STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 2

Case No. 2016AP1365
Trial Court Case No. 2015CV358
Case Classification Code No. 30607

Wisconsin Department of Workforce Development,

Plaintiff-Respondent,

vs.

Wisconsin Labor and Industry Review Commission,

Defendant-Appellant,

Valarie Beres and Mequon Jewish Campus, Inc.

Defendants.

Appeal from an Order of the
Circuit Court for Ozaukee County
Honorable Sandy A. Williams, Circuit Judge, Presiding

Brief of Defendant-Appellant Labor and Industry Review Commission

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The commission's interpretation of Wis. Stat. § 108.04(5)(e) finds disqualifying "misconduct" under par. (5)(e) only when a worker's attendance record violates both the statutory more-than-2-occasions-in-120-days standard and the standard specified in the employer's manual, if any. Is that interpretation reasonable or, alternatively, more reasonable than the Department of Workforce Development's interpretation which delegates to employers the ability to define disqualifying "misconduct"?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT

Oral argument is not necessary. The parties' briefs should fully present the issues on appeal and fully develop the legal theories and precedents on each side of the case.

STATEMENT ON PUBLICATION

The Court's opinion should be published because it will enunciate a new rule of law and decide a case of substantial and continuing public interest: the meaning of a recently-enacted statutory provision defining "misconduct" due to absenteeism for the purposes of eligibility for unemployment insurance benefits and worker's compensation benefits.

STATEMENT OF THE CASE

I. Posture

This case arises from an action by the Wisconsin Department of Workforce Development (department) seeking judicial review of an administrative decision issued by the Wisconsin Labor and Industry Review Commission (commission) concerning an unemployment insurance claim filed by Valarie Beres following her separation from Mequon Jewish Campus, Inc. By decision dated August 31, 2015 *(R. 9:2-7; app. 101-06),*[1] the commission found that Mequon Jewish Campus terminated Beres' work, but that her discharge was not for "misconduct" within the meaning of Wis. Stat. § 108.04(5)(e) specifically, or Wis. Stat. § 108.04(5) generally. The commission further found the discharge was not for "substantial fault" within the meaning of Wis. Stat. § 108.04(5g). As a result, Beres was eligible for unemployment insurance benefits. *(R. 9:5; app. 104.)*

[1] References to documents in the appeal record filed by the Ozaukee County Clerk of Courts will generally be to the document number and internal page reference where necessary in the form *(R. N:pp).* For the convenience of the Court, references to the transcript of the hearing before the ALJ and the exhibits received in that hearings, which are part of R. 8, will be in the form (*T.*) and *(Ex.)* for the exhibits admitted at those hearings respectively. The hearing exhibits are all at the end of the transcript. References to this brief's appendix will be in the form *(app.).*

Mequon Jewish Campus did not seek judicial review of the commission's decision finding Beres eligible for benefits. Rather, the department sought judicial review under Wis. Stat. § 108.09(7)(a), challenging only the commission's interpretation and application of Wis. Stat. § 108.04(5)(e). *(R. 1:4, complaint paragraph 22.)* The circuit court set aside the commission's decision, concluding that Wis. Stat. § 108.04(5)(e) is unambiguous and that the commission misapplied it. *(R. 25; app. 107-09.)*

The commission then appealed to this Court.

II. Facts of Beres' separation from work

The department does not dispute the commission's findings of facts regarding Beres' separation from her employment with Mequon Jewish Campus. Those facts, as stated in the commission decision *(R. 9:2-3; app. 101-02)* are:

Beres worked for approximately five weeks as a registered nurse for Mequon Jewish Campus, an assisted living care center. *(T. 10:22 to 12:2, 22:12-24.)* Her last day of work was February 20, 2015. *(T. 12:22-24.)* Mequon Jewish Campus discharged Beres on February 26, 2015 *(T. 11:9-10, 12:1-3.)*

Mequon Jewish Campus requires its workers to serve a 90-day probationary period upon hire. *(T. 12:16-20, 13:17-21; Ex. 1, p.*

1.) It has a written attendance policy that provides that probationary workers may be discharged for one incident of failing show to up for a scheduled shift without notice. *(T. 12:15 to 13:24; Ex. 1, p. 1).* Beres signed an acknowledgement form indicating receipt of the policy on January 20, 2015. *(T. 13:9-16, 27:5-7; Ex. 1, p. 2).*

Beres failed to call or show up for her scheduled shift on February 23, 2015, due to illness. *(T. 12:16-20, 13:22 to 14:4, 19:5 to 20:24, 23:9-25.)* After Beres' shift started, Mequon Jewish Campus' director of nursing contacted Beres and spoke with her husband who said Beres was unable to work that day because she was sick. *(T. 23:17-22).* On February 26, Mequon Jewish Campus' human resources generalist discharged Beres by telephone for violating the Mequon Jewish Campus' attendance policy. *(T. 12:4-9, 18:20 to 20:24, 30:24 to 31:8.)*

ARGUMENT

I. The scope and standard of review of the commission's decision is limited by statute and case law

Judicial review of the commission decision in this unemployment insurance case is governed by Wis. Stat. § 102.23,[2] part of the Worker's Compensation Act that applies to unemployment insurance decisions under Wis. Stat. § 108.09(7). Wisconsin Stat. § 102.23(1)(e) provides that a commission decision may only be set aside on the limited grounds:

> 1. That the commission acted without or in excess of its powers.
> 2. That the order or award was procured by fraud.
> 3. That the findings of fact by the commission do not support the order or award.

