FILED
09-19-2024
CLERK OF WISCONSIN
SUPREME COURT

Supreme Court of Wisconsin

Appeal No. 2023AP001057
Trial Court Case No. 2022CV001241
Case Classification Code No. 30607

Bevco Precision Manufacturing Co.,
Plaintiff-Respondent,

vs.

Wisconsin Labor and Industry Review Commission,
Defendant-Appellant-Petitioner,

Wisconsin Department of Workforce Development,
Defendant-Co-Appellant,

Jacob Fish,
Defendant.

On Review of a Decision of the Wisconsin Court of Appeals, District II,
Appeal No. 2023AP1057
On Appeal from the Circuit Court of Waukesha County,
Case No. 2022CV1241,
The Honorable Michael J. Aprahamian, Presiding Judge

Petition for Review

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September 19, 2024

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Introduction

The Wisconsin Labor and Industry Review Commission petitions the Supreme Court of Wisconsin, pursuant to Wis. Stat. §§ 808.10 and 809.62, to review the decision of the Wisconsin Court of Appeals, District II, in *Bevco Precision Manufacturing Co. v. Wisconsin Labor and Industry Review Commission, Wisconsin Department of Workforce Development, and Jacob Fish*, appeal no. 2023AP1057, filed on August 21, 2024.

Statement of Issues

1. Wisconsin Stat. § 108.04(5)(e) defines "misconduct" to include absences exceeding the *number* permitted in an employer's attendance policy (when that policy meets certain statutory criteria), "if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism…" May an employer's absence and tardiness policies override the express statutory requirement that "misconduct" requires proof of the lack of notice or valid reason, potentially making an employee ineligible for unemployment insurance after missing work, with notice, for a valid reason such as illness?

The Court of Appeals answered, "Yes."

2. Bevco Precision Manufacturing Co. (Bevco) discharged Jacob Fish when he exceeded the 10 points permitted under its attendance policy. Four of those points were assessed for absences which the commission found were for a valid reason, illness, and with adequate notice. Did the Labor and Industry Review Commission (commission)

correctly conclude that Bevco failed to meet its burden of establishing misconduct under Wis. Stat. § 108.04(5)(e)?

The Court of Appeals answered, "No."

3. Does the Court of Appeals' interpretation of Wis. Stat. § 108.04(5)(e), which allows employers themselves to define disqualifying "misconduct" for the purposes of Wis. Stat. §§ 102.43(9)(e) and 108.04(5)(e), result in an improper delegation of legislative authority to employers in violation of Wis. Const. art. IV, § 1?

The Court of Appeals answered, "No."

4. Wisconsin Stat. § 108.04(5g) defines "substantial fault" to include only acts or omissions "over which the employee exercised reasonable control." The final two absences for which Bevco discharged Fish occurred because Fish was ill and could not work. Did the Labor and Industry Review Commission (commission) correctly conclude that those absences were not within Fish's control, so that Bevco failed to meet its burden of establishing substantial fault under Wis. Stat. § 108.04(5g)?

The Court of Appeals did not reach this issue.

Statement of Criteria for Review

Each year the Department of Workforce Development (department) issues thousands of initial determinations regarding eligibility for unemployment insurance benefits. In 2023 alone, over 150,000 individuals filed for unemployment insurance in Wisconsin, and the department issued over 12,000 determinations finding that a claimant was ineligible for benefits because he or she had been discharged for misconduct. Poor attendance is the reason perhaps

asserted most frequently by employers in support of a misconduct discharge. It is safe to say, then, that each year several thousand unemployment insurance claimants are found ineligible based on "misconduct" due to their attendance records. That number is almost certain to grow dramatically under the Court of Appeals' decision in this case, potentially shifting an additional portion of the economic burden caused by unemployment to this state's workers.

This case involves the construction of Wis. Stat. § 108.04(5)(e),[1] which deals with attendance as a basis for a finding of disqualifying "misconduct." Subsection (5)(e) is divided into four clauses separated by commas. The first clause states minimum number of absences that may constitute misconduct. The second clause contains an exception that applies if an employer has adopted a written absence policy and its employees have acknowledged receipt of that policy with their signature. The third clause deals exclusively with tardiness (as opposed to absence), and the fourth clause requires that an absence or instance of tardiness be without notice or valid reason in order to constitute misconduct under the sub. (5)(e).

This Court previously considered the first two clauses of the statute. *DWD v. LIRC (Beres)*, 2018 WI 77, ¶15, 382 Wis. 2d 611,

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[1] (5) DISCHARGE FOR MISCONDUCT. …. 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.

914 N.W.2d 625. In *Beres*, this Court held those two clauses, read together, permit an employer to set out in an employment manual a different *number* of absences that may constitute misconduct than the number set by statute. In effect, this Court held that the second clause of the statute permits employers to "opt out" of the first clause stating the minimum number of absences that may constitute misconduct and substitute their own number.

