WISCONSIN COURT OF APPEALS
DISTRICT II

CHRYSLER GROUP LLC,

Petitioner-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION

Case No. 2014AP000083

and

MICHAL L. SHEA,

Respondents-Respondents.

APPEAL FROM A DECISION OF THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE DAVID M. BASTIANELLI PRESIDING

AMICUS CURIAE BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE AND WISCONSIN CIVIL JUSTICE COUNCIL, INC.

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INTRODUCTION

The Wisconsin Manufacturers & Commerce ("WMC") and Wisconsin Civil Justice Council, Inc. ("WCJC") are both long-standing Wisconsin organizations representing the interests of Wisconsin businesses. WMC is the state's largest general business trade association, whose more than 3,500 members employ nearly one-quarter of the private sector employees in Wisconsin. WCJC was formed to represent Wisconsin business interests with a mission of promoting fairness and equity for businesses in the court system and enhancing Wisconsin's image as a place to live and work. WCJC's members include numerous Wisconsin trade associations representing employers of all sizes throughout Wisconsin.

The Wisconsin Fair Employment Act ("WFEA"), Wis. Stat. § 111.31 *et seq*., is intended to encourage employment of qualified individuals in the workplace, a matter of

statewide concern. The WFEA prohibits unfair discrimination by employers with respect to a variety of bases, including "age, race, creed, color, disability, marital status, sex, national origin, ancestry, sexual orientation, arrest record, conviction record, [or] military service . . . ." Wis. Stat. § 111.31(1).

In this case, the Labor and Industry Review Commission ("LIRC") and the circuit court determined that Chrysler Group LLC's ("Chrysler's") decision to place employee, Michal Shea, on paid leave rather than reinstate her to active work based upon legitimate and serious concerns regarding Ms. Shea's verified consumption of alcohol before work and potential resulting safety risks to her coworkers constituted discrimination under the WFEA.

WMC and WCJC are submitting this brief because they are concerned that the circuit court's decision will have broad and sweeping implications for employers throughout

the state, and may affect the growth of business in Wisconsin. The circuit court's decision implies that employers must continue to allow in the workplace employees who admit to intentionally and consistently drinking alcohol immediately before coming to work with the goal of affecting their demeanor and work experience. Allowing this to become the standard for employers would greatly impact the safety of other employees in the workplace, and would expose employers to unwarranted and unnecessary liability with respect to their workplaces and products. Such a result is not required by the WFEA and would have a damaging effect on Wisconsin's employers and thus, economy.

ARGUMENT

I. THE LOWER COURT'S DECISION PREVENTS EMPLOYERS FROM PROTECTING THE SAFETY OF THEIR EMPLOYEES AND THE PUBLIC.

One of the paramount concerns for Wisconsin employers is the safety of their employees. Indeed, there are numerous federal and state laws and regulations addressing this specific issue. *See e.g.*, the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* Further, employers are concerned about the safety and prosperity of their communities, which include not only their employees but their families and customers. The Wisconsin Legislature acknowledged the importance of an employer's ability to consider the safety of its employees and the public in the language of the WFEA. The WFEA provides an employer may consider "the present and future safety of the individual, of the individual's coworkers and, if applicable, of the general

public," in evaluating whether an individual is able to adequately undertake the responsibilities of a job. Wis. Stat. § 111.34(2)(b).

The lower court's decision in this case undercuts employers' efforts to keep their workplaces safe, and to safeguard their employees, the public and their businesses. The circuit court decision prevents employers from placing their employees on leave (with pay) to seek treatment for alcohol-related issues, and requires the employer to return the individual to work despite a physician's instructions to the contrary. Effectively, under the circuit court decision an employee must appear at work inebriated or actually cause an injury or damage before an employer could rightfully take any action.

The LIRC decision, upheld by the circuit court, relies heavily on Dr. Montemurro's opinion that the employee could return to work, rather than the opinion of the employer's

doctor. However, it is undisputed that Dr. Montemurro's opinion was based on incomplete information, as he was entirely unaware of the employee's statements that she intended to continue drinking before work.

It is not uncommon for physicians to have differing opinions. In the face of credible undisputed evidence to support one doctor's view, though, the law should not force employers to ignore this evidence and play Russian Roulette with the safety of their employees to avoid a discrimination lawsuit. Employers should be able to act when their employees admit to problematic and dangerous behavior and the only contrary evidence comes from an admittedly uninformed source.