Whether an employee is entitled to unemployment benefits under Wis. Stat. ch. 108 presents both questions of fact and questions of law. *Nottelson v. DILHR,* 94 Wis. 2d 106, 115, 287 N.W.2d 763 (1980). *See also Klatt v. LIRC*, 2003 WI App 197, ¶10,

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[2] Wisconsin Stat. § 108.09(7) was substantially amended by 2015 Wis. Act 334, Sections 54 to 56. That Act, which was published on March 31, 2016, generally took effect on April 3, 2016. However, Sections 102(3) and 103(3) of Act 334, read together, provide that the "Judicial Review Changes" to Wis. Stat. § 108.09(7) first apply to actions filed on August 1, 2016.

The department filed this action with the Ozaukee County Clerk of Court on September 23, 2015. *(R. 1:1.)* Thus, the pre-amendment version of Wis. Stat. § 108.09(7), the version in 2013-14 Wisconsin Statutes, applies to this case.

266 Wis. 2d 1038, 669 N.W.2d 752. Reviewing courts apply different standards to review the commission's conclusions of law than they apply to review the commission's findings of fact. *Heritage Mut. Ins. Co. v. Larsen*, 2001 WI 30, ¶21, 242 Wis. 2d 47, 624 N.W.2d 129. Further, the Court of Appeals reviews the decision of the commission, not the circuit court. *Neenah Foundry Co. v. LIRC*, 2015 WI App 18, ¶11, 360 Wis. 2d 459, 860 N.W.2d 524.

A. The commission's findings of fact are conclusive if supported by substantial and credible evidence.

Review of the commission's findings of fact is significantly limited. *Heritage Mutual Ins. Co. v. Larsen*, 242 Wis. 2d 47, ¶24. Reviewing courts are not to substitute their judgment for that of the commission on the weight or credibility of evidence. Wis. Stat. § 102.23(6); *Mervosh v. LIRC*, 2010 WI App 36, ¶8, 324 Wis. 2d 134, 781 N.W.2d 236. A court may remand a case to the commission if its order depends on a material and controverted finding of fact not supported by substantial and credible evidence under Wis. Stat. § 102.23(6), because such findings are in excess of the commission's authority. *Xcel Energy Services, Inc. v. LIRC*, 2013 WI 64, ¶55, 349 Wis. 2d 234, 833 N.W.2d 665. Otherwise, absent fraud, the commission's findings of fact are conclusive on judicial review.

Wis. Stat. § 102.23(1)(a); *DILHR v. LIRC*, 155 Wis. 2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990).

The department does not dispute any of the commission's findings of fact in this case.

B. The commission's interpretation and application of Wis. Stat. § 108.04(5)(e) is entitled to great weight

The department challenges only the commission's interpretation and application of Wis. Stat. § 108.04(5)(e). *(R. 1:4, complaint paragraph 22; R. 16:10[3].)* At the outset, it is worth noting that the commission's legal conclusions and statutory interpretations, not the department's, are significant on judicial review. In *DILHR v. LIRC*, 161 Wis. 2d 231, 245, 467 N.W.2d 545 (1991), the Supreme Court held:

> …the Commission was created to have final review authority of Department interpretations. Granting deference to the Department's findings would undermine the reviewing authority of the Commission and result in increased judicial review without achieving any material corresponding benefits. The Commission provides an opportunity for the correction of errors and helps to assure consistent statutory application.
>
> Based on the above, we hold that the reviewing courts of this state should accord deference to the findings of the Commission, rather than those of the Department, where deference to an agency's decision is appropriate.

[3] In its brief to the circuit court, the department stated: "This case involves paragraph (5)(e) and raises a single question of law, one of first impression." *(R. 16:10.)*

A reviewing court is not bound by the commission's determinations of law. *Lopez v. LIRC,* 2002 WI App 63, ¶9, 252 Wis. 2d 476, 642 N.W.2d 561. However, the court must determine the level of deference applicable to the commission's legal conclusions: great weight, due weight, or *de novo* review. *Id. at* ¶11, n.2. Which level is appropriate depends on the comparative institutional capabilities and qualifications of the court and the administrative agency. *Brown v. LIRC,* 2003 WI 142, ¶13, 267 Wis. 2d 31, 671 N.W.2d 279.

Great weight deference is appropriate where: (1) the agency is charged by the legislature with administering the statute at issue; (2) the interpretation of the statute is one of longstanding; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in the application of the statute. *Lopez v. LIRC,* 252 Wis. 2d 476, ¶10; *Brown v. LIRC*, 267 Wis. 2d 31, ¶16.

The commission, of course, is charged with administering the unemployment insurance laws. Wis. Stats. §§ 103.04(1) and 108.09(6). *See also DaimlerChrysler v. LIRC*, 2007 WI 15, ¶12, 299 Wis. 2d 1, 727 N.W.2d 311. Regarding the unemployment insurance statutes generally, the court of appeals has held that:

> Because LIRC has longstanding experience, technical competence and specialized knowledge in administering the

> unemployment insurance statutes, we conclude that its interpretation and application of those statutes is entitled to great weight.

Hubert v. LIRC, 186 Wis. 2d 590, 597, 522 N.W.2d 512 (Ct. App. 1994). Where the commission has experience in administering a particular statutory scheme, derived from considering a variety of factual situations and circumstances, great weight deference is appropriate. *Lopez v. LIRC*, 252 Wis. 2d 476, ¶13.

