STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1671

CREE, INC.,

Petitioner-Respondent-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK PALMER,

Respondent-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING A FINAL ORDER OF THE RACINE COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL J. PIONTEK, PRESIDING

BRIEF OF RESPONDENT-CO-APPELLANT LABOR AND INDUSTRY REVIEW COMMISSION

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INTRODUCTION

Cree, Inc. rescinded a job offer made to Derrick Palmer after learning about his conviction record for domestic abuse-related crimes. The Wisconsin's Fair Employment Act ("WFEA"), Wis. Stat. §§ 111.31–.395, prohibits employment discrimination based on conviction record. An employer's failure to hire an applicant who has qualified for a job on this basis is unlawful discrimination. A statutory exception, however, provides that it is not unlawful discrimination if the circumstances of the applicant's criminal offenses are substantially related to the circumstances of the job offered. Thus, Cree had to prove to the Labor and Industry Review Commission that the circumstances of Palmer's convictions were substantially similar to the circumstances of the job offered to him. The Commission concluded—and the court of appeals agreed—that Cree failed to meet its burden. In other words, there is no substantial relationship between the circumstances of Palmer's crimes and the circumstances of the particular job. Because Cree has not supplied this Court with a reason to set aside the Commission's decision that it discriminated against Palmer, under ch. 227 judicial review standards, it must be affirmed.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Cree rescinded a job offer to Palmer, as a lighting schematic layout applications specialist, based on his convictions for domestic-related felony and misdemeanor offenses: felony strangulation and suffocation, misdemeanor battery, and misdemeanor fourth degree sexual assault. Applying the statute and case law to its undisputed factual findings, the Commission concluded that Cree did not meet its burden of proving that a substantial relationship existed and therefore Cree violated the WFEA in refusing to hire

Palmer based on his conviction record. Should the Commission's decision be affirmed?

The circuit court answered no.

The court of appeals answered yes.

This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested and publication of this Court's decision is warranted.

STATEMENT OF THE CASE

I. Nature of the case.

This is an appeal of a published decision of the Court of Appeals, District II, which, pursuant to ch. 227 of the Wisconsin Statutes, reversed a final order of the Racine County Circuit Court. The circuit court had reversed a December 3, 2018, decision of the Labor and Industry Review Commission, which concluded that Cree violated the Wisconsin Fair Employment Act by refusing to hire Palmer based on his conviction record. The Commission determined that Cree had failed to prove an exception to this discrimination prohibition—that the circumstances of Palmer's crimes substantially relate to the circumstances of job offered to him.

II. Statement of the facts.

These facts are taken from the findings of fact made by the Commission in its fair employment decision. (R. 8:2–20.)

Cree is a company that manufactures and sells lighting products. It employs roughly 1100 employees at an

assembly facility, including about 500 women. (R. 8:4–5; 12:81.)

In June 2015, Cree posted a job announcement for the position of Lighting Schematic Layout Applications Specialist. (R. 8:4, 113 (announcement); 12:86–87.) It described the position as,

> a mixture of design, pre-sales and post-sales customer support responsibilities. In this role you will design and recommend the installation of appropriate lighting equipment and systems, create lighting site plans and 3D models, use local building code requirements to perform energy calculations, and also interact directly with customers. You will be part of a team, while applying project management skills to drive your own projects to completion.

(R. 8:4–5, 113.) The posting also listed various qualifications, including an associate degree in engineering or mathematics.[1] (R. 8:4–5, 113.)

The position would be at an assembly facility for lighting fixture products that is over 600,000 square feet in size, and with over 1100 employees, about 500 of them women. The facility includes manufacturing space, storage areas, offices, conference rooms, cubicles, and break rooms. The employee would work in the cubicle area but would have access to the rest of the facility. There are security cameras

[1] The job announcement additionally stated that the employee would "study lighting requirements of clients," "design layouts" and provide "designs verbally or through computer assisted lighting layouts," respond to customer questions, "occasionally promote products and represent company at trade shows," "maintain information" about projects, and "visualize and interpret blueprints." (R. 8:113.)

in the facility, but not necessarily in office areas and conference rooms. (R. 8:5; 12:81–85.)

The position included interaction with teams and clients. Customer interaction would typically be by telephone or email, although local clients might appear in person and there might be occasional travel to a client. The job also would require travel to trade shows. This would involve hotel says, car rentals, and interacting with clients on the trade show floor. Travel would not be supervised. (R. 8:5; 12:87–91.)

In June 2015, Palmer applied for the job, and he satisfied its requirements. (R. 8:5; 12:96.)

At the request of a Cree recruiter, Lee Motley, Palmer then completed an online questionnaire and a separate online pre-interview questionnaire. The latter asked whether he had ever been convicted of a felony or a misdemeanor. Palmer checked the "yes" box as to both, indicating "[d]omestic related charges." (R. 8:5–6; 12:18–19, 25; 9:1–2.)

After two interviews, Cree offered the position to Palmer, contingent on a drug screen and background check. Palmer accepted. (R. 8:6; 12:22–23; 9:7–10.)

When Motley contacted Palmer about the background check, Palmer asked Motley if he was aware of his criminal convictions. Motley said he was not, even though Palmer had checked the boxes on the pre-interview questionnaire. Palmer explained to Motley that he had been convicted of domestic-related offenses against a live-in girlfriend. (R. 8:6; 12:18–19, 25, 104–05, 115, 128; 9:1–2.)

The criminal background check, conducted by an outside company, showed that Palmer had been convicted in October 2012 of felony strangulation/suffocation and three misdemeanors—battery, fourth degree sexual assault, and

criminal damage to property. (R. 10:1–9 (criminal background check report).) These crimes resulted in a 30-month prison sentence, 30 months of extended supervision, and probation. (R. 8:6; 12:37–38; 9:34–36; 11:19–20, 33–34, 37.)

Palmer also had a 2001 battery conviction from a domestic dispute with a girlfriend, but it was not included in the criminal history report. (R. 8:6; 10:1–9; 12:65.)

