

Wisconsin Court Holds That Employers May Inquire into an Applicant's Criminal History

The Wisconsin Fair Employment Act (WFEA) prohibits employers from discriminating against applicants on the basis of their arrest or conviction record. However, there is an exception to this general rule. It is not employment discrimination if the circumstances of the individual's arrest or conviction "substantially relates" to the duties of the open position. For example, a conviction for theft substantially relates to a job in which the applicant would have access to cash because that job would give the applicant an opportunity to engage in the same type of criminal conduct that led to the original conviction.

Recently, in *Lee v. LIRC*, the Wisconsin Court of Appeals confirmed that the exception gives employers leeway to inquire into an applicant's criminal history. Stephen Lee filled out four employment applications, all of which asked if he had ever been convicted of a felony, misdemeanor, or had violated an ordinance. The employment applications noted that an affirmative response would not automatically disqualify Lee from employment and asked for additional information regarding any convictions. Lee filed a complaint with the Equal Rights Division (ERD), alleging that the applications violated the WFEA's prohibition on arrest and conviction record discrimination.

The ERD dismissed Lee's complaint and the Court of Appeals affirmed. The Court noted that employers may refuse to hire any applicant whose arrest or conviction record substantially relates to the circumstances of the position applied for. It follows that the employer can seek arrest and conviction information without running afoul of the WFEA because such information is needed to assess whether the exception applies to the applicant.

The decision in *Lee* confirms that employers may ask applicants about arrest or conviction records. Employers should, however, inform the applicant that providing such information will not result in automatic disqualification from employment.

Reinhart's [Labor and Employment Department](#) is experienced in drafting employment applications and stands ready to help employers with all aspects of the hiring process.

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