The particular language of Wis. Stat. § 108.04(5)(e), is new as of 2014. *See* 2013 Wis. Act 20, SECTIONS 1717f and 9351(1q). However, the commission and its predecessor agencies have applied the general definition of "misconduct," now codified at Wis. Stat. § 108.04(5)(intro.), in cases going back more than 75 years. *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636 (1941). The commission's longstanding and consistent application of the general definition of "misconduct" for the purposes of Wis. Stat. § 108.04(5) is based on its expertise or specialized knowledge developed in dealing with unemployment insurance cases and provides uniformity in the application of the misconduct statute.

Indeed, the Court of Appeals has recognized that "[d]eference to LIRC's interpretation and application of Wis. Stat. § 108.04(5) will continue to provide uniformity and consistency in its application." *Lopez v. LIRC*, 252 Wis. 2d 476, ¶15. Thus, the Court

of Appeals has repeatedly and consistently held, across a range of varying factual contexts, that the commission's interpretation and application of the "misconduct" statute in the unemployment insurance law should be given great weight deference,[4] including specifically cases where—as here—a worker was discharged for absenteeism. *Charette v. LIRC*, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995). *See also Milwaukee Transformer Co. v. Indus. Comm'n*, 22 Wis. 2d 502, 510-11, 126 N.W.2d 6 (1964).

Further, the commission had issued at least 50 decisions applying Wis. Stat. § 108.04(5)(e) as created by 2013 Wisconsin Act 20[5] before its August 31, 2015 decision in this case. The number of decisions the commission has previously issued on an issue is relevant to the level of deference accorded the commission on that issue. *Brown v. LIRC*, 267 Wis. 2d 31, ¶18 n.19. N*eenah Foundry Co. v. LIRC*, 360 Wis. 2d 459, ¶19. While the outcome of the 50-plus decisions applying Wis. Stat. § 108.04(5)(e) depended on the

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[4] *Lopez v. LIRC*, 252 Wis. 2d 476, ¶16; *Bunker v. LIRC*, 2002 WI App 216, ¶26, 27, 257 Wis. 2d 255, 650 N.W.2d 864. *See also Goetsch v. Dep't of Workforce Develop.*, 2002 WI App 128, ¶9, 254 Wis. 2d 807, 646 N.W.2d 389, and *Bernhardt v. LIRC*, 207 Wis. 2d 292, 303, 558 N.W.2d 874 (Ct. App. 1996).

[5] Copies of 50 commission decisions applying Wis. Stat. § 108.04(5)(e) before August 31, 2015, were included chronologically in the appendix to the commission's circuit court brief. *(R. 22:20 to 22:164)*. Scanned copies of the commission's decision are available to the department following issuance.

actual facts of each case, the analysis performed by the commission was consistent. The significant number of commission decisions construing and applying the current version of Wis. Stat. § 108.04(5)(e) since its enactment in 2014—coupled with the commission's longstanding familiarity with the concepts involved and the general statutory framework of misconduct as recognized by the courts—warrant giving the commission's application of the statute in this case great weight deference.

Where an agency has significant experience interpreting and applying the provisions of a particular statute in disputed cases, its interpretation and application may be accorded great weight even where the agency has only interpreted and applied the exact statutory wording at issue on a single prior occasion. *Mercycare Ins. Co. v. Wis. Comm'r of Ins.*, 2010 WI 87, ¶35, n.14, 328 Wis. 2d 110, 786 N.W.2d 785.[6] Among the numerous prior commission decisions

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[6] In which the Court stated that "[i]n *Barron [Elec. Co-op. v. Pub. Serv. Comm'n*, 212 Wis. 2d 752, 569 N.W.2d 726 (Ct. App. 1997)], for instance, the commission had interpreted and applied the provisions of the statute at issue to similar disputes, and on at least one occasion, the commission had interpreted the exact statutory language that was at issue in the case (underlining added)."

The *Barron* court itself held, in according great weight deference to the PSC's interpretation of Wis. Stat. § 196.495:

> The parties have cited us to several cases over the years in which the commission has interpreted and applied the provisions of the

(continued on next page)

applying Wis. Stat. § 108.04(5)(e) is *Gonzalez-Santan v. Therm-Tech of Waukesha, Inc.*, UI Dec. Hearing No. 14608989MW(LIRC Mar. 10, 2015) available online at http://lirc.wisconsin.gov/ucdecsns/4092.htm *(R. 22:2-6; app. 112-14)*. In that case, the commission addressed at length the very language at issue in this case: "unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature." Accordingly, the court should give great weight deference to the commission's conclusions on that same issue here.

Should the Court disagree, however, the commission's application of Wis. Stat. § 108.04(5)(e) would still be entitled to "due weight deference." A reviewing court may "grant due weight deference to an agency's decision on an issue of first impression if the agency is charged with administering the statute and has experience with issues that the statute addresses, even if the agency has not interpreted the particular statutory provision at issue." *Masri v. LIRC*, 2014 WI 81, ¶24, 356 Wis. 2d 405, 850 N.W.2d 298. The

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> statute to public utility territorial disputes, *including at least one case involving the very language at issue here.*

Barron Elec. Co-op, 212 Wis. 2d at 766 (emphasis added).

Masri court explained that the decision to apply due weight deference is based more on the fact that the Legislature charged the agency, in this case the commission, with administering the statute than on the agency's specialized knowledge or expertise. *Id.* at ¶23. Here, again, the Legislature has charged the commission with the enforcement of Wis. Stat. § 108.04(5)(e) and the commission issued numerous decisions interpreting and applying that statutory paragraph prior to its decision in Beres' case.

