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# 60-Second Memo

October 20, 2010

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### Reexamining the Substantial Relationship Test under the Wisconsin Fair Employment Act

By Marcie B. Cornfield, Esq.

As GSH has noted in this space before, one of the trickier aspects for employers operating a business with employees in multiple states is the difference between each state's employment laws. After all, what is a protected class in one state is not necessarily a protected class in another. One common area that trips up employers is arrest and conviction record discrimination. Many states do not have a specific prohibition against arrest and conviction record discrimination, but some states, like Wisconsin, do. Under the Wisconsin Fair Employment Act ("WFEA"), the circumstances of the pending criminal charge or the conviction must be substantially related to the circumstances of the employee's (or applicant's) particular job before the employee can be discharged (or have a job offer rescinded). But what exactly does that mean?

In recent years, this analysis - known as the "substantial relationship test" - has been interpreted very narrowly, requiring a strict case-by-case analysis. A recent administrative agency decision proves this point. In *Featherston v. Roehl Transportation*, the employee was discharged because of her conviction for public assistance fraud. Her job entailed checking references, previous employment, and criminal backgrounds of applicants for driver positions. The employee handled confidential driver information, including the applicants' names, addresses, telephone numbers, birth dates, driver's license numbers, and social security numbers. (LIRC, July 23, 2010).

The case turned on whether the circumstances of the employee's conviction record were substantially related to the circumstances of the employee's job. The employer, Roehl Transportation, raised two arguments in support of its assertion the

employee's conviction record was substantially related to the circumstances of the employee's job. First, Roehl argued that it was concerned about identity theft due to the personal information to which the employee had access. Second, Roehl stated that it was concerned the employee might hire an unsafe driver because she would purposefully omit information regarding the applicant, intimating that the employee might be willing to manipulate test results for financial gain and bend the rules in terms of the drivers hired.

Each of these arguments was analyzed separately - and quite distinctly - by the administrative agency review board, the Labor and Industrial Review Commission ("LIRC"). LIRC rejected Roehl's second argument outright, stating that it seemed "unlikely that driver applicants would attempt to bribe the [employee] to disregard their drug test results, and [Roehl] did not demonstrate that this had ever occurred in the past." LIRC also noted that because the employee had no direct contact with job applicants, she was not in a position to engage in the type of conduct Roehl described. LIRC did, however, place credence on Roehl's first argument, stating that Roehl's concern about identity theft was legitimate, as access to social security numbers, birth dates, driver's license numbers, and other personal identification information is a circumstance that could facilitate criminal activity by someone - like the employee - predisposed to engage in fraud for economic gain.

What is most interesting, however, is LIRC's reasoning for its findings. LIRC stated that a prior conviction for fraud or theft is substantially related to *virtually any job* that provides an opportunity for new acts of fraud or theft. What does this mean for employers? Does this change the substantial relationship test once more, indicating that LIRC will not examine the specific tendencies and inclinations of a given conviction, but rather move toward a more employer-friendly broad-based analysis?

Not really. The substantial relationship test still seems to be analyzed narrowly and on a case-by-case basis, although there still seems to be some broad-based categories LIRC utilizes. In other words, while there is a case-by-case analysis, it appears as though LIRC leaves employers some wiggle room - at least in the context of theft convictions - finding that where an employee has committed theft in one category, there is the propensity to commit theft again in different circumstances when given the opportunity. However, the *Featherston* decision makes it clear that LIRC will not universally accept any argument made by an employer as to why a substantial relationship exists, and in fact, the *Featherston* decision demonstrates that an employer's decision must have a sound basis in fact. Given such a determination, employers should take the following steps in arrest and conviction cases:

- *Make a case-by-case determination.* Employers cannot simply make a determination that because an applicant has a certain conviction, they will be barred from any and all jobs. Employers *must* make a case-by-case determination, ensuring that the elements of the crime are substantially related to the position applied for.

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- *Inquire as to the circumstances of the conviction.* While employers must conduct a case-by-case analysis in terms of the substantial relationship test, the law is clear that an applicant can be excluded from employment where the applicant was dishonest about a previous conviction record. Accordingly, employers should carefully inquire into the conviction record. Leave ample room on the application for an applicant to be able to describe the previous conviction. Establish clear interview guidelines for making further inquiries. Often, employers lose on the substantial relationship test, but win due to an applicant's failure to honestly and accurately disclose his or her previous conviction record. Along those lines, keep interview notes and have a uniform process in place for interview questions concerning arrest and conviction records.
- *Conduct a Disparate Impact Analysis.* In recent years, the EEOC has taken an interest in arrest and conviction background checks. Employers should conduct a disparate impact analysis in order to ensure that their policies are not creating a disparate impact on one particular group of applicants, as that is a potential area of interest for the EEOC.
- *Note the distinction between the City of Madison's Local Ordinance and the WFEA.* Even within states, there may be city ordinances that provide different protections for a protected class than does the state-wide law. In Wisconsin, there are some striking differences between the City of Madison's ordinances and the WFEA regarding the use of arrest and conviction record information in employment decisions. For instance, under the Madison Local Ordinance, only convictions that occurred within the past three years can be considered, while the WFEA does not have such a timeframe. Employers conducting business throughout the state of Wisconsin must be mindful that the Madison Local Ordinance is even more narrowly drawn than the Wisconsin Fair Employment Act.

Employers without any employees in Wisconsin or a state with prohibitions on arrest and conviction record discrimination should still be aware of EEOC investigations into disparate treatment of certain groups of employees through decisions based on arrest and conviction records. Although the EEOC has not aggressively investigated such claims in the past, recent statements made by the agency indicate that this may change. If it does, the concerns over litigation costs from arrest and conviction record claims may not be limited to just Wisconsin employers much longer.

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