Wisconsin Civil Trial Journal

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SPECIAL EMPLOYMENT LAW ISSUE

The Status of Remote Work as a Reasonable Accommodation in Wisconsin After the COVID-19 Pandemic
Mary E. Nelson and Agatha K. Raynor

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Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

Journal Policy

WDC Members and other readers are encouraged to submit articles for possible publication in the Civil Trial Journal, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4210, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.

President's Message: New and Exciting Initiatives

by: Andrew B. Hebl, President, Wisconsin Defense Counsel

As I write this, my last message for the Journal as WDC President, I am filled with a sense of optimism for our organization. We have managed to come through this historically challenging year with membership engagement at an all-time high by following through with our strategic plan to revitalize our committee structure and to develop new initiatives to generate sustainable membership growth. You are now going to start seeing these initiatives pay dividends.

As we head into the fall and winter conferences, expect to start seeing law students from UW and Marquette in attendance. Our newly-formed law school committee, chaired by Grace Kulkoski and Monte Weiss, has already had outreach to both law schools, and we have received very enthusiastic feedback from them to coordinate our increased engagement with prospective attorneys. In addition, our Past President Ariella Schreiber has committed to reaching out to the Young Lawyers Section of the State Bar, and so we expect to see growth in our ranks from newly-admitted attorneys who might not otherwise have considered a defense practice.

We have also received a very enthusiastic response to the rollout of our Diversity, Equity, and Inclusion initiative, both from within the organization and through law school outreach. We remain committed to fostering an organization that is open and inclusive to all prospective members across the cultural spectrum of our society. Only in doing so can we ensure that a civil litigation defense practice remains viewed as not just a viable, but highly valuable, career option for all, and one WDC is uniquely positioned to support.

At our upcoming annual conference in the Wisconsin Dells—which I am pleased to say will be in-person for the first time since the WDC Winter Conference of 2019—our Membership Committee Chair Sandy Hupfer and our Employment Law Committee Chair Liz Rowicki, both from Secura, have worked with our Program Chair Monte Weiss to put together a brilliant program that offers an employment law focus for the first time. With the growth of employment practices liability insurance (EPLI) over the past several years, more and more employment lawyers find themselves doing what is effectively insurance defense work. Likewise, more and more insurance defense lawyers find themselves practicing employment law alongside their conventional practice. We view this as an opportunity to attract new members and to provide resources to our existing members as the nature of defense practice grows and evolves.

As we try to broaden our reach across different types of practices, we are also cognizant of your desire for programming that focuses on litigation skills training. We understand that you consider this to be the most valuable training that our programming can provide for both newer and experienced attorneys. At this year's Winter Conference, expect to see programming that will heavily focus on litigation skills in order to satisfy that demand, while also getting you the end-of-year ethics credits that you count on from us.

As I wrap up my time as President, I want to express my gratitude to the Board of Directors for their high level of engagement. Our Board is committed and energized about WDC and ensuring that it grows and

flourishes as an organization. I am looking forward to welcoming our incoming President, Chris Bandt, into his role. You will be in great hands. I also want to thank our committee chairs for their great work, and our journal editor, Vincent Scipior, who has done a brilliant job with the Wisconsin Civil Trial Journal. Most importantly, however, I want to thank you, our members, for sticking with WDC so well through a very unique and challenging year.

Author Biography:

Andrew Hebl is a partner in Boardman & Clark's Litigation Practice Group. He also chairs the firm's Technology Committee. Andrew's trial and appellate practice focuses on the representation of insurance companies and their insureds. The cases primarily involve personal injury, property damage, and professional malpractice. Andrew also frequently represents insurance companies in insurance coverage disputes and extra-contractual litigation (bad faith). Finally, Andrew regularly defends municipalities in a wide variety of matters, including major civil rights lawsuits. Andrew is admitted to practice before all Wisconsin state and federal trial and appellate courts and listed in the Best Lawyers in America. He is rated AV-Preeminent by Martindale-Hubbell.

Employment Law: A Foreword

by: Elizabeth Rowicki, SECURA Insurance

This issue of the Wisconsin Civil Trial Journal is dedicated to providing an overview of employment law topics and trends. Whether you are new to employment law or an experienced employment practitioner, this issue will serve as a valuable resource and update. We will guide you through important employment laws, provide insight into best practices for the workplace, and explain the complaint and investigative processes.

Recent current events, particularly the outbreak of COVID-19, created new workplace complications. It is believed that employers have not yet experienced the entirety of the predicted pandemic ramifications. This issue will explore emerging challenges facing employers in the era of COVID-19, including remote working accommodations and vaccination mandates.

The articles in this issue were authored by Members of the Wisconsin Defense Counsel's Employment Law Committee and colleagues from their firms. As the Chair of the Employment Law Committee, I thank the authors for their hard work in preparing the articles and the Journal's editor for his work in finalizing the articles for publication. I hope all who read this issue find the content helpful for understanding a practice area that is so important to our organization – Employment Law.

2021 Advocate of the Year: Sheila M. Sullivan

Congratulations to Sheila M. Sullivan for being selected by the WDC Board of Directors as the 2021 Advocate of the Year! The Advocate of the Year Award recognizes the member with the most defense work success of the prior calendar year.

Sheila is a shareholder at Bell, Moore & Richter, S.C. She earned a J.D. from the University of Wisconsin Law School, an M.A. in Russian and East European Studies from George Washington University, and a B.S. in Languages and Linguistics, *magna cum laude*, from Georgetown University. Sheila is admitted to practice in the United States Supreme Court, the U.S. Court of Appeals for the Seventh Circuit, and all Wisconsin state and federal courts. Sheila practices civil litigation with primary focus on insurance defense, civil rights defense, and appellate litigation. She also handles a large number of subrogation claims for insurance company clients. Sheila has an "AV-Preeminent" rating by Martindale-Hubbell, has been voted by her peers as a "Superlawyer" from 2013 to 2021, and received a "Women in the Law" award from the Wisconsin Law Journal in 2013.

Sheila is a very talented writer. She routinely drafts motions and briefs at the trial court level on issues of statutory interpretation, insurance policy construction and complex procedural questions relating to liability and insurance coverage issues that are important to our membership. She has also written hundreds of appellate briefs in both state and federal court, including in the Court of Appeals for the Seventh Circuit. Sheila's writing talent is unparalleled. Her writing style is clean and concise. She avoids inflammatory or flowery language. She makes her points succinctly and clearly, and is an excellent advocate.

In addition to her motion and brief writing responsibilities, Sheila took over the lead authorship and editing responsibilities of Anderson on Wisconsin Insurance Law (formerly Wisconsin Insurance Law) after Arnold Anderson passed away. Undertaking this responsibility was no small feat. Anderson on Wisconsin Insurance Law is an insurance treatise published by the State Bar of Wisconsin that is considered the 'bible' of insurance law. Sheila updates the book with new case law in our field that is very helpful for WDC members. Her chapters and updates are cited routinely by insurance defense practitioners in briefs—on both sides of the Bar—as well as by judges.

Sheila is known for providing excellent service and guidance to clients in Wisconsin and across the country. She is the go-to person on coverage questions by clients and defense counsel around the state. She is also sought out by insurers nationally for Wisconsin coverage opinions, often in complex and unprecedented matters such as bad faith issues. Sheila knows insurance coverage like the back of her hand and is always willing to give her thoughts on a particular scenario.

Sheila is an inspiration to other women in the field of insurance law. She mentors younger attorneys regularly. Her door is always open and she is never stingy with her knowledge and experience. She has also raised four children while working full time, including adopting her two younger children from Mongolia, along with her husband Frank Sullivan

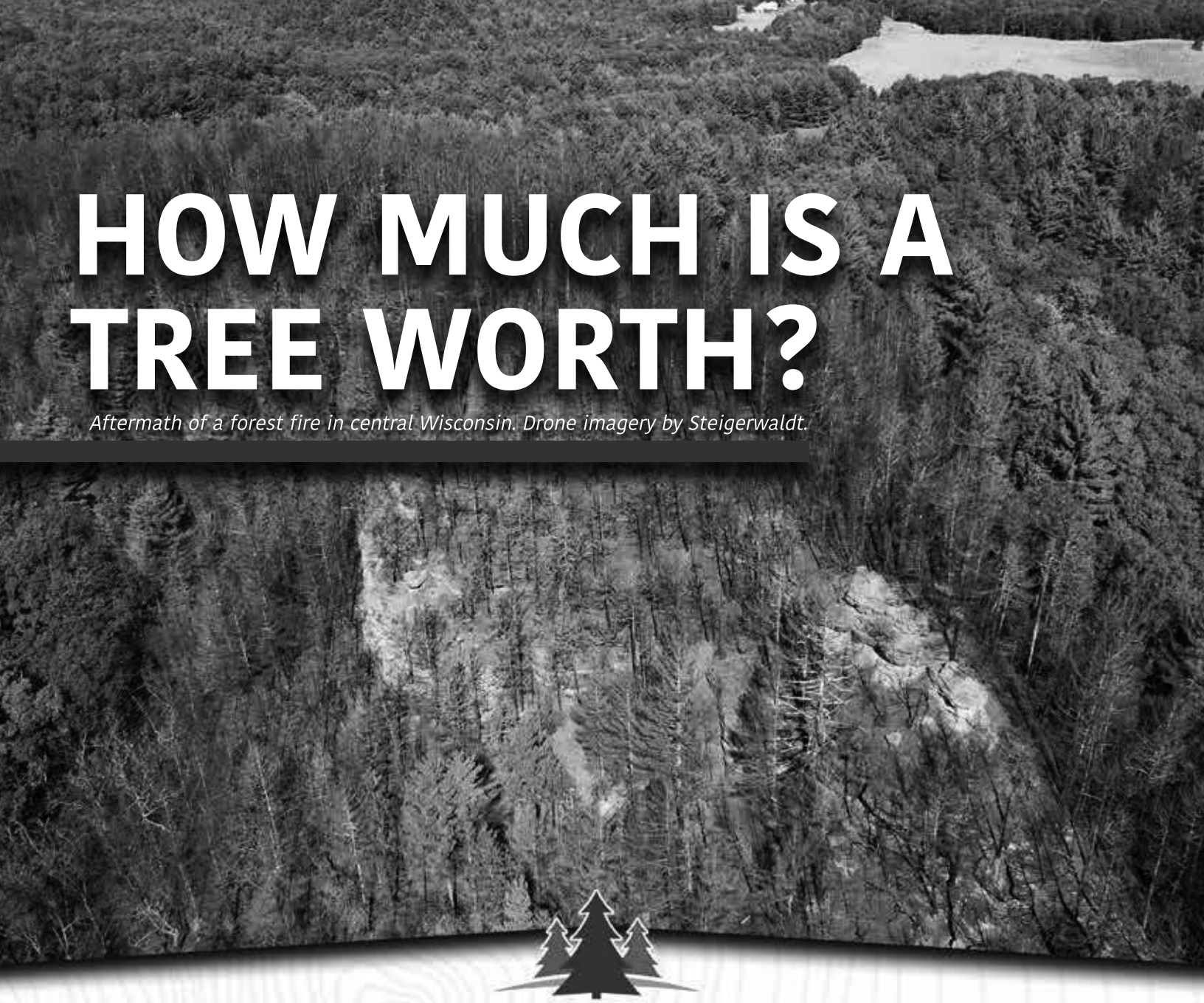
(who is an attorney with the Wisconsin Department of Justice).

Sheila is an outstanding attorney in our practice area. She is smart, hardworking, decent, kind, and amazingly competent. She is a very worthy recipient of the WDC 2021 Advocate of the Year Award!

Nominated By: Patricia Epstein Putney, Ann C. Emmerich, Ward I. Richter, Bell, Moore & Richter, S.C.; Eileen I. Dorfman, Cap Specialty Inc.; Francis X. Sullivan, Wisconsin Department of Justice; and Laura M. Lyons, Secura Insurance.

HOW MUCH IS A TREE WORTH?

Aftermath of a forest fire in central Wisconsin. Drone imagery by Steigerwaldt.



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2021 Distinguished Professional Service Award: Heather L. Nelson

Congratulations to Heather L. Nelson for being selected by the WDC Board of Directors as the recipient of the 2021 Distinguished Professional Service Award! The Distinguished Professional Service Award recognizes a longtime member who has given consistent effort to grow and improve WDC. Heather has been a member of WDC for many years. She is an active member of the Board of Directors and is the incoming Executive Committee Program Chair. Heather has presented CLE topics at WDC conferences (including the North Central Trial Academy), has authored articles for the Wisconsin Civil Trial Journal, is the Chair of the Women in the Law Committee, and runs the annual WDC clothing drive. Thank you Heather for everything you do for the WDC!

Heather is a Shareholder at The Everson Law Firm in Green Bay. She is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back to her Green Bay roots. Her practice areas include motor vehicle accidents, premises liability, wrongful death, and products liability.

Nominated By: Andrew B. Hebl, Boardman & Clark LLP

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2021 Publication Award: Michael J. Wirth and Abigail T. Hodgdon

Congratulations to Michael J. Wirth and Abigail T. Hodgdon for being selected by the WDC Journal Editor and Board of Directors as the recipients of the 2021 Publication Award! The Publication Award recognizes a well-written cutting edge article written for the Wisconsin Civil Trial Journal. Michael and Abigail receive the award for their article, "Breach of Contract, Bad Faith, and the Impact of *Dahmen* and *Brethorst*," which appeared in the winter 2020 issue of the Journal.

Michael is a member of Borgelt, Powell, Peterson & Frauen, S.C. He obtained his J.D. from the Marquette University Law School in 1999, an M.A. from Northern Illinois University, and a B.A. from the University of Wisconsin – Milwaukee. Michael is admitted to practice in all Wisconsin state courts, the U.S. District Court for the Eastern District of Wisconsin, and the U.S. District Court for the Western District of Wisconsin. His practice focuses on bad-faith-claim counseling and litigation, first-party property insurance issues, general negligence litigation, insurance coverage analysis and litigation, non-litigation and pre-suit claim analysis, and property insurance.

Abigail is a 2020 graduate of the Marquette University Law School. She is formerly an associate at Borgelt, Powell, Peterson & Frauen, S.C.

Legislative Update: Wisconsin Enacts COVID Liability Reform and Creates New Worker's Compensation Claim for Public Safety Officers

by: Adam Jordahl, The Hamilton Consulting Group, LLC

I. COVID Liability Protections Signed into Law

On February 25, 2021, Wisconsin Governor Tony Evers (D) signed 2021 Wisconsin Act 4, legislation including both COVID liability protections and reforms to the state's unemployment insurance (UI) system.[1] It cleared both houses of the Wisconsin Legislature in February with widespread support. In particular, Senate President Chris Kapenga (R-Delafield), Senate Majority Leader Devin LeMahieu (R-Oostburg), Assembly Speaker Robin Vos (R-Rochester), and Representative Mark Born (R-Beaver Dam) championed the liability protections in the Legislature.

Act 4 provides a broad civil liability exemption from COVID exposure claims for Wisconsin employers, governments, schools, and other entities as well as their employees, agents, and contractors. Now, entities cannot be held liable for ordinary negligence claims associated with a COVID infection; instead, to hold a defendant liable, the plaintiff needs to demonstrate that the infection was the result of an act or omission involving reckless or wanton conduct or intentional misconduct. The liability protections are retroactive to claims arising March 1, 2020, but not yet filed as of February 27, 2021 (the effective date of Act 4).

Act 4 is the result of a special session of the Legislature ordered by Governor Evers following his State of the State address in January.[2] Referencing the influx of unemployment claims that the state has received since March 2020, the governor claimed that an "antiquated system" and burdensome rules caused the resulting backlog of claims and long delays in processing times. The governor called on the Legislature to convene a special session to take up his proposed changes to the UI system.[3],[4] While the Legislature approved parts of the governor's proposal, it removed a $5.3 million appropriation for the project along with several other provisions and added the COVID liability protections.

II. Worker's Compensation Benefits Now Available to Public Safety Officers Diagnosed with PTSD

On April 27, 2021, Governor Evers signed 2021 Wisconsin Act 29 making various changes to Wisconsin's worker's compensation law, including creating a new type of claim for public safety officers diagnosed with job-related post-traumatic stress disorder (PTSD).[5] The bill originated in the Wisconsin Legislature as Senate Bill 11 and has also been referred to as the "Public Safety PTSD Coverage Act."[6]

The bill was authored by Senator André Jacque (R-De Pere), while a companion bill (Assembly Bill 17) was introduced by Representative Cody Horlacher (R-Mukwonago). It passed the Senate unanimously on February 11, 2021 and the Assembly concurred in the bill by voice vote on April 13, 2021. A similar bill was introduced in the 2019-20 legislative session but died when the Senate adjourned due to the emergence of COVID-19.

Act 29 provides that if a law enforcement officer or fire fighter is diagnosed with PTSD by a licensed psychiatrist or psychologist and the mental injury

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that resulted in that diagnosis is not accompanied by a physical injury, that person can bring a claim for worker's compensation benefits if the conditions of liability are proven by a preponderance of the evidence and the mental injury is not the result of a good-faith employment action by the person's employer.

The law limits liability for treatment for these claims to no more than 32 weeks after the injury is first reported. A public safety officer cannot receive compensation under this type of claim more than three times total in his or her lifetime, irrespective of any changes of employer or employment.

Under previous law, any injured employee claiming PTSD without an accompanying physical injury was required to demonstrate that a diagnosis was based on unusual stress greater than the day-to-day stress experienced by all employees.

Act 29 also includes the following provisions:

- Requires a health care provider to furnish to the representative or agent of a worker's compensation insurer a complete billing statement for treatment of an injury for which an employee claims compensation upon request.
- Provides that a client of an employee leasing company may agree to assume the worker's compensation liability for leased employees; if a client terminates or otherwise does not provide worker's compensation insurance for the leased employees, the leasing company remains liable for injuries to those employees.
- Clarifies that for worker's compensation claims the statute of limitations applies to an individual's employer, the employer's insurance company, and any other named party.
- Changes the administration of employer and insurer payments to the work injury supplemental benefit fund (WISBF) in cases of injury resulting in death and leaving no person dependent for support or leaving one or more persons partially dependent for support.

Author Biography:

Adam Jordahl is the Communications & Government Relations Manager for the Hamilton Consulting Group, a full-service government affairs firm based in Madison. On behalf of the firm and its clients, including Wisconsin Defense Counsel, he tracks legislation, rules, and news items; researches policy issues; develops communications and publications; and manages websites and social media accounts. Adam earned a B.A. in religious studies and sociology from Rice University in Houston, graduating cum laude with distinction for his senior thesis on internet memes and political messaging.

References

1 2021 Wisconsin Act 4, available at: https://docs.legis.wisconsin.gov/2021/related/acts/4.

2 2021 Wisconsin State of the State Address, available at: http://www.thewheelerreport.com/wheeler_docs/files/011221everssostext.pdf.

