STATE OF WISCONSIN PERSONNEL COMMISSION

EARNEST L. WILLIAMS,
Complainant,

v.

Secretary, DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 97-0086-PC-ER

FINAL DECISION AND ORDER

NATURE OF THE CASE

On June 16, 1997, complainant, Earnest L. Williams, filed a charge of discrimination with this Commission alleging, *inter alia*, that respondent Department of Corrections (DOC), discriminated against him because of his conviction record when respondent threatened to terminate his employment, in violation of the Wisconsin Fair Employment Act (WFEA), Subchapter II, Ch. 111, Stats. In an initial determination dated August 23, 1998, the Commission found that there was probable cause to believe that complainant was discriminated against on the basis of arrest or conviction record when he was threatened with termination upon any subsequent charges of driving while intoxicated. This case proceeded to hearing on the following agreed statement of issue:

> Whether respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act in connection with the last paragraph of its January 3, 1997, letter to complainant:
>
> > This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, any subsequent driving while intoxicated or similar charges will also result in termination of your employment. (Conference report dated July 20, 1998)

Following a hearing before a hearing examiner, and pursuant to §227.46(2), Stats., the examiner issued a proposed decision and order. The proposed decision concluded that while respondent's action did not violate §111.322(l) of the WFEA, it did violate §111.322(2), Stats. The proposed decision noted that pursuant to the precedent established in *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, employer actions such as investigations can involve an employe's

"terms, conditions or privileges of employment," §111.322(l), notwithstanding they do not affect the employe's tangible conditions of employment, if they adversely affect the employe's work environment to the extent of creating a hostile environment. The proposed decision then concluded that the "last chance" warning did not create a hostile environment. However, it did conclude there was a violation of §111.322(2), because by distributing the letter containing the last chance warning to nine individuals, including a union official, respondent "circulated" a "statement" expressing respondent's intent to discriminate,[1] in violation of §111.322(2).

In its objections to the proposed decision, respondent argued, among other things, that the examiner decided the issue on a point of law which neither party had addressed. Respondent pointed out that while it had not made a record of this at the hearing, all of the people who received a copy of the letter in question had either a management or a contractual need to know, and thus there was no "circulation" of the letter that would bring it within the purview of §111.322(2). Respondent's position on this point raised the question of whether the notice of hearing complied with the notice requirement of the Administrative Procedure Act (APA) at §227.44(2), Stats., or, put another way, whether the proposed decision violated the APA by addressing and deciding matters which were outside the scope of the issue for hearing.

The Commission concluded the hearing examiner erred in deciding an issue that was not properly noticed, rejected that part of the proposed decision which had concluded that respondent's distribution of the "last chance warning" letter violated §111.322(2), Stats., and remanded the case for further proceedings before the hearing examiner. However, the Commission noted the findings of fact were primarily stipulated and were not in dispute, and therefore adopted them.

The Commission noted respondent's argument in its objections to the proposed decision that "there is a substantial relationship[2] between the job of an officer and a conviction for

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[1] I.e., among other things, respondent stated its intent to discharge complainant should he ever in the future be even charged with OWI.

[2] Section 111.335(1)(c), Stats., provides:

> Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to . . . terminate from employment . . . any individual who:

criminal OWI." (Respondent's objections, p. 3). The commission concluded that this argument ran to the question of whether respondent violated §111.322(2), Stats., and since that was part of the issue on which the case was remanded to the examiner for further proceedings, the Commission did not address it further.

Following the Commission's remand to the examiner, it was agreed that respondent would submit an affidavit addressing the remaining issues. Respondent did so, and complainant did not object to it. Therefore, the original findings will be reiterated here, as modified by respondent's additional submission. The Commission then will address the issue of whether respondent violated §111.322(2), Stats.

