

HR Heads Up “Double Header”: Recent Cases Provide Important Reminders on Employment Law Fundamentals

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This is the second installment in a two-part HR Heads Up Double Header. In the [first installment](#), we addressed the fundamental lessons of *Anicich v. Home Depot U.S.A., Inc.* regarding the need for employers to act vigilantly to address employee harassment. In this installment, we address *Wisconsin Bell, Inc. v. LIRC*, a Wisconsin Court of Appeals case that provides a crucial reminder of how an employer’s legal obligation to provide reasonable accommodations for an employee with a disability can become tangled with the employer’s need to address performance issues with that same employee. As Wisconsin Bell demonstrates, while disentangling performance and disability-related issues is often challenging, employers that fail to do so risk violating their disability accommodation obligations under the Wisconsin Fair Employment Act (WFEA).

Wisconsin Bell, Inc. v. LIRC

In a case involving a fact pattern that we see with increasing frequency, the Wisconsin Court of Appeals in *Wisconsin Bell, Inc. v. LIRC* addressed the question of whether an employer may be liable under the WFEA for disability discrimination where it takes adverse employment action against an employee based on conduct that the employee asserts was caused by the employee’s disability. This is not a new question under WFEA, as the Wisconsin Labor and Industries Review Commission (LIRC) has repeatedly found that an employer can be held liable in these circumstances. LIRC’s position on this issue, however, is a break from standards imposed on employers by the federal Americans with Disabilities Act (ADA), which courts have found to not require accommodation of an employee’s improper behavior, even if that behavior might be caused by the employee’s disability. Wisconsin Bell represents the first time that the Wisconsin Court of Appeals has specifically addressed LIRC’s position that the WFEA reaches beyond the ADA and imposes a duty to accommodate in this type of circumstance.

Wisconsin Bell involved an employee, Charles Carlson, who was known by his employer, Wisconsin Bell, to have bipolar disorder. Carlson was a long-time employee of Wisconsin Bell, having been hired in 1986, and he disclosed his bipolar diagnosis when he moved into a new position in 2006. After this disclosure, Wisconsin Bell provided Carlson with various accommodations over a period of several years. However, when Carlson moved into a new call center position in 2010, he did not disclose his bipolar diagnosis to his new supervisor, as he mistakenly understood that this information would have been passed on by management.

Carlson's new supervisor disciplined Carlson after observing him disconnect eight calls in a period of nine minutes, without explanation, in violation of Wisconsin Bell's policy against call avoidance. This discipline, a suspension pending termination, was reviewed at a disciplinary hearing at which Carlson presented evidence from his health care providers regarding his bipolar disorder and its symptoms, such as "extreme moods" prompted by "relatively minor frustration." Wisconsin Bell nevertheless determined that discipline was appropriate, as intentionally disconnecting customers would not be allowed under any circumstances, and it imposed a fifty-day unpaid suspension. Wisconsin Bell informed Carlson that if he needed an accommodation in the future, he should request it, but he would not be provided an accommodation that involved call avoidance.

Wisconsin Bell also had Carlson commit to a "Back to Work Agreement," under which he agreed that for a one-year period after his return to work, Wisconsin Bell would have just cause to terminate his employment for any infractions relating to customer care or breach of integrity. Ten days before this agreement was set to expire, Carlson was found to be improperly "chatting" with a co-worker over an internal messaging system while his phone was set to inactive mode using a "health code," which was intended to be used by employees for purposes such as illness or needing to use the bathroom. He was therefore disciplined with a suspension pending termination.

At the hearing on this disciplinary action, Carlson again presented evidence regarding his bipolar disorder, including a letter from his health care provider noting a recent increase in his symptoms and medication. Carlson explained that he had activated the health code after receiving news that he had failed a test for a position in the Collections Department, which had greatly upset him, and he stated that he "doesn't react to things like everybody else." He further explained that when he activated his health code, he first went to his supervisor to see about leaving for the day, and he was told to "do what you need to do." Upon returning to his workstation, he decided to attempt to keep working because the call center was in "Code Red" (heavy volume), and he was "chatting" with friends for support, which was a coping mechanism that had been suggested by his therapist. When he was eventually confronted by his supervisor about the chatting, he decided to leave work early because he was upset and crying and would not have been able to handle calls in a professional manner.

