STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126
http://dwd.wisconsin.gov/lirc/

DONALD J ZUNKER, Complainant
411 ST JOHN ST
GREEN BAY WI 54301

RTS DISTRIBUTORS, Respondent
712 N QUINCY
GREEN BAY WI 54302

FAIR EMPLOYMENT DECISION

ERD Case No. CR201004089

Dated and mailed:
JUN 16 2014

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SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge for the Equal Rights Division of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the administrative law judge. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modifications:

1. Paragraph 4 of the administrative law judge's FINDINGS OF FACT is deleted and the remaining paragraphs are renumbered accordingly.

2. Paragraph 11 of the administrative law judge's FINDINGS OF FACT is deleted and the following paragraph is substituted therefor:

> "RTS hired some sales people in conjunction with the advertisement it placed in October of 2010."

3. The administrative law judge's ORDER is deleted and the following ORDER is substituted therefor:

> 1. *Time within which respondent must comply with Order.* The respondent shall comply with all of the terms of this Order within 30 days of the date on which this decision becomes final. This decision will become final if it is not timely appealed, or, if it is timely appealed, it will become final if it is affirmed by a reviewing court and the decision of that court is not timely appealed.

2. That the respondent shall cease and desist from discriminating against the complainant based upon his conviction record, in violation of the Wisconsin Fair Employment Act.

3. That the respondent shall cease and desist from printing or circulating or causing to be printed or circulated an advertisement which expresses an intent to discriminate based on conviction record, in violation of the Wisconsin Fair Employment Act.

4. That the respondent shall offer the complainant instatement into the next available office, general labor, sales, advertising or delivery position, substantially equivalent to one of the positions referenced in the advertisement to which the complainant responded. This offer shall be tendered by the respondent or an authorized agent and shall allow the complainant a reasonable time to respond. Upon the complainant's acceptance of such position, the respondent shall afford the complainant all seniority and benefits, if any, to which he would be entitled but for the respondent's unlawful discrimination, including sick leave and vacation credits.

5. That the respondent shall make the complainant whole for all losses in pay the complainant suffered by reason of its unlawful conduct by paying the complainant the sum he would have earned as an employee from October 18, 2010, the approximate date on which the complainant would have been hired but for the discrimination, until such time as the complainant begins employment with the respondent or would begin such employment but for his refusal of a valid offer of a substantially equivalent position. The back pay for the period shall be based on the gross amount of $470 per week, and shall be computed on a calendar quarterly basis with an offset for any interim earnings during each calendar quarter. Any unemployment compensation or welfare benefits received by the complainant during the above period shall not reduce the amount of back pay otherwise allowable, but shall be withheld by the respondent and paid to the Unemployment Insurance Reserve Fund or the applicable welfare agency.

6. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred representing the complainant in this matter up until the issuance of the administrative law judge's decision, in the amount of $20,000.00, and for the proceedings before the commission, in the amount of $6,020.50, for a total amount of $26,020.50. A check in that amount shall be made payable jointly to the complainant and his attorney, Aaron N. Halstead, and delivered to Mr. Halstead.

7. That within 30 days of the date on which this decision becomes final, the respondent shall file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. The Compliance Report shall be prepared using the "Compliance Report" form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. *See* Wis. Stat. §§ 111.395, 103.005(11) and (12).

8. That the claim that the complainant was discriminated against based upon arrest record, in violation of the Wisconsin Fair Employment Act, is dismissed with prejudice.

4. The administrative law judge's MEMORANDUM OPINION is deleted.

DECISION

The decision of the administrative law judge (copy attached), as modified, is affirmed.