Cree's in-house recruiter, Motley, forwarded the background check report to Melissa Garrett, Cree's associate general counsel, to decide whether to rescind the job offer. After receiving it, Garrett discussed the position with Motley. (R. 12:240–42.) Garrett also consulted a matrix for evaluating types of criminal convictions for employability. A "fail" on the matrix would disqualify the candidate for employment. Palmer's convictions for sexual assault, battery, strangulation, and criminal damage to property were designated "fail" on the matrix.[2] (R. 8:6; 9:60–83 (matrix); 11:47–49; 12:246; 13:8, 21–22.)

Garrett made the decision to rescind the offer to Palmer and notified Motley. (R. 8:6; 12:157; 13:1–2.) In turn, Motley notified Palmer by email that the job offer was rescinded based on Cree's hiring criteria and the contents of the criminal background check report. (R. 8:7; 9:24, 41; 12:124–26, 160.)

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[2] Garrett was unable to identify any applicants in the "fail" category who had been hired by Cree, although she said people were hired before her time. (R. 8:6; 13:25.) Cree's recruiter, Motley, also could not recall having hired someone with a felony. (R. 12:131.)

III. Procedural history.

A. Proceedings before the Department of Workforce Development.

In September 2015, Palmer filed an employment discrimination complaint with the Equal Rights Division of the Wisconsin Department of Workforce Development (the "Department"). (R. 11:100–101.) He alleged that he applied for a job with Cree, which offered him employment subject to a criminal background check. (R. 11:101.) However, the offer was rescinded after the background check, and, as a result, Palmer alleged Cree's action violated Wis. Stat. § 111.321's prohibition on refusing to hire because of a conviction record. (R. 11:101.) The Department found probable cause of a violation sufficient to proceed to an evidentiary hearing before an administrative law judge (ALJ). (R. 11:110–13.)

After that August 2016 hearing (R. 12, 13 (transcript of hearing), the ALJ ruled that Cree had not discriminated unlawfully. In the ALJ's view, Palmer's convictions were substantially related to the position offered. (R. 8:102–09.) The ALJ acknowledged that Palmer's domestic offenses "occurred in a private setting," but concluded that the Cree position may involve "one-on-one work with customers" and further hypothesized that Palmer might develop a relationship with a female co-worker. (R. 8:108–09.)

B. Proceedings before the Commission.

Palmer appealed to the Commission, which reversed the ALJ in a written decision. (R. 8:2–25.) The Commission concluded that Cree discriminated against Palmer based on his conviction record in violation of the WEFA. (R. 8:7.) For the remedy, the Commission required Cree to offer Palmer a position and awarded back pay and interest. (R. 8:2–3.)

In reaching its decision, the Commission reviewed the evidence and found that the circumstances did not satisfy the substantially-related exception to conviction-based employment discrimination. The Commission explained that Cree had "presented no evidence indicating that [Palmer] would be supervising or mentoring female employees, nor is there anything to suggest that he would be working closely with female employees." (R. 8:13.) The Commission thus declined to infer that Palmer would "have had significant personal interactions with female employees in the context of his job." (R. 8:13.) Further, the evidence supported that client contacts largely would be electronic or by phone and, when in person, "would take place either at trade shows or at the customer's site," which were in the "industrial setting," not in homes or other personal space. (R. 8:13.) And, although Cree generally characterized the job as "high stress," it did not specify an aspect that connected with Palmer's particular offenses. (R. 8:13–14.)

In addition, the Commission explained that the ALJ went astray when speculating that Palmer might become involved romantically with a female co-worker and, in turn, might engage in the same behaviors. (R. 8:12.) It found that connection required "a high degree of speculation and conjecture" that went beyond "job-related conduct," which is all that is relevant. (R. 8:12–13.)

Put differently, the evidence would have required the Commission to infer that the mere interaction with women in an unsupervised setting had a substantial relationship to Palmer's violence-related offenses. (R. 8:14.) The Commission declined to make that broad assumption without a greater factual connection to the circumstances of Palmer's convictions. (R. 8:14.) The Commission noted that Cree attempted to use an expert to make its case, but even the ALJ—who had found in favor of Cree—did not rely on

that opinion. (R. 8:14.) Neither did the Commission, as the witness did not address the particular circumstances of how Palmer's offenses related to the job, but rather more generally opined that someone willing to engage in domestic violence may also be willing to engage in violence in other settings. (R. 8:14 n.6; 12:187–88, 199, 202, 211, 230–32.)

While acknowledging the concerning nature of Palmer's offenses, the Commission found that there was insufficient evidence to support the inference that the circumstances of Palmer's crimes were substantially related to the circumstances of the position. (R. 8:14–15.) As a result, because the decision not to hire Palmer was based on his conviction record, Cree violated the WFEA. (R. 8:7.)

C. Proceedings before the circuit court.

Cree sought judicial review of the Commission's final decision (R. 1), and the circuit court reversed in favor of Cree (R. 25). According to the circuit court, the Commission erred because Cree's evidence of a connection was "uncontroverted," and the record was "devoid of substantial facts" supporting the Commission's findings. (R. 25:13, 15.) The court also faulted the Commission for not giving weight to Cree's expert. (R. 25:15.)

D. Proceedings before the court of appeals.

Both Palmer and the Commission appealed. (R. 28; 30.) The parties filed their briefs with the court of appeals in January 2020. The court held oral argument on October 1. During argument, the court also asked for supplemental letter briefs, which the parties thereafter filed.

On December 9, 2020, the court of appeals issued a unanimous decision, recommended for publication, reversing the circuit court and thereby affirming the Commission.

Cree, Inc. v. LIRC, 2021 WI App 4, ¶ 1, 395 Wis. 2d 642, 953 N.W.2d 883 ("Op.").

The court of appeals held, based on the Commission's undisputed factual findings, that Cree failed to meet its burden to prove that the circumstances of Palmer's criminal offenses substantially relate to the circumstances of the position he was offered. Op. ¶¶ 1, 10. The court recognized that, while Palmer's criminal record demonstrates a tendency and inclination to be physically abusive toward women in a live-in boyfriend/girlfriend relationship, that was not the question before it. Op. ¶ 14. Rather, the "question is whether Cree met its burden to show that Palmer's past domestic abuse is substantially related to the circumstances of the Applications Specialist job Palmer applied for." Op. ¶ 14. Cree's failure to meet this burden meant that it was not excused from its otherwise unlawful act of employment discrimination against Palmer based on his conviction record. Op. ¶¶ 1, 14.