3 Wisconsin Executive Order #103, available at: https://content.govdelivery.com/attachments/WIGOV/2021/01/13/file_attachments/1648239/2021%20SOTS_EO103-SpecialSessionUI%20%28002%29.pdf.

4 LRB-1312, available at: https://www.wispolitics.com/wp-content/uploads/2021/01/210113Draft.pdf.

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Employment Discrimination Complaints: How to Avoid Them and How to Defend Them When They Arise

by: Jenna E. Rousseau, Strang, Patteson, Renning, Lewis & Lacy, S.C.

Employers are prohibited from discriminating against employees and job applicants based upon certain protected classifications under state and federal law. It is often time-consuming and expensive for employers to defend against discrimination complaints when they arise. Therefore, it is important for employers to implement certain policies and practices to avoid discrimination complaints. In addition, if an employer follows its policies and practices, it will likely be in a much better position to defend against a discrimination complaint. If an employer receives notice of a discrimination complaint, it is important for it to weigh its options, such as participating in mediation, engaging in private settlement discussions, or defending against the complaint.

The Wisconsin Fair Employment Act (WFEA)[1] applies to public and private employers with at least one employee. The WFEA prohibits discrimination against an individual in employment-related actions on the basis of his or her age, race, creed, color, disability, marital status, sex, sexual orientation, pregnancy or child birth, national origin, ancestry, arrest record, conviction record, military service, genetic testing, honesty testing, use or nonuse of lawful products off the employer's premises during nonworking hours, and declining to attend a meeting or to participate in any communication about religious matters or political matters. The WFEA also prohibits harassment based upon one's protected classification(s), as well as retaliation against an employee for filing a complaint, assisting with a complaint, or opposing discrimination. The Wisconsin Equal Rights Division enforces the WFEA.

There are also various federal laws that prohibit employment discrimination and retaliation. For instance, Title VII of the Civil Rights Act of 1964[2] (Title VII) prohibits discrimination in employment actions on the basis of one's race, color, religion, national origin, or sex. The Pregnancy Discrimination Act of 1978[3] added pregnancy, child birth, and medical conditions related thereto to Title VII as prohibited bases of discrimination. In addition, the Age Discrimination in Employment Act of 1967[4] (ADEA) prohibits discrimination in employment actions on the basis of one's age for individuals who are 40 or older. Moreover, Title I of the Americans with Disabilities Act of 1990,[5] as amended, prohibits employment discrimination against qualified individuals with disabilities. The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws.

An employee or job applicant may initially file a discrimination complaint (or charge of discrimination) with the ERD or the EEOC within 300 days after the alleged discrimination occurred. Pursuant to a work-sharing agreement between the two agencies, if the allegation(s) fall under both state and federal anti-discrimination laws, the agency that initially receives the complaint will cross-file it with the other agency. The agency that initially receives the complaint will usually process it first.

The process for filing a discrimination complaint (or charge of discrimination) differs depending on which agency the complainant wishes to file with initially. If filing initially with the ERD, the complainant must generally use the form provided

by the ERD. The complainant must include his or her name and address, the employer's name and address, his or her signature or representative's signature, and a "concise statement of the facts, including pertinent dates, constituting the alleged act of employment discrimination."[6] The ERD must provide assistance to the complainant in preparing and filing the complaint, if requested.[7] This process differs from the EEOC filing process, which generally commences with the complainant submitting an inquiry to the EEOC, followed by an interview. The EEOC staff member who conducts the interview then prepares a charge of discrimination for the complainant to review and sign. Once filed, the agency that initially receives the complaint or charge must notify the employer.

An employer has several options to respond to a complaint or charge of discrimination. The notice containing a copy of the complaint will direct the employer to respond to the allegations by a specific date, typically within 30 days, though it may be possible to seek a short extension. The response usually takes the form of a position statement. Alternatively, the notice from the agency containing the complaint or charge of discrimination usually offers the parties the option of participating in early mediation.

Early mediation may be a good option for a number of reasons. For instance, if an employer does not wish to spend a considerable amount of time and money to defend against a discrimination complaint, regardless of the strength or weakness of the allegations, it may wish to participate in early mediation. In addition, if there is a risk of significant liability, the employer may wish to attempt early resolution to reduce its exposure. Conversely, the allegations may be so deficient that an employer can settle early on for a minimal amount. An employer also has the option of engaging in direct settlement negotiations with the complainant, but this will not stay the timeline to submit a position statement, and there can be risks associated with negotiating directly with a complainant.

If the parties do not participate in early mediation, the agency will conduct an investigation regarding the complaint or charge of discrimination. In this regard, the agency assigns an investigator to the matter. The first step is usually for the employer to submit its position statement in response to the complaint or charge of discrimination. In the position statement, it is important for employers to raise any timeliness defenses, and also to explain why the complainant failed to (and cannot) state a claim of discrimination or retaliation. The position statement is usually structured with a statement of facts section, applicable law section, and argument section. In addition, the employer should attach any relevant exhibits that rebut the complainant's allegations. After submission of the position statement, the investigator usually provides the complainant with an opportunity to reply, and may ask the employer to provide responses to specific questions or requests for information. The investigator may also conduct interviews and obtain statements, with or without the employer's knowledge.

In general, a position statement should focus on why the employee failed to set forth a *prima facie* case of discrimination or retaliation. Under Wisconsin law, to establish a *prima facie* case of discrimination on the basis of disparate treatment, a complainant must generally show that "he was a member of the protected group and suffered the adverse action alleged, and that the relevant circumstances create an inference of discrimination, *i.e.*, typically, that others not in the protected group were treated more favorably."[8] If the complainant meets his or her burden, the employer then has the burden to produce evidence of its legitimate, non-discriminatory reason(s) for the employment action at issue.[9] If the employer meets its burden, the employee must then show that the employer's reasons are merely a "pretext" for discrimination.[10]

Similarly, under federal law, an employee asserting a disparate treatment claim under Title VII through indirect evidence may prove his or her claims using the "*McDonnell Douglas* framework."[11] Under this framework, which is meant to be flexible,

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an employee may establish a *prima facie* case of discrimination by "'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under' Title VII."[12] Thereafter, if the employee meets this burden, the employer must articulate its legitimate, non-discriminatory reasons for the employment action.[13] The employee must then show that the employer's reasons are "pretextual."[14]

There are different elements that an employee must show for retaliation claims under Wisconsin law. Under the direct method of proof, the employee must show that he or she "engaged in protected activity, was subject to adverse employment decisions, and that there was a causal connection between the two facts."[15] By contrast, under the indirect method of proof, the employee must show that he or she: "(1) engaged in statutorily protected activity; (2) met the employer's legitimate expectations; (3) suffered an adverse employment action; and (4) was treated less favorably than a similarly situated employee who did not engage in statutorily protected activity."[16] The United States Court of Appeals for the Seventh Circuit applies the same standards for retaliation claims under Title VII.[17]

Against this backdrop, employers with policies and procedures in place to avoid discrimination complaints in the first instance will likely have a much stronger defense to discrimination complaints when they arise.

For instance, employers should have a non-discrimination policy, including a procedure for employees to report allegations of discrimination or harassment. If an employee never reported discrimination or harassment under the employer's policy, and the employer was not otherwise aware of the allegations, these facts may strengthen its defense to a subsequent discrimination complaint. In addition, if an employer thoroughly investigated a report of discrimination or harassment and found no evidence to support it, these facts will likely strengthen its defense. Moreover, it may be the case that the employer finds evidence of discrimination or harassment following an investigation. If the employer takes immediate action to stop the discrimination or harassment and imposes discipline against the aggressor, this will likely strengthen its defense. Conversely, if an employer fails to follow its own policy or to otherwise address allegations of discrimination or harassment of which it has knowledge, it could result in liability.

Employers should also have procedures in place to properly document the reason(s) for any adverse employment action. For instance, it is important for employers to document employee performance-related issues, including the employers' attempts to counsel the employee regarding his or her work performance. This may consist of performance reviews, documentation of verbal counseling, documentation of meetings to address poor work performance and expectations, documentation of verbal or written warnings, documentation of suspensions, and performance improvement plans. Such documentation will serve as evidence of the employer's legitimate, non-discriminatory reason for imposing discipline, including termination of employment. Moreover, if an employer has a progressive discipline policy in place, it should ensure that it follows the policy, applies it uniformly, and documents reasons why it chose to impose certain levels of discipline.

Employers should be clear about their reasons for taking an adverse employment action. In this regard, employers should resist using vague reasons for terminating an employee's employment, such as "we've decided to go in a different direction," or "it's not a good fit." Similarly, if an employee requests information on why he or she was not chosen for a promotion, it is advisable to provide specific, objective reasons as opposed to a vague response that another candidate "was a better fit." If an employer provides a vague reason for its adverse employment action or inconsistent reasons, it will be in a much weaker position to defend against a discrimination complaint. Indeed, if an employer provides inconsistent reasons for its decision, an employee may argue that it serves as evidence of pretext.

Employers should also have procedures in place to ensure that they impose comparable discipline for employees who are similarly situated. In this regard, if an employer can produce evidence of employees who engaged in similar conduct and received similar discipline, such evidence tends to contradict allegations of discrimination or retaliation, particularly if the comparable employee is outside of the protected class at issue. Conversely, if an employer imposes different levels of discipline for employees who are similarly situated, it must be able to explain its legitimate, non-discriminatory reasons for doing so.

It could also be the case that the purported comparator is not similarly situated, in which case the employer should be prepared to explain why. For instance, the comparator may not be similarly situated to the complainant if the complainant's conduct is more severe than the comparator's conduct, the complainant has a history of work performance issues and the comparator does not, or the comparator's position is entirely different from the complainant's position. Under state and federal law, the analysis "calls for a 'flexible, common-sense' examination of all relevant factors,"[18] and "[a] similarly situated employee need not be identical to the employee in every conceivable way."[19] Thus, when determining an appropriate level of discipline to impose, the employer should take a broad view of other potential comparators.

In making hiring and promotional decisions, employers should document the objective and subjective considerations that they relied upon. For instance, the job announcement, position description, minimum qualifications, and exam scores may serve as evidence of the objective criteria that the employer relied upon in making its hiring or promotional decision. Interview notes and reference check documentation may serve as evidence of the non-discriminatory, subjective criteria that the employer relied upon. This documentation will be relevant in an investigation and subsequent hearing, if any.

After the employer submits its position statement and the investigator concludes his or her investigation, the investigator will issue a determination. An investigator for the ERD will issue an initial determination of whether probable cause exists to believe that the employer engaged in employment discrimination.[20] If the investigator issues a determination of probable cause, the case will be assigned to an Administrative Law Judge for a hearing on the merits.[21] Conversely, if the investigator issues a determination of no probable cause, the case will be dismissed, subject to the complainant's right to appeal the initial determination within 30 days.[22] If a complainant appeals a no probable cause determination, the ERD will assign an Administrative Law Judge to conduct a hearing on the issue. Notably, the investigator can also issue a decision finding probable cause in part and no probable cause in part. This can lead to two separate hearings, one on the issue of probable cause, and one on the merits, if the complainant appeals the no probable cause determination. There is an option to stipulate to a consolidated hearing on the merits, however.[23]

At a hearing on the issue of probable cause, the complainant has the burden of proof to establish a *prima facie* case of discrimination or retaliation. This burden of proof is "low" and is "somewhere between a preponderance and a 'suspicion' that discrimination has occurred."[24] If the complainant meets his or her burden, such as through witness testimony and exhibits, the burden then shifts to the employer, as set forth above. Although the complainant's burden at a probable cause hearing is lower than at a merits hearing, a probable cause hearing can be helpful to put closure to a case that has no merit, to narrow the issues between the parties in cases involving in part determinations, or to use the process as a discovery tool. If the Administrative Law Judge finds no probable cause after such a hearing, the allegations are dismissed, subject to the complainant's right to file a petition for review with the Labor and Industry Review Commission (LIRC).

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If the Administrative Law Judge finds probable cause after a hearing, or if the investigator issues an initial determination of probable cause, the ERD will certify the case to a merits hearing. Thereafter, the case will be scheduled for hearing before an Administrative Law Judge. After a case is certified to hearing, whether on the issue of probable cause or on the merits, the parties may commence discovery. The methods and scope of discovery are similar to other civil cases, but different rules apply to *pro se* parties. At the hearing, the parties may present witnesses and exhibits to prove their respective cases. After the hearing, the Administrative Law Judge may allow written briefing from the parties. The Administrative Law Judge will then issue a decision. If the Administrative Law Judge finds that an employer engaged in unlawful discrimination or retaliation, the Administrative Law Judge "shall order such action by the respondent as shall effectuate the purposes of the act."[25] Any party may appeal a final decision of the Administrative Law Judge to the LIRC.

The EEOC's determination process differs from the ERD determination process. Specifically, if the EEOC is unable to conclude that there is reasonable cause to believe that discrimination occurred, it will issue a Dismissal and Notice of Rights. This notice triggers the 90-day timeframe for the complainant to file suit in federal court based on claims under federal law. Conversely, if the EEOC finds reasonable cause to believe that discrimination occurred, it will issue a Letter of Determination and attempt to resolve the charge through a voluntary process called conciliation. If the case is not resolved through conciliation, the EEOC may sue in federal court or issue a Notice of Right to Sue to the complainant, thereby triggering the 90-day period for the complainant to file suit in federal court. Notably, it is also possible for a complainant to request a Notice of Right to Sue after 180 days have passed since the filing of a charge.

The agency that did not initially investigate the discrimination complaint or charge will usually adopt the findings of the investigating agency unless the complainant requests an additional investigation by the second agency. Accordingly, it is conceivable that an employer may need to respond to two separate investigations involving the same allegations.

The process to defend against discrimination complaints can be time-consuming and costly for employers. There are also intangible costs to an employer, such as a negative impact on employee morale. Accordingly, it is important for employers to have policies and procedures in place to avoid discrimination complaints on the front end. If an employer receives notice of a discrimination complaint or charge of discrimination, it must carefully evaluate its options. It is also important for an employer to re-evaluate its options as the case progresses.

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The Status of Remote Work as a Reasonable Accommodation in Wisconsin After the COVID-19 Pandemic

by: Mary E. Nelson and Agatha K. Raynor, Crivello Carlson, S.C.

As employers move beyond the pandemic and reopen offices, questions linger as to whether employers will require employees to return to in-person work and, when they do, whether continued remote work may be a required reasonable accommodation for those employees who have a qualifying disability under the Americans with Disabilities Act (ADA) or the Wisconsin Fair Employment Act (WFEA).

Although the COVID-19 pandemic brought with it many new challenges and uncertainty for employers, the basic legal tenets of evaluating a disability claim under the ADA and WFEA did not and have not changed. However, because the reasonable accommodation inquiry involves a fact-specific analysis, as emergency health orders are lifted, and as the status/severity of the pandemic continues to hopefully improve, the reasonable accommodation analysis also necessarily changes because it must be made in the context of present circumstances. Thus, an accommodation that may have been considered reasonable during the height of the pandemic may no longer be considered reasonable. Regardless, employers must use caution and must continue, at all times, to undertake the full and proper analysis, which includes the following:

1. Is the employee an individual with a disability under the ADA and/or WFEA?
2. Can the employee perform the essential functions of the job, with or without accommodation?
3. Is the accommodation reasonable or does it create an undue hardship?

This article addresses each of these steps, focusing on traditional well-established legal principles as applied to the circumstances of the COVID-19 pandemic.

I. Disability

As a threshold matter, the first question to be addressed is whether the particular medical condition (or mix of conditions) qualifies as a disability. The ADA defines a disability as a "physical or mental impairment that substantially limits one or more major life activities."[1] An individual is considered disabled under the ADA if the person (1) has an actual impairment "that substantially limits one or more major life activities;" (2) has a "a record of such impairment;" or (3) is "regarded as having such an impairment."[2] Similarly, the WFEA defines an "individual with a disability" as a person who (1) has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (2) has a record of such an impairment; or (3) is perceived as having such an impairment.[3]

Whether the medical condition, such as COVID-19 and/or post-COVID symptoms, rises to the level of "disability" under the ADA depends on whether the condition(s) substantially limits a major life activity, such as breathing, speaking, walking, *etc*.[4]

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This question involves a very fact-intensive inquiry which may require medical information regarding how the specific condition(s) affects the particular individual employee. The EEOC confirmed that during the pandemic employers could still engage in the interactive process and request information from an employee about why an accommodation is needed.[5] In its COVID guidance, the EEOC stated that "if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation."[6] The EEOC confirmed that this inquiry may include questions regarding: "(1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the 'essential functions' of his [or her] position (that is, the fundamental job duties)."[7]

Although there is limited precedent addressing the issue of "disability" during the COVID-19 pandemic, courts that have addressed the issue have recognized that the inquiry continues to involve a fact-specific analysis and that the existence of the pandemic and its related dangers must become *part of* that fact-specific inquiry. For example, in July 2020, a Louisiana district court held that the 98-year-old plaintiff, who suffered from significant, inoperable, aortic valve disease and systolic heart failure and had a permanent pacemaker which substantially limited the operation of his cardiovascular system, was disabled under the ADA.[8] The court noted that its holding resulted, "in substantial part, from the existence of the COVID-19 pandemic in our nation, and the existence of [plaintiff's] obvious comorbidities," confirming that the "application of these laws to these facts must be based upon a factual analysis that considers the totality of [plaintiff's] *health* circumstances in conjunction with one's *social* circumstances":[9]

> Call it a totality of the circumstances evaluation. The determination of a qualifying disability in this case cannot be looked at in a vacuum. . . . [E]ven counsel for the [defendant] conceded that the advent of the pandemic has turned virtually everything we do on its head. . . . In sum, consideration of [plaintiff's] documented serious underlying medical situation, *in light of the pandemic's existence*, is the proper way to make the disability determination here.[10]

The court expressly limited relief to the time period covered by the Louisiana Governor's COVID-19 emergency orders.[11]

A Massachusetts federal court came to a similar conclusion in a case involving a plaintiff who suffered from "moderate asthma," noting that the plaintiff "is likely to prevail on their contention that their asthma is a disability, *at least during the COVID-19 pandemic*."[12] Thus, if other courts follow this line of thinking, employees who may have been considered "disabled" under the ADA at the height of the pandemic may no longer be considered disabled as the status of the pandemic improves.

