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122 Arrest or conviction record discrimination

122.1 Arrest or conviction record discrimination; Coverage, exceptions

122.11 Arrest or conviction record discrimination; Coverage, exceptions; General

An employer must be able to ascertain information on an applicant's conviction record or pending charges in order to determine whether that conviction or pending charge substantially relates to the position that the applicant seeks. Therefore, a question on an employment application asking if the applicant had ever been convicted of an offense or whether the applicant had charges pending does not violate the Wisconsin Fair Employment Act. ***Lee v. LIRC (City of Milwaukee)*** (Milwaukee Co. Cir. Ct., 03/02/09).

The Wisconsin Fair Employment Act permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job. Therefore, it is not a violation of the Act to request conviction record information from a job applicant. A question about an applicant's conviction record on an employer's employment application would not, therefore, constitute prohibited discrimination within the meaning of sec. 111.322(2), Stats., which prohibits printing or circulating any statement, advertisement or publication or using any form of application for employment which implies or expresses any limitation or discrimination with respect to an individual. ***Lee v. LIRC*** (Ct. App., Dist. I, unpublished decision, 05/27/10). ***Lee v. D.J.'s Pizza*** (LIRC, 05/20/09); ***Lee v. Wendy's*** (LIRC, 05/20/09); ***Lee v. Speedway Super America*** (LIRC, 05/20/09).

The WFEA permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job. Accordingly, it is implicit that it is not a violation of the WFEA to request conviction record information from an applicant. ***Lee v. City of Milwaukee*** (LIRC, 09/26/08), *aff'd sub nom*. ***Lee v. LIRC*** (Milwaukee Co. Cir. Ct., 03/02/09); ***Lee v. Milwaukee County*** (LIRC, 09/26/08), *aff'd sub nom*. ***Lee v. LIRC*** (Milwaukee Co. Cir. Ct., 03/31/09).

Because the Wisconsin Fair Employment Act permits an employer to make employment decisions based upon an applicant's conviction record if the circumstances of the offense are substantially related to the circumstances of the particular job, it is implicit that it is not a violation of the Wisconsin Fair Employment Act to request conviction record information from an applicant. Therefore, a question on the Respondent's employment application inquiring about

the applicant's conviction record did not constitute prohibited discrimination under sec. 111.322(2), Stats. ***Lee v. McDonald's*** (LIRC, 12/26/08); ***Lee v. Office Depot*** (LIRC, 12/26/08).

Although the Wisconsin Fair Employment Act allows employers to *suspend* the employment of workers who are charged with, but not yet convicted of, certain offenses, it is illegal to *discharge* an employee because of an arrest. ***Nunn v. Dollar General*** (LIRC, 03/14/08).

A Complainant's conviction for an offense estops him from subsequently trying to call into question his culpability in any of the material elements of the offense. Any alleged problems surrounding an individual's criminal conviction must be addressed by way of an appeal from that conviction. ***Holze v. ADT Security Serv.*** (LIRC, 09/23/05)

A question on an employment application asking if an applicant has been convicted of a felony in the preceding five years is not prohibited by the Wisconsin Fair Employment Act. The Act provides that it is not employment discrimination because of conviction record to refuse to employ any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job. The Act presupposes that an applicant's criminal record is known to the employer and does not prohibit an employer from asking questions about criminal records. Also, nothing in the Act prohibits an employer from conducting background checks. ***Jackson v. Klemm Tank Lines*** (LIRC, 04/29/05).

Employers do not violate the Wisconsin Fair Employment Act by requiring job applicants to document that an arrest had not, in fact, resulted in any conviction. ***Wozniak v. Bank One*** (LIRC, 10/10/03).

