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SUPREME COURT

STATE OF WISCONSIN
SUPREME COURT
Case No. 2019AP001671

CREE, INC.,

Petitioner-Respondent-Petitioner,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Respondent-Co-Appellant,

DERRICK S. 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, CIRCUIT COURT CASE NO. 19-CV-703

NON-PARTY BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE IN SUPPORT OF PETITIONER-RESPONDENT-PETITIONER CREE, INC.

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INTRODUCTION

This case revolves around the Labor and Industry Review Commission (LIRC), and subsequently the court of appeals, misapplying the substantial relationship test in an instance where an employer, Cree, withdrew a conditional offer of employment when it came to light the applicant, Mr. Palmer, had a conviction history of physical violence, sexual violence, and property damage. LIRC, and the court of appeals, deviated from this Court's precedent to find that these violent crimes did not substantially relate to the job Mr. Palmer applied for because he was physically and sexually violent only to past domestic partners and therefore was unlikely to commit similar crimes in the workplace.

LIRC's and the court of appeals' decisions in this case add to the uncertainty and confusion surrounding how an employer can appropriately apply the substantial relationship test under Wisconsin's Fair Employment Act (WFEA). LIRC created this confusion because it manufactured a dichotomy between how it applies the substantial relationship test based on the type of criminal conviction history the ex-offender job applicant has. When an employer refuses to hire an ex-offender convicted of crimes committed in the "domestic context"—such as Mr. Palmer—LIRC applies a heightened version of the test requiring an employer to show there was an "unacceptably high risk of recidivism" for a particular employee and conducts a detailed factual analysis, directly contrary to this Court's

precedent. In practice, LIRC has found that crimes of domestic violence are all but never substantially related to any employment (contrary the undisputed evidence in this case, as well as social science and real life experience). In all other instances, LIRC follows this Court's precedent. The potential consequences of allowing this heightened test to stand are stark; it puts the safety of an employer's employees, customers, guests, and property at risk.

As Wisconsin's chamber of commerce and manufacturers association, Wisconsin Manufacturers and Commerce recognizes that maintaining the principles of certainty and practicality surrounding the substantial relationship test is vital to employers. If LIRC's heightened substantial relationship test remains, it will damage Wisconsin's business climate, paralyze employers' ability to make effective hiring decisions, and create real safety concerns in the workplace. This Court should reverse LIRC and dismiss Palmer's complaint in its entirety.

ARGUMENT

I. This Court should reject the dichotomy created by LIRC where it ignores this Court's precedent and subjects employers to a heightened standard when screening job applicants who have committed crimes against victims in the "domestic context."

LIRC's and the court of appeals' decisions in this case conflict with this Court's precedent by creating an all but bright-line rule where criminal convictions stemming from crimes committed in the "domestic context" can never be "substantially related" to any job. LIRC's heightened test for crimes committed in the domestic context includes an in-depth *subjective* factual analysis, which creates significant uncertainty for employers trying to apply the substantial relationship test on the ground and in real-time.

A. This Court has long stated that the substantial relationship test is meant to be practical and easy to comply with, not a fact-intensive inquiry.

The WFEA generally prohibits employment discrimination based on conviction record. Wis. Stat. §§ 111.321[1] & 111.322. The legislature created an exemption to this general WFEA prohibition on discrimination based on conviction record: "[I]t is not employment discrimination because of conviction record to refuse to employ any individual… convicted of any felony, misdemeanor, or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity." Wis. Stat. § 111.335 (3)(a)(1).

[1] All citations to the Wisconsin Statutes are current unless stated otherwise.

This Court has interpreted this exemption as a balancing test to determine "when the risk of recidivism becomes too great to ask the citizenry to bear." *Cty. of Milwaukee v. LIRC*, 139 Wis. 2d. 805, 823, 407 N.W.2d 908 (1987). The rationale behind the exemption is to balance the rehabilitation of ex-offenders with the importance of protecting citizens from ex-offenders who are "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 Cty.*, 139 Wis. 2d. at 821.

This Court has repeatedly rejected the idea that the substantial relationship test requires a fact-specific inquiry. *Id.* at 823-824; *Gibson v. Transp. Comm'n*, 106 Wis. 2d 22, 28, 315 N.W.2d 346 (Wis. 1982); *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 492, 204 N.W.2d 89 (Wis. 1981). Rather, a court should assess "whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed." *Milwaukee Cty.*, 139 Wis. 2d at 823-24. The assessment should focus on the "circumstances which foster criminal activity" such as "the opportunity for criminal behavior" and "the reaction to responsibility." *Id.* at 824. Examining the elements of the offenses the ex-offender is convicted of "help[s] to elucidate the circumstances of the offense." *Id.* at 826.