In this case, the Court of Appeals dramatically expanded the limited holding in *Beres* to allow employers to adopt employment manuals or policies that "opt out" of Wis. Stat. § 108.04(5)(e) *entirely*, including the express statutory requirement in the fourth clause that an absence or tardiness must be without notice or valid reason in order to constitute misconduct. In essence, the Court of Appeals' decision allows employers—themselves parties to an unemployment insurance claim—to adopt a rule that could turn a single absence or instance of tardiness into disqualifying "misconduct," even if the employee provided advance notice and had a valid reason (such as a medical emergency or illness) for the absence or tardiness. As the department observes in its separate petition of review in this case, the Court of Appeals' decision thus will compel a determination of disqualifying misconduct even in the absence of any culpable conduct by an employee, a result the Legislature certainly could not have intended.

The consequence is not trivial to this state's workers. In cases of misconduct, an employee does not only lose the right to receive unemployment insurance following his or her discharge. In addition, the employee's earnings from the discharging employer are excluded from

his or her "base period." *See* Wis. Stat. § 108.04(5)(intro.).[2] The resulting loss of "base period wages" may reduce the amount of benefits available to the employee in *future* claims, even claims following a layoff from another employer for purely economic reasons. Nor is the effect limited to unemployment insurance claimants; applicants for worker's compensation benefits will be negatively affected as well, as Wis. Stat. § 102.43(9)(e) incorporates Wis. Stat. § 108.04(5) by reference.

Further, the Court of Appeals' interpretation, which, again, allows employers to define misconduct as used in Wis. Stat. § 108.04(5)(e) with respect to unemployment insurance claims brought against their accounts, results in an unconstitutional delegation of the legislative power our state's constitution vests in the Senate and Assembly. *See* Wis. Const. art. IV, § 1. The Court of Appeals, of course, held otherwise. It held that no improper delegation resulted because the Legislature itself delegated the authority and because the statute limits the exercise of that legislative authority by requiring that employers provide their employees with copies of the attendance policies. However, the fact that the Legislature *itself* delegated the authority begs the issue, which is whether the delegation is sufficiently *limited*, and the simple

[2] (5) DISCHARGE FOR MISCONDUCT. An employee whose work is terminated by an employing unit for misconduct by the employee connected with the employee's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's weekly benefit rate shall be the rate that would have been paid had the discharge not occurred. The wages paid to an employee by an employer which terminates employment of the employee for misconduct connected with the employee's employment shall be excluded from the employee's base period wages under s. 108.06 (1) for purposes of benefit entitlement….

requirement that employers provide employees with a copy of an attendance policy that employers unilaterally adopt is not a sufficient limit on the exercise of legislative authority by employers.

This case thus meets the criteria for review in Wis. Stat. § 809.62(1r)(a), (c)2. and 3., and (d). The main issue is one of statewide concern, given the thousands of individuals whose unemployment insurance claims are disputed by employers on assertions of misconduct based on poor attendance. The main issue presented will also help develop, clarify, or harmonize a novel issue of law—the extent to which an employer may define disqualifying "misconduct" for unemployment insurance purposes (and some worker's compensation purposes) through an attendance policy—that it is not factual in nature and will certainly recur. Further, the Court of Appeals' decision, which has been recommended for publication, conflicts with the opinion of this Court in *Beres,* as explained in more detail below. Finally, whether the Legislature may delegate to individual employers the legislative authority to define the statutory term "misconduct" as used in sub. (5)(e), with no meaningful control or limit over how the employers define and apply the term, poses a real and significant constitutional issue.

Statement of the Case

I. Nature of the case and posture

This petition arises from an action for judicial review of an administrative decision of the commission issued under the state unemployment insurance act, Wis. Stat. ch. 108. The commission's decision found Jacob Fish eligible for unemployment insurance following the termination of his employment by his employer, Bevco.

Fish began a claim for unemployment insurance benefits after separating from his employment at Bevco *(Doc.17:231)*.[3] On July 29, 2022, following a hearing before an administrative law judge, the commission issued a decision that determined that Fish was eligible for unemployment insurance benefits because Bevco failed to meet its burden of proving that he had been discharged for misconduct or substantial fault *(Doc.17:2-6; P.Appx.67-71)*.

