

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CALUMET COUNTY EMPLOYEES UNION,
LOCAL 1362, AFSCME, AFL-CIO,
AND AFFILIATED WITH
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES**

and

CALUMET COUNTY, WISCONSIN

Case 151
No. 69017
MA-14441

Appearances:

Sam Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, for Calumet County Employees Union, Local 1362, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, which is referred to below as the Union.

James R. Scott, Lindner & Marsack, Attorneys at Law, 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin 53202, for Calumet County, Wisconsin, which is referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint one of the members of a panel of arbitrators named in the collective bargaining agreement to serve as Arbitrator to resolve a grievance filed on behalf of Steven Woelfel, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff.

With the agreement of the parties, hearing was set for September 23, 2009. In a letter filed with the Commission on August 18, the County raised a concern that, “the Union is taking the position that grievant has some type of medical condition which limits his ability to

tell the truth” and may “present expert medical testimony.” I conducted a teleconference on August 25 to address this and a number of other issues. In an e-mail dated September 8, Gieryn noted that he “currently plans to present testimony by two professionals . . . by phone.” He also noted:

We also want to make it perfectly clear that, in addition to claiming that the County lacked proper cause to terminate (the Grievant), the Union will maintain that the County discriminated against (the Grievant) based on his disability.

In an e-mail dated September 8, Scott stated the County’s disagreement with taking testimony by phone, noting:

If you do not produce them I will subpoena them. Also I believe you indicated that you did not intend to litigate the ADA/WFEA claim in the labor arbitration during the pre-hearing conference. Is this a change in position or did (you) overlook your earlier commitment?

Gieryn responded that the professionals informed him that their employer “is likely to suppress any subpoenas, as they can’t afford to have them out of the office.” The issue concerning phone testimony was addressed via e-mail and phone by September 10. In an e-mail dated September 21, Gieryn noted:

I will need to testify at the hearing. Will you accept my testimony in the narrative or should I arrange for another staff member to cross examine me.

Scott responded in a series of e-mails on September 21, objecting to testimony in any form other than “a direct examination/cross examination format.” I addressed the dispute in an e-mail dated September 22, which states:

I have permitted advocates to testify in arbitrations. Whether an advocate feels it poses an ethical or a practical issue demanding someone else to conduct the questioning, I leave to the advocate. The more complicated issue for me is how to get the testimony in a fair and efficient manner. If there is no one else to do the questioning, then narrative is the only option. I view the opposing advocate to have the option to have the narrative stopped to permit notes to be taken, pending a complete and separate cross examination at the end of the narrative, or to have the narrative stopped at reasonable intervals to permit cross examination during the narrative.

Hearing on the grievance was conducted in Chilton, Wisconsin on September 23. Witness testimony did not include testimony from the professionals noted above, and the parties agreed, at the close of the hearing, that the record would be kept open “in the evidentiary sense because the parties are going to determine if, when, and how to potentially depose the doctors” [Transcript of September 23 hearing (Tr.) at 224]. Beyond this, the record remained open

regarding Employer Exhibit 11, CD recordings of investigatory interviews, to permit the Union to review the CDs to determine whether it objected to their admission.

In an e-mail dated October 1, the Union stated a desire to “initiate discussion of matters related to our planned second day of hearing, to be conducted” at the offices of the Grievant’s doctors in Appleton, and questioned “the arbitrator’s role in the second day of hearing.” The Union also asserted:

The Union intends to submit as evidence the WC file for (the Grievant’s) 3/18/93 injury as well as (the Grievant’s) more recent medical records made in the regular course of business by Affinity Medical Group. I will provide a copy of the documents and certification thereof which we intend to submit prior to the 2nd day of hearing. The information is relevant because the Union has alleged a medical defense for his conduct and disability discrimination. His actual medical condition from the date of the incident forward is relevant not only as to his culpability, but also as to his veracity in claiming a disability and the actual presence of a disability. The file contains diagnoses of (the Grievant) made nearly contemporaneously with both the conduct complained of and (the Grievant’s) claim of disability. The doctors we will examine will provide foundation for admission of most, if not all of the records and the certification will cover the rest.

In an e-mail dated October 2, the Union objected to the receipt into evidence of Employer Exhibit 11, asserting the meetings recorded onto a CD “are cumulative and therefore irrelevant”, and also questioned “if there is additional evidence to be gleaned from the CDs, when will the Union have an opportunity to cross examine . . . ?” In a series of e-mails to the County dated October 5, the Union renewed an information request made of the County in September, “to review (the Grievant’s) Worker’s Compensation file”. By October 7, the Union restricted its request to depose to a single doctor, and proposed to conduct the deposition at the close of business hours.

In an e-mail to the parties dated 9:48 a.m. on October 8, I stated:

I prefer to hear from each advocate before entering the fray, but I will be on the road virtually all of next week, so I will weigh in. My understanding was that the doctor(s) would be deposed. A deposition, unlike a hearing, presumes that the decision maker will not be in attendance. I had not anticipated attending. Rulings should not be a problem. Objections can be entered to specific items of testimony which can be highlighted in the deposition transcript for later ruling. This is analogous to a motion to strike testimony at hearing, and yields the same result.

I do not see how I can address potential evidentiary issues regarding the WC files or the interview CDs unless/until the County states its position. I have

weighed in on the deposition because I do not want my absence from the office to complicate matters.

A series of e-mails followed this response. At 11:16 a.m. on October 8, Scott filed, via e-mail attachment, a letter stating:

I am confused by Mr. Gieryn's email to you of October 1, 2009. We had an agreement that the record would be kept open for the purpose of taking two trial depositions of the treating psychologist and psychiatrist. There was nary a word of discussion about a second day of hearing. Mr. Gieryn is apparently concerned that you need be present to "rule" on objections. For Mr. Gieryn's benefit, the customary procedure is to lodge objections on the record and then proceed to have the witness respond. Any exclusion of evidence would then be in your hands when the transcripts are submitted. I see no reason to require your attendance, particularly, when we had an agreement to the contrary. We will have enough difficulty getting this scheduled without building in your attendance. On the other hand, if you choose to appear, I have no objection.

By email dated September 29th, Mr. Gieryn advised the depones that he would be taking those depositions and requested a date after 5 p.m. If I am going to Appleton, it will be during the business day, not at night.

Finally, Mr. Gieryn apparently seeks to submit all of the grievant's medical records as evidence. The time for doing that was at the hearing and then after giving prior notice. That having been said, I am not certain what value records of treatment from 1993 and after the discharge have to do with this matter.

In an e-mail dated 3:05 p.m. on October 8, the County's Human Resources Director, Patrick Glynn, noted:

The union did indeed request access to the County's worker's compensation files for the grievant. Since the County is self-insured, and since our files are not kept on an employee-by-employee basis, we referred the union to our TPA for access to the appropriate records. The TPA . . . maintains custody of our worker's compensation records . . . (T)heir records are as good as, and probably better (i.e. more complete), than those retained by the County. It is my understanding that the TPA released the records to the grievant.

In an e-mail dated 3:37 p.m. on October 8, I stated:

A second day of hearing may become necessary, but that issue is not yet posed. I read the Union's request to be that I attend the deposition of the doctor(s). I will not do so. There are two basic reasons for this. First, the testimony of the doctor(s) has been an issue for some time, including pre-hearing conferences. A

number of alternatives have been explored to secure the doctor(s)' views either by way of documentation or of testimony to cause them the least amount of disruption possible, while maintaining the quality of evidence needed for the parties' cases. It was, and continues to be, my understanding that the two of you agreed to secure that testimony via deposition. As I noted earlier, I consider a deposition to be qualitatively different than a hearing. A deposition, even in the arbitration context, is more akin to the discovery process than to the hearing process. My appearance at a deposition is unnecessary. This is not a matter of personal convenience. Turning a discovery process into a hearing process unnecessarily balloons the cost of what is expected to be an informal and inexpensive means of dispute resolution. If we set a second day of hearing at the clinic, all the advocates/witnesses/necessary parties who would attend the hearing will travel from Chilton or farther. More parochially speaking, if hearing was routinely set in this fashion, it would break the already strained budget of this agency.

Second, the request turns the hearing process solely on the convenience of the doctor(s). From the hearing perspective, the doctor(s) are witnesses, nothing more and nothing less. If memory serves me, the Union noted during a prehearing conference that the doctor(s) and/or their clinic indicated they would oppose a subpoena. The concerns we discussed at that point turned, from at least my perspective, on how to avoid the delay and expense of a legal fight on how/whether the doctor(s) could be compelled to testify. I will bend the hearing process with regard to the form of testimony or its timing to minimize the disruption to any witness, but granting the request to attend a deposition at a time and place set with no regard to anything but the convenience of the witnesses bends the hearing process past the breaking point. I understand the Union's concern with regard to the County's statement of availability, but putting rhetorical flourishes aside, the difficulty starts with the doctor(s)' inflexibility. As I understand it, the parties have already informed the doctor(s) that the deposition will take place at their office. Is it their view that the Grievant's situation does not warrant attention during business hours? Would it go better to set the deposition as an office visit? That rhetorical flourish hopefully highlights the difficulty the request poses. Legally speaking, how can it be that the Grievant can secure an office visit during business hours, but nothing else?

