* to prove the complainant had

battered anyone outside her gang affiliation; it did not require the employer in *Hoewisch* to prove that the complainant had developed a relationship at work that resembled that of foster parent and child; and it did not require the employer in *Weston* to prove that the complainant would supervise or mentor any of the female employees with whom he worked. *See Billings* (LIRC June 10, 2020); *Hoewisch* (LIRC Aug. 14, 2012); *Weston* (LIRC Jan. 18, 2006).

LIRC significantly and erroneously deviated from this Court's simple and practical test for determining whether a substantial relationship exists. Rather than focus on what the WFEA and this Court requires—which is to look no further than the statutory elements of Palmer's crimes, the character traits revealed by those elements, and the general circumstances of the job Palmer sought—LIRC applied its own domestic crimes exception to the substantial relationship test. And in doing so, it made outcome determinative findings which presuppose that men convicted of beating or sexually assaulting their wives or girlfriends can rarely if ever be denied employment based on their crimes. But because Cree amply and indisputably demonstrated Palmer's tendencies and inclinations to behave violently against women *were* substantially related to the Applications Specialist work environment—which was all that it was required to do—this Court must reverse LIRC, dismiss Palmer's claim, and enter judgment in Cree's favor. Indeed, to do anything else would both violate the WFEA and create an unreasonable risk of harm for Cree's employees, customers, and the public.

II. LIRC's Weight and Credibility Determinations were Erroneous and Resulted in Unsupported Findings of Fact

In failing to adhere to this Court's interpretation of the WFEA's substantial relationship test, and instead applying its agency-created "domestic setting" rule, LIRC improperly ignored undisputed evidence that even the Court of Appeals acknowledged

"may have made a difference" to the outcome of the case. (P-App. 006,031-032,038). Specifically, LIRC gave *no* weight to the unrefuted expert testimony of Dr. Hanusa that there *is a correlation* between a male batterer's willingness to engage in domestic violence and his willingness to engage in generalized violence in other settings, including the workplace. (P-App. 032). So too, LIRC erroneously concluded that the unrefuted testimony of Motley and Garrett that the environment in which Palmer would have worked was fast-paced, high-pressure, and at times abrasive, was insufficiently elaborate and incredible. (P-App. 031-032,038). These evidentiary findings (or the lack of them) were thereafter endorsed by the Court of Appeals. (P-App. 006).

LIRC's evidentiary findings, once again, depended upon an erroneous interpretation of the substantial relationship test and the information relevant to this analysis. Further, LIRC's disregard of entirely uncontroverted evidence was necessary to perpetuate its equally erroneous and particularly ill-advised "domestic crimes do not matter" exception to the substantial relationship test. Accordingly, this Court should reverse these erroneous evidentiary determinations and caution LIRC to avoid such unjustified rejections of undisputed evidence in the future.

A. LIRC and the Court of Appeals Improperly Disregarded Dr. Hanusa's Unrefuted Expert Testimony

After Cree established his qualifications and expertise in the field of domestic violence, Dr. Hanusa—a board-certified and licensed clinical social worker who has counseled *thousands* of male batterers—testified about the general character traits and inclinations of men who engage in domestic violence. (P-App. 097-098). Specifically, Dr. Hanusa explained that—contrary to LIRC's consistently articulated but wholly unsupported belief that domestic violence toward women does not create a substantial risk of harm in the workplace—the willingness to use violence against a current or former intimate partner *does* have a "direct

relationship" to using violence in other settings, including the workplace. *Id.* Citing to what is known as the "power principle," Dr. Hanusa noted that men who engage in violence in a domestic setting often see violence generally as a means of asserting power and control. Such men are prone to resorting to violence *whenever* they are feeling powerless, frustrated, or angered—not just, as LIRC has repeatedly opined, when they are at home with their wives or girlfriends. *Id.*

Though the record was devoid of any evidence (expert or otherwise) contradicting Dr. Hanusa's experientially and academically supported testimony, LIRC gave it *no* weight. (P-App. 032). And it tried to justify doing so simply because Dr. Hanusa did not personally evaluate Palmer or consider his completion of anger management and criminal thinking courses.[6] *Id.* But even LIRC's claim that Dr. Hanusa's opinion about the general character traits and inclinations of domestic batterers would only have been worthy of consideration if he individually evaluated and assessed Palmer proves that LIRC either misunderstands the substantial relationship test or has chosen to disregard it when dealing with men who are convicted of domestic violence against women.