BY THE COMMISSION:

Laurie R. McCallum, Chairperson

C. William Jordahl, Commissioner

David B. Falstad, Commissioner

MEMORANDUM OPINION

Failure to Hire[1]

There are two ways the complainant can prove discrimination under the Wisconsin Fair Employment Act, by the indirect evidence method, as originally set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), or by introducing direct evidence of discrimination. Under the former, the complainant has the initial burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. In the context of a hiring decision, the elements of a *prima facie* case are that the complainant: 1) is a member of a protected class, 2) applied for and is qualified for the position, and 3) was rejected under circumstances which gave rise to an inference of unlawful discrimination. *Kalsto v. Village of Somerset*, ERD Case No. 199802509 (LIRC Oct. 03, 2000); *Larson v. DILHR* (Wis. Personnel Comm., Jan. 22, 1989).

In this case, the complainant established that he 1) had a criminal conviction record, 2) applied for and was qualified for the jobs advertised (which required no experience and provided for on-the-job training), and 3) was rejected under circumstances which gave rise to an inference of unlawful discrimination. The respondent knew about the complainant's conviction record and did not offer him a job, but continued to seek candidates for the same jobs.

The complainant having established a *prima facie* case of discrimination, the respondent then has the burden of presenting a legitimate, nondiscriminatory reason for its decision not to hire the complainant. *Josellis v. Pace Industries.*, ERD Case No. CR199900264 (LIRC Aug. 31, 2004), citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). A finding in the complainant's favor will result when the *prima facie* case of discrimination is not rebutted by the articulation of a non-discriminatory reason. *Foust v. City of Oshkosh Police Dept.*, ERD Case No. 9200216 (LIRC April 9, 1998).

At the hearing the respondent presented only one witness, Allen LaVigne, the owner's husband. Mr. LaVigne was not present at the complainant's interview, had no idea who else applied for the job, and could offer no details about the hiring decision. While Mr. LaVigne testified that, with the exception of the sales positions, the jobs for which the complainant applied were never filled, he did not contend that the respondent made a deliberate decision not to fill the jobs and did not assert that this was the reason the complainant was not hired. Mr. LaVigne's testimony, which constituted the only evidence offered by the respondent, does not meet the respondent's burden of presenting a legitimate, non-discriminatory reason for the hiring decision.

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[1] The administrative law judge found that the respondent's job posting, which specified "please no felonies," was in violation Wis. Stat. § 111.322(2). The commission agrees, but considers it unnecessary to address that issue further in this memorandum opinion.

In addition to the above, which clearly satisfies the complainant's burden of proof under the *McDonnell Douglas* method, the record also contains direct evidence of discrimination. Mr. LaVigne conceded that at least some of the jobs at issue were positions for which the respondent would not consider hiring an individual with a conviction record for theft.

Given the circumstances, the complainant has established that he was discriminated against under both a burden shifting analysis, based upon his unrebutted *prima facie* case, and under a direct evidence analysis, in light of the respondent's admission that it would not consider an individual with a conviction record for at least some of the positions at issue.

Remedy

The question then becomes, what remedy is appropriate to address the discrimination perpetrated by the respondent? Although the administrative law judge found that the respondent refused to hire the complainant because of his conviction record, he declined to order back pay or reinstatement "because [the complainant] failed to establish that any of the advertised positions were ever filled, and failed to prove he would have been hired for any position had his conviction record not been considered." The administrative law judge noted that the complainant "cites no case where back pay was awarded where the complainant failed to prove that the position or positions in question were filled, and none is known." (Decision, at 5-6).

The administrative law judge's rationale that the complainant failed to establish that any of the advertised positions were ever filled and failed to prove he would have been hired for any position had his conviction record not been considered is contrary to prior commission and court decisions. The presumed remedy in a failure to hire case is instatement into the job and back pay, and it is the discriminating employer who bears the burden of establishing through clear and convincing evidence that such remedy should not be awarded. *Olson v. Whatever Bar*, ERD Case No. CR201003939 (LIRC March 12, 2013); *Moore v. Milwaukee Board of School Directors*, ERD Case No. 199604335 (LIRC July 23, 1999). Once the complainant proves discrimination, back pay should be awarded unless the respondent establishes by clear and convincing evidence that, even in the absence of discrimination, the rejected applicant would not have been selected for the open position. *Silvers v. LIRC (Madison Metro. School Dist.)*(Dane Co. Cir. Ct., Jan. 13, 1984). Uncertainties about remedy are resolved against the discriminating employer. *Nunn v. Dollar General* ERD Case No. CR200402731 (LIRC March 14, 2008); *Fields v. Cardinal TG Co.*, ERD Case No. 199702574 (LIRC Feb. 16 2001).