The court rejected Cree's argument that the size and layout of its Racine facility would create significant opportunity with which Palmer could commit additional crimes against persons. It also rejected Cree's argument that Palmer would regularly interact with female co-workers whom he could later harm outside of work. Op. ¶ 13. Cree did not present any "evidence suggesting Palmer has ever been violent in a circumstance other than a live-in boyfriend/girlfriend relationship or even suggesting he has ever had such a relationship that in any way stemmed from or was related to his employment." Op. ¶ 15. Neither did Cree provide "evidence suggesting Palmer would be supervising, mentoring or even working closely with female employees." Op. ¶ 15. The court agreed with the Commission's conclusion that "it would require 'a high degree of speculation and conjecture' to conclude that

Palmer would develop a live-in boyfriend/girlfriend relationship through the Applications Specialist job." Op. ¶ 15. It further agreed with the Commission "that the mere contact with others at the facility and on the job is not substantially related to Palmer's domestic violence." Op. ¶ 15. The court opined that Cree failed to focus on the specific job Palmer was offered but rather improperly "focused on the general sense that Palmer is not fit to be unconfined from prison and participating in the community at all due to his prior crimes, even though he has long since finished serving the confinement portion of his sentence." Op. ¶ 15.

The court concluded by opining that the Legislature could have exempted from its prohibition against conviction-based employment discrimination specific convictions like fourth-degree sexual assault or strangulation/suffocation, but it chose not to. Op. ¶ 16. Instead, the Legislature left it up to the courts to determine where circumstances of offenses are substantially related (not "somewhat related") to the circumstances of the particular job. Based on the undisputed findings of fact of the Commission, here Cree failed to establish that substantial relationship. Op. ¶ 16.

Cree filed a petition for review, which this Court granted.

STANDARD OF REVIEW

On appeal of a decision of the Commission, this Court reviews the Commission's decision "rather than the decision of the circuit court." *Masri v. LIRC*, 2014 WI 81, ¶ 20, 356 Wis. 2d 405, 850 N.W.2d 298.

This Court does not defer to the Commission's interpretation of law. Wis. Stat. § 227.53(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶ 3, 71, 75–76, 382 Wis. 2d 496, 924 N.W.2d 21. Instead, this Court reviews the

Commission's interpretation of a statute *de novo*. *Wisconsin Bell, Inc. v. LIRC*, 2018 WI 76, ¶ 29, 382 Wis. 2d 624, 914 N.W.2d 1. And de novo review is the proper standard as to the substantial relationship test itself under Wis. Stat. § 111.335(3)(a)1. *See Milwaukee County v. LIRC*, 139 Wis. 2d 805, 828, 407 N.W.2d 908 (1987).

Also, the Commission's findings of fact must be affirmed if they are supported by substantial evidence in the record. Wis. Stat. § 227.57(6). "Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." *Milwaukee Symphony Orchestra, Inc. v. DOR*, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674.

ARGUMENT

The Commission properly concluded, based on its undisputed factual findings, that the circumstances of Palmer's criminal offenses do not substantially relate to the circumstances of the job offered to him and, therefore, Cree discriminated based on conviction record.

It is undisputed that Cree rescinded a job offer made to Palmer based on his conviction record. This is blatant employment discrimination prohibited by the Wisconsin Fair Employment Act, which Cree can avoid only by proving that the circumstances of Palmer's criminal offenses substantially relate to the circumstances of the job offered. Here, the Commission concluded that Cree failed to meet its burden. The court of appeals properly affirmed. Because Cree has failed to prove a ground for setting aside the Commission's decision, this Court must affirm it.

I. State law governing unlawful employment decision based on conviction record puts the burden on Cree.

A. The burdens under a Wisconsin Statutes ch. 227 judicial review of a Commission decision concluding that employment discrimination occurred.

Judicial review of a fair employment decision of the Commission is governed by ch. 227 of the Wisconsin Statutes. *See* Wis. Stat. § 111.395.

The burden is on the challenger—here, Cree—to show that the Commission's decision is erroneous. "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a specified provision of this section, it *shall* affirm the agency's action." Wis. Stat. § 227.57(2); *see also Bethards v. DWD*, 2017 WI App 37, ¶ 16, 376 Wis. 2d 347, 899 N.W.2d 364 ("petitioner . . . bears the burden of demonstrating that the agency decision should be modified or set aside").

The burden is also on the employer—again, Cree—to show that the substantially-related exception to employment discrimination based on conviction record applies. *See Gibson v. Transp. Comm'n*, 106 Wis. 2d 22, 29, 315 N.W.2d 346 (1982).

B. The Legislature's prohibition of employment discrimination based on conviction record and its substantially-related exception.

Under the WFEA, "it is an act of employment discrimination to . . . refuse to hire [or] employ . . . any

individual . . . because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322. The unlawful bases in Wis. Stat. § 111.321 include "conviction record."[3]

The statute contains several exceptions to that default rule against conviction record discrimination. *See* Wis. Stat. § 111.335(3)(a)–(f). Relevant here, it is not discrimination to deny employment on the basis of conviction record 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.[4]

This substantial relationship test requires an application of law to a set of facts, which is a legal question. *Milwaukee County*, 139 Wis. 2d at 828–30. It is an after-the-fact objective test. *See* id at 818 ("What procedure is required in order that *courts* may assess the 'circumstances' in the particular case?" (emphasis added)); *Gibson*, 106 Wis. 2d at 28 (court conducted its own independent analysis of the substantial relationship test).

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[3] "'Conviction record' includes, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority." Wis. Stat. § 111.32(3).

[4] This statute was renumbered during this litigation. *See* Wis. Stat. § 111.335(1)(c)1. (2015–16). The court of appeals used the most recent version in its decision, *see Cree, Inc. v. Labor & Industry Review Commission*, 2021 WI App 4, ¶ 4 n.3, 395 Wis. 2d 642, 953 N.W.2d 883 ("Op."), as the Commission does in this brief.

The WFEA's conviction record statutes balance society's "interest in rehabilitating one who has been convicted of crime" against "an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime." *Milwaukee County*, 139 Wis. 2d at 821. Thus, while generally seeking "to eradicate many sources of employment discrimination," *id.* at 819, such discrimination on conviction record may still be done "in employment settings where experience has demonstrated the likelihood of repetitive criminal behavior," *id.* at 823.