FINDINGS OF FACT[3]

1. Complainant is employed by respondent as a Correctional Officer 3 at the John C. Burke Correctional Center.

2. Complainant was convicted of operating while intoxicated [OWI] on November 15, 1996. Complainant was sentenced to the following: alcohol assessment, forfeiture and fine totaling $1,234, local jail sentence of 75 days with Huber privileges[4] commencing on January

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

[3] "In addition to the evidence submitted by the parties at the hearing, the parties stipulated to the facts contained in the investigative summary section of the initial determination Accordingly, Findings 1-6 below are taken verbatim from the initial determination, with the addition of certain bracketed material based on the hearing record, and additional findings 7 and 8." Proposed decision and order, pp. 1-2. Following the remand to the examiner, the Commission makes the additional finding #4a.

[4] Section 303.08, Stats., follows:

> "Huber Law"; employment of county jail prisoners.
> (1) Any person sentenced to a county jail for crime, nonpayment of a fine or forfeiture, or contempt of court, may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:
> (a) Seeking employment or engaging in employment training;
> (b) Working at employment;
> (bn) Performing community service work under s 973.03;
> (c) Conducting any self-employed occupation including housekeeping and attending the needs of the person's family;
> (d) Attendance at an educational institution; or
> (e) Medical treatment.

14, 1997 (the first thirty days to be served in the DC [Dodge County] jail; forty-five days on electronic monitoring; with good time credit given to both sentences), license revoked for thirty months and ignition interlock for thirty months.

3. The conviction was complainant's third offense for operating while intoxicated.

4. On January 3, 1997, complainant received a letter from respondent notifying complainant of a five day suspension without pay and additional reprimands. The letter follows, in relevant part:

> Dear Mr. Williams:
>
> This is notification of a five (5) day suspension without pay for violation of the Department of Corrections Work Rule #A2, Category C, "Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy.", [sic] [brackets in original] specifically, the Department Arrest and Conviction Policy. The dates of your suspension are January 7, 8, 11, 12 and 13, 1997.
>
> On December 12, 1996, a pre-disciplinary hearing was held with Assistant Superintendent Calvin Landaal, at which time you acknowledged you were arrested on October 19, 1995, for Driving while Intoxicated. This was your third *(3rd)* offense of this nature.
>
> As a result of the arrest on October 19, 1995, you were convicted of Driving While Intoxicated on November 19, 1996, and received the following disposition from Dodge County Circuit Court . . . .
>
> While you are serving the jail term and on electronic monitoring, you are considered unfit for duty and therefore, prohibited from reporting for duty at the John C. Burke Correctional Center. You may use vacation, Saturday Legal Holiday or Personal Holiday during this time period. If you are placed in an inpatient AODA treatment program or a mental health facility, you may use sick leave.
>
> To retain your employment with the Department of Corrections, you must submit to the following:
>
> - An assessment by a provider of the Department's choice, at the expense of the Department. You will be notified in writing of the date of the assessment. You will be paid for the time off for the assessment;

- Must sign an Authorization for Release of Information to allow management to communicate with any health personnel including therapist, etc., that are involved in the assessment and/or follow-up treatment;
- Agree to any and all treatment outlined in the assessment. If treatment is required, it will be your responsibility or the responsibility of your health insurance to pay for treatment. Additionally, you will be required to use a leave balance or be on leave without pay for the time in treatment;
- Random urinalysis to be conducted by a certified outside laboratory or clinic for one (1) year. Payment for the urinalysis will be at your expense or at the expense of your health care provider.

  This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, any subsequent driving while intoxicated or similar charges will also result in termination of your employment.

[Respondent issued what it denominated a "corrected letter" of discipline under date of September 18, 1998, which was six days before the hearing on the merits but after the hearing had been scheduled. The only substantive change from the original (January 3, 1997) letter was in the last sentence wherein the word "charges" was replaced with the word "convictions." Both versions of the letter were copied to nine people, including "Robert McLinn, Local 18."]

4.a. With the exception of Mr. McLinn, all the people who were copied on this letter were members of management and were either in the direct chain of command over complainant, or involved in personnel administration in connection with the disciplinary transaction. Mr. McLinn was copied on the letter because he was the union official respondent was required to notify under the relevant collective bargaining agreement.