Although, as set forth above, the respondent has not articulated any reason for its decision not to hire the complainant, the commission has considered whether the assertion that no one was hired for the positions constitutes evidence that the complainant would not have been hired even in the absence of discrimination, such that his remedy is affected. The commission concludes it does not. The

respondent's only evidence on this point was Mr. LaVigne's testimony to the effect that the respondent did not hire anyone for the open positions, with the exception of a few commissioned sales people.[2] Mr. LaVigne's testimony, which was somewhat equivocal in that he stated he could not recall but did not believe anyone was hired for the general labor job, and that no one was hired for the office or delivery jobs, did not clearly establish that the positions were never filled. Moreover, the respondent did not provide any business records showing who was on its payroll after the ads were posted and when those individuals were hired.

Even concluding that the respondent did not fill the positions, there is no reason to presume that the complainant would not have been hired absent his conviction record. In a prior case in which the commission found that a complainant who was discriminated against based upon a conviction record would not have been hired without regard to his record because the respondent did not fill a job, it did so based upon significant evidence on this point that was submitted by the respondent at the hearing. *See, Jackson v. Dedicated Logistics*, ERD Case No. CR200800665 (LIRC July 29, 2011). In *Jackson*, the respondent explained that it decided not to fill a truck driver job for which it had advertised because it decided to consolidate the route with another route and concluded that it did not need the position. By contrast, the respondent here has never asserted that it made a conscious decision to not fill the advertised positions, and it presented no evidence to indicate this was the case.

Indeed, what little evidence there is in the record suggests otherwise. If the individual who performed the "general labor" position (who was responsible for, among other things, cleaning the office, repairing vacuums and making bank deposits) retired, as Mr. LaVigne asserted occurred, it stands to reason that the respondent would need to fill that position. Moreover, the complainant testified without rebuttal that he was told on the telephone both before and after his interview that the respondent had already filled a few of the job openings but that there were some jobs left, suggesting that the respondent intended to fill the positions. Further, Mr. LaVigne testified that it is hard to find people who want to work as telemarketers--the job characterized in the advertisement as "office work"--another piece of evidence leading to a conclusion that the respondent did have jobs open and would have hired the complainant if not for his conviction record.

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[2] The Wisconsin Fair Employment Act provides no protection for independent contractors against discrimination in their contractual relationships. *Moore v. LIRC*, 175 Wis. 2d 561, 569, 499 N.W.2d 288 (Ct. App. 1993). While there is no mention of this in the decision, the record seems to suggest that the administrative law judge concluded that the sales people whom the respondent conceded it hired were independent contractors and not covered under the Act. However, the only evidence in the record regarding the status of the sales people is Mr. LaVigne's testimony that their compensation was based upon commissions. The record contains no evidence whatever regarding the employer's right to control the 'means and manner' of the workers' job performance or any of the other factors that are traditionally considered in an independent contractor analysis, as set forth in *Moore*. The mere fact the sales people are paid based on commissions is insufficient to warrant a conclusion that they should be considered independent contractors rather than employees.

Under all the circumstances, the commission believes that the respondent has not met its burden of establishing by clear and convincing evidence that the complainant should be awarded something less than instatement and back pay, the standard remedies in a failure to hire case.

The commission has modified the administrative law judge's Order in accordance with this memorandum opinion. The respondent is directed to offer the complainant the next available job and to pay him back pay according to the amounts that were specified in the job advertisement.

cc: Attorney Aaron Halstead
Attorney Jonathan Olson