To properly determine when that lawful-unlawful discrimination line is crossed involves some basic fact finding as to the "circumstances." *Id.* at 825–26. It 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.* at 824. This allows for a "factual inquiry" "ascertaining relevant, general, character-related circumstances of the offense or job." *Id.* at 825.

In turn, once the factual circumstances are found, the question is whether "[t]he propensities and personal qualities exhibited are manifestly inconsistent with the expectations of responsibility associated with the job." *Id.* at 828. Put differently, it looks to whether the "opportunities for criminal activity" on the particular job are "similar to those present in the crimes." *Id.* at 821.

For example, this Court has concluded that the circumstances of a criminal offense and job were substantially related where the job applicant had been criminally negligent when administering a nursing home and then sought employment as a crisis specialist at a

medical facility. The findings revealed that "[t]he responsibilities present in both jobs extended to a group of people similarly situated so that neglect or dereliction of duties in either job would likely have similar consequences." *Id.* at 810, 828. And, when a police officer "was convicted of misconduct in public office on . . . felony counts of falsifying uniform traffic citations," those offenses were substantially related to a job as a police chief. *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 492, 305 N.W.2d 89 (1981).

As discussed more in detail below, the Commission made findings about the relevant circumstances of Palmer's crimes and the job he was offered. Those findings reveal that that they lacked the requisite substantial relationship under the statutory exception against conviction record-based employment discrimination.

II. The Commission properly applied the law to its factual findings and correctly concluded that no substantial relationship exists between the circumstances of Palmer's criminal offenses and the circumstances of the job Cree offered him.

As Cree has acknowledged, the main issue in this case is whether it proved that the circumstances of Palmer's criminal offenses substantially relate to the circumstances of the applications specialist job. (E.g., Cree's Br. 1, 3.) The Commission concluded, applying the law to its findings of fact, that Cree had not met its burden. As a result of this failure, Cree's rescission of the job offer made to Palmer based on his conviction record was unlawful employment discrimination. The Commission's conclusion that employment discrimination occurred was proper and the court of appeals' decision should be affirmed.

A. The Commission's factual findings are conclusive because they are not challenged and are supported by substantial evidence.

As an initial matter, the Commission's findings of fact are conclusive upon this Court for two main reasons. First, Cree has not challenged them on judicial review and admits so in its brief. (*See* Cree's Br. 12 ("here—the facts are undisputed").) The court of appeals recognized this—"Cree develop[ed] no challenge to LIRC's factual findings." Op. ¶ 10. Under ch. 227 judicial review, then, there is no reason for this Court to determine facts if they are not being "disputed." Wis. Stat. § 227.57(3).

Second, and in any event, the Commission's findings of fact are supported by substantial evidence in the record, as noted above.[5] Notably, the factual findings that Cree rescinded its job offer to Palmer based on his conviction record is supported by substantial evidence. (R. 8:6–7 (findings of fact nos. 12–14).) Cree's recruiter involved in Palmer's hiring process testified that Palmer's background check was the reason he was not hired. (R. 8:7; 12:22–23, 160; 9:7–10, 24.)

B. The circumstances of Palmer's offenses do not substantially relate to the circumstances of the particular job.

The Commission decided that Cree did not meet its burden of showing that the circumstances of Palmer's criminal offenses "substantially relate" to the circumstances of the applications specialist position. (R. 8:14–15.) It effectively determined that, taking into consideration the

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[5] The Commission has cited record evidence in the Statement of the Case section of this brief.

character traits revealed by Palmer's felony and misdemeanor offenses, employing him in the applications specialist position would not offer temptations or opportunities for criminal activity like those present in the offenses for which he was convicted, and would not create an unreasonable risk that he would commit similar crimes in the employment setting.

As for the circumstances of Palmer's offenses, he informed Cree that he was convicted on "[d]omestic related charges" and that he had charges "stemming from a domestic dispute involving a live-in girlfriend." (R. 8:5–6 (finding of fact nos. 7, 9); 9:2.) Cree then obtained a criminal background report which listed felony and misdemeanor convictions. (R. 8:6 (finding of fact no. 10).) The felony and three misdemeanors were all described as "[Wis. Stat. §] 968.075(1)(a) Domestic Abuse" in his judgment of conviction. (R. 11:33, 40.) Palmer pled to "domestic abuse" counts for felony strangulation/suffocation, and misdemeanor battery, fourth degree sexual assault, and criminal damage to property.[6] (R. 12:37–38; 9:34–36; 11:19–20, 33–34, 37.) The Commission recognized, in its memorandum opinion, that

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[6] Cree repeats allegations made in an amended criminal complaint when purporting to summarize Palmer's criminal history. (Cree's Br. 7 (citing P-App. 148–49).) That is wholly improper. Palmer was not convicted of all of the charges in the amended criminal complaint, including charges of second- and third-degree sexual assault. (*See* R. 11:3–8.) The inquiry here was limited to Palmer's convictions, not all charges against him. Criminal offenses only charged are mere arrests, *see* Wis. Stat. § 111.32(1), and are unlawful bases to decline to hire someone unless there is "a pending criminal charge" that is "substantially relate[d]." Wis. Stat. § 111.335(2)(b). There were no pending charges in this case; indeed, Cree has never made that argument.

the traits associated with Palmer's convictions included "disregard for the health and safety of others, inability to control anger, frustration, or other emotions, [] the use of violence to achieve power or to solve problems" and "a tendency to disregard the property rights of others." (R. 8:10, 12.)

As for the circumstances of the applications specialist job, the Commission found "no evidence indicating that [Palmer] would be supervising or mentoring female employees, nor is there anything to suggest that he would be working closely with female employees." (R. 8:13.) The employee typically would sit in the facility's "cubicle farm." (R. 12:92.) In a general sense, the work was done as "part of a team," but day-to-day work by the employee was to monitor and carry out his "own . . . book of business." (R. 12:91.) And there was no evidence that Palmer would not be traveling with female employees on business trips, or sharing cars, staying at the same hotels, or socializing with them in his business travel. (R. 8:13.)

