



Wisconsin Court of Appeals Clarifies Employees' Burden to Prove Refusal to Rehire in Workers' Compensation Cases

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A recent decision from the Wisconsin Court of Appeals will make it easier for employees to prove certain workers' compensation claims against their former employers. In *Bartelt Custom Automotive, Inc. v. LIRC*, the Court resolved confusion over the elements that an employee must prove to show that their employer unreasonably refused to rehire them following a workplace injury.

Wis. Stat. § 102.35(3) prohibits employers from refusing to rehire an employee following a workplace injury unless the employer has "reasonable cause" for doing so. The statute states:

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 . . . has exclusive liability to pay the employee, in addition to other benefits, the wages lost during the period of such refusal, not exceeding one year's wages.

Before this decision in *Bartelt*, there were conflicting court decisions about what elements an employee had to show to prove that the employer refused to hire them based on a workplace injury. *Bartelt* clarified that moving forward, to establish such

a claim, an employee must show that they: (1) were an employee; (2) sustained an injury in the course of their employment; and (3) were subsequently denied rehire. If an employee can show these three elements, the burden then shifts to the employer to show that it had “reasonable cause” for refusing to rehire the employee.

What qualifies as “reasonable cause” depends on the facts of a particular case. However, an employer will have “reasonable cause” if the employer is never put on notice that the employee is interested in returning to work or if the employee’s position was eliminated during the recovery period to save costs and promote efficiency. Additionally, an employer would have reasonable cause not to consider the employee for an open higher-level position if the employee’s old job is unavailable and the employee lacks the necessary qualifications for that role. If the employer has filled the employee’s position while the employee was out recovering, an employer is not obligated to bump the employee who filled the position in the interim. If, however, the employee took FMLA to recover from their workplace injury, the employer may be obligated to restore the employee back to the same or equivalent position that was held prior to taking the leave.

The facts of the *Bartelt* decision help illustrate some of these points. When Kevin Warlow first applied at Bartelt, he was offered a press brake operator position based on his prior experience performing that work, but he turned it down because he was not interested in it. Warlow accepted a welding position instead. Warlow injured his left hand on the job while doing welding work. He sought to return to work approximately two months later. He was told that work had slowed down and that he was being laid off. What Bartelt did not tell Warlow was that his job had been filled by someone else, but that there was an open press brake position available. Bartelt did not offer the open press brake operator position to Warlow on the assumption that he would have turned it down based on his previous disinterest and because Warlow never asked about other open work that was available. Warlow testified later that he would have accepted the press brake job to sustain his income.

Warlow later learned these facts and filed a lawsuit against Bartelt, alleging that it had unreasonably refused to offer him the press brake operator role following his injury. Bartelt raised three arguments in its defense to show that it had “reasonable cause,” but each of Bartelt’s arguments were rejected on appeal.

- Bartelt argued that it had no duty to offer the press brake role to Warlow because he had previously made comments about being worried he was too

physically small to perform the job. Those comments were never substantiated and were found insufficient to justify Bartelt's complete refusal to even explore whether Warlow was interested in the role.

- Bartelt argued that it had no obligation to offer the role because Warlow had previously turned it down. Bartelt argued it was reasonable to assume he would have rejected it again and so offering it would have been futile. The Court rejected that argument because Warlow's circumstances had changed significantly and he was eager for good-paying work to sustain his income. Thus, even though it was not his preferred job and he had made that clear earlier, Bartelt still had an obligation to offer it to him.
- The Court rejected Bartelt's argument that Warlow had an obligation to ask about what other roles were available even though he had no idea that the press brake operator was an option. In rejecting that argument, the Court observed that "the key focus is on whether the employer had notice that the employee was seeking to return to work" and that "it is enough for the employee to contact the employer and indicate they want and are able to return to work." Thus, Warlow was not obligated to ask about every other available role since he had expressed a general interest in coming back.

This case is significant because it lessens the burden on employees to prove their claims and makes clear that employers have significant obligations to explore options for employees who are returning from workplace injuries. Moving forward, employers may continue enforcing their legitimate and neutral hiring practices for determining who is qualified for a given position, but employers should be cautious about withholding information about open positions which the employee might be qualified for and even those which the employee has previously expressed disinterest in performing.

Although this case was focused on just the employer's obligations under the worker's compensation law, employers will often have several laws to consider when determining whether an employee can return to work, including the ADA, FMLA, and state disability laws. Because of these multiple obligations, consultation with legal counsel is advisable. We encourage employers to reach out to a member of the Boardman Clark Labor & Employment Practice Group with questions.

Disclaimer: This information is not intended to be legal advice. Rather, it seeks to make recipients aware of certain legal developments that affect human resource issues. Recipients who want legal advice concerning a particular matter should consult with an attorney who is given a full understanding of the relevant facts pertaining to the particular matter.

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