UNINSURED CLAIMS AGAINST THE EMPLOYER FOR UNREASONABLE REFUSAL TO REHIRE

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I. THE DEFINITION AND PURPOSE OF UNREASONABLE REFUSAL TO REHIRE CLAIMS

A. The Statutory Definition: Section 102.35(3), Stats.

"(3) Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee 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."

B. The purpose of Section 102.35(3), Stats.

"It is clear from the plain words of the statute that its purpose is 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." West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 422, 342 N.W.2d 415 (1984).

Under section 102.35(3), Stats., "an employer, if there is suitable employment available, can only refuse to rehire for a cause or reason that is fair, just, or fit under the circumstances." West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 426, 342 N.W.2d 415 (1984).

II. THE EMPLOYEE'S BURDEN OF PROOF

A. The Elements of an Employee's Claim.

To establish a prima facie case under section 102.35(3), Stats., the employee has the initial burden of proving the following elements: (1) that he was an employee at the time of the injury, (2) that he was injured during the course of his employment, (3) that he applied for rehire, and (4) that the employer failed to reemploy the injured employee. West Bend Co. v. LIRC, 149 Wis. 2d 110, 126, 438 N.W.2d 823 (1989); Hill v. LIRC, 184 Wis. 2d 101, 111, 516 N.W.2d 441 (Ct. Appl. 1984).

1. Employee at the Time of the Injury.

The employment status referred to is that of the worker at the time of the injury, not his status at the time he seeks to go back to work. "The statute refers to one who is not an employee but seeks to become one under section 102.35(3), on the basis of a prior employment status that existed when an injury occurred." West Bend Co. v. LIRC, 149 Wis. 2d 110, 119, 438 N.W.2d 823 (1989).

2. Injured During the Course of His Employment.

a. The employee must have sustained an injury compensable under Chapter 102, Stats. Unless, after a formal hearing between the employee and the worker's compensation insurance carrier where the injury was disputed, an order was issued finding the injury compensable, the employer is free to contest the compensable nature of the injury in a section 102.35(3) proceeding. The employer is not bound by the insurance carrier's decision to accept the injury as compensable or by the carrier's decision to pay compensation pursuant to a compromise agreement. J. D. Neal & J. Danas, Jr., *Worker's Compensation Handbook*, section 8.38 (6th ed. 2009).

b. Under section 102.35(3), Stats., the injury need not result in either time off from work or the payment of benefits for an injured employee to be eligible for compensation in an unreasonable refusal to rehire case. West Bend Co. v. LIRC, 149 Wis. 2d 110, 124, 438 N.W.2d 823 (1989). "All that is necessary to be protected under the statute is that a person be injured while employed and then not rehired, because of those injuries." Id. at 121.

c. The employee's burden of proving a compensable injury requires the same degree of competent medical evidence that is required in a claim for primary compensation, i.e. WKC-16-B.

3. The Employee Must Demonstrate an Interest in Rehire.

a. The employee must communicate to the employer that he wishes to return to work. The communication need not take the form of a written job application, but may be accomplished through informal means, e.g. a telephone conversation. Informing the employer of the physician's release to return to work with or without restrictions may be sufficient. The burden is also on the employee to communicate to the employer the extent to which the employee is willing to return to work in some capacity other than his former job assignment when the employee is precluded from returning to his previous job. Hill v. LIRC, 184 Wis. 2d 101, 111-112, 516 N.W.2d 441 (Ct. App. 1994).

b. However, an employee who is terminated during a period of temporary disability following an industrial injury is not required to contact the former employer at the end of the healing period and ask for a job in order to recover under section 102.35(3), Stats. L & H Wrecking Co. v. LIRC, 114 Wis. 2d 504, 510, 339 N.W.2d 344 (Ct. App. 1983).

4. Employer Must Refuse to Rehire the Employee.

With regard to the fourth element of the employee's claim, caselaw distinguishes between situations where the employee is not rehired by his former employer and situations where there has been a "pro forma" or pretextual rehiring.

a. If the employee is not rehired by his former employer.

Regarding the fourth element of the employee's claim, if the other elements are proven, an employee's prima facie case is established simply by showing that the employer failed to reemploy the injured employee. See West Bend Co. v. LIRC, 149 Wis. 2d 110, 122-124, 438 N.W.2d 823 (1989); but see Ray Hutson Chevrolet, Inc. v. LIRC, 186 Wis. 2d 118, 121-122, 519 N.W.2d 713 (Ct. App. 1994).

b. If there has been a "pro forma" rehiring.