The Commission did not find evidence that client contacts would provide substantial opportunity for Palmer to reoffend, either. (R. 8:13.) For example, Cree's recruiter, Motley, testified that typical interactions with customers were by "phone and email," or else in "demonstration rooms," in the "factory," "at a booth at a trade show," or "occasionally" through traveling to a client's location at a work site—"oftentimes it's a builder or a construction company." (R. 12:88–90; 8:13.) There was no evidence that Palmer would have client contact in "private homes or other isolated settings, nor did [Cree] specify that the on-site meetings with clients would be conducted one-on-one." (R. 8:13.)

Further, the Commission explained that "there is nothing in the record regarding the types of interactions with co-workers or with the public that might raise a concern that [Palmer] would act in a violent manner." (R. 8:13.) For example, Palmer would not be "required to deal with angry or irate customers or that there were any conflicts presented in his relationships with the public." (R. 8:13.)

Based on its factual findings, the Commission properly concluded that Cree had not shown the circumstances of Palmer's offenses are substantially related to the circumstances of the applications specialist job. This test looks to the "general, character-related circumstances of the offense or job." *Milwaukee County*, 139 Wis. 2d at 825. The Commission examined and made findings about whether there was a substantial connection between the circumstances of his convictions and the particular "employment setting[]." *Id.* at 823. The evidence about the particular job here lacked the required "temptations or opportunities . . . similar to those present in the crimes for which [Palmer] had been previously convicted." *Id.* at 821.

As the Commission found, the circumstances for the offenses were a romantic relationship that turned bad and a domestic assault of Palmer's partner. However alarming—and the Commission found Palmer's conviction record concerning (R. 8:14)—the Commission found that Cree offered no similar scenario in its lighting factory. Palmer's offenses were not against co-workers or members of the public but, rather, flowed from an intimate relationship in a domestic setting.

That result is consistent with the scenarios in this Court's precedent. For example, the applications specialist job was not a position of public trust involving a special population—Palmer is not like the armed robber seeking to

be a school bus driver who, according to the credited testimony, needed qualities that were clearly absent. *Id.* at 828. He also is different than the criminally negligent nursing home administrator who sought similar employment as a crisis specialist. *Id.* at 810, 828–29. Likewise, Palmer is unlike the police officer convicted of forging citations who then sought to be a police chief. *Law Enf't Standards Bd.*, 101 Wis. 2d at 492. The clear connections or circumstances present in those cases were found not to be present for the applications specialist job here.[7]

Thus, the court of appeals correctly held that Palmer's criminal offenses "demonstrate a 'tendenc[y] and inclination[] to behave a certain way in a particular context'—to be physically abusive toward women in a live-in boyfriend/girlfriend relationship." Op. ¶ 14 (citing *Milwaukee County*, 139 Wis. 2d at 824). But "Cree presented

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[7] This result also is consistent with the Commission's prior decisions discussed in its memorandum opinion. (R. 8:10–12.) Cree spends much of its brief disagreeing by discussing those and other Commission decisions about conviction record discrimination. (Cree's Br. 16–19, 22–26.) This argument, however, misses the mark and deserves no detailed response. Prior Commission decisions that Cree claims are inconsistent with its decision here are nothing more than decisions that comport with the Legislature's mandated statutory scheme. Substantial relationship decisions all rely on different "circumstances" (with different factual findings as their foundation) of various criminal offenses and "particular" jobs. Wis. Stat. § 111.335(3)(a)1. The fact that different circumstances will yield different results is precisely what one would expect from a circumstance-based statute. Moreover, supposed inconsistent application of the law to facts should not influence this Court's decision in any event, because deference is no longer granted to the Commission's legal conclusions. *See* Wis. Stat. § 227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21.

no evidence suggesting Palmer has ever been violent in a circumstance other than a live-in boyfriend/girlfriend relationship or even suggesting that he has ever had such a relationship that in any way stemmed from or was related to his employment." Op. ¶ 15. The court also agreed with the Commission's conclusion that "mere contact with others at the [Cree] facility and on the job is not substantially related to Palmer's domestic violence." *Id.* The court of appeals' decision to reverse the circuit court was proper.

C. Cree's arguments are unpersuasive.

Cree makes several arguments in its attempt to provide this Court with a necessary ground for setting aside the Commission's decision, *see* Wis. Stat. § 227.57(2), but all fail.

Cree essentially argues that it proved the exception to the prohibition of conviction record-based discrimination because Palmer was violent in his crimes and he would deal with people the same way in his applications specialist job. (Cree's Br. 12, 16–17, 20.) This Court should decline, like the Commission did, to conclude that "the mere presence of other human beings is a circumstance that creates a substantial relationship." (R. 8:14.) Cree's assertion strays from the text of the statutory test and this Court's decisions interpreting it.

When concluding that Cree did not make the required showing, the Commission relied on testimony that provided, at best, a generalized connection between Palmer's convictions and the applications specialist job—one that would exist for nearly any job. Again, that is not the statutory standard. On the contrary, the circumstances of the offenses must "*substantially* relate to the circumstances of the *particular* job." Wis. Stat. § 111.335(3)(a)1. Cree's position paints with too broad a brush and deviates from the

law. It is possible that, if working in the offered job, Palmer could engage with a female co-worker, establish a personal relationship, and then become violent in another domestic setting. But the fact that Palmer would work with other persons, including women, is not a circumstance to the particular job. It is a circumstance of *every* job. Moreover, this Court has held that the statute applies to "employment settings." *Milwaukee County*, 139 Wis. 2d at 823. That is why the court of appeals correctly explained that the question is not "whether Palmer is likely to again be violent toward another woman with whom he is in a live-in boyfriend/girlfriend relationship." Op. ¶ 14. Rather, the "question is whether Cree met its burden to show that Palmer's past domestic abuse is substantially related to the circumstances of the Applications Specialist job Palmer applied for." *Id.* And the answer to that question is no. *Id.*

Cree also complains that the Commission considered "superficial matters" and a "fact-specific analysis" related to Palmer's offenses. (Cree's Br. 16, 21, 25.) For example, Cree criticizes the Commission for considering who Palmer victimized by numerous references to his "live-in girlfriend," that the violence was motivated by fighting and wanting to "break up," and that the crimes occurred "at home." (Cree's Br. 21.) These references, however, are the "*general* facts" and "*general* character-related circumstances" that this Court expressly permits in deciding the substantially-related test. *Milwaukee County*, 139 Wis. 2d at 825 (emphasis added). These aforementioned references are *not* the kind of "factual *details*" that this Court admonished are not important, such as "the hour of the day the offense was committed, the clothes worn during the crime, [or] whether a knife or a gun was used." *Id.* at 823. No details of that type were considered by the Commission. Moreover, the Commission's references to "live-in girlfriend," "break up",

and "home" are related to the elements of the "domestic abuse" aspect of Palmer's offenses. Indeed, "[d]omestic abuse" means an intentional infliction of pain or physical injury "by an adult person against his or her spouse or former spouse [or] *against an adult with whom the person resides*." Wis. Stat. § 968.075(1)(a). Not only did Palmer notify Cree that his offenses were domestic offenses, his judgment of conviction makes that explicit (R. 11:33). The Commission would have been remiss to ignore the "elements" of Palmer's domestic abuse offenses because this Court has acknowledged that the elements of a crime are considered as part of the substantial relationship test. *See Milwaukee County*, 139 Wis. 2d at 826.