Bevco sought judicial review of that decision in Waukesha County Circuit Court under Wis. Stat. § 108.09(7). On May 5, 2023, the Honorable Michael J. Aprahamian, Waukesha County Circuit Judge, issued a Decision and Order that set aside the commission's decision and determined that Fish's claim must be denied because Bevco discharged him for misconduct or, alternatively, for substantial fault *(Doc.40:1, 8-17; P.Appx.22, 29-38)*. On May 9, 2023, Judge Aprahamian issued a Final Order that, for the reasons stated in his May 5, 2023 Decision and Order, set aside the commission's decision, reversed the commission's decision, and remanded the matter to the commission for further proceedings consistent with his May 5, 2023 Decision and Order *(Doc.43:1-2; P.Appx.20-21)*.

The commission and the department each brought timely appeals of Judge Aprahamian's May 9, 2023 Final Order in the Court of Appeals.

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[3] References to the documents and papers in the commission file in this matter, which have been filed pursuant to Wis. Stat. § 108.09(7)(c)5., in the appellate index as circuit court document 17 "Unemployment Administrative Record - Jacob Fish" will use the pagination included upon filing and be in the form *(Doc.17:p)*. References to the transcript of the administrative hearing held on August 31, 2021, which is filed in the appellate index as circuit court document 18 "Unemployment Hearing and Exhibits - Jacob Fish" will be in the form *(T._)*. References to exhibits filed with the transcript at the end of circuit court document 18 will use the pagination included upon filing and be in the form *(Ex._, Doc.18:p)*. References to documents in the appendix to this petition will be in the form *(P.Appx._)*.

The Court of Appeals affirmed Judge Aprahamian's decision in an opinion recommended for publication. *Bevco Precision Manufacturing Co. v. Wis. LIRC, Wis. DWD, and Jacob Fish*, Appeal No. 2023AP1057 (Wis. Ct. App. Aug. 21, 2024) (publication recommended) (*Bevco v. LIRC*) *(P.Appx.3-18)*. In so doing, the Court of Appeals held that "a violation of an employer's attendance policy of which an employee is aware (as evidenced by a signed acknowledgement of receipt) constitutes 'misconduct' for the purposes of disqualification from employment benefits, full stop." *Id.*, slip op. at ¶18.

The commission now files this petition for review before this Court.

II. Facts.

The relevant facts as found by the commission are straightforward. Bevco discharged defendant Fish after Fish accumulated 10 points under Bevco's no-fault attendance policy, based upon days in which Fish was either absent from work or tardy in reporting for work. *(Ex.13, Doc.18:159; T.47:2-21, 55:3-15, 77:21-25.)* Four of the points assessed against Fish were for absences on days (January 2020, February 2020, July 23, 2020, August 7, 2020) when he was ill, as established by Bevco's own records showing that he provided a doctor's excuse *(Ex.10, Doc.18:152; Ex.11, Doc.18:154; Ex.17, Doc.18:166),* testimony from Bevco's witness about receipt of a screenshot of a doctor's excuse *(T.70:11 to 71:1),* or evidence of a doctor's excuse *(Ex.21, Doc.18:171)*. Fish "called in" to give advance notice of his absence for the first three of those days *(Ex.10, Doc.18:152; Ex.11, Doc.18:154; Ex.17, Doc.18:166; see also, T.47:25 to 48:1, 85:17-19)*. The fourth occurred after Fish experienced an episode of uncontrolled diarrhea on the way to work *(T.92:22-25, 93:11; see also Ex.21, Doc.8:171)*. On that occasion, Fish called Bevco 20

minutes after his shift began to inform Bevco he had had "an accident" on the way to work and would be absent that day *(T.51:16-19, 52:23-25, 53:13-18, 92:20-25)*.

Discussion

I. The Court of Appeals' overly expansive reading of *Beres* conflicts with this Court's carefully limited holding in that case, and its repeated pronouncement that the unemployment insurance statutes are to be liberally construed.

The Court should grant review in this case because the Court of Appeals' dramatically expands this Court's actual holding in *Beres* and will jeopardize the unemployment insurance claims of thousands of Wisconsin workers each year. The decision, which has been recommended for publication, directly contradicts this Court's longstanding and repeated holding that the unemployment insurance statutes should be read liberally in favor of coverage for unemployed workers. It also overlooks two other rules of statutory construction, as well as the traditional rules applied in reading prior appellate decisions.

A. The Court's holding in *Beres.*

An understanding of the issues in this case must begin with a discussion of this Court's holding in *Beres*. In that case, an employer's absence policy provided that a probationary employee could be discharged if, in a single instance, the employee did not give the employer advance notice of an absence. *Beres*, 382 Wis. 2d 611, ¶6. Valarie Beres, a probationary employee, was discharged after missing one day of work without providing notice. This Court found that Beres was discharged for "misconduct" under Wis. Stat. § 108.04(5)(e), and so was ineligible for unemployment insurance benefits.

