

State of Wisconsin



Labor and Industry Review Commission

Mark T. Bechard
Complainant

Ferrellgas, Inc.
Respondent

ERD Case No. CR201403085

Fair Employment Decision¹

Dated and Mailed:

JUL 29 2016

The decision of the administrative law judge is reversed. Accordingly, the complaint of discrimination is dismissed.

By the Commission:

Handwritten signature of Laurie R. McCallum in cursive.

Laurie R. McCallum, Chairperson

Handwritten signature of C. William Jordahl in cursive.

C. William Jordahl, Commissioner

Handwritten signature of David B. Falstad in cursive.

David B. Falstad, Commissioner

¹ **Appeal Rights:** See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you must name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above).

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent refused to hire him because of his felony conviction record in violation of the Wisconsin Fair Employment Act. An administrative law judge (ALJ) for the Equal Rights Division of the Department of Workforce Development held a hearing on the merits of the complaint and issued a decision. The respondent filed a timely petition for commission review. The commission has considered the petition and the positions of the parties, and has reviewed the evidence submitted at the hearing. Based on its review, the commission reverses the decision of the ALJ, and makes the following:

Findings of Fact

1. The respondent, Ferrellgas, Inc., is an employer within the meaning of §111.32(6), Wis. Stats., supplying propane gas to customers in Wisconsin.
2. The complainant, Mark Bechard, is an individual and was an applicant for employment with Ferrellgas.
3. In October 1994, Bechard's daughter was born.
4. On January 23, 1995, Bechard hit and shook his daughter, causing great harm to her. His daughter was hospitalized with life threatening injuries. On that date the police questioned Bechard about the injuries his daughter suffered and he told the police that his daughter was injured while he was giving her a bath which was not the truth.
5. The next day, Bechard spoke to the police again and told them that he had been shoveling snow the day before and then picked his daughter up from a babysitter. He stated that after arriving at home with his daughter, she was crying and he "snapped." He picked up his daughter, shoved her into his shoulder, and snapped her head as he shoved his daughter into her chair.
6. Bechard's daughter suffered a fractured skull, bleeding on the brain with swelling, and a stroke from Bechard's actions on January 23, 1995.
7. Bechard also informed the police that prior to January 23, 1995 he struck his daughter, shook her, punched her pelvis, and forcefully hit her with a toy, causing her harm.
8. As a result of Bechard's actions prior to January 23, 1995, his daughter suffered fractures of the skull, pelvis, ribs, and legs.

9. Bechard described the assaults on his infant daughter, which happened in a matter of seconds, as barbaric and stated that at the time he was "kind of like a Jekyll and Hyde."
10. Bechard pled no contest on February 28, 1995, to two counts of child abuse-recklessly causing great harm pursuant to Wis. Stats. § 948.03(3)(a). These were class D felonies. He was found guilty of those crimes on May 1, 1995. He was sentenced to 10 years in prison for Count 1 of the child abuse charge. He served 6 years and 8 months in prison. He was on parole for the remainder of the 10-year sentence. He was sentenced to probation for 10 years for Count 2 of the child abuse charge and satisfied the terms of his probation on January 24, 2015.
11. Bechard is an individual with a conviction record within the meaning of §111.321, Wis. Stats.
12. Because of his conviction for child abuse, Bechard was not allowed to have any contact with children 18-years-old or younger, unless supervised by an adult, during the time he was on parole and probation.
13. Based on the conviction of child abuse-recklessly causing great harm, Bechard exhibited the following character traits: a willingness to cause great harm to a child without provocation; a willingness to create a situation of unreasonable risk of harm to a child; consciously disregarding the health and safety of a child; an inability to control anger, frustration, or other emotions towards a child; poor self-control; lack of good judgment; and lack of trustworthiness with children.
14. Bechard worked for Ferrellgas as a Cylinder Driver from July 2004 to November 2009. He left employment with Ferrellgas in 2009 to seek other employment opportunities.
15. Bechard decided he wanted to return to employment with Ferrellgas and applied for the position of Cylinder Driver with Ferrellgas in January 2014, after learning that Ferrellgas had a position available through a job posting. He submitted an application on-line. He also contacted Brian King, Ferrellgas' Operations Manager for the Wausau, Wisconsin area, to discuss the available position.
16. On February 12, 2014, Bechard met with Mr. King and Joseph Pischke, Ferrellgas' Director of Operations, to discuss the Cylinder Driver position. Bechard was informed that some things had changed since he last worked for Ferrellgas. For example, drivers exchanged tanks for businesses on Mondays, Wednesdays and Fridays, rather than every day of the week. On Tuesdays and

Thursdays, drivers were responsible for filling residential tanks, completing bulk deliveries and assisting other employees with their routes. During this meeting, Bechard completed a second application for Ferrellgas, which was reviewed by Mr. King. Bechard informed Mr. King that he had previously worked for Ferrellgas as a Cylinder Driver and that his CDL and hazardous materials endorsement were current.