This Court has admonished—and even LIRC has recognized in a number of its non-domestic-violence decisions—that any individualized assessment regarding a complainant's suitability for a particular position or his specific risk of recidivism is irrelevant under the substantial relationship test. *Milwaukee*

[6] LIRC was wrong when it contended that Dr. Hanusa testified that "someone who had successfully completed a domestic violence pro[gram] would not pose a significant risk of workplace violence." (P-App. 0032). To the contrary, Dr. Hanusa testified that according to a 2012 or 2013 study, 52 percent of participating male domestic batterers who successfully completed treatment engaged in *less* violence over a three-year follow-up period. (P-App. at 105). Of course, this is damning enough as it relates to those 52 percent, and even more so for the 48 percent who continued their violence toward women at the same pace as they did before taking the treatment.

County, 139 Wis. 2d at 823-824; *Sheridan v. United Parcel Serv.*, ERD Case No. CR20024955 (LIRC July 11, 2005); *Jackson v. Summit Logistics Servs., Inc.*, ERD Case No. CR200200067 (LIRC Oct. 30, 2003). Thus, in *Jackson v. Summit Logistic Services, Inc.*, LIRC upheld the ALJ's decision to exclude the complainant's proffered evidence regarding recidivism rates of released prisoners, which he contended showed that—due to his race, work history, years out of prison, and other factors—he had a low risk of committing another crime. *Jackson* (LIRC Oct. 30, 2003). Citing to this Court's decision in *Milwaukee County*, LIRC stated:

> 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. In *County of Milwaukee*…the Wisconsin Supreme Court addressed the scope of the substantial relationship test, stating that the test must serve 'not only the judicial system's purposes but the employer's…as well…[T]here must be a semblance of practicality about what the test requires. A full-blown factual hearing is not only unnecessary, it is impractical.'

Id. (emphasis added). Thereafter, in *Sheridan v. United Parcel Services*, LIRC again affirmed the ALJ's ruling that the testimony of the complainant's treating psychologist as to his *individual* character traits and *individual* likelihood of reoffending was irrelevant. *Sheridan* (LIRC July 11, 2005). Once again citing *County of Milwaukee*, LIRC stated "[I]t is not the individual's unique character traits which are relevant to determining whether the substantial relationship test is satisfied but instead the character traits necessarily exhibited by an individual who commits a particular offense, as gleaned from an examination of the offense." *Id.*

Precisely because such evidence is neither required nor relevant under the substantial relationship test, Cree did not ask Dr. Hanusa to examine Palmer, apply any clinical risk tests to him, or opine as to his *individualized* suitability for the position at issue in light of his supposed rehabilitative efforts. Instead, it offered Dr. Hanusa's testimony related to the critical analysis under the substantial relationship test; i.e., what are the general character traits exhibited by men who commit domestic violence and could those traits reappear in the workplace? Dr. Hanusa spoke directly to these issues, 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 chose to disregard Dr. Hanusa's *undisputed* expert testimony in favor of its personal inclination—which finds *no* support in the hearing record, or any past hearing record—that domestic batterers rarely if ever harm women in the workplace. While in very limited circumstances the law *may* permit an administrative fact-finder to cast off an entirely uncontroverted expert opinion when the fact-finder has a reason to believe it is not true,[7] LIRC never stated that it disbelieved Dr.

[7] LIRC relies on the Court of Appeals' decision in *Conradt v. Mt. Carmel School*, 197 Wis. 2d 60, 539 N.W.2d 713 (Ct. App. 1995), for the proposition that it may reject an expert opinion, even if no contradictory evidence is found. (LIRC PFR Response at 10). At the outset, LIRC cites to no Wisconsin Supreme Court opinion on this issue, nor is Cree aware of one. Further, the facts in the decision are easily distinguishable from those here. In *Conradt*, a claimant for worker's compensation benefits was advocating for a "treating physician rule" under which LIRC would give preference to the opinion of a treating physician over other physicians. *Conradt*, 197 Wis. 2d at 67-69. In rejecting the claimant's suggestion, the Court of Appeals noted that while state law provided that

Hanusa's opinion that male domestic batterers *do* resort to violence outside the domestic setting as a means to gain power and control over others. Rather, LIRC stated that the opinion was "unhelpful" because Dr. Hanusa did not conduct an individualized assessment of Palmer and his alleged rehabilitative efforts. (P-App. 032).

