

# Patch II

99-3481df



AssemblyRepublicanCaucus



malaigm



1999 DRAFTING REQUEST

Bill

Received: 08/23/1999

Received By: malaigm

Wanted: As time permits

Identical to LRB:

For: Assembly Republican Caucus 4-8586

By/Representing: Matt Tompach

This file may be shown to any legislator: NO

Drafter: malaigm

May Contact: Mary Klaver (414) 778-5780

Alt. Drafters:

Subject: Discrimination

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Employment discrimination based on conviction record; exception for schools

Instructions:

See attached--provide an exception in the Fair Employment Act that would permit schools to consider a person's conviction record in making employment decisions even if the conviction is not substantially related to the person's job

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	malaigm 08/26/1999	ygeller 08/27/1999					S&L
/1			martykr 08/27/1999		lrb_docadmin 08/27/1999	lrb_docadmin 09/01/1999	

FE Sent For (09/01/1999.)

Handwritten circled "4/1" with an arrow pointing to the date in the FE Sent For line.

<END>

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FE Sent For:

*G (09-01-99)*

*Requested By Matt Tompach*

*<END>*

*for Assm - send to Rep. office (not ARC)*

*Jacketed*

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1?	malaigm	11/8/27 jlg	11/8/27 km	11/8/27 JF			

FE Sent For:

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# Lawmakers decry ruling for MPS to rehire felon

## Two state legislators vow to review law after decision by state commission

By Jessica McBride  
of the Journal Sentinel staff

*Last Updated: Aug. 20, 1999*

Two state legislators said Friday they will examine whether schools should have greater legal authority to not hire felons, after a ruling by a state commission that would force Milwaukee Public Schools to employ a felon who tossed hot grease on a child.

Sen. Alberta Darling (R-River Hills) said schools should be included in the 1997 law prohibiting health-care providers from hiring people with serious criminal records.

"We've got to change this, and it has to be done ASAP," she said.

The author of that law - state Rep. Peggy Krusick (D-Milwaukee) - also said she wanted to study the issue.

"I'm willing to discuss with parents, school officials and child welfare advocates, to see if our current laws are adequate to prevent abuse in schools," Krusick said, adding that she hoped the recent decision involving MPS "will be overturned."

MPS filed a petition in Circuit Court this week asking a judge to do just that - reverse the July ruling by the state Labor and Industry Review Commission that would force MPS to hire Mark Moore, the felon, as a boiler attendant trainee.

Darling also called on the commission to reopen and review its ruling.

The commissioners, who are appointed by the governor and serve six-year terms, were not in their office Friday. They could not be reached for comment.

Darling shipped off a letter to the three-panel commission, calling the decision an "irresponsible act" and saying it "may be placing many children in the way of great harm."

But James Buchen, vice president of Wisconsin Manufacturers & Commerce, the state's largest business group, said the problem isn't with the commissioners - it's with the law. Buchen said Wisconsin is one of three states that made having a criminal conviction or arrest a protected class.

Under the Wisconsin Fair Employment Act, employers can't choose not to hire a person with a criminal past simply because of their conviction, unless they can show it "substantially" relates to the job. In Moore's case, the commission said it did not. MPS disagreed.

"It's a foolish law we have in Wisconsin, and it's almost unique in the country," Buchen said. "It causes all kinds of problems anywhere where employees have to interact with vulnerable people, like at schools. I've seen cases like this before."

Karen Crooker, assistant professor with the University of Wisconsin-Milwaukee School of Business Administration, also said that Wisconsin has "developed more categories of protection than most other states."

"We are forward thinking in protecting employee rights," Crooker said. Wisconsin, she said, also has unusual protections against discrimination involving marital status, sexual orientation and even membership in the National Guard. It also bans firings for lawful activities outside the job - such as drinking beer or smoking cigarettes.

The health-care law created exceptions, requiring background checks and banning the hiring of people convicted of a list of crimes, unless they prove rehabilitation. It covers facilities such as nursing homes, hospitals, day care agencies and group homes. But not schools.