Still, the commission contends the Court should apply the great weight deference standard to the commission's interpretation and application of Wis. Stat. § 108.04(5)(e) in this case. Where the great weight deference standard applies, a reviewing court will uphold the commission's decision so long as it is reasonable, even if the court feels that an alternative interpretation is more reasonable. *Klatt v. LIRC*, 266 Wis. 2d 1038, ¶14. A decision is reasonable unless it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is without a rational basis. *Lopez v. LIRC*, 252 Wis. 2d 476, ¶16. Further, the commission need not justify its interpretation; the burden of establishing that the commission's interpretation is unreasonable is on the party seeking to overturn the commission's decision, here the department. *Bunker v. LIRC*, 257 Wis. 2d 255, ¶26.

Even where the lesser due weight deference standard applies, a reviewing court will sustain an agency's statutory interpretation if it is not contrary to the clear meaning of the statute, unless the reviewing court determines that a more reasonable interpretation exists. *Neenah Foundry Co. v. LIRC*, 360 Wis. 2d 459, ¶16. Since the commission's decision here reflects the most reasonable interpretation and application of Wis. Stat. § 108.04(5)(e) in this case, the Court should confirm it regardless of which deference standard—great weight or due weight—applies.

II. The commission's interpretation and application of Wis. Stat. § 108.04(5)(e) in this case is reasonable

A. Wisconsin Stat. § 108.04(5)(e) and its effects

As stated above, review in this case is confined to the commission's interpretation and application of Wis. Stat. § 108.04(5)(e), which provides:

> 108.04(5) DISCHARGE FOR MISCONDUCT. (intro.) … In addition, "misconduct" includes:
>
> (e) Absenteeism by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination, unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature, or excessive tardiness by an employee in violation of a policy of the employer that has been communicated to the employee, if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism or tardiness.

The penalty for misconduct is severe. An employee does not requalify for benefits until seven weeks after the end of the week in which the discharge occurred and he or she earns wages in subsequent covered employment equal to at least 14 times his or her weekly benefit rate. Even then, the wages earned from the discharging employer will not be included in determining the employee's weekly benefit rate, should he or she be laid off by the subsequent employer. *See* Wis. Stat. § 108.04(5)(intro.).

Further, while this is an unemployment insurance case, the meaning of Wis. Stat. § 108.04(5)(e) also affects worker's compensation claims. Under Wis. Stat. § 102.43(9)(e), as created by 2015 Wis. Act 180, a worker injured in the course of employment is ineligible for temporary disability benefits during any period when he or she could return to restricted duty while in a "healing period" if his or her employment has been terminated by his or her employer for misconduct under Wis. Stat. § 108.04(5) (which of course includes a discharge under par. (5)(e)). Thus, if an injured worker recovers to the point he or she can do light duty work, but then is discharged for an attendance violation constituting misconduct under par. (5)(e), he or she will not receive temporary disability compensation even though he or she remains temporarily disabled.

B. The commission properly interpreted and applied Wis. Stat. § 108.04(5)(e) in concluding that Beres' actions did not constitute misconduct under that provision

Mequon Jewish Campus discharged Beres for one occasion of absence without notice because she was sick. Beres' single occasion of absence without notice did not amount to misconduct under the Wis. Stat. § 108.04(5)(e) standard of "absenteeism by an employee on more than 2 occasions within the 120-day period before the date of the employee's termination." However, Mequon Jewish Campus has an attendance policy which provides for termination for one occasion of "no call no show" for employees in their first 90 days of employment, and Beres signed to acknowledge receipt of that policy. *(Ex. 1.)* Because Beres had only worked for Mequon Jewish Campus for five weeks when she missed work because she was sick, her single occasion of absence was grounds for termination as specified by Mequon Jewish Campus "in an employment manual of which [Beres] has acknowledged receipt."

In other words, Beres' single absence did not violate the statutory more-than-2-occasions-within-120-days standard for misconduct in par. (e), but did violate the standard for discharge set by Mequon Jewish Campus in its employment manual. In this case, as in its prior decision in *Gonzalez-Santan v. Therm-Tech of Waukesha Inc.*, UI Dec. Hearing No. 14608989MW

(LIRC Mar. 10, 2015), available online at http://lirc.wisconsin.gov/ucdecsns/4092.htm *(R. 22:2-6; app. 112-14)*, the commission interpreted Wis. Stat. § 108.04(5)(e) to mean that a worker will be disqualified for "misconduct" under par. (5)(e) only if his or her attendance record violates both the statutory more-than-2-occasions-within-120-days standard and the employer's attendance policy specified in its manual (if any). Thus, consistently with *Gonzalez-Santan*, the commission held that Beres' single absence without notice was not "misconduct" by operation of par. (5)(e). The commission then turned to the question of whether misconduct was established under the general rule stated in Wis. Stat. § 108.04(5)(intro.).[7]

In *Gonzalez-Santan*, the commission explained:

> If an employer's policy were more generous than the standard set by the specific provision, that is, it allowed an employee, prior to discharge, to accumulate more than three absences within the relevant 120-day period, then it stands to reason that an employee's accumulation of more than the employer's allowable number of occurrences (after subtracting those for which the employee gave notice and had a valid reason), would be misconduct under paragraph (5)(e)-because the employee not only would be in violation of the employer's standard, but also would have incurred more absences without notice or valid reason than are necessary to meet the default standard in

[7] That is, whether the particular facts of the employment relationship warranted a finding that Beres' absenteeism was an intentional and substantial disregard of the employer's interest or the behavior that it had a right to expect.