A "pro forma" rehiring occurs when the employee is rehired only to meet the technical requirements of section 102.35(3), Stats., and without a sincere intention of permitting the employment to continue. It is not enough for the employer to rehire the employee with the intent to fire him at a later date. Dielectric Corp. v. LIRC, 111 Wis. 2d 270, 278, 330 N.W.2d 606 (Ct. App. 1983).

Where there ostensibly has been a "rehiring," as is the case with a pro forma rehiring, the fourth element of an employee's prima facie case is established simply by showing that the employer reemployed the injured employee but then interrupted the course of employment. West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 342 N.W.2d 415 (1984); Dielectric Corp. v. LIRC, 111 Wis. 2d 270, 330 N.W.2d 606 (Ct. App. 1983).

B. Evidence of Employer's Motivation Not Necessary.

"Section 102.35(3) does not require a showing that the employer's motivation for discharging the employee is related to the industrial injury, . . ." J. D. Neal & J. Danas, Jr., *Worker's Compensation Handbook*, section 8.32 (6th ed. 2009).

C. The Reason For The Absence From Work Is Not An Element Of The Employee's Prima Case.

"Under section 102.35(3), Stats., the focus is on the injury, the employment status at the time of injury, the fact of being out of work, and the failure to rehire in the absence of reasonable cause. The reason for the absence from work prior to asserting the right to be rehired is not made a criterion for the application of the statute to an otherwise eligible injured employee." [Emphasis added.] West Bend Co. v. LIRC, 149 Wis. 2d 110, 122, 438 N.W.2d 823 (1989).

III. THE EMPLOYER'S BURDEN OF PROOF

Once the injured employee establishes his or her prima facie case, the burden of proof shifts to the employer.

A. In Cases Where the Employee Is Not Rehired by His or Her Former Employer.

The burden of proof shifts to the employer to show a reasonable cause for refusing to rehire the injured employee. To prove reasonable cause, the employer must show that it refused to rehire "for a cause or reason that is fair, just or fit under the circumstances." West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 426, 342 N.W.2d 415 (1984).

In some cases, reasonable cause is established if the employer can show: (1) that the employee could not do the work for which he applied; and (2) that no other suitable work was available within the employee's physical and mental limitations. West Bend Co. v. LIRC, 149 Wis. 2d 110, 126, 438 N.W.2d 823 (1989); Universal Foods Corp. v. LIRC, 161 Wis. 2d 1, 7, 467 N.W.2d 793 (Ct. App. 1991).

1. ". . . Medical evidence is necessary to forecast that a particular person will, for physical and mental reasons, be unable to do a particular job without the likelihood of injury." West Bend Co. v. LIRC, 149 Wis. 2d 110, 129, 438 N.W.2d 823 (1989). Thus, in such a case, medical proof that an employee is unable to perform a job is necessary for the employer to sustain its burden of proof.

2. "To be received at a hearing, a medical report on which an employer relies in refusing to reemploy an employee need not be certified on a Form WKC-16-B. . . . The question is not whether any report truly and correctly states the claimant's disability, but only whether the report is authentic and whether the employer was entitled in good faith to rely on its contents when reemployment was refused. It is the employer's judgment, not the medical practitioners, that is the subject of examination." J. D. Neal & J. Danas, Jr., *Worker's Compensation Handbook*, section 8.36 (6th ed. 2009).

3. The burden of proof as to the availability of suitable work rests with the employer. L & H Wrecking Co. v. LIRC, 114 Wis. 2d 504, 511, 339 N.W.2d 344 (Ct. App. 1983).

4. In determining whether suitable employment is available, seniority provisions of a collective bargaining agreement or promulgated written work rules "shall govern," while the employer's continuance in business shall merely "be considered." Section 102.35(3), Stats.

5. When determining whether the employer had reasonable cause not to rehire the injured employee, the focus is on the reasons the employer relied upon at the time the decision not to rehire was

made, and not on reasons that may have surfaced after the decision was made. "Evidence regarding what the employer might have done after the discharge decision is irrelevant and entirely speculative. Such 'after acquired' evidence cannot reduce the monetary penalty established by Section 102.35(3)." Thomas M. Domer & Charles F. Domer, *Wisconsin Worker's Compensation Law*, Section 25:32 (2012-2013 ed.)

B. In cases Of An Alleged "Pro Forma" Rehiring.

Where there ostensibly has been a "rehiring," the employer has the burden of proving (1) that it rehired the injured employee in "good faith" and (2) that there was subsequently reasonable cause not to rehire the employee. See West Allis School Dist. v. DILHR, 116 Wis. 2d 425 to 429, 342 N.W.2d 415 (1984).

1. To prove "good faith" in rehiring, the employer must show that it intended to reemploy the injured employee for an indefinite term of employment. West Allis School Dist. v. DILHR, 116 Wis. 2d 410, 413, 418, 419 and 424, 342 N.W.2d 415 (1984). "To be in good faith, the employer must rehire the injured employee with the intention of keeping the employee on the job, as it would intend to keep its other employees on the job." Id. at 413.