In its decision, the commission wrote: "The Legislature did not choose to exempt schools from the conviction record provisions of the Fair Employment Act and, lacking any genuine basis for concluding that (Moore's) criminal conviction record is substantially related to the job in question, (MPS) is not permitted to discriminate against him, regardless of the fact it operates a school."

Ken Cole, executive director of the Wisconsin Association of School Boards, wants that changed.

"I don't think people realize that unless the conviction relates to the duties (a felon) will perform, for (schools) it's in essence discriminating" to deny the felon employment, he said, calling the law "unreasonable."

Cole said he did not know how many felons are currently working in schools. MPS officials - who conduct background checks on employees - did not return a call seeking comment.

Moore was convicted of reckless injury in 1992 for tossing hot grease at a child, who was severely burned, during an argument with his girlfriend. He left without aiding the child, slamming the door on his way out, court records say.

Moore, who could not be reached for comment, had been a boiler attendant previously at MPS, but when the district discovered his conviction, he was fired for not revealing it on his application. He reapplied, this time admitting the felony and was turned down because of it. MPS believes the substantial connection is met because Moore would have contact both with children and chemicals.

But the commissioners, David Falstad, James Rutkowski and Pamela Anderson - upholding a ruling by administrative law judge John Grandberry - ruled that MPS had discriminated against Moore.

The commission found the connection between the boiler job and Moore's conviction "tenuous and remote" and said his actions had been reckless, not intentional, and were not directed at the child, who was not his target. The commission ruled that it would be unlikely that the situation, which arose from a domestic dispute, would repeat itself in a school setting.

Jeff Hynes, a lawyer who represents employees in equal-rights cases and co-chairs the Wisconsin Employment Lawyers Association, said he would be greatly concerned to see any legal changes making it tougher for felons to get jobs - even in schools - and attempt to rehabilitate themselves. Hynes said he's seen cases under that law in which health-care workers lost their jobs because they "smoked a joint 15 years ago."

And Jennifer Lattis, an assistant state attorney general who is director of the employment litigation unit, which handles appeals for the commission - said courts have generally construed the issue of a substantial connection "fairly broadly," usually deciding against employees who have convictions. In fact, she could think of no other commission decisions similar to Moore's.

"It's the first decision I've ever seen come out of (the commission) in support of the person with the conviction in a school setting," she said.

Appeared in the Milwaukee Journal Sentinel on Aug. 21, 1999.

STATE OF WISCONSIN  
LABOR AND INDUSTRY REVIEW COMMISSION  
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

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MARK MOORE, Complainant

MILWAUKEE BOARD OF SCHOOL DIRECTORS, Respondent

**FAIR EMPLOYMENT DECISION**  
ERD Case No. 199604335

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An administrative law judge (ALJ) for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on the applicable law, records and evidence in this case, the commission makes the following:

**FINDINGS OF FACT**

1. The complainant began working for the respondent, the Milwaukee Public Schools, in 1979 as a Building Service Helper I.
2. In 1992 the complainant was convicted of injury by conduct regardless of life, in violation of Wis. Stat. § 940.23(1), based upon an offense he committed in 1988. According to the criminal complaint, the complainant threw a pan of hot grease at his girlfriend during an altercation, but missed the girlfriend and struck her 20-month old daughter with the grease, causing her serious injury. As a consequence of his conviction, the complainant spent 90 days in a work-release program, during which time he continued to work for the respondent.
3. In 1993 the respondent instituted a policy of conducting criminal background checks on all applicants.
4. In 1995 the complainant applied for and was promoted to the position of Boiler Attendant Trainee. The complainant was assigned to work at Samuel Morse Middle School on the first shift, from approximately 6:00 a.m. until 2:00 p.m., during which time students were present in the building. As a Boiler Attendant Trainee the complainant worked on projects with the school engineer and his job duties included operating the boiler, material handling, and performing general maintenance and custodial work.
5. After the complainant had been working as a Boiler Attendant Trainee for approximately three months, the respondent discovered he had been convicted of injury by conduct regardless of life, a matter which the complainant had failed to divulge when filling out his application for the position. The complainant was discharged for falsifying his application.
6. In 1996 the complainant reapplied for the position of Boiler Attendant Trainee, this time disclosing



his conviction record on the application.