5. To receive income while serving his jail sentence, complainant used approximately 200 hours of accumulated vacation time, twenty-four (24) hours of personal holiday time, 100 hours of Saturday/Legal Holiday time, four (4) hours of Sabbatical time and approximately twenty-one (21) hours of leave without pay.

6. Respondent's Executive Directive 42 states, in relevant part:

DEPARTMENT OF CORRECTIONS POLICY REGARDING THE EMPLOYMENT OR RETENTION OF INDIVIDUALS HAVING AN ARREST OR CONVICTION RECORD

. . . .

II. POLICY STATEMENT

To help ensure that the Department meets its mission and at the same time complies with the Wisconsin Fair Employment Act, it is Department policy that records of pending criminal charges and convictions be considered in employment decisions only when the circumstances of the pending charge or conviction are substantially related to the job. Municipal ordinance violations may be considered. Additionally, being under the custody, control or supervision of a federal, state or local law enforcement agency or having a felony conviction record may restrict employment in certain classifications or restrict the performance of regularly assigned duties and responsibilities. (For example, correctional officers may not have a felony conviction record under s. 941.29, Stats., since they are required to be able to possess firearms as part of their duties and responsibilities.

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IV. PROCEDURE

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B. CRIMINAL ACTIVITY OF CURRENT EMPLOYEES

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A current employee who is charged with or convicted of an offense occurring on or off duty may be subject to discipline for the conduct which gave rise to the pending charge or conviction. Disciplinary action based on the underlying misconduct may proceed prior to charges being filed or a conviction being obtained.

V. NEXUS BETWEEN POSITIONS/CLASSIFICATIONS AND OFFENSES

A person may not be discriminated against on the basis of a pending charge or conviction record unless there is a substantial relationship between the circumstances of the criminal offense and the circumstances of the job. (See s. 111.335, Stats.) This test emphasizes a review of the circumstances which foster criminal activity, for example, the opportunity for criminal behavior. In determining the relationship between the job and the offense, the appointing authority shall look at the impact of the offense or the charge on the department's operations and interests.

A. JOB RELATED OFFENSE FACTORS

In determining whether or not the circumstances of a pending charge or conviction are substantially related to the circumstances of a job the following job related offense factors are considered:

1. The Job
a. the nature and scope of the job's public, inmate or client contact;
b. the nature and scope of the job's discretionary authority and degree of independence in judgment relating to decisions or actions which affect the care and custody of inmates, the commitment or expenditure of funds;
c. the opportunity the job presents for the commission of offenses;
d. the extent to which acceptable job performance requires public, inmate or client trust and confidence;
e. the amount and type of supervision received in the job; and
f. the amount and type of supervision provided to subordinate staff, if any.

2. The Offense
a. whether the elements of the offense (as stated in the statute or ordinance the employee is charged under or convicted of) are substantially related to the job duties;
b. whether the circumstances of the pending charge or conviction arose out of an employment situation;
c. for current employees, whether the conduct giving rise to the pending charge or conviction occurred during the working hours, on state property or involved the use of state property or involved other state employees or clients;
d. whether intent is an element of the offense; and
e. whether the offense was a felony, misdemeanor or other.

B. ADDITIONAL CONSIDERATIONS

1. Effective April 8, 1996, current DOC employees who supervise inmate or clients (for example, officers, social workers, recreation leaders, industry specialists and probation and parole agents) and who are under the custody, control or supervision of a federal, state or local law enforcement agency, including a jail sentence with Huber privileges under s. 303.08, Wis. Stats., are considered unfit for duty on the grounds that the circumstances of the custody, control or supervision negatively impact on the department's operations and interests and on the employees' [sic] [brackets in original] ability to effectively perform their duties and responsibilities.

In situations involving jail sentences with Huber privileges under s. 303.08, Wis. Stats., employees may be placed on leave without pay status. Employees who are granted a leave of absence may use vacation or holiday leave or compensatory time as a substitute for leave without pay. Sick leave may be used

only if the individual is serving jail time in an inpatient AODA treatment program or a mental health facility.