LIRC should not be permitted to disregard an undisputed expert opinion where its sole justification for doing so derives not from any articulated and legitimate basis for disbelieving it, but instead as necessary to maintain its domestic crimes against women exception to the substantial relationship test which finds no basis in either the WFEA of this Court's interpretation of it. To hold otherwise sets a dangerous precedent—one which allows LIRC to continue advancing its personal but invalidated belief, under the guise of an alleged evidentiary determination which finds no support in the record (let alone substantial evidence), that the tendency of male batters to use violence to achieve power or solve problems is *not* likely to recur in the work setting. *See* Wis. Stat. §227.57(6) (requiring a review court to set aside agency action or remand the case if it finds that the agency's action depends on

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expert opinions in the form of a WC-16-B were *prima facie* evidence, that should not be confused with presumptive evidence because "even if a claimant offers a WC-16-B and there is no contradictory evidence presented, LIRC may still reject the expert opinion if it does not believe it to be true." *Id.* at 69. Notably, the use of WC-16-B's in worker's compensation claims is ubiquitous and LIRC has issued decisions in thousands of cases in which the parties offered dueling medical opinions of treating versus independent examining physicians, and as a result it had more than sufficient experience to reject out of hand one claimant's opinion that LIRC should always favor a treating physician's opinions over any other ones. LIRC has no such assemblage of published expertise regarding recidivism by male batterers in any setting, much less in a domestic setting. It therefore had no basis for rejecting Dr. Hanusa's opinion other than because it contradicted its wholly unsupported inclination that domestic criminal violence against women is not as serious as criminal violence against others outside the home.

any finding of fact that is not supported by substantial evidence in the record).

B. LIRC and the Court of Appeals Erred in Disregarding Cree's Unrefuted Testimony Regarding the Nature of the Job and the Opportunity to Reoffend

Finally, LIRC asserts that it based its decision on the particular facts of this case. (*See, e.g.,* LIRC PFR Response at 7). And as it relates to the job Palmer sought at Cree, all of those facts were provided through the testimony of Cree's witnesses, Motley and Garrett. LIRC therefore adopted as fact Motley's and Garrett's testimony on numerous aspects of the work environment and responsibilities involved in its Applications Specialist job, such as that Cree's Racine facility was over 600,000 square feet in size; that it included manufacturing space, storage areas, offices, conference rooms, cubicle farms, and break rooms; and that it was home to over 1,100 employees, nearly half of whom were female. (P-App. 023). Likewise, LIRC adopted as fact Motley and Garrett's testimony that Palmer's job would have entailed interaction with both Cree employees and clients and required unsupervised travel. *Id.* While apparently concluding that the testimony Motley and Garrett provided was credible and sufficiently specific on all of these topics, LIRC arbitrarily and inexplicably rejected their testimony regarding the stressful nature of the job Palmer would have held.

On this subject, Motley and Garrett testified that Cree was an employer with "very high expectations" that placed "a lot of pressure" on its employees. They further explained under oath that the work environment for an Applications Specialist was fast-paced, deadline driven, and required very quick turnaround, all of which created friction (i.e., "blunt[ness]" in workplace

communications).[8] Their testimony drew no objections and Palmer offered no contrary evidence. Indeed, he neither testified nor called any witnesses to testify that, for instance, his work at Cree would have been undertaken in a relaxed and undemanding environment. (P-App. 072-073,113).

Despite this, LIRC concluded that Motley's and Garrett's testimony regarding the stresses inherent in the position was "not sufficiently elaborate" and it therefore found (based on a years-later conversation with the presiding ALJ that was void of any "specific demeanor impressions") that *only as to this evidence*, Motley and Garrett were not credible. (P-App. 031-032,038). It bears noting that by choosing to disregard this undisputed testimony as "not credible," LIRC could then arguably support its finding that Palmer's job would not involve a "work atmosphere likely to trigger criminal conduct in a person who has difficulty controlling anger or a propensity to resolve problems with violence." *Id.* Not coincidentally, such a finding also played well with LIRC's "domestic crimes do not matter" exception to the substantial relationship test.

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

[8] Additionally, Motley and Garrett testified regarding the particular responsibilities of the position Palmer sought, noting that it required unsupervised travel to Cree's customers, as well as attendance at multi-day trade shows during which Palmer would inevitably interact with the public. (P-App. 072-073,113). Remarkably, LIRC downplayed this testimony because it claimed that Cree did not offer specific record evidence that while attending trade shows and staying in hotels open to the public, Palmer would be in the company of women. (P-App. 031). It is hard to imagine what possibly could have caused LIRC to conclude that only men would attend trade shows or be involved in purchasing Cree's products at them. It is even harder to imagine what hotels Palmer would have stayed at that had no female guests.

deference will be accorded an agency finding when the finding is based entirely on uncontroverted evidence). To the contrary, the witness testimony regarding the stressful nature of the work environment was undisputed in every respect—no one objected to it and no one offered conflicting testimony. (Court of Appeals Brief of Petitioner-Respondent Cree, Inc. ("Cree COA Br.") at 9,16,26,28,35).