The Court began its analysis in *Beres* by observing that Wis. Stat. § 108.04(5)(e) contains "three main clauses relating to absenteeism" and that the first two are:

- 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

Beres, 382 Wis. 2d 611, ¶15-17. Another clause deals solely with tardiness (as opposed to absenteeism):

- or excessive tardiness by an employee in violation of a policy of the employer that has been communicated to the employee,

The final clause of the statute deals with both absenteeism and tardiness:

- 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 Court stated that "only the first two clauses [dealing with absenteeism were] relevant" to its decision in *Beres*. *Id.,* 382 Wis. 2d 611*,* ¶15*.* It therefore did not address the third clause, which was irrelevant because it deals only with tardiness. Nor did it address the fourth and final clause of Wis. Stat. § 108.04(5)(e): "if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism…" which was irrelevant because there was no dispute in that case that Ms. Beres had failed to provide notice to her employer.

Read in light of these limiting statements from the Court itself, the *Beres* decision held that if an employer has an absenteeism policy of which an employee acknowledged receipt, the *number* of absences permitted in that policy alone governs. *Beres*, 382 Wis. 2d 611, ¶¶14 to 19. In effect, *Beres* permits employers, by written manual or attendance

policy, to modify or "opt out" of the first clause's stated minimum *number* of absences that might constitute misconduct. Because the employer in *Beres* had such a policy, and because Ms. Beres had exceeded the permitted number of absences when she missed work without notice, the Court concluded that misconduct had been established. *Id.*, at ¶23.

B. The Court of Appeals' decision dramatically expands *Beres* in violation of the rule that exceptions to unemployment insurance coverage should be narrowly construed.

The Court of Appeals' decision in this case dramatically expands this Court's limited holding in *Beres*. The Court of Appeals reads *Beres* to permit employers to opt out of Wis. Stat. § 108.04(5)(e) *entirely*, including the third clause limiting "misconduct" under a policy to "excessive tardiness," and the fourth clause's limitation of "misconduct" to absences and tardiness for which an employee does not provide to his or her employer both notice and one or more valid reasons. The obvious effect of this reading is that employers are now free to adopt attendance policies that would require a finding of "misconduct" for a single instance of tardiness or absence, even if the employee provided both advance notice and had a valid reason—such as illness—a fact pattern not presented in *Beres*. And unlike other statutes that permit a finding of misconduct based on a violation of an employer rule, there is no requirement that such attendance policies be objectively "reasonable." *See, e.g.,* Wis. Stat. § 108.04(5)(a).

Wisconsin, of course, is an "employment at will" state. *Runzheimer Int'l, Ltd. v. Friedlen*, 2015 WI 45, ¶41, 362 Wis. 2d 100, 862 N.W.2d 879. Employers are free to discharge workers for a single instance of tardiness or absence if they choose. But that right cannot reasonably be read to permit employers to potentially adopt policies that

disqualify an employee for unemployment insurance benefits following a single absence or tardiness, regardless of notice or reason,[4] at least not under Wis. Stat. § 108.04(5)(e) as written and interpreted by this Court in *Beres*. Yet the Court of Appeals' decision does exactly that, placing the social cost of unemployment following such discharges solely on the discharged worker. *See* Wis. Stat. § 108.01(1).

That type of draconian interpretation of the unemployment insurance statutes is precisely what this Court has said should *not* happen. This Court has repeatedly held that the state's "unemployment compensation statutes embody a strong public policy in favor of compensating the unemployed," citing the policy codified in Wis. Stat. § 108.01. *See Operton v. LIRC*, 2017 WI 46, ¶31, 375 Wis. 2d 1, 894 N.W.2d 426. Indeed, the law presumes that an employee is not disqualified from unemployment insurance. *Consol. Const. Co. v. Casey*, 71 Wis. 2d at 820. Consistent with that policy and presumption, Wis. Stat. ch. 108 is "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 62, 330 N.W.2d 169 (1983); *Operton*, 375 Wis. 2d 1, ¶32. As a corollary to that rule, this Court has held that, as the unemployment insurance statutes are liberally construed, then *exceptions* to coverage such as the one contained in sub. (5)(e) must be *narrowly* construed. *Cath. Charities Bureau, Inc. v. LIRC*, 2004 WI 13, ¶47, 411 Wis. 2d 1, 3 N.W.2d 666.

[4] "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 Court. *Consol. Const. Co. v. Casey*, 71 Wis. 2d 811, 819-20, 238 N.W.2d 758 (1975) .

These holdings take on even greater meaning here where the statute at issue effectively delegates to an employer—one of the parties to an unemployment insurance claim—the authority to define disqualifying "misconduct" by adopting a policy. Regardless of the extent to which the statute may constitute an unconstitutional delegation of legislative authority (discussed below), the liberal construction rule and its corollary regarding exceptions warrant construing such delegations especially narrowly. Stated bluntly, the Court should not construe Wis. Stat. § 108.04(5)(e) to permit a broad delegation to employers to define the entire field of what attendance lapses constitute misconduct, absent language from the Legislature clearly giving them that authority.