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C. OFFICER AND RELATED POSITIONS AND AGENT AND RELATED POSITIONS

Appendix 1 contains the listing of offenses which have been determined to be substantially related to officer, agent and related positions for the purposes of this policy. This listing is based on current classification titles and work assignments.

As position classification titles, functions and work environments are created or changed, this listing should be used as a guideline to illustrate the nexus standard. The listing of job functions does not identify every duty and responsibility assigned but identifies those to which there is a nexus with a related offense.

Similarly, the listing of related offenses is based on Wisconsin Statutes. It is not intended to be exhaustive. The list is subject to change as criminal statutes are amended. Crimes which occur in different jurisdictions may be titled or defined differently but still may be substantially related to the position.

. . . .

Department of Corrections
Arrest and Conviction Record Policy
Appendix 1

1. Officer and Related Security Positions:

Titles:
Institution Security Director 1 and 2; Officer; . . .

Job Functions:
Supervision and care of inmates; responsible for maintaining a secure environment and for ensuring the safety at large; employes have continuous inmate contact and/or have a great deal of authority over them; staff must use independent judgment to maintain order and security; acceptable performance requires public as well as inmate trust, confidence and respect; responsibility for inventory, receiving and transporting inmate property; . . . transportation and supervision of inmate trips.

Related Offenses:

Crimes against life and bodily security (ch. 940) . . .
Crimes against public health and safety (ch. 941) including but not limited to: illegal use or possession of weapons
Crimes against property (ch. 943) . . .
Crimes against sexual morality (ch. 944) . . .
Crimes against government and its administration (ch. 946) . . .
Crimes against children (ch. 948) . . .
Crimes against animals (ch. 951) . . .
Violations of the uniform controlled substances act (ch. 161) . . .

7. Respondent requires CO's to maintain valid driver's licenses because their general duties and responsibilities include driving motor vehicles and transporting inmates. Respondent does not terminate all employes who fail to maintain valid driver's licenses.

8. Respondent has a policy for dealing with employes who are required to have a valid driver's license and who are convicted of OWI offenses. For a first time OWI offense, if it is civil rather than criminal under the Wisconsin statutes[5], an employe is given a verbal warning and required to follow court-ordered assessment and treatment, and to secure an occupational license. For a second time OWI conviction, if it is criminal rather than civil, an employe receives some measure of discipline, is required to undergo an AODA assessment at the employer's expense, to comply with treatment recommendations, and to secure an occupational license. If an employe incurs what for him or her is a second (criminal) OWI conviction that is his first under the policy—e. g, if the employe had one OWI conviction shortly before becoming employed by DOC and then has another OWI conviction that is criminal—respondent treats it as a second conviction under its policy. For a third time OWI conviction, if it is criminal rather than civil, the employe is discharged.

[5] *See §346.65(2), Stats.*, regarding the treatment of such offenses as civil or criminal.

OPINION

Under the Wisconsin Fair Employment Act (FEA), the initial burden of proof is on complainant to show a prima facie case of discrimination. If complainant meets this burden, the employer then has the burden of articulating a non-discriminatory reason for the actions taken which complainant may, in turn, attempt to show was a pretext for discrimination. *McDonnell-Douglas v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 5 FEP Cases 965 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 25 FEP Cases 113 (1981).

Complainant claims that respondent discriminated against him on the basis of his conviction record when it threatened to terminate complainant's employment for any subsequent OWI or similar charges. In the typical case, to establish that complainant was discriminated against because of his conviction record, the facts must show: (1) complainant has a conviction record within the meaning of the Fair Employment Act, §111.32(3), Stats.; (2) complainant suffered an adverse term or condition of employment because of his conviction record; (3) respondent's action does not fall under the exceptions in §111.335, Stats.

With respect to the first element, complainant has a conviction record[6] which was respondent's primary reason for informing complainant that any subsequent driving while intoxicated charges would result in his termination.

