

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-1956

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MILWAUKEE BOARD OF SCHOOL DIRECTORS,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed in part; reversed in part.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 CURLEY, J. The Milwaukee Board of School Directors (the board) appeals from an order affirming the findings of the Labor and Industry Review Commission (the commission), which concluded that the board, in

violation of the Wisconsin Fair Employment Act (WFEA), unlawfully discriminated against Mark Moore by refusing to re-hire Moore as a Boiler Attendant Trainee based on his criminal record. The board offers two arguments on appeal: (1) that the commission's decision is not entitled to great weight deference by this court; and (2) that the commission erred in concluding that the circumstances of Moore's felony conviction for "injury by conduct regardless of life" did not "substantially relate" to the job of Boiler Attendant Trainee under WIS. STAT. § 111.335(1)(c). We conclude that the commission's decision is entitled to great weight deference; and we conclude that the commission correctly determined that the board's refusal to rehire Moore violated the WFEA; therefore, we affirm.

¶2 The commission cross-appeals from that part of the circuit court's order which set aside the commission's directive that the board hire Moore to fill the next available Boiler Attendant Trainee position and pay Moore back wages with interest. The commission argues that the circuit court erred in setting aside its remedial order for several reasons, including that the circuit court substituted its judgment for that of the commission's. Because we conclude the circuit court erred by improperly substituting its judgment for the commission's and setting aside the commission's remedial order, we reverse the circuit court's order on that issue.

I. BACKGROUND.

¶3 This case arose under an exception to the WFEA's general rule prohibiting discrimination against job applicants on the basis of their criminal records. Under the exception, an employer may refuse to hire an otherwise qualified applicant who was convicted of a felony when the circumstances of the

conviction are substantially related to the performance of the job. The facts are as follows. In 1988, Mark Moore was convicted of “injury by conduct regardless of life,” contrary to WIS. STAT. § 940.23 (1987-88). The conviction concerned an argument with his girlfriend. Moore threw a pan of hot grease at her, which missed her, but hit her twenty-month-old daughter who was standing between them. The hot grease severely burned the young girl, requiring extensive surgery, skin grafting and hospitalization. Following his conviction, Moore was hired as a Boiler Attendant Trainee in the Milwaukee Public Schools (MPS) system. However, upon learning of his conviction, MPS terminated Moore for intentionally falsifying his employment application because he failed to disclose his conviction as required on the application.¹

¶4 In 1996, Moore re-applied for the position of Boiler Attendant Trainee with MPS. Moore scored well on a preliminary examination and was placed on an eligibility list. At the time, MPS required extensive pre-employment criminal background checks on all applicants. This time Moore disclosed his felony conviction on his application, and an MPS official conducting his background check obtained a copy of the criminal complaint. After reviewing the facts contained in the complaint in conjunction with the job requirements of the Boiler Attendant Trainee position, Moore’s application for re-hire was denied. Moore received a letter explaining:

¹ Moore subsequently filed a complaint with the Equal Rights Division of the Department of Workforce Development claiming that, in terminating him, the board unlawfully discriminated against him based on his conviction of the felony charge. Following a hearing on the matter, an ALJ concluded that there was no probable cause to support Moore’s allegations that the board unlawfully discriminated against him based on his conviction record. Moore appealed the ALJ’s decision and the commission affirmed, dismissing Moore’s complaint. Moore has not appealed from this decision.

We have completed our review of your application for employment as a Boiler Attendant Trainee with Milwaukee Public Schools. Based on information from the Wisconsin Department of Justice, Crime Information Bureau, and the Milwaukee County Clerk of Circuit Court, we have noted that you have been convicted of “Injury by Conduct Regardless of Life.” Based on the violent nature of your conviction and the fact that [the] victim of [your] offense was a small child, the nature of the position for which you applied, and the nature of our business (public education), we must reject your application for employment.

Moore’s name was then removed from the eligibility list for the position of Boiler Attendant Trainee.

¶5 Moore subsequently filed a second discrimination complaint with the Equal Rights Division of the Department of Workforce Development (DWD), alleging that MPS’s failure to re-hire him to the position of Boiler Attendant Trainee constituted unlawful discrimination based on his criminal record. The DWD denied Moore’s claim, issuing an initial determination of no probable cause. Moore appealed and a hearing was conducted by an Administrative Law Judge (ALJ), who upheld the DWD’s finding of no probable cause to support Moore’s allegations. Moore then appealed the ALJ’s decision to the commission, which reversed, finding that Moore had established probable cause. The case was then remanded to the DWD for a hearing on the merits.