The concept of conviction record under the Wisconsin Fair Employment Act is not limited only to situations where absolute proof exists that an actual conviction exists. An employment decision based on information indicating that an individual has a conviction record, even if the individual has no conviction record, is a decision based on conviction record within the meaning of the Act. ***Miles v. Regency Janitorial Serv***. (LIRC, 05/31/01), rev'd on other grounds *sub nom*. ***Regency Janitorial Serv. v. LIRC*** (Milwaukee CO. Cir. Ct., 03/12/02).

Discharging someone because of negative publicity over a conviction is precisely what the prohibition on conviction record discrimination was intended to prevent. ***Murray v. Waukesha Memorial Hosp***. (LIRC, 05/11/01)

The Complainant was arrested on a charge of criminal damage to property. The Respondent suspended the Complainant's employment because one of the conditions of her bond was that she have no contact whatsoever with two of her fellow employees. The Respondent's decision to suspend the Complainant's employment was not based upon discriminatory animus or bias associated with the fact that the Complainant had pending criminal charges against her, but upon a legitimate assessment that, while the Complainant was subject to the "no contact" order, she

was effectively barred from coming to work and performing her job. ***Schmid-Long v. Hartzell Mfg.*** (LIRC, 03/26/99).

The fact that criminal charges are dismissed, or that an employe is acquitted of the charges, does not prove that a prior action taken on the basis of an arrest for those charges was unlawful discrimination. In this case, the Respondent, a licensing authority, temporarily suspended the Complainant's taxicab driver's license pending the resolution of criminal charges against him. The charges against the Complainant (which included sexual assault and threatening to injure another while in possession of a dangerous weapon) were dismissed approximately two months later. The Respondent then re-issued the Complainant's taxicab driver's permit. While the Complainant provided evidence tending to show that he was damaged because of the denial of his taxicab driver's permit for two months based on criminal charges that were later dismissed, he did not establish probable cause to believe that the Respondent unlawfully discriminated against him under the Wisconsin Fair Employment Act. ***Rathbun v. City of Madison*** (LIRC, 12/19/96)

The fact that the Complainant was eventually acquitted of the charges against him had no bearing on the question of whether there was unlawful arrest record discrimination. ***Paxton v. Aurora Health Care*** (LIRC, 10/21/93)

An employer may reassign an employe who is arrested on a charge the circumstances of which substantially relate to the circumstances of the particular job, although the employer should not be allowed to try to evade the purpose of the law by reassigning an employe to onerous duties in an effort to induce that employe's resignation. In this case, the employer reassigned the Complainant, rather than suspending her outright, in order to preserve her employment. ***Delapast v. Northwoods Beach Home Caring Homes*** (LIRC, 02/17/93)

Although an individual had received a full and unconditional pardon from the Governor, an employer was not precluded from taking into account the historical facts of his criminal behavior and its consequences, including his dismissal from previous employment. ***Cieciwa v. County of Milwaukee*** (LIRC, 11/19/92)

An employer who had no knowledge that the reason an employe was absent for three days without calling work was due to the employe's incarceration did not discharge the employe because of his arrest record. The employer terminated the employe's employment due to the employe's failure to follow the employer's procedure that the employe notify the employer of the employe's absence before the employe's shift begins. The employer had no duty to call the employe to inquire about the employe's whereabouts. ***Kessner v. Dairy Systems*** (LIRC, 09/30/92)

An employer is entitled to know whether an applicant has a conviction record, so that the employer can determine if the conviction record is substantially related to the applicant's prospective job duties. An employer may lawfully refuse to hire an applicant who falsifies an employment application with respect to a conviction record. ***Haynes v. National School Bus Service*** (LIRC, 01/31/92).

Where an employe has been unlawfully discharged because of an arrest, his subsequent conviction for that offense is irrelevant. There are no exceptions to the illegality of discharging an employe because of arrest record. ***Maline v. Wisconsin Bell*** (LIRC, 10/30/89).