I will add a few points to highlight the scope of this conclusion. I do not see the issue being whether or not the deposition/hearing can take place at other than normal business hours. This started as a consensual arrangement to secure the testimony via deposition. That deposition can take place whenever the two of you agree to it. In the absence of your agreement, the issue turns to how to compel it. It may be that there is authority to compel the deposition (see, for example, Sec. 788.07, Stats.), but I have yet to hear argument on that point.

More to the point, this drags the matter back to the issues discussed at the prehearing conferences, which sought to minimize the risk of collateral litigation. All I do for now is highlight that I will not agree to convert a consensual deposition into a compelled hearing. If an issue of compelling testimony remains, then the setting of additional hearing is posed, together with the risk/expense that the doctor(s) will not comply with a subpoena outside of a court's ruling.

As a final point, I add that the issue of the CDs remains unresolved. I bring that up because the Union raised a significant point concerning whether their admission risked setting additional hearing. This underscores the significance of compelling further hearing. It is my hope that this litigation need not go that far.

In an e-mail dated October 9, the Union confirmed the availability of the Grievant's doctor for a deposition during business hours.

In a letter filed with the Commission on October 14, 2009, the Union stated:

Please find enclosed two sets of documents to be added to the record . . . The first is a complete set of (the Grievant's) medical records at Affinity Behavioral Health from April 2009 through August 2009, accompanied by the certification of the records custodian. The documents are relevant because they provide observations and diagnoses made by medical professions in the course of their ordinary business of (the Grievant's) mental health condition just subsequent to the incident in this case. The information is relevant because the Union has alleged a medical defense for (the Grievant's) conduct. His actual medical condition from the date of the incident forward is relevant as to his culpability for that conduct. The information is also relevant because the Union has alleged disability discrimination. His actual medical condition from the date of the incident forward is relevant as to his veracity in claiming a disability and the actual presence of the disability.

The second item is the complete Worker's Compensation file for (the Grievant's) March 18, 1993 injury. This set of documents also provides observations and diagnoses of (the Grievant's) mental health condition just subsequent to the incident in this case made by medical professions in the course of their ordinary business. In addition, this set of documents also provides observations and diagnoses of (the Grievant's) mental health condition prior to the 1993 injury and up to the present. Such information is relevant to the extent of (the Grievant's) disability. In addition, such information is relevant to the level of obligation owed to (the Grievant) by the Employer. If (the Grievant) did indeed repeatedly receive blows to the head in the line of duty, and if those blows were significant and caused him substantial injury, the Employer's

obligation of forbearance is greater, because those facts are germane to his work record. The records are accompanied by the appropriate certifications by the records custodians at each health facility involved.

To come yet is an additional set of medical records from St. Elizabeth's Hospital in Appleton.

None of the records listed above are subject to the hearsay rule because they fall within the following exceptions . . . 908.03(4) . . . and . . . 908.03(6) . . .

If necessary we can have the proper custodians present at Dr. Neunaber's office. When we take his deposition we can take theirs as well. Please let me know prior to the deposition whether the certification letter accompanying the files is sufficient.

In addition, prior to the initial hearing the Union requested, but did not receive, an opportunity to review (the Grievant's) workers compensation files held by the Employer. I forwarded you the requests via two emails of October 5, 2009. Such information is critical to a determination of what the Employer's knowledge of (the Grievant's) condition was, both at the time of the incident and at the time they discharged him. Certainly such information is relevant to the duty owed to (the Grievant) under disability law. We are now requesting that the Employer send the Workers Compensation files and any other records they possess regarding (the Grievant's) medical condition to you and the Union.

In the interest of justice, reliable information about (the Grievant's) mental health condition, the causes thereof, and the Employer's knowledge thereof need to be part of the record of this case. Since the record has been held open this far, I do not believe there is a good reason to exclude this probative information at our fingertips. . . .

In a letter filed on October 20, the County responded thus:

I received a packet of materials from Mr. Gieryn which purport to be the medical file of (the Grievant) from April of 2009 through August of 2009 relative to his treatment during that period by Affinity Behavioral Health, Mr. Gieryn offers the documents as support for what he calls a "medical defense" for the grievant's "conduct." He goes on to assert that his medical condition is relevant as to his "culpability for that conduct." I am unaware of any legal doctrine (short of an insanity plea) that excuses intentional misconduct based upon "mood disorders not otherwise specified" or "anxiety." Certainly, (the Grievant) was depressed about losing his job, but what does that have to do with his culpability for the incident? One can run into another car in an intersection because you are depressed and distracted, but that does not excuse the

negligence. These records were generated after the discharge or when grievant (and Mr. Gieryn) realized the noose was closing.

The exception in § 908.03(4) Stats. is intended to allow medical experts to testify based upon statements contained within medical records. It is not intended to allow medical opinions to be received through hospital records. Judicial Counsel Committee notes - 1974. (The rule does “not extend so far as to permit a medical diagnosis to be received in evidence through hospital records admitted under the ‘regularly conducted actively’ exception . . . nor does this exception go that far.”) The quote from the judicial counsel squarely addresses both of the Union’s arguments. A physician can rely on hearsay within a medical record to form an opinion, but you cannot backdoor an opinion via a medical record. That having been said, the current post-discharge records are essentially irrelevant and immaterial. They do not indicate that grievant was unable to discern right from wrong in March and April of 2009 when he engaged in a pattern of falsehoods designed to conceal his wrongdoing.

The workers compensation file likewise adds nothing to the issue at hand. The employer is under no legal obligation to accommodate a disability it was unaware of and which is not corroborated by the psychologists’ opinions. There are signed reports that the grievant was released to return to work without limitations.

We believe the records should not be accepted as evidence, as they contain pure hearsay.

The Union responded to the County in a letter filed with the Commission on October 30, 2009. With the letter, the Union supplied the “set of medical records from St. Elizabeth’s Hospital in Appleton” as noted in its October 14 letter and reiterated its request to receive the County’s Worker’s Compensation file into evidence.

In an e-mail dated November 2, I advised the parties that “the record status of the various portions of the Grievant’s medical file will await the depositions.” The Union responded via e-mail on November 2 that, “We would ask you to rule on their admission and as to the status of the Employer’s workers compensation file.” The County, via November 2 e-mail, noted that it had stated its position, adding, “We do not challenge the authenticity of the records and accordingly it would not be necessary to require testimony of the custodians.”

I responded in a November 2 e-mail thus:

I am not convinced that the record status of the various medical files can be addressed prior to the medical testimony. I do not see what purpose the testimony of the custodians would serve.

Apart from a hearsay objection, the basic issue on the admission of evidence bears on its relevance. "Relevance" demands that the existence of a fact of consequence to the grievance's resolution be more or less probable with the evidence than without it. Strictly speaking under the Wisconsin Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." At this point, I have several inches of documentation and the possibility of several more. Ignoring that I have yet to review it, the issue is what fact is at issue, and how the asserted documentation assists in its determination. I am not convinced either of you can speak to that point prior to the testimony of the doctor. There is no purpose served by my own unguided review of a mass of medical fact. More to the point, the doctor's testimony presumably supplies reasoned opinion to be brought to bear on the underlying data. You must each have the opportunity to get and to test that reasoned opinion to supply the necessary focus regarding what, if any, disputed fact requires the bulk of data asserted at this point.

We will need to get together, perhaps via conference call, at some point to determine the total body of evidence received upon which you will make your arguments. I am not willing to take in a bulk of data on the assumption that some part of it may prove relevant. Prior to the deposition, there will not be sufficient focus of the dispute to permit a meaningful ruling.

On December 22, 2009, the parties took Neunaber's deposition. By February 8, 2010, the parties stipulated a briefing schedule.

On February 18, 2010, the Union filed its initial brief, with documentation summarized in the cover letter to that brief thus:

Please also find enclosed supplemental exhibits which were entered in the record at the deposition of Dr. Neunaber on December 22, 2009. These include both Dr. Neunaber's "Expert Report" (ER Supp. Ex. 1) which was submitted to the Department of Workforce Development as part of an unemployment compensation appeal, and (the Grievant's) medical records (U Supp. Ex 1) which were in the possession of Dr. Neunaber's employer Affinity Behavioral Health and from which Dr. Neunaber testified. Prior to going on record at the deposition, the parties stipulated to the admission of the medical records without the testimony of the official custodian, Ms. Shannon Beernink, whose certification does, in any case, accompany the records.

The parties completed the briefing schedule on March 15, 2010.

ISSUES

The parties stipulated the following issues:

Did the County violate the contract when it terminated the employment of the Grievant, Steven Woelfel?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

. . .

1.02 Non-Discrimination. The Employer and the Union agree they shall not discriminate in the administration of the provisions of this Agreement relative to personnel with handicapping conditions as defined by State and Federal laws or Courts of Competent jurisdiction.

. . .

ARTICLE VII – MANAGEMENT RIGHTS RESERVED

7.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to . . . demote or suspend, or otherwise discharge for proper cause . . . is vested exclusively in the Employer. . . .

BACKGROUND

The grievance form, dated May 6, 2009 (references to dates are to 2009, unless otherwise noted), alleges a County violation of Section 7.01 because the Grievant's "termination was not based on just cause." The termination letter, dated May 5, states:

You were placed on paid administrative leave effective April 17, 2009, pending the final outcome of the investigation, and after consulting with the Highway Commissioner and County Administrator, I have been directed to advise you that your employment with Calumet County is terminated effective May 5, 2009.

