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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

REPLY BRIEF FOR PETITIONER CREE, INC.

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INTRODUCTION

Even LIRC acknowledges that in applying this Court's substantial relationship test, one must "look 'first and foremost' at the statutory elements of the criminal offenses involved," "decide what character traits are revealed from those elements," and then determine "what their relationship is to the individual's employment." *Billings v. Right Step, Inc.*, ERD Case No. CR201501613 (LIRC June 10, 2020). As night follows day, this analysis inexorably leads to only one conclusion: Palmer's repeated criminal convictions for physical and sexual violence against women were substantially related to the job at Cree that involved extensive work, interaction, and travel with women under circumstances in which Cree could neither oversee his actions nor prevent him from attacking women again.

Nonetheless, LIRC has doubled down, insisting that because Palmer's convictions might be characterized as "domestic-related," this Court's substantial relationship test should be abandoned in favor of its own agency-created one. At once, this approach—which demands an exact identity between the setting in which Palmer's crimes occurred, the identity of his victims, and the nature of the job he sought—both contravenes the practical analysis this Court requires and creates an unreasonable risk of harm to Wisconsin employers, employees, and the public. It therefore must be struck down by this Court.

ARGUMENT

I. LIRC Erroneously Interpreted and Applied the Substantial Relationship Test

A. LIRC Disregarded this Court's Interpretation of the Test

Through *Lyndon Station*, *Gibson,* and *Milwaukee County*, this Court established the framework for properly applying the WFEA's substantial relationship test. Emphasizing the need for

"practicality," the Court rejected any contention that an "inquiry into the specific factual circumstances" of a conviction was required, and instead looked to the attendant "general character-related circumstances" and whether they were likely to reappear on the job. *Milwaukee County*, 139 Wis. 2d 805, 825, 407 N.W.2d 908 (1987). Ultimately it's "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.

To LIRC's credit, it properly commenced the substantial relationship analysis by looking to the elements of Palmer's strangulation, battery, and sexual assault convictions. As it had in other cases, LIRC concluded that these crimes' character traits included disregard for the health and safety of others, inability to control anger and frustration, and use of violence to achieve power or solve problems. (P-App. 028-029; Co-Appellant Response Brief (CARB) at 18).

But then LIRC went dangerously astray. It did not ask—as *Milwaukee County* and its predecessors instruct—whether the job at Cree afforded the opportunity for those *general* traits and tendencies to reappear. Instead, it fixated on the identity of the women Palmer brutalized and the physical setting in which he tormented them, and demanded proof that such circumstances would be replicated at Cree. LIRC therefore insisted on evidence that Palmer's violence toward women "stemmed from or was related to his employment;" or that he would develop a romantic relationship with a coworker; or that the position would place him in the "homes or other personal space[s]" of Cree's customers. In the absence of such a particularized showing, LIRC concluded that there was no substantial relationship between the position and Palmer's offenses. (CARB at 7,9,18-20).

Yet neither the legislature nor this Court have ever conditioned a substantial relationship finding on such a showing. Certainly Wis. Stat. §111.335(3)(a)(1) does not pigeon hole the

substantial relationship defense to only those instances in which an employer can prove that the crime victim was a fellow employee or the crime occurred at work. Nor has this Court ever required such an artificial, illogical analysis in determining whether the job would provide an unreasonable risk of harm. Thus, the Court in *Gibson* never demanded proof that the complainant's armed robbery conviction arose from his employment or that he previously robbed children like those he would encounter on the job. Rather, the Court looked at the *general traits* attendant to an armed robbery conviction—disregard for the rights of others and propensity to use force to accomplish one's purpose—and found that such traits substantially related to a job—bus driver—that demanded extreme patience, level-headedness, and avoidance of force. *Gibson*, 106 Wis. 2d at 27-28.

Given that the substantial relationship test does not turn on the context-specific showing it demands here, it's not terribly surprising that LIRC would prefer this Court not look too carefully at some of its previous conviction record decisions. (CARB at 20). In *Weston v. ADM Milling Co.*, LIRC flatly rejected the contention that because the complainant's battery and sexual assault did not "occur[] in an employment setting, the substantial relationship test ha[d] not been met." ERD Case No. CR200300025 (LIRC Jan. 18, 2006). And in *Hoewisch v. St. Norbert College*, LIRC saw no need to scour the record for proof that the complainant would develop a foster-like relationship or enter the homes or personal spaces of the children encountered on her job. Instead—consistent with *Gibson*—LIRC concluded that "the context of the offense and the job need not be identical" and found a substantial relationship because of the "distinct possibilit[y]" that [her] job would "place her in the presence of children without supervision." *Hoewisch*, ERD Case No. CR200800730 (LIRC Aug. 14, 2012).