17. On the application form Bechard submitted to Ferrellgas, he disclosed his conviction of a felony criminal offense. He further noted that he had been convicted of an assault on a minor in 1995 and that he was currently on probation.
18. Mr. King believed that Bechard was qualified for the position of Cylinder Driver.
19. On February 12, 2014, Ferrellgas offered Bechard the position of Cylinder Driver, with a start date of February 18, 2014. Bechard was to be paid \$16.50 per hour by Ferrellgas as a Cylinder Driver. Ferrellgas' offer of employment was contingent on Bechard accepting the offer, signing a non-solicitation agreement, signing an invention agreement, passing a drug screening, passing a background review, and passing a physical ability test.
20. Bechard accepted Ferrellgas' offer of employment, signed the non-solicitation agreement and invention agreement provided by Ferrellgas, and submitted to a drug test. Ferrellgas also arranged to have Bechard take a physical ability test.
21. Bechard did not pass Ferrellgas' background check because of his felony conviction.
22. Ferrellgas withdrew its offer of employment to Bechard. Bechard received a letter rescinding Ferrellgas' offer of employment in late February 2014. In the letter, Ferrellgas noted that its decision to rescind its offer of employment was due to the information it obtained when completing a background check for him.
23. The information that Ferrellgas obtained when completing the background check for Bechard was information relating to his conviction record. Ferrellgas decided not to hire Bechard because of his conviction for felony child abuse which caused Ferrellgas to be concerned about the safety of its customers.
24. The job duties of a Cylinder Driver included delivering cylinder propane tanks to local businesses and residences, servicing tanks at businesses and residences, filling propane tanks at residences and Ferrellgas' warehouse, maintaining trucks, leveling tanks, painting tanks, assisting with tank set-ups and tank pick-ups, and filling cylinder tanks for delivery to customers. A Cylinder Driver delivers tanks to customers and services tanks without supervision. In addition

to delivering tanks to residences and businesses, a Cylinder Driver delivers tanks to carnivals, festivals, church picnics, soccer tournaments, and similar gatherings.

25. Cylinder Drivers deliver propane to residences when an order is placed by a residential customer, in response to a "keep-full" order on file for a residential customer, and on an on-call basis. A Cylinder Driver generally performs his duties outside the residence unless a pilot light needs to be re-lit or a gas leak assessed.
26. During a delivery that has been ordered by a residential customer, the customer receives a 5-day delivery window during which the delivery could be made. Children could be present outside the house while the delivery is being made by the Cylinder Driver without the presence or awareness of an adult.
27. Ferrellgas' residential customers may have "keep-full" orders on file with Ferrellgas, which requires Ferrellgas to track the amount of gas a customer is using and to go to the customer's residence to fill the gas tank without being called by the customer for service. During a "keep-full" delivery, Cylinder Drivers appear at the residence unannounced. Children could be present outside the house while the delivery is being made by the Cylinder Driver without the presence or awareness of an adult.
28. During an on-call delivery, a residential customer is generally aware when a Cylinder Driver will be present to make a delivery. Children could be present outside the house during the delivery without the presence of an adult.
29. During deliveries to carnivals, festivals, church picnics, soccer tournaments, and similar gatherings, children could be present without the presence or awareness of an adult.
30. Generally, a Cylinder Driver will not enter a residence unless there is an adult present.
31. The services provided by a Cylinder Driver to Ferrellgas' customers provide opportunity for a Cylinder Driver to be in contact with children without the presence or awareness of adults.

Conclusions of Law

1. Ferrellgas is an employer within the meaning of the Wisconsin Fair Employment Act.
2. Bechard is an individual and an applicant for employment with Ferrellgas within the meaning of the Wisconsin Fair Employment Act.

