LEGAL UPDATES

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Wisconsin Supreme Court Confirms Approach to Evaluating Domestic Violence Conviction Record and Employment Obligations

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On March 10, 2022, in the case *Cree Inc. v. Labor and Industry Review Commission (Cree)*, the Wisconsin Supreme Court issued a 4-3 opinion holding that the employer's recission of a job offer based on a domestic violence conviction record did not unlawfully discriminate against the job applicant in violation of Wisconsin statute section 111.321 (section 111.321). The majority concluded that the employer's decision to rescind the job offer was lawful because the evidence demonstrated that a substantial relationship existed between the circumstances of the domestic violence conviction and the circumstances of the employment position sought.

The decision is an important ruling for employers regarding the interpretation of the "substantial relationship" test, an exception to the general rule against discrimination based on a record of prior conviction. The struggle to apply the substantial relationship test is evidenced by the "seesawing appellate history" in *Cree*. The administrative agency and lower court decisions of the administrative law judge, the Wisconsin Labor and Industry Commission (LIRC), the circuit court and the court of appeals vacillated between concerns of "eviscerating the anti-discrimination purpose" of the statute and protecting employers and the public from a heightened risk of recidivistic criminal behavior.

The circumstances of the criminal conviction and the employment position

In 2013, the job applicant pleaded no contest to two counts of felony strangulation and suffocation, four counts of misdemeanor battery, one count

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of sexual assault and one count of criminal damage to property arising out of a domestic violence incident involving a former live-in girlfriend. He was sentenced to 30 months in prison, 30 months of extended supervision, four years of probation and ordered to register as a sex offender. He had a previous domestic battery conviction in 2001.

In 2015, The job applicant applied for a job with petitioner Cree Inc. as an Applications Specialist. The job duties of the position required the individual to work independently and without supervision, to interact with co-workers and customers, to respond to customer demands, to provide a level of conflict resolution between Cree Inc. and its customers, to travel overnight to trade shows, and to have access to petitioner's 600,000 square foot facility, including isolated areas.

Petitioner extended to the job applicant a conditional offer of employment subject to a background check. Cree Inc. subsequently rescinded the offer of employment based on an evaluation of the 2013 domestic violence conviction record. The job applicant filed a complaint with the Wisconsin Department of Workforce Development's Equal Rights Division.

In a hearing on the merits of the complaint, the administrative law judge determined that the job applicant's conviction substantially related to the Application Specialist position and that Cree Inc. did not unlawfully discriminate against the job applicant. The LIRC reversed upon concluding that a domestic crime involving a personal and intimate relationship was not substantially related to the circumstances of the employment position. The Circuit Court reversed the LIRC decision as not supported by the evidence, only to be reversed by the Court of Appeals, which upheld the LIRC decision.

Wisconsin law prohibiting discrimination based on a record of prior conviction

Wisconsin statutory law prohibits employers from discriminating against employees and prospective employees by denying them employment opportunities based on their record of prior convictions. Section 111.321 provides, in relevant part:

> Subject to sections 111.33 to 111.365, no employer…may engage in any act of employment discrimination as specified in section 111.322 against any individual on the basis of…conviction record.

Section 111.322 provides, in relevant part, that:

> …It is an act of employment discrimination to do any of the following: (1) to refuse to hire, employ…or terminate from employment…any individual…because of any basis enumerated in s. 111.321.

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Wisconsin statute section 111.335(3)(a)(1) embodies the substantial relationship test which provides an exception to the ban on employment decisions based on prior convictions. Section 111.335(3)(a)(1) provides in relevant part:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license or to bar or terminate from employment or licensing any individual if any of the following applies to the individual: 1…the individual has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially related to the circumstances of the particular job or licensed activity.

The substantial relationship test

The majority recognized that Wisconsin's employment discrimination statutes relating to prior conviction records strive to balance the competing interests of 1) rehabilitating individuals convicted of crimes and 2) protecting the public from the risk of criminal violence and recidivism. The Wisconsin legislature's inclusion of an exception to the prohibition on employment discrimination based on prior convictions demonstrates the legislature's unwillingness to force employers to assist with the rehabilitation of convicted criminals when the risk of recidivism is likely in a workplace setting.