Where the employer terminated an employe because she had been arrested, it violated the Act. Neither the fact that the conduct for which the employe was arrested was substantially related to the circumstances of her job, nor the fact that she was subsequently convicted of the charges, save the termination from illegality. Under the Act, the only action that an employer may take in response to the arrest of an employe for acts substantially related to the employe's job is suspension pending the outcome of the criminal charges. ***Shipley v. Town & Country Restaurant*** (LIRC, 07/14/87).

The Personnel Commission lacks subject matter jurisdiction over a complaint filed by an inmate who alleged discrimination based on conviction record with respect to actions taken by the prison's education director. ***Richards v. DHSS*** (Wis. Personnel Comm., 09/04/86).

The purpose of the prohibition against arrest and conviction record discrimination is to prevent employment decisions from being made based on the stigma of an arrest or conviction record. ***Miller Brewing Co. v. ILHR Dept.***, 103 Wis. 2d 496, 308 N.W.2d 922 (Ct. App. 1981).

122.12 Arrest or conviction record discrimination; Coverage, exceptions; Definition of 'arrest record', 'conviction record'

With respect to arrest record discrimination, the legislature's primary concern was about employment decisions being made on the basis of an assumption about an individual's guilt merely on the basis of an individual's contact with law enforcement or military authorities. With respect to the term conviction record, however, the question of whether the individual convicted of an offense was actually guilty of committing the offense for which he or she was convicted would never arise. It appears that the legislature's concern in conviction record cases is whether or not the individual has been convicted of an offense that is substantially related to the job that an employer has to offer. ***Swanson v. Kelly Services*** (LIRC, 10/13/04).

The definition of conviction record suggests that there is coverage against discrimination on the basis of perceived conviction record. ***Stroede v. Federal Express*** (LIRC, 08/14/96).

The affirmative defense set forth in sec. 111.335(1)(b), Stats., provides that it is not employment discrimination because of arrest record to suspend from employment any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the job. That section is not applicable where the charge for which the Complainant was arrested is not a "criminal charge." In this case, the Complainant was charged with driving while under the influence of alcohol, as defined by sec. 346.63, Stats. Case law provides that a first offense under that section is not a criminal offense. ***Gustafson v. C.J.W., Inc.*** (LIRC, 03/21/89).

Being questioned by police and then issued a civil citation charging damage to property in violation of a municipal code constituted an arrest record within the meaning of the Wisconsin Fair Employment Act. ***Levanduski v. Visiting Nurse Ass'n. of Sheboygan*** (LIRC, 02/10/88).

The affirmative defense contained in sec. 111.335(1)(b), Stats., allowing employment decisions where the individual is subject to a pending criminal charge which is substantially related to the job, is not available where the charge in question is not a criminal charge. ***Springer v. Town of Madison*** (LIRC, 9/22/87).

The affirmative defense set forth in sec. 111.335(1)(b), Stats., allowing suspension from employment of any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity, is not available to a Respondent in a case in which the employe in question is subject to a charge of a municipal ordinance violation, since such a violation is not criminal. ***Hart v. Wausau Ins. Companies*** (LIRC, 04/10/87).

An employe discharged because of the employer's belief that he was stealing from the company had not been "arrested" within the meaning of the Act where the employer questioned the employe on its own as part of an internal investigation. ***Holliday v. Trane Co.*** (LIRC, 04/21/83).

122.13 Arrest record discrimination; Coverage, exceptions; '*Onalaska*' rule: underlying act, rather than arrest, as reason

The evidence in this case failed to establish that the Respondent obtained a significant amount of information through its own investigation independent of the arresting authorities which led it to conclude that the Complainant had engaged in the conduct with which he was charged. The Complainant was discharged from his position as a supervising officer at the Milwaukee Secure Detention Facility of the Department of Corrections after he was arrested and charged with the sexual assault of a child. After the Complainant was discharged, the criminal charges against the Complainant were dismissed. The warden decided to terminate the Complainant based upon looking at everything that he could, which included matters defined as part of the Complainant's arrest record. Given that the warden could not identify what was more or less important in his decision to discharge the Complainant, it is impossible to conclude that the decision would have taken place in the absence of the impermissible motivating factor of the Complainant's arrest. ***Suttle v. Department of Corrections*** (LIRC, 05/22/09), *aff'd. sub nom* ***Department of Corrections and Suttle v. LIRC*** (Dane Co. Cir. Ct., 06/02/10).