The next question is whether the last paragraph in respondent's January 3, 1997, letter to complainant[7] constitutes an adverse term or condition of employment. Respondent argues as follows:

> This [last] sentence warns Complainant that "any subsequent driving while intoxicated or similar charges will also result in termination." While the choice of the word "charges" may have been unwise, Respondent did not in fact take any action which adversely affected Complainant's employment based on criminal

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[6] "Conviction record includes, but is not limited to, information indicating that an 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 , placed on extended suspension, or paroled pursuant to any law enforcement or military authority." §111.32(3), Stats.

[7] "This letter serves as a last chance warning. Failure to comply with the above conditions will result in termination of your employment. Additionally, *any subsequent driving while intoxicated or similar charges will also result in termination of your employment."* (emphasis added)

> charges or convictions. At worst, Respondent fairly warned complainant that he should avoid criminal drunk driving or there would be a consequence affecting his employment. A warning to avoid criminal behavior is hardly an adverse action. (Respondent's post-hearing brief, p. 3)

Section 111.322, Stats., provides, inter alia:

> **111.322. Discriminatory actions prohibited**
>
> Subject to ss. 111.33 to 111.36, it is an act of employment discrimination to do any of the following:
>
> (1) To refuse to hire, employ admit or license any individual, to bar or terminate from employment . . . any individual or to discriminate against any individual in promotion, compensation or in terms, conditions or privileges of employment . . . because of any basis enumerated in s. 111. 321.[8]
>
> (2) To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

While this Commission apparently has never ruled on the question of whether a warning of the nature involved here constitutes an adverse employment action under the WFEA, in *Klein v. DATCP*, 95-0014-PC-ER, 5/21/97, it addressed the question of whether the employer's action of investigating complainant with respect to an allegation of sexual harassment made by another employe implicated the complainant's "terms, conditions or privileges of employment," §111.322(l). The Commission's opinion includes the following:

> [T]here are two ways that an employer can take averse employment action with respect to "terms, conditions or privileges of employment." The first type of action affects the tangible conditions of employment--i.e., employment status per se--such as a transfer to a less desirable position or the assignment of less desirable work. The second kind does not affect the employe's employment status per se but has an adverse effect on the employe's work environment--for example, a supervisor calling an employe stupid. However, precedent establishes that

[8] Section 111.321, Stats., includes arrest record and conviction record in the enumeration of prohibited bases of discrimination.

> in order to be actionable, the action must be sufficiently opprobrious to create a hostile environment. *Klein, p.* 8. (citations omitted)

The Commission went on to find that complainant had failed to establish a hostile environment:

> The Commission does not believe it can infer from the facts of record that a reasonable employe similarly situated to complainant would experience the handling of this one pre-disciplinary process as a hostile work environment. While it is safe to assume that any allegation of employe misconduct will result in some degree of stress, we are dealing here with a single incident, which did not result in the pursuit of any disciplinary action against complainant. *Klein, pp.* 8-9. (footnote omitted)

In the instant case, the complainant also has failed to show a hostile environment. As respondent contends, complainant merely was warned concerning respondent's intention in the event of another OWI. Obviously, since the warning ran to a future traffic violation by complainant that might or might not occur, management's action did not even involve an investigation, as in *Klein.* Therefore, complainant has failed to establish either a prima facie case or a violation of §111.322(l), Stats. At this point the Commission will turn to the question of whether the "last chance warning" violated §111.322(2), Stats.

Pursuant to §111.322(2), Stats., the WFEA goes beyond prohibiting adverse employment actions prohibited by §111.322(1), such as termination of employment. Section 111.322(2) makes it unlawful:

> To print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment which implies or expresses any limitation, specification or discrimination with respect to an individual or any intent to make such limitation, specification or discrimination because of any basis enumerated in s. 111.321.

In the instant case, the application of this subsection raises the questions of whether this statute encompasses the letter of suspension which contained the last chance warning, and whether respondent printed or circulated or caused the printing or circulation of the letter in question.

As to the first question, several of the terms used in this subsection clearly do not apply to the January 3, 1997, letter. The letter is not an "advertisement or publication . . . form of application for employment . . . or . . . inquiry in connection with prospective employment."

