

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 1, 2004**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0324  
STATE OF WISCONSIN**

**Cir. Ct. No. 02CV000703**

**IN COURT OF APPEALS  
DISTRICT IV**

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**RICK JACKSON,**

**PETITIONER-APPELLANT,**

**v.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND  
TRANSPORT AMERICA,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Rock County:  
DANIEL T. DILLON, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Rick Jackson, pro se, appeals the circuit court's order affirming a decision of the Labor and Industry Review Commission (LIRC). The issue is whether LIRC properly concluded that Transport America, a trucking

company, had not unlawfully discriminated against Jackson when it refused to hire him because he is a convicted felon.<sup>1</sup> We affirm.

¶2 The Wisconsin Fair Employment Act (WFEA) prohibits an employer from discriminating against a potential employee by refusing to hire him or her based on a criminal conviction record unless the circumstances of the conviction “substantially relate to the circumstances of the particular job.” *See* WIS. STAT. §§ 111.322 and 111.335(1)(c)1 (2001-02).<sup>2</sup> Where, as here, an agency is responsible for administering a statute and has a long history of applying and interpreting the statute, we accord the agency’s legal interpretation of the statute great weight. *See Knight v. LIRC*, 220 Wis. 2d 137, 146-50, 582 N.W.2d 448 (Ct. App. 1998). We will affirm the agency’s findings of fact if they are supported by substantial evidence in the record. *Id.* at 149. “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (citation omitted).

¶3 We begin by discussing what this case is *not* about. This case is not about whether Transport America refused to hire Jackson because he had a criminal record. There is no dispute that Transport America refused to hire Jackson for that reason. The issue is whether Transport America *was permitted under the law* to refuse to hire Jackson because he had a criminal record. It could refuse to hire Jackson if the circumstances of Jackson’s convictions “substantially

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<sup>1</sup> On appeal, we review LIRC’s decision, not the circuit court’s decision. *See Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981).

<sup>2</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

relate[d] to the circumstances of the particular job [for which he applied].” WIS. STAT. § 111.335(1)(c)1.

¶4 LIRC adopted as its own the following findings of fact made by the hearing examiner. Transport America employs truck drivers that are assigned to drive throughout the continental United States and Canada. Transport America employs a very limited number of regional drivers, but those jobs are filled by seniority and are not available to truck drivers who are newly hired. Transport America drivers carry consumer merchandise that is valuable and that can be sold on the “street.” The drivers often unload the trucks alone and are sometimes alone at customer facilities outside of regular business hours.

¶5 Conceding that he is not allowed to drive in Canada because of his convictions, which include armed robbery and theft, Jackson contends that substantial evidence does not support LIRC’s findings that: (1) drivers must drive in Canada; (2) regional driving positions, which do not require driving in Canada, are not filled by new drivers; and (3) there are no new positions available at the service center that would not require driving. After reviewing the transcript of the hearing, we reject Jackson’s claim. The extensive testimony of both George Schoonover and Tamara Warn supported these factual findings.

¶6 We turn next to LIRC’s legal conclusion that Jackson’s convictions substantially relate to the position for which he applied. We accord this legal conclusion great weight and, under this standard, we easily uphold it. The offenses showed Jackson has an inclination to act in a manner that is not compatible with working for Transport America. He is unable to work in Canada and not trustworthy enough to haul valuable freight, especially due to the fact that

the freight can easily be sold on the street. Therefore, his convictions are substantially related to the position for which he applied.

¶7 As a final note, we ordered supplemental briefing on whether it was appropriate to apply the substantial relationship test after the fact. After reviewing the supplemental briefs, we conclude it is appropriate to employ the test after the fact because the substantial relationship test is an objective one which does not turn on the employer's subjective intent. Our conclusion is based on the analysis provided in prior well-reasoned decisions of LIRC, which point out that supreme court cases addressing the WFEA have employed an objective after-the-fact inquiry to determine the substantial relationship issue. *See, e.g., Gibson v. Transportation Comm'n*, 106 Wis. 2d 22, 315 N.W. 2d 346 (1982).<sup>3</sup>

*By the Court.*—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

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<sup>3</sup> We do not address whether Transport America's written policy, which provides for a blanket prohibition against hiring felons, violates the WFEA because Jackson did not raise that issue before LIRC.