Under the Onalaska defense, there is no discrimination on the basis of arrest record if an employer refuses to hire an individual because the employer concludes from its own investigation and questioning of the individual that he has committed an offense. In short, the employer has not acted on the basis of the individual's arrest record. On the other hand, where an employer has acted on the basis of an individual's arrest record, the employer may avoid liability if the circumstances of the individual's pending criminal charge substantially relate to the circumstances of the job. It was error for an Administrative Law Judge to hold both that: (1) the

employer did not act on the basis of the Complainant's arrest record, and (2) the employer did act on the basis of his arrest record but that such action fell under the exception to the prohibition against discrimination on the basis of arrest record. ***Johnson v. Kelly Services*** (LIRC, 04/21/09), *aff'd. sub nom* ***Johnson v. LIRC*** (Milwaukee Co. Cir. Ct., 04/06/10).

Where the Respondent elected to await a court's determination on the Complainant's pending criminal charges before it made a hiring decision on his application for employment, there was no basis to support a conclusion that the action the Respondent had taken was because it had determined from its own investigation and questioning of the Complainant that he had committed an offense. ***Johnson v. Kelly Services*** (LIRC, 04/21/09), *aff'd. sub nom* ***Johnson v. LIRC*** (Milwaukee Co. Cir. Ct., 04/06/10).

A plant manager saw the Complainant operating a vehicle and reported him to the police for not having a valid driver's license, resulting in an officer pulling the Complainant over and fining him for operating a vehicle after his license had been revoked. The Complainant's subsequent discharge was based on his underlying conduct, rather than his arrest record. Where the information an employer relies on to draw its conclusion that an employee engaged in unacceptable conduct was information independent from that of the arresting authority, the employer does not rely on the employee's arrest record. ***Ardell v. Alliant Energy*** (LIRC, 01/31/08).

The Respondent in this case had some information that the Complainant had been arrested. The Respondent also had a copy of an arrest report containing what purported to be information provided by a law enforcement officer to the effect that the Complainant had made certain admissions in the jail. Such information coming from an arresting authority would not constitute information independent of the arrest and of the arresting authorities, but would be part and parcel of the Complainant's "arrest record." However, the fact that the Respondent had this information did not in and of itself prove that there was a violation of the prohibition against discrimination because of arrest record. The evidence showed that the Respondent had obtained a significant amount of information through its own investigation, independent of the arresting authorities, which led it to conclude that the Complainant had used illegal drugs and had been dishonest with the Respondent in a number of respects relating to or arising out of that drug use. The Respondent's beliefs and conclusions regarding this conduct by the Complainant were the result of the information the Respondent had obtained independent of the arresting authorities and the fact of the arrest. The actions the Respondent took because of its beliefs and conclusions, including its discharge of the Complainant, were thus not "because of" the Complainant's arrest record. ***Betters v. Kimberly Area Schools*** (LIRC, 11/28/07).

The underlying rationale in ***City of Onalaska v. LIRC***, 120 Wis. 2d 363, 354 N.W.2d 22 (Ct. App. 1984), does not extend beyond arrest record cases to conviction record cases. ***Sheridan v. United Parcel Serv.*** (LIRC, 07/11/05)