7. In a letter dated October 30, 1996, the respondent informed the complainant:

"... Based on information listed on your application as well as 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 victim [sic] of you [sic] 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."

Based on the FINDINGS OF FACT made above, the commission makes the following:

#### CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of the Wisconsin Fair Employment Act (hereinafter "Act.")
2. The complainant is a member of a protected classification, within the meaning of the Act.
3. The evidence failed to demonstrate that the complainant's conviction is substantially related to the duties of Boiler Attendant Trainee.
4. There is probable cause to believe that the respondent unlawfully refused to hire the complainant based upon his conviction record, in violation of the Act.

Based on the FINDINGS OF FACT and CONCLUSIONS OF LAW made above, the commission issues the following:

#### ORDER

The decision of the administrative law judge is reversed. This matter is remanded to the Division for further proceedings.

Dated and mailed: April 17, 1998

moorema.rrr:164:9

/s/ David B. Falstad, Chairman

/s/ Pamela I. Anderson, Commissioner

James A. Rutkowski, Commissioner

#### MEMORANDUM OPINION

This matter is before the commission on probable cause. A complainant's burden of proof is less in a probable cause proceeding than it would be at a hearing on the merits. Thus, rather than demonstrating by a preponderance of the evidence that discrimination occurred, the complainant need

only show a reasonable ground for belief, supported by facts and circumstances strong enough to warrant a prudent person in the belief, that he was discriminated against in violation of the law. See *Herling v. Dealer's Office Equipment, Inc.* (LIRC, February 18, 1987). The record in this case clearly demonstrates that the complainant was denied hire by the respondent based upon his conviction record. While the respondent asserted that the complainant's conviction record was substantially related to the circumstances of the job--a matter which if proven would constitute an affirmative defense to the complainant's allegations--the commission does not believe it presented sufficient evidence to defeat the complainant's showing of probable cause.

The respondent's argument at the probable cause hearing was essentially that the complainant had engaged in a crime causing bodily injury to a child and that the respondent does not want a violent individual around children. However, a conclusion that a substantial relationship exists necessitates evidence about the specific requirements or circumstances of the position that are incompatible with the circumstances of the conviction and that are likely to foster repeat criminal conduct, and the commission is unwilling to infer a substantial relationship based upon the mere proximity of children in the building. This is particularly true in the absence of evidence establishing how much actual contact the complainant would have with children and under what circumstances. Further, while the commission might speculate that the job of operating a boiler would require the complainant to utilize dangerous materials and would entail a high degree of responsibility, the record is devoid of any evidence to establish that this is the case or to demonstrate how these circumstances relate to the circumstances of the complainant's conviction.

This matter is therefore remanded for a more complete exposition of those factors that might support the respondent's contentions that the complainant's conviction record is substantially related to the job of Boiler Attendant Trainee.

NOTE: The commission did not consult with the administrative law judge regarding witness credibility and demeanor. The commission's reversal is not based on a differing credibility assessment, but is as a matter of law.

cc: Tracy M. Johnson

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LABOR AND INDUSTRY REVIEW COMMISSION  
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

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ERD Case No. 199604335

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An administrative law judge for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modifications:

1. In the second paragraph of the administrative law judge's ORDER the term "boiler attendant" is deleted and the term "Boiler Attendant Trainee" is substituted therefor.
2. The third paragraph of the administrative law judge's ORDER is deleted and the following is substituted therefor:

"That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the sum he would have earned as an employe from the date on which he would have been hired but for the discrimination until such time as the complainant resumes employment with the respondent or would resume such employment but for his refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment compensation or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Insurance Reserve Fund or the applicable welfare agency."

3. The fifth paragraph of the administrative law judge's ORDER is deleted and the following is substituted therefor:

"Within 30 days of the expiration of time within which an appeal may be taken herein, the respondent shall submit a compliance report detailing the specific action taken to comply with the commission's Order. The compliance report shall be directed to the attention of Kendra DePrey, Labor

and Industry Review Commission, P. O. Box 8126, Madison, Wisconsin. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than \$10 nor more than \$100 for each offense. See Wis. Stat. § § 111.395, 103.005(11) and (12)."

