LEGAL MINUTE

Arrest and Conviction Record Discrimination Applies to More than Just Crimes!

How many times have I warned about making employment decisions based on an employee's contact with law enforcement? I may sound like a broken record, but I discuss this topic a lot because compliance with Wisconsin's prohibition against arrest and conviction record discrimination is often not obvious or intuitive.

In Wisconsin, "arrest and conviction record" is a protected characteristic subject to antidiscrimination laws, just like other characteristics such as race, gender, disability, etc. One of the many ways in which this law can confuse employers is that it does not just apply to situations where an employee has been arrested by law enforcement or convicted of a crime. It can apply to any contact the employee has with law enforcement-even just being questioned by a police officer.

Recently, the Supreme Court of Wisconsin reaffirmed just how broad the prohibition against arrest and conviction record discrimination is. In *Oconomowoc Area School District v. Cota*, the Court confirmed that the definition of "arrest record" in the Wisconsin Fair Employment Act includes non-criminal offenses like municipal citations. The case arose when the School District suspected that two employees were stealing money from the District. The District's internal investigation was inconclusive, so the District referred the matter to law enforcement. After investigating the matter, law enforcement determined that the employees did, in fact, steal from their employer and issued the employees non-criminal citations for municipal theft. The District terminated the employees the next day because, well, they had stolen from the District.

The Supreme Court of Wisconsin concluded that the District violated the WFEA's prohibition against arrest record discrimination because the District relied on the outcome of law enforcement action to base its employment decision, rather than on its own internal investigation.

It's never a bad idea to consult with an attorney prior to making a termination decision. However, I strongly recommend consulting with legal counsel each and every time you are considering an employment decision concerning an employee who has had contact with law enforcement.



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