¶6 After a hearing, the ALJ found that Moore’s conviction was not substantially related to the job of Boiler Attendant Trainee and concluded that in refusing to re-hire Moore, the board violated the WFEA by discriminating against him based on his criminal conviction. The ALJ ordered the board to re-hire Moore to fill the next available Boiler Attendant Trainee position, and to pay Moore back wages with interest from the date he was denied re-hire.

¶7 The board petitioned the commission for review of the ALJ's decision. Following a hearing, the commission adopted the ALJ's findings of fact and conclusions of law and affirmed the ALJ's order to re-hire Moore and to pay him back wages. The commission also slightly modified the ALJ's order by requiring the back wages to be offset by Moore's interim earnings. The board then filed a petition for review of the commission's decision with the circuit court. The circuit court affirmed that part of the commission's decision finding that the board had violated the WFEA by refusing to re-hire Moore on the basis of his criminal record, but the circuit court set aside the commission's remedial order, remanding the matter for a determination of a remedy.

II. ANALYSIS.

¶8 For purposes of this appeal, we review the commission's decision and not the circuit court's. *See Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We may only reverse the commission's decision if: (1) the commission "acted without or in excess of its powers"; (2) the order was procured by fraud; or (3) "the findings of fact by [the commission] do not support the order or award." *Eaton Corp. v. LIRC*, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985). "[The commission's] findings of fact will be upheld on appeal if they are supported by credible and substantial evidence in the record." *North River Ins. Co. v. Manpower Temporary Services*, 212 Wis. 2d 63, 69, 568 N.W.2d 15 (Ct. App. 1997); *see also* WIS. STAT. § 227.57(6). Further, we "are not bound by [the commission's] conclusions of law, but reasonable legal conclusions by [the commission] will be sustained even if an alternative view may be equally reasonable." *Eaton Corp.*, 122 Wis. 2d at 708.

A. *The commission's decision is entitled to "great weight" deference.*

¶9 The board first argues that this court should not give any deference to the commission's decision. Specifically, the board argues that the commission's decision is not entitled to deference because some of the commission's findings of fact are not supported by evidence in the record, and its conclusions of law are not consistent with its prior decisions or with the decisions of the appellate courts.² However, we note that the findings of fact complained of by the board are immaterial to the commission's decision; thus, it does not matter to this court, for purposes of our review, whether those particular findings of fact are supported by evidence in the record. We are satisfied that evidence exists in the record to support those findings that serve as the underpinnings for the commission's decision.

¶10 Moreover, we conclude that the commission's decision is entitled to great weight deference. "When [an] agency uses its expertise to interpret a statute, we accord the agency one of two levels of deference, namely, 'due weight' or 'great weight.'" *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 572, 579 N.W.2d 668

² Specifically, the board challenges five findings of fact originally made by the ALJ and adopted by the commission:

- (1) The complainant, Mark Moore (Moore), began working for the Milwaukee Public Schools (MPS) as a Building Service Helper in 1979 ...
- (2) ... Moore continued to work at MPS during his incarceration under the work release program.
- (3) In 1993, [the board] decided to require criminal background checks of all employees hired to work at MPS.
- (4) ... [A]s a trainee, Moore was assigned to work on the first shift with an engineer who could train him to be a boiler attendant.
- (5) As a trainee, Moore would be required to work on the first shift for at least two years. ...

(1998). We must apply four factors to determine whether great weight deference is appropriate. *Id.* We will give the commission's decision great weight deference if:

(1) [the commission] is charged by the legislature with administering the statute; (2) [the commission's interpretation] is one of long standing; (3) [the commission] employed its expertise or specialized knowledge in forming the interpretation; and (4) [the commission's] interpretation will provide uniformity in the application of the statute.

Id. After applying these four factors we conclude that the commission's decision is entitled to great weight deference and we reject the board's arguments.

¶11 First, the legislature has clearly charged the DWD and the commission with administering the provisions of the WFEA. Under WIS. STAT. § 111.39, the legislature bestowed certain powers on the DWD and the commission in order to enforce the protections of the WFEA. In particular, the DWD may receive and investigate complaints of discrimination, hold hearings, and employ examiners to hear and decide the complaints. WIS. STAT. §§ 111.39(1) through (4). Section 111.39(5) provides that “[a]ny respondent or complainant who is dissatisfied with the findings and order of the examiner may file a written petition with the [DWD] for review by the commission of the findings and order.” The plain language of these statutory provisions indicates that the legislature has charged the commission with administering the statutory provisions applicable in the instant case.