> paragraph (5)(e). If, however, an employer's policy were more strict than the standard in paragraph (5)(e), a violation of the employer's standard may fall short of meeting the default standard in paragraph (5)(e). In such a case, the employee's absenteeism might still be considered misconduct, but it would not be misconduct under paragraph (5)(e)…

(R. 22:5-6; app. 114)

Seizing upon the commission's use of the words "generous" and "strict," the department argued to the circuit court in this case that the commission's interpretation of par. (e) requires the determination of "whether an employer's attendance policy is 'stricter' than the statutory standard," which will "entail subjective judgments and comparisons, generating inconsistent decisions." *(R. 16:7, department circuit court brief, page 7.*[8]*)* In its circuit court brief, the commission did indicate that par. (e) would not apply if the employer's policy was stricter than the statutory standard, but parried the department's argument by observing that reviewing courts traditionally have given the commission deference in making such value judgments. (*R. 21:19-20, commission circuit court brief, pages 17-18*[9]*.)* An even more powerful counterargument is made here: the commission's interpretation of Wis. Stat.

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[8] *See also R. 16:12, department circuit court brief, page 12* (referring to "LIRC …examin[ing] the content of the policy to test it for its strictness").

[9] Citing *Bernhardt* v. *LIRC*, 207 Wis. 2d at 303; *Charette v. LIRC*, 196 Wis. 2d at 960.

§ 108.04(5)(e) does not actually necessitate any such weighing or testing for "strictness" in cases where an employer has an attendance policy.

In actual application, the commission's test is far more direct: if the employee's attendance record violates both the statutory more-than-2-occasions-within-120-days standard and an employer's attendance manual established by signed receipt, misconduct under Wis. Stat. § 108.04(5)(e) is established. If not, the commission proceeds to the question of whether misconduct is established under Wis. Stat. § 108.04(5)(intro.).

The commission's interpretation of Wis. Stat. § 108.04(5)(e) follows the principle that a violation of an employer's attendance policy or rule—while perhaps justifying a discharge for business efficiency or other reasons—should not automatically disqualify a worker from unemployment insurance benefits. "The principle that violation of a valid work rule may justify discharge but at the same time may not amount to statutory 'misconduct' for unemployment compensation purposes has been repeatedly recognized" by the Supreme Court. *Consolidated Constr. Co. v. Casey*, 71 Wis. 2d 811, 819-20**,** 238 N.W.2d 758 (1975). Indeed, in another case involving a discharge based on an attendance violation, the Supreme Court stated:

> In considering whether a breach of company work rules or collective-agreement provisions is misconduct, the "reasonableness" of the company rule must be assessed in light of the purpose of unemployment compensation rather than solely in terms of efficient industrial relations. We are less concerned with the "reasonableness" of the rule from the point of view of labor-management relations, than with the "unreasonableness" of the conduct of the employee in breach of the rule. …

Milwaukee Transformer Co., 22 Wis. 2d at 512 (footnotes and citations omitted).

The Supreme Court has also held that

> "… the legislature is presumed to act with knowledge of the existing case law." Therefore, a statute's construction will stand unless the legislature explicitly changes the law.

Czapinski v. St. Francis Hosp., Inc., 2000 WI 80, 236 Wis. 2d 316, ¶22, 613 N.W.2d 120 (2000) (citations omitted). It is true that the Legislature codified the statutory definition of misconduct in 2013 Wis. Act 20, and enacting, among other provisions, Wis. Stat. § 108.04(5)(e). As discussed in part III. B. of this brief, however, that provision is ambiguous. The commission could reasonably conclude that if the Legislature intended to allow thousands of employers to define misconduct by their work rules governing attendance—without reference to the Legislature's statutory more-than-2-occasions-within-120-days standard—it would have explicitly said so.

III. The commission's interpretation of Wis. Stat. § 108.04(5)(e) is more reasonable than the department's interpretation

A. The department's contrary interpretation of Wis. Stat. § 108.04(5)(e)

On review before the circuit court, the department asserted that the commission's interpretation of Wis. Stat. § 108.04(5)(e) is unreasonable. It contends that, whenever an employee acknowledges receipt of an employment manual stating an employer's attendance policy, Wis. Stat. § 108.04(5)(e) unambiguously provides that "the employer—not the statute—has 'specified' the number of occasions of absence without notice or valid reasons that suffice to establish a misconduct discharge." *(R. 16:12, department circuit court brief, page 12.)*

In other words, the department argues that the "unless otherwise specified" clause must be read to require a *misconduct* finding under Wis. Stat. § 108.04(5)(e) any time a worker's attendance infractions meet the number specified by the employer in its manual for *discharge*, provided the absence is without notice or without good cause. In effect, the department argues that the Legislature has delegated to employers the authority to determine what level of absence from work "misconduct" is making a worker

ineligible for unemployment insurance by stating the level of absence that the employer believes warrants discharge.