On April 2, 9, and 17, 2009, we met with you and your union representative in order to investigate the accident that occurred on March 8, 2009. We gave you the opportunity to provide your version of the events that occurred on March 8,

2009, and to provide us with any information which you wanted considered prior to making our decision. At the first two meetings, when confronted with evidence that suggested that you provided us with false information about the accident, you continued to present false information and attempted to shift blame to others. At the April 17, 2009, meeting you admitted to the accident occurring in the County Park and acknowledged that you lied about the events of March 8, 2009, and that you had lied during the prior investigatory interviews.

The following disciplinary actions have been taken against you over the last few years:

- **November 1, 2005:** You received a written warning for [1] taking of a County vehicle home without permission; [2] performing activities that were in direct violation of your work restrictions; and [3] failure to follow directives and/or instructions.
- **December 5, 2005:** You received a written warning related to damage to Truck # 9 which could have been avoided and attempted to conceal the damage done to the truck. You had informed the Shop Foreman that you were going to utilize the paint to touch up an area on your plow, but instead you attempted to cosmetically camouflage the damage that had occurred to the box. At that time you were informed that “... *this particular accident could have been alleviated with you being more observant of your surroundings in relation to the truck you were operating.*”
- **December 22, 2005:** You received a 1-day disciplinary suspension for sleeping in Truck #9 while parked at the Calumet County Park Marina. It was also established during the investigation of this matter that you were untruthful to management. At that time you were informed that “*You are further warned that any future infractions of poor decision making on your part may result in discipline up to and including termination.*” You were also reminded of the existence of the Employee Assistance Program to assist you with any issues that might have been contributing to your poor decision making.
- **April 24, 2006:** You received a 1-day disciplinary suspension for Damage to Truck #22 while operating in an unsafe manner. At that time you were informed that “*Your [sic] are further warned that any future infractions on poor judgment and decision making on your part may result in discipline up to an including termination.*” Once again you were reminded of the existence of the Employee Assistance Program to assist you with any issues that might have been contributing to your poor decision making.

- **December 10, 2008:** You received a verbal warning for failure to report to work as scheduled.

The latest incident and your work record represent a series of escalating performance problems related to misconduct including but not limited to: failure to follow procedure; intentional falsification of accident report(s); concealing an accident by intentionally lying to County personnel; careless or sloppy work resulting in damage to County property; performing your job in an unsafe manner; making false statements about management and your co-workers; and dishonesty in your dealings with management.

The County has considered all of the facts pertaining to the current events, the information you have provided during our investigatory interview, and your past disciplinary actions and has determined that it is not likely that your behavior would be corrected by the imposition of any lesser discipline. . . .

The parties were unable to resolve the matter through the grievance process. The Union response at Step 3 is set forth in a letter from Gieryn to the Human Resources Committee dated June 2, which states the Union's view of Section 7.01 thus:

On May 5, 2009 the County terminated (the Grievant). The Union challenges the termination via the grievance procedure alleging a violation of the proper cause standard incorporated in the management rights clause of the collective bargaining agreement. One of the elements of proper cause is that the penalty must fit the crime given all the circumstances. The Union's primary contention is that the penalty of termination is too severe given the past record and medical history of the Grievant and the specific conduct at issue.

First we note that the County's failure thus far to consider what role the (Grievant's) medical condition may have played in these events, and to what degree his level of culpability for those events is lessened by his condition, is a key matter of concern. Prior to his termination, (the Grievant) and I met with Mr. Glynn and Mr. Shambeau on April 28, and presented a letter from (the Grievant's) family physician, Dr. Tipler, indicating that (the Grievant) had had a previous concussion, that post-concussive syndrome could cause a variety cognitive impairments, and that (the Grievant) was currently being evaluated for possible complications from his original injury. We explained to Mr.s Glynn and Shambeau that (the Grievant) had been experiencing an increased inability to handle stressful situations appropriately, that he suffered from anxiety and panic attacks, and that in this particular instance, he overreacted to a situation, feared he would lose his job, and took the wrong course of action. We explained that such behavior is completely in line with expected behavioral impacts of a previous brain injury. We indicated that (the Grievant) had already

sought treatment on his own accord. We also explained that (the Grievant's) condition is likely to be controllable with proper medication. (The Grievant) apologized and took full responsibility for his actions and the consequences. He pledged to correct his mistakes and repair the relationships that were damaged. He explained his personal and medical situation fully and promised to do everything in his power to prevent this type of behavior from happening again. All these facts suggest a strong possibility that rehabilitation would be successful for (the Grievant), and termination was not necessary.

At the April 28 meeting, (the Grievant) asked for a chance to prove that he could continue to work if under the care of a physician. We further informed Mr. Glynn that (the Grievant) had been advised that his condition may qualify as a disability under the Americans with Disabilities Act. We specifically requested an accommodation to allow him the opportunity to work with his physician until he was cleared, and then to return to work while under a physician's care.

None of these facts were addressed in the County's termination letter of May 5. In fact, the April 28 meeting with Mr. Glynn and Mr. Shambeau is not even mentioned in the letter of termination. The County also seems to understate the importance of (the Grievant's) long history of service. He has dedicated thirty-two years, more than half of his life, to County service. The fact that the medical condition affecting (the Grievant's) behavior now may very well stem from an injury (the Grievant) sustained in the line of duty for this employer some sixteen years ago is worth noting. The Grievant's service should translate into some forbearance by the County. Why the rush to throw out one of your own who needs help? Yes, there have been increasing problems of late, with current events being clearly the most serious and earlier events relatively minor, perhaps mostly just warning signals. If you will read through the brochures enclosed you will see that increased problems with age are to be expected for individuals with prior brain injuries, if left untreated. But they can be treated.

It is also important to recognize that this incident did not result in serious damage to the County's property or reputation. . . .

The County has not allowed progressive discipline the opportunity to work on (the Grievant). . . .

(The Grievant) is currently under the care of Dr. David Sovine, of Affinity Health Systems. Dr. Sovine has indicated that (the Grievant) has possible right hemisphere brain dysfunction. The condition is known to result in problem solving difficulty, including difficulty responding appropriately to common events such as a vehicle breakdown. Dr. Sovine is working with (the Grievant) to develop a treatment plan to improve (the Grievant's) condition. It is expected that (the Grievant) will be able to function normally, once treated. . . .

The following additional information relevant to Mr. Woelfel's condition is enclosed:

. . .

If you would like to receive further documentation of (the Grievant's) condition and/or more information from Dr. Sovine, we will arrange an authorization for him to discuss (the Grievant's) condition with you.

We hope you will take the time to seriously consider the significant contribution that (the Grievant) has made to the Calumet County and will provide him with an opportunity, now that he has recognized the nature of his difficulties, to overcome them, and to continue to use his knowledge and experience for the benefit of the people of County, and to finish his long career on a successful note. To prematurely end his career when it appears likely that an injury he received in the line of duty made it increasingly more difficult for (the Grievant) to function, would be tragic, especially considering that he will very likely recover from that injury, now that its effect has been discovered.

The note from Tipler reads thus:

(The Grievant) sustained a concussion in 1993. At the time he had secondary complications of memory loss and confusion. Post concussion syndromes can include cognitive impairment, neuropsychotic symptoms including insomnia, anxiety and depression. Presently (the Grievant) is being evaluated by Dr. Sovine for various possible complications from his original injury. He has noticed symptoms compatible to post concussion syndrome.

Gieryn also faxed the County, on June 3, a copy of a June 2 letter from Sovine that states:

I am in receipt of your letter in which you request information concerning (the Grievant). Regarding the above, please find the following:

What is (the Grievant's) medical condition?

(The Grievant) has been diagnosed with a Mood Disorder with Depression, Cognitive Impairment, History of Alcohol and Employment Problem.

What is the cause of the condition, if known?

There are several and probably include history of alcohol, repeated trauma to head and stress of employment situation.

Could these impacts have contributed to (the Grievant's) poor decision to try and cover up his responsibility for an accident?

Yes, there is a possibility his behavior was affected by his condition. He is not being treated for alcoholism at this time.

Can the behavioral impacts of (the Grievant's) condition be controlled, and how?

His current treatment should help.

Is there any reason to believe that (the Grievant's) condition, once controlled with medication, would prevent him from performing his occupation of truck driver?

His medication may, or may not be able to control his condition and prediction of outcome is difficult to say.

Will (the Grievant's) condition, or the medication he will take to control it, allow him to continue to maintain his commercial Drivers' License?

This question would better be answered by a Neurologist. He is able to return to work at this time.

In a letter to Gieryn dated June 16, Glynn confirmed receipt of the Union's submission and the County's denial of the grievance.