Another potential issue is whether an employee can be considered disabled based on the fact that an employee *had* COVID-19 and may therefore suffer long-term or future impairments/effects. Although not a case involving COVID, in *EEOC v. STME, LLC*,[13] the Eleventh Circuit stated that the possibility that an employee might, in the future, contract the Ebola virus was not enough to show an impairment under the ADA because "even construing the statute broadly, the terms of the ADA protect persons who experience discrimination because of a current, past, or perceived disability – not because of a potential future disability that a healthy person may experience later."[14]

II. Reasonable Accommodation

Once a disability has been established, the next question is whether the employee can perform the essential functions of the job with or without

a reasonable accommodation. Pursuant to the WFEA, a reasonable accommodation "is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."[15] "The employer has an obligation to engage in an 'interactive process' aimed at determining the precise job-related limitations imposed by a disability and how those limitations could be overcome with a reasonable accommodation."[16] "[T]he failure to engage in an interactive process does not, on its own, constitute a violation of the law."[17]

There is no requirement, however, to provide a reasonable accommodation when the disability is only perceived. "That is because, where it is not established that there was a disability, or limitations, or performance difficulties stemming from such limitations, any such analysis would be entirely artificial and speculative."[18]

The ADA describes potential reasonable accommodations to include (1) making the current workplace "readily accessible to and usable by individuals with disabilities;" (2) "job restructuring;" (3) modified work hours; (4) "reassignment to a vacant position;" (5) purchase or modification of equipment; (6) "modification of examinations, training materials or policies;" (7) providing readers or interpreters; and (8) "other similar accommodations for individuals with disabilities."[19]

Under the ADA, remote work may qualify as a reasonable accommodation in some, but not all circumstances since many jobs cannot successfully be performed from home. This, however, must always involve a fact-specific analysis of present circumstances. In a 1995 decision addressing remote work as a potential reasonable accommodation, the Seventh Circuit confirmed that an "employer is not required to allow disabled workers to work at home, where their productivity inevitably would be greatly reduced."[20] In *Vande Zande v. State of Wisconsin Department of Administration*,[21] the court acknowledged that many jobs cannot be performed from home, particularly where supervision and/or collaboration are required:

> Most jobs in organizations public or private involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance.[22]

The Seventh Circuit noted that "[t]his will no doubt change as communications technology advances."[23] Twenty-four years later, the Seventh Circuit repeated this acknowledgement when it held that "[t]echnological development and the expansion of telecommuting . . . since *Vande Zande* likely mean that such an accommodation is not quite as extraordinary as it was then. That inquiry is context-specific; a work-from-home arrangement might be reasonable for a software engineer but not for a construction worker."[24] Thus, even with advances in technology, courts have acknowledged that some jobs simply "often require face-to-face collaboration."[25] Accordingly, each situation must be evaluated on an individual basis. "Litigants (and courts) in ADA cases would do well to assess what's reasonable under the statute under current technological capabilities, not what was possible years ago."[26]

Although COVID-19 was certainly a new and unknown condition, the EEOC, throughout the pandemic, has confirmed that basic ADA principles concerning the interactive review process apply to the accommodation process during the pandemic and post-pandemic. On May 28, 2021, the EEOC reaffirmed application of the basic principles in its "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,"[27] and specifically answered questions regarding remote work as a reasonable accommodation. According to the EEOC, remote work may, but does not necessarily, qualify as a reasonable accommodation under the ADA:

D.9. Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship? *(4/17/20)*

Yes. An employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." As described in the two questions that follow, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.

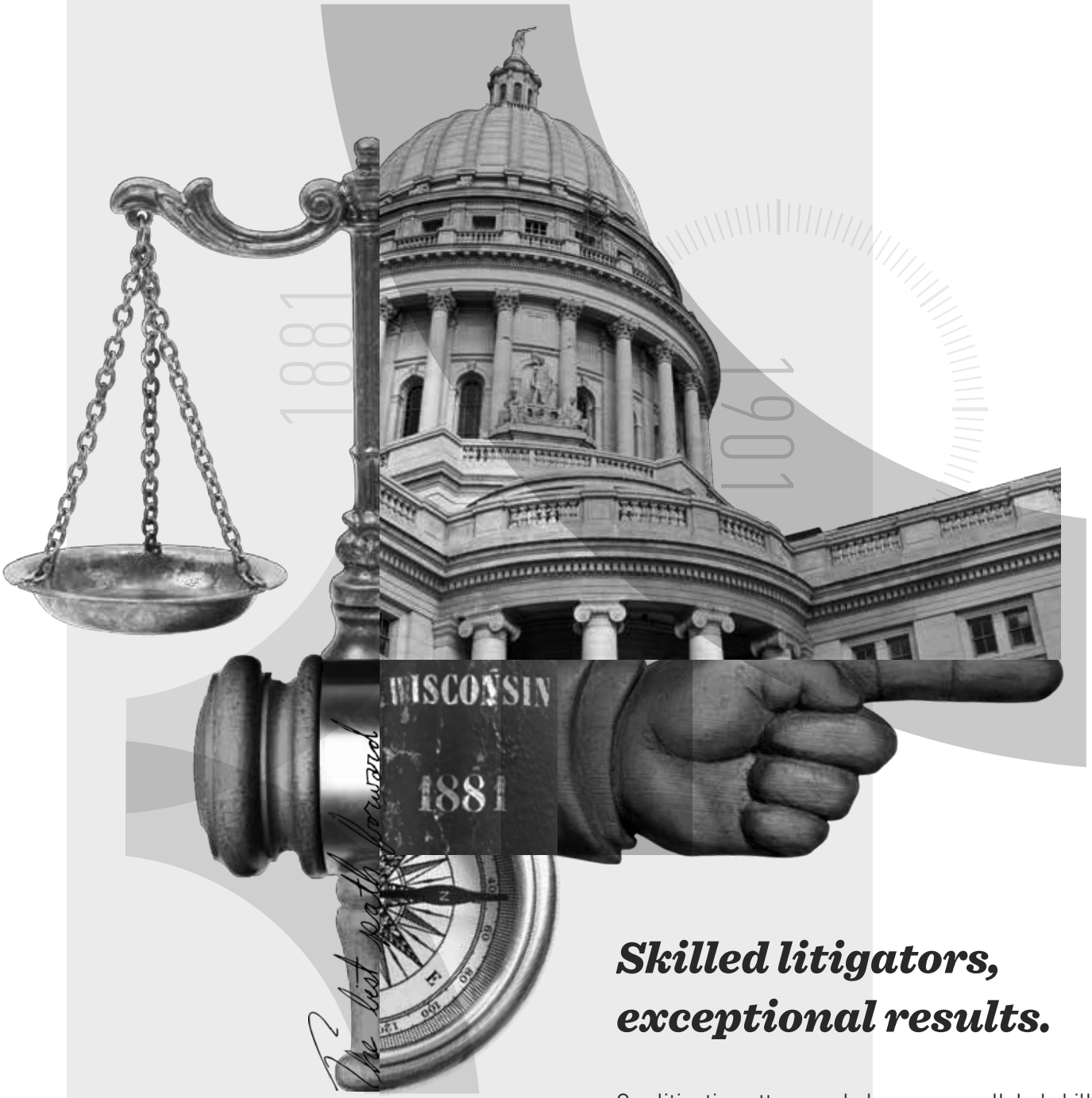
D.15. Assume that an employer grants telework to employees for the purpose of slowing or stopping the spread of COVID-19. When an employer reopens the workplace and recalls employees to the worksite, does the employer automatically have to grant telework as a reasonable accommodation to every employee with a disability who requests to continue this arrangement as an ADA/Rehabilitation Act accommodation? *(9/8/20; adapted from 3/27/20 Webinar Question 21)*

No. Any time an employee requests a reasonable accommodation, the employer is entitled to understand the disability-related limitation that necessitates an accommodation. If there is no disability-related limitation that requires teleworking, then the employer does not have to provide telework as an accommodation. Or, if there is a disability-related limitation but the employer can effectively address the need with another form of reasonable accommodation at the workplace, then the employer can choose that alternative to telework.

To the extent that an employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request—after the workplace reopens—to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function. The ADA never requires an employer to eliminate an essential function as an accommodation for an individual with a disability.

The fact that an employer temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, or otherwise chose to permit telework, does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship. These are fact-specific determinations. The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules.

D.16. Assume that prior to the emergence of the COVID-19 pandemic, an employee with a disability had requested telework



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as a reasonable accommodation. The employee had shown a disability-related need for this accommodation, but the employer denied it because of concerns that the employee would not be able to perform the essential functions remotely. In the past, the employee therefore continued to come to the workplace. However, after the COVID-19 crisis has subsided and temporary telework ends, the employee renews her request for telework as a reasonable accommodation. Can the employer again refuse the request? *(9/8/20; adapted from 3/27/20 Webinar Question 22)*

Assuming all requirements for such a reasonable accommodation are satisfied, the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise.[28]

Even if an employee is allowed to work from home, the employer can still hold the employee to legitimate employment and performance expectations, including punctuality and attendance. In *Taylor-Novotny v. Health Alliance Medical Plans, Inc.*,[29] the employer allowed employees to work at home pursuant to an internal "Work at Home" policy. However, the court stated that allowing employees to work from home, in and of itself, "hardly establishes that punctuality and regular attendance are not essential functions of [a] position."[30] In that case, the internal policy expressly required employees to follow an agreed-upon work schedule, to be accessible during that schedule, to attend required meetings either by telephone or in person, and employees were evaluated on "Attendance and Punctuality."[31] Plaintiff submitted a note from her physician stating that she suffered from "very poor energy and stamina" and suggested a "flexible work schedule that would allow her to work efficiently when she is doing well but then allow rest periods when she is having a bad day."[32] The court confirmed that the ADA provides that "consideration shall be given to the employer's judgment as to what functions of a job are essential."[33] The employer considered it essential that employees be accessible at regular times to supervisors, staff, and customers, "regardless whether an employee was working from the [employer's] office or from home."[34] Accordingly, the court held that, based on the evidence in the record, it "cannot conclude that [plaintiff] could satisfy the essential function of regular attendance and, therefore, is not a qualified individual with a disability entitled to protection under the ADA."[35] Furthermore, the court noted that even if plaintiff was a "qualified individual with a disability" under the ADA, she would still be required to establish that she was meeting her employer's legitimate expectations.[36]

Moreover, if the business operation or demands change, an existing accommodation of remote work may no longer be considered reasonable under *present* circumstances if the essential job functions change. The court addressed this issue in *Bilinsky v. American Airlines, Inc.*[37] In *Bilinsky*, the employer accommodated the plaintiff's disability for years by allowing her to work from home. However, after a merger, the employer determined that the merger "fundamentally changed the position's nature and that consistent, physical presence on site became an essential function of the position" such that remote arrangements were insufficient to meet business demands.[38] Thus, in that case,

remote work was reasonable at one time, but duties of the position changed such that physical presence became an essential function of the job. Under this analysis, a remote work accommodation which was reasonable during the pandemic may no longer be considered reasonable, particularly if the employer excused or changed essential job functions during the pandemic. The EEOC has stated that "the fact that an employer temporarily excused performance of one or more essential functions" because of COVID-19 does not mean that the employer has permanently changed a job's essential functions.[39]

III. Undue Hardship

The final consideration is whether an undue hardship can be established such that the employer is not required to provide the reasonable accommodation, which could include allowing an employee to telework from home. According to the ADA, a "hardship" is defined as action "requiring significant difficulty or expense, when considered in light of the [following] factors:"

1. The "nature and cost" of the needed accommodation;
2. The "overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;"
3. The "overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities;" and
4. The "type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity."[40]

Similarly, the WFEA mandates that "if an accommodation is reasonable and can be provided by the employer without creating a hardship for its business, the Wisconsin Fair Employment Act contemplates that it do so."[41]

IV. Conclusion

In conclusion, the ADA and WFEA provide continuity to the disability accommodation evaluation. As the pandemic, and the cases of *Silver, Vande Zande, Taylor-Novotny* and *Bilinksy*, have shown us, there always needs to be a fact-specific interactive evaluation that is based on present circumstances. What may appear to be an extraordinary request today may be commonplace 24 years from now.[42]

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The History of Mandatory Vaccinations in the United States and the Ongoing Debate Concerning the COVID-19 Vaccination for Employers

by: Maria del Pizzo Sanders, von Briesen & Roper, S.C.

The Spanish flu pandemic of 1918, the deadliest in history, infected an estimated 500 million people worldwide—about one-third of the planet's population—and killed an estimated 20 million to 50 million victims, including some 675,000 Americans.[1] At the time, there were no effective drugs or vaccines to treat this flu strain. "Citizens were ordered to wear masks, schools, theaters and businesses were shuttered and bodies piled up in makeshift morgues before the virus ended."[2]

Fast forward 103 years and the world is once again recovering from a global pandemic caused by the COVID-19 virus. As of June 3, 2021, there have been 172,395,932 cases of the coronavirus and 3,705,381 deaths worldwide.[3] The crucial difference between the two pandemics is the widespread availability of a vaccine. At the present time, the United States Food and Drug Administration has authorized three COVID-19 vaccines for emergency use. The vaccines are: (1) Pfizer BioNTech COVID-19 Vaccine; (2) Moderna COVID-19 Vaccine; and (3) Janssen COVID-19 Vaccine (Johnson & Johnson). [4] While these vaccines have not yet been approved by the FDA, each one has received an emergency use authorization (EUA), which permits them to be distributed in the United States.[5]

While the vaccine has become readily available to those in the United States who choose to receive it, there has been much speculation and debate as to whether the administration of the vaccine can be considered mandatory and, if so, whether it should be. Even before the 1918 pandemic, both the state and federal government have been called upon to interpret and implement requirements related to mandatory vaccination policies. The first state law mandating vaccination was enacted in Massachusetts in 1809 and, in 1855, Massachusetts became the first state to enact a school vaccination requirement to prevent the spread of smallpox in schools.[6] The constitutional basis of vaccination requirements rests in the police power of the state.

In 1905, the Supreme Court issued its decision in *Jacobson v. Massachusetts*[7], upholding the right of states to compel vaccination. In *Jacobsen*, the Court held a health regulation requiring smallpox vaccination was a reasonable exercise of the state's police power that did not violate the liberty rights of individuals under the Fourteenth Amendment to the U.S. Constitution. The police power is the authority reserved to the states by the Constitution and embraces "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety."[8]

In *Jacobson*, the Commonwealth of Massachusetts enacted a statute that authorized local boards of health to require vaccinations. Jacobson challenged his conviction for refusal to be vaccinated against smallpox as required by regulations of the local Board of Health. While acknowledging the potential for vaccines to cause adverse events and the inability to determine whether a person can be safely vaccinated, the Court specifically rejected the idea of an exemption based on personal choice. To do otherwise "would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease" [9] The Court also noted the tension between personal freedom and public health

inherent in liberty: "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."[10]

Seventeen years later in 1922, the Supreme Court again addressed the constitutionality of vaccination requirements in *Zucht v. King*.[11] In *Zucht*, the Court denied a due process Fourteenth Amendment challenge to the constitutionality of city ordinances that excluded children from school attendance for failure to present a certificate of vaccination holding that "these ordinances confer not arbitrary power, but only that broad discretion required for the protection of the public health."[12]

By the 1980-81 school year, all 50 states had laws covering students first entering school.[13] As of the 1998-99 school year, all states but four (Louisiana, Michigan, South Carolina, and West Virginia) had requirements covering all grades from kindergarten through 12th grade.[14]

Despite such laws, people continue to assert their personal rights in response to mandatory vaccinations. For example, in response to a more recent measles epidemic in Maricopa County, Arizona, the Arizona Court of Appeals rejected an argument that an individual's right to education overrides the state's need to protect against the spread of infectious diseases. In *Maricopa County Health Department v. Harmon*[15], the court upheld an injunction issued by the Maricopa County Health Department excluding a group of children from Franklin Elementary School during the 1985-86 school year until March 18, 1986 unless they provided proof of immunization against measles.[16] Under the facts of the case, the court upheld the County Health Department's efforts to take action to combat the disease by excluding unvaccinated children from the school when there is "a reasonably perceived, but unconfirmed, risk for the spread of measles."[17]Although the court considered the student's right to an education under Arizona's constitution, the court upheld the use of the state's police power to ensure the public health of its citizens. The Maricopa County Court specifically noted that nothing in *Jacobson* required a state to prove the existence of epidemic conditions in order to compel certain vaccinations for the public health of its citizens.[18]

While case law exists upholding the constitutionality of mandatory vaccinations, the question currently under debate is whether states and/or private employers should *require* its citizens and/or employees to get one of the three available COVID-19 vaccinations as a condition of employment. Many reasons have been relied upon to justify a mandatory vaccination policy by certain employers. Those reasons include exposure to a vulnerable client population, protecting other employees, and removing the need for quarantining during a possible exposure. The concept of mandatory vaccinations by employers in certain sectors of employment is certainly not new. Private employers, especially those in sectors whose employees are at greater risk of contracting vaccine-preventable illness or who work with populations that are especially vulnerable if they do get ill (*i.e.* hospital employees, health care workers, employees of long-term care facilities and/or nursing homes) can and have implemented mandatory vaccine policies if there is a "reasonable basis" for it.[19] Such laws, which vary widely, generally contain opt-out provisions where a vaccine is medically contraindicated or if the vaccine is against the individual's religious or philosophical beliefs.[20]

Of course, any mandatory vaccination requirement imposed by employers must comply with federal and state employment laws, including but not necessarily limited to the Americans with Disabilities Act (ADA) (*e.g.* an employee with a disability may ask for an accommodation not to comply with the mandatory vaccination policy) and Title VII of the Civil Rights Act (*e.g.* if an employee is able to establish a sincerely-held religious belief that would prohibit an employee from taking the

vaccine and can explain what belief such a policy violates, tan employer may be required to grant an accommodation unless doing so creates an undue hardship).

In an effort to assist employers with the decision whether to mandate employees to obtain one of the COVID-19 vaccines as a condition of employment and, if so, how, the EEOC recently provided long-awaited guidance explaining how federal employment laws apply to vaccination policies, vaccination incentive programs, and confidential employee documentation relating to such policies and programs. Specifically, on May 28, 2021, the EEOC published updated and expanded technical assistance related to the COVID-19 pandemic, addressing questions arising under federal employment laws, and also posted a new resource for job applicants and employees, explaining how federal employment discrimination laws protect workers during a pandemic.[21]

First, regarding antidiscrimination and reasonable accommodation issues, the EEOC clarified that federal employment laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act.[22] For instance, if employers decide to implement a mandatory COVID-19 vaccination policy, they must comply with the "reasonable accommodation" provisions of the ADA, Title VII, and other employment considerations for those employees who are unable to receive the vaccine due to a disability or a sincerely-held religious belief.

Moreover, because some individuals or demographic groups may face greater challenges to receiving a COVID-19 vaccination, some employees may be more negatively impacted by a vaccination requirement than others. Due to these concerns, employers may be required to respond to allegations that a facially-neutral, non-discriminatory vaccination requirement constitutes a disparate impact on a protected group, such as minorities.[23] The guidance also notes it would be unlawful for employers to apply a mandatory COVID-19 vaccination policy to employees in a manner that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.[24] Furthermore, pursuant to Title VII, an employer must ensure that pregnant employees are not discriminated against compared to other employees similarly situated.[25] For instance, a pregnant employee may be entitled to some type of job modification, changes to work schedule or assignments, and/or long or short term leave to the extent any such modifications are offered to other employees.