§111.322(2), Stats. This leaves the question of whether the letter constitutes a "statement." The definition of "statement" in WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 2229 (1981) is:

> 1: the act or process of stating, reciting or presenting orally or on paper . . . 2: something stated: as **a**: a report or narrative (as of facts, events, opinions) . . . **b**: a single declaration or remark: ALLEGATION, ASSERTION . . . 3: PROPOSITION . . . 4b a formal declaration required by law or made in the course of some official proceeding (as a statement of a witness or of a position of a state in a diplomatic proceeding)

BLACK'S LAW DICTIONARY 1263 (5th ED. 1979) defines "statement" as follows:

> In a general sense, an allegation, a declaration of matters of fact. The term has come to be used of a variety of formal narratives of facts, required by law in various jurisdictions as the foundation of judicial or official proceedings and in a limited sense is a formal, exact, detailed presentation.

The paragraph in question fits into this definitional framework in its most general sense. It sets forth or asserts what action respondent will take with regard to complainant's employment status if certain events occur—i. e., if complainant fails to comply with the conditions stated in the letter, or incurs any further driving while intoxicated or similar charges, respondent will terminate his employment. The definitional framework includes the concept of a more formal document, such as a policy or directive, but in the context of the apparent legislative intent of §230.322(2), Stats., there is no persuasive reason to limit this subsection to that reading. While the apparent thrust of this provision is to prohibit the dissemination of discriminatory employment policies or practices such as, for example, advertisements which state the employer only hires men or women in a particular job category, it also runs to specific acts that may not reflect or imply a general discriminatory policy. This subsection prohibits the employer from making "*any inquiry* in connection with prospective employment, which *implies or expresses any* limitation, specification or discrimination with respect to *an individual* or *any intent* to make such limitation, specification or discrimination." (emphasis added) For example, an employer may or may not follow a policy or practice of discriminating on the basis of religious belief in violation of the WFEA, but §230.322(2), Stats., prohibits the employer from asking an applicant as part of the job interview about the applicant's religious beliefs, because

such a question implies an intent to discriminate on that basis.[9] Therefore, the Commission concludes the last chance paragraph is included within the term "statement" as used in §111.322(2), Stats., because it expresses the intent to terminate complainant's employment if he should be *charged* with driving while intoxicated, which, as is discussed below, would constitute discrimination on the basis of arrest/conviction record.

Pursuant to § 111.32(1), Stats., "arrest record" includes information indicating an individual has been "*charged* with . . . any felony, misdemeanor or other offense." (emphasis added) Section 111.335(1)(b), Stats., provides that an employe may be suspended because of "a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity." However, there is nothing in the WFEA that permits *termination* because of a pending charge.

Respondent takes the position that the use of the term "charge" rather than "conviction" was inadvertent, and it never actually intended to terminate complainant's employment because of a pending charge. However, the express thrust of the letter, and its only reasonable interpretation, is that complainant would be terminated if he incurred another OWI charge.[10]

Respondent's letter is also problematical because its blanket statement that "*any subsequent*" (emphasis added) OWI charge would result in termination is inconsistent with the requirement for a case by case application of the "substantial relationship" test. Section 111.335(1)(c)1., Stats., provides that it is not employment discrimination to terminate a convicted employe if the employe "[h]as been convicted of any felony, misdemeanor or other offense the *circumstances* of which substantially relate to the *circumstances* of the particular job." (emphasis added) It is clear from this language that the employer is to consider the circumstances of the conviction as it relates to the circumstances of the job, not merely the fact of conviction. *See Gibson v. Transp. Comm.*, 106 Wis. 2d 22, 28-29, 315 N. W. 2d 346 (1982), where the Court pointed out that if it were not appropriate to consider the factual circumstances

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[9] This example assumes there are not circumstances under which a job applicant's religious beliefs could be a bona fide occupational qualification.