The Respondent failed to show that it discharged the Complainant because it concluded from its own investigation and questioning of him that he had committed an offense. The evidence indicated that the Respondent's "own investigation" primarily consisted of consideration of the criminal complaint against the Complainant, and that the limited questioning it undertook of him was insufficient to support a conclusion that he had committed the offense of marijuana possession. Evidence of the Respondent's primary reliance on the criminal complaint was apparent, based upon its repeated requests for the Complainant to furnish it with the paperwork documenting what he was arrested for. It was also apparent based on the statement in the termination letter that the Complainant had admitted to the possession of marijuana, which was a conclusion which could only be drawn from the criminal complaint against the Complainant. During the investigation conducted by the Respondent, the Complainant was never asked if the marijuana in question was his, and he never admitted to possession of marijuana on the date in question. None of the Complainant's statements constituted an admission that he had committed the offense of possession of marijuana. The Respondent, therefore, violated the prohibition against termination on the basis of arrest record. However, the employee (who ultimately pleaded guilty to the charge) was still not entitled to any remedy for that violation because the circumstances of the charged offense substantially related to the employment such that suspension of the employee would have been legal. ***Blunt v. Dept. of Corrections*** (LIRC, 02/04/05).

In arrest record cases it can be concluded that an employer "does not rely on information indicating the individual has an arrest record" because the employer has concluded from its own investigation and questioning of the individual *that the individual has committed an offense.* In all but the most unusual case, in a conviction record case the question of whether an individual that has been convicted of an offense was actually guilty of committing the offense for which he has been convicted would never arise. Even if such a case were to arise, an employer that learned through its own investigation and questioning of the individual that the individual was convicted of some offense would not properly be held to have made an unwarranted assumption regarding the individual's guilt. An employer cannot escape liability under the Wisconsin Fair Employment Act merely by undertaking its own investigation and by questioning the individual if he has committed the offense for which he was convicted. An employer that had the unfettered authority to decide for itself that an individual's conviction is substantially related to the particular job just because it concluded from its investigation and questioning of the individual that the individual committed the offense for which the individual was convicted would be to subject such individuals to the very arbitrary treatment the WFEA was enacted to prevent. ***Swanson v. Kelly Services*** (LIRC, 10/13/04).

Where the information which the employer relied to draw its conclusion that the employee engaged in unacceptable conduct was information that came from the arresting authority, this does not constitute information independent of the arrest and of the arresting authorities. Things such as police reports from the arresting authority, the criminal complaint, and statements made by or other information provided by the arresting or prosecuting authority, are all part and parcel of an "arrest record" itself. "Independent" sources of information which an employer may use to form a belief that an employee engaged in an offense of some kind which is also the subject of

an employee's arrest include: (1) an admission by the employee; (2) statements to the employer by others who witnessed the conduct; (3) direct observations made by the employer while joining in a police search; or (4) an investigation by the employer that made use of information obtained from a contemporaneous police investigation. The Labor and Industry Review Commission no longer chooses to be guided by its prior decisions in *Ponto v. Grand Geneva Resort & Spa* (LIRC, 08/22/96), or *Springer v. Town of Madison* (LIRC, 09/22/87), where it concluded that the employer had not violated the WFEA when it made employment decisions based upon information that the employee engaged in unacceptable conduct that came from the arresting authority. Rather, the question to be resolved is whether the employer's conclusion that the employee had engaged in unacceptable behaviors was based on information "independent of the arrest and of the arresting authorities." ***Betters v. Kimberly Area Schools*** (LIRC, 07/30/04).

The critical question which needs to be answered to properly apply the *Onalaska* principle in a case where an employer has both learned about an employee's arrest from the arresting authorities, and learned things about the employee's conduct independently of the arresting authorities, is the question of the employer's motivation. The question is whether the employer made the decision to discharge the employee because of the information it acquired from the arrest and the arresting authorities, or because of the information it acquired through its own investigation independent of the arresting authorities. The employer's subjective intent and motivation in arriving at the challenged decision is a question of ultimate fact. ***Betters v. Kimberly Area Schools*** (LIRC, 07/30/04).