On the issue of incentive programs, the EEOC clarified that federal employment laws do not prevent or limit employers from offering bonuses or other incentives to employees in order to encourage them to voluntarily get the vaccine from a third party not acting on the employer's behalf.[26] Moreover, the guidance clarified that those employers offering bonuses or incentives to their employees to get the vaccine and who provide their own on-site agents to administer the vaccine to their employees may do so as long as the bonus and/or incentive is not "coercive."[27] However, the guidance fails to define or provide examples of what could be considered coercive.

On the issue of employer rights to information versus the employee's right to keep such information confidential, the EEOC clarified that an employer can request employees to provide confirmation of their COVID-19 vaccination status.[28] However, if the employer chooses to do so, such information should be considered confidential pursuant to the ADA and kept separate from the employee's personnel files. Additionally, the EEOC noted that employers may provide employees and their family members with information that educates them about COVID-19 vaccines and raises awareness about the benefits of the vaccine, and also highlights federal government resources available to those individuals

seeking more information about how to get the COVID-19 vaccine.[29]

It must be remembered that, as specifically noted by the EEOC, the guidance applies only to federal employment laws, and therefore employers must consider whether other applicable state or local laws place additional restrictions on any such policy.[30] Also, the updated guidance does not address how any mandatory COVID-19 vaccination policy would apply to remote workers.

While the EEOC addressed vital legal considerations on whether and how employers can require their employees to be vaccinated, employers continue to struggle with addressing the question of whether they *should* implement a mandatory vaccination policy and, if so, whether they should offer some form of incentive to their employees to get the vaccine. If they do decide to make the vaccine mandatory, in addition to complying with all of the above requirements, employers must consider whether any such policy and its implementation will qualify the employee for workers' compensation benefits should the employee experience adverse reactions that require medical care and/or time off from work.

If a Wisconsin employer decides to mandate the vaccine for its employees, and an employee develops a reaction that requires medical care and time off work, it will likely be considered a compensable injury and the employee would be entitled to worker's compensation benefits. However, if the vaccine is entirely voluntary and uncompensated, it is more likely than not that it would not be considered a compensable injury. That is because, under Wisconsin worker's compensation law, an employee does not qualify for benefits if an injury is the result of uncompensated and voluntary participation in workplace wellness programs. Specifically, pursuant to Wis. Stat. 102.03(1)(c)(3), an employee is not performing services growing out of and incidental to employment while engaging in a program, event or activity designed to improve the physical well-being of the employee, whether or not the program, event or activity is located on the employer premises, if participation in the program, event or activity is voluntary and the employee receives no compensation for participation. Therefore, if receipt of the COVID-19 vaccine remains entirely voluntary and uncompensated, any injury resulting therefore would likely be excluded from coverage under the Act.[31]

If the employer does not mandate employees to get the vaccine, but offers it to its employees through an on-site clinic, any resulting injury will most likely be compensable because it is highly likely that the employee would be compensated for their participation in such an on-site clinic, as most employers would not require employees to discount their time if they participate in any such clinic.[32] Again, to avoid liability, the employer should be clear that participation by any employee in an on-site vaccination program is voluntary and not required, and that the employee is not compensated in any way while receiving the vaccine.[33]

While the advantages to employers for mandating vaccines for its employees may include getting employees safely back into the workplace quicker, provide peace of mind to both employers and employees alike that have been reluctant to return to work because of the fear of exposure (which may increase work morale and productivity), and reduce the chances of exposure to its customers, the disadvantages may actually outweigh the advantages. That is because such mandatory vaccination policies may lead to more employee complaints and allegations of discrimination for those not on board with any such policy and feel they are being forced to get a vaccine they would not otherwise choose to get.[34] It may also result in higher cost of medical care if the employee suffers some type of allergic reaction and requires medical care and time off for which they seek workers' compensation benefits, and may result in a decreased workforce if certain employees faced with a mandatory vaccination policy decide to voluntarily terminate their employment and seek alternate employment that does not require mandatory vaccinations.

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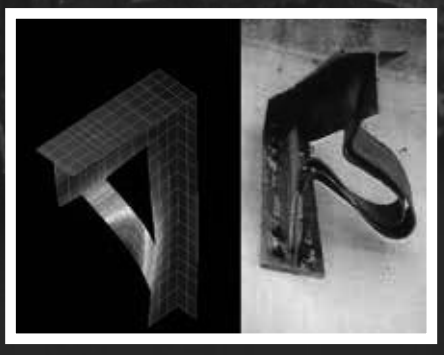

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The Rise of Hybrid Actions: How a Lawful Termination Can Morph into a Multi-Million Dollar Liability

by: Josh Johanningmeier and Maggie Cook, Godfrey & Kahn, S.C.

Imagine a scenario where an employer lawfully terminates an employee of three months for blatant and repeated violations of the company's attendance policy. The disgruntled (now former) employee discusses the circumstances surrounding his termination with a lawyer. Finding nothing unlawful about the termination, the lawyer asks the former employee about payroll practices, timekeeping, and bonuses at his old job. With some promising anecdotes, the lawyer then turns to the employee's wage statements and uncovers what appears to be a technical violation of federal and state wage and hour laws. If the technical violation seemingly results from a common policy or practice, the former employee can then file a complaint on behalf of all affected current and former employees, alleging violations of federal and state wage and hour laws on a collective and class action basis.

When collective and class action claims are brought in the same lawsuit, the case is commonly referred to as a "hybrid" action. Hybrid actions allow employees to pool their claims for prosecution and oftentimes result in a larger individual recovery for the former employee (who receives a service award on top of wage damages) and a significant fee award (frequently 1/3 of the total recovery) for the employee's lawyer. Consequently, hybrid actions are one of the most expensive lawsuits an employer can face. And, given the "gotcha" nature of many wage and hour laws, hybrid actions can come with little-to-no warning.

The number of new hybrid actions filed each year has steadily been on the rise, however, last year proved to be a bit of an anomaly. Although fewer hybrid actions were filed in 2020, a higher percentage of collective action claims achieved conditional certification and plaintiffs on the whole obtained larger recoveries. As the country emerges from the COVID-19 pandemic, there is reason to believe the number of hybrid actions will continue to increase and remain a source of significant financial exposure to employers of all sizes. By all accounts, hybrid actions are here to stay, making a basic comprehension of the procedural and substantive anatomy of hybrid actions necessary to help employers limit exposure and mitigate risk.

I. When Federal and State Wage and Hour Law Claims Collide

Eligible employees are afforded wage and hour protections under both federal and state law. The Fair Labor Standards Act of 1938 (FLSA), a federal labor law, establishes minimum wage, overtime pay, child labor, and record-keeping requirements affecting full- and part-time employees in the private sector and in federal, state, and local, governments.[1] State and local laws can vary by jurisdiction but often add another layer of complexity when they provide different or additional protections to employees that extend beyond the FLSA. Employers must be cognizant of these variations because they are required to comply with the laws providing the greatest protection to employees.

Despite the potential variation between federal and state requirements, the factual underpinnings of alleged wage and hour violations are often the same. This common fact pattern allows plaintiffs to assert, on a representative basis, both federal and state law claims in a single hybrid action. Plaintiff's lawyers are apt to contend that hybrid actions are superior for efficiency's sake. Not surprisingly, defendants and their counsel often hold a differing view—that hybrid actions simply serve to leverage larger settlements for a limited number of employees and a substantial fee award for their counsel.

Regardless of perspective, hybrid actions do allow for the simultaneous pursuit of federal and state law wage and hour claims in the same action. But the differing legal and procedural requirements of collective and class actions adds a level of complexity that can be confusing even for lawyers.

II. Collective and Class Actions are Subject to Distinct Legal and Procedural Requirements

The procedure for bringing a FLSA collective action is governed by 29 U.S.C. § 216(b), whereas the procedure for bringing a class action is governed by Rule 23 of the Federal Rules of Civil Procedure. A plaintiff must independently satisfy the legal and procedural requirements of both frameworks to successfully pursue a hybrid action on a representative basis.

The most significant difference between a class and collective action is the certification process and, more specifically, how individuals become bound by the outcome of the lawsuit. The FLSA requires individuals to affirmatively "opt-in" to a collective action by signing and filing a written consent to join with the presiding court. Conversely, Rule 23 class actions are subject to an "opt-out" procedure, where unwilling plaintiffs must provide written confirmation of their desire to not be included in the lawsuit. These decision points—whether to opt-in to a collective action or opt-out of a class action—arise at different times in a hybrid action and are dependent on the court granting conditional certification in a FLSA collective action and certification in a Rule 23 class action.

The majority of district courts evaluate the viability of a collective action using a two-step certification process. To implement the FLSA opt-in procedure, the named plaintiff must first move for conditional certification, which requires the plaintiff to demonstrate a "reasonable basis" for the court to conclude he or she is similarly situated to the other potential opt-in plaintiffs.[2] The burden is low because the plaintiff need only make "a modest factual showing" through declarations, deposition testimony, or other documents, that there is some "factual nexus between the plaintiff and the proposed class or a common policy that affects all the collective members."[3] Although the "modest factual showing" standard is lenient, it is not a "mere formality," because once the class is conditionally certified, notice is sent to other potential collective members, advising them of the lawsuit and providing them the opportunity to "opt-in" and become a party plaintiff. [4] Upon receiving notice of a collective action, an individual can either "opt-in" to be a member of the FLSA collective, or do nothing, in which case the individual will not be bound by any judicial determination affecting the collective.

Because conditional certification is granted without examining the actual merits of the collective action allegations, district courts have established a second step in the certification process, which provides the employer the opportunity to move to decertify the collective action and force the court to determine whether the plaintiffs who have opted in are, in fact, similarly situated.[5] In this phase, the court assesses whether continuing as a collective action provides efficient resolution in one proceeding of common issues of law and fact.[6] The downside for employers is that this second stage follows discovery, which is time-consuming and expensive. The upside is that a successful motion for decertification sounds the death knell for the collective action by prohibiting the plaintiff from pursuing FLSA wage and hour claims on a representative basis. Employers are more likely to defeat a collective action at the

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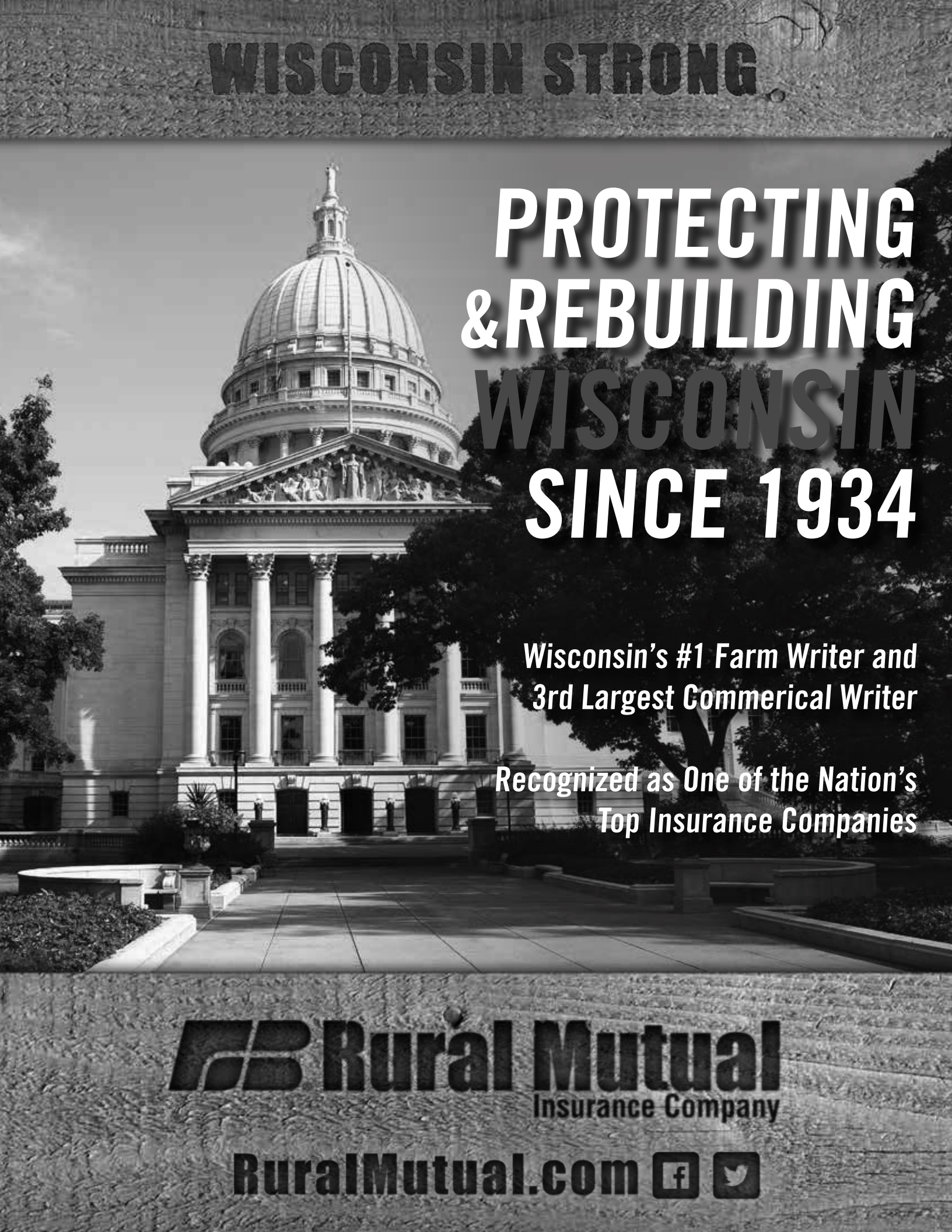
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decertification stage when discovery reveals that individualized issues predominate.

In comparison, Rule 23 class actions have a one-step certification process typically occurring after extensive discovery is completed. Class certification requires a judicial finding that (1) the putative class is "so numerous that joinder of all members is impracticable," (2) the class claims share common questions of law or fact, (3) "the claims or defenses of the representative parties are typical of the claims of defenses of the class," and (4) "the representative parties will fairly and adequately protect the interests of the class" members.[7] If each of these four elements are satisfied, certification will be granted so long as the putative class also meets one of the requirements of Rule 23(b). In hybrid actions, this is usually the predominance and superiority prong, which requires the court to find that common questions of law and fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[8] If, and only if, certification is granted, putative class members receive notice of the lawsuit and the opportunity to "opt-out" of the class action. Under the Rule 23 framework, putative class members are automatically included in the lawsuit with respect to the state law wage and hour claims. Upon receiving notice of the class action, an individual can do nothing and stay in the case or affirmatively opt-out and not be bound by the ultimate resolution of the state law claims.

Although hybrid actions combine the procedural framework for collective and class actions in one lawsuit, the Seventh Circuit recently issued a decision suggesting that the availability of the collective action mechanism may, in certain instances, preclude class certification.[9] In *Anderson v. Weinert Enterprises, Inc.*, a seasonal employee of a roofing company brought a hybrid action against his employer alleging violations of the FLSA and Wisconsin labor laws. His collective action failed to garner sufficient support, with only three other employees (only one of which was timely) filing the "opt-in" consent to join forms with the court.[10] He amended his complaint to convert the FLSA collective action into an individual claim (which later settled) and put his energy into his Wisconsin law class action claim.[11] The Eastern District of Wisconsin denied his motion for class certification on numerosity grounds, finding that the joinder of 37 employees in a single lawsuit would not be impracticable.[12] On appeal, the Seventh Circuit found no abuse of discretion and affirmed the district court's denial of class certification. While this ruling does not obliterate hybrid actions, it arguably opens the door for courts to deny class certification when a collective action is available.

III. Common Allegations in Hybrid Actions

Most hybrid actions involve misclassification or compensable time claims because the FLSA requires employers to pay non-exempt employees at least the minimum wage for all hours worked and overtime pay for all hours worked over 40 in a workweek. Worker misclassification claims focus on whether an employee is exempt from overtime wages or improperly classified as an independent contractor or volunteer. Common compensable time claims include allegations of unpaid wages, improper regular rate calculations, time-shaving, off-the-clock work, tip credit violations, and expense under-reimbursement. Regardless of the specific claims at issue, the following exemplars show how hybrid actions can turn low-dollar individual claims into substantial employer liability.

> ***Scenario 1: Making a Mountain Out of a Molehill.*** A brewery employs over 400 non-exempt hourly employees over three shifts and uses a time clock to track hours worked. The company follows the 7-minute rule, rounding its employees' clock in-and-out times to the nearest quarter hour. Although this practice follows Department of Labor guidance, the company gets hit with a hybrid action initiated by a former employee who worked for the company for just four months,

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alleging time-shaving claims under the FLSA and Wisconsin law. The company's 7-minute rounding rule is neutral on its face, but the former employee alleges that the practice almost always inures to the benefit of the employer and does not fully compensate employees for actual time worked. As an individual claim, the former employee's recovery would be *de minimis*, but aggregated across 400 employees over a 3-year statute of limitations with a liquidated damages multiplier, the employer's potential liability skyrockets.

Scenario 2: No Good Deed Goes Unpunished. A national retailer employs thousands of in-store customer service representatives, many of whom become hesitant to work during a global pandemic. To incentivize attendance, the retailer decides to pay employees an additional dollar per hour for all hours worked during the height of the pandemic. Many of these employees work overtime but the additional dollar per hour is not included in their regular rate calculation. As a result, employees are being shorted pennies on the dollar for all overtime hours worked. What can amount to pennies on one paycheck, however, can easily turn into big money on a class and collective basis. Employers often get tripped up by not including non-discretionary bonuses in their regular rate calculations for purposes of determining overtime pay.

Scenario 3: This Car Pays for Itself. A restaurant employs drivers to deliver food and beverage orders to customers within a defined geographic area. The drivers are non-exempt hourly employees and must use their own vehicles to make deliveries. In exchange, the restaurant reimburses the drivers 32 cents-per-mile as tracked by GPS on a restaurant-owned mapping device. A disgruntled delivery driver files a class and collective action against the restaurant claiming that the 32 cents-per-mile reimbursement fails to reasonably approximate drivers' vehicle expenses—expenses he has not tracked. The representative plaintiff seeks reimbursement at the IRS standard business mileage rate, contending that anything less amounts to an unlawful kickback from the drivers' wages. Even though the restaurant engaged a leading workforce management company to calculate a reasonable approximation of each drivers' per-mile vehicle expenses, taking into account the make, model, and year of each driver's vehicle, the restaurant ends up negotiating a settlement because the cost of defending the action will equal, if not surpass, the class's likely recovery.

These three scenarios, and countless others like them, make it easy to see the motivation for plaintiffs' lawyers to identify potential hybrid actions and to understand why they are here to stay.