[10] While respondent issued a "corrected letter" changing the word "charges" to "convictions" on September 18, 1998, six days before the hearing, the subject matter of this complaint and the stipulated issue involve the original January 3, 1997, letter. Therefore, the corrected letter only has significance to the remedy phase of this case.

of the crime "the 'circumstances of which' language in sec. 111.32(5)(h)2b, Stats., would be superfluous and it is clear from the legislative history of that statute that the legislature specifically intended to include such language in the statute."[11] (footnote omitted) While the Court in *Gibson* went on to hold that as a matter of law the offense in question constituted circumstances related to the job in question, such a conclusion cannot be reached in the instant case. The blanket language of the last chance warning does not take into consideration a number of factors, such as how much time has elapsed between convictions and whether the conviction would be a felony, misdemeanor or simply a civil offense.[12] Failure to consider the latter factor would even be a specific violation of respondent's own written policy, see finding #3, above. In addition, because the last chance warning runs not only to OWI charges but also to "similar" charges, respondent has mapped a course of action that necessarily could not even take into consideration the exact offense under the motor vehicle code, no less the circumstances of the offense. The Commission also observes that respondent's written policy in this area (see finding #6, above) does not include OWI in the enumeration of related offenses. Albeit the list of related offenses is not intended to be exhaustive, the absence of OWI from this list would weigh against any contention in this case that the substantial relationship test can be concluded to be present as a matter of law. This leaves the question of whether respondent printed or circulated this statement or caused it to be printed or circulated, as those terms are used in §111.322(2), Stats.

In *Racine Unified School Dist. v. LIRC,* 164 Wis. 2d 567, 476 N. W. 2d 707 (Ct. App. 1991), the Court held that the "print or circulate" language in §111.322(2), Stats., is ambiguous, and concluded that "the offending conduct under sec. 111.322(2), Stats., is not the *adoption* of a discriminatory employment policy, but rather the *publication* or *circulation* of such policy . . . Sec. 111.322(2), Stats., requires an affirmative act of volition by *the employer* in publishing or circulating its discriminatory statements." 164 Wis. 2d at 590, 591. By using the

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[11] Respondent's chief witness, an employment relations specialist for DOC, whose responsibilities included determining the relationship between the circumstances of convictions and the circumstances of positions, also testified that the WFEA required that this determination be made on a case by case basis.

[12] The OWI penalty structure, §346.65, Stats., depends on the number of suspensions, revocations, or convictions the driver has had within certain time frames.

term "publish" for the term "print," the Court in effect interpreted the "print" provision in the sense of "to publish in print." (alternative definition of "print" in WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 1803 (1981)). Respondent placed the "last chance warning" in a letter to complainant which was copied to nine individuals. This action did not involve "printing" the statement, which leaves the question of whether it was circulated.

In *Racine Unified School District,* the Court did not specifically address the meaning of the word "circulate," as it held that the "print or circulate" requirement was not met by the employer's act of publishing its meeting minutes (which included the discriminatory policy), but that the employer did print and circulate the policy when it inserted the policy into its officially published board policies. Turning to dictionary definitions, BLACK'S LAW DICTIONARY 220 (5TH ED. 1979) defines "circulated" as follows: "A thing is 'circulated' when it passes, as from one person or place to another, or spreads, as a report or tale." (citation omitted). WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 409 (1981) defines "circulate" as "to cause to pass from person to person and usu. to become widely known: DISSEMINATE."

These definitions indicate that for a thing to be circulated, a certain, relatively wide quantitative degree of distribution is required. Respondent's unopposed affidavit makes it clear that the distribution of the letter in question was limited to individuals with a specific "need to know"—i. e., primarily individuals in the supervisory chain over complainant or involved in personnel administration, which includes the processing of disciplinary actions. The union official who was copied on the letter also had a need to know in connection with the union contract. This limited dissemination is at odds with the foregoing definition: "to cause to pass from person to person and usu. to become widely known." Therefore, notwithstanding the statutory admonition to interpret the WFEA liberally, §111.31(3), Stats., the Commission is compelled to conclude that this limited circulation of a specific warning to the complainant among these members of management and a union official who all had a clearly delineated need to know about the notice of discipline in question cannot be considered to constitute circulation of the last paragraph of that notice.