Finally, Cree contends that the Commission has created a rule that "men convicted of beating or sexually assaulting their wives or girlfriends can rarely if ever be denied employment based on their crimes." (Cree's Br. 26.) The Commission has created no such rule. It simply determined that there would be no "unreasonable risk" that Palmer, in the application specialist job, would be "offered temptations or opportunities for criminal activity similar to those present" in the crimes for which he had been previously convicted, and "commit another similar crime." *Milwaukee County*, 139 Wis. 2d at 821. Far from the Commission creating a bright-line rule with its decision, it is Cree that seeks a rule from this Court that persons convicted of violent crimes can be discriminated against in employment if they have any co-workers, and that persons convicted of violence against women can be discriminated against if any co-workers are women. (Cree's Br. 12, 16–17, 20 (references to Palmer's "violent crimes" and co-workers, including "women" and "female employees").) The court of appeals rightly explained that "Cree's position appears to be less focused on the circumstances of the particular job

Palmer applied for and more focused on the general sense that Palmer is not fit to be unconfined from prison and participating in the community at all due to his prior crimes, even though he has long since finished serving the confinement portion of his sentence." Op. ¶ 15.

Cree's position reveals that it wants a change in state policy regarding conviction record employment discrimination, but that is for the Legislature, not this Court, to provide. "[D]etermination of public policy is a matter primarily for the legislature, and where the legislature has clearly stated its policy in the form of a statute, as is here the case, that determination is binding on the [Commission] and the courts." *Sinclair v. DHSS*, 77 Wis. 2d 322, 335, 253 N.W.2d 245 (1977); *see also Juneau v. Wisconsin Tax Comm'n*, 184 Wis. 485, 199 N.W. 63, 65 (1924) ("There may be profound questions of public policy involved, but matters relating to the policy of the statute are for the consideration of the Legislature and not the courts, as we have pointed out many times."). As the court of appeals noted, the "courts are left with the task of trying to faithfully apply the law the legislature enacted, which is with general language allowing for conviction-based employment discrimination only where the circumstances of the conviction are 'substantially relate[d]' (not 'somewhat related') to the circumstances of the particular job." Op. ¶ 16. The Commission's conclusion that Cree failed to establish a substantial relationship here was proper under the law. *Id.*

III. The Commission's determinations as to the weight and credibility of Cree's witnesses' testimony are conclusive.

Cree devotes much of its brief arguing that the Commission made erroneous determinations regarding the credibility and weight of the evidence. (Cree's Br. 26–36.)

Cree focuses on the Commission's determinations that (1) gave no weight to the witness testimony of Dr. Darald Hanusa, and (2) the testimony of Melissa Garrett and Lee Motley about the stress of the job offered to Palmer was not credible. These arguments can be rejected for two reasons. First, and foremost, they fail on their merits because determinations of weight and credibility of evidence are for the Commission to make, not the courts. Second, Cree has forfeited the issue as to Garrett and Motley because it was not raised to the circuit court.

A. The Commission properly determined the weight and credibility of witness testimony.

Cree purports to challenge Commission weight and credibility determinations. (Cree's Br. 26.) These arguments should be rejected, and the Commission's determinations should be allowed to stand.

1. The Commission's determination to give no weight to Dr. Hanusa's testimony is conclusive.

Cree first complains that the Commission gave no weight to the testimony of Dr. Hanusa, Ph.D., a board-certified and licensed clinical social worker. (Cree's Br. 27–32; R. 12:180–236 (hearing transcript).) Hanusa testified that there is a relationship between domestic violence and workplace violence; men who batter oftentimes have problems on the job as well, and "if you have a willingness to use violence in your intimate relationship, there's a direct relationship between your willingness to use violence in other settings." (R. 12:189–94.) He opined that Palmer presented a risk in the workplace because of the extremely severe violence reflected in his criminal offenses, particularly the suffocation offense. (R. 12:200–01.) Hanusa

believed that the size of Cree's facility, the sizable female workforce, the absence of direct supervision, and an employee's access to the entire facility were factors that made it "risky" for Cree to employ Palmer. (R. 12:203–08.) Hanusa feared that "a person in this situation who has a history of relationship violence could foster a relationship with a coworker who's female and then in turn become violent with that person." (R. 12:204.)

Upon review, the Commission first consulted with the ALJ to obtain his impressions of the demeanor of the witnesses, but the ALJ offered no specific demeanor impressions. The Commission found Hanusa's testimony "unhelpful." (R. 8:14.)

Cree argues that the Commission was not free to reject this "unrefuted expert testimony." (Cree's Br. 30–31 n.7.) Cree's argument fails because it has no basis in law.

It has long been the law of judicial review that "the weight and credibility of the evidence are for the agency, not the reviewing court, to determine." *Hilton v. DNR,* 2006 WI 84, ¶ 25, 293 Wis. 2d 1, 717 N.W.2d 166. "It is not this court's function to judge the credibility of the witnesses or the weight of the evidence on review." *Samens v. LIRC*, 117 Wis. 2d 646, 660, 345 N.W.2d 432 (1984); *Bucyrus-Erie, Co. v. DILHR,* 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979) ("The reviewing court cannot evaluate the credibility or weight of the evidence."); Wis. Stat. § 227.57(6). Put simply, a court may not "second guess" the proper exercise of the agency's fact-finding function even though, if viewing the case *ab initio*, it would come to another result. *Briggs & Stratton Corp. v. DILHR*, 43 Wis. 2d 398, 409, 168 N.W.2d 817 (1969).