The practical and potentially catastrophic implications of the lower court's ruling are troubling to employers. In this case, for example, the daily dangers are numerous. Driving herself to work after consuming the alcohol she deems a

"bracer" to get through her day, the employee poses a threat to herself and the general public. Similarly, the employer may face liability if the employee injures herself or someone else during her morning commute or any driving during her shift if her driving is tied to her work or the employer is aware of her practice of drinking before driving to work.

Once in the workplace the employee creates an entirely separate but no less severe set of potential dangers.[1] In this case, the employee worked around parts, machinery and equipment, and regularly had to climb ladders and undertake other physical activities to perform the duties of her job. The employee exposes herself and those in her physical

[1] In addition to concerns of physical injury, the employee exposes the employer to inefficiency, ineffectiveness and inaccuracy in her work, and detrimental customer, client and employee relations due to the effects of alcohol consumption. There is also the potential for employer liability if, for example, a product is assembled or packaged improperly as a result of the employee's condition.

proximity to a substantial risk of injury by undertaking these activities while under the influence of alcohol.[2]

As if these safety concerns are not severe enough, the implications in other employment settings are even more worrisome. What if the employee is a school bus driver taking children to and from school? What if the employee is a nurse assisting in a complex surgery? What if the employee is a salesperson demonstration the operation of a piece of equipment? The lower court decision would have the employer return these employees to work to complete these jobs while under the influence.

Rather than allow an employer to take steps to assist its employees and protect the interests of its other employees and the public, the lower court ruling requires the employer to

[2] The National Council on Alcohol and Drug Dependence reports that 35% of employees injured in the workplace having alcohol dependence issues, and in at least 11% of workplace fatalities, the employee had alcohol in his/her system. *See* http://ncadd.org/learn-about-alcohol/workplace/204-workplace (last visited July 17, 2014).

continue with the status quo until a tragedy occurs. This should not become the rule in Wisconsin and is not the intention of the WFEA.

II. ALLOWING THE CIRCUIT COURT'S DECISION TO STAND ESTABLISHES A WORRISOME PRECEDENT FOR RESPONSIBLE EMPLOYERS IN WISCONSIN.

The lower court's interpretation of the WFEA in this case sends a troublesome message to the businesses/employers in Wisconsin. Indeed, the lower court's decision effectively ties the hands of employers in Wisconsin who attempt to accommodate employees with problematic alcohol use.

This is not a case where the employer's knowledge of the problematic alcohol use by its employee was speculative. Instead, the employee admitted her problematic drinking behavior. She also expressly stated her intention to continue to drink before work, without apology, to a doctor hired by her employer. Despite her admission that she regularly and

purposefully came to work under the influence of alcohol, Chrysler did not terminate the employee. Instead, Chrysler placed her on a very generous paid leave so that she could seek appropriate treatment for her alcohol consumption issues. During this time, the employee still received 95 percent of her net pay.

The lower court's decision says this is not enough. Instead, the court appears to require employers to continue to allow an employee to remain in its workforce and in the workplace despite her admission not only to drinking daily before work, but to doing so for the purpose of coping with her job responsibilities.[3]

To allow Chrysler's reasonable attempt to assist its employee to gain the help she needed while protecting the safety of its other workers to be labeled "disability

[3] This undisputed admission by Ms. Shea is particularly troublesome to the amici in that it suggests that her intention in drinking before coming to work was to alter her mental state while at work.

discrimination" places it and other Wisconsin employers in an impossible position: If they put the employee on leave, the employer faces a lawsuit. If the employer allows return to work, it faces potential liability as a result of not only the employee's own actions, should she be injured while on the job, but also potential injuries to other employees, those visiting the workplace or even the general public.

Indeed, such a result in this case – which involves egregious actions and admissions by the employee and a generous accommodation by the employer – leaves Wisconsin employers in an untenable situation.

CONCLUSION

Employers in Wisconsin should not be forced to face an unending scope of liability because of admittedly dangerous activities by one employee. Such a result is

contrary to the Wisconsin Fair Employment Act and discourages employers from doing business in Wisconsin.

Therefore, based on the foregoing, WMC and WCJC respectfully urge this court to review the circuit court decision upholding the decision of the Labor and Industry Review Commission.

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CERTIFICATION

I hereby certify that:

This brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 1,460 words.

I have submitted an electronic copy of this brief that complies with the requirements of Wis. Stats. § 809.09(12). The text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

I further certify that if the record is required by law to be confidential, the portions of the record included in the supplemental appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

A copy of this certificate has been served with the paper copies of this brief filed with the court and three copies were served on all opposing parties by United States first class mail, postage prepaid:

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