



Civil or Municipal Offenses Not Covered by WFEA Protections

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Arrest and conviction record discrimination law is a complex area for employers to navigate, and it is one that can lead to liability for unwary employers. There have been several significant Wisconsin court cases that address these issues under the Wisconsin Fair Employment Act (WFEA) over the last two years, and the Wisconsin Court of Appeals just released another decision which concerns arrest record discrimination. Given these decisions, employers must stay up to date on the state of the law to ensure they are meeting their legal obligations.

WFEA PROTECTIONS

Under the WFEA, employers are severely restricted in how they can use arrest record information in the hiring process. The WFEA defines “arrest record” broadly as including but not limited to: “[I]nformation 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.” (Emphasis added). The Madison General Ordinances use identical language to define “arrest record,” but the case which is the subject of this article only addressed the WFEA and not the Madison General Ordinances.

THE CASE

In *Oconomowoc Area School District v. Gregory L. Cota, et al.*, the District terminated Jeffrey and Gregory Cota because it believed they improperly retained money they received from selling District scrap metal. The Cotas received municipal citations for theft and paid \$500 to the municipal prosecutor to resolve the case. There is no indication that either man was ever questioned or physically apprehended by a law enforcement authority. The Cotas challenged their terminations by filing a charge with the Wisconsin Equal Rights Division and contended that their terminations constituted unlawful arrest record discrimination because of the catch-all language “other offense” in the WFEA’s definition of “arrest record.”

The Administrative Law Judge determined there was no discrimination. An appeal of that decision was filed with the Labor & Industry Review Commission (LIRC), which ruled in the Cotas’ favor and concluded that the WFEA prohibited discrimination based on offenses which are civil or municipal. A circuit court affirmed LIRC’s decision. On appeal to the Wisconsin Court of Appeals, the court reversed the lower decision and held that the WFEA’s definition of “arrest record” only extended to offenses which were criminal and not civil in nature. In the end, the District prevailed, and the court ruled that the District was entitled to terminate the Cotas based on their municipal violations. Therefore, moving forward, civil offenses cannot be the basis for a claim of arrest or conviction record discrimination under the WFEA.

Conclusion

Although this decision limited the scope of the WFEA’s protections against arrest record discrimination, employers should remain wary of doing independent research on applicants’ records of criminal activity as this can lead to errors in the employment decision-making process and cause applicants and employees to be unlawfully stereotyped. Additionally, employers should still remain wary of their obligations under laws like the Fair Credit Reporting Act and local ordinances which are not affected by the outcome of this decision.

We encourage employers to reach out to a member of the Boardman Clark [Labor & Employment Practice Group](#) with questions.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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