

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 4, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-2690**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**WAL-MART STORES, INC.,**

**PETITIONER-APPELLANT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION  
AND PAULA HERDAHL,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County:  
RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Wal-Mart Stores, Inc., appeals an order affirming a decision of the Labor and Industry Review Commission (LIRC). That decision requires Wal-Mart to reinstate and pay back wages to Paula Herdahl, a former

employee, who was suspended and then terminated for a drug-related arrest and subsequent conviction.

Wal-Mart first contends that the evidence shows that it suspended Herdahl and then fired her based on her conduct and not on the arrest and conviction. Wal-Mart unequivocally stipulated to the contrary on the record at the administrative hearing, and that resolves this issue. *See Schmidt v. Schmidt*, 40 Wis.2d 649, 653-54, 162 N.W.2d 618, 621 (1968).<sup>1</sup> Wal-Mart next argues that the LIRC erred by concluding that the circumstances of the arrest and conviction were not reasonably related to the circumstances of Herdahl's employment. Finally, Wal-Mart claims that it lawfully suspended Herdahl even if the subsequent firing was unlawful. We reject the latter two arguments and affirm the order.

In December 1992, the State arrested and charged Herdahl with three felony drug charges related to the seizure of 1000 grams of marijuana on her property. In May 1994, Wal-Mart hired Herdahl after she passed a drug screening test. She was not asked and did not volunteer that any criminal charges were pending against her. She was assigned as a "stocker" which involves opening boxes with a small knife and putting items on shelves, under relatively little supervision or monitoring, in a one million square foot distribution center.

In September 1994, Wal-Mart learned of the still pending charges and suspended Herdahl. In December 1994, she pled guilty to misdemeanor possession of marijuana. Several weeks later, Wal-Mart fired her retroactive to the date of her suspension.

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<sup>1</sup> Moreover, Wal-Mart raises the issue for the first time on appeal and therefore has waived it. *State v. Rogers*, 196 Wis.2d 817, 826, 539 N.W.2d 897, 900 (Ct. App. 1995).

Sections 111.321 and 111.322, STATS., prohibit employment discrimination based on an arrest or conviction record. Exceptions are allowed if the circumstances of a charge or a conviction “substantially relate to the circumstances of the particular job or licensed activity.” Sections 111.335(1)(b) and (c)1, STATS. Herdahl filed a discrimination claim with the Department of Workforce Development citing these provisions. At the evidentiary hearing on the complaint, as we have noted, Wal-Mart stipulated that the arrest and conviction prompted the firing. The administrative law judge found no violation of §§ 111.321 and 111.322, however, concluding that the arrest and conviction were substantially related to Herdahl’s job circumstances.

On Herdahl’s petition for administrative review, the LIRC concluded otherwise and ordered Herdahl reinstated with back wages. The LIRC concluded that the circumstances of Herdahl’s arrest demonstrated a “propensity to unlawfully use, distribute and sell drugs,” and that her conviction demonstrated a “tendency to possess illegal drugs and, presumably, to engage in unlawful drug use.” However, the LIRC did not find a relationship between Herdahl’s arrest and conviction and the circumstances of her job with Wal-Mart. The LIRC first noted that safety was not an issue because Herdahl did not work with dangerous tools or at dangerous tasks. Although she sometimes worked in proximity to dangerous conditions,

the mere fact that an employe works somewhere in the vicinity of potentially dangerous equipment or machinery is insufficient to warrant a finding that a drug-related arrest or conviction record is substantially related to the circumstances of the job, absent other evidence establishing an actual safety risk. To find otherwise would be to conclude that individuals with drug-related arrests or conviction records can be legally barred from employment in virtually any industry, warehouse, or agricultural setting, ... where there are employes who work with potentially dangerous equipment.

Second, the LIRC found no evidence that Herdahl had any substantial opportunity to distribute or use drugs in the workplace. In fact, given Wal-Mart's continuing drug testing of employees, its daily security checks of Herdahl and her co-workers, and her highly regimented and structured workday, the LIRC concluded that she had "an unusually limited opportunity" to distribute or use drugs. The LIRC cited its prior decisions that "a particular and significant opportunity for such criminal behavior" must be present to establish a substantial relationship. In conclusion, the LIRC stated:

In addition to ... the lack of safety concerns, drug testing requirements, presence of security measures, and the regimented nature of the job—this is a job which does not afford any access to prescription drugs or medication and which, overall, appears to present no particular opportunity for repeat criminal behavior. Given these circumstances, the respondent's decision to suspend the complainant's employment and to ultimately discharge her as a result of her criminal arrest and conviction record was without legal justification and, thus, a violation of the Act.