Further, this Court has held that the Commission may reject an expert witness's opinion, even if there is no contrary evidence. *See E.F. Brewer Co. v. DILHR,* 82 Wis. 2d 634, 636–37, 264 N.W.2d 222 (1978); *see also In re Commitment of Kienitz*, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999) ("This court has never bound the trier of fact to the opinion of an expert; rather, it can accept or reject it."). And this rule applies generally to administrative proceedings. *See Xerox Corp. v. DOR*, 2009 WI App 113, ¶ 58, 321 Wis. 2d 181, 772 N.W.2d 677 (citing *E.F. Brewer,* 82 Wis. 2d at 636–37).

Here, the Commission considered the testimony of Dr. Hanusa, which was nothing more than a reiteration of Cree's generalized-risk theory. He opined, for example, "[I]s there a relationship between domestic violence, generalized violence, and workplace violence? The answer to that is yes." (R. 12:187.) In addition, he opined that "[g]eneralized violence isn't relationship specific, those are the kind of people who get into bar fights, get into fights with family members, have fights in high school, things of that nature. But that does spill over to the workplace." (R. 12:188.) Dr. Hanusa also opined that people like Palmer "present a certain risk to their families, to their intimate partners and in the workplace, because they're willing to go that far to make their point." (R. 12:199.) But he conceded that he had not compiled statistical information quantifying how often domestic offenders go on to commit an act of workplace violence. (R. 122:230–32.) He further suggested that Palmer "could foster a relationship with a coworker who's female and then in turn become violent with that person." (R. 12:202.) And he asserted that, "When someone is violent to the intimate partner, it's not just violence against that woman, it's violence to the community." (R. 12:202.)

The Commission was under no legal obligation to give any weight to this testimony, even if uncontroverted, *see E.F. Brewer Co.,* 82 Wis. 2d at 636–37; *Xerox Corp.*, 321 Wis. 2d 181, ¶ 58, and it properly did not. That determination was well within the Commission's province. In explaining why, the Commission noted that Dr. Hanusa opined that taking rehabilitative steps would matter to his analysis, but then he failed to address that Palmer indeed had taken steps, including taking anger management classes. (R. 8:14 n.6; 12:187–88, 203; 13:29–31.) And, more fundamentally, Dr. Hanusa's opinions were based on general observations about violence—that someone who is violent at home is, on average, more likely be violent elsewhere—and hypotheticals that were irrelevant to the job—that Palmer might become romantically involved with a co-worker. Those premises seemingly would allow someone convicted of a violent offense to be rejected for any job that involves working with other people. But that leaves out the required analysis of the "character-related circumstances of the offense," and the "particular job['s]" "opportunity for criminal behavior" or exposure to "people similarly situated." *Milwaukee County*, 139 Wis. 2d at 824–25, 828.

Also, contrary to Cree's assertion, the Commission, in giving no weight to Dr. Hanusa's testimony, did not find that the tendency of male batterers to use violence to achieve power or solve problems is not likely to recur in work settings. (Cree's Br. 31.) Rather, the Commission reasonably rejected Dr. Hanusa's opinion that Palmer, if placed in the applications specialist position, might become involved romantically with a female co-worker because this required a high degree of speculation and conjecture that went beyond any relevant job-related conduct. (R. 8:12–13; 12:204.) And Dr. Hanusa's opinion is not dispositive in passing the substantially-related test, as Cree implies.

"Whether a particular set of facts satisfies a legal standard is a question of law that is decided not by expert witnesses, but by the Commission." *Xerox Corp.*, 321 Wis. 2d 181, ¶ 58.

Moreover, this Court has confirmed that the substantially-related test is not supposed to require sophisticated litigation but rather should be "practical." *Milwaukee County*, 139 Wis. 2d at 826. Cree does not square that directive with its view that its expert's opinion should be dispositive to the case. In fact, its position would require an employee to retain an expert, potentially at great expense, any time an employer uses one.

Finally, and despite making it an issue before this Court, Cree has provided no legal authority for its novel position that the Commission must give weight to its expert's testimony simply because it is uncontroverted. (Cree's Br. 27–32.) Not only does Cree cite *no case law* supporting its position, it makes no attempt to explain why *E.F. Brewer Co.* and *Xerox Corp.* do not control, either. This Court does not need to consider an argument unsupported by legal authority. *McEvoy by Finn v. Grp. Health Co-op. of Eau Claire*, 213 Wis. 2d 507, 530 n.8, 570 N.W.2d 397 (1997). And "[a]n appellate court need not consider arguments that are inadequately briefed." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 87 n.30, 277 Wis. 2d 635, 691 N.W.2d 658). Also, Cree cannot develop any substantive argument for the first time on reply because "[i]t prevents the opposing party from having an adequate opportunity to respond." *Paynter v. ProAssurance Wis. Ins. Co.*, 2019 WI 65, ¶ 108, 387 Wis. 2d 278, 929 N.W.2d 113 (quoting *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998)).

The Commission determined that it did not find the testimony of Dr. Hanusa to be helpful and gave it no weight. Because the Commission, not the courts, determines the weight of evidence, this specific determination is conclusive.

2. The Commission's determination that Motley's and Garrett's testimony about the amount of the stress of the job was not credible is conclusive.

Cree also challenges the Commission's decision that the testimony of Motley and Garrett was not credible as to the amount of stress in the applications specialist job. (Cree's Br. 32–36; R. 8:20 ("The administrative law judge indicated that he did not find the respondent's witnesses credible with respect to the amount of stress in the workplace—a finding with which the commission agrees.").) Again, this determination is within the province of the Commission, not the courts. Consequently, the Commission's credibility determination, resulting in no factual finding that the job offered was very stressful, is conclusive and must stand.

As an initial matter, Cree incorrectly describes portions of the court of appeals decision. The court did not say that the Commission's ignoring of undisputed evidence "may have made a difference" to the outcome of the case. Rather, the court of appeals wrote that "*a different credibility finding* . . . may have made a difference in the consideration of this case." Op. ¶ 7 n.4 (emphasis added). And the court properly recognized that it was bound by the credibility determination made by the Commission—that Garrett and Motely were not credible as to the job's high stress. *Id.* (citing *Xcel Energy Servs., Inc., v. LIRC*, 2013 WI 64, ¶ 48, 349 Wis. 2d 234, 833 N.W.2d 665). Also, Cree implies that the court of appeals was referring to Dr. Hanusa's testimony, but it was not. The court of appeals

made its "may have made a difference" comment about the testimony of Motley and Garrett, not Hanusa. Op. ¶ 7.

