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WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2011-12

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Labor, Public Safety, and Urban Affairs (SC-LPSUA)

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SB 207 file

THE UNWISDOM OF THE WISCONSIN FAIR EMPLOYMENT ACT'S BAN OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF CONVICTION RECORDS

I. INTRODUCTION

Employment discrimination laws exist primarily to protect populations that are prone to harmful discrimination or those that historically have been discriminated against, thereby limiting their opportunities in the labor market.[1] Implicit in these laws is a determination that the trait or traits defining these populations are largely unrelated to an individual's ability to successfully perform a job.[2] Yet in the quest to ensure that certain classes of people remain protected from invidious discrimination, federal and state laws have been created that have, either directly or indirectly, made persons with criminal records a class to be protected from employment discrimination. This development has thereby made criminal histories a trait implicitly "unrelated" to job qualifications. The wisdom of this development is questionable and, unfortunately, Wisconsin is the jurisdiction that leads in this misguided jurisprudence.

Neither the federal government nor the vast majority of states include within their fair employment or civil rights statutes a protection against employment discrimination on the basis of criminal record.[3] Nonetheless, employers may violate federal civil rights laws if they establish policies against employing persons with criminal records and those policies have a verifiable disparate impact on minorities.[4]

Meanwhile, the Wisconsin Fair Employment Act (WFEA) expressly bars employers from discriminating in employment decisions on the

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1. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII [of the Federal Civil Rights Act of 1964] makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."); Holder v. Hall, 512 U.S. 874, 956–57 (1994) (Ginsburg, J., dissenting) (discussing Title VII's purposes); *see also* Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 62 (1999) ("Title VII was enacted primarily to remedy discrimination against members of groups that had historically been excluded from equal access to social, political, and economic power.").

2. *See* WIS. STAT. § 111.31(2) (1999–2000) (stating that employers should "evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong"); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("What is required by Congress [in Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

3. *See infra* Parts II.B, II.C and accompanying notes.

4. Green v. Mo. Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); *see also infra* Part II.C and accompanying notes.

basis of an employee's or applicant's criminal record.[5] However, the law also provides an important exception, which makes it lawful to discriminate against those previously convicted of a crime if the circumstances of the particular criminal offense "substantially relate" to the circumstances of the particular job.[6] In recent years, Wisconsin lawmakers have considered removing conviction records from the WFEA, therefore making it legal for employers to discriminate on the basis of one's criminal history.[7] In light of this development, it would be helpful to determine whether such a policy transformation is wise and, furthermore, to examine the impact that this change would have on employment decisions in Wisconsin involving previously convicted criminals.

This Comment addresses such questions by examining the general efficacy and desirability of the WFEA's provision against discrimination on the basis of conviction records, including its "substantial relation" exception. Part II provides a general overview of the current law with respect to criminal record considerations in employment decisions. It details how Wisconsin law governs this issue and how administrative agencies and courts have interpreted and applied the Act's ambiguous provisions.[8] Part II also briefly describes how other jurisdictions address the permissibility of considering criminal records in employment decisions, highlighting the divergent rationales, details, and practical impacts of each approach.[9] Furthermore, the final section of Part II offers a brief overview of how the Federal Civil Rights Act, which governs employment discrimination issues in the absence of state laws to that effect, considers employment polices regarding criminal records.[10]

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5. WIS. STAT. § 111.321.

6. *Id.* § 111.335(1)(c). The statute reads:

> [I]t 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; or (2) Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

Id.

7. *See infra* Part II.A.2.c and accompanying notes.

8. *See infra* Part II.A and accompanying notes.

9. *See infra* Part II.B and accompanying notes.

10. *See infra* Part II.C and accompanying notes.

Part III of this Comment analyzes the WFEA criminal record provisions, discussing whether the law is well-founded from a legal standpoint.[11] This analysis delves into the fundamental differences between conviction records as an impermissible basis for employment discrimination versus the other personal attributes from which states and the federal government bar discrimination. This Comment then examines whether the WFEA conviction record provision, and specifically its substantial relation exception, is truly workable in a consistent and meaningful manner.[12] These analyses will compare and contrast the WFEA criminal record provision with the existing federal jurisprudence on this issue of criminal record considerations in employment. Such a comparison is important because, in the absence of a state law provision on criminal record consideration in employment decisions, federal law governs claims brought on these discrimination grounds.[13]

This Comment concludes that Wisconsin should eliminate the conviction record basis for an employment discrimination claim. Furthermore, such an alteration of the WFEA would not undermine the most legitimate basis for questioning the use of criminal records in employment decisions—that of a disparate impact on otherwise protected classes, namely racial minorities, which would still retain adequate protection under available federal law.

II. CURRENT STATUS OF THE LEGALITY OF CONVICTION RECORD CONSIDERATION IN EMPLOYMENT DECISIONS

A. Wisconsin's Fair Employment Act

1. General Provisions, Purpose, and Enforcement

Wisconsin maintains one of the most comprehensive statutes in regard to fair employment practices and the disallowance of employment discrimination.[14] The WFEA lists fourteen prohibited

11. *See infra* Part III.A.

12. *See infra* Part III.B.

13. *See infra* Part III.D.

14. For a summary of employment discrimination laws, and the relative amount of practices and populations covered, see 1 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 2.51 (2d ed. 1999).

bases for discrimination.[15] Many of these are similar or identical to those found within the equal employment opportunities laws of other states, including such individual attributes as age, race, creed, color, disability, sex, national origin, ancestry, and marital status.[16] Yet, Wisconsin's other six prohibited bases for discrimination are relatively unique,[17] and include reserve service in the military or national guard, arrest record, conviction record, sexual orientation, and the "use or nonuse of lawful products off the employer's premises during nonworking hours."[18]

The WFEA was enacted to help eliminate the practice of denying employment and other social opportunities to individuals on the basis of certain non-vocational characteristics and to curtail the ancillary negative effects that such practices incur on citizens of the state.[19] Generally speaking, and in the words of the Wisconsin Supreme Court, the WFEA is "a broad-based effort to eradicate many sources of employment discrimination."[20] The Act specifies several purposes that underlie the law and should guide its application, including: (1) that such discrimination "substantially and adversely affects the general welfare of the state" and will "deprive [properly qualified people who are being discriminated against] of the earnings that are necessary to maintain a just and decent standard of living";[21] (2) "to encourage employers to evaluate an employee or applicant for employment based upon the employee's or applicant's individual qualifications rather than upon a particular class to which the individual may belong";[22] and (3) to "foster to the fullest extent practicable the employment of all properly qualified

15. WIS. STAT. §§ 111.321, 111.36 (1999-2000).

16. Nearly all states that have a statutory law against employment discrimination cover age, race (or color), sex, religion (or creed), age, and handicap. *See* 1 ROTHSTEIN, *supra* note 14, § 2.51. Twenty states (including Wisconsin) include marital status protection from employment discrimination, and nineteen (including Wisconsin) include ancestry protection. *Id.* The exception is Alabama, which has no comprehensive act prohibiting employment discrimination. *See id.*

17. *See id.* (listing all the areas covered by states' general employment discrimination statutes and showing the relative comprehensiveness of Wisconsin's coverage).

18. WIS. STAT. § 111.321. The Act also prohibits various forms of sexual harassment and discrimination "on the basis of pregnancy, childbirth, maternity leave or related medical conditions." *Id.* § 111.36(1)(c).

19. *See id.* § 111.31.

20. County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 914 (Wis. 1987).

21. WIS. STAT. § 111.31(1).

22. *Id.* § 111.31(2).

individuals" regardless of their status in one of the protected classes.[23] The Act further states that its provisions should be liberally construed to accomplish these general purposes.[24] Overall, these stated purposes will provide an important context for the subsequent discussion of how an individual's status as a convicted criminal may substantively differ from other individual attributes that are protected under the WFEA.[25]

The WFEA prohibits various forms of discriminatory behavior against persons due to their inclusion in one of the Act's protected classes. The law prohibits refusals to hire, employ, promote, or compensate; discrimination in the terms, conditions, or privileges of employment; and, actions to bar or terminate from employment or membership, if such discrimination is because the individual has one or more of the protected attributes.[26] These prohibitions apply to public and private employers, labor organizations, licensing agencies, and other persons.[27]

Administration and enforcement of the WFEA is assigned to Wisconsin's Department of Workforce Development (DWD).[28] Persons wishing to allege that they have experienced unlawful discrimination as defined under the WFEA must first state a claim with the DWD.[29] Such an action will usually result in a hearing and eventual ruling as to the merits of the claim by an administrative law judge (ALJ) within the Equal Rights Division of the DWD.[30] Decisions by an ALJ can then be appealed to the Labor and Industry Review Commission (LIRC), which conducts a review of the evidence previously submitted before the ALJ and decides whether to affirm, reverse, or modify the decision, or to

23. *Id.* § 111.31(3).

24. *Id.*

25. *See infra* Part III.A.

26. WIS. STAT. § 111.322(1). The Act also prohibits various means of expressed or implied limitations, specifications, or discrimination against any of the protected classes. *Id.* § 111.322(2). These limitations are aimed at restricting both the ability of employers to learn of traits that could be used for unlawfully discriminatory purposes, and the implication to applicants or employees that such discriminatory practices might occur. *Id.* Finally, the Act also prohibits retaliation against someone who opposes a proscribed discriminatory practice, and the use of lie detectors and other forms of honesty testing. *Id.* §§ 111.322(3), 111.37.

27. *Id.* § 111.325.

28. *Id.* § 111.375.

29. *Id.* § 111.39(1). All remedies for violations made under the WFEA must initially be pursued administratively. Bachand v. Conn. Gen. Life Ins. Co., 305 N.W.2d 149, 153 (Wis. Ct. App. 1981).

30. WIS. ADMIN. CODE, ch. LIRC §§ 1.02, 4.01 (2001).

direct further hearings or other proceedings.[31] Decisions made by the LIRC may be appealed to the circuit court in the county where the petitioner resides,[32] at which point the issues in the case are addressed and appealed in a procedural manner consistent with other civil law claims.[33]

The nature of this process has important ramifications on employment discrimination claims, both generally and specifically for those claims based on allegations of improper use of conviction records, because claims are filtered through an administrative agency that develops a very particularized and specialized knowledge. Moreover, most discrimination claims are settled before ever reaching the circuit court.[34] As a result, the DWD, and the LIRC in particular, have great latitude and responsibility in determining the standard by which the WFEA is enforced. Judicial oversight in this area is sometimes minimal—but, as will be shown below, it can have an important impact on the resulting efficacy of the law.

2. Conviction Record

One of the prohibited reasons for discrimination under the Wisconsin Fair Employment Act is that of an employee's or applicant's conviction record.[35] Use of this characteristic, along with arrests not resulting in convictions,[36] as a reason to deny equal employment

31. WIS. STAT. § 111.39(5).

32. *See* WIS. ADMIN. CODE, ch. LIRC § 4.04(1).

33. The exception in this procedure is that the standard of review upon appeal requires each successive court to review de novo the ruling of the LIRC decision. *See* Knight v. Labor & Indus. Review Comm'n, 582 N.W.2d 448, 453 (Wis. Ct. App. 1998) (stating "we substantively review LIRC's decision and not that of the circuit court") (citing Johnson v. Labor & Indus. Review Comm'n, 547 N.W.2d 783, 785 (Wis. Ct. App. 1996)).

34. From 1995–1998, the LIRC resolved 4771 cases involving Equal Rights matters—which are mostly cases arising under the WFEA. WIS. LEGIS. AUDIT BUREAU, HEARING OFFICERS IN STATE GOVERNMENT 36 (June 2000). Of those resolved decisions, only 489 were appealed, of which only 35 (or 7.2%) actually reversed the decision of the LIRC. *Id.* This also means that of the original 4771 LIRC decisions, only 0.7% were eventually reversed on appeal in the courts.

35. WIS. STAT. § 111.321. A conviction record is defined as including, but not limited to, "information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned, placed on extended supervision or paroled pursuant to any law enforcement or military authority." *Id.* § 111.32(3).

36. This Comment focuses almost exclusively on matters of discrimination related only to conviction record, as opposed to both conviction and arrest record. In many respects, the analyses of both bases of discrimination are similar, but they diverge on many important

opportunities was first prohibited by the Wisconsin Legislature in 1977,[37] thirty-two years after the original Wisconsin Fair Employment Act was enacted.[38] The following text explains the parameters of the WFEA conviction record bar, the treatment of the law in the courts, especially the various interpretations applied to its substantial relation exception, and a brief explanation of the law's precarious existence.

a. Statutory Directives and Exceptions

One articulated purpose for the prohibition against discrimination on the basis of conviction records is to prevent the stigma of a criminal record from completely swaying employment decisions.[39] Others have suggested that such protection is required to aid in the rehabilitation of ex-felons and other offenders, and to provide them with the means to gainful employment, which is considered fundamental for ensuring that these persons do not revert to crime.[40]

Yet the WFEA also includes a critical exception, which states that

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points, especially with regard to analysis under Title VII of the Federal Civil Rights Act, 42 U.S.C. §§ 2000e-2 to e-17 (1994 & Supp. 2000). Further, most courts and commentators believe that it is generally more permissible for employers to consider conviction records than arrest records, since the former are more probative of guilt. *See* Paul v. Davis, 424 U.S. 693, 719 n.6 (1976) (quoting Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 241 (1957)); Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between A Rock and A Hard Place*, 14 HOFSTRA LAB. L.J. 365 (1997). "Courts generally are less tolerant of an employer's use of arrest records, as opposed to conviction records.... Conviction records are more reliable than arrest records because the criminal justice system has established that misconduct actually occurred." Befort, *supra*, at 405; *see also infra* Part III.B.1.b.

This focus on only conviction record provisions is made for two reasons. First, under recently proposed changes to Wisconsin's Fair Employment Act, the law would permit discrimination on the basis of conviction records, yet would still restrict the use of arrest records. *See infra* Part II.A.2.c. Second, the deletion of the use of arrest records as a prohibited basis for employment discrimination is a less-compelling need than the deletion of the conviction record bar. In this regard, the substantial relation exception also should apply differently precisely because of the different nature of arrest records (not based on a evidentiary finding of guilt) and conviction records (based on the finding of guilt beyond a reasonable doubt). *See infra* Part III.B.1.b. Nonetheless, many of the arguments offered for elimination of the conviction record provision of the WFEA may apply to the arrest record provision; they would just apply with less force.

37. 1977 Wis. Laws 619.

38. The original Wisconsin Fair Employment Act was enacted in 1945. 1945 Wis. Laws 861. It included only race, creed, color, national origin, and ancestry as bases protected from discrimination. *Id.*

39. *See* Miller Brewing Co. v. Dep't of Indus. Labor & Human Relations, 308 N.W.2d 922, 927 (Wis. Ct. App. 1981).

40. *See* County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 915 (Wis. 1987); *see also infra* Part III.B.

otherwise-prohibited discrimination based on conviction records is permissible if the circumstances of the criminal offense, which may be a "felony, misdemeanor or other offense[,] . . . substantially relate to the circumstances of the particular job."[41] This exception is in line with the general jurisprudence on employment discrimination law, which has traditionally allowed exemptions that enable otherwise-prohibited discrimination if bona fide occupational qualifications justify such practices.[42]

b. The "Substantial Relation" Test

i. Overview

The conundrum faced by employers, administrative law judges, employment lawyers, the LIRC, and courts, all of which attempt to apply the WFEA's conviction record provision, is largely found within its nebulous "substantial relationship" exception. The exception is extremely important because the level of generality applied to its interpretation will determine the effective force, or lack thereof, of the ban against consideration of conviction records in employment decisions.[43] Unfortunately, it has never been altogether clear just how the exception is meant to apply, given its language.[44]

Meanwhile, the state legislature has passed upon codifying any criteria that should govern determining whether a substantial relationship exists between the circumstances of a crime and a job in any particular case. As a result, the various governmental entities and courts charged with interpreting, administering, and enforcing the WFEA have each articulated their own standard for reviewing claims of discrimination based on criminal record.

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41. WIS. STAT. § 111.335(1)(c)(1) (1999-2000).

42. *See infra* Part II.C.3.

43. *See* Jeffery D. Myers, Note, County of Milwaukee v. LIRC: *Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 WIS. L. REV. 891.

44. Interestingly, the statute does specify some very particular circumstances under which conviction record discrimination is allowed. WIS. STAT. § 111.335(1)(cm) (allowing the denial of employment to an applicant for employment as burglar alarm installer if that applicant has been convicted of a felony and is not pardoned); WIS. STAT. § 111.335(1)(cg) (allowing employment and licensing discrimination based on felony records against persons involved in the field of private investigation and personal security); WIS. STAT. § 111.335(1)(cs) (allowing discrimination in the area of alcoholic beverage licensing based on convictions involving controlled substances).

ii. The Rise and Fall of the Factors-Specific Test[45]

The first few years after the inclusion of the conviction record provision in the WFEA highlighted the need for determining how the substantial relationship test should apply, and upon which parties the burdens should fall when the exception is raised as a defense. Given the procedural nature of claims based upon the WFEA,[46] the early responsibility for determining how the substantial relation exception would apply was assumed by the administrative agencies assigned with enforcing the law, namely the Labor and Industry Review Commission (LIRC).

During the 1980s, the LIRC issued a series of opinions in cases in which complainants alleged employment discrimination on the basis of conviction record, and the application of the substantial relation exception was a primary factor in the decisions.[47] These cases provided a composite of the factors to be considered by an employer when determining whether an applicant's criminal record is of a relation substantial enough to the job applied for, such that discrimination on that basis would be permissible. These articulated factors included the following: the public profile or nature of the applicant's job, the principal duties of that job, the time that had elapsed since conviction, mitigating circumstances involved in the crime for which the conviction arose, evidence of rehabilitation, and, perhaps most important, the number and seriousness of the crimes.[48] These early LIRC decisions did

45. This characterization of the LIRC's pre-*County of Milwaukee* analysis as the "factors-specific test" was coined by Myers, who referred to the analysis as a "factor-weighing approach." Myers, *supra* note 43, at 898.

46. *See supra* Part II.A.I.

47. *See* Gumbert v. Ken Loesch Oldsmobile, Inc., ERD Case No. 8206448 (LIRC July 9, 1985); Johnson v. Bd. of Sch. Dirs. of Milwaukee, ERD Case No. 7805675 (LIRC June 28, 1983); Gulbrandson v. City of Franklin, ERD Case No. 7905259 (LIRC July 2, 1981); McVicker v. Milwaukee County Children's Court Ctr., ERD Case No. 8152283 (LIRC July 2, 1981).

48. *See Gumbert*, ERD Case No. 8206448 (finding that the short time since the commission of multiple speeding convictions, the repetition of offenses, and disregard in handling automobiles allowed for discharge of automobile repairman); *Johnson*, ERD Case No. 7805675 (finding an impermissible consideration of conviction record for manslaughter conviction for an assistant social worker, given mitigating circumstances in the crime, the lack of a previous criminal record, and considerable rehabilitation efforts); *Gulbrandson*, ERD Case No. 7905259 (finding as dispositive the recentness of the convictions, the repetition of offenses, and the involvement of substance abuse in criminal offense, in the denial of a bartender's license); *McVicker*, ERD Case No. 8152283 (deciding that the high public profile and sensitive nature of the job applied for and the seriousness of convictions for false representation in medical assistance weighed toward allowing denial of job as children's

not assert that the preceding list of factors was exhaustive, thereby further emphasizing the need for case-by-case determinations of both the factors to be considered and their relative weight. A primary consequence of this approach was that the statutory exception placed upon employers the burden of establishing a significantly detailed factual record in order to lawfully base their decision to discriminate upon criminal records.[49] The substantial relation exception was therefore narrowly drawn.

The LIRC's factors-specific test was eventually reviewed by the Wisconsin Supreme Court in *Law Enforcement Standards Board v. Village of Lyndon Station*[50] and in *Gibson v. Transportation Commission*.[51] In these two cases, the Wisconsin Supreme Court exhibited its desire to use a broad interpretation of the substantial relation exception. In *Lyndon Station*, a majority of the court found that a substantial relationship did exist between the duty of a public law enforcement officer and previous felony convictions for misconduct in public office.[52] However, this conclusion is perhaps less important than the route that led the court to its determination. The court refused to look into the specific factors surrounding the officer's case and instead asserted that the trust and confidence required of such a public position

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probation officer). For a more-detailed explanation of these cases and their role in the early interpretation of the WFEA's conviction record bar, see Myers, *supra* note 43, at 898–901.

49. *See* Myers, *supra* note 43, at 900.

50. 305 N.W.2d 89 (Wis. 1981). This case arose when the Law Enforcement Standards Board (LESB) petitioned for a writ of mandamus to force the village of Lyndon Station to discharge its chief of police, William Jessen. *Id.* at 93–95. Some years prior, the LESB had refused to certify Jessen as a qualified law enforcement officer due to his conviction on twenty-six felony counts of misconduct in public office, which largely involved the falsification of traffic violations while he was chief deputy sheriff for Juneau County. *Id.* at 91–93. As a result, Jessen was placed on a two-year probation, during which time the village subsequently hired him as chief of police, even though it was aware of his previous criminal convictions. *Id.* at 92. While no formal action was taken by the LESB in opposition to this hiring at the time it occurred, the LESB reaffirmed its decision to deny Jessen recognition as a qualified law enforcement officer. *Id.* at 92–93. The village maintained Jessen in his position as chief of police for three years, at which time the LESB finally brought action to have him removed by court order. *Id.* at 93. The Wisconsin Supreme Court affirmed lower court rulings requiring the village to discharge the chief of police due to his prior conviction record. *Id.* at 101.

51. 315 N.W.2d 346 (Wis. 1982). The Department of Transportation (DOT) had denied Gibson a school bus driver's license based on his conviction for armed robbery two years prior. *Id.* at 348. The LIRC upheld the DOT's refusal to grant Gibson a license; the Dane County Circuit Court and the Wisconsin Court of Appeals both affirmed that decision. *Id.* at 347 (citing Gibson v. Transp. Comm'n, 309 N.W.2d 858 (Wis. Ct. App. 1981)). The Wisconsin Supreme Court also affirmed the LIRC's decision. *Id.*

52. *Lyndon Station*, 305 N.W.2d at 99.

would be shaken by his previous forms of misconduct.[53] Likewise, the court did not require the LESB to investigate the factors involved with the previous criminal conviction and the current job position in order to establish a substantial relationship. In *Gibson*, the court continued this logic, further articulating its understanding of the WFEA substantial relation test for discrimination claims based on criminal conviction record:

> Our decision in this case does not mean that the particular factual circumstances of the crime upon which a felony conviction was based may never be relevant to a school bus driver licensure decision. If this were the case, the "circumstances of which" language in sec. 111.32(5)(h)2b, Stats., would be superfluous and it is clear from the legislative history of that statute that the legislature specifically intended to include such language in the statute. However, just as a conviction of falsifying traffic citations as a matter of law constitutes circumstances which substantially relate to the job of police chief, so does a conviction of the offense of armed robbery as defined under Indiana law in and of itself constitute circumstances substantially related to school bus driver licensure.[54]

This interpretation by the court showed a growing willingness to look predominantly to the elements of the underlying crime being considered as the appropriate reference of "circumstances" to compare to the nature of the employment sought.[55]

Justice Abrahamson was the lone dissenter in both *Lyndon Station* and *Gibson*. Her analysis focused on whether specific factors found in both the convictions and the current job would have justified discrimination on the grounds of the conviction record.[56] In particular, she would have had the court adhere to the LIRC approach and look to many of the factors that seem to comprise the LIRC's standard of review, including mitigating circumstances.[57] Justice Abrahamson argued that the majority opinion reduced the issue to merely the

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53. *Id.*

54. *Gibson*, 315 N.W.2d at 349 (footnote omitted).

55. *Id.* at 348.

56. *Lyndon Station*, 305 N.W.2d at 101–10 (Abrahamson, J., dissenting).

57. *Id.* at 109 (Abrahamson, J., dissenting). In Jessen's case, those circumstances would have been the fact that he had satisfactorily performed as police chief for seven years, and that more than nine years had passed since his conviction. *Id.* at 108.

presence of a conviction record, and not whether the conviction record related to the capabilities of the individuals being denied employment or licenses.[58] In *Gibson*, Justice Abrahamson suggested the majority had "rewritten the statute in a way which promotes additional litigation" by ignoring both its direct language and legislative history.[59] In essence, Justice Abrahamson disagreed with both the majority's legal conclusions and, perhaps more important, with the procedure and test it employed to reach those results.

After these decisions, it was evident that a majority of the Wisconsin Supreme Court was, at a minimum, apprehensive about reading the substantial relation exception too narrowly, so as to make it difficult for employers to deny employment based on an applicant's prior criminal record. The LIRC factors-specific weighing test appeared to be wobbling on weak legs.

iii. *County of Milwaukee v. LIRC* and the Elements-Only Test

The factors-specific test previously adopted by the LIRC was explicitly overruled by the Wisconsin Supreme Court in 1987 in *County of Milwaukee v. LIRC*.[60] In its place, the court established a much broader exception that seemingly enables employers to more comfortably and more frequently find lawful cause to discriminate against employees and applicants based on their criminal record.

The complainant in *County of Milwaukee*, Steven Serebin, who held a position as a crisis intervention specialist for the County of Milwaukee, was terminated from employment after he was convicted of homicide by reckless conduct and twelve misdemeanor counts of patient neglect arising from actions taken during his previous employment as a nursing home administrator.[61] The LIRC found that Serebin had been

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58. *Id.* at 107–09.

59. *Gibson*, 315 N.W.2d at 350 (Abrahamson, J., dissenting). In particular, Abrahamson argued that the legislature would have written statutory language in the form of "felony . . . *the circumstances of which* substantially relate" to the position sought, as opposed to the actual language that refers to the "felony . . . the elements of which substantially relate" to the position sought, if it were to have intended the majority's interpretation. *Id.* (emphasis in original).

60. 407 N.W.2d 908 (Wis. 1987).

61. *Id.* at 910. Serebin had been charged with fifty-eight counts of negligence toward nursing home residents, plus the count of homicide from reckless conduct. *See* Serebin v. Milwaukee County Mental Health Complex, ERD Case No. 8254772, slip op. at 2 (DILHR Mar. 13, 1984). The Wisconsin Court of Appeals later reversed all of the convictions, but the Wisconsin Supreme Court subsequently reinstated the misdemeanor counts. State v. Serebin,

unlawfully discriminated against on the basis of his conviction record and argued that his offenses as nursing home administrator gave no indication of his ability to successfully perform his position as a direct care provider.[62] The LIRC's decision was subsequently affirmed by the Milwaukee County Circuit Court and later the Wisconsin Court of Appeals, both concluding that the circumstances of Serebin's conviction were not substantially related to his employment duties as crisis intervention specialist.[63]

The Wisconsin Supreme Court reversed the LIRC's decision, concluding that the County's termination of Serebin due to his conviction record was lawful.[64] In doing so, the court "conclud[ed], *as a matter of law*, that the circumstances of the offenses for which Serebin was convicted substantially relate to the circumstances of the job of crisis intervention specialist."[65] How the court arrived at this conclusion is instructive in determining the current legal effect of the WFEA's provision against discrimination on the basis of conviction record.

After stating that the basic question facing the court is the nature of the inquiry required by the substantial relation exception,[66] the majority made clear its desire to dismiss the factors-specific test. According to the court, "[w]e reject an interpretation of [the substantial relation] test which would require, in all cases, a detailed inquiry into the facts of the offense and the job."[67] Instead, the court held that assessing the relationship between circumstances of a criminal offense and the circumstances of a job requires only an inquiry into "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."[68] Moreover, the court defended its "elements-

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338 N.W.2d 855 (Wis. Ct. App. 1983), *aff'd in part, rev'd in part*, 350 N.W.2d 65 (Wis. 1984).

62. *County of Milwaukee*, 407 N.W.2d at 911 (quoting *Serebin*, ERD Case No. 8254772, slip op. at 3).

63. *Id.*

64. *Id.* at 918.

65. *Id.* at 917–18 (emphasis added).

66. *Id.* at 909.

67. *Id.* at 916.

68. *Id.* In explicating this holding, the court stated:

> Assessing 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, is the purpose of the test. What is important in this assessment is not the factual details related to such things as the hour of the day the offense was

only" analysis previously established in *Gibson*,[69] stating that such an approach best effectuates the WFEA statutory provision.[70]

Given the court's clear articulation of this test, it could then proceed to apply the facts of the case so as to validate Milwaukee County's decision to terminate Serebin. Adopting Milwaukee County's argument, the court stated:

> [T]he "circumstances" of the offense and the job are similar since in both contexts Serebin was in a position of exercising enormous responsibility for the safety, health, and life of a vulnerable, dependent segment of the population. The twelve misdemeanors indicate a pattern of neglect of duty for the welfare of people unable to protect themselves. The propensities and personal qualities exhibited are manifestly inconsistent with the expectations of responsibility associated with the job.[71]

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committed, the clothes worn during the crime, whether a knife or a gun was used, whether there was one victim or a dozen or whether the robber wanted money to buy drugs or to raise bail money for a friend. All of these could fit a broad interpretation of "circumstances." However, they are entirely irrelevant to the proper "circumstances" inquiry required under the statute.

Id.

69. Gibson v. Transp. Comm'n, 315 N.W.2d 346 (Wis. 1982); *see also supra* Part II.A.2.b(ii) and accompanying notes. The LIRC argued to the court that it believed the *Lyndon Station* and *Gibson* precedent had established an "elements of the crime" standard, which is what it was following in its decision against Milwaukee County. *County of Milwaukee*, 407 N.W.2d at 913. Moreover, the court quoted from the commission's argument that "[t]he difficulty with the court's analysis in [*Lyndon Station*] and *Gibson* is that it fails to explain when the 'elements of the crime' standard should be used as opposed to the 'circumstances of the offense' standard." *Id.* (alteration in original). The court, in its decision, eliminated this confusion by holding that the "elements of the crime" standard governs all cases brought under a claim of discrimination based on conviction record.

70. 407 N.W.2d at 917 ("It appears that the 'elements only' test is not a test distinct from the statutory test. Rather, focusing on the elements simply helped to elucidate the circumstances of the offense.").

71. *Id.* This language echoes that found in Milwaukee County's brief for the case, cited by the court earlier in its opinion, which claimed that:

> Conviction of *twelve counts* of patient neglect strongly suggests a pattern of behavior and an underlying attitude which resulted in Serebin's knowing failure to accept responsibility for the needs of an extremely dependent, vulnerable population. The patients whom Serebin would encounter as a crisis intervention worker either on the telephone or in the field would surely be similarly vulnerable and dependent. Serebin's inclination and ability to deal responsibly and professionally with their needs is, by any common sense analysis, substantially related to his criminal dereliction as a nursing home administrator.

Id. at 913.

This language comports nicely with the principle the court established regarding the need to inquire into whether circumstances that "foster criminal activity" exist within the job held by the person with a criminal record. Although admitting that specific facts in any case may play a role in this inquiry,[72] the court appears to have seen a significant degree of similarity between the nature of a crime, as defined through its elements, and the nature of a job, as defined through the duties of a job.

Once again, Justice Abrahamson disagreed with the majority's logic—or, more precisely, with its premises. Although she concurred with the decision, Abrahamson argued that the majority's opinion had over-generalized the nature of the "circumstances of the offense" analysis in such a way that resulted in an "eviscerated statute."[73] She sharply disagreed with the majority's view that "[w]hether an individual can perform a job up to the employer's standards is not the relevant question."[74] Abrahamson argued instead that one of the purposes of the WFEA restriction is precisely "to prohibit an employer from prejudging an applicant's or employee's suitability for a job on the basis of a conviction record."[75]

iv. Subsequent Developments: Wading Through Administrative Law and Lower Court Decisions

Since *County of Milwaukee*, the LIRC has had multiple occasions to apply this elements-only analysis to claims brought on grounds of discrimination based on conviction records. These decisions have built upon the legal principles articulated in *County of Milwaukee* and have fleshed out some nuances, while also providing a growing list of decisions filling in the conviction/job "substantial relation" matrix.[76] First, these decisions have ruled that the circumstances of a conviction

72. *Id.* at 916 (explaining that disorderly conduct crimes, for example, may require an inquiry into the facts surrounding the crime to determine the crime's relationship to the job).

73. *Id.* at 919.

74. *Id.* at 917.

75. *Id.* at 919.

76. By this phrase I mean the issue of whether, as a matter of law, a particular job will be deemed substantially related to a particular crime or set of crimes. While one can speculate as to which jobs and crimes "substantially relate"—which is precisely the type of speculation that employers must engage in in the absence of a court decision specifically comparing a particular job to a particular crime—the legal determination of such numerous connections is not made until a case presents itself based on a formal complaint.

arising out of an employee's conduct while under duty for the employer is per se substantially related to the job.[77] The LIRC has also ruled that certain factors are not material to the application of the substantial relation test. These irrelevant factors include the mitigating circumstances since the conviction,[78] the passage of time since the last criminal offense,[79] the fact that an applicant appears able to successfully perform the job,[80] and that an applicant has received a governor's pardon for the crime.[81] These are precisely the type of factors that were critical to a substantial relationship assessment during the factors-specific, pre-*County of Milwaukee* days.[82]

A key principle that the LIRC has articulated since *County of Milwaukee* is that the "substantially related" test is intended to be an objective test, applied after the fact by a reviewing tribunal, and is not to be applied against any subjective intention of the employer at the time it makes its employment decision.[83] This interpretation means that it is irrelevant if an employer fails to actually inquire into whether any substantial relationship exists; rather, the sole issue is whether the reviewing legal tribunal finds such a relationship exists in fact.[84] This

77. *See, e.g.*, Maline v. Wisconsin Bell, ERD Case No. 8751378 (LIRC Oct. 30, 1989) (permitting the termination of a telephone service technician arrested for delivering cocaine with a company van). This interpretation arose in the pre-*County of Milwaukee* days. *See* Kozlowicz v. Augie's Pizzaria, ERD Case No. 8256201 (LIRC Dec. 7, 1983).

78. *See, e.g.*, Ford v. Villa Maria Home Health Nursing Servs., ERD Case No. 9401033 (LIRC Nov. 17, 1995) (stating that while an employer is entitled to consider mitigating circumstances occurring since an applicant's conviction, the WFEA does not require such an assessment).

79. *See, e.g.*, Nelson v. Prudential Ins. Co., ERD Case No. 9401390 (LIRC May 17, 1996) (finding that the length of time between a conviction and the alleged discrimination is an irrelevant consideration).

80. *Id.* slip op. at 3.

81. Cieciwa v. County of Milwaukee, ERD Case No. 8952249 (LIRC Nov. 19, 1992).

82. *See supra* Part II.A.2.b.ii.

83. Lillge v. Schneider Nat'l, Inc., ERD Case No. 199604807 (LIRC June 10, 1998); *see also* Santos v. Whitehead Specialties, Inc., ERD Case No. 8802471 (LIRC Feb. 26, 1992); Jorgensen v. HMI Ltd., ERD Case No. 8951025, slip op. at 6 (LIRC Oct. 25, 1991); Collins v. Milwaukee County Civil Serv. Communications, ERD Case No. 8822724 (LIRC Mar. 8, 1991), *aff'd in* No. 91-2839 (Wis. Ct. App. Dec. 15, 1992) (not to be cited as precedent or authority per WIS. STAT. § 809.23(3) (1999–2000)); Black v. Warner Cable Comm. Co., ERD Case No. 8551979 (LIRC July 10, 1989). *See generally*, BRADDEN C. BACKER ET AL., HIRING AND FIRING IN WISCONSIN § 1.8 (1998); ANN WASSERMAN, A GUIDE TO WISCONSIN EMPLOYMENT DISCRIMINATION LAW § 3.23 (1998).

84. Moore v. Overnite Transp. Co., ERD Case No. 9201293 (LIRC Oct. 13, 1994); *Jorgensen*, ERD Case No. 8951025, slip op. at 4–5 ("[T]he 'substantially related' exception is not a test by which one measures the subjective intent of the employer at the time it makes

interpretation arguably takes the spirit of the *County of Milwaukee* decision even further, by immunizing an employer from not taking the lead in ensuring that it does not impermissibly discriminate on the basis of criminal conviction records. A final ruling has determined that employers who express that, under certain circumstances, they would not hire individuals with conviction records have not unlawfully discriminated because such a statement "is no more than a layman's statement" of what is contained in the statute.[85]

Also in the spirit of *County of Milwaukee*, the LIRC has repeatedly invoked the notion that what may ultimately be dispositive in discrimination claims based on conviction records is an analysis of whether the job sought will be performed in a setting inclined to tempt the ex-convict to behave again in a criminal manner.[86] This factor seems especially pertinent for jobs involving a significant amount of unsupervised work.[87] Finally, under the WFEA, employers may inquire about conviction records; yet, they must inform applicants that, in doing so, any answers will not result in an absolute bar to employment, as well as explain the limited circumstances where the inquiry will affect the employment decision.[88] If the applicant lies or falsifies a response to

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the challenged decision; it is, rather, a test by which the legal correctness of the employer's decision is measured by the ALJ, the Commission, and the courts."); *Collins*, ERD Case No. 8822724.

85. Konrad v. Dorchester Nursing Ctr., LIRC Dec. No. 199603133, slip op. at 2 (LIRC June 10, 1998) (referring to the substantial relation exception).

86. *See, e.g.*, Rathbun v. City of Madison, ERD Case No. 199500515 (LIRC Dec. 19, 1996) (finding that a job as a taxi cab driver obviously gave person who was convicted of sexual assault and threatening to injure another while in possession of a dangerous weapon, opportunities to commit similar crimes); *see also* Goerl v. Appleton Papers, Inc., ERD Case No. 8802099 (LIRC Oct. 22, 1992) (noting the *County of Milwaukee* test in stating that it is the circumstances that foster criminal activity which are important).

87. *See, e.g.*, Halverson v. LIRC, No. 87-2171, 1988 Wisc. App. LEXIS 674, at *2 (Wis. Ct. App. Aug. 9, 1988) (unpublished, limited precedent decision under WIS. STAT. § 809.23(3)); Perry v. Univ. of Wis.-Madison, Wis. Pers. Comm'n Dec. No. 87-0036-PC-ER (May 18, 1989).

88. *See* BACKER ET AL., *supra* note 83, § 1.8.

> If an employer chooses to inquire about pending arrests or convictions, either on an application form or during an interview, the employer should make the disclaimer that . . . convictions are not an absolute bar to employment and that they will be considered only if there is a substantial relationship to the circumstances of the particular job. . . .

Id.; *see also* Haynes v. Nat'l Sch. Bus Serv., ERD Dec. No. 8751901 (LIRC Jan. 31, 1992) (recognizing that an employer can inquire into an applicant's conviction record so that the employer is able to determine if the crimes in that record substantially relate to the

such inquires, an employer may lawfully refuse to hire the applicant on the basis of that falsification.[89] Overall, the LIRC-reviewed cases since *County of Milwaukee* have involved a case-by-case comparison of the elements of the crimes committed and the job duties required, and a survey of these LIRC decisions offers a plethora of examples of specific applications.

In addition to LIRC administrative reviews, a few cases involving the conviction record provision of the WFEA have reached federal district courts[90] and Wisconsin's appellate courts, adding to the legal understanding of the provision. In a series of unpublished opinions,[91] the Wisconsin Court of Appeals has largely echoed *County of Milwaukee* and the legal interpretations of the decision given by the LIRC.[92] Within these opinions, it has been stated that while post-conviction behavior may be relevant to one's ability to perform the job, post-conviction events are not relevant to determining whether the substantial relationship test has been met.[93] Further, the law has been said to not require the employer to prove that there is an unreasonable risk of the applicant repeating his criminal behavior.[94] These decisions have also adopted the understanding that the "substantially related" test

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prospective job duties).

89. *Haynes*, ERD Case No. 8751901, slip op. at 10 (citing Miller Brewing Co. v. Dep't of Indust. Labor & Human Relations, 308 N.W.2d 922 (Wis. Ct. App. 1981)).

90. *See* Tee & Bee, Inc. v. City of West Allis, 936 F. Supp. 1479, 1489–90 (E.D. Wis. 1996). The court found that a city ordinance, which rendered an applicant ineligible for a license to operate an "adult bookstore" due to his prior convictions of a sex-related crime, was substantially related, under the WFEA, to the concern being regulated. *Id.*

91. These currently unpublished decisions are obviously not discussed for their precedential value, as they have none, but are used only to show how Wisconsin courts have applied the WFEA after *County of Milwaukee*. Therefore, although they have no effect on expanding the interpretation of the law, the cases provide examples of how certain fact patterns have been handled by courts under the current law.

92. *See, e.g.*, Nawrocki v. City of Milwaukee Fire & Police Comm'n., No. 91-0024, 1991 Wisc. App. LEXIS 1371, at *16–18 (Wis. Ct. App. Oct. 22, 1991) (citing *County of Milwaukee*'s "substantially related" test in holding that Nawrocki's discharge based on his fraudulent retention of funds from tenants living at his real estate housing is sufficiently related to job as police officer) (unpublished, limited precedent decision under WIS. STAT. § 809.23(3)).

93. Collins v. Labor & Indus. Review Comm'n, No. 91-2839, 1992 Wisc. App. LEXIS 904, at *12 (Wis. Ct. App. Dec. 15, 1992) (unpublished, limited precedent decision under WIS. STAT. § 809.23(3)) (finding that the circumstances of the offense of armed robbery are substantially related to the circumstances of the position of Juvenile Correctional Worker) (citing Law Enforcement Standards Bd. v. Vill. of Lyndon Station, 305 N.W.2d 89 (Wis. 1981)).

94. *Id.* slip op. at *12.

is not a test of the subjective intent of an employer, and employers need not show that they had concluded at the time of the employment that the circumstances of the offense and the particular job were substantially related.[95]

However, the Wisconsin Court of Appeals has also found occasion to disallow an employer's use of an employee's conviction for possession of marijuana, where that employee worked as a stocker.[96] In making this decision, the court essentially agreed with the LIRC's conclusion that if someone is "considered unsuitable for the stocker position based upon the potential to distribute drugs, then it would appear that she could be lawfully excluded from essentially every job which placed her in contact with other workers or with the public."[97] The LIRC had concluded that "[s]uch a result would be inconsistent with the goals of the [WFEA]."[98]

In 1998, the Wisconsin Court of Appeals added some additional insights in *Knight v. LIRC*.[99] The case involved an individual who had previously been convicted of a drug crime and was applying for a position as a district agent for Prudential Insurance Company of America. Due to matters related to federal securities law, Prudential kept a policy of summarily rejecting all applicants having a criminal record that would disqualify that individual for National Association of Securities Dealers (NASD) certification.[100] Knight filed a complaint under the WFEA.[101] An administrative law judge decided in favor of Prudential, ruling that an employer is not required by the WFEA to accommodate an applicant's criminal record in its hiring process.[102] This decision was subsequently affirmed by the LIRC and the Waukesha County Circuit Court.[103]

The Wisconsin Court of Appeals also affirmed, finding that

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95. *See, e.g., id.*

96. Wal-Mart Stores v. Labor & Indus. Review Comm'n, No. 97-2690, 1998 Wisc. App. LEXIS 1529, at *9 (Wis. Ct. App. June 4, 1998) (unpublished, limited precedent decision under WIS. STAT. § 809.23(3)).

97. Herdahl v. Wal-Mart Distrib. Ctr., ERD Case No. 9500713 (LIRC Feb. 20, 1997).

98. *Id.*

99. 582 N.W.2d 448 (Wis. Ct. App. 1998), *review denied*, 585 N.W.2d 157 (Wis. 2001).

100. Prudential required all employees involved in the company's registered securities business to be individually registered with the NASD. *Id.* at 451. Among other criteria, federal law had established disqualification for persons to receive this registration if they have received a felony conviction within the past ten years. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

Prudential had not improperly discriminated against Knight on the basis of his conviction record.[104] In making this decision, the court elaborated on its view of what is required of such claims. First, the court agreed with the language used in the lower court rulings, stating that nothing in the WFEA requires employers to take affirmative actions to accommodate individuals with felony convictions.[105] Second, the court held that, to prevail under the WFEA, a complainant must prove that he or she is truly qualified for the position,[106] adding that this determination is a question of fact.[107] The court then determined that Knight had, in fact, failed to show that he possessed adequate qualifications for the job.[108] Finally, although noting that the issue was not dispositive, the court found that Knight's conviction for involvement in a drug deal "can be construed as substantially related to the circumstances of a position as a district agent."[109] The *Knight* decision seemed to express a growing willingness by Wisconsin courts, at least at the appellate level, to allow employers reasonable deference in establishing certain policies against the hiring of persons with criminal records. In sum, since *County of Milwaukee*, cases have been resolved largely, but not exclusively, in the favor of employers, showing that a liberal interpretation of the substantial relationship exception lives on.[110]

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104. *Id.*

105. *Id.* at 456 (finding that the WFEA—prior to the amendments codified in WIS. STATS. §§ 111.337 and 111.34—did not impose upon employers a duty to accommodate an employee's religious practices). Accordingly, "no accommodation is required [under the WFEA] absent express language to the contrary." *Id.* (citing Am. Motors v. Dep't of Indus. & Human Relations, 305 N.W.2d 62, 77 (Wis. 1981)).

106. *Id.* at 454. In addition to proving this factor,

> to establish a prima facie case of employment discrimination under WFEA, a complainant must prove that: (1) he or she was a member of a protected class under the statute, (2) he or she was discharged . . . and (4) either he or she was replaced by someone not within the protected class or that others not in the protected class were treated more favorably.

Id. (citing Puetz Motor Sales, Inc. v. Labor & Indus. Review Comm'n, 376 N.W.2d 372, 374–75 (Wis. Ct. App. 1985)).

107. *Id.*

108. *Id.*

109. *Id.* at 456 ("As a district agent, Knight would have a significant amount of unsupervised time making calls and would also have a fiduciary responsibility to his customers that would include handling sums of money.").

110. An assessment of the merit of the court's decision in *County of Milwaukee*, and its continued application, will be undertaken *infra* Part III.B.

v. Current Legal Limbo: The Saga of Michael Moore

Belief that the *County of Milwaukee* decision effectively gutted the WFEA's ban on conviction record consideration in employment decisions should be tempered by the legal conclusions in a recent, high-profile case involving this provision. The case involved an applicant for a position as boiler attendant in a public elementary school in Milwaukee. The applicant, Michael Moore, had been previously convicted for "'injury by conduct regardless of life,'" at that time a Class C felony, involving his accidental scalding of a child resulting from a domestic dispute with his wife.[111] The LIRC concluded, *inter alia*, that this crime did not fall within the substantial relation exception and that the Milwaukee Board of School Directors (MBSD) had unlawfully discriminated against Moore on the basis of his criminal record by failing to hire him.[112] The MBSD appealed this decision to Milwaukee County Circuit Court, which subsequently affirmed the LIRC decision.[113]

The MBSD subsequently filed an appeal to the Wisconsin Court of Appeals, which ruled in favor of the LIRC's finding that Moore was unlawfully discriminated against by the MBSD because of his conviction record.[114] The court reached this conclusion by first finding that the LIRC's initial decision was entitled to a great weight of deference under the court's standard of review.[115] Although summarily addressing some of the primary conclusions and reasoning of *County of Milwaukee*, the court ultimately concluded that the LIRC "properly applied the statutory exception and correctly concluded that the circumstances of Moore's conviction were not substantially related to the job of Boiler

111. Moore v. Milwaukee Bd. of Sch. Dirs., ERD Case No. 199604335 (LIRC July 23, 1999).

112. *Id.*

113. Milwaukee Bd. of Sch. Dirs. v. Labor & Indus. Review Comm'n, Case No. 99-CV-006637 (Milwaukee County Circuit Court June 14, 2000), *available at* http://www.dwd.state.wi.us/lirc/moorcrct.htm (last visited Jan. 13, 2002).

114. Milwaukee Bd. of Sch. Dirs. v. Labor & Indus. Review Comm'n, No. 00-1956, 2001 Wisc. App. LEXIS 601, at *25 (Wis. Ct. App. June 12, 2001) (unpublished, limited precedent decision under WIS. STAT. § 809.23(3) (1999–2000)). The vote of the court of appeals panel was 2–1. The court of appeals reviewed the LIRC decision and not the circuit court's decision. *Id.* at *6 (citing Stafford Trucking, Inc. v. Dep't of Indust. Labor & Human Relations, 306 N.W.2d 79 (Wis. Ct. App. 1981)).

115. *Id.* at *7–12 (citing CBS, Inc. v. Labor & Indus. Review Comm'n, 579 N.W.2d 668 (Wis. 1998)).

Attendant Trainee."[116] The court also disagreed with the view that the LIRC's decision "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."[117] Finally, the court dismissed the MBSD's contention that the character traits revealed by Moore's conviction are likely to reappear on his job, and the court further said that Moore's "sporadic contact with children" is not enough to suggest further criminal conduct will be fostered on his part.[118] The MBSD subsequently submitted a petition for review to the Wisconsin Supreme Court, which was denied early in the court's 2001–2002 term.[119]

c. *Proposed Deletion of Conviction Records as an Impermissible Basis for Employment Discrimination Under the WFEA*

In the 1999–2000 session of the Wisconsin State Legislature, both chambers drafted bills that would have stricken conviction records as one of the bases protected from discrimination under the WFEA.[120] The Assembly version would have permitted discrimination against any individual who had been convicted of a felony,[121] while the Senate version would have also eliminated the WFEA protection for those convicted of misdemeanors or "other offense[s]."[122] Although the Assembly version of the bill passed by a wide margin, the Senate bill never reached a vote and thus died at the end of the legislative session.

The impetus for the bills proposed in the 1999–2000 session was largely the public outcry generated by two high-profile applications of the law in favor of the employment rights of a previously convicted job applicant.[123] It is uncertain whether either bill or similar proposed

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116. *Id.* at *17.

117. *Id.* at n.3.

118. *Id.* at *20. Interestingly, the court also stated that "had the legislature wished to create such a blanket exception pertaining to schools, it would have done so." *Id.* at *21–22.

119. 635 N.W.2d 783 (Wis. 2001).

120. Assemb. B. 469, 95th Legis. Sess. (Wis. 1999); S.B. 238, 95th Legis. Sess. (Wis. 1999).

121. The Assembly also passed a bill that would have specifically exempted "educational agencies," including schools from the WFEA conviction record law. Assemb. B. 446, 95th Legis. Sess. (Wis. 1999).

122. Assemb. B. 469, 95th Legis. Sess. (Wis. 1999); S.B. 238, 95th Legis. Sess. (Wis. 1999).

123. The first instance involved the case of Michael Moore, discussed *supra* notes 111–119 and accompanying text. The second instance involved Gerald Turner, a man known in

changes to the WFEA will be raised again in future legislative sessions—although, given the legal disposition obtained in the Moore case, some legislators have expressed a renewed interest to amend the conviction record provision.[124] It is difficult to disentangle the political circumstances surrounding the creation, continuation, or possible deletion of criminal records as a protected basis from employment discrimination from the legal issues involved. Moreover, the WFEA criminal record provision, and the principles underlying the law, generate considerable emotion by both its advocates and detractors. Nevertheless, legal practitioners and analysts must fully understand what effect a decision to delete conviction records would have on the law and on employers and employees in Wisconsin.[125]

B. Treatment of Conviction Record Discrimination in Other States

Wisconsin remains one of only a handful of states with employment discrimination laws addressing arrest or conviction records. A survey of the statutory treatment by other states with respect to discrimination on the basis of conviction records, and the corresponding application of these statutes by the courts, allows for comparison with Wisconsin.[126]

The Illinois Human Rights Act, for example, which serves as the state's fair employment practice law, prohibits employment discrimination based on certain criminal history records and related information.[127] While its statutory restriction on the use of criminal

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Wisconsin as "the Halloween Killer." Turner had been convicted of child sexual assault and second-degree murder of a nine-year-old girl trick-or-treating on Halloween 1973. *See* Thomas Hruz, *Criminals Escaping Affliction: Gerald Turner and Wisconsin's Fair Employment Law*, WI: WISCONSIN INTEREST, Winter 2000, at 7. After his release from prison and involuntary civil confinement under Wisconsin's sexual predator law, Turner applied for a job with Waste Management, Inc., involving the sorting of recyclables. *Id.* at 9. After Waste Management, Inc. refused to hire Turner, he filed a complaint under the WFEA. *Id.* After an administrative law judge found probable cause that unlawful discrimination based on conviction records had occurred, Waste Management, Inc. settled out of court with Turner for an undisclosed amount of money. *Id.* Therefore, the case never formally reached the LIRC for review. The legal issues involved with these decisions, especially the Moore case, are discussed in greater detail *infra* Part III.

124. Tom Kertscher, *MPS Must Rehire Felon, Give Him $150,000 in Back Pay*, MILWAUKEE J. SENTINEL, Oct. 4, 2001, at B1.

125. Part III, *infra*, of this Comment addresses these issues, along with providing extensive normative judgments as to why such a change in the law better recognizes the nature of how criminal records relate to employment and is therefore recommended.

126. A brief comparison to Wisconsin's current law and the treatment in other states occurs later in this Comment *infra* Part III.C.

127. 775 ILL. COMP. STAT. ANN. 5/2-103 (West 1999).

records is relatively limited, Illinois courts have found occasion to directly address the issue of whether an employer may bar an applicant from consideration for employment solely because of a criminal conviction.[128] In a case involving a racial minority applicant for a university police position, the Illinois Appellate Court found that no grounds of business necessity justified the denial of employment due to a single misdemeanor weapons possession charge.[129] The court based its decision largely on the existing mitigating circumstances, such as the fact that the conviction was five years prior to the denial to hire, that the applicant had since developed a history of quality and responsible police-related work, and, finally, that the employer had presented no evidence exhibiting how the applicant's conviction was reasonably related to his current ability to perform the job successfully.[130] From this language and logic, and given the seeming congruence between the elements of the criminal offense (weapons violation) and the job applied for (police officer), Illinois courts have pursued a rule more akin to the factors-specific test previously applied in Wisconsin.

Hawaii state law, meanwhile, makes it an unlawful employment practice to discriminate on the basis of an "arrest and court record."[131] The law allows employers to inquire as to an applicant's criminal conviction record from the past ten years, provided that the crime in the record "bears a rational relationship to the duties and responsibilities of the position."[132] Furthermore, this inquiry may take place "only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position."[133] Hawaii also provides an exception similar to that found under Wisconsin law, which allows employers to consider conviction records that are substantially related to the job sought.[134] Overall, Hawaii's law closely resembles Wisconsin's law.

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128. Bd. of Trs. v. Knight, 516 N.E.2d 991 (Ill. App. Ct. 1987).

129. *Id.* at 999.

130. *Id.* at 997–98

131. HAW. REV. STAT. ANN. § 378-2 (Michie 1999).

132. *Id.* § 378-2.5.

133. *Id.*

134. *Id.* § 378-3 ("Nothing in this part shall be deemed to . . . [p]rohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment."). For more information on Hawaii's law regarding discrimination on the basis of criminal

Pennsylvania also requires that an employer's consideration of an individual's felony or misdemeanor conviction record when deciding whether to hire that individual can be done "only to the extent to which [the convictions] relate to the applicant's suitability for employment in the position for which he has applied."[135] Pennsylvania state courts have, in the past, interpreted this provision so as to give it great force.[136] Likewise, the state constitution has been interpreted to bar public employers from denying employment based on conviction records.[137]

Finally, since 1977, the State of New York has restricted employers' use of criminal conviction records to deny employment to applicants "unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the . . . employment sought; or (2) . . . the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[138] Unlike in other states, this New York law specifically sets forth the factors to be considered in determining the relationship between the job and the criminal offenses.[139] These factors include specific inquiries into how the job relates to the crime, the time that has elapsed since the criminal offense, the age of the person at the time of the criminal offense, the seriousness of the offense, legitimate interests in protecting property and the public, business safety, and evidence of rehabilitation provided by the applicant.[140]

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records, see Sheri-Ann S.L. Lau, Recent Development, *Employment Discrimination Because of One's Arrest and Court Record in Hawaii*, 22 U. HAW. L. REV. 709 (2000).

135. 18 PA. CONS. STAT. ANN. § 9125 (West 1999).

136. Hunter v. Port Auth., 419 A.2d 631, 634 (Pa. Super. Ct. 1980) ("[Pennsylvania's] Supreme Court has not hesitated to limit unwarranted governmental restrictions upon an individual's right to engage in lawful employment on account of the individual's past criminal record.") (citing 18 PA. CONS. STAT. ANN. § 9125).

137. *Id.* at 635. The Pennsylvania Superior Court stated that it has:

> no trouble concluding that when a person is denied public employment on the basis of a prior conviction for which he has been pardoned, unless the conviction is reasonably related to the person's fitness to perform the job sought, or to some other legitimate governmental objective, [the Pennsylvania State Constitution] is violated.

Id.

138. N.Y. CORRECT. LAW § 752 (McKinney 1998); N.Y. EXEC. LAW § 296 (McKinney 1998). These statutes have only been held applicable to those seeking employment and not current employees. *See* Green v. Wells Fargo Alarm Serv., 596 N.Y.S.2d 412, 413 (N.Y. App. Div. 1993).

139. N.Y. CORRECT. LAW § 753.

140. *Id.*

No other states have directly addressed within their laws the matter of employment discrimination based on criminal conviction records for all employers. Courts in other states that address discrimination complaints based on conviction record consideration mostly defer to the treatment available under Title VII of the Federal Civil Rights Act[141] and either explicitly or implicitly adopt the disparate impact test developed under federal law.[142] Still, other states have attempted to address this issue in a less formal and less thorough fashion. For example, the State of Washington's Human Rights Commission issued a regulation barring bias against persons convicted of crimes, only to have the state appellate court rule that the Commission exceeded its authority in so doing.[143] A number of states, such as California and Massachusetts, do not bar employers from using criminal records in employment considerations, but they do restrict employers from requesting that information from employees or potential employees.[144] A few states disallow the consideration of conviction records in state licensing decisions for certain types of employment[145] or for civil service positions.[146] Finally, some state courts have expressly declined to hold

141. 42 U.S.C. §§ 2000e-2 to e-17 (1994 & Supp. 2000).

142. *See, e.g.*, Heatherington v. State Pers. Bd., 27 Fair Empl. Prac. Cas. (BNA) 1182 (Cal. Ct. App. 1978) (finding that the employer successfully demonstrated that the prior criminal conduct bore a significant relationship to the duties of a police officer). "More frequently [than specific state statutes prohibiting discrimination based on criminal offenses], challenges to employment discrimination on the basis of prior conviction or arrest are based on constitutional grounds or are alleged to violate Title VII." 1 ROTHSTEIN, *supra* note 14, § 1.9. For a description of the federal law on employment discrimination involving criminal records, see *infra* Part II.C.

143. Gugin v. Sonico, Inc., 846 P.2d 571 (Wash. Ct. App. 1993).

144. *See* CAL. PENAL CODE § 13326 (West 1998); Bynes v. Sch. Comm., 581 N.E.2d 1019, 1020 (Mass. 1991) (applying MASS. GEN. LAWS ch. 151B, § 4(9) (1990)); *see also* D.C. CODE ANN. § 2-1402.66 (2000) (limiting inquiry into conviction records to those crimes having been committed in the past ten years). For a complete discussion of how states apply various restrictions on when and how employers can access an applicant's criminal records, see 1 ROTHSTEIN, *supra* note 14, § 1.9.

145. *See, e.g.*, LA. REV. STAT. ANN. § 37:2950 (West 2000) (stating that "a person shall not [be unable] to engage in any trade, occupation, or profession for which a license, permit or certificate is required to be issued by the state of Louisiana . . . solely because of a prior criminal record," except when an applicant has been convicted of a felony that directly relates to the job or trade sought).

146. *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-80(a)–(d) (West 1998) (restricting state employers from the ability to disqualify any person from employment solely on the basis of a criminal conviction unless the nature of the crime and its relationship to the job in question, the convicted person's rehabilitation, and the time elapsed since the conviction or release show that the employee is unfit for the position); MINN. STAT. ANN. § 364.03 (West 1999)

that persons with conviction records are a class deserving of fair employment protection.[147]

C. The Federal Approach to Considerations of Conviction Records

Unlike Wisconsin law, federal statutory law does not expressly restrict the ability of employers to consider criminal conviction records within employment-related decisions. Instead, federal law concerns itself with considerations of criminal convictions indirectly, largely by the application of the theory of disparate impact through the Federal Civil Rights Act of 1964.[148] This has occurred through various federal court cases and Equal Employment Opportunity Commission (EEOC) decisions generating legal prohibitions against the use of arrest and conviction records in employment decisions if such a policy has a disparate impact on minorities and is not justified by a business necessity.[149] In general, the business necessity exception is the analog to

(stating that individuals shall not be disqualified from public employment because of a prior criminal conviction, "unless the crime or crimes for which convicted directly relate to the position of employment sought," and sufficient evidence of rehabilitation is not provided).

147. *See, e.g.*, Leonard v. Corr. Cabinet, 828 S.W.2d 668, 672 (Ky. Ct. App. 1992) ("Although, if given the opportunity, Leonard might be able to prove that the Cabinet has denied employment or promotions to more black applicants than white applicants because of the felon status, we know of no established protected class involving persons with felony records, and we decline to create one.").

148. 42 U.S.C. §§ 2000e-2 to e-17 (1994 & Supp. 2000). Some federal courts have recognized federal constitutional violations in certain types of government-mandated employment restrictions on the basis of criminal records. *See* Kindem v. City of Alameda, 502 F. Supp. 1108 (N.D. Cal. 1980) (finding that city's policy prohibiting municipal employment of ex-felons violated a liberty interest and the due process clause of the Fourteenth Amendment of the United States Constitution); Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973) (finding that a municipal ordinance barring employment as a custodian by a person who had been discharged from the army under less than honorable circumstances violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment); Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977) (holding that a statute barring felony offenders from employment by licensed detective and security guard agencies violates the Equal Protection Clause); Osterman v. Paulk, 387 F. Supp. 669 (S.D. Fla. 1974) (finding that a prohibition of employing, as city office clerks, persons who had used marijuana within past six months was a violation of the Equal Protection Clause); Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974) (holding that a statute absolutely prohibiting the employment of convicted felons in civil service positions violates the Equal Protection Clause).

149. *See, e.g.*, EEOC Dec. No. 74-89, 8 Fair Empl. Prac. Cas. (BNA) 431 (Oct. 18, 1971) (stating EEOC position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks, given statistics showing that these groups are convicted at a rate disproportionately greater than their representation in the general population); EEOC Dec. No. 81-22, 27 Fair Empl. Prac. Cas. (BNA) 1811 (May 12, 1981) (same); EEOC Dec. No. 81-06, 27 Fair Empl. Prac. Cas.

Wisconsin's "substantial relation" exception.[150]

An understanding of the federal rule on criminal record considerations is pertinent to the present analysis for two reasons. First, the underlying rationale of the federal law, as reflected in its enforcement, is starkly different than Wisconsin's approach. Wisconsin prohibits discrimination against former criminals in most any manner, while federal law only restricts this type of discrimination to the extent it unintentionally causes discrimination against an otherwise suspect class, namely racial minorities.[151] Second, were the State of Wisconsin to eliminate its inclusion of conviction records as a prohibited basis for discrimination, employees in the state would be left with federal law as the means by which to seek redress for discrimination.[152]

1. Title VII of the Civil Rights Act

Title VII of the Federal Civil Rights Act of 1964 prohibits certain types of discrimination in employment, with its directives applying to most employers.[153] Title VII explicitly prohibits discrimination on the basis of race, color, religion, national origin, and sex, with the latter category having been construed to include pregnancy, childbirth and related conditions.[154] The Act makes it unlawful for employers to treat persons within these classes differently in matters related to hiring, termination, compensation, or other terms, conditions, or privileges of

(BNA) 1779 (Nov. 7, 1980) (same with regard to Hispanics); EEOC Dec. No. 80-10, 6 Fair Empl. Prac. Cas. (BNA) 1792 (Aug. 1, 1980) (same); *see also* Green v. Mo. Pac. R.R., 523 F.2d 1290 (8th Cir. 1975); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

150. A comparison between these two tests of legal validity (the substantial relation and business necessity exceptions) is discussed *infra* Part III.B.2.

151. This difference will be discussed in great detail, *infra* Part III.D.

152. A discussion of how federal law on the subject would apply in the absence of the Wisconsin ban on criminal record consideration is directly discussed *infra* Part III.D.

153. 42 U.S.C. §§ 2000e-2 to e-17. Employers must be involved in interstate commerce and have at least fifteen employees for each working day in order to fall under the purview of the Civil Rights Act. *Id.* § 2000e(b). Title VII also applies to federal government employees. *Id.* § 2000e-16(a).

154. Specifically, Title VII includes language stating that

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a)(1).

employment.[155] In this respect, the law is analogous to the Wisconsin Fair Employment Act, as with similar laws in most other states. The Equal Employment Opportunity Commission (EEOC) is given the authority to interpret and enforce the provisions of Title VII[156] and, as with Wisconsin's LIRC, handles most claims based on Title VII without such cases reaching the courts.[157]

Title VII's reach covers two general types of employment discrimination. First, the law prohibits employers from discriminating directly on the basis of an applicant's or employee's inclusion in one of the protected, or "suspect," classes named in the law.[158] Actions or policies that discriminate in this manner fall under the rubric of "disparate treatment," and absent the showing of a well-founded, bona fide occupational qualification for such discrimination, these practices will almost invariably be found in violation of Title VII.[159] The fundamental element of these claims is the showing of discriminatory intent against the person harmed because of his inclusion in one of the protected classes.[160]

Title VII also prohibits ostensibly neutral job requirements, if those criteria disproportionately exclude a protected class and they are not job-related or necessitated by a feature of the job or business involved.[161]

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155. "[T]o limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(2).

156. The EEOC's enforcement provisions are located in 42 U.S.C. § 2000e-5; its regulations and guidelines are found in 29 C.F.R. § 1614 (2001).

157. In Fiscal Year 2000, the EEOC was involved, either through a direct suit or by way of intervention, with 304 lawsuits involving Title VII claims. *EEOC Litigation Statistics, FY 1992 through 2000, available at* http://www.eeoc.gov/stats/litigation.html (last modified Jan. 31, 2001). By way of comparison, the total number of charge receipts filed under Title VII with the EEOC in FY 2000 was 59,588. *Title VII of the Civil Rights Act of 1964 Charges FY 1992–FY 2000, available at* http://www.eeoc.gov/stats/vii.html (last modified Jan. 18, 2001).

158. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (setting out the Court's view of disparate treatment cases under Title VII).

159. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

160. *See* GEORGE RUTHERGLEN, MAJOR ISSUES IN THE FEDERAL LAW OF EMPLOYMENT DISCRIMINATION 10 (3d ed. 1996). Employers who are alleged to have discriminated under Title VII by disparate treatment also have a defense of disavowing any discriminatory intent or motive. *Id.* at 20.

161. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII also proscribes practices that are fair in form, but discriminatory in operation). According to the Court in *Griggs*, "Congress directed the thrust of the [Civil Rights Act of 1964] to the *consequences* of employment practices, not simply the motivation." *Id.* at 432. *But see* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT

Such occurrences invoke a "disparate impact" analysis by the courts or the EEOC, which was first approved as a judicial analytical technique by the United States Supreme Court in *Griggs v. Duke Power Company*.[162] Disparate impact jurisprudence has had a colorful history and the central tenet of the theory has been described in a variety of ways.[163] Generally, its application is premised on the notion that "practices that are fair in form, but discriminatory in operation" violate Title VII, absent a business necessity for that practice.[164] Although disparate impact claims may arise from the use of numerous types of subjectively or objectively scored criteria, the focus of this Comment is on the use of criminal conviction records. Generally, employers that refuse to hire applicants on the basis of previous criminal convictions may, in effect, disproportionately exclude minority applicants, and in many geographic areas, this disparate effect may be more probable.[165] Unlike under a disparate treatment claim, no discriminatory intent against a protected class must be shown to advance a claim.[166]

Under a Title VII disparate impact claim, the plaintiff carries the burden of proving that the employment practice in question does in fact disparately impact the class of which the individual is a member.[167] Once a plaintiff evidences this type of disparate impact, an employer fighting the claim has two options. First, the employer can attack the evidence that minorities truly are affected negatively by the policy to a more disproportionate degree than non-minorities.[168] The employer's second

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DISCRIMINATION LAWS 197–200 (1992) (arguing that imposing employment discrimination liability in instances of statistically disparate impact was manifestly beyond the intent of the drafters of the Civil Rights Act of 1964).

162. 401 U.S. at 430. *Griggs* involved an employer's requirement of a high school education or passing of a standardized general intelligence test as a condition of employment in, or transfer to, higher-level jobs. *Id.* at 427–28. The Court held that this practice violated Title VII because the requirements were not related to successful job performance, and further that the employer's lack of discriminatory intent was not controlling because Title VII required a look to the consequences of employment practices. *Id.* at 431–33. The facts also showed that this company had a history of racial discrimination prior to the 1964 Civil Rights Act and that the employer's intelligence tests were aimed at achieving this same type of racial discrimination. *Id.* at 426.

163. *See, e.g.*, MICHAEL EVAN GOLD, AN INTRODUCTION TO THE LAW OF EMPLOYMENT DISCRIMINATION 17 (1993) ("The basic idea of disparate impact is that an employment practice should affect various classes of people in the same way . . . .").

164. *Griggs*, 401 U.S. at 431.

165. *See* sources cited *supra* note 149.

166. *See* RUTHERGLEN, *supra* note 160, at 17–18.

167. *Griggs*, 401 U.S. at 429; *see also* GOLD, *supra* note 163, at 19.

168. This defense will likely be attempted by criticizing the plaintiff's statistical analysis,

option is to prove that the exclusion of persons convicted of certain offenses is job-related and consistent with a business necessity.[169]

It is crucial to note that since a conviction record is not expressly listed in the Federal Civil Rights Act as a prohibited basis for discrimination, no disparate treatment claim can be brought on the basis of being in the class of convicted criminals.[170] Likewise, disparate impact theory in the context of criminal records only arises if the policy is applied equally to all applicants, yet would still have a statistically greater adverse effect on minorities. Some employers may also attempt to use an applicant's criminal record as a mere pretext for racial discrimination. For example, an employer may use conviction records as a reason to deny employment to black applicants, while concurrently not rejecting similarly situated white applicants.[171] In these instances, the action is analyzed under a disparate treatment test, not a disparate impact one,[172] and is better framed as an instance of direct racial discrimination.[173]

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including a narrowing of the applicable geographical region from which the statistical comparison is made, or by proffering applicant flow data showing how different groups of persons apply.

169. *Griggs*, 401 U.S. at 432. Courts have also recognized that this second defense usually entails rebutting any claims by the plaintiff that the employer's legitimate business concern could be addressed equally well by alternative means that would reduce the disparate impact. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

170. The relevance of this point will be highlighted when the Title VII analysis is compared to the WFEA approach to criminal records, *infra* Part III, in that under Wisconsin law, a disparate treatment claim is available to those discriminated against on the basis of their conviction record.

171. *See, e.g.*, McGaughy v. State Human Rights Comm'n, 612 N.E.2d 964 (Ill. App. Ct. 1993) (finding evidence that African-American employee's discharge was racially motivated when a Caucasian co-worker convicted of a similar offense was not likewise terminated). *But cf.* Webster v. Redmond, 599 F.2d 793, 802–03 (7th Cir. 1979) (claiming that the substitution of discriminatory impact for discriminatory intent is premised on the existence of a pattern or practice on the part of employer using arrest records and, that the school board, in refusing to promote a black teacher because of his arrest, had not impermissibly discriminated under Title VII).

172. *See* 2 EEOC Compl. Man. (CCH), *Conviction Records* §604.10 ¶ 2088 (1998).

173. Note that, similar to the WFEA, the EEOC has ruled that "discharge of or failure to hire an employee who falsifies an inquiry concerning his conviction record on an employment application is not a violation of Title VII. . . ." EEOC Dec. No. 80-26, 26 Fair Empl. Prac. Cas. (BNA) 1810, 1811 n.4 (Sept. 11, 1980) ("[T]here are no data or testimony showing that Blacks either lie more than other groups or that they are disproportionately excluded from employment because of falsification of application forms.").

2. *Green v. Missouri Pacific Railroad*

The leading case in the federal courts concerning matters of discrimination based on conviction records remains *Green v. Missouri Pacific Railroad Company*.[174] In *Green*, a three-judge panel of the Eighth Circuit of the United States Court of Appeals held that employers subject to Title VII may not impose a policy barring all persons with criminal convictions from employment, absent a showing of business necessity for such policy.[175] Missouri Pacific Railroad followed an "absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense."[176] Green, an African-American, applied for a job as a clerk with the company, but was denied employment solely on the basis of his prior conviction.[177]

In deciding the case, the Eighth Circuit applied a similar analysis as that which the federal courts had already applied to discrimination based on arrest records.[178] First, the court looked to the statistical evidence presented by the plaintiff showing that Missouri Pacific's policy had a disproportionate and adverse impact on African-Americans.[179] The court emphasized that Green had adequately shown that blacks were convicted at a much higher rate in the St. Louis

174. 523 F.2d 1290 (8th Cir. 1975).

175. *Id.* at 1298–99.

176. *Id.* at 1292.

177. *Id.* at 1292–93. Green had been convicted for refusing military induction during the Vietnam War. *Id.* at 1292. Green had attempted to file as a conscientious objector on religious grounds to avoid military service, but had been denied—and when he refused induction, he was convicted. *Id.* at 1293 n.5.

178. *See* Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd and vacated in part on other grounds*, 472 F.2d 631 (9th Cir. 1972) (declaring unlawful an employer's policy of disqualifying from employment consideration those applicants who had been arrested on numerous occasions for offenses other than minor traffic offenses, after a black plaintiff was denied a job due to the policy). The court held that even if such a policy is applied objectively, it was discriminatory and unlawful because it had the foreseeable effect of denying African-American applicants equal opportunities for employment. *Id.* at 403. The court further found no business necessity for the policy. *Id.* at 402.

179. The court identified three ways of statistically establishing disproportionate impact. The plaintiff may attempt to determine: (1) whether blacks as a class, or at least blacks in a specified geographical area, are excluded by the suspect practice at a substantially higher rate than whites; (2) the percentages of class member applicants that are actually excluded by the practice or policy, or (3) the level of employment of blacks by the employer in comparison with the percentage of blacks in the relevant labor market or geographic area. *Green*, 523 F.2d at 1293–94.

metropolitan area than whites.[180] Moreover, upon examination of Missouri Pacific's employment records, black applicants were two and one-half times more likely to be rejected for employment from the company than whites under this no-conviction policy.[181] As a result, the court found that these statistics satisfied the plaintiff's prima facie case of disparate impact.[182] The court then proceeded to assess the relative merit of the defendant's claims of business necessity.[183] In dismissing the company's defenses, it concluded that although some consideration of criminal records may be undertaken by employers, "[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed."[184]

While *Green* held that use of conviction records as an absolute bar to employment is unlawful, it did not entirely preclude the use of a criminal conviction as an employment factor. Employers could still weigh various factors, including conviction records for crimes related to the job being applied for, to see if the offenses apply to that individual's fitness for a job.[185] In fact, after *Green* had been remanded, it was appealed back to the Eighth Circuit,[186] which then elucidated its previous opinion using language a bit more sympathetic to employers. Here, the court denied a motion by Green to enjoin Missouri Pacific from using conviction information as even a partial basis in disqualifying an applicant for employment.[187] While repeating that absolute bars to employment based on criminal records are impermissible, the court affirmed the lower court's ruling that employers may still consider

> an applicants' prior criminal record *as a factor* in making

180. *Id.* at 1294–95.

181. *Id.*

182. *Id.* at 1295.

183. Missouri Pacific argued that at least seven reasons supported its no-conviction policy, including: "(1) fear of cargo theft, (2) handling of company funds, (3) bonding qualifications, (4) possible impeachment of employee as a witness, (5) possible liability for hiring persons with known violent tendencies, (6) employment disruption caused by recidivism, and (7) alleged lack of moral character of persons with convictions." *Id.* at 1298.

184. *Id.*

185. *Id.* ("Although the reasons MoPac advances for its absolute bar can serve as relevant considerations in making individual hiring decisions, they in no way justify an absolute policy which sweeps so broadly.").

186. Green v. Mo. Pac. R.R., 549 F.2d 1158 (8th Cir. 1977).

187. *Id.* at 1160.

> individual hiring decisions so long as the [employer] takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.[188]

The court seemed to stress that conviction records need not be entirely ignored by employers, but rather that employers must use this information only for a readily identifiable, purposeful, and defensible reason. In essence, businesses were forewarned that if they are to consider criminal convictions in making employment decisions, they should do so with "kid gloves."

Some other federal courts have addressed the matter of employment discrimination based on criminal conviction records, either building upon *Green* or simply applying an independent analysis. These cases show that, first, certain professions, most notably law enforcement, firefighting, and other security-sensitive jobs, receive greater deference to draft policies denying employment based on criminal records.[189] Second, as in Wisconsin, while inquiries concerning an applicant's conviction record are allowed, they must specify that answers will not bar employment.[190] Third, federal district courts remain able to invoke

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188. *Id.* (emphasis added) (quoting from the trial court's injunctive order). The court also referenced back to language it used in its earlier decision, which had stated "[a]lthough the reasons [Missouri Pacific] advances for its absolute bar can serve as relevant considerations in making individual hiring decisions, they in no way justify an absolute policy which sweeps so broadly." *Id.* at 1160 n.1 (quoting *Green*, 523 F.2d at 1298).

189. *See, e.g.*, Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986) (upholding the requirement that applicants for police officer positions can not have been convicted of more than three moving traffic violations in the preceding twelve months, mentioning the public interest in the safe operation of squad cars and the reliability of moving violations as a predictor of involvement in future accidents); Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1971) (allowing a fire department to give "fair consideration" to recent convictions in evaluating an applicant's fitness for being a firefighter); United States v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976) (holding that a prior conviction for a serious crime may be a lawful reason to disqualify individuals from police work despite the disproportional impact such a policy may have on minorities), *aff'd in part, rev'd in part on other grounds*, 549 F.2d 415 (7th Cir. 1977); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971), *aff'd per curiam*, 468 F.2d 951 (5th Cir. 1972) (allowing discrimination on the basis of conviction record for a job as hotel bellman, given that the job requires the handling of other individuals' property).

190. Although the EEOC maintains that employers may not terminate or refuse to hire persons who give false or incomplete information regarding their conviction record, court decisions overwhelmingly permit such actions in the absence of proof of disparate impact. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION

their discretion, recognized in *Green*,[191] to define the relevant class as they see fit, including restricting the statistical analysis of disparate impact to certain geographic areas or persons with certain qualifications.[192] Fourth, federal courts have also looked to the relationship between the criminal record and the job sought,[193] while some have also weighed the effect of the length of a hiring ban based on a criminal offense.[194] Finally, courts since *Green* "have been quick to distinguish cases in which conviction records are used only as one factor in considering the application and cases in which the employer requires a special level of trust in its employees."[195]

Since disparate impact deals with seemingly less nefarious motives and actions on the part of employers, the law has, in a sense, cut employers some "legal slack." Yet disparate impact theory still strongly favors the protection of suspect classes, even when only seemingly neutral job requirements, like a conviction record ban, cause discrimination.[196]

3. The Business Necessity Exception

The force of Title VII's ban against the use of criminal conviction records is tempered by whether any such policy is justified by a business

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LAW 184 (2d ed. 1983).

191. *Green*, 523 F.2d at 1299 (stating that "the district court is vested with some discretion in determining the parameters of the class" (citations omitted)).

192. It appears that there are "no cases wherein the third method was exclusively relied upon to demonstrate the discriminatory impact of considering arrest or conviction records." Annotation, *Consideration of Arrest Record as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964*, 33 A.L.R. FED. 263, 271 n.9 (1977 & Supp. 2000). Nonetheless, a few courts have, while not expressly invoking this type of analysis, acted in accordance with such an approach. *See, e.g.*, Hill v. United States Postal Serv., 522 F. Supp. 1283, 1302 (S.D.N.Y. 1981) (noting statistical comparisons to the general population are less probative when jobs require special qualifications).

193. Avant v. S. Cent. Bell Tel. Co., 716 F.2d 1083, 1087 (5th Cir. 1983); Despears v. Milwaukee County, 63 F.3d 635, 637 (7th Cir. 1995) (holding that employer legally demoted employee to a job not requiring driving when employee lost driver's license after fourth conviction for driving under the influence of alcohol, stating that the Americans with Disabilities Act does not require overlooking infractions of the law).

194. Schanuel v. Anderson, 708 F.2d 316 (7th Cir. 1983) (upholding a state law imposing a ten-year ban on the time between the end of a criminal sentence and employment as a detective agent).

195. LEX LARSEN, EMPLOYMENT SCREENING § 9.05, at 9-14 to 9-15 (1996) (footnote omitted).

196. *See* GOLD, *supra* note 163, at 17 ("[I]f [an employment] practice has a proportionately greater adverse effect on one class than on another, a good reason should justify this effect.").

necessity. Of course, "business necessity" can mean a myriad of different things to many different people.[197] The United States Supreme Court in *Griggs v. Duke Power Company*, the progenitor of all disparate impact cases, defined the term in a variety of ways, from a "reasonable" practice that has a "demonstrabl[e] . . . measure of job performance"[198] to stating that "any given requirement must have a manifest relationship to the employment in question."[199] Some commentators have argued that *Griggs*, despite the language found in the opinion, requires only reasonable necessity, not absolute necessity.[200] In *Green*, the Eighth Circuit applied a strict business necessity test, such that the contested policy must not only foster safety and efficiency, but must also be essential to that goal.[201] Other courts have described business necessity as when job performance can merely be demonstrably related to a no-conviction requirement.[202] Finally, the EEOC has stated that "[t]o establish business necessity, the employer must demonstrate that the nature of a particular criminal conviction disqualifies the individual job applicant from performing the particular job in an acceptable, business-like manner."[203]

A thorough inspection of business necessity jurisprudence, including arguments over the competing definitions of the concept and its effect on disparate impact claims of discrimination, is outside the scope of this Comment.[204] A few summary comments, however, are helpful in

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197. *See, e.g.*, Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) ("'[B]usiness necessity' means that the practice or policy is essential to the safe and efficient operation of the business."); 2 EEOC Compl. Man. (CCH), *Policy Guidance on the Consideration of Arrest* § 604.10 ¶ 2094 (1998) ("Business necessity can be established where the employee or applicant is engaged in conduct which is particularly egregious or related to the position in question.").

198. 401 U.S. 424, 436 (1971).

199. *Id.* at 432.

200. *See* Marcus B. Chandler, Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911, 933 (1979).

201. Green v. Mo. Pac. R.R., 523 F.2d 1290, 1297–98 (8th Cir. 1975) (stating that business necessity "connotes an irresistible demand") (quoting United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301, 308 (8th Cir. 1972)).

202. *See, e.g.*, Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971).

203. EEOC Dec. No. 81-7, 27 Fair Empl. Prac. Cas. (BNA) 1780 (Nov. 12, 1980).

204. For a review of the various interpretations given to "business necessity," see generally James O. Pearson, Annotation, *What Constitutes "Business Necessity" Justifying Employment Practice Prima Facie Discrimination Under Title VII of Civil Rights Act of 1964*, 36 A.L.R. Fed. 9 (1978); Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and The Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315 (1998).

comparing the federal exception with Wisconsin's substantial relation exception and in analyzing the general merit of restricting discrimination based on criminal conviction records.

Two basic and quasi-independent elements to business necessity emerge from these various formulations of the concept. First, it seems evident that the business necessity exemption is closely related to fears of criminal recidivism on the job and, more specifically, to concerns of negligent hiring by employers.[205] Second, and perhaps more central to disparate impact jurisprudence, the business necessity test focuses on how well previously committed criminal offenses indicate an applicant's unfitness or inability to perform a job well. The EEOC has articulated this rationale perhaps the most frequently.[206] According to the EEOC, an employer claiming a business necessity for a no-conviction policy must show only that it considered three factors: "(1) The nature and gravity of the offense or offenses; (2) The time that has passed since the conviction and/or completion of the sentence; and (3) The nature of the job held or sought."[207] This language now reflects that used by the

205. According to two commentators, "where the job involves a demonstrable economic or human risk, relatively little evidence may be required to establish the business justification for excluding those with convictions for job-related serious crimes. A greater degree of job relatedness is required with respect to jobs with a low degree of economic or human risk." BARBARA LINEMANN & PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 189–90 (Paul W. Crane, Jr. et al. eds., 3d ed. 1976) (footnote omitted). While this statement does refer to economic factors, clearly there is an interrelationship between the crime or crimes on the record and the nature of the job. This connection is discussed in greater detail *infra* Part III.A.3.

206. *See* Lye, *supra* note 204, at 339 (stating that the EEOC conviction record decisions after *Green* gave particular emphasis to the job-connectedness of the conviction).

207. 2 EEOC Compl. Man. (CCH), *Conviction Records* §604.10 ¶ 2088 (1998). Shortly after *Green*, the EEOC established guidelines for its policy enforcement of Title VII claims alleging impermissible discrimination on the basis of criminal convictions, which included guidelines for employers wishing to establish a business necessity defense based on the exclusion from employment individuals with a conviction record. *Id.* Initially, the EEOC standards required an employer to show, first, that the criminal offense was job-related and, second, that the employer "had . . . examine[d] other relevant factors to determine whether the conviction affected the individual's ability to perform the job in a manner consistent with the safe and efficient operation of the employer's business." *Id.* at n.4 (citing EEOC Dec. No. 78-35, ¶ 6720 (CCH 1983)). The EEOC specifically outlined what factors should be included for the employer to consider. These include: "(1) The number of offenses and the circumstances of each offense for which the individual was convicted; (2) The length of time intervening between the conviction for the offense and the employment decision; (3) The individual's employment history; and (4) The individual's efforts at rehabilitation." *Id.* (citing EEOC Dec. No. 78-35, ¶ 6720 (CCH 1983)). In 1985, the EEOC modified this guideline, eliminating the two-step process in favor of a simpler one-step approach. *Id.*