B. Wisconsin Stat. § 108.04(5)(e) is ambiguous and subject to liberal construction in favor of the payment of benefits

Wisconsin Stat. § 108.04(5)(e) is ambiguous. It does not actually say what happens when the "unless otherwise specified" clause is triggered. The word "unless" is commonly understood to mean "except on the condition that." *Webster's Ninth New Collegiate Dictionary* (1988). The word "unless" when used alone does not tell the reader what happens when the stated condition—here the existence of an employer's manual dealing with attendance—is present. The department *interprets* the statute to mean that the employer may by manual establish the number of occasions of absence that suffice to establish a misconduct discharge without reference to the statutory more-than-2-absences-in-120-days standard; the statute does not actually say that.

It is axiomatic that a statutory provision is ambiguous if reasonable minds can differ as to its meaning. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995). One possible reading of the "unless otherwise specified clause" could be that—as the department argues—the statutory more-than-2-

absences-in-120-days standard becomes meaningless and the employer's manual alone governs. Another possible reading is that—as the commission has held in *Gonzalez-Santan* and in this case—both statutory standard and the employer's standard must be met before misconduct may be found under Wis. Stat. § 108.04(5)(e).

Given their remedial nature, Wisconsin's unemployment insurance statutes "should be liberally construed to effect unemployment compensation coverage for workers…." *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983). Conversely, in a case construing the language that makes a claimant ineligible for benefits based on a misconduct discharge, the Supreme Court held that language resulting in forfeiture of unemployment insurance benefits should be read strictly to soften its severity. *Boynton Cab Co. v. Neubeck*, 237 Wis. at 259. The department's interpretation—which would essentially delegate the determination of "misconduct" in contested attendance cases to rules set unilaterally by employers without reference to the statutory more-than-2-absences-in-120-days minimum stated in par. (e)—runs contrary to the required liberal construction of the statute in favor of the payment of unemployment benefits.

C. The Department's interpretation is unreasonable and conflicts with the state constitution

But even if Wis. Stat. § 108.04(5)(e) were not ambiguous and subject to the liberal construction rule, the department's purported literal interpretation of the statute—as explained below—leads to absurd and unreasonable results. The Supreme Court has held that "when a literal interpretation produces absurd or unreasonable results, or results that are clearly at odds with the legislature's intent, 'our task is to give some alternative meaning' to the words." *State v. Jennings*, 2003 WI 10, ¶11, 259 Wis. 2d 523, 657 N.W.2d 393. *See also State v. Carey*, 2004 WI App 83, ¶8, 272 Wis. 2d 697, 679 N.W.2d 910. The commission's reasonable interpretation of par. (e) avoids the absurd and unreasonable results produced by the department's interpretation.

1) The department's interpretation produces absurd results

First, the department's interpretation, under which an employer determines the standard for a misconduct disqualification by stating in an employment manual the level of absence that subjects an employee to discharge, yields absurd results. For example, if an employer's manual provided for discharge in the event of a single absence without notice, a 30-year employee with an

otherwise flawless attendance record would be deemed to have committed "misconduct" making the employee ineligible for unemployment insurance or worker's compensation benefits[10] if the employee suffered a disabling heart attack or accident driving to work and so was unable to give advance notice of the absence. If an employer specified in its employment manual that "absenteeism" means a single late arrival for work, a long-time employee with an otherwise perfect record would be deemed to commit "misconduct" making the employee ineligible for his unemployment insurance benefits or worker's compensation benefits by being 15 minutes—or, for that matter, 15 seconds—late on a single occasion.

Under Wisconsin's at-will employment rule, employers are perfectly free to adopt a "zero-tolerance" attendance policy and discharge employees under that standard. But not every discharge equates to misconduct for unemployment insurance purposes. *Consolidated Constr. Co.*, 71 Wis. 2d at 819-20; *Milwaukee Transformer Co.*, 22 Wis. 2d at 512. Few people would view the

[10] Again, under the worker's compensation statutes, a worker injured in the course of employment who has returned to limited duty work while healing, but who is then terminated from such work for "misconduct" under Wis. Stat. § 108.04(5), would also be ineligible for temporary disability benefits. *See* Wis. Stat. § 102.43(9)(e).

situations described above as "misconduct" that should disqualify an employee from receiving unemployment insurance or workers compensation benefits, but the department's interpretation leads to that absurd result.[11]

2) The department's interpretation produces unevenness in application of the law.

Second, the department's interpretation creates a disparity or unevenness in the application of the statute. Disqualifying "misconduct" would have a different meaning—even for employees who are doing essentially the same work—based solely on differences in their employers' employment manuals.

That is, allowing individual employers to effectively define "misconduct" in their employment manuals means that, if two workers' employers had different attendance rules, the workers could do the same job for the same number of years and be discharged based on the same attendance record, but that one would receive unemployment insurance benefits while the other would not. The commission's interpretation of Wis. Stat. § 108.04(5)(e) limits

[11] As discussed in part III.C.3 below, allowing employers to define disqualifying misconduct gives employers a financial incentive to develop unreasonably harsh attendance rules.

that unevenness by setting a minimum level of absences—more than two in 120 days—necessary to result in an automatic disqualification for benefits for "misconduct."

Of course, as the commission has previously argued, the Legislature may limit the unemployment compensation program, and the fiscal integrity of the unemployment reserve fund is a legitimate concern of the state. *Brooks v. LIRC*, 138 Wis. 2d 106, 111, 405 N.W.2d 705 (Ct. App. 1987). The commission acknowledges, too, that the Legislature may recognize in the unemployment insurance statutes "certain identifiable classes of claimants and accord[] them different treatment." *Id.* However, those principles neither justify nor mandate an interpretation of Wis. Stat. § 108.04(5)(e) that would allow one worker to receive unemployment insurance while a similarly-situated worker does not, based simply on differences in the attendance policies or rules adopted by their employers.