It is not arrest record discrimination if an employer undertakes its own investigation and bases the subject employment decision on the results of that investigation. In this case, it was not until the employer received a final investigative report concluding that the Complainant had used his work computer to access and download pornography that he was terminated. There was no probable cause to believe that the Complainant was discriminated against based on arrest record. ***Speltz v. Trane Div. of American Standard*** (LIRC, 05/25/04).

The Respondent failed to establish that it discharged the Complainant because she violated its alcohol and drug abuse policy, rather than because she was arrested for knowingly keeping and maintaining a dwelling which is resorted to by persons manufacturing controlled substances, contrary to sec. 961.42(1), Stats. The Complainant informed management that she had been arrested, and that she had known that an individual living in her home was growing hallucinatory mushrooms in his room. The Complainant's statements to management did not constitute an admission that the Complainant had violated the Respondent's alcohol and drug abuse policy, which provided, in part, that "the use, possession, sale, transfer, acceptance, or purchase of illegal drugs at any time is strictly prohibited." The Respondent simply assumed that the Complainant was guilty of possessing illegal drugs in violation of company policy, and that assumption was based entirely on the fact of her arrest record. ***Garton v. Wal-Mart Stores*** (LIRC, 01/27/00), *aff'd sub nom*. ***Wal-Mart Stores v. LIRC*** (Dane Co. Cir. Ct., 08/21/00).

The Respondent suspended and then discharged the Complainant after reading two newspaper articles stating that he had been charged with second degree sexual assault of a child and exposing a child to harmful materials and had allegedly admitted the conduct to the police. The newspaper articles were based on information obtained from the police, including the application

for a search warrant and the criminal complaint. The suspension was not unlawful arrest record discrimination, because the offense charged here was substantially related to the employee's job as director of the fitness center at a resort. While the WFEA does not provide a "substantially related" exception for *discharge* because of *arrest*, the discharge was not unlawful since the reason that the employer discharged the employee was that it believed, based on what it read in the newspaper articles, that the employee had confessed to the conduct involved. ***Ponto v. Grand Geneva Resort & Spa*** (LIRC, 08/22/96). [Ed. note: LIRC has expressly stated, in ***Betters v. Kimberly Area Schools*** (LIRC, 07/30/04), that it no longer chooses to be guided by the *Ponto* decision.]

Although the Complainant's general manager and the area supervisor were aware of her arrest, the Complainant had also admitted to the Respondent during its investigation that she had been involved with the conduct of selling controlled substances. It was this admission of unacceptable conduct that led to the Complainant's discharge. Since the Respondent discharged the Complainant because she admitted to having engaged in conduct unacceptable to the employer, and not because of her arrest record, the question of whether the Complainant's actions were substantially related to her employment did not have to be addressed. ***Lamb v. Happy Chef of Sparta*** (LIRC, 09/29/95).

The Respondent continued to employ the Complainant long after his manager learned of his conviction record, and even after other employees began complaining that the Complainant was stealing tips from them. The eventual discharge decision was made by a regional manager who was unaware of the Complainant's conviction record. That decision was based on the Respondent's belief, formed after investigation, that the Complainant was indeed stealing tips from other employees. Thus, the Complainant failed to demonstrate that his conviction record played any role in the Respondent's decision to discharge him. ***Bradley v. Exel Inn of America*** (LIRC, 02/02/95).

The employer did not discharge the Complainant because of arrest record where its belief as to the Complainant's guilt was based on its own investigation and was independent of the mere fact of his arrest. When the employer interviewed the Complainant, he admitted that he had marijuana in his car (which was the offense for which he was arrested). Additionally, when the Complainant was arrested he told the employer that he would not be able to get to work on time due to "car problems." The Respondent subsequently learned that the Complainant had been untruthful and that the real reason that he was unable to report to work on time was because he was incarcerated. Both of these contacts were independent of the arrest and of the arresting authorities because they were communications directly from the employe to the employer. ***Greene v. Air Wisconsin*** (LIRC, 02/02/95), *aff'd. sub nom.* ***Greene v. LIRC*** (Monroe Co. Cir. Ct., 08/25/95).