4. The portion of the decision immediately following the fifth paragraph of the administrative law judge's ORDER and prior to the date line is deleted.

### DECISION

The decision of the administrative law judge (copy attached), as modified, is affirmed.

Dated and mailed July 23, 1999  
moorema.rmd:164:9

/s/ David B. Falstad, Chairman

/s/ Pamela I. Anderson, Commissioner

/s/ James A. Rutkowski, Commissioner

### MEMORANDUM OPINION

#### Merits

The Wisconsin Fair Employment Act prohibits an employer from engaging in any act of employment discrimination against any individual on the basis of arrest or conviction record. Wis. Stat. § § 111.321 and 111.322. However, the law contains the following relevant exception:

"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 who:

1. Has been 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(1)(c)1.

In drafting the above-cited exception, the legislature sought to strike a balance between society's interest in rehabilitating criminals and its interest in protecting citizens. *See County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987). In *County of Milwaukee* the Wisconsin Supreme Court opined, in relevant part:

"This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume

risks of repeat conduct by those whose conviction records show them to have the 'propensity' to commit similar crimes long recognized by courts, legislatures and social experience.

"In balancing the competing interests, and structuring the [statutory] 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. at 823.

A determination as to whether the circumstances of a criminal offense are substantially related to a particular job requires assessing whether the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person. *Id.* at 824; *Goerl v. Appleton Papers, Inc.* (LIRC, October 5, 1992).

In its petition for commission review the respondent argues that the complainant was convicted of "injury by conduct regardless of life," which provides that, "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." The respondent maintains that the character traits revealed by the complainant's conviction include a lack of concern for the safety and well-being of a child; disregard for human life; extremely poor judgment; 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; and a lack of decency or compassion in coming to the aid of a child who has been severely injured, and that these traits are substantially related to the position of Boiler Attendant Trainee. The commission has carefully considered the respondent's argument, but finds it unpersuasive.

In considering the issues raised in this case, it is important to note that the crime "injury by conduct without regard to life," of which the complainant was convicted, no longer existed as an offense after 1988 and, since then, the analogous criminal statute has been entitled "reckless injury." *See* Wis. Stat. § 940.23. (1) It is the definition of "first-degree reckless injury" which the respondent now argues should be applied in this case. Based upon the statutory definition to which the respondent refers, the circumstances of the complainant's conviction suggest, essentially, a tendency to engage in acts of gross recklessness without regard to the consequences. Thus, the respondent is basically correct in its assertions 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.

The commission, however, does not agree with the respondent that the circumstances of the complainant's criminal conviction include 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 criminal statute in question addresses recklessness rather than deliberate violence, and while the traits revealed by the conviction may include gross negligence or indifference to the safety of others, they do not encompass a propensity to intentionally inflict harm on others, nor do they include a failure to come to the aid of injured persons. Indeed, it appears that some of the criminal tendencies which the respondent would seek to ascribe to the complainant by

virtue of his conviction relate not to the elements of the crime itself, but to the individual facts and circumstances of the incident which resulted in the conviction. However, as the respondent has accurately noted in its brief, as a general rule the circumstances of the offense are to be gleaned based upon a review of the elements of the crime and an inquiry into the factual details of the specific offense is not required. *County of Milwaukee v. LIRC*, 139 Wis. 2d. 805, 823-824, 407 N.W.2d 908 (1987). (2)

Having concluded that the criminal traits revealed by the complainant's conviction include, generally, a tendency to act recklessly without regard to the consequences or for the safety or well-being of others, the question to decide is whether those traits are likely to reappear on the job of Boiler Attendant Trainee such that the risk of recidivism is too great to ask the respondent to bear. The commission is unpersuaded that this is the case. The job description presented at the remand hearing suggests that, for all practical purposes, the Boiler Attendant Trainee position is janitorial in nature. While it is conceivable that an individual with a tendency to act recklessly and without regard to the consequences of his actions could engage in harmful behavior in virtually any job, the commission sees nothing about a janitorial position that poses a greater than usual opportunity for criminal behavior. To the contrary, the Boiler Attendant Trainee job was not shown to be a particularly safety-sensitive position, nor one in which the complainant would be entrusted with an extremely high level of responsibility, and the commission is unable to conclude that it presents any particular or significant risk of recidivism for the complainant.