II. The Court of Appeals' decision violates the "next preceding antecedent" rule of statutory construction, as well as traditional rules for reading appellate decisions.

These considerations aside, the Court of Appeals' decision violates another basic rule of statutory construction which would limit the application of the "unless otherwise specified" or "opt out" language in the second clause of Wis. Stat. § 108.04(5)(e) to the "number of permitted absences" language in the first clause:

> The rule is that qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or the evident meaning of the enactment requires a different construction.

Vandervelde v. City of Green Lake, 72 Wis. 2d 210, 215, 240 N.W.2d 399 (1976).[5] Stated another way, "qualifying words or phrases modify the words or phrases immediately preceding them and not words [or] phrases more remote." *In re Marriage of Meister*, 2016 WI 22, ¶29 n.13,

[5] The Legislative Reference Bureau cites *Vandervelde* in its bill drafting manual for the proposition that "qualifying words in a statute generally refer to the nearest antecedent only." *Wisconsin Bill Drafting Manual*, § 2.07(1)(c) Note. (LRB rev. Sept. 2022) *(P.Appx.75)*.

367 Wis. 2d 447, 876 N.W.2d 746. Under this rule, the qualifying language of the *second* clause dealing with the situation in which an employer adopts its own absence policy would apply only to the *first* clause (the "next preceding antecedent") dealing with the statutory number of absences. That is why this Court made clear in the *Beres* decision that it was limiting its decision to the first two clauses of the statute. However, the Court of Appeals holds that the second clause also limits or qualifies two *succeeding* clauses—the *third* clause dealing with tardiness and the *fourth* clause dealing with notice and valid reason.

The Court of Appeals justified its departure from the rule by noting that, in summarizing its holding in *Beres*, this Court used broad language stating that an employee can "opt out" of the statutory definition of "misconduct" by absenteeism and set its own absenteeism policy, the violation of which will constitute statutory misconduct. *See Bevco v. LIRC*, ¶18. However, the language this Court used in summarizing its holding in *Beres* cannot somehow retract or "unsay" the Court's clear statement that "only the first two clauses" in sub. (5)(e) "[we]re relevant" in that case. *Beres*, 382 Wis. 2d 611, ¶15.

Nor could the summary language change the facts in *Beres* which, as this Court specifically noted, included the fact that Ms. Beres failed to give notice. *Beres*, 382 Wis. 2d 611, ¶¶7, 24. This explains why the fourth clause of Wis. Stat. § 108.04(5)(e) was not "relevant" to this Court's legal analysis in *Beres*—Ms. Beres' failure to give notice as required by that clause was undisputed.[6] Appellate courts decide cases

[6] If an employee exceeds the number of permitted absences under the first two clauses of Wis. Stat. § 108.04(5)(e), according to the commission's interpretation of the statute, misconduct results under the fourth clause if the employee failed to provide notice or a valid reason for the absences to the employer. Thus, a failure to provide *either* notice

Footnote cont'd

on the narrowest possible grounds, *Md. Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15., and their opinions "must be read in the light of [their] facts and not as establishing a rule of law on an issue not raised by the facts," *Dickens v. Kensmoe*, 61 Wis. 2d 211, 220, 212 N.W.2d 484 (1973). Because notice was not at issue in *Beres*, and because the *Beres* court specifically stated it was not addressing the notice and valid reason clause of the statute, the Court of Appeals erred in concluding that *Beres* requires a reading of sub. (5)(e) that would permit an employer to opt out of, or override, the notice and valid reason requirement in the fourth clause of that subsection.

III. The Court of Appeals' interpretation of Wis. Stat. § 108.04(5)(e) violates the rule against statutory surplusage.

The Court of Appeals' decision also violates another basic rule of statutory construction. Again, the Court of Appeals holds that an employer may "opt out" of both the absence and tardiness clauses of Wis. Stat. §108.04(5)(e) by adopting a policy. However, the clause in sub. (5)(e) that deals with tardiness, the third clause, as written *only* applies when an employer has adopted a tardiness policy ("or excessive tardiness by an employee *in violation of a policy…*"). Because the Court of Appeals holds that an employer opts out of sub. (5)(e) (including the third clause) by adopting a tardiness or attendance policy, the entire third clause becomes surplusage. It has no meaning, as the third clause only deals with tardiness in violation of an employer's policy, but the Court of Appeals holds that if an employer has such a policy, sub. (5)(e) does not apply at all because the employer's attendance policy alone determines

or a valid reason with respect to a particular absence results in that absence being considered in the tally of absences that might result in a finding of misconduct and requires a finding of misconduct if such absences exceeded the number permitted.

what constitutes disqualifying misconduct, "full stop." *Bevco v. LIRC*, ¶18. That is, if an employer adopted a policy that permitted only a single instance of tardiness, and that policy *alone* governs as the Court of Appeals held, there would never be an inquiry under the third clause into whether the tardiness in violation of that policy was *excessive*.