IV. Hybrid Actions in a Post-COVID World

As if COVID-19 did not present enough unprecedented challenges to employers over the last year and a half, the emergence of employees from furloughs and remote work environments is all but certain to spawn a spike in hybrid actions. This is to be expected given the seemingly overnight closure of the country and transition to telework environments in industries that never contemplated the possibility. Remote work environments naturally give rise to additional "off-

the-clock" claims by nonexempt employees. Most employers with a predominantly onsite workforce pre-pandemic lacked the necessary infrastructure to track compensable time when employees began working from home. In addition, the act of setting up a remote work environment naturally lends itself to an increase in expense reimbursement claims.

The anticipated rise in hybrid actions will extend beyond the remote work environment, too. Throughout the pandemic, non-exempt essential healthcare employees were required to work extended shifts, potentially subjecting employers to additional unpaid overtime and off-the-clock claims. Likewise, employers in the retail and restaurant industries are susceptible to compensable time claims relating to time spent by employees waiting in line for temperature checks or misclassification claims by managers performing increased non-exempt work as a cost-saving measure to control payroll expenses. But even a return to some sense of normalcy will likely be met with additional hybrid actions challenging everything from employer decisions about who to bring back from furlough to facemask policies and vaccine mandates.

V. Should I Stay (and Litigate) or Should I Go (and Settle)?

Hybrid actions can range from small nuisance-value claims to "bet-the-company" litigation. This wide variance in potential liability underscores the importance of conducting an early evaluation of claims, including a thorough review of the employer's overall payroll structure to determine whether there are other potential problems that could affect the value of the case and overall risk assessment. Early assessment of the employer's potential liability in concert with its overall risk tolerance will steer the hybrid action toward putting up a defense or settlement.

When a case is headed toward settlement, consideration should be given to whether settlement on an individual basis is a possibility. Defense counsel should be sure to explore and obtain representations from plaintiff's counsel that they do not represent or know of any other potential class or collective members who could step in the place of the settling plaintiff. On the other hand, if settling on an individual basis is not feasible or there is uncertainty over employee interest in a hybrid action, defense counsel should discuss negotiating a "blow up" provision in the settlement agreement that allows the defendant the option of backing out of the deal or "blowing it up" if a negotiated percentage or number of class members opt out of the settlement.

For risk adverse employers, class action waivers in arbitration agreements may be a viable option for keeping hybrid actions at bay. Though preventing hybrid actions altogether may seem desirable, the potential disadvantages are exposed when multiple employees simultaneously pursue individual claims in separate arbitrations. When this happens, employers end up facing a series of identical arbitration claims and, despite fee-splitting agreements, also end up funding most, if not all, of the administrative and arbitrator fees associated with each action. An employer who receives 100 individual arbitration demands can end up paying $265,000 in filing and case management fees even if the claims are completely without merit.

VI. Conclusion

If you take nothing else from this article, remember this: It is a mistake to be dismissive of apparently small dollar claims based on a single named plaintiff's tenure and individual experience at the defendant company. That plaintiff is the proverbial camel's nose, sniffing and peeking into the tent. Triage the claims pled—and look for claims that are not pled and may be found along the way—to make an early evaluation for your client and set strategy accordingly.

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Employment Discrimination Laws and Best Practices

by: Matthew J. Hastings, Kasdorf, Lewis & Swietlik, S.C.

For the past several years, the Wisconsin Equal Rights Division ("ERD") has investigated around 3,000 employment discrimination complaints per year,[1] while the U.S. Equal Employment Opportunity Commission ("EEOC") has done the same for the roughly 1,000 charges (EEOC jargon for "complaints") filed annually by Wisconsin employees.[2] In either case, the complainant need only establish probable cause – a low standard that requires more than mere "suspicion" but less than a "preponderance of the evidence."[3] And yet, after investigation, roughly 75% of ERD complaints[4] and EEOC charges[5] cannot meet this low bar and, consequently, are dismissed at the initial determination stage.[6]

The point here is neither to dissuade aggrieved employees from pursuing legitimate claims nor to reassure intolerant employers. Rather, the intended takeaway is that, whether it involves a trivial slight against "an irritable, chip-on-the-shoulder employee,"[7] a terrorizing sequence of "persistent, crazy, hostile behavior" that a male employee directs toward a female colleague "of average steadfastness" without consequence,[8] or anywhere in between, the long odds of success[9] have not depressed employment discrimination claims. What's more, since all complaints are automatically cross-filed with both the ERD and EEOC, a simple dispute can easily turn into an expensive and years-long ordeal, as the *Aldrich* odyssey clearly illustrates.[10]

Accordingly, the objective of this article is simply to provide an overview of the requirements and range of actions arising under the Wisconsin Fair Employment Act ("WFEA")[11] and the three (3) central statutes within the federal regime[12] – Title VII of the Civil Rights Act ("Title VII"),[13] the Age Discrimination in Employment Act ("ADEA"),[14] and the Americans with Disabilities Act ("ADA")[15] – and offer a few simple measures that can be taken to avoid the pitfalls that these statutes can present.

I. The Legal Framework of Employment Discrimination

In many ways, the WFEA is analogous to its federal counterparts. Title VII, the ADEA, and the WFEA extend their protection from employment discrimination to the same classes of people; Title VII protects everyone from discrimination based on their "race, color, religion, sex,[16] or national origin,"[17] the ADEA protects all "individuals who are at least 40 years of age,"[18] and the WFEA covers all the aforementioned classes.[19] And despite sharing very little else in common, both the WFEA and ADA extend various protections to individuals with a disability.

The most consequential difference between the two regimes lies in their remedial provisions. The WFEA does not create a private right of action in circuit court and the available remedies are generally limited to back pay, attorney's fees, and orders of reinstatement where appropriate.[20] By contrast, each of the federal provisions confer a private right of action to recover compensatory and punitive damages, as well as "any other equitable relief as the court deems appropriate."[21]

Nevertheless, under all the statutes, intentional discrimination[22] encompasses three types of claims: disparate treatment, retaliation, and harassment.[23] While the same causes of action are cognizable under the ADA, its additional eligibility requirements, duties, and causes of action require a separate discussion.

II. Disparate Treatment and Retaliation Claims

Broadly speaking, all disparate treatment and retaliation claims arising under any antidiscrimination statute have the same basic elements. Disparate treatment claims require the plaintiff to prove (1) membership in a statutorily protected class (*e.g.*, over 40 years of age for ADEA coverage); (2) an adverse action taken against his or her employment; and (3) a causal connection between the two.[24] Similarly, retaliation claims require the plaintiff to prove (1) engagement in a statutorily protected activity, meaning (a) good faith opposition to perceived workplace discrimination[25] or (b) participation in any investigation or proceeding related to such conduct;[26] (2) subjection to an adverse employment action; and (3) a causal link between the protected activity and the adverse action.[27]

In most disparate treatment and retaliation claims, the sole question that matters is whether the plaintiff would have kept his or her job if he or she had a different protected status (or none at all), and everything else had remained the same.[28] For Title VII retaliation and all ADEA claims, "the traditional standard of 'but-for' causation" applies.[29] For Title VII disparate treatment and WFEA claims, the more relaxed "mixed motive" or "motivating factor" causation standard applies.[30] Proving causation, however, is a much more complicated question. For present purposes, suffice it to say that the standards laid out in *Ortiz* and its progeny[31] provide the blueprint under both state and federal law.[32]

III. Harassment and Hostile Work Environment Claims

Wis. Stat. § 111.36(1)(b) notwithstanding,[33] harassment claims originate from the "terms, conditions, or privileges of employment" component of the protections common to all antidiscrimination statutes.[34] Two types of discriminatory harassment are actionable at both the state and federal levels. The first and most obvious type is *quid pro quo* sexual harassment in which a supervisor conditions employment or tangible benefits on submission to their harasser's sexual advances.[35]

The second, more common form of actionable harassment is "hostile work environment" discrimination. A hostile work environment is one that is "so 'permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'"[36] The plaintiff must prove that (1) he or she was subjected to unwelcome harassment; (2) he or she was being harassed because of a protected characteristic; (3) the harassment was sufficiently severe or pervasive from both a subjective (*i.e.*, the plaintiff's perspective) and an objective (*i.e.*, a reasonable person's perspective) point of view to create a hostile work environment; and (4) there is a basis for employer liability.[37] If a supervisor participated in the harassment, then the employer is strictly liable; otherwise, the fourth element requires proof that the employer was negligent in discovering or remedying the harassment by a coworker or a third party.[38]

Notably, the plaintiff need not prove an "adverse action" in the traditional sense; instead, the act of subjecting an employee to a hostile work environment is considered an adverse action unto itself.[39] Thus, the focus is on whether the harassment was so "sufficiently severe or pervasive" as to create a workplace so heavily polluted with discrimination that the terms and conditions of employment are altered.[40] The case law on this point is legion,[41] but suffice it to say that although conditions need not become "hellish," [42] the underlying "conduct must

be extreme to amount to a change in the terms and conditions of employment."[43]

IV. The ADA's "Qualified Individual" Inquiry and Duty to Accommodate

Unlike Title VII and the ADEA, the ADA and its WFEA counterpart have surface-level similarity but cannot accurately be characterized as each other's analog. Since employers face far greater exposure under federal law, this section will focus solely on the ADA instead of trying to catalog all the ways it differs from the WFEA.[44]

As previously noted, disparate treatment, retaliation, and harassment are all cognizable claims under the ADA and require proof of the same basic elements as the other statutes,[45] including "but-for" causation.[46] However, two features distinguish the ADA from the other statutes. First, the ADA does not extend protection to *all* individuals with a disability; instead, the ADA prohibits discrimination "against a *qualified individual* on the basis of disability."[47] Second, the ADA recognizes a separate cause of action for failure to accommodate that is entirely distinct from a disparate treatment claim.[48]

Determining whether someone is a "qualified individual" entails a two-step inquiry.[49] The first step asks whether the plaintiff is "qualified on paper" in that he or she satisfies the prerequisites for the job he or she holds or desires by virtue of his or her experience, education, and the like. If so, then the second step asks whether the plaintiff is "otherwise qualified," meaning he or she can perform all the essential functions of his or her job either with or without reasonable accommodation.[50]

The duty to accommodate is triggered when a paper-qualified employee informs his or her employer about a disability and requests an accommodation.[51] At that point, the employer has two options: (1) provide reasonable accommodation without further inquiry or (2) fulfill the duty to engage the employee in an "interactive process," which is simply a flexible, informal dialogue geared toward identifying a reasonable accommodation. If the employer initiates the interactive process, then both sides are obliged to cooperate in a good faith effort to find an effective solution.[52]

In either case, an unaccommodated "qualified individual" may bring a cause of action for "failure to accommodate." The elements of a "failure to accommodate" claim are logical and straightforward: (1) statutory protection (*i.e.*, "qualified individual" status); (2) the employer's awareness of the disability; and (3) failure to reasonably accommodate the known disability. No adverse action is necessary, since the decisive inquiry is simply whether the plaintiff can identify a facially reasonable accommodation that was not offered to him or her and, if so, whether the employer can demonstrate that providing the accommodation would cause undue hardship to the business.[53]

The interrelated concepts of "reasonable accommodation" and "essential functions" are at the core of both the "qualified individual" inquiry and a "failure to accommodate" claim. Broadly speaking, reasonable accommodation includes any adjustments to the physical workspace or nonessential duties of the job that will enable an otherwise qualified employee to perform all essential functions of the job.[54] "Essential functions" simply refers to the "fundamental" duties of the job, as opposed to those which are "marginal." Courts generally defer to the employer's judgment as to what functions are "essential," and their opinion is presumed correct unless the plaintiff produces evidence to the contrary.[55]

Putting these interlocking concepts together, the duty to accommodate requires the employer to take whatever reasonable steps are necessary to either enable the employee to work his or her current job in reasonable comfort,[56] or to reassign the employee to an existing but vacant position for which they are otherwise qualified.[57] The employee is not entitled to a perfect solution, their ideal accommodation, or even the one they request or prefer; their entitlement is to whatever reasonable solution the employer selects, so long as it effectively accommodates the disability.[58] If the employee's disability-related limitations do not affect his or her ability to perform an essential function, then the ADA does not require

an accommodation.[59] While removing some of the job's nonessential functions may be required, reassigning or otherwise modifying the job's essential functions is unreasonable as a matter of law,[60] as are any accommodations which impose an undue burden on the employer from a cost-benefit perspective.[61]

V. Suggested Practices for Avoiding but Preparing for Litigation

The prevailing theme of most antidiscrimination case law is that the best way to avoid litigation is to maintain open lines of communication. Disciplining an employee without providing any clear explanation creates fertile ground for resentment and, ultimately, litigation. Conversely, an open dialogue allows employees to air their grievances to a responsive supervisor and enables the employer to communicate its expectations so that everyone is on the same page.

The obvious problem is that no workplace can be sunshine and rainbows all the time, and even the most benevolent employer can and should expect at least *some* conflict to inevitably arise. With that in mind, here are a few suggested ways that employers can maintain a reasonably harmonious environment while simultaneously protecting themselves if and when an employee relationship goes south.

VI. Update and Distribute the Employee Handbook

Stating the obvious, the best way to communicate the company's general policies and expectations is through the employee handbook. However, having a handbook does not do anyone any good if it has not been updated or distributed since the 1980s, or if you have no idea which employees have actually received it – both of which are remarkably common, particularly among smaller businesses. Accordingly, before addressing any substantive policies, here are a few quick fixes for some basic but surprisingly pervasive deficiencies:

Update the handbook at reasonable intervals. In terms of legal obligations, this is a no-brainer and, since sea changes in the law are rare, this need only occur every few years. If company resources do not permit engaging counsel to make these revisions, then open sources such as the ABA's quarterly newsletter can be useful tools for keeping up with the times. Other policies in the handbook should also be addressed on an as-needed basis when unique or persistent issues emerge. For example, a lax attendance policy should be revised if employees routinely show up 10 minutes late.

Distribute all revised versions to employees. Consider this scenario: a 20-year employee who only received a handbook at the time of hire files a complaint after being terminated for violating the current personal conduct policy. Even assuming the fossilized version can be located, it is entirely possible that its policy is quite different than the current version. This may not be a dispositive issue, but wouldn't it make the employer's life easier if the fired employee had actual knowledge of the policy that led to his or her termination?

Keep handbook receipts. This ties into the other two suggestions. Handbooks commonly include a form for the employee to sign, date, and return to their supervisor. This form acknowledges not only their receipt of the handbook, but also their agreement to review and abide by its terms and to consult a supervisor if they do not understand any policy. If the employee later asserts they were fired for some manufactured policy violation, then a signed handbook receipt at least means he or she cannot challenge the policy's existence or claim ignorance of the same.

VII. Establish a Comprehensive but Flexible Code of Conduct

Whether part of the handbook or kept as a separate policy, having all prohibited conduct organized in a single location rather than scattered throughout multiple policies can short-circuit any argument that the employer scoured the handbook in search of a pretext for the adverse action. More fundamentally,

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workplace rule violations are legitimate bases for employee discipline up to and including termination, and federal law does not recognize an exception for bad conduct that is a byproduct of a disability.[62]

Relatedly, a progressive discipline policy, meaning one that escalates the consequences at each "step," should certainly include a statement that preserves the employer's discretion to deviate upward or downward based on the severity of the offense. After all, as the Seventh Circuit has repeated in more than 100 published opinions, the court does not sit as a super-personnel department that second-guesses an employer's facially legitimate policies or determines which employment infractions deserve greater punishment,[63] and claims which are solely based on the employee's belief that he or she was punished too severely typically fall on deaf ears.[64] However, it is just as important (and intuitive) that all rules are enforced (or not enforced) evenly and that similar punishment is meted out for similar offenses. Consistent application and enforcement of the rules can preempt these common lines of attack in disparate treatment claim.[65]

VIII. Take Advantage of the Interactive Process

All businesses have (or should have) a policy containing boilerplate language that generally notifies employees of the ADA's accommodation requirements. Clearly directing requests to a supervisor or human resources is useful, but having a strict reporting protocol likely exceeds the employee's minimal initial burden to "tell his employer" of the disability and corresponding need for accommodation.[66]

Once a qualified individual requests accommodation, engaging in the interactive process is a low-risk, high-reward proposition. If the employee can show that an effective reasonable accommodation was possible but never offered by the employer, then liability turns on which party was responsible for the breakdown of the interactive process. Obviously, this does not bode well for the employer who refuses to take part in any interactive process. By contrast, taking an active, good-faith role in the interactive process shields the employer from liability if the employee refuses to participate, withholds essential information, or otherwise obstructs or delays the process.[67]

Along the same lines, if an employee's request seems specious on its face, the interactive process allows the employer to confirm its legitimacy without exposing itself to liability. For example, the employer can request medical evidence from the employee and even consult with their treating physician to determine necessary accommodations, and if the employee refuses to provide that evidence, then the request may be denied without fear of ADA liability.[68]

IX. Make Sure Employees Have Multiple Avenues for Reporting Harassment and Discrimination.

Like the accommodation policy, the substance of these policies is typically boilerplate and there is no need to reinvent the wheel. However, the policy should establish a clear reporting process, including multiple points of contact for situations in which the alleged harasser is a supervisor. Ideally, this type of policy protects both the employee and employer by fixing the problem on the front end and avoiding potential liability on the back end.[69]

a. Investigate All Facially Plausible Allegations

It seems obvious that reports of serious incidents should be internally investigated, since an employer's liability for harassment claims often hinges on their failure to act.[70] Bearing in mind that an actionably hostile environment can arise from severe *or* pervasive harassment, however, less severe but facially plausible complaints should also be investigated to the extent warranted by the allegation. There is little drawback in doing so, particularly since courts generally avoid assessing the quality or manner of an internal investigation.[71] Moreover, failure to investigate can be considered an adverse employment action if it leads to demonstrable harm or retaliation.[72] Better to err on

the side of thoroughness than to dismiss a complaint out of hand.

b. Carefully Document Significant Employee Interactions

Keeping comprehensive records does more than simply protect against the inevitable fading of memories due to the passage of time, though that is certainly good reason for doing so. In the run of cases, discrimination claims are about intent, and it is not uncommon for claims to come down to which of two competing interpretations of a one-on-one interaction seems more credible. While there is no perfect solution, keeping contemporaneous notes of employee interactions which are contentious or related to discrimination can at least help vitiate claims of "shifting explanations" or after-the-fact justification for the adverse action.[73] Sending a brief post-meeting summary email to the employee, including a simple request for the person to respond with any clarifications or misstatements, can also prove useful.

However, all written materials should be drafted with the expectation that they will be used as evidence at some point. Detailed descriptions of conduct and demeanor are useful, so long as it does not devolve into any editorializing that could be interpreted as vindictive.