Despite the evidence of the connection between Carlson's disability and his conduct, Wisconsin Bell determined that it would move forward with a termination for breach of the Back to Work agreement. As a basis for this decision, Wisconsin Bell cited Carlson's chatting while the health code was activated and his leaving work early, both of which Wisconsin Bell characterized as improper call avoidance. Wisconsin Bell also stated that it did not believe that Carlson was truly ill.

After his termination, Carlson filed complaints under the WFEA alleging that both his 50-day suspension and his eventual termination constituted unlawful discrimination based on his disability. After a hearing on these claims, an Administrative Law Judge (ALJ) concluded that Wisconsin Bell had violated the WFEA in regard to both issues because its actions were based on Carlson's disability, and further, that Wisconsin Bell had refused to reasonably accommodate Carlson's disability. Wisconsin Bell appealed this decision to LIRC, and LIRC upheld the ALJ's determination that Carlson's termination was unlawful. However, LIRC concluded that the suspension did not violate the WFEA because the individuals responsible for his discipline were not aware of his disability at the time, and even if they had been, it would not have been a reasonable accommodation to permit Carlson to hang up on customers.

The Court of Appeals reviewed and affirmed LIRC's decision. It specifically approved of LIRC's reasoning which it called the "inference theory" that disciplinary action that is based on conduct caused by an employee's disability violates the WFEA. The court explained that a necessary element of the inference theory is evidence that the employer had knowledge of the link between the employee's disability and the conduct that resulted in the adverse action. The court found that it was reasonable for LIRC to conclude that this evidence existed in regard to Carlson's termination based on the information he presented at the first review hearing, which included letters from his health care providers, as well as the fact that his conduct that resulted in the termination decision was consistent with the symptoms described in those letters.

The court also addressed the fact that in cases such as this, where the connection between the employee's disability and his conduct would be outside of the expertise of LIRC, expert testimony is necessary to establish the causal link. The court found the required expert evidence in the form of the letters from Carlson's health care providers, as well as testimony that they provided during the hearing process, all of which supported a causal connection between Carlson's bipolar disorder and his "chatting" at work after receiving upsetting news. The court noted that Wisconsin Bell's response in the face of this evidence was to simply choose not to believe Carlson, without giving any consideration to the information from his doctors, and without providing its own expert evidence to contradict that information. The court found that by taking this approach, Wisconsin Bell did not act in good faith in terminating Carlson's employment.

In sum, while Wisconsin Bell may not establish new law, it provides a host of important lessons for employers. Addressing misconduct and performance issues with an employee who may have a disability that relates in some way to the conduct at issue is one of the most challenging issues an employer can face. This is particularly true when the disability is a mental health condition, as the potential connection between the disability and the employee's conduct may be murky. Wisconsin Bell teaches that in these circumstances, an employer must proceed cautiously. Among other things, an employer should consider:

- Whether the employee has explicitly disclosed a disability or made a request for a reasonable accommodation.
- If not, whether the employer is aware of facts that might reasonably suggest that the employee has a disability or has indicated a need for a reasonable accommodation.
- If a disability has been disclosed or may reasonably be suspected, is it possible that there is a connection between the disability and the conduct at issue?
- Is there a need for the employer to seek additional information in regard to any of these issues?
- Although Wisconsin Bell explained that expert evidence of a disability may be required to establish the link between a disability and an employee's conduct, an employee is not required to present expert evidence to trigger an employer's obligation to explore a reasonable accommodation.
- If an employer knows or should reasonably suspect that there may be a connection between an employee's improper conduct and a disability, the employer likely has a legal obligation to explore whether it has a duty to provide a reasonable accommodation taking disciplinary action before exploring this obligation could expose the employer to a disability discrimination claim.
- If the employee has come forward with evidence of a connection between a disability and the conduct at issue, has the employer adequately considered that information? Is there a need for the employer to request additional information from the employee's medical provider or to engage its own expert to evaluate the employee's condition or the potential connection between that condition and the conduct at issue?
- Before imposing any discipline, does the employer have an obligation to engage the employee in the interactive process to attempt to identify a reasonable accommodation for the employee's disability?

This is only a partial list of potential issues and considerations, and an employer's specific legal obligations may vary depending on the circumstances, which is part of what makes this such a challenging issue for employers. Nevertheless, the overall lesson of Wisconsin Bell is clear: Employers that disregard potential connections between an employee's disability and conduct for which the employee will be disciplined do so at their own peril, with the risk of violating their legal obligations to the employee under the WFEA.

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.