Likewise, the words "or tardiness" in the fourth clause have no meaning under the Court of Appeals' decision. Under that decision the fourth clause, the "notice and valid reason" clause, only applies to *absences* under the first clause and only when an employer has no written policy. Because the fourth clause could never apply to the situation contemplated in the third clause—"excessive tardiness … in violation of an employer's policy"—the words "or tardiness" in the fourth clause also have no meaning.

Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Fortunately, there is a reading of Wis. Stat. § 108.04(5)(e) and *Beres* that harmonizes the plain language of the statute enacted by the Legislature with this Court's holding in *Beres* and avoids surplusage: The "notice and valid reason" requirement of the fourth clause applies to all three prior clauses. This does not affect the outcome in *Beres*, as the single absence at issue in that case was without notice, nor does it violate this Court's interpretation of the first two clauses of sub. (5)(e), the only clauses relevant to that decision.

As set out above, *Beres* holds that the employer may choose to enact a policy that sets the number of absences permitted lower than the default provided in the first clause of the statute. But if *Beres* held–and

the commission by no means believes that it did–that an employer may also choose to have absences that were with notice and for valid reasons considered "misconduct" under Wis. Stat. § 108.04(5)(e), this Court should revisit and overturn that holding as contrary to the plain language of the statute.

IV. The Court of Appeals' decision departs from the plain meaning of Wis. Stat. § 108.04(5)(e) in a misplaced and unnecessary attempt to salvage "no-fault" attendance policies.

The Court of Appeals states that the commission's reading of the statute—which limits the "opt out" language of the second clause to the number of absences permitted—is illogical as it would preclude the enforcement of a "no-fault" policy if even one of the number of absences permitted under the policy was with notice and valid reason. *See Bevco v. LIRC*, slip op. ¶19 n.11. *See also id.*, ¶27 (Neubauer, J., concurring). The concurrence particularly notes that "[i]f the legislature had intended to preclude no-fault employer absenteeism policies … it would have said so." However, neither the statute nor the *Beres* decision mentions no-fault policies at all. Instead, the statute specifically requires that misconduct results under the statute only upon proof of some level of employee "fault"—if the absence is without notice or valid reason. If the Legislature truly meant Wis. Stat. § 108.04(5)(e) to protect no-fault policies (or for that matter to allow employers to override the statutory requirement that limits misconduct related to tardiness to "*excessive* tardiness"), it would have made it clear that the "opt out" clause applied to the third and fourth clauses of the statute.

Certainly, the Legislature knows how to draft such a statute. Since this case was decided by the circuit court, the Legislature passed legislation that would have amended Wis. Stat. § 108.04(5)(e) as follows:

> SECTION 7. 108.04 (5) (e) of the statutes is renumbered 108.04 (5) (e) 1. and amended to read:
>
> 108.04 (5) (e) 1. 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~~ if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism. This subdivision does not apply if the employer has a reasonable policy that covers absenteeism described in subd. 2. 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~~.
>
> SECTION 8. 108.04 (5) (e) 2. of the statutes is created to read:
>
> 108.04 (5) (e) 2. A violation of an employer's reasonable policy that covers employee absenteeism, tardiness, or both, and that results in an employee's termination, if that termination is in accordance with that policy and the policy is specified by the employer in an employment manual of which the employee has acknowledged receipt with his or her signature.

See 2023 Assembly Bill 147.[7] That is, the Legislature would have amended sub. (5)(e) so that it would read much as the Court of Appeals *now* reads it: to permit an employer to adopt a written no-fault policy that "opts out" of the requirement of proof of "notice and valid reason." Significantly, however, the amended statute would have included a requirement that the policy be "reasonable," a protection against overly severe or arbitrary employer policies *not* present under the Court of Appeals' decision.

The Governor vetoed 2023 Assembly Bill 147, and the bill would not have governed the commission's 2022 decision in this case even it had been enacted into law. However, the bill's passage through *both*

[7] The history of the bill showing its passage in both houses is available online at https://docs.legis.wisconsin.gov/2023/proposals/reg/asm/bill/ab147. The text of the enrolled bill is at https://docs.legis.wisconsin.gov/2023/related/vetoedinfull/ab147.pdf.

houses of the Legislature should be accorded "some weight as [an] aid[] to this court in determining what was intended by the legislature" in the earlier enactment of Wis. Stat. § 108.04(5)(e) in its current form. *McGarrity v. Welch Plumbing Co.*, 104 Wis. 2d 414, 427, 312 N.W.2d 37 (1981); *see also, State v. Cole,* 2003 WI 59, ¶40, 262 Wis. 2d 167, 663N.W.2d 700. Stated simply, the Legislature can enact a statute that specifically the addresses the Court of Appeals' concern about protecting no-fault policies—and in fact it passed such a statute through both houses—but the current version of Wis. Stat. § 108.02(5)(e) does not do so.