Ideally, these memos should make their way into the personnel file of each party to the dispute. This is particularly true in ERD cases, since the ALJ is not bound by common law or statutory rules of evidence.[74] If the decisionmaker is no longer with the company and is unable (or unwilling) to testify at a hearing, then those contemporaneous notes can be authenticated by their successor if they are kept in the employee's personnel file.

c. Keep Up-to-Date Job Descriptions for Every Position

Tedious as it may seem, a written job description listing a clear set of essential functions for each position could pay dividends. The ADA specifically mandates that an employer's written job description "shall be considered evidence of the essential functions of the job," provided it was prepared "before advertising or interviewing applicants for the job."[75]

X. Conclusion

It should go without saying that this article only scratches the surface of employment discrimination law. Like any other practice area, each of the applicable statutes has its own peculiarities, fact-specific exceptions, and wide variations that exist between the WFEA and federal law – not to mention the "rat's nest of surplus 'tests'" for causation that were recently eradicated from federal litigation yet live on in state cases. Whatever their substantive differences, all discrimination claims have at least one thing in common: regardless of their statutory origin, the steady flow of complaints shows no signs of slowing down.

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1 *See* Wis. DWD Biennial Report, 2017-19 at 41-42 ("In close to one quarter of [civil rights complaints], ERD investigators found probable cause to believe the law had been violated.").

2 EEOC, FY 2009 - 2020 EEOC Charge Receipts for WI, available at: https://www.eeoc.gov/statistics/enforcement/charges-by-state/WI (last visited: June 6, 2021).

3 Wis. Admin. Code § DWD 218.02(8) ("'Probable cause' means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of the act probably has been or is being committed.'"); *Brunette v. Cardinal Ridge Residential Care, LLC*, ERD Case No.

CR201403694 (LIRC Feb. 22, 2019).

4 *Supra* note 1.

5 Percentage reflects averages for Title VII, ADEA, and ADA charges closed by Administrative Closure (21.61%), No Reasonable Cause (73.16%), and Reasonable Cause (5.23%). *See* EEOC, Title VII of the Civil Rights Act of 1964 Charges (Charges filed with EEOC) (includes concurrent charges with ADEA, ADA, EPA, and GINA) FY 1997 - FY 2020, available at: https://www.eeoc.gov/statistics/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges (last visited: June 10, 2021); EEOC, Age Discrimination in Employment Act (Charges filed with EEOC) (includes concurrent charges with Title VII, ADA, EPA, and GINA) FY 1997 - FY 2020, available at: https://www.eeoc.gov/statistics/age-discrimination-employment-act-charges-filed-eeoc-includes-concurrent-charges-title (last visited: June 10, 2021); EEOC, Americans with Disabilities Act of 1990 (ADA) Charges (Charges filed with EEOC) (includes concurrent charges with Title VII, ADEA, EPA, and GINA) FY 1997- FY 2020, available at: https://www.eeoc.gov/statistics/americans-disabilities-act-1990-ada-charges-charges-filed-eeoc-includes-concurrent (last visited: June 10, 2021).

6 Of course, dismissal does not signal the end for either the state or federal litigant. The Wisconsin litigant has avenues of appeal, *see* Wis. Stat. § 111.395, Wis. Admin. Code §§ DWD 218.20-218.21, while the federal complainant can file a federal lawsuit. *See* 42 U.S.C. §§ 2000e-5(b), (f)(1).

7 *Williams v. Bristol-Myers Squibb Co*., 85 F.3d 270, 274 (7th Cir. 1996).

8 *Frazier v. Delco Elecs. Corp*., 263 F.3d 663, 666-68 (7th Cir. 2001).

9 *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 429, 433 (2004) (noting that even though "[e]mployment discrimination plaintiffs have a tough row to hoe," the number of cases "exploded" by 270% in the 1990s.).

10 *See Aldrich v. Best Buy Co*., 3:05-cv-00226-jcs; 2005 U.S. Dist. LEXIS 20986 (W.D. Wis. Sept. 21, 2005); *Aldrich v. Best Buy, Inc*., ERD Case No. CR200400999 (LIRC Jan. 12, 2007), *rev'd sub nom. Aldrich v. LIRC*, Case No. 2007CV000113 (Eau Claire Cty. Cir. Ct. June 7, 2008), *aff'd and remanded* 2008 WI App 63, 310 Wis. 2d 796, 751 N.W.2d 866, *dismissed sub nom. Aldrich v. Best Buy, Inc*., ERD Case No. CR200400999 (LIRC May 21, 2009), *vacated sub nom. Aldrich v. LIRC,* Case Number 2009CV000518 (Eau Claire Cty. Cir. Ct. June 9, 2010), *rev'd* 2011 WI App 94, 334 Wis. 2d 495, 801 N.W.2d 457, *rev'd and remanded* 2012 WI 53, 341 Wis. 2d 36, 814 N.W.2d 433.

11 Wis. Stats. §§ 111.31-111.395.

12 *See* Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 Geo. Mason L. Rev. 545, 546-47 (2013) ("Federal employment discrimination law is centered on" the Title VII, the ADEA, and the ADA.).

13 Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, et seq.

14 Age Discrimination and Employment Act of 1967, *as amended* 29 U.S.C. § 621, et seq.

15 The Americans with Disabilities Act, *as amended* by the ADA Amendments Act of 2008 ("ADAAA"), 42 U.S.C. § 12101, et seq.

16 "Sex" includes sexual orientation, *see Hively v. Ivy Tech Cmty. College of Ind*., 853 F.3d 339, 341 (7th Cir. 2017) (*En banc*); *Bostock v. Clayton Cty*., 140 S. Ct. 1731 (2020), *Bowen v. LIRC*, 2007 WI App 45, ¶¶ 7-9, 299 Wis. 2d 800, 730 N.W.2d 164; *Gustavus v. Wis. Dep't of Corrs*., ERD Case No. 200303640 (LIRC May 8, 2008), and encompasses same-sex harassment. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-79 (1998).

17 42 U.S.C. § 2000e-2(a)(1); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

18 29 U.S.C. § 631(a).

19 Wis. Stat. §§ 111.321 ("… [N]o employer … may engage in any act of employment discrimination … against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, [or] ancestry ….''), 111.33(1) ("The prohibition against employment discrimination on the basis of age applies only to discrimination against an individual who is age 40 or over.").

20 *See Aldrich*, 310 Wis. 2d 796, ¶¶ 9-10; *Olson v. Whatever Bar*, ERD Case No. CR201003939 (LIRC Mar. 12, 2013); Wis. Stat. § 111.39(c).

21 42 USC §§ 1981a., 2000e-5(b), (f)(1), (g).

22 Though this article focuses solely on intentional discrimination, Title VII also permits claims of "disparate impact" in which a facially neutral policy unintentionally produces a disproportionately adverse effect on minorities. *See* 42 U.S.C. § 2000e-2(k)(1). For discussion of disparate impact claims, *see Ricci v. DeStefano*, 557 U.S. 557, 577-578 (2009).

23 *See, e.g., Boumehdi v. Plastag Holdings*, *LLC*, 489 F.3d 781, 787 (7th Cir. 2007); *Cole v. Bd. of Trs*., 838 F.3d 888, 895 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1614, 197 L. Ed. 2d 708 (2017); *Alamo v. Bliss*, 864 F.3d 541, 548 (7th Cir. 2017).

24 *Abrego v. Wilkie*, 907 F.3d 1004, 1012 (7th Cir. 2018) (*quoting Morgan v. SVT, LLC*, 724 F.3d 990, 995 (7th Cir. 2013)).

25 *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 563 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1115, 197 L. Ed. 2d 185 (2017); *Kruschek v. Trane Co*., ERD Case No. CR200603576 (LIRC Dec. 23, 2010).

26 *Robertson v. Wis. Dep't of Health Servs*., 949 F.3d 371, 378-79 (7th Cir. 2020); *Hanson v. State of Wis. DOT*, ERD Case No. 200303172 (LIRC June 14, 2005).

27 *Lewis v. Wilkie*, 909 F.3d 858, 866 (7th Cir. 2018).

28 *Vega v. Chi. Park Dist*., 954 F.3d 996, 1004 (7th Cir. 2020); *Joll v. Valparaiso Cmty. Sch*., 953 F.3d 923, 929 (7th Cir. 2020); *Waldvogel v. DC Everest Area S.D*., ERD Case No.

CR201302128 (LIRC Mar. 22, 2019).

29 *EEOC v. Abercrombie & Fitch Stores, Inc*., 575 U.S. 768, 772-73 (2015); *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 351-52 (2013); *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175-76 (2009).

30 *Nassar*, 570 U.S. at 348-49; *Hoell v. LIRC*, 186 Wis. 2d 603, 606, 608-11, 522 N.W.2d 234 (Ct. App. 1994); *Stoughton Trailers, Inc. v. LIRC*, 2006 WI App 157, 295 Wis. 2d 750, 721 N.W.2d 102 ("mixed motive" or "motivating factor" test applies.) *aff'd* 2007 WI 105, ¶ 70, 303 Wis. 2d 514, 735 N.W.2d 477 (standard in "mixed-motive" case is whether the termination would have occurred "in the absence of the impermissible motivating factor.").

31 *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760 (7th Cir. 2016); *see also, e.g., David v. Bd. of Trs. of Cmty. Coll. Dist. No. 508,* 846 F.3d 216 (7th Cir. 2017); *Monroe v. Ind. DOT*, 871 F.3d 495 (7th Cir. 2017); *Johnson v. Advocate Health & Hosps. Corp*., 892 F.3d 887 (7th Cir. 2018); *Khungar v. Access Cmty. Health Network*, 985 F.3d 565 (7th Cir. 2021); *Igasaki v. Ill. Dep't of Fin. & Prof'l Regulation*, 988 F.3d 948 (7th Cir. 2021).

32 *Williams v. All Saints Healthcare System, Inc*., ERD Case No. 200504037 (LIRC Aug. 14, 2009) (*McDonnell Douglas* may be used at probable cause hearing and merits hearing.); *but see Waldvogel*, ERD Case No. CR201302128.

33 Sec. 111.36(1)(b) of the WFEA was intended to provide broader protections than Title VII by creating a cause of action for sexual harassment perpetrated by an employer or their agent (*i.e.*, a supervisor) regardless of whether the underlying conduct satisfied the elements of a hostile work environment claim. *Anderson v. MRM Elgin Corp.*, ERD Case No. 199804070 (LIRC Jan. 28, 2004); *but see Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir. 2001) ("[O]ne extremely serious act of harassment could rise to an actionable level [of harassment."). Otherwise, state and federal law are substantively identical.

34 *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986) (*quoting* 42 U.S.C. § 2000e-2(a)(1)); *see also Ford v. Marion Cty. Sheriff's Office*, 942 F.3d 839, 851 (7th Cir. 2019) ("Hostile work environment claims have their legal basis in the phrase 'terms, conditions, and privileges of employment' present in the ADA and other employment discrimination statutes."); *Dent v. RJ Wood Indus., Inc.*, ERD Case No. CR200903357 (LIRC Mar. 28, 2014) (*citing* Wis. Stat. § 111.322(1)); 29 U.S.C. § 623(a) (prohibiting discrimination with respect to, *inter alia*, "terms, conditions, or privileges of employment, because of such individual's age."); *but see Tyburski v. City of Chi*., 964 F.3d 590, 600-01 (7th Cir. 2020) ("We have 'assumed, but never decided, that plaintiffs may bring hostile environment claims under the ADEA.'" (*citations omitted*)).

35 *Jim Walter Color Separations v. LIRC*, 226 Wis. 2d 334, 342 (Ct. App. 1999); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 790-91 (1998).

36 *Hall v. City of Chi*., 713 F.3d 325, 330 (7th Cir. 2013) (*quoting Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993)).

37 *EEOC v. Costco Wholesale Corp*., 903 F.3d 618, 625 (7th Cir. 2018); *Vaserman v. Lakeshore Medical Clinic, Ltd.*, ERD Case No. CR201004003 (LIRC Oct. 30, 2015).

38 *Howard v. Cook Cty. Sheriff's Office*, 989 F.3d 587, 607 (7th Cir. 2021) (*citations omitted*); *accord Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014) ("An employer is not liable for co-employee sexual harassment when a mechanism to report the harassment exists, but the victim fails to utilize it.").

39 *Gates v. Bd. of Educ. of Chi*., 916 F.3d 631, 636 (7th Cir. 2019); *accord Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2175, 167 L. Ed. 2d 982 (2007). ("In hostile work environment claims, "the actionable wrong is the environment, not the individual acts that, taken together, create the environment.").

40 *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013); *cf. Harper v. Menard Inc*., ERD Case No. CR200602401 (LIRC Sept. 18, 2009); *Dent*, ERD Case No. CR200903357.

41 *See, e.g., Oncale*, 523 U.S. at 81; *Faragher*, 524 U.S. at 787-88; *Swyear v. Fare Foods Corp*., 911 F.3d 874, 881 (7th Cir. 2018); *Johnson*, 892 F.3d at 900-01; *Coolidge v. Consol. Indianapolis*, 505 F.3d 731, 734 (7th Cir. 2007); *Alamo*, 864 F.3d at 550.

42 *Gates*, 916 F.3d at 637.

43 *Faragher*, 524 U.S. at 787-88.

44 The WFEA's disability protections are discussed at length in *Wis. Bell, Inc. v. LIRC*, 2018 WI 76, 382 Wis. 2d 624, 914 N.W.2d 1, and the cases cited therein. *See also Schultz v. Cty. of Manitowoc*, ERD Case No. CR201104000 (LIRC Oct. 31, 2016).

45 *Igasaki*, 988 F.3d at 961 (ADA disparate treatment); *Williams v. Bd. of Educ*., 982 F.3d 495, 508-09 (7th Cir. 2020) (ADA retaliation); *Ford*, 942 F.3d at 852-53 (ADA harassment/ hostile work environment).

46 *Stelter v. Wis. Physicians Serv. Ins. Corp.*, 950 F.3d 488, 491 (7th Cir. 2020); *but see Kurtzhals v. Cty. of Dunn*, 969 F.3d 725, 728 (7th Cir. 2020) (collecting cases) (applying "but-for" causation, but asserting "it remains an open question in this circuit whether that change affects the 'but for' causation standard we apply in these cases.").

47 *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 862 (7th Cir. 2005), *cert. denied*, 546 U.S. 1033 (2005).

48 *See Rodrigo v. Carle Found. Hosp.*, 879 F.3d 236, 241-42 (7th Cir. 2018).

49 Although the plaintiff must also show that he or she has a statutory "disability," the ADAAA and corresponding EEOC regulations relaxed the definition to such extent that it now includes nearly any type of "impairment." *See* 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(i)(2), (j)(1). Accordingly, whereas pre-2009 cases commonly address the issue of whether the plaintiff has a "disability," it is rarely litigated in post-2009 cases. *See Mancini v. City of Providence*, 909 F.3d 32, 40-41 (1st Cir. 2018) (ADAAA and amended regulations "changed the ground rules and defenestrated" the previous requirements that limited the universe of "impairments" that could be considered a

"disability.").

50 *Brumfield v. City of Chicago*, 735 F.3d 619, 632 (7th Cir. 2013); *Conners v. Wilkie*, 984 F.3d 1255, 1261 (7th Cir. 2021); 42 U.S.C. §§ 12111(8)-(9), 12112(b)(5)(A); 29 C.F.R. § 1630.2(m), (n)(1),(o)(1).

51 *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1176 (7th Cir. 2013); *see also Brumfield*, 735 F.3d at 632 ("[A] n employer's accommodation duty is triggered only in situations where an individual who is qualified on paper requires an accommodation in order to be able to perform the essential functions of the job.").

52 *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-16 (7th Cir. 2000) (*citing, inter alia*, 29 C.F.R. § 1630.2(o)(3), pt. 1630, app.); *Sansone v. Brennan*, 917 F.3d 975, 979-80 (7th Cir. 2019).

53 *Taylor-Novotny v. Health Alliance Med. Plans, Inc*., 772 F.3d 478, 493 (7th Cir. 2014).

54 42 U.S.C. § 12111(9) – (10); 29 C.F.R. § 1630.2(o) – (p); *Cloe*, 712 F.3d at 1176; *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 577 (7th Cir. 2001).

55 *Basith v. Cook Cty*., 241 F.3d 919, 928-29 (7th Cir. 2001); *Gratzl v. Office of Chief Judges*, 601 F.3d 674, 679 (7th Cir. 2010); *Kotaska v. Fed. Express Corp*., 966 F.3d 624, 628-29 (7th Cir. 2020); *Conners*, 984 F.3d at 1261-62; *Tonyan v. Dunham's Athleisure Corp*., 966 F.3d 681, 688-89 (7th Cir. 2020).

56 *Cloe*, 712 F.3d at 1176; *Hoffman*, 256 F.3d at 577.

57 *Rehling*, 207 F.3d at 1014; *Stern v. St. Anthony's Health Ctr*., 788 F.3d 276, 291 (7th Cir. 2015); *accord Dalton v. Subaru-Isuzu Auto., Inc*., 141 F.3d 667, 678 (7th Cir. 1998) (employer not required to abandon legitimate, nondiscriminatory job qualifications, to accommodate a transfer.).

58 *Igasaki*, 988 F.3d at 961-62; *Stewart v. Cty. of Brown*, 86 F.3d 107, 111-12 (7th Cir. 1996); *Mays v. Principi*, 301 F.3d 866, 872 (7th Cir. 2002); *Kersting v. Wal-Mart Stores, Inc*., 250 F.3d 1109, 1116-17 (7th Cir. 2001).

59 *Brumfield*, 735 F.3d at 633; *Hoffman*, 256 F.3d at 577.

60 *Kotaska*, 966 F.3d at 631; *Ammons v. Aramark Unif. Servs.*, 368 F.3d 809, 819 (7th Cir. 2004).

61 *Mays*, 301 F.3d at 872; *Hoffman*, 256 F.3d at 577. *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 543 (7th Cir. 1995).

62 *Guzman v. Brown Cty*., 884 F.3d 633, 641-42 (7th Cir. 2018); *but see Wis. Bell, Inc.*, 382 Wis. 2d 624, ¶ 41 ("[A] n employer does not engage in intentional discrimination when it bases an adverse employment action on the employee's conduct unless the employee proves the employer knew his disability caused his conduct.").

63 *Joll*, 953 F.3d at 933; *Harris v. Warrick Cty. Sheriff's Dep't*, 666 F.3d 444, 449 (7th Cir. 2012); *accord Joyce v. Milwaukee Cylinder*, ERD Case Nos. CR201303197 & CR201402554 (LIRC Nov. 5, 2019) (Employer has discretion to decide the severity it attaches to violations of its rules.).

64 *See Williams v. Verizon Wash., D.C. Inc*., 304 F. Supp. 3d 183, 200 (D.D.C. 2018) ("[T]he mere fact that Verizon could have taken a different approach – i.e., suspend[] him instead of terminat[ing] him" doesn't show pretext.) (*citing Wilkerson v. Wackenhut Protective Servs., Inc.*, 813 F. Supp. 2d 61, 67 (D.D.C. 2011) (pretext cannot be established by claiming the employer "could have, but did not, impose progressive discipline, especially when [its] policy permitted swift and severe punishment for a single 'no show.'")).