The Grievant's Work History

At the time of his discharge, the Grievant had worked as a County employee for thirty-one years, serving the Highway Department as a Welder, Maintenance Operator and Truck Driver. The Union introduced seven evaluations of his work: "4-1-88 to 4-1-89"; "April 89 to April 90"; "1-1-90 to 12-31-90"; "April 1995 to April 1996"; "to Spring 2005"; "2006 to 2007"; and "2008 to 2008". The evaluation forms are divided into six Performance Dimensions, the first two of which are Quality of Work and Quantity of Work. Each Performance Dimension contains five boxes to indicate an evaluation of the work behavior constituting the Performance Dimension. The first four evaluations have the "Work is acceptable" box checked under the Quality of Work Performance Dimension. The first three of those forms have the "Does work as directed . . . Quantity and promptness is fine" box checked under the Quantity of Work Performance Dimension. The "April 1995 to April 1996" evaluation has the "Usually turns in more than requested or required for an adequate job" box checked under the Quantity of Work Performance Dimension. The final three of those forms have the "Work needs checking because it is not consistently accurate" box checked under the Quality of Work Performance Dimension and the "Performs just enough work to get by" box checked under the Quantity of Work Performance Dimension.

The May 5 letter of termination documents the Grievant's disciplinary history. The April 24, 2006 discipline was the subject of a settlement agreement that addressed a grievance and a complaint of prohibited practice concerning a denial of a request for representation. The provisions of the settlement agreement include the following:

The County shall reduce the 3 day suspension . . . to a 1 day suspension, make (the Grievant) whole for two of the three days pay lost on account of that

suspension and remove from (his) personnel file the suspension document dated 4-24-06 and replace it with a 1 day suspension based on conduct resulting in damage to a County vehicle, without any reference to deceitful or untruthful conduct.

The County discharged the Grievant in 1993 for stealing gasoline, then reinstated him.

The Grievant has suffered a number of injuries. In perhaps 1989, he slipped at work while working on a truck, and struck his head against a toolbox. He became nauseous and dizzy. He passed out or had a seizure. He missed some work and experienced headaches for, "Quite a long time" (Tr. at 127) following the injury. Prior to that injury, he was struck by a propane tank that had rolled from a roof that was being repaired at the Highway Department. The tank struck him in the chest, causing extensive bruising that led to significant pain and problems with his heart beat. Roughly six years ago, he slipped on ice as he was getting off of a Highway Department truck and tore his rotator cuff while trying to break his fall. At roughly the same time, he got a sliver under a fingernail while performing brush work for the County. The sliver led to a bone infection that required the infected finger to be amputated. In March of 1993, the Grievant fell backwards onto his head lacerating his head and requiring stitches, which he received from Tipler. Tipler returned the Grievant to work after stitching the wound. After his return to the Highway Department, the Grievant was assigned to drive a County pickup truck to Oshkosh to secure parts. He became disoriented on the trip, leaving the vehicle stuck in the snow on a snowmobile trail and wandering several miles to a village police department. He had no knowledge of who he was or how he got there. Ultimately, his identity was discovered because he had a card from Tipler in one of his pockets. He was hospitalized and treated in-house over several days. During this treatment, the Grievant was referred to Dr. Daniel Neunaber. Neunaber found the Grievant to be suffering from anxiety and depression. The Grievant returned to work after treatment, but did not see any physician on an ongoing basis for treatment following the trauma. He did, on occasion, consult Tipler, who prescribed Xanax for him.

The Incident and Its Aftermath

The termination letter cites a series of events, flowing from an accident on March 8 through the May 5 termination. That series of events is referred to as the Incident.

On Sunday, March 8, the Grievant was plowing snow in a County Park on Lake Winnebago. Within the park is a paved road leading to a turnaround, which pivots around a large tree. Roughly half of the portion of the road which pivots around the tree is gravel. Standard procedure to plow the area is to raise the plow over the gravel portion of the turnaround, then lower it to permit the paved driveway to be plowed. The Grievant had plowed the Park for from three to five years. On March 8, the Grievant had the plow lowered to the point that when it reached pavement, it dug into the asphalt. The shock forced the

plow's blade and wing mechanism backward toward the cab and upward toward the rider's side door and window. The impact bent the wing's push arm, and caused a fragment of the mechanism attaching the plow arm to a hydraulic ram to break off entirely. The impact forced the wing or part of its assembly up to the rider's side rear view mirror, bending it, scratching the truck body, and breaking glass from the mirror and window. Stuck on the plow's brake camber was a broken length of chain.

County Road EE is the paved access to the Park where the accident occurred. After the accident, the Grievant drove from County Road EE to State Highway 55, which he took to County Road F, from which he drove onto County Road C. A year or two prior to the Incident, the Grievant had an accident on County Road C. The Grievant stated that an oncoming car forced his snowplow off of the road. Another employee chained a road grader to the truck to attempt to pull the truck from the ditch. The chain, which was taken from the Grievant's truck, snapped. The vehicles were then hooked together with another chain, and the grader pulled the truck from the ditch. No discipline resulted from this incident.

On March 8, while on a straight portion of County Road C, close to the site of the prior accident and roughly nine miles from the Park at which the March 8 accident had occurred, the Grievant pulled his snowplow onto the shoulder and into a ditch. He removed a cotter pin from the plow arm and walked one to two hundred yards behind the truck, placing it on the ground. He returned to the truck and placed glass shards from the damaged window alongside the rider's side of the truck. He then called David Emmer, the Patrol Superintendent and asked him to come to County C. Emmer did so, viewed the area and discussed the accident with the Grievant. Emmer reported the incident to Michael Ottery, the County Highway Commissioner, at roughly 3:30 p.m. on March 8.

Ottery inspected the truck on the morning of March 9. He thought the damage was severe considering a dropped cotter pin caused it, and he noticed that the damage included the loss of an oil plug. He did not question whether the accident had occurred as reported.

Emmer and the Grievant collaborated on documenting the accident. The "Employee Injury/Accident Report Form", dated March 9, describes the accident thus:

Plowing snow. Cotter pin came out of wing pin. Ram dropped down and caught in patch. I stopped truck when plow laid down. I called Dave and showed Dave where ram caught in patch. Plow spring holder are worn out and let go. The cotter pin in ram was replaced last week. Speed was not factor.

The "Supervisor's Report of an Injury/Accident" form, dated March 11, includes the following:

Equipment malfunctioning. Operators are not checking the equipment for wear and tear. Operators are using excessive speed. Operators are using the equipment beyond what it is meant to do. Hitting objects such as curb and gutters. . . .

The operators must check the equipment for excessive wear and tear, lower the speed, use the equipment for what it is meant for, watch for objects so contact can be avoided.

Emmer added the following under the “Additional Supervisory Comments” section:

I'm having a very difficult time excepting the fact that losing a .10 cent cotter pin can cause approximately \$7,000.00 damage to a truck cab, wing assembly and at the very same time trip the plow blade and then damage two trip bars on the plow. Without any proof of operator error I can only say at this time it was equipment failure.

The Grievant and Emmer signed both forms. Damage repair estimates varied, with one estimate coming in at less than one-half the damage Emmer noted in his accident report comments.

Ottery met with the Grievant on March 10 to discuss the accident. The Grievant repeated that the pin came out, causing the plow and wing to strike the pavement, forcing the mechanism back into the door of the truck.

On March 20, the Grievant entered Ottery's office early in the work day, dropping a length of chain on Ottery's desk. Ottery perceived the Grievant as “a bit agitated” (Tr. at 44), and understood the Grievant to be asserting that the chain was marked with “SW”. Ottery understood the Grievant to be asserting that a length of chain found under the truck on County Road C could not have been his, because it had no “SW” welded on it. Ottery took the Grievant's implication to be that another employee had planted the chain at the County Road C site. As the discussion progressed, it became more animated. The Grievant had pictures with him, and asked Ottery if the Grievant could use Department barricades to display “for sale” signs at his house that weekend. When Ottery denied the Grievant the use of the barricades, the Grievant displayed the pictures and stated that Ottery had earlier used the barricades for the same purpose. Ottery told the Grievant the discussion was done and he should leave the office. He repeated the direction several times before the Grievant turned to leave. Ottery testified thus regarding what happened next:

. . . as he was leaving, what he muttered under his breath, from what I believe, was, “You're really a prick.” . . . I got out of my chair. I wasn't real happy that an employee would, you know, say that to me, and I asked him, “What did you say to me?” And he said, “I didn't call you a prick.” And I looked at him. “I never alluded to what you had even said to me, so why would you even come up with that?” And then he – I was walking back in my office, “Just leave,” and he was going to follow me back in, and I put my hand up, and I said, “Just leave. This is it. You have your orders for the day. Leave.” (Tr. at 47-48)

Ottery had no further involvement in the Incident until Glynn advised him that Glynn was investigating a claim of harassment lodged by the Grievant against Ottery.

Glynn was aware of the March 8 accident, but did not play any direct role in it until sometime after March 20. Because the Grievant complained of harassment traceable to a department head, Glynn assumed responsibility for its investigation. Glynn understood that the March 20 incident had roots pre-dating March 20 and had also produced an encounter between the Grievant and staff at the County Administrator's office. Before that investigation had progressed to any significant degree, Michael Mischnick, a Patrol Superintendent, informed Glynn that Mischnick had received information from other employees that the County should investigate the scene at the turnaround in the County Park on County Road EE.

After Mischnick informed Glynn of the rumors regarding the County Park site, Glynn asked Mischnick to view the site, take pictures of it and report his findings. After viewing the site, Mischnick informed Glynn that he found shards of window glass in the turnaround area, and a substantial portion of pavement broken between the border of the asphalt and gravel.

Between March 27 and April 1, Glynn interviewed eight Highway Department employees, including unit members and supervisors, one employee in the County Administrator's office and the County Administrator. Glynn also viewed the County Park and the County Road C sites.