3. Bechard is an individual with a conviction record within the meaning of §111.321, Wis. Stats.
4. Ferrellgas discriminated against Bechard by refusing to hire him as a Cylinder Driver based on his felony conviction for recklessly causing great bodily harm to a child pursuant to Wis. Stats. § 948.03(3)(a).
5. Ferrellgas has proven by a preponderance of the credible evidence that it has met the statutory exception provided in Wis. Stats. §111.335(1) (c) 1 by showing that the circumstances of Bechard's offense are substantially related to the position of a Cylinder Driver for Ferrellgas.
6. Accordingly, Ferrellgas did not violate the Wisconsin Fair Employment Act by refusing to hire Bechard based on his conviction record.

Memorandum Opinion

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

Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity. . . .

Wis. Stat. § 111.335(1)(c)1.

It is undisputed that Ferrellgas did not hire Bechard because of his conviction record. The remaining question then is whether the circumstances of the conviction record were substantially related to the circumstances of the job.

In drafting the exception stated in Wis. Stat. § 111.335(1)(c), the legislature sought to strike a balance between society's interest in rehabilitating those who have been convicted of crime and its interest in protecting citizens. *County of Milwaukee v. LIRC and Serebin*, 139 Wis. 2d 805, 821, 407 N.W.2d 908 (1987). In *County of Milwaukee* the Wisconsin Supreme Court stated, in relevant part:

This law should be liberally construed to effect its purpose of providing jobs for those who have been convicted of crime and at the same time not forcing employers to assume risks of repeat conduct by those whose conviction records show them to have the 'propensity' to commit similar crimes long recognized by courts, legislatures and social experience.

In balancing the competing interests, and structuring the [statutory] exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.

Id. at 823.

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

Bechard in this case was charged with, and ultimately convicted of, two counts of child abuse-recklessly causing great harm in violation of Wis. Stats. § 948.03(3)(a). The character traits associated with the offense of child abuse-recklessly causing great bodily harm to a child include: a willingness to cause great harm to a child without provocation; a willingness to create a situation of unreasonable risk of harm to a child; consciously disregarding the health and safety of a child; an inability to control anger, frustration, or other emotions towards a child; poor self-control; lack of good judgment; and, lack of trustworthiness with children.

The job at issue in this case is that of a Cylinder Driver for Ferrellgas who, among other duties, delivers propane gas to tanks at residences, and at public and private gatherings. A Cylinder Driver performs his duties alone and without any supervision. Deliveries and services to residential customers comprise 40 percent of a Cylinder Driver's work schedule. Other than on-call deliveries, and a five-day delivery window for deliveries ordered by residential customers, propane deliveries by Cylinder Drivers to residential customers are unannounced. These deliveries are

to tanks outside the home where children may be present without notice to, or the presence or awareness of adults. Cylinder Drivers also make propane deliveries to gatherings such as carnivals, festivals, church picnics, and soccer tournaments where children could be present without the presence or awareness of adults.

After determining the circumstances of the offense and the job, the commission focuses on assessing the risk that the circumstances of the employment could present an opportunity for the commission of a similar offense. As the Court stated in *County of Milwaukee*:

There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime.

Id. at 821.

The Court in *County of Milwaukee* does not state that the test is whether it is "likely" that the convicted person will reoffend, but rather whether there is an "unreasonable risk" of this occurring. The Court describes risk presented to "individuals" generally, and to "the community at large". "The impact of a further offense on the individuals victimized, and on the community at large, will be equally severe regardless of when or where any further crime takes place." *Matousek v. Sears Roebuck & Co.* ERD Case No. 200302571 (LIRC February 28, 2007). The determination of whether the risk of an individual reoffending in a particular case is an "unreasonable" one is ultimately a matter of judgment. *Id.* After considering all the circumstances in this case, the commission believes that in this case such an unreasonable risk has been shown.

Accordingly, the commission concludes that the circumstances of Bechard's offense are substantially related to the circumstances of a Cylinder Driver position for Ferrellgas. Specifically, the traits of the offenses (a willingness to cause great harm to a child without provocation; a willingness to create a situation of unreasonable risk of harm to a child; consciously disregarding the health and safety of a child; an inability to control anger, frustration, or other emotions towards a child; poor self-control; lack of good judgment; and, lack of trustworthiness with children) and the circumstances of the job (unannounced and unscheduled deliveries to residences

and gatherings where children could be present without the presence or awareness of other adults) would provide Bechard an opportunity to reoffend.