65 *See generally Peters v. Renaissance Hotel Operating Co*., 307 F.3d 535, 546 (7th Cir. 2002) (pretext argument that employee was "singled out" for harsher discipline than others who broke the same rules.); *Ezell v. Potter*, 400 F.3d 1041, 1049 (7th Cir. 2005) (same.); *cf. Bagwe v. Sedgwick Claims Mgmt. Servs*., 811 F.3d 866, 882 (7th Cir. 2016) (evidence of employer's departure from its customary enforcement and response to violations of a specific policy may be circumstantial evidence of discrimination.), *cert. denied*, 137 S. Ct. 82, 196 L. Ed. 2d 36 (2016).

66 *See, e.g., Spurling v. C&M Fine Pack, Inc*., 739 F.3d 1055, 1062 (7th Cir. 2014) (*quoting Hedberg v. Indiana Bell Tel. Co*., 47 F.3d 928, 934 (7th Cir. 1995)).

67 *See EEOC v. Sears, Roebuck & Co*., 417 F.3d 789, 805-06 (7th Cir. 2005).

68 *Haschmann v. Time Warner Entertainment Co., L.P.*, 151 F.3d 591, 601 (7th Cir. 1998) (*citing* 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c)); *Keen v. Merck Sharp & Dohme Corp*., 819 F. App'x 423, 427 (7th Cir. 2020).

69 *Muhammad*, 767 F.3d at 698; *cf. Montgomery v. American Airlines, Inc*., 626 F.3d 382, 392 (7th Cir. 2010) ("An aggrieved employee must at least report—clearly and directly—nonobvious policy violations troubling him so that supervisors may intervene.").

70 *Howard*, 989 F.3d at 607.

71 *Marshall v. Ind. Dep't of Corr*., 973 F.3d 789, 793 (7th Cir. 2020).

72 *See Kuhn v. United Airlines*, 63 F. Supp. 3d 796, 802-03 (N.D. Ill. 2014) (*citing, inter alia, Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 640-41 (10th Cir. 2012)).

73 *Bagwe*, 811 F.3d at 882.

74 *Rutherford v. LIRC*, 2008 WI App 66, ¶ 21, 309 Wis. 2d 498, 752 N.W.2d 897 (*citing* Wis. Stat. § 227.45).

75 42 U.S.C. § 12111(8); *Dunderdale v. United Airlines, Inc.*, 807 F.3d 849, 853 (7th Cir. 2015) (employer's judgment and written job description are first among several factors considered in essential functions inquiry.), *cert. denied*, 136 S. Ct. 2399, 195 L.Ed.2d 764 (2016).

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Defending Unreasonable Refusal to Rehire Claims Filed Against Wisconsin Businesses

by: Daniel J. Finerty and James E. Panther, Lindner & Marsack, S.C.

I. Introduction

Wisconsin law provides several litigation perils for Wisconsin employers attempting to economically direct their business enterprises. While there are numerous examples of Wisconsin-specific claims that trip up businesses, this article addresses one particular statute that, if violated, can require an employer to pay up to one year's wages to an employee terminated or not rehired following a work-related injury: the unreasonable refusal to rehire penalty in Wis. Stat. § 102.35. Among Wisconsin's penalty provisions often called "secondary claims," this secondary claim is distinct from the portions of the Worker's Compensation Act that compensate for physical or mental injuries incurred in the work place, and cannot be insured or paid by a worker's compensation insurance carrier.[1] This particular secondary claim presents a challenge for defense counsel unlike others due to the one-year damage cap, which necessitates economical, cost-effective handling of this claim from start to finish.

II. The Statute

When 1975 Senate Bill 2 was passed by the Wisconsin legislature, signed by Governor Patrick Lucey and published on December 28, 1975, the law made many changes to state law regarding worker's compensation.[2] Those changes included the creation of a specific, uninsured penalty claim against an employer. While this penalty statute has been amended slightly since, Wisconsin law provides that an employer may be obligated to pay up to one year's wages to an employee who is terminated or not rehired following a work-related injury unless the employer has reasonable cause to do so. Wis. Stat. § 102.35(3) provides:

> Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, when suitable employment is available within the employee's physical and mental limitations, upon order of the department or the division, has exclusive liability to pay to the employee, in addition to other benefits, the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.[3]

Stated another way, an employer is obligated to rehire an employee following recovery from a work-related injury if suitable work is available within the employee's limitations unless the employer has "reasonable cause" not to rehire or to terminate. If the employer refuses to rehire or terminates when

suitable work is available and cannot establish reasonable cause for its decision, an unreasonable refusal to rehire (URR) application or claim seeking penalty may be filed with the Department of Workforce Development's Worker's Compensation Division.[4]

Wis. Stat. §102.35(3) attempts to "prevent discrimination against employees who have previously sustained injuries and to see to it, if there are positions available and the injured employee can do the work, that the injured person goes back to work with his former employer," in effect declaring a compensable injury an additional protected exception to the "at will" employment doctrine.[5] Consistent with the compensatory nature of the Worker's Compensation Act[6] as a whole, courts are required to liberally construe these provisions to fulfill their "beneficent purpose,"[7] something defense counsel should be keenly aware of in all phases of URR litigation.

With that said, the Labor and Industry Review Commission[8] and Wisconsin courts do not generally interfere with a Wisconsin employer's ability to economically run its business and have sustained defenses in cases where, for example, the employer has established a basic economic necessity or well-grounded, policy-based defense to support reasonable cause.

III. Applicant's Burden of Proof

Claims under Wis. Stat. § 102.35(3) are evaluated using a burden-shifting framework. To make a *prima facie* case, an employee must show that he or she was an "employee," as defined by Wis. Stat. § 102.07 for an employer[9] at the time of injury, who sustained a compensable injury in the course and scope of work, and was denied rehire after seeking reemployment.[10] Each of these elements is reviewed in more detail below.

a. Employee Status

For a private sector employer, an "employee" is defined by Wis. Stat. § 102.07(4)(a)[11] to include every person in the service of another regardless of by whom the employee is paid provided the employer has actual or constructive knowledge; however, the statute expressly excludes domestic servants and certain other individuals.

"Domestic servant" has been reasonably defined by the Commission to exclude from worker's compensation coverage "an individual who is hired to give primary care to an invalid," "even though the primary care giver may assist in preparation and clean up for the invalid's meals, because such activities would be incidental to the primary care duties."[12] In past cases, the Commission has reviewed the underlying details relating to an alleged employment relationship. In *Halvorsen v. Alexander*, the applicant filed an application for worker's compensation benefits after a physical alteration arose during a side project in which the applicant's boss paid $500 to him and several individuals to paint his personal boat outside of his normal duties working for the business:

> [A] person does not become an "employee" for the purposes of Wis. Stat. §102.07(4) simply by performing some kind of compensated service for another. In order to be an "employee" as defined in Wis. Stat. § 102.07(4), a worker must perform services under a contract of hire, and *in the course of a trade, business, profession, or occupation of the putative employer*. A trade or business has been defined as an occupation or employment habitually engaged in for livelihood or gain. Applying that definition, neither Jeffrey Alexander nor Alexander & Alexander is engaged in a trade, business, occupation, or profession even tangentially related to painting boats.[13]

In recent years, Wisconsin courts have recognized that the party seeking to prove an employment relationship has the burden of proof.[14] While the independent contractor test is set forth by statute, the *Kress* test still provides the primary vehicle for

determining whether the work performed establishes an employer-employee relationship by examining the level of control over the work by an employer.[15] Those sources should be consulted for more details on the employer-employee relationship and independent contractor issue in appropriate circumstances.

The Wisconsin Supreme Court has been clear that the worker's compensation statute must be liberally construed in favor of including all services that can reasonably be said to come within its purview.[16] As a result, if the facts tend to show even the most basic employer-employee relationship existed, counsel should turn to other portions of the burden-shifting approach discussed below.

b. Compensable Injury

In order to come within the protection of Wis. Stat. § 102.35(3) and the larger Chapter 102 itself, the employee is obligated to prove there was in fact a compensable work-related injury that both arose out of employment and occurred while the employee was in the course of employment as required by Wis. Stat. § 102.03. Without a compensable work injury, the employer cannot be said to have refused rehire of an employee "injured in the course of employment." Often, a worker's compensation carrier will dispute this aspect of the primary claim on a medical basis through the use of an Independent Medical Examination (IME) or, less often, on a factual basis.

When the compensability of an injury is in dispute, the Office of Worker's Compensation Hearings[17] will typically schedule a hearing on the issue of primary compensation first to determine if the employee is eligible for worker's compensation benefits, which often will include a determination whether a compensable work injury occurred. If the applicant is successful at the primary compensation hearing, and a work-related injury is shown, this element will be established for purposes of his or her URR claim; in such a case, defense strategies should be focused elsewhere.

However, when the applicant requests a penalty hearing on the Wis. Stat. § 102.35(3) application without a prior finding of the work-relatedness of the injury, the employer can logically take the position that the employee's injury did not take place in the course of employment or was otherwise not compensable, assuming sufficient facts exist to support such a defense in order to defeat this claim.

In this regard, a concession by a worker's compensation carrier in a Limited Compromise Agreement to resolve a primary compensation claim does not bind the employer, unless the employer is a signatory to the Agreement and does not except itself from the concession. However, an employer would typically only be a party to a Full Compromise Agreement which would resolve both the primary claim and the secondary claim, bringing the entire claim to a resolution.

c. Denial of Rehire or Termination

For the final *prima facie* element, an employee must typically establish that he or she applied to be rehired.[18] An employee can do so via informal means such as a telephone conversation.[19] In situations where the employee is released to return to the same position without restrictions, the employee need only inform the employer of the physician's release in order to express a sufficient interest in returning to work.[20] By contrast, if an employee is terminated while on leave during a healing period and before permanent restrictions have been assigned, no formal reapplication is required nor is the employee required to show up once the healing period ends since doing so would be futile.[21]

However, if restrictions from the employee's doctor preclude the employee from physically or mentally performing the job held at the time of injury, the employee must, at least, express to the employer the extent to which he or she is interested in working in a different capacity before a *prima facie* case can be established for an alleged failure to rehire into another position.[22] The Court of Appeals recently resolved this tension between the conflicting obligations to initiate the rehire discussion by holding:

> The exception [to the obligation of the employee to provide notice to the employer only] applies under circumstances where the employee's application to return to the prior position would be futile given that he or she was fired from that position, constituting his employer's unreasonable refusal to rehire. But in instances in which the employer has a reasonable basis to terminate an employee who is not capable of returning to his or her former position, it is not overly burdensome to require the employee to intimate that he or she is interested in other positions in order to establish a prima facie case for the failure-to-rehire penalty under Wis. Stat. § 102.35(3).[23]

In light of Wisconsin's labor shortage, even where an employee cannot work in his or her original position, an employer may wish to consider rehiring an employee into a different position in light of the employer's prior investment in training and the employee's experience.

IV. Employer's Defenses

If an employee can sustain the *prima facie* burden, the burden then shifts to the employer to show one of a number of defenses including that suitable work was not available, the employee was medically prevented from performing the job-related duties of his or her position, that the employee never provided notice of his orher desire to return to work and that the basis for the employer's refusal to rehire amounted to reasonable cause.[24]

First, numerous Commission and court cases over the years have exposed a serious pitfall for Wisconsin employers where an employer terminates because of an employee's violation of a no-fault attendance policy. However, where the facts reveal that one or more of the absences considered by the employer were related to or caused by the prior work-related injury,[25] an employer's contention that its uniformly-applied attendance policy provides reasonable cause for termination will likely fail. An attendance-based termination of an employee who sustained a worker's compensation injury prior to a recent return to work may present an area of risk for Wisconsin employers. In this regard, Wisconsin courts have been consistent that "the law applies even where a worker is fired *only in part* because of the work injury."[26] Perhaps some defense remains where the employee never informed the employer that the absences were due to the prior injury and/or never followed the employer's policy in regard to reporting or providing medical documentation regarding such absences; however, this is merely a possibility that focuses on an employer's intent that is not necessarily consistent with the statutory language.

Second, if no suitable work is available, the employer cannot be held liable, as explicitly laid out in the statute itself. Since information on available work is typically within the employer's possession, the employer bears the burden to present this defense. Even suitable part-time positions must be offered to injured employees who have recovered from their injury and are again available for work.[27] If no suitable work was available and a URR claim is filed nonetheless, this information should be collected, preserved and, if appropriate, shared with the applicant along with a request to withdraw the application. Absent dismissal, this information must be presented at hearing with supporting testimony by a company official knowledgeable of the positions not available at the time. Additional testimony regarding any business-related reasons for the lack of work may also be helpful. If no work was available, much less any suitable work, the employer has established the defense.

Third, as an extension of the prior defense, if the employer can show that an employee was physically or mentally unable to perform the job held at the time of injury and that no other suitable work was available, the employer is not liable for the statutory penalty.[28] This defense, by contrast to the prior defense, focuses on the ability of the employee to perform the job-related duties of the specific position into which rehire is sought.[29] To establish this defense, counsel

should review with the employer the applicable job description which provides, for example, lifting and other physical requirements of the position, and discuss its application to the employee's position in light of the treating doctor's limitation on the employee's ability to work. At hearing, the employer must offer medical proof that the employee was physically or mentally unable to perform the job, which will typically come in the form of the treating doctor's limitations upon the employee's ability to perform work. In addition, a company official should testify regarding the employee's job description and the employee's job in general. As an example, while a firefighter need not necessarily lift and carry 200 pounds every day, the ability to do so is essential for any fire department member even a fire inspector. To be clear, both the position's physical and mental obligations and the medical evidence showing that the employee cannot meet those obligations are necessary to establish this defense under *West Bend*. With that said, helpful testimony can also be obtained through the cross-examination of the employee and submission of the doctor-issued restrictions submitted within the employee's medical records in order to establish the underlying claim. As they say, the best defense is sometimes a good offense.

Fourth, in order to meet the reasonable cause burden, the employer must establish facts and circumstances to show its actions were "fair, just, or fit under the circumstances."[30] The question of whether an employer unreasonably refused to rehire an individual is a mixed question of fact and law.[31] The question of whether the established facts give rise to reasonable cause requires an examination of the statute and its application to those facts.[32] Generally, reasonable cause may be established by showing that the discharge was for a reason unrelated to the injury, such as misconduct, poor performance, an economic slowdown or an employer's decision to eliminate an employee's position.[33] This defense, at its best, typically centers around an employer's economic decision based upon business circumstances and economic need.[34] The employers' defenses in *Ray Hutson* and *deBoer Transport* are illustrative.

In *Ray Hutson*, after a five-month absence due to a work-related knee injury, the employee, Tooley, sought rehire to his parts salesperson position at his employer, Ray Hutson Chevrolet, but found the position was eliminated. During the employee's leave, the employer found that it could operate the parts department with only four parts salespersons, instead of five (the firth being the employee), along with one unskilled assistant paid roughly 60% of the employee's base. As a result, it eliminated the employee's position, operated the parts department with four parts salespeople, and, upon his return, offered the employee a different position at a reduced salary. The employee rejected the offered position, opting to file a URR application instead. After the ALJ found a violation, the Commission affirmed finding that, among other things, "Hutson has failed to show that efficiency justified the reduction in sales positions..."[35] The Court of Appeals, however, flatly rejected the Commission's reasoning and held that:

> A business decision to reduce costs can, by itself, establish the reasonableness of the decision. Reducing costs is a form of efficiency. Inefficient businesses risk their very survival and the jobs of all employees. Nothing in § 102.35(3), STATS., reflects a legislative intent that an employer must perpetuate an unnecessary expense by rehiring an injured employee to fill a position the employer eliminated to save costs. We conclude that if an employer shows that it refused to rehire an injured employee because the employee's position has been eliminated to reduce costs and therefore to increase efficiency, the employer has shown reasonable cause under § 102.35(3).[36]

The Court of Appeals concluded that the employer had reasonable cause not to rehire the employee and reversed and remanded to the circuit court with instructions to vacate the Commission's contrary order.[37] Notably, it did so because LIRC did not identify Hutson's impermissible motive

and the Commission's inference that Hutson had a hidden motive (not reflected within the record) was unreasonable. Accordingly, counsel should be cognizant that even the best reasonable cause defense can get tripped up if management statements reflect questionable motives.

In *deBoer*, the Supreme Court recognized the reasonable cause defense, again reversing the Commission. The employee, Swenson, a truck driver who drove exclusively night-time routes for his employer, DeBoer Transport, Inc., in order to care for his ailing father during the day and save on the care-related expenses, sustained a conceded work injury to his left knee. After he was released, the employer insisted that he complete a safety-related "check-ride" with another driver, essentially an extended skills assessment trip imposed on all employees upon return from any leave. The company's requirement was in place for public safety reasons and no known exceptions had ever been made. After being advised that the check-ride trip could take anywhere from a few days to weeks, the employee requested modification of the requirement so that it could done locally; alternatively, he requested the company pay for a nurse to care for his father during his trip. The company declined both requests. Due to the employee's refusal to complete the check-ride, he was terminated.

After hearing, the ALJ held the employer did not have a reasonable cause for refusing to rehire Swenson. Likewise, LIRC and the circuit court both agreed, each focusing on the employer's refusal to modify the check-ride requirement so the employee could complete it *and* care for his terminally-ill father.