Notwithstanding these issues, Cree criticizes the Commission for accepting some aspects of Garrett's and Motley's testimony, such as hard facts about the workplace (i.e., building's square feet, number of employees, etc.), but not others, such as their opinions on the stress level of the lighting applications specialist's job. (Cree's Br. 32.) This argument goes nowhere because "the trier of fact is privileged to disregard a portion or all of a witness's testimony." *City of Chippewa Falls v. Kendall*, 145 Wis. 2d 908, 430 N.W.2d 381 (Ct. App. 1988) (citing *Pappas v. Jack O.A. Nelsen Agency, Inc.,* 81 Wis. 2d 363, 369–70, 260 N.W.2d 721 (1978)); *see also State v. Owen*, 202 Wis. 2d 620, 634, 551 N.W.2d 50 (Ct. App. 1996) (holding trial court may accept some, but not all, of an expert's testimony). Indeed, this Court has explained that "it is the trier of fact's task, not this court's, to sift and winnow the credibility of the witnesses." *In re Commitment of Curiel*, 227 Wis. 2d 389, 421, 597 N.W.2d 697 (1999).

Cree does not convincingly explain that the Commission's determination not to find Motley's and Garrett's testimony that the job as "high stress" was without basis. Although the Commission recognized that a character trait of a crime Palmer committed is the inability to control anger, frustration, or other emotions, it explained that Cree "did not elaborate upon the nature of the stress other than to state that there are deadlines, and it did not identify any aspect of the work atmosphere likely to trigger criminal conduct in a person who has difficulty controlling anger or a propensity to resolves problems with violence. (R. 8:14, 5.) And there was no record evidence that Palmer would be required to deal with "angry or irate customers or that there were any conflicts presented in his relationships with the

public." (R. 8:14.) In short, Cree has not shown that a finding that the applications specialist job would be high stress was necessary or even would be a dispositive factor to the substantial relationship test.

The Commission's determination that Garrett's and Motley's testimony–that the job offered to Palmer was stressful–was not credible must stand.

B. Cree forfeited the challenge to the Commission determination that Garrett's and Motley's testimony was not credible.

In addition to the Commission's argument above, this Court should reject Cree's argument on this point because it has forfeited the issue.

"Generally, issues not raised or considered by the circuit court will not be considered for the first time on appeal." *McKee Fam. I, LLC v. City of Fitchburg*, 2017 WI 34, ¶ 32, 374 Wis. 2d 487, 893 N.W.2d 12. This Court even declined to address an issue that the court of appeals tackled because it was not raised with the circuit court. *Bostco, LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 83, 350 Wis. 2d 554, 835 N.W.2d 160.

Here, the record is clear that Cree did not raise the credibility issue as to Garrett's and Motley's workplace stress testimony before the circuit court (or the court of appeals). Cree's petition for ch. 227 judicial review is devoid of any challenge to the Commission's credibility determinations. On the contrary, Cree focused on the Commission's application and interpretation of the law regarding the substantial relationship test.[8] (R. 1:3.) Cree's

[8] Cree had challenged the Commission's order awarding interest on the backpay award to Palmer. (*See* R. 1:3; 18:26–27;

opening circuit court brief does not raise any challenge to the Commission's credibility determination as to Garrett and Motley, either. And Cree did not raise an untimely challenge to this credibility determination in reply. (R. 23.) Finally, Cree's court of appeals brief did not challenge this Commission credibility determination. Cree's focus was on the Commission's alleged "erroneous application of law and its application of the undisputed facts to the law at which are at issue." (Cree's Court of Appeals Br. 16.) In fact, the brief did not even mention the names of Motley or Garrett. (*See* Cree's Court of Appeals Br.) The first time Cree raised the issue was in its petition for supreme court review. (Pet. 23–25.) This is far too late to warrant this Court's decision on the issue. *Bostco*, 350 Wis. 2d 554, ¶ 83.

To the extent that Cree argues that Commission factual findings are not supported by substantial evidence (Cree's Br. 34 n.9), that argument also was not raised or developed below. As mentioned above, Cree affirmatively denied any challenge to Commission factual findings before the court of appeals[9] and the court of appeals agreed. *See* Op. ¶ 10. Cree does not demonstrate otherwise in its brief.

23:16–18.) Cree, however, did not raise this issue in its appellate briefs. As a result, it has abandoned the issue. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.").

[9] Cree wrote in its court of appeals brief: "The Case Is Not About Substantial Evidence." (Cree's Court of Appeals Br. 16.) Cree also wrote, "[T]here is no relevant 'disputed finding of fact.'" (Cree's Court of Appeals Br. 16 (quoting Wis. Stat. § 227.57(6)). And, Cree continued, "The only facts that are relevant to the substantial relationship test articulated by the Wisconsin Supreme Court . . . are undisputed." (Cree's Court of Appeals Br. 16.)

Cree's argument regarding the Commission's credibility determination as to Garrett's and Motley's opinions that the job offered to Palmer was very stressful has been forfeited and should be rejected.

***

Cree engaged in unlawful employment discrimination by rescinding the applications specialist job offered to Palmer based on his conviction record. And the Commission's conclusion that Cree failed to meet its burden in proving the relevant exception to this discrimination—that the circumstances of Palmer's offenses are substantially related to the circumstances of the job—was in accordance with the statutory text and this Court's *Milwaukee County* decision. Consequently, the Commission's conclusion that Cree violated the Wisconsin Fair Employment Act was legally proper.

CONCLUSION

The Labor and Industry Review Commission respectfully asks this Court to affirm the decision of the Court of Appeals and therefore its decision.

Dated this 17th day of May 2021.

Respectfully submitted,

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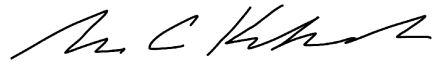
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9375 words.

Dated this 17th day of May 2021.



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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (Rule) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 17th day of May 2021.

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