

# Wisconsin LIRC Determines Even Very Upsetting Criminal Convictions May Not Be Substantially Related to the Job

April 30, 2019

By [Mark A. Johnson](#)



Wisconsin employers deciding whether to hire an applicant with a criminal background often find themselves between a rock and a hard place. If they fail to take reasonable care screening the applicant, they may face a negligent hiring claim. But if they screen too stringently, they may face a claim that they violated the Wisconsin Fair Employment Act, which prohibits discriminating against applicants with a conviction record that does not substantially relate to the job.

# WISCONSIN



# 1848

Wisconsin employers deciding whether to hire an applicant with a criminal background often find themselves between a rock and a hard place. If they fail to take reasonable care screening the applicant, they may face a negligent hiring claim. But if they screen too stringently, they may face a claim that they violated the Wisconsin Fair Employment Act, which prohibits discriminating against applicants with a conviction record that does not substantially relate to the job.

A recent decision of the Wisconsin Labor and Industry Review Commission (LIRC) illustrates how this dilemma can arise when an applicant has been convicted of serious crimes. As the decision puts it, “Whether a crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job.” *Palmer v. Cree, Inc.* (December 3, 2018).

## Background

The employer in question manufactures and sells lighting products. The company sought to hire an employee to perform design and sales duties. The employee would work at a manufacturing facility with over 1,100 employees. The facility included manufacturing, storage, conference, and cubicle spaces.

Derrek Palmer applied for the job and had two positive interviews, but then the company conducted a criminal background check. The background check showed that, in 2012, Palmer had been convicted of felony strangulation and suffocation, fourth-degree misdemeanor sexual assault, misdemeanor damage

to property, and misdemeanor battery. Although the background check did not reveal this, he had also been convicted of battery in 2001. Palmer discussed his convictions with the company and said they were connected to a domestic situation.

When reviewing criminal background reports, the company used a matrix under which convictions for certain crimes automatically disqualified a candidate from being hired. Palmer's convictions disqualified him from working for the company, and he was told he would not be considered further.

Palmer filed a complaint alleging that the company had violated the Wisconsin Fair Employment Act's prohibition against rejecting a candidate because of his conviction record unless the conviction record substantially relates to the job in question.

After a hearing, an administrative law judge (ALJ) found in favor of the company and held the convictions substantially related to the job. The ALJ found it significant that the position involved completely unsupervised one-on-one work with customers and determined that the employer's large female population was "problematic" because, if Palmer developed a relationship with a coworker and it ended badly, he could exhibit the same type of behaviors that led to his convictions.

### **LIRC's Findings**

On appeal, the LIRC reversed the ALJ. According to the commission, for a substantial relationship between the job and the conviction to exist, there must be a realistic possibility of recidivism in the new job. This requires analyzing whether the tendencies and character traits that led to a conviction are likely to reappear on the job.

According to the commission, the crime of battery reveals traits of "disregard for the health and safety of others, inability to control anger, frustration, or other emotions, and the use of violence . . . to solve problems." Those traits are specifically relevant to jobs dealing with vulnerable individuals. The commission also found that sexual assault reveals "a willingness to engage in a nonconsensual sexual act" and that whether such a conviction arose out of a personal relationship was relevant to determining whether the conviction substantially relates to the job. The commission concluded that the crimes of strangulation and suffocation and criminal property damage revealed similar character traits as the other crimes for which Palmer had been convicted.

The commission, however, held that the convictions were not substantially related to the job Palmer sought. It found that a job that required unsupervised conduct with customers at their homes did not suggest that Palmer would engage in the same type of conduct that led to the convictions. Additionally, the mere fact that females would be present at work was not enough to find a substantial relationship. According to the commission, there was nothing about the work atmosphere that would trigger Palmer to repeat the crimes for which he had been convicted.

## Key Takeaways

This decision reminds Wisconsin employers that even the most serious crimes may not be considered substantially related to a job. The application of the Wisconsin Fair Employment Act is not always intuitive, and employers may want to proceed carefully when dealing with potentially risky decisions. Using a matrix to review criminal backgrounds can be a useful first step when considering applicants' backgrounds, but employers may want to also conduct an individualized assessment of a criminal record. The individualized assessment can consider the circumstances surrounding the crime, the nature of the job, and all other relevant facts.

---

### AUTHOR



#### ARTICLES

**Mark A. Johnson**

el, Milwaukee  
November 17, 2022

Ogletree  
Deakins

DOL Sued Over FOIA  
Request for Contractors'  
EEO-1 Reports

Ogletree  
Deakins

January 25, 2023  
OFCCP's Scheduling List  
Targets Contractors That  
Didn't Certify in OFCCP's  
Contractor Portal

### RELATED WEBINAR

Ogletree  
Deakins

February 9, 2023  
I-9 Compliance Series: The  
Basics, Part 1—What Does  
Good Faith Compliance  
Mean? Contractors'...

### RELATED SEMINAR

## Browse More Insights

PODCASTS

SEMINARS

WEBINARS



Sign up to receive emails about new developments and upcoming programs.

SIGN UP NOW