¶12 Next, the commission's interpretation and application of the statutory provisions of the WFEA at issue here is well-established. The commission has been called upon to interpret and apply the “substantially related” test set forth in WIS. STAT. § 111.335 in over forty cases during the past twenty

years. In those cases, the commission considered the central question presented in this case – whether an offense was “substantially related” to the circumstances of a job or licensed activity. Therefore, we are satisfied that the commission’s interpretation and application of the statute is of long standing.

¶13 Finally, we are satisfied that the third and fourth factors set forth above have also been met. The commission applied specialized knowledge and expertise in forming its interpretation and application of the “substantially related” standard in this case. Here, the commission was required to consider the circumstances of Moore’s conviction in relation to the circumstances of the Boiler Attendant Trainee position to determine whether the two are substantially related. This was a task for which the commission was uniquely suited and required the application of specialized knowledge and expertise formed over two decades of applying the “substantially related” standard. Furthermore, the commission’s interpretation and application of the “substantially related” test will foster uniformity in the application of the statute in cases where it is alleged that the employer has discriminated against an employee on the basis of conviction record. Therefore, for all of the above stated reasons, we conclude that, contrary to the board’s assertions, the commission’s decision is entitled to great weight deference.

B. Moore’s prior conviction is not “substantially related” to the job of Boiler Attendant Trainee.

¶14 The board next argues that the commission erred in concluding that it unlawfully discriminated against Moore in refusing to rehire him because of his criminal conviction. As noted, the WFEA prohibits employers from discriminating against a potential employee by refusing to hire him or her because of a criminal record, *see* WIS. STAT. § 111.322, unless the circumstances of the felony conviction “substantially relate to the circumstances of the particular job.”

WIS. STAT. § 111.335(1)(c). The board maintains that the exception applies in this case because Moore's conviction for "injury by conduct regardless of life" substantially relates to the job of Boiler Attendant Trainee and, therefore, the commission's decision should be overturned. We disagree.

¶15 Here, our review of the commission's findings of fact and the application of those findings to the law, WIS. STAT. § 111.335, presents a mixed question of law and fact. *Johnson v. LIRC*, 177 Wis. 2d 736, 740, 503 N.W.2d 1 (Ct. App. 1993); see also *Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis. 2d 928, 931, 541 N.W.2d 241 (Ct. App. 1995). In *Michels*, this court asserted:

When the question on appeal is whether a statutory concept embraces a particular set of factual circumstances, the court is presented with a mixed question of fact and law. The conduct of the parties presents a question of fact and the meaning of the statute a question of law. The application of the statute to the facts is also a question of law. However, the application of a statutory concept to a set of facts frequently also calls for a value judgment; and when the administrative agency's expertise is significant to the value judgment, the agency's decision is accorded some weight.

Id. We must not substitute our judgment for the commission's application of the law to the facts if a rational basis exists in law for the commission's interpretation, and it does not conflict with controlling precedent. *Klusendorf Chevrolet-Buick, Inc. v. LIRC*, 110 Wis. 2d 328, 331-32, 328 N.W.2d 890 (Ct. App. 1982). Under the "great weight deference" standard, which we have determined is applicable here, we must sustain the commission's interpretation and application of the statute if it is reasonable even though we may conclude that other interpretations are also reasonable. *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996).

¶16 In *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 407 N.W.2d 908 (1987), a case that both parties and the commission cite extensively, our supreme court analyzed the exception to the WFEA's prohibition against job discrimination on the basis of a criminal record. Specifically, the court endeavored to determine "[w]hat is the nature of the inquiry required by [the exception]," and observed that "[a]nswering this question requires that this court determine what the legislature intended when it chose to phrase the exception in terms of the 'circumstances' of the offense and the 'circumstances' of the particular job. *Id.* at 818. After determining that the language of the exception was ambiguous, the court attempted to discern the legislature's intent.