Nor is the disparate effect of the department's interpretation confined to unemployment insurance benefits. The interpretation urged by the department in this case will create disparities among worker's compensation claimants as well. *See* Wis. Stat. § 102.43(9)(e). Even if two injured workers had identical injuries, employment records, and attendance records, one could receive

temporary disability benefits during his or her healing period while the other would not, if their employers had different attendance rules. The commission's interpretation, by contrast, would even out the disparity by ensuring that both workers had at least met the more-than-2-occasions-within-120-days standard.

3) The department's interpretation results in an unconstitutional and standardless delegation of legislative authority to interested, private employers to define "misconduct"

Third, the statute as interpreted by the department would improperly delegate legislative authority to employers. Article IV, section 1, of the Wisconsin Constitution provides that "the legislative power shall be vested in a senate and assembly." If employers can define disqualifying "misconduct," if as the department itself puts it "the employer—not the statute—has 'specified' the number of occasions of absence without notice or valid reasons that suffice to establish a misconduct discharge,"[12] employers are effectively making law.

[12] *R. 16:12, department circuit court brief, page 12.*

Regarding the delegation of legislative authority, the Supreme Court has stated:

> … The power to declare whether or not there shall be a law; to determine the general purpose or policy to be achieved by the law; to fix the limits within which the law shall operate, -- is a power which is vested by our constitutions in the legislature and may not be delegated. …

State ex rel Warren v. Nusbaum, 59 Wis. 2d 391, 440, 208 N.W.2d 780 (1973) (emphasis supplied). The Court of Appeals has likewise noted that a delegation of authority will not be upheld unless "[t]here are sufficient standards to limit the exercise of such power." *Milwaukee County v. Milwaukee District Council 4*, 109 Wis. 2d 14, 24, 325 N.W.2d 350 (Ct. App. 1982).[13]

Under the department's interpretation of Wis. Stat. § 108.04(5)(e), the Legislature has not "fixed the limits" of the number or duration of attendance violations that result in ineligibility for attendance-based misconduct, but left that up to employers.

[13] Recent cases generally deal with the delegation of authority to administrative agencies to make rules. Those cases stress the degree of oversight that the legislature has over agencies (which are creatures of the legislature) and over the rule-making process. *See Gilbert v. State, Medical Examining Bd.*, 119 Wis. 2d 168, 184-86, 349 N.W.2d 68 (1984) (citing Kenneth Culp Davis, *Administrative Law Treatise* § 3.15 at 206-07 (2d ed. 1978). *See also Panzer v. Doyle*, 2004 WI 52, ¶53, 271 Wis. 2d 295, 680 N.W.2d 666 (2004), overruled in part on other grounds by *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, ¶2, 295 Wis. 2d 1, 719 N.W.2d 408**.** Obviously, neither type of oversight is present when private sector employers are authorized by statute to define misconduct themselves without following the statutory rule-making process.

Regarding delegation of legislative power to private parties particularly, the Supreme Court struck down a Milwaukee City Code provision that allowed labor unions to set a prevailing wage scale for jobs done for the city in *Wagner v. City of Milwaukee*, 177 Wis. 410, 188 N.W.2d 487 (1922), noting that

> [t]he controlling, dominant feature of this entire ordinance is the fixing, in concrete, definite form and in express terms of dollars and cents, the prevailing wage scale for the various crafts and industries. This essential and dominant feature is by the ordinance fixed by the labor unions rather than by the common council.

Id., 177 Wis. at 418-19. The court further held:

> This in effect declares that some body or organization outside of, and independent from, the common council, and other than a state or local administrative body, shall exercise the judgment required to fix and determine a prevailing wage scale. It amounts to nothing less than a surrender by the members of the common council of the exercise of their independent, individual judgments in the determination of a matter of legislative concern and an agreement that, if they act upon the subject at all, the determination of such outside body rather than their own shall control. There is no discretion left with the common council as to the scale; if it fixes any, it must fix that scale determined by the unions. The action and judgment of determining the wage scale is that of the unions, not that of the common council. The power to exercise such legislative function is exclusively in the common council, and their duty and obligation as representatives of the people to so exercise it is coextensive with the power itself.

Id., 177 Wis. at 416-17.

Similarly, in *Gibson Auto Company, Inc., v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935), the Court struck down a law that allowed private trade groups to ask the governor to approve "a code of fair competition and trade practices" if the code was first

"approved by a preponderant majority of persons engaged in such trade or industry" *Id.*, 217 Wis. at 404-05. The court found that law to be an unconstitutional delegation of legislative authority as well:

> We are not called upon in this case to deal with a narrow question of the delegation of the legislative power to fill up the details or to make public regulation interpreting the statute and directing the details of its execution. That the legislature acting within constitutional limitations may do, but it may not in effect abdicate its legislative functions. An act which attempts to do that is invalid in fact though valid in form [] … for the reason that it is an unlawful attempt to delegate the lawmaking power vested in the senate and assembly by sec. 1 of art. IV of the constitution.

Id., 217 Wis. at 412 (citations omitted).

