



DEPARTMENT OF
**LEGAL AND
ADMINISTRATIVE
SERVICES**

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TO: Safety and Licensing Committee, Common Council

From: ACA Zak Buruin

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RE: Operator (Bartender) License Application of Tosheba Jackson

Tosheba Jackson has applied for an Operator (Bartender) license and is appealing the recommended denial of that application. Below is a summary of the relevant Chapter 125 eligibility requirements and an analysis of their application in this case.

Summary

Ms. Jackson's conviction record makes her statutorily ineligible for the Operator (Bartender) License sought and the application must be denied. Denial of this license application does not constitute unlawful employment discrimination. Because the conviction in question is for an "exempt" offense, there need be no written explanation of the substantial relationship between the circumstances of the offense and the licensed activity. Also because of the conviction being for an "exempt" offense, the applicant is not afforded the opportunity to demonstrate rehabilitation.

§125.04(5) Licensing Requirements

According to §125.04(5)(a)1, in order to be granted a license or permit under Wisconsin Statutes Chapter 125, the applicant may not have an arrest or conviction record. This prohibition is subject to the requirements of various statutes prohibiting certain types of employment discrimination, which will be discussed below. These statutes are §111.321, §111.322, §111.335 and §125.12 (1) (b).

§125.04(5)(b) states that "No license or permit related to alcohol beverages may, subject to §111.321, 111.322 and 111.335, be issued under this chapter to any person who has habitually been a law offender or has been convicted of a felony unless the person has been duly pardoned."

In summary, §125.04(5) prohibits the issuance of alcohol related licenses under chapter 125 to anybody with an arrest or conviction record, anybody with an unpardoned felony conviction, or

anybody “who has habitually been a law offender,” regardless of whether any arrests or convictions exist (see State ex rel. Smith v. City of Oak Creek, 139 Wis. 2d 788, 407 N.W.2d 901 (1987)), unless failing to grant that license would constitute prohibited discrimination.

Prohibited Discrimination

§111.321 – Prohibited Bases of Discrimination

Arrest or conviction (among other bases not relevant to consideration here) are not permitted to be used as a basis for employment discrimination by a licensing agency.

§111.322 – Discriminatory Actions Prohibited

§111.322(1) specifies that refusal to license any individual on any of the bases listed in §111.321, which includes arrest and conviction history. This is subject to exceptions set forth in §111.33 to §111.365, neither of which apply to the instant circumstances.

§111.335 – Arrest or Conviction Record; Exceptions and Special Cases

§111.335(3)(a)1 states that it is not employment discrimination because of a conviction record to refuse to license an individual where that person has been convicted of “any felony, misdemeanor, or other offense the circumstances of which substantially related to the circumstances of the particular job or licensed activity.” In evaluating the existence of a substantial relationship, it is the circumstances that provide the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the applicant that are the proper considerations. It is not relevant whether the applicant has the ability to perform the work to an employer’s standards. (See Milwaukee Cnty. v. Lab. & Indus. Rev. Comm’n, 139 Wis. 2d 805, 407 N.W.2d 908 (1987)).

Each offense must be evaluated under the above criteria for determination of whether or not it is substantially related to the activity for which a license is sought. Any arrest, conviction, or other offense which is substantially related to the licensed activity is to be considered in the licensing decision.

Exempt Offenses

“Exempt Offenses” are defined by §111.335(1m)(b). Exempt offenses are those specified in Chapter 940 or §948.02, 948.025, 948.03, 948.05, 948.051, 948.055, 948.06, 948.07, 948.075, 948.08, 948.085, or 948.095, or a violation of the law of another jurisdiction that would be a violation of one of the listed statutes if committed in Wisconsin.

§111.335(4)(c)2 indicates that the considerations of rehabilitation and the requirement to state the reasons for denial based upon §111.335(3)(a)1, including the substantial relationship, do not

apply to an “exempt offense.”¹ The allowance for demonstration of rehabilitation is only provided for by §111.335(4)(c)1.b, which does not apply to “exempt offenses.” Where a particular offense is considered “exempt,” its consideration stops at the existence of a “substantial relationship,” and does not progress to rehabilitation.

Chapter 940 offenses are crimes against life and bodily security. Homicide offenses, sexual offenses, various forms of battery and other more general violent offenses are contained within Chapter 940. Any offense in Chapter 940 is considered “exempt.” Chapter 948 addresses crimes against children. While only specified offenses within this chapter are considered “exempt,” the specified offenses are sexual offenses committed against children. While it is true that a licensing agency is statutorily much more restricted in how it may consider “exempt offenses,” those restrictions are reserved for a limited class of criminal offenses.

Applicability to Tosheba Jackson

Ms. Jackson was convicted of Battery [Modifiers: Domestic Abuse] (a class A misdemeanor), contrary to Wisconsin Statutes §940.19(1) and §968.075(1)(a) in Outagamie County case 2022CM000259. The date of violation for this offense was on or about April 10, 2022. The date of conviction was March 4, 2024.

According to the Criminal Complaint in the matter, the charge and conviction arise from an incident occurring at a bar in downtown Appleton. It involved at least two separate physical altercations. There was dispute about the origins of the first altercation, but the final altercation was documented by traffic camera. According to the complaint, the video shows Ms. Jackson rush at and attack “JH” outside of the bar right as “JH” was exiting the bar, initiating a physical altercation that involved numerous people. The result of this altercation was that “JH” had her head pushed into a vehicle windshield and was then thrown down against the bumper of another vehicle by a bouncer of the bar that may or may not have been on duty at the time. That bouncer is also the father of Ms. Jackson’s child.

As it is contained in Chapter 940 of the Wisconsin Statutes, Battery is an “exempt” offense according to §111.335(1m)(b). Therefore, there is no need to state in writing the reasons for denial or how the circumstances relate to the licensed activity. Nor does the requirement to permit applicants to show evidence of rehabilitation and fitness apply.

It is not relevant whether Ms. Jackson has the ability to perform the licensed activity to an employer’s standard. The circumstances affording the opportunity for criminal behavior, the reaction to responsibility, and / or the character traits of the applicant that are properly considered when determining whether the conviction is substantially related to the licensed

¹ It is the advice of Legal Services that a substantial relationship must still exist between the circumstances of the offense and licensed activity, even though the licensing agency is statutorily relieved from documenting its nature in writing.

activity.

Further, it should be noted that denial of the license applied for does not prohibit the applicant from working as a bartender. It merely prevents her from doing so without the supervision of someone who is licensed.

Conclusion

Ms. Jackson has an arrest and conviction record that renders her ineligible for the license applied for under Wisconsin Statutes §125.04(5)(a)1. For the reasons set forth above, denial on the basis of this record does not constitute unlawful employment discrimination. As the conviction is for an “exempt offense,” the opportunity to provide evidence of rehabilitation and fitness is not afforded. Ms. Jackson is therefore statutorily ineligible for the license applied for and it must be denied.