B. LIRC and the court of appeals have twisted this Court's precedent, requiring employers to meet a heightened standard when applying the substantial relationship test to cases in the "domestic context."

Contrary to this Court's decision in *Milwaukee Cty.*, in numerous cases LIRC has deviated from the substantial relationship test and engaged in a detailed, and subjective, inquiry into the facts of the offense and job when applicants have committed crimes in the "domestic context." Here LIRC's opinion once again, and not-so-subtly, changed the standard in domestic violence cases from "when the circumstances, of the offense and the particular job, are substantially related," then "the risk becomes too great to ask the citizenry to bear," to "a finding of a substantial relationship requires a conclusion that a specific job provides an *unacceptably high risk* of recidivism for a particular employee." *Milwaukee Cty.*, 139 Wis. 2d at 823; *Palmer v. Cree, Inc.*, p. 7, ERD Case No. CR201502651 (LIRC 12/3/2018) (emphasis ours).

This inconsistent application of the substantial relationship test has led to two worlds. One, where LIRC follows this Court's precedent and agrees that the substantial relationship test can still be met when an ex-offender has criminal convictions outside the employment context. *See, e.g.*, *Weston v. ADM Milling Co.*, ERD Case No. CR200300025 (LIRC 01/18/06); *Hoewisch v. St. Norbert's College*, ERD Case No. CR200800730 (LIRC 08/14/12). The second, where LIRC engages in detailed factual analyses of

the context surrounding the conviction, makes the employer meet a heightened standard, and creates an all but bright-line rule where an employer can never satisfy the substantial relationship test when an applicant is convicted of the same type of offenses, but they occurred in a domestic setting. *See, e.g.*, *Robertson v. Family Dollar Stores*, ERD Case No. CR200400021 (LIRC 10/14/05); *Rowser v. Upper Lake Foods*, ERD Case No. 200300509 (LIRC 10/29/04); *McKnight v. Silver Spring Health and Rehab.*, ERD Case No. 199903556 (LIRC 02/05/02). This Court should reject LIRC's view that the offenses involving sexual violence, physical violence, and destruction of property—if they happen in the home against domestic partners—cannot satisfy the substantial relationship test.

C. Cree satisfied the substantial relationship test as expounded by this Court.

There is a substantial relationship between Mr. Palmer's criminal record, the traits his record evinces, and the circumstances of employment he sought with Cree. Most recently, Mr. Palmer was convicted of eight criminal offenses against an ex-partner including two counts of strangulation and suffocation, fourth degree sexual assault, four counts of battery, and criminal damage to property. (Cree Opening Br. 6-7). These were not isolated events. Mr. Palmer has been convicted of physically violent crimes against two other previous partners. (Cree Opening Br. 7-8).

Despite this conviction history, LIRC determined there was no substantial relationship between the job Mr. Palmer applied for and his convictions because his victims were past domestic partners. Instead of examining the elements of Mr. Palmer's criminal convictions or his reaction to responsibility, LIRC fixated on the fact these crimes were committed at home, at one point stating its baseless claim that when physical and sexual violence "stem from personal relationships" then "it cannot necessarily be assumed the individual is likely to engage in the same conduct with co-workers or customers…" *Palmer v. Cree, Inc.*, p. 9-13, ERD Case No. CR201502651 (LIRC 12/3/2018). The "circumstances" LIRC based its decision on are "irrelevant" to the inquiry required under the law. *Milwaukee Cty.*, 139 Wis. 2d at 824, 826; *Lyndon Station*, 101 Wis. 2d at 472. However, LIRC waved away this Court's precedent, stating: "there are circumstances where it is necessary to consider additional factual information." *Palmer*, at p. 6. LIRC's analysis represents exactly the type of in-depth factual inquiry that will paralyze employers making hiring decisions.

Instead of an in-depth factual analysis, LIRC should have examined the traits established by Mr. Palmer's conviction history. The character traits exhibited by Mr. Palmer's criminal convictions include:

- Disregard for the health and safety of others, particularly women;
- The use of violence to achieve power, control, or to solve problems;
- The inability to control anger, frustration, or other emotions; and

- The lack of respect for authority.[2]

Many employers would be deeply hesitant to hire an individual *without a criminal conviction record* who had any of these character traits because that person may lack the "soft skills"[3] necessary to work with others safely and productively. Yet LIRC's decision all but forces private employers to hire job applicants with a criminal conviction history that displays these character traits.