Further, it is important to note that the Court of Appeals did not have to depart from the "next preceding antecedent rule" discussed in *Vandervelde v. City of Green Lake* and *In re Marriage of Meister* in order to avoid an absurd result. The concurring judge, particularly, was concerned that the commission's reading of sub. (5)(e) would "*preclude* a determination of 'misconduct' for a far greater number of unexcused absences than the two unexcused absences permitted under the statute when there is no employer policy, or the one unexcused absence permitted in *Beres*." *Bevco v. LIRC*, ¶27 *(Neubauer, J. concurring)*. However, Wis. Stat. § 108.04(5)(e) in fact has no such preclusive effect.

Wisconsin Stat. § 108.04(5) provides *both* a general definition of misconduct at sub. (5)(intro.)[8] *and* examples of several specific actions

[8] **(5)** DISCHARGE FOR MISCONDUCT. … For purposes of this subsection, "misconduct" means one or more actions or conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer. In addition, "misconduct" includes…

that constitute misconduct at sub. (5)(a) to (g). *Operton*, 375 Wis. 2d 1, ¶34. These are not mutually exclusive, as this Court has made clear, stating that "[i]f an employee is terminated as a result of any of the statutorily delineated actions *or* under the general definition of misconduct, then the employee's termination was for misconduct," *id.,* 375 Wis. 2d 1, ¶34 (emphasis added).

The general definition of misconduct in Wis. Stat. § 108.04(5)(intro.) is a codification of this Court's holding in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-260, 296 N.W. 636 (1941). In practice, the commission determines whether the employee was discharged for misconduct by engaging in any of the actions enumerated in sub. (5)(a) to (g), and, if not, it then determines whether the employee's actions constitute misconduct under the codified misconduct definition at sub. (5)(intro.). *DWD v. LIRC,* 2017 WI App 29, ¶13, 375 Wis. 2d 183, 193, 895 N.W.2d 77, 82, *rev'd on other grounds*, 2018 WI 77, 382 Wis. 2d 611, 914 N.W.2d 625. The commission followed that course in this case, looking first at sub. (5)(e), then at sub. (5)(intro.). *See Doc.17:4-5; P.Appx. 69-70.*

On review, Bevco did not challenge the commission's conclusion that it had failed to establish that Fish's attendance record constituted misconduct under the general definition in Wis. Stat. § 108.04(5)(intro.). *See Doc.17:4-5; see also LIRC's (appellant's) first brief in Court of Appeals, page 26.* Still, Bevco had that opportunity. Misconduct may be found under sub. (5)(intro.) based on a poor attendance record, even when some absences are excused or without fault by the employee, and even when the final absences are with notice and without fault.

When analyzing misconduct under Wis. Stat. § 108.04(5)(intro.) or the former *Boynton Cab Co.* standard, the commission has looked at an employee's *overall* attendance record. In a case where an employee was discharged after a series of motor vehicle accidents, the last of which was not his fault, this Court affirmed a circuit court holding that "no mental gymnastics can change the truth that the employer fired the man because he had six accidents, not because he had one." *Checker Cab Co. v. Indus. Comm'n*, 242 Wis. 429, 433, 8 N.W.2d 286 (1943). In affirming the resulting determination of misconduct, this Court explained that the employee's *overall* accident record was the basis for the discharge, that "the last accident was the occasion of and not the reason for his discharge." *Id.* Thus, in an attendance case specifically, the commission, relying on *Checker Cab Co.*, has held:

> Although the employe did not have another unexcused absence between his final warning and his discharge date, that fact is not necessarily determinative for purposes of assessing misconduct. That the employer allowed the employe to continue working, allowed him to tally a poor attendance record and did not discharge the employe for a specific attendance infraction, does not preclude the commission from looking at the employe's entire attendance record in evaluating the employe's conduct.

Buda v. U Line Corporation, UI Hearing No. 88-602910MW (LIRC Feb. 3, 1989) *(P.Appx. 76-78)*[9]; *see also Williams v. Gilmore Construction Inc.,* UI Hearing No. 99608402 (LIRC Mar. 30, 2000) *(P.Appx. 79-82)*.[10] ("[e]ven though the employe's last absence was not blameworthy, there is sufficient prior blameworthy conduct in the employe's record to form the actual basis for the misconduct finding.") Similarly, in *Charette v.*

[9] Online at https://lirc.wisconsin.gov/ucdecsns/586.htm.