Because the Commission concludes that complainant has failed to establish that respondent discriminated against him in violation of the arrest/conviction provision of the WFEA, it does not address the issue of whether respondent has available the affirmative defense provided by §111.335(1)(c)(1), Stats. (regarding an individual who has been convicted of a crime "the circumstances of which substantially relate to the circumstances of the particular job.").

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(l)(b), Stats.

2. Complainant has the burden of persuasion with respect to establishing "that respondent discriminated against complainant on the basis of arrest or conviction record in violation of the Wisconsin Fair Employment Act [§111.322, Stats.] in connection with the last paragraph of its January 3, 1997, letter to complainant." (stipulated issue for hearing set forth in the July 20, 1998, conference report.

3. Complainant has not satisfied his burden of establishing that the last chance warning in said paragraph constitutes a violation of either §111.322(l) or §111.322(2), Stats.

ORDER

This matter is dismissed.

Dated: November 3, 1999.

STATE PERSONNEL COMMISSION

LAURIE R. McCALLUM, Chairperson

DONALD R. MURPHY, Commissioner

JUDY M. ROGERS, Commissioner

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Parties:
Earnest L. Williams
24 ½ E. Main St., #4
Waupun, WI 53963

Michael J. Sullivan
Secretary, Department of Corrections
P. 0. Box 7925
Madison, WI 53707-7925

NOTICE
OF RIGHT OF PARTIES TO PETITION FOR REHEARING AND JUDICIAL REVIEW
OF AN ADVERSE DECISION BY THE PERSONNEL COMMISSION

Petition for Rehearing. Any person aggrieved by a final order (except an order arising from an arbitration conducted pursuant to §230.44(4)(bm), Wis. Stats.) may, within 20 days after service of the order, file a written petition with the Commission for rehearing. Unless the Commission's order was served personally, service occurred on the date of mailing as set forth in the attached affidavit of mailing. The petition for rehearing must specify the grounds for the relief sought and supporting authorities. Copies shall be served on all parties of record. See §227.49, Wis. Stats , for procedural details regarding petitions for rehearing.

Petition for Judicial Review. Any person aggrieved by a decision is entitled to judicial review thereof. The petition for judicial review must be filed in the appropriate circuit court as provided in §227.53(1)(a)3, Wis. Stats., and a copy of the petition must be served on the Commission pursuant to §227.53(1)(a)1, Wis. Stats. The petition must identify the Wisconsin Personnel Commission as respondent. The petition for judicial review must be served and filed within 30 days after the service of the commission's decision except that if a rehearing is requested, any party desiring judicial review must serve and file a petition for review within 30 days after the service of the Commission's order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. Unless the Commission's decision was served personally, service of the decision occurred on the date of mailing as set forth in the attached affidavit of mailing. Not later than 30 days after the petition has been filed in circuit court, the petitioner must also serve a copy of the petition on all parties who appeared in the proceeding before the Commission (who are identified immediately above as "parties") or upon the party's attorney of record. See §227.53, Wis. Stats., for procedural details regarding petitions for judicial review.

It is the responsibility of the petitioning party to arrange for the preparation of the necessary legal documents because neither the commission nor its staff may assist in such preparation.

Pursuant to 1993 Wis. Act 16, effective August 12, 1993, there are certain additional procedures which apply if the Commission's decision is rendered in an appeal of a classification-related decision made by the Secretary of the Department of Employment Relations (DER) or delegated by DER to another agency. The additional procedures for such decisions are as follows:

1. If the Commission's decision was issued after a contested case hearing, the Commission has 90 days after receipt of notice that a petition for judicial review has been filed in which to issue written findings of fact and conclusions of law. (§3020, 1993 Wis. Act 16, creating §227.47(2), Wis. Stats.)

2. The record of the hearing or arbitration before the Commission is transcribed at the expense of the party petitioning for judicial review. (§3012, 1993 Wis. Act 16, amending §227.44(8), Wis. Stats.)

2/3/95