Where a Complainant was discharged because of the Respondent's reasonable, good faith belief (based upon its own investigation) that he had engaged in conduct for which he was arrested, it is immaterial whether the Complainant in fact engaged in that behavior. What matters is the question of the employer's motivation, not whether the employer was objectively correct. Here, the Complainant was eventually acquitted of the charges against him however this has no bearing on the question of whether there was unlawful arrest record discrimination. The employer came

to a good faith belief based on its investigation that the Complainant had committed some type of sexual assault against a co-worker. It is irrelevant that a jury, which may have heard different evidence, and which was required to apply a stringent burden of proof, arrived at a different conclusion. ***Paxton v. Aurora Health Care*** (LIRC, 10/21/93).

An employer's decision to discharge an employe is not because of an arrest when it is motivated by the employer's belief that the employe has in fact engaged in certain unacceptable conduct and when that belief arises from some source other than the mere fact of the arrest. ***Delapast v. Northwoods Beach Home Caring Homes*** (LIRC, 02/17/93)

The Complainant was arrested on charges of aggravated battery for throwing acid in a woman's face. The day after the arrest, the Respondent received information from a brother of the victim that the Complainant had claimed that he got the acid from his workplace. The employer spoke to both the victim and her brother in investigating the matter. Through its own investigation, the Respondent concluded that the Complainant had committed the offense, using materials obtained from the workplace, and it discharged him. Since the Respondent made its decision based upon what it came to believe about the facts of the incidents through its own investigation, there was no violation of the prohibition on arrest record discrimination. ***Redmon v. Dept. of City Devel.*** (LIRC, 02/22/90).

The Respondent violated the Act when a significant and determining factor in its decision to discharge the Complainant was its belief that the employe had sold illegal drugs out of a company vehicle, a belief that was based solely on the Complainant's arrest on those charges. ***Maline v. Wisconsin Bell*** (LIRC, 10/30/89).

Where an employe has told the employer that he engaged in the conduct for which he was arrested or convicted, the situation must be analyzed to determine whether the subsequent action taken by the employer was taken because of the employer's belief about the conduct or because of the arrest or conviction itself. Here, the termination of the Complainant's employment was based on his arrest record, despite the Complainant's admission of the underlying conduct, because the Respondent's general manager stated that the Complainant was being discharged because the employer did not want anyone working for it who had a "driving while intoxicated" offense on his record. ***Gustafson v. C.J.W., Inc.*** (LIRC, 03/21/89).

Employers are not prohibited from taking an adverse employment action against an employe for improper actions on the job simply because the employe has also been arrested as a result of those actions. However, if the employer is motivated even in part by the arrest itself (as opposed to the underlying job-related misconduct) this should result in a finding of liability. ***Ames v. UW-Milwaukee*** (Wis. Personnel Comm., 12/23/88).

An employer's decision to terminate the Complainant based on the Complainant's admission to a violent incident involving her estranged husband was not based on her arrest record, even though her admission was verified by looking at the police report. ***Levanduski v. LIRC*** (Sheboygan Co. Cir. Ct., 09/13/88).

Where the employe, after having been arrested for unlawful damage to property in connection with a domestic disturbance at her home, admitted to her employer that she had engaged in the violent conduct in question, and the employer thereafter terminated her, the termination was not because of "arrest record," but was because of the employer's beliefs about the Complainant's conduct. ***Levanduski v. LIRC*** (Sheboygan Co. Cir. Ct., 09/15/88).

The employer did not make its employment decision because of the Complainant's arrest record where it made its decision because of a conclusion, based on an investigation which involved contacting law enforcement authorities and obtaining a copy of the citation, accident report, and other information from them, and questioning of the employe, that the employe had committed an offense. ***Springer v. Town of Madison*** (LIRC, 09/22/87), *aff'd.,* Jefferson Co. Cir. Ct., 06/13/88.[Ed. note: LIRC has expressly stated, in ***Betters v. Kimberly Area Schools*** (LIRC, 07/30/04), that it no longer chooses to be guided by the *Springer* decision.]