2. A subsequent interruption of the employment for other than good cause is probative of lack of good faith in the initial "rehiring." Id. at 424-425.

IV. OTHER EXAMPLES OF REASONABLE CAUSE

A. When terminating an employee for absences, an employer should be wary of including absences caused by a work-related injury. Great N. Corp. v. LIRC, 189 Wis. 2d 313, 525 N.W.2d 361 (Ct. App. 1994).

B. "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 their employees." Ray Hutson Chevrolet, Inc. v. LIRC, 186 Wis. 2d 118, 123, 519 N.W.2d 713 (Ct. App. 1994). Thus, if an employer shows that it refused to rehire an injured employee because the employee's position was eliminated to reduce costs and therefore to increase efficiency, the employer has shown reasonable cause under section 102.35(3), Stats.

C. The provisions of section 102.35(3) apply regardless of whether the employee is in a probationary status. Law v. Natural Casing Co., WC Claim No. 88-23004 (LIRC Sept. 25, 1989).

D. An increase in the employer's worker's compensation insurance premium because of the employee's injury does not constitute reasonable cause for an employer's refusal to rehire. Abler v. Antigo Auto Parts, Inc., WC Claim No. 85-62900 (LIRC Feb. 22, 1989).

E. An injured employee may be discharged for misconduct, but the misconduct must not simply be a pretext for discharge. Evidence of the employer's failure to follow a progressive disciplinary policy before discharging the employee is probative of whether the discharge was unreasonable. See Legler v. J. comp Tech., Inc., WC Claim No. 2003-030691 (LIRC April. 22, 2008).

V. PENALTY

A. Uninsured Loss.

Under section 102.35(3), Stats., the employer is solely responsible for a wrongful refusal to rehire. It is not insured for this claim by the worker's compensation carrier.

B. Calculating The Penalty.

1. An employer liable under section 102.35(3), Stats., must pay wages lost by the employee during the period of the refusal, but the penalty cannot exceed one year's wages.

2. The penalty is calculated based upon the employee's actual wage loss, not the weekly indemnity rate.

3. The Labor and Industry Review Commission has interpreted the phrase "one year's wages" to be a monetary, not a temporal, limit. J. D. Neal & J. Danas, Jr., Worker's Compensation Handbook, section 8.34 (6th ed. 2009).

4. The penalty is "in addition to other benefits." Section 102.35(3), Stats. "Presumably, this includes other worker's compensation benefits as well as unemployment compensation benefits and any benefits under state or federal equal rights legislation." J. D. Neal & J. Danas, Jr., Worker's Compensation Handbook, section 8.34 (6th ed. 2009). Consequently, there is no offset for unemployment compensation benefits that the employee may have received during the period of his wage loss.

5. The penalty continues to accrue until either the statutory cap of "one year's wages" is reached or the period of refusal ends. What must an employer do to end the period of refusal? It must do what it should have done in the first instance; namely, rehire the employee in good faith.

6. Because the benefit under section 102.35(3), Stats., is considered a "penalty" payment, it does not constitute wages or back pay which would be subject to income tax withholding. See generally J. D. Neal & J. Danas, Jr., Worker's Compensation Handbook, section 7.34 (4th ed. 1997).

7. "After acquired" reasons for terminating the injured worker cannot reduce the monetary penalty. Thomas M. Domer & Charles F. Domer, *Wisconsin Worker's Compensation Law*, Section 25:32 (2012-2013 ed.)

C. No Duty To Mitigate Damages.

Section 102.35(3), Stats., is silent on the employee's obligation to mitigate his damages and imposes no express burden on the employee to seek reemployment elsewhere. "As a matter of policy, the courts may choose to read in such a requirement, but it is presumed that the employee has satisfied the requirement unless the employer makes an affirmative showing to the contrary." J. D. Neal & J. Danas, Jr., Worker's Compensation Handbook, section 8.35 (6th ed. 2009).

VI. MISCELLANEOUS

A. The Worker's Compensation Act exclusive remedy provision does not bar a complainant whose claim is covered under the Worker's Compensation Act from pursuing a discrimination in employment claim under the Wisconsin Fair Employment Act. Byers v. LIRC, 208 Wis. 2d 388, 407-408, 561 N.W.2d 678 (1997).

B. Section 102.35(3), Stats., does not bar an injured employee from seeking arbitration under a collective bargaining agreement to determine whether a termination violated the agreement. County of La Crosse v. WERC, 182 Wis. 2d 15, 513 N.W.2d 579 (1994).