

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

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Two recent appellate court cases—one state and one federal—provide Wisconsin employers with important reminders on employment law fundamentals that can be easy—but costly—to overlook. In this first installment of a two-part HR Heads Up Double Header, we address the federal case, where the court found that an employer could be held liable for off-duty harm caused by an employee when the harm had a sufficient connection to the workplace. The case involved a supervisor who was a known sexual harasser who eventually murdered a subordinate who he had been harassing. This case highlights the need for employers to vigilantly address threatening behavior by their employees, and to remember that certain off-the-job conduct may have job-related implications that an employer cannot afford to neglect.

Anicich v. Home Depot U.S.A., Inc

In what the Seventh Circuit recognized as a “tragic case,” *Anicich v. Home Depot U.S.A., Inc.* involved the question of whether an employer, Home Depot (along with two other companies that managed its garden centers), may be held liable for the actions of one of its supervisors, Brian Cooper, who coerced his subordinate, Alisha Bromfield, to attend an out-of-town wedding with him and then murdered and raped her after the wedding. The trial court had determined that, as a matter of law, Cooper’s actions were too far removed from his employment for his employer to be held accountable. The Seventh Circuit, however, disagreed, and concluded that the employer could be liable for Cooper’s actions. According to the Seventh Circuit, that is an issue for a jury to decide.

The plaintiff in the case was the estate of the deceased employee and her unborn daughter. The plaintiff alleged that Home Depot was negligent in its supervision of Cooper, as it had continued to employ him despite his known history of sexually harassing, verbally abusing, and physically intimidating his female subordinates, including Bromfield, his victim. Among other things, the plaintiff alleged that Home Depot continued to employ Cooper without addressing his ongoing harassment of Bromfield, which involved verbally abusing her while throwing things, controlling and monitoring her both during and outside of her work hours, and requiring her to come with him on business trips. Finally, after five years of this, the plaintiff alleged that Cooper used his authority as a supervisor—threatening to fire Bromfield or cut her hours—to require Bromfield, who was seven months pregnant at the time, to accompany him on the tragic trip.

The plaintiff's case was based on the legal theory of negligent supervision. This is a concept under state law that holds that while one person generally does not have a legal duty to prevent the criminal actions of another, there is an exception that requires employers to act reasonably in hiring, supervising, and retaining their employees. While this case was brought under Illinois law, Wisconsin courts recognize a similar theory of negligent supervision. Under both Illinois and Wisconsin law, one of the critical elements of proving that an employer is liable for negligent supervision is demonstrating that the employer's actions were responsible for causing the injury at issue. To do this, the plaintiff must demonstrate that the employee's wrongful actions and the harm they caused were foreseeable.

In *Anicich*, the defendants argued that Cooper's murder and rape of Bromfield could not have been foreseeable, because they were much more extreme than even his most offensive prior behavior. They also argued that because Cooper had not previously made explicit threats or actually hit anyone, it would not have been reasonable to foresee his violent behavior. The court rejected both of these arguments, explaining that the question of whether Cooper's actions were foreseeable is an issue that a jury must decide based on all of the facts presented. The court emphasized that the defendants could not avoid having a jury decide this issue just because they may not have foreseen the precise nature of the harm and the exact manner of how it would occur. Rather, if the plaintiff is able to present facts on which a jury might conclude that the actions and harm at issue were reasonably foreseeable, that question becomes an issue for a jury.

The defendants also argued that they could not be liable for Cooper's actions because they did not happen on the job or even on the employer's premises. The court also rejected this argument. The court acknowledged that an employer generally will not be liable for an employee's off-the-job criminal conduct simply because the employee knows the victim through work. Rather, there must be some further connection between the criminal action and the job, such as the action happening on the employer's premises after hours or involving the use of the employer's property. In this case, the court found that this criterion was met because Cooper used his supervisory authority to compel Bromfield to attend the wedding. The court explained that the employer provided Cooper with this authority by virtue of his employment, and it therefore had a duty to properly monitor and supervise his use of that authority.

While the *Anicich* case did not determine that the defendants were necessarily liable for Cooper's heinous actions—it concluded that this was an issue for a jury to decide—it provides an important reminder that employers must vigilantly monitor and address harassment in the workplace, including in circumstances where the harassment might extend beyond the employer's premises and outside of work hours. It is also a reminder that harassing behavior can quickly escalate, and an employer may be held accountable for the results, particularly if it has a history of tolerating and not effectively responding to harassment by its employees. *Anicich* is obviously an extreme case, but an employee's harassment does not have to rise to the level seen in this case for an employer to be found liable for negligent supervision.

In the public sector, employers have some added protection against negligent supervision claims under Wis. Stat. § 893.80(4), which provides immunity for certain intentional and discretionary conduct of their employees. However, the protections of this statute have eroded over time, and it does not provide a guarantee of immunity in every case, which means that the lessons of *Anicich* are still important for public sector employers.

Keep a lookout for the next installment in this HR Heads Up Double Header where we will discuss a recent Wisconsin Court of Appeals case that addresses the circumstances in which an employer may be held liable for disability discrimination under the Wisconsin Fair Employment Act (WFEA) when it takes adverse action against an employee for conduct that is caused by the employee's disability. It is a case that provides an important reminder that employers must proceed with caution when addressing performance and disciplinary issues that may be linked to an employee's disability.

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.