According to the majority, the substantial relationship test requires an employer that seeks to bar an applicant from employment based on prior convictions to show that the facts, events and circumstances surrounding the convicted offense materially relate to the facts, events and circumstances surrounding the prospective job. The majority specified that the substantial relationship test "does not require an exact identity between circumstances" relating to the conviction and the prospective job. Rather, it requires inquiry into "whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later" in another context.

The majority emphasized that the inquiry is not a superficial comparison of circumstances but requires an assessment of circumstances material to fostering criminal activity. Circumstances material to fostering criminal activity are: 1) the opportunity for criminal behavior in the work environment; 2) the reaction to responsibility by the individual and 3) the character traits of the individual. The analysis and application of the substantial relationship test is the same regardless of the nature of the prior conviction, including a domestic violence conviction.

Cree Inc. established the existence of a substantial relationship

To apply the substantial relationship test, the majority refused to evaluate the circumstances based on a superficial comparison of an intimate relationship in the domestic environment and the working relationships in the workplace environment. Instead, it engaged in a practical assessment of the

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material circumstances that lead to or foster criminal activity. In a notable comment on the substantial relationship test, the Court said that the definition of "circumstance" used in the test "is quite broad and asks the court to consider the facts, events and conditions that accompany both the convicted offense and the particular job." Employers will welcome this broad reading of the substantial relationship test.

In *Cree*, the material circumstances of the domestic violence conviction were: the job applicant's willingness to use extreme acts of violence to achieve power and control, especially where a victim is isolated, and to stop another from breathing; a willingness to engage in non-consensual sexual conduct; a disregard for the health and safety of others; a lack of respect for bodily autonomy; an unwillingness and ability to control anger or other emotions in the face of a perceived power differential; and a disregard for the property rights of others. The majority also considered the seriousness of the criminal offense, the recent date of the conviction and the emerging pattern of behavior as exhibited by two domestic violence convictions.

The majority concluded a substantial relationship existed between the circumstances of the job applicant's domestic violence conviction and the circumstances of the job he sought at Cree Inc., as follows:

The job applicant's willingness to use violence to exert control and power was material to the job requirements that he act independently and interact with customers and co-workers in a variety of settings who may challenge his ideas or perceived authority.

The absence of regular supervision, the secluded portions of the facility to which an Applications Specialist has access, and the requirement to travel to trade shows without supervision and meet customers at other locations as part of the job created opportunities for criminal behavior and violence, especially if a victim became isolated from others.

The risk of recidivism was high given the "relative recentness" of the conviction and the emerging pattern of multiple domestic violence convictions.

The Court emphasized that an analysis under the substantial relationship test to determine the lawfulness of an employer's decision to refuse to hire based on a record of a criminal conviction is fact dependent. In this case, the majority stated that the facts demonstrate that requiring Cree Inc. to employ the job applicant would "force the employer to carry too much risk relating to his recent criminal behavior."

What this means to you

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The ruling by the majority represents another detailed, thought-out application of the law by recognizing and accounting for material similarities or differences in criminal behavior that impact the risk of fostering criminal activity in the workplace.

While each case is dependent on the circumstances of the prior conviction as well as the circumstances of the potential work environment, as a general rule, the more serious the criminal activity, the less likely an employer will be expected to bear the risk of recidivism. The decision clarifies for employers that Wisconsin law, while protecting individuals with a prior conviction record from employment discrimination, does not go so far as to expect employers to carry a heightened risk of recidivism and jeopardize the safety of their workforce and the public. The decision provides employers with a practical approach to assessing job applicants with a record of prior convictions and recognizes that domestic violence convictions should be treated no differently than other convictions.

Contact us

If you have questions regarding the impact of this decision on your workplace or issues related to employment, contact Tom O'Day, Tracey O'Brien or your Husch Blackwell attorney.

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