

Potential Unlawful Conduct + Employment Decisions: Wisconsin Court Redefines Arrest Record Discrimination

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Takeaways

- The Wisconsin Supreme Court's *Cota* decision clarifies that even employees' non-criminal, municipal citations are "arrest records" covered by the state employment law's prohibition on arrest record discrimination.
- The decision means that violations of the law can occur even where the arrest record might play a small part in an employer's motivation.
- Employers should be cautious when considering an employee's arrest record or other potentially unlawful conduct.

Related links

- [Oconomowoc Area School District v. Cota, et al.](#) (opinion)
- [Municipal Violation Is Not 'Arrest Record' Covered by Wisconsin Fair Employment Act, Court Holds](#)

Article

The Wisconsin Supreme Court has clarified that non-criminal, municipal citations are covered by the prohibition on arrest record discrimination under the Wisconsin Fair Employment Act (WFEA). [Oconomowoc Area School District v. Cota, et al.](#), 2025 WI 11 (Apr. 10, 2025). The decision reversed a [2024 court of appeals opinion](#).

The court also narrowed the scope of an exception to the law that allows employers to make employment decisions based on independent investigations.

This decision is the latest in the ever-changing jurisprudence on the WFEA's prohibition against discrimination based on employees' arrest and conviction records.

Factual Background

The Oconomowoc Area School District previously employed the plaintiffs as members of its grounds crew. Another employee accused the plaintiffs of stealing from the District, and the District investigated the allegations internally. Its investigation led the District to believe the plaintiffs did indeed steal. Despite the District's initial belief, it turned the matter over to the Oconomowoc Police Department to continue the investigation instead of immediately firing the plaintiffs.

Law enforcement continued investigating and issued the plaintiffs citations for municipal theft, a non-criminal offense. In communications with the District, the assistant city attorney said he believed the plaintiffs were guilty and he could obtain convictions.

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The District terminated the plaintiffs' employment only after the city attorney's statements and based on its independent belief the plaintiffs stole, as well as the plaintiffs' municipal citations.

The plaintiffs filed a complaint against the District with the Wisconsin Department of Workforce Development, Equal Rights Division alleging their terminations constituted unlawful arrest record discrimination under the WFEA. An agency administrative law judge, the Labor and Industry Review Commission, and the county circuit court all agreed, finding the District violated the WFEA because the plaintiffs' municipal citations fell within the WFEA's definition of "arrest record." The Wisconsin Court of Appeals disagreed, reversing the prior decisions and finding the non-criminal, municipal citations were not an "arrest record" under the WFEA and employers were free to utilize such citations in making employment decisions. An appeal to the Wisconsin Supreme Court followed.

Wisconsin Supreme Court Decision

The Wisconsin Supreme Court reversed the court of appeals, finding that even non-criminal, municipal citations were an "arrest record" under the WFEA. The court found that the phrase "any ... other offense" in Wis. Stat. § 111.32(1) includes violations of both criminal and non-criminal laws.

The court then turned to whether the plaintiffs' terminations were based on their arrest records. The District argued the terminations were lawful under the "*Onalaska* defense" because the District's decision was based on its internal investigation in addition to the plaintiffs' arrest record. The District argued its belief that the plaintiffs were guilty after the internal investigation demonstrated its decision was not based on the plaintiffs' arrest records. The court's majority disagreed.

The court said that *Onalaska* holds "simply that an employer who does not rely on arrest-record information when making a discharge decision does not discriminate against an employee because of their arrest record." Because the court agreed with the Labor and Industry Review Commission's finding that the District did not act until *after* the law enforcement investigation and citations, the court found the District relied on the plaintiffs' arrest records and concluded the District violated the WFEA.

The court's holding means that arrest record discrimination can occur even when the arrest record played only a small part in an employer's motivation for its decision.

Implications

Employers should be mindful of the Wisconsin Supreme Court decision before making an employment decision based on an employee's potentially unlawful activity. Relying on a complete and thorough internal investigation to the extent possible in making an adverse employment decision will help minimize the risk of running afoul of the WFEA.

Based on the court's decision, employers should be cautious when considering an employee's arrest record or other potentially unlawful conduct. Employers should take action only after determining whether the offense substantially relates to the employee's employment and consulting with legal counsel.

Jackson Lewis attorneys are constantly monitoring developments of Wisconsin's arrest and conviction record discrimination laws. If you have any questions about this or any

other employment law, please contact a Jackson Lewis attorney to discuss.

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