In *State v. Wakeen*, 263 Wis. 401, 57 N.W.2d 364 (1953), the Court did uphold a statute which defined "drug" for the purposes of a statute as "articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them" against the challenge that the statute was "an unlawful delegation of legislative authority to the private organizations located outside of the state which compile the publications." However, in doing so, the Court noted that the *Gibson* case discussed above was distinguishable, adding:

> This is not a case of the delegation of legislative powers. The publications referred to in the statute are not published in response to any delegation of power, legislative or otherwise, by the statute. The compendia are published independently of the statute and not in response to it. These books were published before the enactment of our statute and for an entirely different purpose.

Wakeen, 263 Wis. at 411.

Here, of course, employers would be charged with defining misconduct for the purposes of Wis. Stat. §108.04(5)(e) under the department's interpretation, and they are not disinterested third parties like the publishers in *Wakeen*. Indeed, employers—who are parties to unemployment insurance and worker's compensation claims—would have an incentive to change their attendance policies in response to Wis. Stat. §108.04(5)(e) to reduce the amount of benefits charged to their accounts in the unemployment reserve fund, to reduce their liability for unemployment insurance contributions, and to reduce their liability for worker's compensation benefits.

In sum, when the Legislature delegates authority, it must set a standard to limit the exercise of the delegated power—it must "fix the limits within which the law shall operate." The only arguable limitation to employer-defined misconduct under the department's interpretation of Wis. Stat. § 108.04(5)(e) is the last clause of the statute which provides that an absence is not misconduct so long as the worker provides both notice and one or more valid reasons for the absence. Still, as explained above, an employer may adopt an attendance manual that provides for discharge with a single late arrival for work or a single absence under circumstances that prevent the employee from giving notice. The department would interpret

Wis. Stat. § 108.04(5)(e) to permit employers to effectively redefine "misconduct" to include trivial lapses in perfect attendance that do not correspond to any reasonable view of "misconduct."

The commission does not argue Wis. Stat. § 108.04(5)(e) itself is void as an unconstitutional delegation of legislative power, but rather that the department's interpretation leads to an unconstitutional result. "Given a choice of reasonable interpretations of a statute, [a] court must select the construction which results in constitutionality." *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 526, 261 N.W. 2d 434 (1978). Indeed, courts should select a construction that avoids even a serious doubt as to statute's constitutionality. *State ex rel. Harvey v. Morgan*, 30 Wis. 2d 1, 13, 139 N.W.2d 585 (1966). [14]

The department's interpretation of Wis. Stat. § 108.04(5)(e)—which would amount to a standardless delegation of legislative authority to employers to define "misconduct" for the purposes of their employees' eligibility for unemployment insurance benefits charged to the employer's own account (and for the

[14] "Stated otherwise, when we determine that there is a statutory flaw that may have constitutional significance, we ascertain whether the government rule or statute can be interpreted in a manner that will avoid a constitutional conflict." *Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262, reconsideration dismissed, 856 N.W.2d 177.

purposes of liability for temporary total disability under the worker's compensation law)—poses serious constitutional problems to say the least. Accepting the commission's more reasonable interpretation avoids that constitutional conflict. By recognizing that the statutory more-than-two-absences-in-120-days standard is a "floor," the commission's interpretation sets a legislative parameter on what "misconduct" is, preventing an employer from making law with its employment manual by redefining disqualifying "misconduct" into something that cannot reasonably be viewed as "misconduct."

Finally, interpreting Wis. Stat. § 108.04(5)(e) to permit employers to use employment manuals to legislate their own version of disqualifying misconduct runs contrary to rule in G*raebel Moving & Storage v. LIRC*, 131 Wis. 2d 353, 355, 389 N.W.2d 37 (Ct. App. 1986):

> The commission is not bound by the parties' designation of [the claimant] as an independent contractor. The conditions for unemployment compensation are not subject to a private agreement but must be determined under the applicable statutory provisions.

See also Roberts v. Indus. Comm'n, 2 Wis. 2d 399, 403, 86 N.W.2d 406 (1957). Consistent with *Graebel Moving*, the Court should reject the department's interpretation of Wis. Stat. § 108.04(5)(e) which allows one party—the employer—to set the conditions for receipt of unemployment insurance unilaterally.

CONCLUSION

The commission reasonably interpreted and applied Wis. Stat. § 108.04(5)(e) to conclude that Beres' conduct in missing work on one occasion without notice (or with late notice) for being sick did not amount to misconduct due to absenteeism under that provision. Its decision should therefore be affirmed under the applicable great weight deference standard of review.

Indeed, the commission's decision reflects the most reasonable application of Wis. Stat. § 108.04(5)(e) to the undisputed facts. It is certainly more reasonable than the department's interpretation, which leads to absurd results and uneven treatment among workers in both worker's compensation and unemployment insurance cases and to conflicts with the Wisconsin constitution. The Court thus should confirm the commission's decision regardless of which level of deference applies.

The commission respectfully asks the Court to reverse the circuit court's decision and order and to confirm the commission's decision.

Respectfully submitted,

_____

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CERTIFICATION OF FORM AND LENGTH

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional font. The number of words in the Statement of the Case, Argument, and Conclusion portions of this brief, including footnotes, is 7,399.

Dated August 12, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

- I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12).
- This electronic brief is identical in content and format to the printed form of this brief filed as of this date.
- A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated August 12, 2016

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CERTIFICATION OF DELIVERY AND MAILING

I certify that this brief and appendix was hand-delivered to the Clerk of the Court of Appeals on August 12, 2016**.** I further certify that on August 12, 2016, three copies of this brief and appendix were deposited in the United States mail, correctly addressed and postage was prepaid, for delivery to the following parties:

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