The character traits evinced by Mr. Palmer's criminal convictions, combined with the potential job as an Applications Specialist, create the circumstances for an opportunity to recidivate. Cree's witnesses testified, unrefuted, that the role Mr. Palmer applied for would have required him to work in a high stress environment under minimal supervision, with access to the entire facility where approximately half of the employees are women, and would have involved off site travel. (Cree Opening Br. at 4-5).

Under this Court's precedent, Cree's decision not to hire Mr. Palmer did not violate the WFEA. If LIRC's decision is allowed to stand, it will harm employers' ability to protect their employees and hire with certainty.

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[2] *See* Weston v. ADM Milling Co., ERD Case No. CR200300025 (LIRC 01/18/06) (discussing traits associated with sexual assault); McClain v. Favorite Nurses, ERD Case No. 200302482 (LIRC 04/27/05) (discussing traits associated with battery).

[3] Mark Feffer, *HR's Hard Challenge: When Employees Lack Soft Skills*, SHRM.ORG, Apr. 1, 2016, https://www.shrm.org/hr-today/news/hr-magazine/0416/pages/hrs-hard-challenge-when-employees-lack-soft-skills.aspx.

II. LIRC's heightened test creates a significant burden on employers looking to comply with Wisconsin's Fair Employment Law.

The substantial relationship test needs to be applied by employers—many without legal training or access to legal counsel—in real-time when making hiring decisions. In other words, the test is meant to serve the employer's purposes and allow employers to be "confident" when making employment decisions. *Milwaukee Cty.*, 139 Wis. 2d at 826. The test requires a "common sense approach" to make the test operable for employers and employees alike. *Id.* ("A full-blown factual hearing is not only unnecessary, it is impractical.") If this Court ratifies LIRC's misapplication of the substantial relationship test and its arbitrary rule that repeated acts of domestic violence cannot substantially relate to the workplace, then the certainty and practicality infused into the test will be erased.

A. LIRC's heightened test makes employers assume the very risks this Court's precedent wanted to avoid burdening employers with.

In *Milwaukee Cty.*, this Court said employers should not be forced to assume any risk of recidivism by ex-offenders "whose conviction records show them to have the 'propensity' to commit similar crimes…" *Milwaukee Cty.*, 139 Wis. 2d at 823. LIRC's misapplication of the test creates a new higher standard requiring employers to assume the risk of recidivism unless that risk is "unacceptably high." *Palmer v. Cree, Inc.*, p. 6-7, ERD Case No. CR201502651 (LIRC 12/3/2018). LIRC's heightened test is a no-win

situation for employers because on one hand, they risk a WFEA conviction discrimination claim if they do not hire an ex-offender, and on the other, they risk the well-being of their staff and customers, and potential legal liability, if the ex-offender recidivates. An employer juggling any or all of these concerns cannot "proceed[] in their employment decision in a confident, timely and informed way." *Milwaukee Cty.*, 319 Wis. 2d at 826.

LIRC's standard necessarily would require an individualized and detailed inquiry into the individual's offenses, hindering making employment decisions in a timely manner and increasing costs necessary to conduct the inquiry, exactly what this Court did not require. *Milwaukee Cty.*, 139 Wis. 2d. at 823-24, 827. Further, the subjectivity means that regardless of the amount of time and effort spent on an individualized assessment employers cannot be confident in the results.

B. LIRC's deviation from this Court's precedent ignores social science data regarding the relationship between repeated acts of violence in the home and at the workplace.

Cree showed during the ERD hearing that LIRC's division between domestic violence and workplace violence is arbitrary. Dr. Darald Hanusa's—a board-certified and licensed clinical social worker who specializes in treating male perpetrators of domestic violence—testimony in this case and scholarly articles show that there is a direct relationship between repeated acts of physical and sexual violence against persons and the destruction of property in the "domestic context" and the propensity to

commit similar acts in the workplace. LIRC's dichotomy cuts against the very "social experience" the Court indicated should be relied upon when weighing competing interests. *Milwaukee Cty.*, 139 Wis. 2d at 823.

Dr. Hanusa's unrefuted testimony explained why hiring an applicant with a conviction record that exhibits traits like the use of violence to solve problems, the inability to control anger, and the lack of respect for authority may make for a problematic employee, even if the applicant's convictions happened in the "domestic context." During his testimony, he stated there is a "direct" relationship between using violence outside the workplace and being willing to use violence at the workplace. (Tr. p. 190-91). Dr. Hanusa also noted that men with a criminal history of "extremely severe violence" like Mr. Palmer present a risk in the workplace "because they're willing to go that far to make their point." (Tr. p. 199-200). They use violence as a way to assert power and control. (Tr. p. 200) Further, past acts of violence—i.e. Mr. Palmer's conviction history—are the best predictor of future violence. (Tr. p. 202).