Bechard implicitly argues that he would be unlikely to reoffend while performing work as a Cylinder Driver given the length of time since his offense, his psychological treatment since his conviction, and given that he previously worked for Ferrellgas as a Cylinder Driver for four years without incident. However, these factors are unpersuasive given that the commission has previously held that evidence of post-conviction actions or impact is irrelevant in determining the existence of a substantial relationship. *Sheridan v. United Parcel Service*, ERD Case No. 26GA300763 (LIRC July 11, 2005).

This result is consistent with that reached by the commission in *Matousek v. Sears Roebuck & Co.*, ERD Case No. 200302571 (LIRC Feb. 28, 2007). In *Matousek*, the respondent was a retail store and the position at issue was that of a salesperson. The record showed that, on occasion, children would be present in the store outside the direct presence of their parents, and Matousek, who had been convicted of repeated sexual assault of a child, would be unsupervised and outside the presence of adult customers or coworkers. The commission held that there was clearly a risk of Matousek reoffending if and when he had an opportunity for unsupervised contact with children, and he would have such an opportunity in the store. As in the present case, it was not common that Matousek would be alone with children in the store, but opportunities did exist, and the commission held that was sufficient to invoke the exception set forth in Wis. Stat. § 111.335(c)(1).

The present case is distinguishable from *Moore v. Milwaukee Board of School Directors*, ERD Case No. 199604335 (LIRC July 23, 1999)², where the commission found no substantial relationship between the circumstances of an offense of “injury by conduct without regard to life” and the circumstances of a job as a Boiler Attendant Trainee in a school where young children were present.

In *Moore*, the complainant was engaged in an argument with his girlfriend when he threw a pan of hot grease at her but missed her and hit her twenty-month-old daughter who was standing between them. The young girl was severely burned by the hot grease and required hospitalization, extensive surgery, and skin grafting. The commission determined that the criminal traits exhibited by the offense include

² *Aff'd, Milwaukee Board of School Directors v. LIRC*, No. 00-1956 (Wis. Ct. App. June 12, 2001)(unpublished).

a lack of concern for the safety and well-being of others, disregard for human life, and extremely poor judgment.

The commission first noted in *Moore* that, “[t]he criminal statute in question addresses recklessness rather than deliberate violence, and while the traits revealed by the conviction may include gross negligence or indifference to the safety of others, they do not encompass a propensity to intentionally inflict harm on others...” That is very different than the crime at issue in the present case.

Further, the commission concluded in *Moore* that the complainant’s offense only incidentally involved harm to a child and was not specifically targeted at a child, and was not a conviction involving circumstances that posed a particular risk to children. Again, that is not true of the crime at issue here. The commission concluded in *Moore* that there was nothing about the circumstances of the offense and the job in a school where young children were present that would indicate an opportunity for criminal behavior such that the risk of recidivism by the complainant was too great for the employer to bear. Unlike *Moore*, the commission concludes that Bechard’s offense involved unprovoked and deliberate violence specifically targeted at a child and these factors, given the circumstances of the job of a Cylinder Driver where Bechard could be present alone with children, present an unreasonable risk of reoffending.

Ferrellgas has proved by a preponderance of the credible evidence that the circumstances of Bechard’s offense are substantially related to the circumstances of the job of a Cylinder Driver. Accordingly, Ferrellgas did not violate the Wisconsin Fair Employment Act by refusing to hire Bechard based on his conviction record.

NOTE: When the commission reverses the decision of an administrative law judge and credibility of witnesses is a material factor, the commission must have the benefit of that administrative law judge’s personal impressions as to the credibility of material witnesses, and it must provide an explanation for its disagreement with that judge’s decision. *Hamilton v. DILHR*, 94 Wis. 2d 611, 288 N.W.2d 857 (1980). The commission has consulted with the administrative law judge who presided over the hearing in this matter and issued the decision under review. The commission’s disagreement with the administrative law judge on the question of whether unlawful discrimination occurred is not a result of any disagreement with her findings of fact on issues as to which there was a credibility dispute between

witnesses who testified before her. Rather, it was a result of a different view on the question of how the applicable legal standard should be applied to the facts.

cc: Attorney Scott M. Paler
Attorney Christine R.H. Olsen