Nor is it terribly surprising that LIRC must abandon this Court's required "common sense" analysis for its own "context-specific" one whenever confronted with domestic battery or assault convictions. Doing so allows LIRC to find no substantial

relationship even when the general character-related circumstances of the crime prove otherwise. *See Johnson v. Rohr Kenosha Motors*, ERD Case No. CR201602571 (LIRC Apr. 29, 2020); *Palmer v. Cree, Inc.*, ERD Case No. CR201502651 (LIRC Dec. 3, 2018); *Knight v. Wal-Mart Stores East LP*, ERD Case No. CR200600021 (LIRC Oct. 11, 2012); *Robertson v. Family Dollar Stores, Inc.,* ERD Case No. CR200300021 (LIRC Oct. 14, 2005).

LIRC's use of one standard when analyzing domestic crimes against women and another when analyzing all other crimes cannot be condoned. Rather, as even LIRC begrudgingly acknowledges, it must "faithfully apply" the law as enacted by the legislature and interpreted by the Court. (CARB at 24). Had it done so, LIRC would have found a substantial, obvious, and compelling relationship between Palmer's repeated criminal abuse of women and the job he sought.

B. Cree Satisfied the Substantial Relationship Test

LIRC acknowledges Palmer's convictions show the "inability to control anger, frustration, or other emotions," and "use of violence to achieve power or…solve problems." (P-App. 028-029; CARB at 18). Yet because Cree could not prove that Palmer's employment would lead to a "romantic relationship that turned bad," LIRC contends there was no substantial relationship between his crimes and Cree's job. (CARB at 19). LIRC fails to recognize that the question is not whether Palmer would engage in the exact same crime in the work environment, but whether the "propensities and personal qualities" exhibited by Palmer's crimes were likely to reappear on the job. *Milwaukee County*, 139 Wis. 2d at 828. Even a cursory review of the Applications Specialist responsibilities and work environment establish that the answer to that question is a resounding "yes."

The fast-paced and demanding nature of the position, the requirement to nimbly manage multiple deadlines while meeting

challenging customer demands, and the certainty of abrasive communications, require one to calmly and rationally solve problems in the volatile context of frustrated and occasionally angry co-workers and customers. (P-App. 072-073, 113). As LIRC acknowledges (and Dr. Hanusa's testimony confirms), when faced with such challenges, one convicted of strangulation, battery, and sexual assault is prone to violence, particularly toward women, regardless of the physical setting. (P-App. 028-029; CARB at 18).

LIRC also acknowledges that the job at Cree would have provided frequent, unsupervised interactions with women. Specifically, he would have worked among 500 women in an expansive facility with largely unmonitored access to Cree's manufacturing space, storage areas, conference rooms, and break rooms and worked without close (or any) supervision, both at Cree and when the job necessitated travel to customer sites and out-of-town trade shows. (CARB at 3-4, 7). LIRC cannot reasonably argue that such an environment did not afford "more than the possibility that an individual could repeat criminal conduct." *Johnson* (LIRC Apr. 29, 2020); *Milwaukee County*, 139 Wis. 2d at 824 (highlighting the importance of the "opportunity for criminal behavior"). Nor can it demand that Cree, its employees, or the public assume that risk.

C. A Substantial Relationship Finding Would Not Deprive Palmer of Future Employment

Both LIRC and Palmer make the outlandish claim that a substantial relationship finding would amount to a rule that "persons convicted of violence against women can be discriminated against if any [of their] co-workers are women." (CARB at 23; Appellant's Response Brief ("ARB") at 1). That is simply not true, and Cree's justification for not hiring Palmer hardly makes it so. The substantial relationship has never been about the mere presence of women at Cree. Rather, it is the continuation of Palmer's character traits as revealed by his repeated and disturbing crimes against women, and the unsupervised and challenging environment in which Palmer would interact with

women—whether it be in a secluded conference room at Cree, an isolated restaurant with a customer, or a hotel room with a potential client—that created a risk of recidivism too great to bear.

But that Cree was right not to employ Palmer in its job has nothing to do with whether he could work with women in countless other jobs, including those in which he would be closely supervised, not required to travel and meet with existing and potential clients, and not expected to solve problems and meet customer demands in a highly stressful environment.

II. LIRC's Weight and Credibility Determinations Were Erroneous

A. LIRC Improperly Disregarded Dr. Hanusa's Unrefuted Expert Opinion

LIRC acknowledges that Dr. Hanusa—who, unlike the Commissioners, is a "Ph.D., board-certified and licensed clinical social worker"—offered an unrefuted expert opinion that "there is a relationship between domestic violence and workplace violence." (CARB at 25). Nevertheless, citing *E.F. Brewer Co. v. DILHR* and *In re Commitment of Kienitz*, LIRC contends that it was empowered to "reject [the] expert witness's opinion, even if there is no contrary evidence." (CARB at 27).[1]

But neither case involved an uncontested expert opinion. Instead, in *E.F. Brewer*, the Court reviewed a worker's compensation judge's decision weighing the opinions of three qualified medical experts regarding whether an employee's work-related accident caused his disability. 82 Wis. 2d 634, 637-638, 264 N.W.2d 222 (1978). The hearing examiner (who directly heard and

[1]While Palmer's brief raises an objection (ARB at 15-20) to Dr. Hanusa's testimony based on *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993), it is waived because he did not assert it before or during the administrative hearing. *State v. Cameron*, 2016 WI App 54, ¶ 12, 370 Wis. 2d 661, 885 N.W.2d 611.

evaluated the testimony) disbelieved—and therefore gave no weight to—two experts' conclusions that the employee's disability pre-dated his accident, and instead adopted the opposite opinion of the third expert. *Id.* at 639. As had LIRC, this Court declined to disturb the judge's decision regarding how to balance *competing* testimony. *Id.*

Kienitz also involved the testimony of three qualified medical experts, this time opining regarding the defendant's risk of recidivism in a sex offender commitment case. 227 Wis. 2d 423, 438, 597 N.W.2d 712 (1999). The experts agreed there was a substantial probability that the defendant would engage in future violence, but varied in their assigned probabilities (from 48% to 58%). *Id.* at 430-431. Acknowledging their expertise, the circuit court (which directly heard and evaluated the testimony), found each expert's opinions "useful and informative" and "relied heavily" upon all three, but found the defendant's expert "more persuasive."[2] This Court affirmed, concluding that "as trier of fact," the circuit court "was free to weigh the experts' testimony when it conflicted and decide which was more reliable…." *Id.* at 441.

These cases offer no support for LIRC's rejection of Dr. Hanusa's testimony because there was no expert testimony which competed or conflicted with it. Further, LIRC never contended that it disbelieved Dr. Hanusa, as in *E.F. Brewer*, but claimed instead that his testimony regarding the "direct relationship" between violence in an intimate relationship and in other settings was

[2]Interestingly, this expert concluded that the defendant had a 48% chance of reoffending, which—when combined with the other evidence—satisfied the circuit court that the defendant was a sexually violent person who should be committed. *Id.* at 430,437. Dr. Hanusa similarly testified that of the male domestic batterers who successfully complete treatment, 48% continue their violence toward women at least at the same pace as prior to treatment. (P-App. at 105). While a 48% chance is enough for commitment, LIRC seemingly contends it is insufficient to meet the substantial relationship test.

"unhelpful" because it was "based on general observations" and failed to address Palmer's "rehabilitative steps." (CARB at 26,28).

Notably, LIRC's criticism of Dr. Hanusa's testimony conflicts with this Court's admonition that the substantial relationship test does not require an individualized assessment of a particular complainant's risk of recidivism, but instead focuses on the *general* character-related circumstances *of the offenses*. *Milwaukee County*, 139 Wis. 2d at 825. And while it wants to ignore them now, LIRC's own words undermine its basis for rejecting Dr. Hanusa's testimony. *See, e.g., Jackson v. Summit Logistic Services, Inc.*, ERD Case No. CR200200067 (LIRC Oct. 30, 2003) ("Incorporating a detailed analysis of a particular applicant's risk for recidivism into the substantial relationship test would be inconsistent with the recognition that the test must be practical").[3]

LIRC's personal, unsubstantiated opinion that domestic batterers rarely if ever engage in violence in the workplace—which is contrary to Dr. Hanusa's expert opinion proving otherwise—is entitled to no weight.