Glynn's investigation prompted him to meet with the Grievant on April 2. The first part of the meeting concerned the harassment complaint. Glynn understood the Grievant's complaint to include the March 20 incident and two others. The meeting then turned to the March 8 accident. Glynn perceived the Grievant to be adamant regarding the site of the accident, describing it "in pretty great detail" (Tr. At 64). Glynn informed the Grievant that shards of glass and broken pavement had been found at the turnaround in the County Park on County Road EE, and showed the Grievant the pictures Mischnick had taken. The Grievant claimed to have no knowledge of the point and stated, "maybe someone else set that there" (Tr. At 64).

The meeting lasted roughly one hour and forty-five minutes. Glynn left the meeting unsettled and drove to the County Park to view the scene himself. While there, he found a metal fragment on the pavement. On April 3, he took the fragment to the Shop and asked the Mechanics what the fragment might be. The Mechanics found it fit the broken end of a mechanism fitting the plow arm to a hydraulic ram of the snowplow driven by the Grievant on March 8. Glynn then scheduled a meeting with an equipment company in Kaukauna to have them review the damage to the truck to determine whether they could assist in reconstructing the accident.

On April 9, Glynn met with the Grievant and Terry Ecker, a Union Steward. Glynn asked the Grievant to review the events of March 8 and the Grievant again "strongly asserted" (Tr. at 71) that the accident occurred on County Road C. Glynn confronted the Grievant with the evidence he had found to that point from the County Park. The Grievant repeated "many times" (Tr. at 71) that his account was the truth and that someone had planted the evidence at the County Park. The Grievant volunteered the name of an employee whom he thought might have planted the evidence. The meeting lasted perhaps an hour.

Glynn followed up on the meeting by meeting with the equipment company in Kaukauna. Their personnel affirmed that the County Park was a more likely site to have caused the damage than the County Road C site. Glynn also interviewed the employee the Grievant had named as someone who might plant evidence and one other employee regarding possible sabotage of the Grievant's truck. That employee was represented by Ecker and when the interview ended on April 16, Glynn informed Ecker that the investigation was done and that Glynn was convinced the Grievant had lied. He advised Ecker to inform the Grievant "to come clean if he had, in fact, been lying." (Tr. at 77). Ecker phoned Glynn on the morning of April 17 to advise him that the Grievant had informed Ecker that if it would save his job, he would lie and say the accident occurred at the County Park. Glynn indicated he wanted the Grievant to tell the truth, and on Ecker's suggestion, Glynn scheduled a meeting for later that morning with the Grievant, Ecker, the County's Corporation Counsel and Glynn.

At the April 17 meeting, the Grievant acknowledged that the accident had occurred at the County Park and that "he panicked, and drove to County C." (Tr. at 78). The Grievant acknowledged placing the pin on the roadway and scattering glass beside the truck. Glynn understood the Grievant's position to be that a three day suspension would be sufficient discipline. Glynn responded that such a suspension could not cover the amount of trouble the Grievant had caused. Glynn and the Corporation Counsel conferred, then informed the Grievant that he would be placed on paid administrative leave while the County determined his employment status.

On April 22, Glynn and Gieryn discussed the Grievant's employment status by phone. Glynn stated that the County was going to discharge the Grievant. He also indicated the County would consider an arrangement to permit the Grievant to resign. Gieryn took Glynn's statements to be a negotiating position. Gieryn testified that he stated the Union's position to be that "we would consider a five-day suspension and nothing more." (Tr. at 222).

On April 22, the Grievant was working on his farm when a bale of hay fell from the top of a stack, striking him in the head. The bale of hay was extremely heavy and the Grievant lost consciousness. He was transported to a clinic, then to a hospital. After treatment of his physical injuries, he was moved to the hospital's psychiatric unit. While hospitalized, he was treated by Sovine, who prescribed medications to treat his injury; to help him sleep; and to treat anxiety and depression. Sovine also recommended neuropsychological testing and therapy through a referral to Neunaber. However, on April 24, the Grievant checked himself out of the hospital, against Sovine's advice, "for an important meeting, which turned out to be a union course offering on harassment in the workplace."

To this point in the Incident, neither the Grievant nor the Union had asserted to the County that the Grievant suffered from a mental illness. That notice came during the April 28 meeting noted in Gieryn's June 2 letter. The April 28 meeting included Glynn, the County Administrator, Gieryn and the Grievant. At that meeting, Gieryn supplied the County information on the impact of head trauma on individual physical and mental health, in addition to the note from Tipler. At the April 28 meeting, the Grievant and Gieryn asserted the

Grievant suffered from a disability flowing from mental illness. Prior to the meeting, Gieryn prepared an outline including issues they wished to present to the County, including: how sorry the Grievant was for his conduct; his long term service; his love of the job; his desire to repair relationships with Highway Department personnel, including Ottery and unit employees; the impact of his medical and mental condition on his life; and his willingness to work through those conditions with medical assistance. The Grievant reviewed the document and communicated his views on the points during the meeting.

After his discharge, the Grievant was again hospitalized, this time under a commitment. Sovine referred the Grievant to Neunaber. After testing and treatment, through a report dated August 28, Neunaber completed the "RESTRICTIONS" section thus: "None, from psychological perspective." His report also responds to the question, "In your opinion, could the employee's 1993 concussion cause him to fabricate an accident scene and be dishonest which his employer during an investigation into the accident?" Neunaber's response states,

His injury of 1993 could have caused him to do the above things. He has a history of head injury, which can affect judgment and reasoning ability. Although his 1993 injury could have caused him to fabricate information and be dishonest, I am unable to state that these factors were the cause of his actions.

The Neunaber Deposition

Neunaber, a Psychologist with a specialty in "Health rehabilitation, neuropsychology, patients with physical illness" [Deposition Transcript (Trd.) at 3], reviewed Sovine's notes prior to assessing the Grievant's condition. Sovine had in June, "diagnosed mood disorder with depression and anxiety, cognitive ability secondary to head trauma, a history of alcohol abuse and an employment problem." (Trd. At 5) Neunaber administered a number of tests including an IQ test to measure intellectual functioning; the Minnesota Multiphasic Personality Inventory-2-RF to yield an interpretable personality profile; the Tower of London Procedure to measure cognitive efficiency and reasoning skills; as well as a battery of other tests to measure speed of information processing, learning, memory and visual perceptual functioning. Neunaber's clinical notes state his conclusions from the tests thus:

Measures of personality show multiple areas of impairment, including poor insight, difficulty understanding himself and others, paranoid ideation, and very high levels of depression and anxiety. . . .

The cognitive test results show . . . difficulties with short-term memory and attention and concentration, and executive/frontal systems dysfunction [i.e. difficulties with planning and thinking ahead] . . . The test findings probably overestimate his level of impairment, given his performance on effort measures.

Neunaber felt the testing process manifested limited effort from the Grievant, but nothing in the test methodology or results warranted, in his view, a finding that the Grievant was malingering.

Neunaber, under normal procedure for him, did not contact the County or otherwise weigh their view of the Incident against the Grievant's. He took his information from the Grievant who, at the start of the consultation process, wondered why he had no memory of the March 8 accident. Neunaber referred him to a hypnotist who "wasn't able to really help" leaving the Grievant wondering if his lack of memory "represented a head injury." (Trd. at 23). Neunaber detailed the Grievant's expressed concern thus:

. . . he was kind of reporting after the fact parts that he had been told later, that there was a period of time he had no memory for and didn't know what had happened . . . He said that he may have been injured while driving a snow plow and that a wing apparently may have hit him -- the wing -- apparently part of the snowplow on the right side of the snowplow . . . may have struck him and he told me he did not report it because he did not remember it . . . He told me that he doesn't remember how long he was there, but it must have been quite a while and did not seek medical care at that time and apparently returned to work and was terminated from the job . . . (Trd. at 24-25)

In the absence of evidence of a head injury, Neunaber "didn't really have an explanation for what had happened during that time." (Trd. at 24) He also was unwilling to draw a causal link between the 1993 trauma and the Grievant's recall problem regarding March 8, stating, "I really couldn't draw a connection with two events 16 years apart." (Trd. at 38) He noted that "a panic attack or paranoia . . . affect judgment and reasoning abilities like most mental illnesses will" and thus "may have" played a role in the Grievant's conduct on March 8. (Trd. at 27) He also noted his belief that the Grievant could return to work without restriction.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The County's Brief

After a review of the evidence, the County notes that the Grievant "admits to lying . . . admits to falsely accusing his co-workers . . . acknowledges that he caused 'serious problems for lots of people' . . . and acknowledged falsely accusing Ottery of harassment." These undisputed facts establish "egregious misconduct" which establishes just cause to discharge.

Whether the Union's case is characterized as "a plea for mercy or a mitigating factor", it constitutes a defense that is the Union's burden to prove. The defense urges that stressful situations prompt the Grievant to lie and this excuses "his fraudulent conduct." This ignores the Grievant's inconsistent testimony, which selectively urges the stress of the March 8

incident prompted him to fabricate an accident scene, then urges that other than that he has been truthful with the County. This inconsistency cannot mask that when the County threatened the Grievant's job, the Grievant, at this most stressful of situations, discovered how to account for his actions truthfully. A more balanced reading of the record notes that the Grievant even chose to lie to his doctor. The evidence thus "smacks of manipulation to mask willful deceit."