The purpose of the prohibition on discrimination because of arrest record is to prevent an employer from making an employment decision solely on the basis of an employee's contact with the criminal justice system, not to prevent an employer from acting on the employee's own admission of conduct inimical to the employer's interests. Therefore, where, as here, the evidence showed that the employer discharged the employee, not because of the fact that he had been charged with an offense, but because of the employee's subsequent direct admission to the Respondent that he had engaged in the conduct with which he had been charged, there was no violation on the prohibition against discrimination because of arrest record. ***Mielke v. Orkin Exterminator Co.*** (LIRC, 04/11/88).

The Complainant, a nuclear plant security guard, was charged with misdemeanor possession of marijuana for having five marijuana plants growing near his residence. He pled guilty and was convicted and fined. Upon learning of this through the newspaper, the Respondent began an investigation, obtaining written and oral statements from the Complainant. Under the Respondent's policies, which called for discharge of employees convicted of a felony, the Complainant's conviction for misdemeanor possession would not necessarily require his discharge. In his initial statements to the Respondent, the Complainant admitted that he had marijuana plants growing near his home. He was not discharged at that time. In a subsequent interview with the Respondent, the Complainant disclosed that in addition to having grown marijuana plants at his residence, he used marijuana during off-duty hours and had done so for some time. He was then discharged. It was the Complainant's admitted possession and use of marijuana, rather than his conviction record, which caused his discharge. The Complainant was discharged only after the Respondent's investigation disclosed that he had been using marijuana for a number of years. Even if the discharge was considered to have been "because of" the Complainant's conviction record, the offense was substantially related to the job, considering the nature of the Complainant's duties as a guard at a nuclear power plant. ***McClellan v. Burns Int'l Security*** (LIRC, 03/31/88).

If an employer discharges an employee because it concludes from its own investigation and questioning of the employee that the employee had committed an offense, the employer does not discriminate because of an arrest record within the meaning of the Wisconsin Fair Employment Act. In this case, the Respondent learned of certain conduct the Complainant had been involved

in (stealing a vehicle and stealing a flag) through information provided to it by a co-worker of the Complainant who had also been involved. The Respondent learned more about the incident by questioning the Complainant himself, who admitted to the conduct. It also eventually came to learn through the Complainant that he had been arrested and charged in connection with the incident. The Complainant was not discharged because of the arrest, but was discharged only because the Respondent believed on the basis of what it learned from the admissions of the involved co-employee and the Complainant himself during its investigation, that the Complainant had engaged in acts of theft which the Respondent equated with dishonesty. ***Himmel v. Copps Corp.*** (LIRC, 10/29/86).

To discharge an employee because of information indicating that the employee has been questioned by a law enforcement or military authority is to rely on an assertion by another person or entity. If the employer discharges an employee because the employer concludes from its own investigation and questioning of the employee that he has committed an offense, the employer does not rely on information indicating that the employee has been questioned, and therefore does not rely on an arrest record. In this case, the Complainant was a police trainee. The Complainant's brother-in-law was arrested for speeding, eluding a police officer, and racing. In response to a question by an officer, the Complainant said that he supposed he was the person with whom his brother-in-law was racing. The police chief told the Complainant that if he did not agree to resign he would be fired immediately. The Complainant was subsequently charged with racing, and was found not guilty. The Complainant's discharge was not discrimination. ***City of Onalaska v. LIRC***, 120 Wis. 2d 363, 354 N.W.2d 223 (Ct. App. 1984).

An employe was not terminated on the basis of his "arrest" where his employer discharged him because he brought a concealed weapon to work, not because he was arrested at work based on the employer's call to police. ***Buller v. University of Wisconsin*** (Wis. Personnel Comm., 10/14/82).