Further, while Wis. Stat. §227.57(6) does not require a reviewing court to adopt LIRC's weight determination, it does obligate the court to affirmatively act "if it finds that the agency's action depend[ed] on any finding of fact that [wa]s not supported by substantial evidence." Wis. Stat. §227.57(6); s*ee 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 conclusion—which the Court of Appeals acknowledged "may have made a difference"—that the work environment was not stressful finds *no* support in the record. Indeed, LIRC could only reach that conclusion by ignoring all available evidence on this subject.[9]

Wisconsin Statute §227.57(6) obligates this Court to take affirmative action to remedy a determinative factual finding that has no support in the record. And as a matter of due process, what LIRC did here is particularly problematic. Specifically, years after Cree put in uncontested evidence about the direct correlation

[9] In its response to Cree's Petition for Review, LIRC contends that Cree waived any argument that LIRC's factual findings were unsupported by substantial evidence. (LIRC PFR Response at 12). This ignores the substance of Cree's arguments on appeal, in which it repeatedly contended, as it does here, that the undisputed evidence established that the Applications Specialist work environment *was* stressful. (Cree COA Br. at 9,16,26,28,35). Of course, implicit within this argument is that any contrary findings of fact by LIRC—i.e., that the work environment was not stressful—are not supported by the substantial evidence.

between violence toward women in the home and violence in the workplace, and concerning the stressful work environment which would have the potential to trigger violence in one who repeatedly used violence to control others, LIRC took the affirmative step to try to nullify that evidence on some flimsy "the ALJ may not have found it particularly credible" basis. This is the antithesis of due process as it provided Cree with no notice or opportunity to either object to such action or offer additional evidence to remedy it. Further, as noted below, given that LIRC's action was arguably undertaken to support the unsupportable—i.e., its domestic violence exception to the substantial relationship test—it is particularly offensive to any concept of objective and fair process in adjudicated matters.

Finally, LIRC claims if it had accepted Cree's uncontroverted evidence regarding the stressful nature of the Applications Specialist work environment that would not have changed the outcome of the case. Per LIRC, this is because Cree "did not show that any particular circumstances of the job connected to Palmer's particular offenses." (LIRC PFR Response at 10). But this argument is circular, including because the very undisputed evidence it rejected established a tie between Palmer's repeated convictions for violence against women and the position he would have held at Cree.

Further, LIRC's self-serving "it wouldn't matter" claim flies in the face of its own analysis in other cases in which it has held that those convicted of multiple counts of battery and sexual assault (let alone strangulation and suffocation) have a tendency and inclination to use violence to control others and an inability to control their own anger and frustration. And when Dr. Hanusa's testimony is layered in, it establishes that these tendencies, inclinations, and inabilities do not cease the moment a convicted domestic batterer steps outside of his home. Rather, they are likely to reappear in other settings, including in the sort of workplace in which the batterer may be frustrated by trying to meet impending deadlines, angered by communications related to them, and able

to evade detection (whether within a massive facility or while away with customers or at trade shows) in his interactions with women.

In the absence of any legitimate, articulable basis for disregarding this singular aspect of Motley's and Garrett's unrefuted testimony, one must ask what motivated LIRC to do what it did? Without a better explanation, it is hard not to conclude that LIRC's inexplicable carving up of only certain undisputed evidence was not motivated by a desire to meaningfully assess the record evidence, but instead to bolster its preordained belief that those who violently and criminally abuse women at home should still get to work with them in the workplace, regardless of whether the particular job provides an unreasonable opportunity to harm them there as well. Regardless of the reasons for LIRC's actions, this Court cannot sanction such an unjustified disregard of relevant, persuasive, and undisputed testimony.

CONCLUSION

LIRC's decision, which the Court of Appeals confirmed, furthers its dangerous and legally unsupportable domestic violence exception to the WFEA's substantial relationship test. Further, as it applied the exception here, LIRC not only failed to utilize the practical, common sense analysis this Court requires, but it effectively nullified unrebutted testimony which established the substantial relationship between Palmer's repeated, criminal, and violent abuse of women and the circumstances of the job in which he would have worked at Cree. Because Cree properly considered and applied the WFEA's substantial relationship test in choosing not to subject its employees, customers, or the public to an unreasonable risk of harm, and because LIRC's contrary opinion was both legally and factually erroneous, Cree respectfully requests that the Court reverse LIRC's decision and enter an order dismissing Palmer's complaint of employment discrimination in its entirety.

Date: April 23, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and (c) as to form and length for a brief and appendix produced with a proportional serif font. The length of this brief is 10,686 words, including footnotes.

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CERTIFICATION REGARDING ELECTRONIC BRIEF

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 the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2021, I caused three copies of this Brief and Appendix to be served upon counsel for the Labor and Industry Review Commission and Derrick Palmer via U.S. Mail, First Class:

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