In arriving at this conclusion the commission does not find that, as a matter of law, work as a boiler attendant could never be considered substantially related to a criminal conviction for conduct regardless of life or reckless injury. The respondent, however, has failed to present sufficient evidence to demonstrate that this is the case. In its remand order the commission specifically advised the respondent that it was unwilling to infer a substantial relationship based upon the mere proximity of children in the building, where the respondent presented no evidence establishing how much actual contact the complainant would have with children and under what circumstances. The commission also asked the respondent to present evidence establishing whether operating a boiler would require the complainant to utilize dangerous materials and would entail a high degree of responsibility and, if so, to demonstrate how those circumstances relate to the circumstances of the complainant's conviction. Although given a specific opportunity to establish the existence of a substantial relationship between the circumstances of the complainant's conviction and of the job at issue, the respondent failed to present evidence that would permit a conclusion that any such relationship exists.

Regarding his contacts with children, at the remand hearing the respondent's witnesses testified only that the complainant would have "access" to children in the schools and would be in contact with students. While the respondent argues that this testimony leads to the conclusion that the complainant would have been in frequent contact with young children, the commission disagrees. If, in fact, the complainant's contacts with children would have been "frequent," as the respondent now asserts, it seems likely that one of its witnesses would have mentioned this at the hearing, particularly since the respondent was represented by counsel and had been specifically advised that it should present evidence at the remand hearing regarding the frequency of the complainant's likely contacts with children in the position in question. To the contrary, the commission concludes that the complainant would have had only sporadic contact with children and, further, that sporadic contact with children is not a circumstance shown to foster criminal conduct on his part. While 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, (3) such a theory does not apply in the instant case. Although the complainant'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. (4)

In addition to the lack of evidence establishing that the complainant would have anything approaching frequent contact with children, no evidence was presented to suggest that the complainant would be responsible for the safety or well-being of children, or that his interactions with school children would be anything more than incidental. A boiler attendant is not expected to supervise or assist children, nor to chauffeur them, counsel them, or otherwise assume responsibility for their welfare, and the mere fact that the complainant might sometimes pass students in the hallway or on the playground is insufficient to permit a finding of a substantial relationship in this case.

Turning to the question of whether the Boiler Attendant Trainee position would have required the complainant to utilize dangerous materials or would entail a high degree of responsibility, the sole evidence presented by the respondent on this point was that it uses numerous chemicals in the schools, such as floor cleaners, insecticides, and chemicals for the treatment of boilers, that the complainant would have had access to those chemicals, and that he would not necessarily be supervised when using those materials. This evidence, on its own, is insufficient to warrant a conclusion that the circumstances of the job would pose a particular risk of harm, even for one with a tendency to engage in reckless conduct. While in its brief the respondent suggests that the complainant might use chemicals or other materials to cause injury to individuals in the school, the commission is unpersuaded that the mere unsupervised use of cleaning products and insecticides gives rise to a reasonable fear that the complainant would be likely to cause injury to others.

In its petition the respondent also makes the argument that a substantial relationship exists by virtue of the fact that section 48.65 of the Wisconsin statutes prohibits persons convicted of injury by conduct regardless of life from being able to operate licensed day care facilities in Wisconsin or from working in regular contact with children at a licensed day care center. However, while the legislature evidently arrived at a policy judgment that an individual convicted of virtually any violation of chapters 940 or 948 is unsuitable to become licensed as a day care center or to work in close contact with children at a licensed day care center, this does not necessarily mean that the legislature also considers such individuals unsuitable to hold employment as boiler attendants at elementary schools. There is a significant difference between a job requiring direct responsibility for the care of infants and preschoolers and one which involves coincidental contact with grade school-age children, and the commission sees no basis to equate the two. Moreover, if the legislature had intended to bar such individuals from employment at elementary schools, it could have drafted legislation accomplishing this.