¶17 The court concluded that the legislature sought to balance society's competing interests in rehabilitating convicted criminals and protecting them from employment discrimination, with society's interest in protecting its citizens. *Id.* at 821. The court asserted:

There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being 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. The concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

Id. The court observed that employment is a vital step in the rehabilitative process, *id.*, but that the legislature has determined that attempts at employment will not be forced under circumstances where repetitive criminal behavior is likely, *id.* at 823. Moreover, courts are to liberally construe the law in order to effectuate its purpose of providing employment for individuals who have been convicted of crimes, without requiring employers to assume the risk of employing

individuals whose conviction records demonstrate a propensity to commit similar crimes. *Id.*

¶18 In *County of Milwaukee*, the court also considered the role played by the risk of recidivism in the analysis, stating: “In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.” *Id.*³ When applying the test “a detailed inquiry into the facts of the offense and the job” is not necessary. *Id.* at 823-24. Rather, an employer, as well as the reviewing agencies and courts, must determine “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.” *Id.* at 824. The circumstances to be considered are those which foster criminal activity, “e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.” *Id.* (footnote omitted). We are satisfied that in the instant case the commission properly applied the statutory exception and correctly

³ In the instant case, the board argues that the commission misapplied the statutory exception because in determining whether the circumstances of Moore’s conviction were substantially related to the job of Boiler Attendant Trainee, instead of focusing on the elements of the crime and the character traits revealed by the conviction, the court focused more on the job circumstances and the risk of recidivism. The board submits that the commission’s decision represents a return to a “risk analysis test” and, in effect, imposes a new legal standard on employers by requiring them to demonstrate a *substantial probability* that a potential employee with a prior conviction would once again engage in criminal conduct. We disagree.

While the commission did consider the risk of recidivism in Moore’s case, as it was required to do under *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 823, 407 N.W.2d 908 (1987), we reject the board’s contention that the commission placed undue importance on this consideration. Under *County of Milwaukee*, as set forth above, the risk of recidivism is a factor that is so tightly woven into the analysis necessarily applied here that the commission was required to consider it as a factor. Moreover, as set forth below, the record reveals that, the commission not only considered the risk of recidivism among other things, but also considered the elements of Moore’s conviction and the character traits revealed thereby.

concluded that the circumstances of Moore's conviction were not substantially related to the job of Boiler Attendant Trainee.

¶19 The commission first considered the elements of the crime of which Moore was convicted in order to ascertain any character traits revealed by the conviction. *See id.* at 823-24 (the circumstances of the offense should be ascertained by reviewing the elements of the crime and, therefore, an extensive review of the factual details surrounding the offense is unnecessary). The commission noted that Moore was convicted of "injury by conduct regardless of life" which, at the time, provided: "Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class C felony." WIS. STAT. § 940.23 (1987-88). The commission determined that "the criminal traits displayed by the conviction include a lack of concern for the safety and well-being of others, a disregard for human life, and extremely poor judgment." However, the commission rejected the board's assertion that the conviction also demonstrated,

a propensity to lash out in anger without considering the consequences of his actions, a propensity to use whatever means is at hand to injure or attempt to injure another individual he is angry with, or a lack of decency or compassion in coming to the aid of a child who has been severely injured.

The commission concluded that while the traits revealed by Moore's conviction possibly included "gross negligence or indifference to the safety of others," they did not rise to the level of a "propensity to intentionally inflict harm on others, nor do they include a failure to come to the aid of injured persons." We agree with the commission's interpretation.

¶20 Next, the commission considered whether the character traits revealed by Moore's conviction are likely to reappear on the job of Boiler Attendant Trainee, making the risk of recidivism too great to require the board to bear. This determination required the commission to consider the circumstances of the Boiler Attendant Trainee job which, the commission concluded, was not a "particularly safety-sensitive" job, nor did it involve a "high level of responsibility." The commission also concluded that although, as a Boiler Attendant Trainee, Moore would be handling numerous potentially dangerous substances such as floor cleaners, insecticides and various chemicals used in the boilers, "the mere unsupervised use of cleaning products and insecticides [does not give] rise to a reasonable fear that [Moore] would be likely to cause injury to others."

¶21 Given the fact that the victim of the crime for which Moore was convicted was a child, the commission also considered Moore's potential contacts with children as part of the Boiler Attendant Trainee job. The commission concluded that based on the evidence presented, the Boiler Attendant Trainee job would only bring Moore into sporadic contact with children, and that such sporadic contact was "not a circumstance shown to foster criminal conduct on his part." The commission asserted, "Although [Moore's] crime incidentally involved harm to a child, it was not specifically targeted at a child and was not a conviction involving circumstances that pose a particular risk for children." After considering the circumstances of Moore's conviction and the Boiler Attendant Trainee job, the commission concluded that there was nothing about either that would indicate an opportunity for criminal behavior such that the risk of

recidivism in Moore's case was too great to require the board to bear. We agree with the commission's conclusions.⁴

¶22 If this court were to conclude, under the facts presented in this case, that Moore's conviction for "injury by conduct regardless of life" was substantially related to the job of Boiler Attendant Trainee, we would be substituting our interpretation for the commission's. We are not permitted to do so.