At best, "the medical evidence relative to the Grievant is confusing." He did not seek assistance until his job was in peril. Detailed examination of Neunaber's testimony establishes that the Grievant misled him, asserting a "memory loss" the Grievant chose to ignore with the County. The only underlying consistency is willful manipulation. Even if the Grievant suffered from "paranoid ideation" or from "anxiety" traceable to earlier head trauma, there is no reliable evidence that these conditions caused the conduct that prompted his discharge. Neither law nor arbitral precedent will excuse deliberate deceit, short of clinical insanity making it impossible for an individual to distinguish right from wrong. Even if an insanity defense can be implied in arbitration, the defense poses a considerable burden of proof on the Union. Examination of the testimony fails to support it. Rather, the evidence shows "a well thought out plan" where the Union needs to prove a clinical condition. His treatment for a condition came "after his falsehoods were discovered, and termination was imminent." There is "not one shred of evidence that Grievant had any medical issues at the time the events giving rise to his discharge occurred." In sum, no medical evidence will "excuse his action or even mitigate it."

Any claim of an ADA violation "is an absolute non-starter." *ANDERS V. WASTE MANAGEMENT OF WISCONSIN* 463 F.3D 670, 677 (7TH CIR. 2006) establishes the elements for such a claim. To invoke a duty to accommodate, the Union must prove "the individual is disabled in the first instance." No such proof exists. The Grievant worked without restriction up to his suspension on April 17. In June of 2009, a physician found the Grievant to exhibit "no signs of paranoid or delusional thinking." In August of 2009, Neunaber released the Grievant to work without restriction. Whatever disability the Grievant suffered was short-lived, and the federal act demands more "than a short-term impairment." That he found work shortly after his discharge establishes that he suffered from no disability.

The County concludes that a "significant lie to one's employer is bad enough and usually requires termination." There is no basis for an exception here, and to "put Grievant back into a workplace he tried to poison would be intolerable." It follows that the grievance must be denied.

The Union's Brief

After an extensive review of the evidence, the Union argues that the discharge violated Section 1.02 by discriminating against the Grievant on the basis of "an impairment (psychotic disorder with clinical anxiety, panic attacks, and paranoid ideation) which makes achievement unusually difficult." The County knew of the condition prior to the discharge and the Union had requested that the County "accommodate the disability through clemency and forbearance

while treatment for the anxiety was being initiated.” County failure to determine the extent of the disability or to accommodate it violates the law and contract.

The Union contends that the Grievant’s initiation of treatment triggered a duty to exercise “clemency and forbearance”, citing TARGET STORES V. LIRC 217 WIS. 2D 1 (CT. APP., 1998) and STOUGHTON TRAILERS V. LIRC, 303 WIS.2D 514 (2007) The Grievant was never given the opportunity to return to work to demonstrate the efficacy of treatment, and the conduct for which he was discharged is nothing more than that he “panicked and lied to cover up his error.”

The evidence clearly establishes his disability, which is traceable to “numerous head injuries” over “the course of his 31 years long employment”. Neunaber’s deposition establishes that the Grievant’s “head injury could have contributed to his behavior in the incident giving rise to his termination.” Even if specific causation for the incident cannot be determined, it is evident that the Grievant’s “panic and paranoia . . . would affect his ability to make appropriate decisions in stressful situations.” The evidence does establish that his “disability was a substantial factor in the incident giving rise to his termination.”

On April 28, the Grievant and the Union met with County representatives. The Grievant “apologized for his behavior and acknowledged the seriousness of his conduct.” He documented his history of concussions, stated that he had begun treatment, and detailed his desire to return to County employment. The Union clarified to the County that his mental health condition “was a legally protected disability” which could, with proper treatment, “permit his return to work.” The Grievant authorized the County to check his medical records, but the County refused to do so. Neunaber confirmed that treatment worked and that the Grievant was capable of working without restriction. A review of the Grievant’s personnel file establishes that his work performance has been solid over a considerable period of time. The clemency the Union and the Grievant sought “was reasonable” and constitutes a legally appropriate accommodation.

Apart from legal issues, the County must have proper cause to discharge and it had none here. The County never proved that the Grievant “had operated his vehicle improperly or unsafely” and overstated the amount of damage to the truck. None of this conduct warrants discharge and whatever the extent of fabrication can be attributed to the Grievant “did not become a matter of public knowledge, so the Employer’s reputation was not damaged.”

In any event, the County failed to give “due consideration to (the Grievant’s) work history.” That work history includes the injuries that probably gave rise to the gradual onset of the Grievant’s cognitive issues. Arbitral authority supports “making allowances for long service” including overturning or modifying discipline. Significantly, the discipline applied by the County “was not progressive.” The Grievant had received “only minor disciplinary actions” and none support discharge. Of the prior infractions, “(o)nly one . . . involved untruthfulness.” That incident was over three years old as of the date of discharge, and resulted in “a one-day suspension.” The other two instances of discipline fall short of

establishing cause for discharge or reason to believe the Grievant had a history of untruthfulness. The parties settled a prohibited practice complaint prompted by one of these incidents and that settlement demanded the expungement of references to untruthfulness from his personnel file. Whatever is said of this history, the underlying cause of the discipline is unrelated and cannot support discharge for the Incident.

Beyond this, discharge is too severe a sanction for the Incident. The Grievant's mental health constitutes a mitigating factor which the County "failed to consider". Arbitral precedent confirms that mental health is a mitigating factor and that reinstatement is "a rehabilitative measure". The underlying factor in this precedent "is that an employee's culpability for his conduct is lessened by the debilitating effects of a mental illness." In this case, the Grievant's initial lie "deepened his paranoia, anxiety and panic about losing his job." This pressure increased exponentially until the Grievant "fessed up and sought help." Whether such conduct is unacceptable "in a normal adult", the fact remains that the Grievant "is not normal" and "has just the sort of illness that could cause this type of problem." The County's failure to follow up on the documentation of the Grievant's illness cannot be held against the Grievant.

Viewing the record as a whole, the Union requests,

That the discipline be rescinded and (the Grievant) reinstated . . . and placed on medical leave of absence effective April 28, 2009. (The Grievant) should (be) entitled to utilize whatever earned sick-leave or other leave benefits . . . available to him at that time. (The Grievant) should have . . . an opportunity to return to work upon authorization from his doctor . . . (who) indicated that (the Grievant) was able to return to work on June 2, 2009. (The Grievant) should be made whole for any lost compensation from June 2, 2009 through the date he actually does return to work.

The County's Reply Brief

The County contends that despite the Grievant's admission of wrongdoing, factual issues in the Union's brief are significant. The Union ignores that the Grievant's presence in the County Park area is unexplained, "although we know from previous discipline that he had been caught sleeping in the same location several years past." Even though he had no plowing to do, the Grievant damaged his truck at the Park, then inexplicably chose not to follow "the longstanding policy of calling in the accident immediately" and not to drive "to the County garage" as had been the practice years ago. Rather, he chose to drive almost nine miles "and then created an elaborate fake accident scene." At no point do these events resemble panic-driven actions. Rather, they manifest "a deliberate plan." More significantly, the Union's narrative of the Incident glosses "over the entire chain incident in which the Grievant attempted to blame his co-workers for sabotage as well as the harassment complaint he filed against . . . Ottery." Nor will the evidence support the view the Grievant "came to his senses and confessed" on April 17. The Grievant did not seek treatment until he had been suspended. Beyond this, the Union obscures that the Grievant, suffering from a non-work

related concussion, turned his back on medical treatment and ignored a request from a Union representative that he resign.

The Union also obscures that it did not assert any violation of the Fair Employment Act “during preliminary discussions framing the issues with the arbitrator” and did assert that it relied “solely on the ADA as a basis for (the) discrimination claim.” The Union’s opening statement focused only on the ADA. This is significant for the “concept of clemency and forbearance as a reasonable accommodation grows out of . . . the Wisconsin Fair Employment Act and has no application to the ADA.” Even if this distinction is ignored, the fact remains that the Grievant “did not begin his course of treatment until after he committed the dischargeable offenses.” The facts also remain that there is “no medical evidence that Grievant was in any way disabled in March of 2009” and that Neunaber issued a complete work release “without restriction dated August 28th.” Against this background, the Grievant has no disability under either State or Federal law.

At best, the “medical issues appear to be manufactured evidence.” Tipler’s handwritten note appears after the Union learned of the discharge decision. Federal precedent cautions against use of after-the-fact evidence to “insulate an unruly employee from the consequences of his misdeeds.” The disability claim is no more “that a plea for mercy”. Neunaber’s testimony stops short of attributing “any conduct or misconduct engaged in by Grievant to any mental condition.” For the myriad of individuals “who are anxious, depressed or have memory issues and worry a lot” few, if any, “fabricate accidents, falsely accuse others of wrongdoings and file groundless complaints.”