Mr. Palmer's attorneys take issue with Dr. Hanusa's conclusion, referencing Palmer's educational record and cherry-picking one statistic related to Palmer having completed a rehab class in prison which may make him less likely than other felons (but still a 48% chance) to re-offend. (Palmer Br. at 9-10). This is the very type of detailed individualized analysis the *Milwaukee County* Court cautioned against. LIRC's rejection of unrefuted

expert testimony on the topic that conformed to the test this Court created, and LIRC's doubling down on its unfounded belief that domestic violence does not transfer over into the workplace, create serious risks for employers trying to keep their workforces safe. *See Palmer v. Cree, Inc.*, p. 13, n.4, ERD Case No. CR201502651 (LIRC 12/3/2018).

Relevant literature agrees with Dr. Hanusa. For example, a literature review on predicting workplace violence found that violence against family members was a "substantial predictor" of aggression against coworkers. Julian Barling, THE PREDICTION, EXPERIENCE, AND CONSEQUENCES OF WORKPLACE VIOLENCE, VIOLENCE ON THE JOB: IDENTIFYING RISKS AND DEVELOPING SOLUTIONS, 34 (G. R. VandenBos & E. Q. Bulatao, 1996), American Psychological Association. The author confirmed that, "[a]n individual's past history of aggression in general will predict violence in the workplace." *Id.* The science is clear: acts of violence "in the domestic context" like Mr. Palmer's are good predictors of violence in the workplace and therefore LIRC's delineation between workplace and domestic violence is unwarranted.

C. LIRC's deviation from this Court's precedent also ignores real life tragedies which have occurred when perpetrators of domestic violence have subsequently committed acts of workplace violence.

Even ignoring both Dr. Hanusa's undisputed testimony and the social science which confirms the relationship between domestic violence and

workplace violence, LIRC's astounding personal belief that domestic violence is not likely to bleed into the workplace flies in the face of real life events. *Palmer v. Cree, Inc.*, p. 9-13, ERD Case No. CR201502651 (LIRC 12/3/2018). Tragically, domestic batterers have gone on to harm or kill employees or others in Midwest workplaces on numerous occasions. For example, just a year ago, a Molson Coors employee who had previously been charged with domestic violence came into his workplace and killed five of his co-workers before taking his own life. *See* Gina Barton, Rory Linnane & Mary Spicuzza, *'We are shocked and dismayed': Family of Molson Coors shooter expresses sadness, heartache*, MILWAUKEE JOURNAL SENTINEL, Feb. 28, 2020, https://www.jsonline.com/story/news/politics/2020/02/28/milwaukee-molson-coors-shooting-gwen-moore-says-victim-old-friend/4902693002/. Similarly, an employee of Henry Platt Company with a history of domestic violence shot and killed five co-workers upon finding out he would be terminated. Caitlin Yilek, *Mother of Aurora gunman who murdered five coworkers says he was 'way too stressed out,'* WASHINGTON EXAMINER, Feb. 15, 2019, https://www.washingtonexaminer.com/news/mother-of-aurora-gunman-who-murdered-five-coworkers-says-he-was-way-too-stressed-out. Violence at home does have a direct relationship to violence at work, and our collective experience bears that out.

Allowing LIRC to further the fiction that repeated acts of domestic violence cannot be substantially related to employment ignores reality. Further, it does nothing to move forward the dual reasons for enacting the conviction discrimination provision, and its exception, in the WFEA. Instead, it creates uncertainty and confusion among employers and places their employees, customers, and guests at risk.

CONCLUSION

For the foregoing reasons, WMC asks this Court to reverse LIRC and dismiss Mr. Palmer's complaint in its entirety.

Dated this 16th day of June, 2021.

Respectfully submitted,

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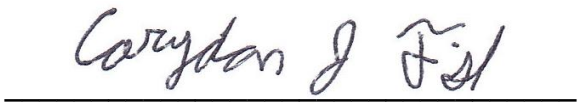
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,965 words.

Dated this 16th day of June, 2021.



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I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

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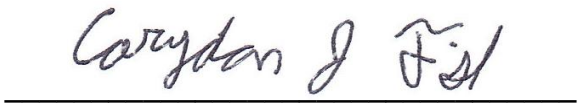

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