¶23 Further, had the legislature wished to create such a blanket exception pertaining to schools, it would have done so. In its brief to this court, the commission correctly noted that the legislature has created such blanket exceptions in a number of instances, *see, e.g.*, WIS. STAT. § 111.335(1)(cg) (individuals convicted of a felony seeking employment as private detectives, investigators and security personnel); § 111.335(1)(cm) (refusal to employ as an installer of burglar alarms any individual convicted of a felony); § 111.335(1)(cs) (allowing revocation, suspension or refusal to renew a license for the sale of alcoholic beverages based on certain controlled substances violations). The commission asserted:

[A] school, must be extremely careful in its selection of staff. However, this exigency must be reconciled with the fact that laws exist which are designed to protect individuals from discrimination in employment, including individuals convicted of criminal activity, and that those laws cannot be nullified simply because the employer

⁴ In its decision, the commission correctly asserted that "there are certainly types of criminal convictions which could conceivably render an individual unsuitable for employment that entailed any contact with children, no matter how incidental." For example, "a violation of WIS. STAT. § 948.07 (child enticement); WIS. STAT. § 948.10 (exposing genitals or pubic area to a child); or WIS. STAT. § 948.605 (gun-free school zone law)." However, the commission concluded, "such a theory does not apply in the instant case."

happens to be in the business of running a school. The legislature did not choose to exempt schools from the conviction record provision of the [WFEA] and, lacking any genuine basis for concluding that [Moore's] criminal conviction record is substantially related to the job in question, the [board] is not permitted to discriminate against him, regardless of the fact that it operates a school.

We agree.

¶24 Therefore, we conclude that in determining that Moore's conviction was not substantially related to the job of Boiler Attendant Trainee, the commission properly applied the statutory exception to the prohibition against employment discrimination on the basis of conviction record.

C. The circuit court erred in setting aside the commission's remedial order.

¶25 The commission cross-appeals from that part of the circuit court's order setting aside the commission's remedial order. Once again, we note that we review the commission's decision and not the circuit court's. *Stafford Trucking, Inc.*, 102 Wis. 2d at 260. We cannot reverse the commission's decision unless it exceeded its powers, its factual findings do not support the decision, or the order was procured by fraud. *Eaton Corp.*, 122 Wis. 2d at 704. The commission's findings of fact must be supported by credible and substantial evidence in the record, *North River Ins. Co.*, 212 Wis. 2d at 69, and its conclusions of law must be reasonable, *Eaton Corp.*, 122 Wis. 2d at 708. We are satisfied that the commission's remedial order was proper and that the circuit court erred in substituting its judgment for that of the commission.

¶26 The WFEA requires that once employment discrimination has been established, the hearing examiner shall award a remedy that "will effectuate the purpose of this subchapter, with or without back pay." WIS. STAT. § 111.39(4)(c).

The appropriate remedy is generally an order which makes the injured person whole. *Watkins v. LIRC*, 117 Wis. 2d 753, 763, 345 N.W.2d 482 (1984). In the instant case, the commission determined that once Moore had established discrimination, back pay would be awarded unless the board demonstrated, by clear and convincing evidence, that even in the absence of discrimination, Moore would not have been selected to fill the position. The commission concluded that the board did not make the requisite showing and, therefore, ordered that Moore be re-hired and awarded back pay. Although never raised by the parties, the circuit court *sua sponte* decided the board had not been properly notified of its burden of proof at the hearing.

¶27 We are satisfied that there is credible and substantial evidence in the record to support the commission's findings of fact and that the commission's conclusions of law are reasonable. Specifically, we conclude that the commission's remedy effectuated the purpose of the WFEA and made Moore "whole." No objection was raised by the board to its obligation to present evidence to alter the commission's decision to make Moore whole. Therefore, we conclude that the circuit court erred in setting aside the commission's remedial order and we reverse that part of the circuit court's order.

By the Court.—Order affirmed in part; reversed in part.

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