The commission recognizes that the respondent, 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 happens to be in the business of running a school. The legislature did not choose to exempt schools from the conviction record provisions of the Fair Employment Act and, lacking any genuine basis for concluding that the complainant's criminal conviction record is substantially related to the job in question, the respondent is not permitted to discriminate against him, regardless of the fact that it operates a school. Because the commission concludes that the relationship between the complainant's criminal conviction and the boiler attendant job is tenuous and remote, notwithstanding the presence of children in the building and the proximity to cleaners and solvents, it finds that the respondent may not discriminate against

the complainant by denying him the position in question.

### Remedy

The administrative law judge ordered that the respondent hire the complainant for the next available position as a boiler attendant, (5) with backpay to the time when he would originally have been hired, but for the act of discrimination. The respondent takes issue with this portion of the administrative law judge's order. The respondent argues that, although the complainant took a test and was among the top ten candidates for the position, he was rejected before being interviewed, and there is no evidence to establish that he would have been the successful candidate had he been allowed to continue on in the application process. It maintains that the appropriate remedy is to put the complainant back in the same position he would have been in, by placing him among the top ten eligible candidates for the next available position of Boiler Attendant Trainee, at which point he would be allowed to interview for the position and establish that his qualifications are superior to those of the other candidates. The commission rejects this argument as without merit.

Once the complainant proves discrimination, back pay should be awarded unless the respondent establishes by clear and convincing evidence that, even in the absence of discrimination, the rejected applicant would not have been elected for the open position. *Silvers v. LIRC*, Dane Cty. Cir. Ct., Case #83-CV-3644, February 13, 1984. Where the evidence presented by the respondent on that point is speculative, the commission will resolve the uncertainty against the discriminating respondent. *Silvers v. Madison Metropolitan School District* (LIRC, July 25, 1986). Here, the complainant established that he tested within the top ten applicants and, further, that he had previously been hired for and performed the very job in question. Thus, it is apparent that the complainant is qualified for the position. Although the respondent may have had reason to believe that other applicants were better qualified than the complainant or that there were other non-discriminatory reasons which would have rendered the complainant ineligible for the job, it failed to present any evidence on these points at the hearing, and the commission is unwilling to speculate that this would have been the case. Consequently, the commission agrees with the administrative law judge that reinstatement into the position, with backpay, is the appropriate remedy for the harm suffered in this case.

The respondent also argues that the administrative law judge's backpay order should be modified to provide offsets for interim earnings and other statutory offsets. Here, the commission agrees. Wis. Stat. § 111.30(4)(c) specifically provides that interim earnings or amounts earnable with reasonable diligence by the person discriminated against shall operate to reduce back pay, and that amounts received as unemployment benefits or welfare payments shall be withheld from the person discriminated against and immediately paid to the unemployment reserve fund or the welfare agency making the payment. The commission has modified the administrative law judge's decision accordingly.

NOTE: The commission has enclosed a worksheet to assist the parties in calculating the appropriate backpay and interest amounts.

cc: Leonard A. Tokus

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*Footnotes:*

(1) (*Back*) The elements of the crime "injury by conduct regardless of life" were as follows: "Whoever causes great bodily harm to another human being by conduct imminently dangerous to another and evincing a depraved mind, regardless of human life, is guilty of a Class C felony." The change from this statute to the "first degree reckless injury" statute was intended, at least in part, to recognize the fact that the concept of "conduct evincing a depraved mind, regardless of human life" is a difficult one to comprehend, inaccurately implying that a clinical mental disorder is involved. The aggravating element in the new statute, "circumstances which show utter disregard for human life," was intended to codify judicial interpretations of "conduct evincing a depraved mind, regardless of life." See Judicial Council Note to Wis. Stat. § 940.02 (1988).

(2) (*Back*) Moreover, even if it were appropriate to consider those factual details, the commission would be disinclined to find them substantially related to the job in question. Although one could reasonably conclude that the facts and circumstances of the criminal act itself demonstrated a propensity to act violently and to lash out in anger, it is difficult to envision a situation in which those traits would manifest themselves in the job of Boiler Attendant Trainee, a position which was not shown to be particularly stressful or emotionally taxing, and the commission sees no reason to believe that anything about the circumstances of the job would be likely to foster further violent outbursts on the complainant's part. To the contrary, the complainant's criminal act arose in the course of a domestic dispute involving his girlfriend, a matter unlikely to replay itself in a school setting. Thus, even if there were a reasonable basis to consider the factual details of the complainant's offense, the commission would be disinclined to find that those details supported a finding of a substantial relationship between the crime and the job at issue.