Viewed as a matter of contract, the grievance lacks merit. The assertion that the Incident did not damage the County’s reputation ignores that it posed more than “the dollar amount of the damage involved.” More significant is that the Grievant “destroyed, beyond any repair, the relationship of trust that is necessary between an employee and an employer.” Similarly, the Union ignores that the County fully considered the Grievant’s work record, noting the “rash of incidents of discipline” from “2005 on”. Beyond this, the discharge was progressive, because lesser levels of discipline did not curb the Grievant’s untruthfulness which constitutes “a pattern of deceit”. Assertions that the County did not investigate the Incident prompted a month long investigation that did not uncover a mental condition because no such issue was presented. The assertion that the Grievant was unable to respond truthfully to the County due to a mental illness was the Union’s issue to advance through the grievance process after “the termination decision was made”. Union assertion that the Grievant suffered from a mental illness at the time of the Incident lacks any evidence of record. At best, the evidence demonstrates that the Grievant felt anxiety and distress only after he “began to feel the jaws of the trap closing around him”.

Viewing the record as a whole, the County argues, “The evidence is overwhelming that grievant must suffer the penalty of discharge.”

The Union's Reply Brief

County recitation of fact is flawed in several respects. The \$7,000.00 estimate of damages is over twice the actual amount. The assertion that the Grievant filed a harassment claim against Ottery overstates the evidence, obscuring that no formal complaint was filed and that Glynn undertook the harassment investigation "of his own accord." That "investigation" had only started when Glynn refocused it on the Grievant. Beyond this, the assertion that the facts are undisputed ignores that "the facts are undisputed because (the Grievant) bared his soul completely prior to his termination."

The evidence will not establish that the Grievant lied or attempted to lie to the professionals who treated him. What evidence there is demonstrates candor between the Grievant and health professionals. Assertion of obfuscation belies the cynicism of the County's view of his behavior. Neunaber's unwillingness to characterize the Grievant as a malingerer cannot be ignored, and stands in contrast to County "attempts to capitalize on (the Grievant's) memory difficulties and general confusion". The Grievant's testimony reveals not the lack of candor but that "it was possible for (the Grievant) to become confused under heavy pressure." Repeated County questioning of the Grievant's "inexplicable" behavior ignores that the absence of clear explanation for it "is exactly the point." There was nothing in the Incident for the Grievant to cover up. Rather than supporting the County's thought process, it underscores the absence of County understanding of the "nature of depression and anxiety". County citation of arbitral precedent that "pre-dates the Americans with Disabilities Act and most state laws protecting workers with mental disabilities" highlights that the "logic in that case is outdated and no longer (is) the accepted understanding of mental illness." County attempts to equate mental illness with a physical injury manifests a "deep misunderstanding of clinical anxiety and paranoia" that "goes right to the heart of what happened to (the Grievant) at the hands of this Employer." County refusal to believe in the impact of mental illness on employee behavior cannot obscure that "The Employer should have considered the impact that (the Grievant's) struggle with his mental illness had on this situation, even if he was not completely insane." The fundamental flaw in County conduct is that the Grievant "deserved a chance to show that with professional help he could regulate his paranoid impulses, his feelings of panic, his anxiety, and could react to situations in a normal manner." The trend in arbitral precedent is to view evidence of mental illness more compassionately than the County chose in this case.

The Grievant started treatment after the Incident, but this "does not prove that (his) condition was imagined"; that his condition was "a result of this incident rather than part of its cause"; or that the condition had not evolved over years as a result of head trauma. Whether the trauma caused the condition or was natural to the Grievant is irrelevant. What is relevant is that the Grievant had "a disease that impacts his ability to see reality clearly and make proper judgments."

County attempts to restrict the contractual analysis to the ADA cannot obscure that the contract incorporated the ADA and the FEA. The duty of "clemency and forbearance" is thus

a relevant consideration. County refusal to grant it requires the implementation of the remedy stated in the Union's initial brief.

DISCUSSION

The stipulated issue focuses on Sections 1.02 and 7.01, questioning whether the Grievant's termination violated the labor agreement. Section 7.01 states a "proper cause" standard, and governs the issue provided it is construed in a fashion which does not contradict the application of Section 1.02. The parties' arguments highlight that they treat "proper cause" synonymous with "just cause". This is not unusual, since "(T)he term 'just cause' is generally held to be synonymous with "cause," "proper cause," or "reasonable cause", see Hill & Sinicropi, *Management Rights*, (BNA, 1986) at 99. See also Bornstein, Gosline & Greenbaum, *Labor and Employment Arbitration*, (Matthew Bender, 1999) at Section 14.01.

The arguments include references to the "seven steps" of just cause, but the parties have not stipulated to them. In the absence of such a stipulation, I view the proper cause analysis to consist of two elements. The first is to determine whether the employer has established conduct in which it has a disciplinary interest and the second is whether the employer has established that the discipline imposed reasonably addresses its disciplinary interest in the conduct.

Application of the first element is essentially undisputed. There is some dispute about the County's disciplinary interest, if any, in the March 8 accident standing alone. The accident in the Park cannot meaningfully stand alone. Rather, the County's disciplinary interest flows from the Grievant's conduct following it. That conduct is undisputed, starting from his leaving the Park to fake an accident scene on County Road C. This fabrication led to a tangled web of lies. The web spun by the Grievant led him to implicate other employees and to engage in a series of insubordinate acts, including the March 20 confrontation with Ottery. He attempted to maintain the web through the April 2 and April 9 meetings. Late in the April 17 meeting, he relented. The web of lies was dismantled at the April 28 meeting, when the Grievant, using Gieryn's outline, undid it piece by piece. There is no dispute that the County established a disciplinary interest in the Incident. By April 22, the issue between the parties was whether that interest warranted a resignation, a discharge or a significant suspension. More to the point, the County has proven the first element.

Application of the second element is the core of the dispute, and poses the potential tension between Sections 1.02 and 7.01. The force of the Union's position is that the Grievant's service points away from the reasonableness of discharge, and that the web of lies constituting the Incident is a manifestation of a mental condition which is a disability requiring the accommodation of "forbearance and clemency."

The more contractual aspects of the Union's argument urge that the County failed to apply progressive discipline and failed to appropriately consider his long service. The contract is silent on a specific progression for discipline.

The persuasive force of the Union's arguments ultimately focuses on the asserted disability. The web of lies constituting the Incident is egregious. The insubordination the Grievant engaged in, unprovoked, on March 20, is egregious. Whatever is said of his disciplinary history, he was on notice of the significance of misrepresenting fact, to the extent such conduct requires notice, see, for example, ENTERPRISE WIRE CO., 46 LA 359, 363 (DAUGHERTY, 1966), where Daugherty noted, regarding the first of the seven step analysis that, "certain offenses . . . are so serious that any employee in the industrial society may properly be expected to know already that such conduct is . . . heavily punishable." The County's conclusion that the Incident warranted discharge cannot be dismissed as unreasonable. The assertion that the accident was not well known and may have cost less than \$3,500.00 in out-of-pocket expense ignores the nature of the County's disciplinary interest. Putting aside the significance of the County's interest in the quality of communication between supervisors and unit employees; putting aside the less quantifiable expense of the investigation; and putting aside the less quantifiable expense of workplace morale among employees who accuse each other of dischargeable offenses, the fact remains that operators of heavy equipment must account for the equipment and their operation of it honestly if that equipment is to be operated safely or efficiently. The breach of trust between the Grievant, his fellow employees and his supervisors is the core of the County's disciplinary interest.

The force of the Union's assertion that the County should have invoked lesser discipline undercuts its assertion of disability. The contract's silence on a specific sequence of discipline assists the Union if the County overstated his misconduct or understated the significance of his work history. As noted above, the County did not overstate the misconduct. The Grievant's long work history is proven fact and was considered by the County. However, as the record shows, the work history is troubled and includes a decline in quantity and quality of his work over time. That the County did not view the quality of his work history to mitigate the egregious misconduct of the Incident is not unreasonable.

This prefaces the ultimate force of the Union's position. The assertion that the County should have resorted to a lesser level of discipline has little persuasive force unless it is presumed that the Incident poses behavior modifiable through the disciplinary process. The force of the Union's position is that it does not, because his behavior manifests a disability demanding clinical medication and therapy by medical professionals rather than progressive discipline from County management personnel.

The Union's position as a general matter has some force. There is no comfort to anyone confronting this record, since viewing it from any angle reveals nothing but tragedy. However sympathetic the Union's general arguments may be, the evidence will not provide the foundation needed to conclude that his medical condition caused or can mitigate his misconduct. On a general level, the Union's objection to County use of a physical injury to compare to a mental condition has persuasive force. This cannot obscure, however, that in either case, there must be a proven bond linking causation with accommodation. If an employee becomes wheelchair bound due to a severe leg fracture which makes access to a workstation impossible due to the need to enter a narrow stairwell to access the workstation,

the bond between disability and accommodation may be easily proven. The increased difficulty of proving a mental rather than a physical impairment does not, however, do away with the need for this bond. Recourse to the “inexplicable” nature of the Grievant’s behavior or to “whatever the cause may be” cannot substitute for a proven bond to link impairment from a disability to its accommodation.

The evidence will provide no such bond. The possibility that the Grievant suffered a disability due to a mental condition was not discussed by the parties prior to the County’s decision to discharge him, which came no later than April 22. Even if it is assumed that the County should have relented from its course of action due to the Union’s assertion of the mental condition on and after April 28, the evidence affords no reliable basis to question the reasonableness of the County’s determination. The Tipler note attached to the Union’s June 2 letter states no more than that the trauma suffered by the Grievant in the past “can” affect his behavior. The Tipler note points toward Sovine as the source of a more certain diagnosis.