We review the LIRC's decision, not that of the circuit court. *Barnes v. DNR*, 178 Wis.2d 290, 302, 506 N.W.2d 155, 160 (Ct. App. 1993), *aff'd*, 184 Wis.2d 645, 516 N.W.2d 730 (1994). Wal-Mart does not dispute the LIRC's findings of fact, but instead challenges its application of the substantial relationship test to those facts. It argues that the LIRC's application of the test is not entitled to any deference and should be reviewed *de novo*, as an issue of first impression. However, if any deference is to be accorded the LIRC's conclusion, Wal-Mart contends that the LIRC's application of the test was unreasonable and contrary to legislative intent.

We first examine whether the LIRC's application of the substantial relationship test is entitled to deference from this court. Depending on the circumstances, we may grant great-weight deference, due-weight deference or no

deference to an agency's interpretation of a statute. *UFE Inc. v. LIRC*, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996). We grant great-weight deference where (1) the agency is charged by the legislature with the duty of administering the statute; (2) the agency's interpretation is long-standing; (3) the agency relies on its expertise or specialized knowledge for its interpretation; and (4) the agency's interpretation will provide uniformity and consistency in applying the statute. *Id.* Under great-weight deference, we affirm an agency's determination if it is reasonable even if we believe a more reasonable interpretation is available. *Id.* at 287, 548 N.W.2d at 62.

Applying the four-part test set forth in *UFE*, we conclude that the LIRC's interpretation of the substantial relationship test is entitled to great-weight deference. The LIRC is charged by the legislature with administering the fair employment statutes by conducting reviews of agency determinations on discrimination claims. Section 111.39(5), STATS. It has interpreted the statutes in question, and applied the substantial relationship test, on numerous occasions since 1982, a period we deem to constitute "long-standing." Additionally, the LIRC applies its expertise and specialized knowledge when making a "substantial relationship" determination. Finally, deferring to its interpretation will provide for uniformity and consistency in applying the substantial relationship test. We thus conduct our review in this case by according the LIRC's determination great-weight deference.

We conclude that the LIRC's interpretation is reasonable and consistent with legislative intent. LIRC's analysis focuses on safety issues, and on Herdahl's lack of opportunity to use or distribute drugs in the workplace. There is no evidence that Herdahl had used or distributed drugs since Wal-Mart hired her. These are reasonable factors to consider and result in a reasoned and reasonable

decision. As the LIRC notes, a contrary decision would preclude large numbers of individuals with criminal records from whole categories of employment. Avoiding that result is within the legislative intent of the Fair Employment Act.

Finally, Wal-Mart argues that if it must reinstate Herdahl, it should not have to pay her wages for the period of her suspension which preceded her firing. This argument merely repeats the challenge to the LIRC's determination that there was no substantial relationship between Herdahl's 1992 arrest and her subsequent employment with Wal-Mart. We have concluded above that the LIRC's decision on this issue was reasonable, and we need not address it further. Wal-Mart is not entitled to relief from the back pay order.

We close by addressing the public policy argument advanced by Wal-Mart. In asserting that this case presents a matter of first impression and that Herdahl's arrest and conviction bears a substantial relationship to her employment circumstances, Wal-Mart emphasizes that it has adopted a "zero-tolerance" drug-free policy for its employees, both on and off the job. Wal-Mart characterizes the LIRC's decision, and by extension, our decision to affirm, as requiring it to employ drug-using individuals. Neither the LIRC's decision nor ours imposes such a requirement.

There is nothing in the present record suggesting that Herdahl was a "drug-using employee" during the term of her employment by Wal-Mart. And, there is nothing in the LIRC's decision, nor in this opinion, which suggests that an employer may not take appropriate action against an employee who is discovered to have violated an employer's policies regarding drug use during the term of his or her employment. The decision we affirm holds only that an arrest or conviction

for past drug use or distribution cannot form the basis for suspending or terminating an employee unless the substantial relationship test is met.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