(3) (*Back*) For example, one might reasonably argue that a criminal conviction for 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), should serve to bar the individual so convicted from any and all contact with school-age children.

(4) (*Back*) The commission also notes that the complainant worked for the respondent as a Building Service Helper for approximately sixteen years, from 1979 through 1995, apparently without incident. While the record does not contain a job description for Building Service Helper, the commission sees no reason to believe that the position involved any less "access" to children than would the job at issue in this case. The fact that the complainant worked as a Building Services Helper for a significant period of time without criminal incident would seem to suggest that the mere "access" to children is not a circumstance likely to foster repeat criminal activity for the complainant.

(5) (*Back*) The commission has modified this portion of the administrative law judge's order to require reinstatement to the position of "Boiler Attendant Trainee," the correct job title for the position in question.



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-3481<sup>1</sup>  
GMM.....  
JK

508

gen cat

**AN ACT ...; relating to:** permitting an educational agency to refuse to employ or to terminate from employment an unpardoned felon.

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***Analysis by the Legislative Reference Bureau***

Current law, subject to certain exceptions, prohibits discrimination in employment based on conviction record. Current law specifies, however, that it is not employment discrimination because of conviction record to refuse to employ or to terminate from employment any individual who has been convicted of any felony, misdemeanor or other offense, the circumstances of which substantially relate to the circumstances of the particular job. This bill specifies that it is not employment discrimination because of conviction record for an educational agency to refuse to employ or to terminate from employment any individual who has been convicted of a felony and who has not been pardoned for that felony, whether or not the circumstances of the felony substantially relate to the circumstances of the particular job.

Under the bill, an "educational agency" is defined as a school district, a cooperative educational service agency, a state correctional institution, a juvenile secured correctional facility, a secured child caring institution, the Wisconsin School for the Visually Handicapped, the Wisconsin School for the Deaf, the Mendota Mental Health Institute, the Winnebago Mental Health Institute, a state center for the developmentally disabled, a private school or an agency under contract with a school board to provide a program for children at risk.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 111.335 (1) (d) <sup>X</sup> of the statutes is created to read:

111.335 (1) (d) Notwithstanding s. 111.322, <sup>✓</sup> it is not employment discrimination because of conviction record for an educational agency, as defined in s. <sup>✓</sup> 115.31 (1) (b), to refuse to employ or to terminate from employment an individual who has been convicted of a felony and who has not been pardoned for that felony.

(END)

**Barman, Mike**

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**From:** Barman, Mike  
**Sent:** Wednesday, September 08, 1999 9:25 AM  
**To:** Rep.Petrowski  
**Subject:** FE's For AB 446 (99-3481/1)



99-3481feDHFScora



99-3481feDOCCora



99-3481feDPlora

*Good morning:*

*Matt Tompach from the ARC asked me to send you over a copy of the FE's for AB 446. He also instructed me to release these fiscals right away (copy to the ACC and sent to DOA for printing). If you have any questions please give me a call.*

*Thank you,*

*Mike Barman*

Mike Barman - Program Asst. (PH. 608-266-3561)  
(E-Mail: [mike.barman@legis.state.wi.us](mailto:mike.barman@legis.state.wi.us)) (FAX: 608-264-6948)

State of Wisconsin  
Legislative Reference Bureau - Legal Section - Front Office  
100 N. Hamilton Street - 5th Floor  
Madison, WI 53703

**Barman, Mike**

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**From:** Barman, Mike  
**Sent:** Wednesday, September 08, 1999 10:14 AM  
**To:** Rep.Petrowski  
**Subject:** FE for AB 446 (99-3481/1) by DWD



99-3481feDWDorig

*Good morning:*

*Matt Tompach from the ARC asked me to send you over a copy of the FE's for AB 446. He also instructed me to release these fiscals right away (copy to the ACC and to DOA for printing). If you have any questions please give me a call.*

*Thank you,*

*Mike Barman*

Mike Barman - Program Asst. (PH. 608-266-3561)  
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