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Employers Beware: Arrest and Conviction Record Discrimination

Most of us have done it. We have looked up co-workers or prospective employees on Wisconsin's Circuit Court Access website (CCAP) to learn about past criminal conduct. The CCAP website contains information from Wisconsin circuit courts, including information about arrests and convictions. In addition to CCAP, many employers utilize more formal background check services. What should you do if you have checked CCAP or obtained a background report for prospective employee that details past criminal conduct? Before you act on that concern, it is important that you understand Wisconsin's law with respect to the use of arrest or conviction records in hiring decisions. In general, Wisconsin's Fair Employment Act ("WFEA") prohibits employers from discriminating against applicants or employees on the basis of his or her arrest or conviction record. Each case should be analyzed on a case-by-case basis and employers should not make a blanket rule they will not hire anyone with a criminal conviction.

What is an arrest record?

"Arrest record" is defined as information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted, or tried for any felony, misdemeanor, or other offense pursuant to any law enforcement or military authority. Wis. Stat. § 111.32(1).

What is a conviction record?

"Conviction record" is defined as information indicating that in 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, or paroled pursuant to any law enforcement or military authority. Wis. Stat. § 111.32(3).

Can an employer refuse to hire someone or fire an employee because of an arrest or conviction record?

Yes. When an employer can show that the circumstances of an individual's pending arrest or past conviction "substantially relate to the circumstances of the particular job," the employer may fire an employee or refuse to hire a prospective employee. Wis. Stat. § 111.335. The law does not define "substantially related," but generally it means that the circumstances of an offense, like when it happened, where it happened, how it happened, etc., are comparable to the circumstances of the job. For example, if prospective banker has a past conviction for embezzlement, a court would likely find that offense substantially related to the job.

Can an employer refuse to hire or fire because of a past arrest record?

No. The employer cannot refuse to hire based upon past arrests, no matter

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County Must Pay Annual Fire Protection Charge Imposed by Town

Charge Is A Fee Not A Tax

Clark County must pay fire protection charges imposed by the Town of Hoard for the County's medical center located in the Town, the Court of Appeals recently held in *Town of Hoard v. Clark County*, Appeal No. 2015AP678, decided November 12, 2015.

The Town of Hoard ("Town"), located in Clark County, is part of a fire protection district made up of multiple municipalities. The individual municipalities in the fire district fund the district by contributing an equal share towards the costs of the district. Prior to 2014, the Town funded its annual contribution to the district through general property taxes. Beginning in 2014, the Town funded its contribution to the district by imposing an annual charge on property located within the Town. The charge was established by ordinance and was reflected in a written schedule. The schedule provided a formula for calculating a property's "domestic user equivalent" or DUE. A single-family home of 1,500 square feet was assigned 1.0 DUEs. The Town divided its total annual contribution to the fire district by the total number of DUEs located within the Town to arrive at a dollar value per DUE, and then used that dollar amount to determine each property's annual charge for fire protection.

Clark County owns a medical center within the Town. Prior to 2014, the County, as a tax-exempt entity, did not pay towards the cost of fire protection provided by the fire district. After the Town adopted the annual charge, the medical center was allocated DUEs, and the County was charged for fire protection service to the medical center on the basis of these DUEs. The

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how frequent or concerning. However, an employer may ask an applicant about pending arrests. If the circumstances of the pending arrest substantially relate to the circumstances of the job, the employer may take an adverse employment action.

Can an employer refuse to hire or fire someone because of a conviction record?

Yes, but only if the circumstances of the conviction substantially relate to the circumstances of the job.

What should an employer say when inquiring about a pending arrest record or past conviction record?

An employer can ask an applicant about pending charges or convictions, but only if the employer makes it clear that it will only consider those offenses that are substantially related to the job.

— Kathryn A. Harrell

Is a Person Entitled to Notice and a Hearing before Being Banned from City Properties after Threatening City Officials?

As is often the case, the answer is not so clear. However, in a recent decision from the Fifth Circuit, *Vincent v. City of Sulphur*, 2015 U.S. App. LEXIS 18761, the Court held that the City of Sulphur, Louisiana ("City") did not violate Carol Vincent's constitutional right to due process when it banned him from City properties after he threatened to get a gun and kill the mayor and a City Council member. In response to the threats, the City's police department issued a no-trespass order prohibiting Vincent from entering city properties, including City Hall, the City County Building and the courthouse. The City issued the order without giving Vincent notice or a hearing.

Vincent brought a federal lawsuit claiming, among other things, violations of his Fourteenth Amendment right to due process. He argued that he had a well-established liberty interest in being free to move about in the public. The defendants filed a motion to dismiss the case arguing that they were entitled to qualified immunity for their actions. Qualified immunity protects public officials who are acting in the scope of their employment from damages for civil liability if they did not violate an individual's "clearly established" statutory or constitutional rights.