B. LIRC Erred in Disregarding Cree's Unrefuted Testimony Regarding the Stresses of the Position

While accepting wholesale Cree's fact witnesses' testimony regarding numerous aspects of the job's work environment and responsibilities, LIRC inexplicably rejected as "incredible" their uncontested testimony regarding the stresses inherent in the position. (P-App. 031-032,038).

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[3]Ironically, LIRC contends that Cree's retention of an expert "does not square" with the Court's directive that the substantial relationship test "should be practical." (CARB at 29). It therefore apparently wants Cree to delve into every detail involved in Palmer's convictions while simultaneously preventing it from seeking expert advice regarding whether someone with Palmer's criminal history would likely confine his violence to only a home setting.

At the outset, LIRC contends Cree forfeited its credibility argument by not raising it before the circuit or appellate court. (CARB at 32). This is form over substance as Cree repeatedly argued that the undisputed evidence *did* establish that the Applications Specialist work environment was stressful. (*See, e.g.,* R:18-20; Cree COA Br. at 9,16,26,28,35). But even if Cree was not as clear in raising this issue as LIRC would prefer, this would not prevent the Court from addressing it now. Indeed, "[i]t is within this [C]ourt's discretion to disregard alleged forfeiture…and consider the merits of any issue." *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, ¶32, 274 Wis. 2d 487, 839 N.W.2d 12 (2017). Such discretion is particularly warranted here because whether LIRC can simply choose to ignore undisputed testimony is an important issue of law that has been fully briefed by the parties. *Id.*

On the merits, LIRC cites a few decisions which it contends make its credibility determination conclusive. (CARB at 30-31). None supports such a bold conclusion. As an unpublished court of appeals decision, *City of Chippewa Falls v. Kendall* is of no precedential value. 145 Wis. 2d 908, 430 N.W.2d 381 (Ct. App. 1988); Wis. Stat. 809.23(3). Further, it did not involve an after-the-fact second-hand credibility determination regarding the uncontested, consistent testimony of multiple witnesses, but instead a determination by the trial judge—who "was in the best position to observe the manner and demeanor of the witnesses"—regarding the comparative credibility of conflicting witnesses. *Chippewa Falls*, 145 Wis. 2d at *1.

Pappas v. Jack O.A. Nelsen Agency, Inc. is similarly inapposite. There, the appellant contended that the trial court erred in accepting witness testimony that was replete with inconsistencies and contradicted by other witnesses. 81 Wis. 2d 363, 368, 260 N.W.2d 721 (1978). The Court rejected this argument, holding that even testimony "so confused, inconsistent, or contradictory as to impair credibility as to parts of [it]" may not be "so incredible that all of it must be rejected." *Id.* Here there was

no confusion, inconsistency, or contradiction regarding the job's difficulties. To the contrary, Cree's witnesses—who alone testified on this issue—both agreed that there was "a lot of pressure" in the job, which was fast-paced, deadline driven, and prone to friction. (P-App. 072-073,113).

Finally, *State v. Owen* hardly supports LIRC's rejection of relevant, uncontested testimony here. There, a medical expert was unable to definitively state that the defendant's actions caused great bodily harm to his child. 202 Wis. 2d 620, 551 N.W.2d 50 (1996). The defendant argued that without such expert testimony he couldn't be convicted. *Id.* at 632. The Court disagreed, upholding the guilty finding—which was not inconsistent with the expert's testimony—because the record did not otherwise establish that it was medically impossible. *Id.* 634. Unlike the *Owen* expert, Cree's witnesses *did* offer definitive testimony regarding the job's inherent and unavoidable stresses. In the absence of any contrary evidence whatsoever, LIRC had no authority to make the opposite factual finding. Wis. Stat. §227.57(6).

CONCLUSION

LIRC erred in multiple and dangerous ways in failing to find a substantial relationship between Palmer's numerous violent crimes against women and the job he sought at Cree. Further, its repeated treatment of domestic violence as less serious than that perpetrated in any other setting violates the WFEA and prevents employers from ensuring a safe environment for their employees, customers, and the public. This Court should therefore reverse LIRC's decision in its entirety.

Date: June 4, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and (c) as to form and length for a reply brief produced with a proportional serif font. The length of this brief is 3,000 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 4th day of June, 2021, I caused three copies of this Reply Brief 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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