Sovine’s June 2 submission affords no certain diagnosis. The “medical condition” is listed as “a Mood Disorder with Depression, Cognitive Impairment, History of Alcohol and Employment Problem.” That condition “probably” included “history of alcohol, repeated trauma to head and stress of employment situation.” It is “possible” that his misconduct “was affected by his condition.” Treatment “should help.” Medication under that treatment “may or may not be able to control his condition” and, in any event, “prediction of outcome is difficult to say.” Sovine declined to speculate on the affect of medication on the Grievant’s CDL, but concluded that the Grievant “is able to return to work at this time.” The Union dates its remedial request from this point, but nothing in the Sovine statement specifies why the Grievant acted as he did during the Incident or how he had been treated reliably enough to permit him to work as a Highway Department employee.

Sovine referred the Grievant to Neunaber, who repeated a clearance to return to work in a report dated August 25. Neunaber’s diagnosis included anxiety, depression and paranoid ideation. However, Neunaber specifically declined to make a causal link between the 1993 trauma and the Incident.

Thus, the medical testimony restates the dilemma the County faced in April: Did the Incident manifest conduct so unacceptable that discharge was necessary? That the conduct was unacceptable is undisputed. More significantly, the medical testimony falls short of undermining the reasonableness of the County’s conclusion that discharge was necessary. There is no solid evidence of a bond between the Grievant’s medical condition and his conduct during the Incident. Assertion that the conduct could be ameliorated through medication or therapy is speculative on this record. He was treated with anti-anxiety and anti-depressants prior to the Incident. The record is, at best, mixed on how treatment after the Incident might produce a better result. The Union accounts for this by urging that the “inexplicable” basis for the Grievant’s conduct establishes a mental condition that precludes the County from reasonably concluding the Grievant was accountable for his misconduct. That the Grievant may suffer from paranoid ideation cannot obscure that the accident scene on County C and the

web of lies that followed it are proven fact. At best, the Union urges that the mental condition may afford insight into how the web was spun. This ignores that the medical testimony cannot link the condition to the misconduct.

Most troubling to the Union's case is the Grievant's own behavior. Neunaber's analysis of the Grievant's account of March 8 proceeded from the Grievant's fear of a loss of memory and the possibility of head trauma. Neunaber's attempt to get at the memory loss through referral to a hypnotist was unsuccessful. Most troubling here is the contrast between what the Grievant relayed to Neunaber and what he relayed at hearing. No witness account of the March 8 Incident, including the Grievant's, states any hint of head injury or a symptom of head injury. At best, the Union urges the Grievant panicked. Whatever came with that panic did not include memory loss. The Grievant testified in detail about the condition of the truck after he struck the pavement in the Park. He testified in detail about the snow conditions as he plowed the Park on March 8. He testified in great detail about road conditions on County Road C on March 8, including how he left the truck safely positioned, with its lights on. His testimony is internally consistent and regarding the actual accident scene, consistent with other evidence. The contrast between the Grievant's account at hearing and his account to Neunaber manifests a troubling dissonance. The gaps in the Grievant's memory had, at hearing, a tendency to appear when he was asked to account for specific fabrications. His memory appeared to function better on points he viewed as favorable to his grievance. Glynn noted a similar dissonance between memory gaps and great detail in explanation as he investigated the cause of the accident. Whatever is said of the clinical cause or treatment of this dissonance, the County's conclusion that it could place no faith in his ability to speak truthfully about the Incident is proven. Its conclusion that this irreparably harmed the employment relationship is reasonable.

In sum, the record supports the reasonableness of the County's conclusions regarding the Incident. The underlying misconduct, standing alone, is egregious and the County had, at no point relevant to the discharge, reliable proof that the Grievant's misconduct during the Incident was caused by a medical condition or could be reasonably accommodated through treatment. Thus, the County has met both elements of the proper cause analysis and the grievance has been denied.

Before closing, it is appropriate to tie this conclusion more closely to the parties' arguments. I have not specifically addressed Section 1.02, nor addressed whether or how the State or Federal statutes should be applied. In my view, the Union's June 2 letter appropriately poses the issue as one of proper cause. Absence of discrimination on the basis of medical condition is a necessary backdrop to application of proper cause, but not the source of jurisdiction. Against this background, differences between state and federal law, or when and how the Union agreed to assert the disability claim are secondary points in arbitration. The issue in arbitration is less to mimic how state or federal courts or administrative agencies address the point, than to apply the contract without evident conflict with external law.

The Union's citation of a duty of "clemency and forbearance" is appropriate but not determinative. Without belaboring the elements of proof and other procedural issues applicable to the application of the Fair Employment Act, the TARGET STORES case concerns the discharge of an employee for sleeping on the job. The employee claimed her dozing was involuntary, traceable to sleep apnea. The employer knew the employee was under treatment for the condition and had another treatment option available to her at the time it fired her for dozing on the job. The Court of Appeals held that "LIRC's decision that temporary forbearance of enforcement of the loafing rule while (she) was undergoing medical treatment is based on a reasonable interpretation of the statute and is supported by substantial evidence." 217 WIS. 2D AT 20. Drawing from this, the Supreme Court noted that:

Like a leave of absence, forbearance . . . is a temporary accommodation to permit medical treatment which, if successful, will remove the difficulty in performing the job-related responsibility. Whether either is a reasonable accommodation . . . will depend on the facts and circumstances of that case." STOUGHTON TRAILERS, INC. 303 WIS. 2D AT 549, PAR. 62, CITING TARGET STORES, 217 WIS. 2D AT 19.

The contrast to this case is plain. TARGET STORES did not involve an extended course of fraudulent conduct. The employee in TARGET STORES was under treatment prior to the imposition of discipline. The Grievant did not volunteer for treatment prior to being found out and threatened with discharge. Unlike the treatment regimen in TARGET STORES, the Grievant's condition was fluid for at least several months after the requested accommodation and rested in significant part on the veracity of the Grievant's self-reporting of symptoms. In STOUGHTON TRAILERS, INC., the Court noted:

LIRC reasonably concluded that an employer should exercise "clemency and forbearance" by not immediately terminating an employee where, as here, the employer knows a medical intervention is already underway that has not had the chance to take effect to potentially resolve the problem of the employee's absences. 303 WIS. 2D AT 550, PAR. 65.

STOUGHTON TRAILERS involved a discharge of an employee being treated for migraine headaches who was discharged for violation of a no-fault attendance policy. The Court used TARGET STORES to exemplify the duty, but the contrast of those cases with the grievance is plain. The Union's difficulty of proof is to invoke the duty of "clemency and forbearance" on the facts posed here without making it unlimited. I am not persuaded it has done so. If behavior such as that posed by the Incident can invoke a duty of "clemency and forbearance", then none but the most scrupulously honest or most poorly advised employee will respond to discharge with anything other than a request for leniency and extended treatment.

This application of Section 7.01 does not plainly conflict with Section 1.02 or the statutes that underlie it. Some caution is appropriate to the intersection of the collective rights of a labor agreement and the individual rights of the statutes Section 1.02 incorporates. As written, it is not clear that Section 1.02 seeks an arbitrator's direct interpretation of underlying law, and I am reluctant to do so in the absence of a stipulation. In the absence of a clear stipulation on the scope of an arbitrator's authority to interpret external law, there is no clear assurance that a venture into external law will do anything but add an additional level to the dispute. The parties have not stipulated to which of the acts or relevant case law should be considered the governing authority. The overview of Wisconsin law stated above reflects a view of the most expansive authority cited, to determine if the application of Section 7.01 is in plain conflict with it.

The Union has argued in the alternative, which is aggressive advocacy and is appropriate. Tension can, however, result from alternative argument. The assertion that the County should use lesser discipline runs counter to the assertion that the Grievant's medical condition prevented him from acting appropriately during the Incident. A hypothetical question may highlight the implications of the fine line that the two lines of argument highlight regarding the application of Section 1.02. If, on April 22, the parties agreed to a five-day suspension to preserve the Grievant's employment, could their agreement expose them both to an allegation of discrimination under Section 1.02? Sovine's June 2 report includes "employment situation" in his diagnosis of the Grievant's condition. The hypothetical agreement would address that source, but not necessarily address the more strictly clinical sources. Section 1.02 places the non-discrimination duty on both parties. The hypothetical question highlights the potential difficulty of reconciling contract with statute. More to the point, it underscores the need to interpret Section 7.01 in a fashion that does not plainly violate Section 1.02. This underscores the need for a tighter bond linking causation and accommodation regarding the Grievant's medical condition and the Incident than this record affords. The weakness of the link precludes finding the discharge decision unreasonable.

The evidentiary status of certain documents was left unaddressed pending Neunaber's deposition. I have not listened to Employer Exhibit 11 and do not consider it received into evidence. As the Union asserts, it is cumulative to the testimony of meeting participants. Nor do I consider the medical documentation filed by the Union on October 14 to be part of the evidentiary record. That material is hearsay and cumulative to Neunaber's deposition. The exhibits stipulated by the parties and supplied with the deposition (Union Supplemental Exhibit 1 and Employer Supplemental Exhibit 1) are properly part of the evidentiary record on which this decision rests.

AWARD

The County did not violate the contract when it terminated the employment of the Grievant, Steven Woelfel.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 3rd day of June, 2010.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator