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# In Making Hiring Decisions, Wisconsin Employers May Consider Convictions for Crimes of Domestic Violence

The Wisconsin Fair Employment Act (WFEA) generally prohibits an employer from discriminating against an applicant based on conviction record, unless the circumstances of that record "substantially relate" to the circumstances of the particular job opening. For many years, the Wisconsin Labor and Industry Review Commission (LIRC) took the position that *domestic* violence crimes generally do not substantially relate to any job in the workplace, because such crimes are committed in a domestic setting and typically involve violence only towards intimate domestic partners.

On March 10, 2022, the Wisconsin Supreme Court refused to defer to LIRC's long-held position that domestic violence crimes are "practically immaterial to recidivism in the workplace." In *Cree, Inc. v. Palmer*, the court ruled that the substantial relationship test should be applied to a domestic violence conviction in the same way it is applied to any other conviction.

## Background

In 2013, a circuit court convicted Derrick Palmer of committing eight crimes of domestic violence against his live-in girlfriend, including two counts of felony strangulation and suffocation, four counts of misdemeanor battery, one count of fourth degree sexual assault, and one count of criminal damage to property. The circuit court sentenced Palmer to thirty months in prison and ordered him to register as a sex offender.

In June 2015, Palmer applied for an Applications Specialist opening at Cree, Inc. in Racine. Cree manufactured and sold lighting components. Its Applications Specialists designed and recommended lighting systems to customers, sometimes at customer locations. Applications Specialists worked independently and largely without close supervision. The position's duties required an Applications Specialist to travel to trade shows (with unsupervised overnight hotel stays).

Cree's Racine facility spanned 600,000 square feet, including many "nooks and crannies" that experienced little foot traffic and had no security camera coverage.

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Applications Specialists had access to most areas. At the time of Palmer's application, Cree employed approximately 1,100 workers at its Racine facility.

In filling out an employment questionnaire, Palmer responded "yes" to the question whether he had been convicted of a felony or misdemeanor, and stated that his convictions were domestic in nature. When informed there would be a background check, Palmer disclosed his 2013 convictions.

In July 2015, Cree offered Palmer the Applications Specialist position, subject to the background check. After that check revealed Palmer's 2013 convictions, Cree rescinded its employment offer. Palmer then filed a charge of conviction record discrimination with Wisconsin's Equal Rights Division.

## Wisconsin Supreme Court Decision

The Wisconsin Supreme Court commenced its analysis by pointing out that WFEA's general prohibition against conviction record discrimination, and the "substantial relationship" exception, reflect two important—but sometimes competing—interests: (1) Rehabilitating those convicted of crimes, and (2) protecting the public from criminal recidivism.

The court stated that the "substantial relationship" test requires an employer to show that the circumstances (*i.e.*, the facts, events, and conditions) surrounding a crime *materially* relate to the circumstances surrounding the job at issue. The court rejected LIRC's position that domestic violence crimes are immaterial to recidivism in the workplace.

The court faulted LIRC's stance that a substantial relationship can only be found when a violent offense occurs outside the home—but not when that very same offense is committed at home against an intimate partner. That assumption created an "exception for domestic violence claims" that the court found unwarranted. Rather than focus on the domestic setting of an offense or on the existence of an intimate relationship between perpetrator and victim, the court instead focused on whether the workplace environment presented opportunities for a domestic violence perpetrator to recidivate, given the character traits revealed by the circumstances of the domestic violence crime. Of particular importance is whether a perpetrator displays, as a character trait, a willingness to use violence when he perceives a threat to his power and authority.

The court then examined Palmer's conviction record. It concluded his crimes showed, as character traits, a willingness to use extreme violence to control


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others, and a disregard for others' health and safety. Beyond these character traits, the court also considered other circumstances of Palmer's convictions, including "the seriousness and number of offenses, how recent the conviction is, and whether there is a pattern of behavior." (Palmer had a prior battery conviction.) The court found Palmer's offenses to be undeniably serious, recent, and part of an emerging pattern of behavior—all of which increased the risk of recidivism.

The court next examined the circumstances of the Applications Specialist position. The court observed that Applications Specialists had access to most of Cree's facility, including the secluded nooks and crannies not monitored by security cameras. It noted that portions of the facility were loud enough to cover the cries of a struggle. It pointed out that Applications Specialists worked independently and without regular supervision, including when at customers' facilities or at trade shows. The court further noted that as an Applications Specialist, Palmer would often be challenged by supervisors, coworkers, and customers.

Having examined the interplay between the circumstances of Palmer's convictions and the circumstances of the Applications Specialist position, the court concluded that Cree had established a "substantial relationship" in two key regards:

1. Palmer's willingness to use violence to exert power and control over others substantially related to the circumstances of the Applications Specialist position, which presented situations where Palmer's power or authority could be challenged or threatened by customers, coworkers or supervisors.
2. Palmer's propensity to use violence to exert power and control over others, and the absence of regular supervision, created opportunities for violent encounters in secluded or noisy portions of Cree's facility, or when Palmer was working with clients on location or traveling for trade shows.

The court also noted the recency of Palmer's convictions, his emerging pattern of domestic violence convictions, and the seriousness of his convictions. Hiring Palmer "would force Cree to assume the risk of Palmer repeating his conduct and threatening the safety of employees, customers and the public."

## The Significance of *Cree* for Employers

In analyzing whether the circumstances of an applicant's (or employee's) crimes "substantially relate" to the circumstances of a particular job, Wisconsin employers may now consider convictions for *domestic* violence crimes in the same


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way as they consider convictions for other violent crimes. Employers should still be careful, however, to engage in an individualized assessment of the special circumstances of each individual's arrest or conviction record, and of the particular circumstances of the job and work environment, before taking an adverse employment action based on conviction record.

If you have any questions regarding an applicant or employee's arrest or conviction record, and whether you may take that record into account in hiring or other employment decisions, please contact Rob Sholl, Matt DeLange or your Reinhart attorney.

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