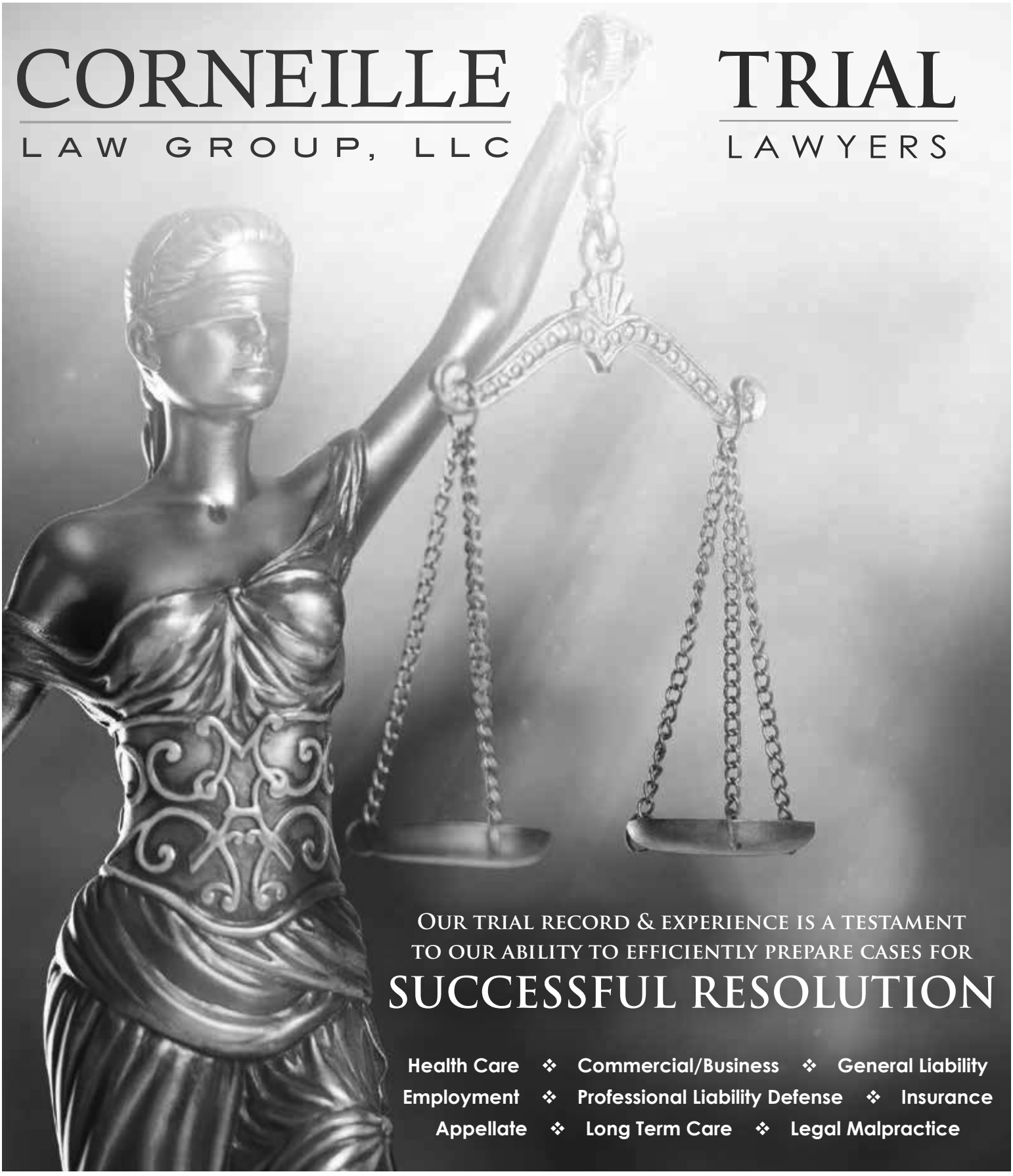
However, the Court of Appeals reversed, concluding that LIRC went too far when it held the employer acted unreasonably when it refused to adjust the "non-work, non-injury related issue in Swenson's life."[38] Upholding this reversal and remanding the claim for dismissal, the Supreme Court held there was no evidence the employer failed to rehire the employee for any reason other than his refusal to comply with its check-ride safety policy.[39] In this regard, the Supreme Court held that the statute does not require "employers [to] change their legitimate and universally applied business policies to meet the personal obligations of their employees."[40] Perhaps more significantly, however, the Supreme Court clarified that the Wisconsin Fair Employment Act's disability-related "reasonable accommodation" obligation placed upon an employer, which was arguably implicated by the employee's request to modify the check-ride requirement, had no application to the employee's URR claim.[41]

V. Best Practices

Assuming an economical settlement cannot be reached, the critical factor for defense counsel to keep in mind is that, in many cases, the business client is solely paying for the defense. This fact alone differentiates the claim from defense of a primary compensation claim, where the worker's compensation carrier provides the defense. Rather, the worker's compensation carrier is precluded by law from defending this penalty claim.[42] Quite simply, it may change the economics of a settlement evaluation.

However, with the increased prevalence of Employment Practice Liability Insurance (EPLI) among business clients, companies that tender URR claims are finding coverage through EPLI policies. Assuming tender and a favorable coverage determination, a solid tripartite relationship between the employer, the carrier and defense counsel should ensure an efficient and cost-effective defense toward a favorable settlement and, if that is not possible, an appeal-proof defense at hearing.

Practically, as the liability for the claim is, at most, one year's wages, the employee's earnings in the year prior to the accident should be ascertained at the earliest possible moment. Further, even assuming the employee prevails, the amount at issue could be less than one year's wages, as the recovery is temporal, not monetary.[43] An employer can review their monthly unemployment insurance reports to determine the amount of benefits the employee has collected to date.



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It stands to reason that most companies, and their EPLI carrier partners, would rather settle a claim for some lesser percentage of the total recovery when it will cost more than that percentage to fully defend the matter. While it is hard to predict defense costs at the outset, counsel should gather information and prepare a solid budget to ensure the client and carrier are fully-informed going forward. Upon learning of the filing, counsel should implement litigation holds to secure all electronic and documentary evidence in the employer's possession and, if warranted, provide an evidence preservation letter to the employee. Following service of the URR claim, the employer must prepare and file an Answer to the Complaint and Admission to Service with the OWCH.[44] At that point, counsel must examine all possible defenses and elect which defenses asserted in the answer provide the most economical and effective route toward achieving favorable settlement or, if necessary, a successful hearing. As several of the defenses outlined above can be found in the medical records, it is best to request medical authorizations from the applicant and obtain certified medical records directly from all treating medical providers.[45]

More generally, as reasonable cause and other aspects of the employee's *prima facie* claim depend upon them, the underlying facts and circumstances relating to the employee's job, work history, injury, treatment, and work restrictions as well as the business background, as highlighted by interviews with senior management officials and others, must be ascertained to determine the relative strength of each defense.

VI. Conclusion

URR claims present an unusual litigation risk in Wisconsin that, while limited in monetary exposure, may present traditional employment litigators with a challenge. For the statute's "reasonable cause" to be established, more is required than that which is required to show a "legitimate business reason" under either Title VII or the WFEA. This requires a deeper dive into the facts and circumstances surrounding an employee's return to work and/or the basis for the separation. By definition, this dive must be economically prudent in order to develop a cost-effective strategy to encourage a favorable settlement and, if not possible, to prevail at hearing with a record that can sustain appellate review.

Author Biographies:

Daniel J. Finerty (Marquette University Law School, 1998) is a shareholder with Lindner & Marsack, S.C. in Milwaukee, Wisconsin, where he regularly counsels and defends private-sector, public-sector, non-profit and Native American tribal clients, also representing the interests of the EPLI carriers, in employment litigation and wage and hour matters in administrative agencies, federal, state and tribal courts and other venues. Daniel is a member of the Wisconsin Defense Counsel's Employment Law Committee.

James E. Panther (University of Wisconsin Law School, 2014) is an associate at Lindner & Marsack, S.C. in Milwaukee, where he represents insurers and self-insured employers in the defense of worker's compensation claims throughout Wisconsin. Jim is a member of the Wisconsin Association of Worker's Compensation Attorneys.

References

1 *County of La Crosse v. WERC*, 182 Wis. 2d 15, 34, 513 N.W.2d 579 (1994); Wis. Stat. § 102.31(1)(c) ("Liability under s. 102.35(3) is the sole liability of the employer, notwithstanding any agreement of the parties to the contrary.").

2 1975 Wisconsin Act 175 can be found on the Legislature's website at https://docs.legis.wisconsin.gov/1975/related/acts/147 (last visited, May 11, 2021). In this article, the filing party is referred to as either the applicant or employee, the target as the employer, company or business client and the insurer, to the extent involved, as either insurer or carrier. These terms are used interchangeably throughout.

3 Wis. Stat. §102.35(3), available at: https://docs.legis.wisconsin.gov/statutes/statutes/102/35 (last visited May 11, 2021).

4 *West Allis Sch. Dist. v. DILHR*, 116 Wis. 2d 410, 422, 342 N.W.2d 415 (1984).

5 *Id.*; *see also Dielectric Corp. v. LIRC,* 111 Wis. 2d 270, 278, 330 N.W. 2d 606 (Ct. App. 1983).

6 The authors note here that, as a result of an ongoing debate within their Firm over the terminology, the Wisconsin legislature's selection of the term "worker's compensation"

seeks to draw focus to its protection of each individual employee in Wisconsin while the common usage outside of Wisconsin, "workers' compensation" draws attention to the system created to address workplace injuries. While the authors tend to use the former, we acknowledge that individuals outside of Wisconsin may think we failed second grade grammar class; however, the authors profess to an acceptable level of knowledge on this issue.

7 *Great Northern Corp. v. LIRC*, 189 Wis. 2d 313, 317, 525 N.W.2d 361 (1994).

8 The Labor and Industry Review Commission, the appellate body which reviews decisions by the Office of Worker's Compensation Hearings (OWCH), among others, will be referred to herein as LIRC or Commission.

9 "Employer" is defined by Wis. Stat. §102.04(1)(b) to include "1. Every person who usually employs 3 or more employees for services performed in this state, whether in one or more trades, businesses, professions, or occupations, and whether in one or more locations", or "2. Every person who usually employs less than 3 employees, provided the person has paid wages of $500 or more in any calendar quarter for services performed in this state. Such employer shall become subject on the 10th day of the month next succeeding such quarter." Specific definitions apply to farming operations, temporary agencies, franchisees and other employers. *See* https://docs.legis.wisconsin.gov/statutes/statutes/102/04 (May 12, 2021).

10 *Universal Foods Corp. v. LIRC*, 161 Wis. 2d 1, 6, 467 N.W.2d 793 (Ct. App. 1991) (citing *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 126, 438 N.W.2d 823 (1989)). Note that an inconsistency remains in Wisconsin law as to whether, as part of the *prima facie* proof, an employee must establish the decision not to rehire simply occurred *after* the work-related injury, *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 123, 438 N.W.2d 823 (1989), or *because* of the injury. The Supreme Court recently left this issue for another day as it did not have to be resolved. *See deBoer Transp., Inc. v. Swenson*, 2011 WI 64, ¶ 42, 335 Wis. 2d 599, 804 N.W.2d 658 (citing *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938)) (only dispositive issues need be addressed).

11 This statute provides that "[e]very person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employees, but not including the following: 1. Domestic servants. 2. Any person whose employment is not in the course of a trade, business, profession or occupation of the employer, unless as to any of said classes, the employer has elected to include them."

12 *Ambrose v. Harley Vandeveer Family Trust*, Claim No. 86-39393 (LIRC Feb. 20, 1989). In *Ambrose*, the applicant was injured during work while caring for her invalid sister. However, in rejecting her application, the Commission held that she was hired exclusively as a primary care giver instead of as a cook, cleaning person, or other form of domestic servant (the duties during which she was injured). The Commission's use of the term "invalid" is used herein in its original form, despite its outdated nature. The Commission decisions cited in this article can be found on its website, https://lirc.wisconsin.gov/ (last visited June 28, 2021).

13 *Halverson v. Alexander*, Claim No. 1994003111 (LIRC Apr. 10, 2001) (citing *Cornelius v. Industrial Commission*, 242 Wis. 183, 185 (1943)) (internal citations omitted).

14 *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶¶ 49-52, 298 Wis. 2d 640, 726 N.W.2d 258 (as the carrier contended the employer should be charged more insurance premiums due to a greater number of employees, it bore the burden of proof to establish that an employment relationship existed, as any party "attempting to obtain judicial recognition that the relationship exists" bears that same burden).

15 Wis. Stat. §102.07(8)(b); *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973) (the factors considered to determine whether an applicant is an independent contractor include (1) The direct evidence of the exercise of the right to control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the relationship), *superseded in part by statute as stated in Olivas*, 298 Wis. 2d 640, ¶ 87. The recent increase in the use of the independent contractor model via the gig economy certainly muddies any potential clarity about the nature of employment.

16 *Grant County Serv. Bureau, Inc. v. Indus. Comm'n*, 25 Wis. 2d 579, 582, 131 N.W.2d 293 (1964).

17 Following the filing of an application for worker's compensation benefits by an employee, the hearing stage of these primary or secondary (penalty) "litigated claims" are adjudicated by the OWCH, in the Department of Administration's Division of Hearings and Appeals, effective January 11, 2016.

18 *West Bend Co.*, 149 Wis. 2d at 123.

19 *Hill v. LIRC*, 184 Wis. 2d 101, 112, 516 N.W.2d 441 (Ct. App. 1994).

20 *Id.* at 111.

21 *L & H Wrecking Co. v. LIRC*, 114 Wis. 2d 504, 510, 339 N.W.2d 344 (Ct. App. 1983).

22 *Hill*, 184 Wis. 2d at 111-112. Wisconsin courts have not directly addressed an employer's re-hire obligation with regard to an employee who, after release from a work-related injury that precludes work in the employee's original position, seeks available work in a different position. As the statutory language does not expressly limit the potential penalty to one position only, but rather expressly to "suitable employment […] available within the employee's physical and mental limitations," Wis. Stat. §102.35(3) likely extends beyond the original position. *See also Link Indus., Inc. v. LIRC*, 141 Wis. 2d 551, 556, 415 N.W.2d 574 (1987) (interpreting "rehire" to mean "that if an employee is absent from work because of an injury suffered in the course of employment, the employee must be allowed the opportunity to return to work if there are

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positions available and the previously injured employee can do the work.").

23 *Anderson v. Labor and Industry Review Commission and Northridge Chevrolet GEO,* App. No. 2020AP27 (Ct. App. June 2, 2021) (pub. recommended) (appeal docketed) (available at: https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=372813) (June 7, 2021). Counsel seeking to cite *Anderson* are encouraged to check its subsequent history prior to doing so as a petition for review has been filed in the Supreme Court and is being opposed.

24 *See*, *e.g.*, *West Bend*, 149 Wis. 2d at 123; *see also Ray Hutson Chevrolet v. LIRC*, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994), *rev. denied* 524 N.W. 2d 143. As most experienced employment lawyers do, numerous defenses are presented which may be asserted when supported by factual circumstances; however, while the rules of civil procedural do not apply in worker's compensation matters, it is prudent to assert all available defenses to avoid a potential waiver argument being raised by another party and the attendant increase in defense costs required to favorably resolve that issue.

25 "Neither the statute nor the case law require that the injured employee suffer a significant period of disability in order for the requirements of sec. 102.35(3) to be invoked." *Link Indus., Inc.*, 141 Wis. 2d at 556 (one-day absence from work due to an injury triggered the statutory penalty provision).

26 *Great Northern Corp.*, 189 Wis. 2d at 320 (statute prohibits an employer from by terminating employee who returns from work-related injury for any number of absences where one or more of the absences counted against the employee were part of the total absences were related to the work-injury, exactly what the statue was designed to prevent) (emphasis supplied).

27 *See Williams v. Michaels Dairy*, Claim No. 2007-032676 (LIRC June 23, 2010 (citing cases).

28 *West Bend Co.*, 149 Wis. 2d at 126.

29 *Inman v. Morgan Tire & Auto LLC*, Claim No.2014-007042 (LIRC Oct. 31, 2018) (employer successfully demonstrated reasonable cause to terminate the applicant's employment due to his physical inability to perform all the duties required of either a salesperson, or of a shop foreman/lead technician); *Oldenburg v. Big Lots Stores, Inc.*, Claim No. 2015-011721 (LIRC Jan. 31, 2019) (credible evidence demonstrated employer acted reasonably and without pretext in discharging the applicant because he was physically unable to return to the job he was performing when injured).

30 *West Allis*, 116 Wis. 2d at 426.

31 *deBoer Transp.*, 335 Wis. 2d 599, ¶ 29.

32 *Id.* at ¶ 31.

33 *Great Northern Corp.*, 189 Wis. 2d at 318-19; *Ray Hutson Chevrolet*, 186 Wis. 2d at 123; *Riech v. SM&P Utility Resources, Inc*., Claim No. 2016-029538 (LIRC Nov. 30, 2018) (employer sufficiently demonstrated that it had concerns about the applicant's ability to learn the technical aspects of the job, and that the applicant had violated a safety rule, which were sufficient treason to discharge but had nothing to do with the applicant's knee injury.); *Baker v. Menard Inc.*, Claim No. 2012-005778 (LIRC Dec. 17, 2013) (reasonable cause found where the applicant, disregarding a recent directive from the employer, allowed his subordinates to engage in time theft *i.e.*, being paid for time they did not work.); *Dryden v. G4S Secure Solutions*, Claim No. 2017-014529 (LIRC May 31, 2019) ("[c]redible evidence supports the fact that the applicant, a prison guard whose job required him to carry a loaded gun, verbally threatened to shoot two coworkers. After investigating and determining that the applicant had made this threat, the employer discharged him.").

34 *Ray Hutson Chevrolet*, 186 Wis. 2d at 123.

35 *Id*. at 122.

36 *Id*.

37 *Id*.

38 *deBoer Transp., Inc. v. Swenson*, 2010 WI App 54, ¶¶ 15-16, 324 Wis. 2d 485, 781 N.W.2d 709.

39 *deBoer Transp., Inc.*, 335 Wis. 2d 599, ¶ 61.

40 *Id.* at ¶ 45.

41 *Id*. at ¶¶ 52-53 (establishing that while the Americans with Disabilities Act and the Wisconsin Fair Employment Act, Wis. Stat. § 111.34(1)(b), may require accommodation of an employee's restrictions, Wis. Stat. § 102.35(3) does not require employers to make "accommodations" to their long-standing and universally applied policies in order to rehire injured workers who are physically unable to return to their regular position).

42 Wis. Stat. § 102.31(1)(c); *see also* Wis. Stat. § 102.35(3) ("Any employer who without reasonable cause refuses to rehire an employee . . . has *exclusive liability* to pay the employee…") (emphasis added).

43 *See*, *e.g.*, *Klay v. Unified Mgmt. Co LLC*, Claim No. 2007-022950 (LIRC Nov. 6, 2008). In *Klay*, the Commission held that the employer was not necessarily responsible for the entire annual wage amount the employee earned in the prior year, $35,152 at $676/week for the full-time receptionist position; rather, it was responsible only for the wages of the position which the employee should have been offered upon seeking rehire, the now-reduced, part-time receptionist position, that was not offered by the employer.

44 *See supra* note 15. The Answer should either admit, deny or otherwise provides support for the employee's correct weekly wage for purposes of determining the one-year wage amount.

45 "An employee who reports an injury alleged to be work-related or files an application for hearing waives any physician-patient, psychologist-patient, or chiropractor-patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation." Wis. Stat. § 102.13(2)(a). With that said, it is common to secure employee authorization in order to avoid the unnecessary privilege discussion with each individual provider that does not understand the statute.

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News from Around the State: Trials and Verdicts

Caroline D. Baker v. Fleet Wholesale Supply Co, LLC, et al.
St. Croix County Case No. 18-CV-295
May 3-4, 2021

Facts: Plaintiff sued for injuries she sustained from a slip-and-fall at the Fleet Farm store in Hudson, Wisconsin.

Issues for Trial: Damages were stipulated to prior to trial. Liability was contested.

At Trial: The jury found plaintiff causally negligent for her injuries and found no negligence on the part of Fleet Farm.

Plaintiff's Final Pre-Trial Demand: $200,000
Defendant's Final Pre-Trial Offer: None
Verdict: $0

For more information, please contact Kevin J. Kennedy at kkennedy@borgelt.com.

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