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SPECIAL EMPLOYMENT LAW ISSUE

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Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue...

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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.

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.

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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

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.