The district court ruled in Vincent's favor, finding that the defendants were not entitled to qualified immunity because the no-trespass order, without notice and an opportunity to be heard, violated well-established case law. The defendants appealed.

The 5th Circuit Court of Appeals reversed the trial court finding that the cases it relied upon did not reflect clearly established law. The court analyzed various decisions from the United States Supreme Court and other circuits and concluded that "it is untenable to read these decisions as clearly establishing, such that any reasonable officer would be aware, the entitlement of a person in Vincent's position to notice and a hearing before issuance of the no-trespass order designed to keep him from coming into contact with the targets of the alleged threats." Based upon this finding, the Court held that the officers who issued the no-trespass order were entitled to qualified immunity.

— Kathryn E. Harrell

Recreational Immunity: The Basics

Wisconsin's Recreational Immunity Statute, Wis. Stat. § 895.52, was designed to protect certain owners, including governmental bodies, organizations and individuals, from civil liability for injuries or death caused while a person is engaged in recreational activities on their land. The law's purpose was "to help assure the continued availability in this state of enterprises that offer recreational activities to the public." Consistent with this purpose, the statute broadly defines "recreational activity" and offers considerable protection to landowners and their affiliates. However, the statute contains a number of important exceptions to the broad immunity it affords.

Who Is Protected?

The law protects "owners" of certain property. "Owner" is defined as a person, governmental body or nonprofit organization that owns, leases or occupies property. "Owner" is also defined as a governmental body or nonprofit organization that has a recreational agreement with another owner. A "recreational agreement" is a written authorization granted by the landowner to a governmental body or nonprofit organization that permits public access to all or part of the owner's property for a recreational activity. The law extends its protections to officers, employees and agents of landowners.

What Protections Are Afforded?

Owners cannot be liable for the death or injury to a person who is engaged in a recreational activity on the owner's property or for death or injury caused by an attack by a wild animal on the owner's property.

In addition, owners owe no duty to a person who enters their property to engage in a recreational activity to (1) keep the property safe for recreational activities, (2) inspect the property and (3) warn the person of unsafe conditions on the property.

What Types of Activities Are Protected?

Recreational activities are protected. A "recreational activity" is broadly defined as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction of any such activity." The statute identifies 37 recreational activities ranging from common activities like camping, bicycling and snowmobiling, to more obscure activities like bird watching and climbing observation towers.

Are There Exceptions?

There are some key exceptions identified in the statute. Owners who receive more than $2,000 a year from people using their property are not covered by the statute. Similarly, if an owner charges an admission fee for spectators, there is no immunity. Another exception exists for landowners who sponsor an "organized team sporting activity" on their property. For example, if a municipality takes team registrations, maintains the grounds, and provides referees, scorekeepers, and equipment for a team sport, it is considered a sponsor. While a landowner has no obligation to keep the property safe, if he or she maliciously fails to warn a recreational user against an unsafe condition, there is no immunity. Finally, if a private property owner expressly and individually invites a social guest to his or her property for a specific occasion during which a death or injury occurs, there is no immunity.

— Kathryn A. Harrell

County Must Pay Annual Fire Protection Charge Imposed by Town

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County refused to pay the charges claiming that it was exempt because the charges were actually a tax. The Town brought an action for declaratory judgment to compel the County to pay the charge.

The Court of Appeals agreed with the Town and held that the charge was a fee that the County was obligated to pay. The Court indicated that the test for deciding whether a charge was a fee or a tax was whether the primary purpose of the charge was to raise revenue, in which case it was a tax, or was to cover the expense of providing services, supervision or regulation, in which case it was a fee. The Court held that here the Town established that the charge imposed by the ordinance was used to solely cover the expense of providing fire protection service, and therefore was a fee. The County argued that the fact that the Town is imposing the charge in its role as a municipality, rather than as a public utility, and the fact that non-payment of the charge results in a tax lien against the property, shows that the charge is really a tax. The Court rejected this contention, indicating that these facts are not part of the test set out by the Supreme Court in *State v. Jackman*, 60 Wis. 2d 700, 707 (1973) to determine whether a charge is a tax or fee.

The Court also held that the Town has authority pursuant to Wis. Stat. § 60.55(2)(b), to charge a fee to cover the cost of providing fire protection. The County argued that while fire protection was available, it was not actually used by the medical center, and therefore the Town could not charge the County for service that was available but unused. The Court dismissed that argument stating that "the presence of a fire district standing by ready to extinguish fires constitutes a fire protection service for which a fee may be assessed."

— Lawrie Kobza

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