[10] Online at https://lirc.wisconsin.gov/ucdecsns/859.htm.

LIRC, 196 Wis. 2d 956, 962-63, 540 N.W.2d 239 (Ct. App. 1995), the Court of Appeals affirmed the commission's decision finding misconduct for excessive tardiness under the *Boynton Cab* standard now codified at sub. (5)(intro.), where the worker's *overall* attendance record "exhibited a reoccurring pattern of tardiness," evidencing "an intentional and substantial disregard of the employer's interests and of her duties as an employee."

Stated directly, Wis. Stat. § 108.04(5)(e) does not *preclude* a finding of misconduct under a no-fault policy if one, or some, of the absences were with notice and valid reason. If an employer discharges an employee under a no-fault policy, and that employee's attendance record viewed as a whole establishes an intentional and substantial disregard of the employer's interests or the standards of conduct it has a right to expect, "misconduct" will still result under § 108.04(5)(intro.), even if some of the absences were excused and with notice. Again, because Bevco did not raise the issue below, whether the commission correctly determined that Fish's attendance record did not constitute misconduct under (5)(intro.) is not before this Court on review. Still, it was not necessary for the Court of Appeals to adopt a strained interpretation of sub. (5)(e) or to engage in an overly broad reading of this Court's *Beres* decision to salvage no-fault policies.

V. The Court of Appeals' decision results in an unconstitutional delegation of Legislative authority to employers.

The legislative authority of this state is vested in the state Senate and Assembly under Wis. Const. art. IV, § 1. This Court has held:

> … 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). In determining whether a legislative grant of authority transgresses this inferred constitutional limitation, this Court examines both the substantive nature of the granted power and the adequacy of attending procedural safeguards against arbitrary exercise of that power. *Becker v. Dane Cnty.*, 2022 WI 63, ¶31, 403 Wis. 2d 424, 977 N.W.2d 390. 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).

This Court has previously invalidated legislation 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." *Gibson Auto Co. v. Finnegan*, 217 Wis. 401, 259 N.W. 420 (1935). It also 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).

Responding to this argument, the Court of Appeals noted that "the Legislature itself provided the employers the ability to adopt attendance policies that fit their businesses for the purposes of this statute." However, the fact that the Legislature *itself* delegated the authority begs the issue, which is whether the delegation was improper. And "providing employers the ability to adopt policies for … the purposes of [the] statute" is simply another way of stating that the Legislature did indeed delegate to employers the ability "to fix the limits within which the law shall

operate" by defining the term "misconduct" for the purposes of benefit disqualification under Wis. Stat. § 108.04(5)(e).

The Court of Appeals also stated that there are "sufficient standards to limit the exercise of such power," because an employer must put its policy in writing and provide it to its employees. *Bevco v. LIRC,* ¶21. But recent cases which deal with the standards that limit the exercise of delegated legislative power involve some degree of oversight by the Legislature or the Courts in the exercise of that power. *See Gilbert v. Medical Examining Bd.,* 119 Wis. 2d 168, 184-86, 349 N.W.2d 68 (1984) (referring to procedural and judicial safeguards). *See also, Panzer v. Doyle,* 2004 WI 52, ¶¶53-57, 271 Wis. 2d 295, 680 N.W.2d 666, *overruled in part on other grounds by Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶2, 295 Wis. 2d 1, 719 N.W.2d 408. The Court has also indicated that what might seem to be an adequate safeguard for a delegation of legislative authority to an administrative agency may be wholly inadequate in the case of a delegation to other entities, *Panzer v. Doyle*, 271 Wis. 2d 295, ¶57, such as private employers.

One example of a "standard to limit the exercise of power" in this case would include the statutory requirement, set by the Legislature, of showing a lack of notice or valid reason, which would limit misconduct disqualifications following arbitrary discharges under unreasonable policies. Another example might include requiring that the employer's attendance policy be "reasonable," as the Legislature did in Wis. Stat. § 108.04(5)(a) with respect to "misconduct" resulting from a violation of an employer's drug or alcohol policy, and as it attempted to do in 2023 Assembly Bill 147. That would at least permit administrative and judicial inquiry into to whether the employer's definition of disqualifying

misconduct relating to attendance is "reasonable." In this case, however, the Court of Appeals *only* points to an after-the-fact notification to employees of the policy that the employer unilaterally adopts, and that the employee presumably must accept as a condition of becoming or remaining employed. That cannot reasonably be viewed as a sufficient limitation of the exercise of the delegated legislative power to define disqualifying "misconduct" under sub. (5)(e).

VI. This Court should affirm the commission's findings and conclusion regarding substantial fault under Wis. Stat. § 108.04(5g).

The commission adopts the arguments of the department regarding substantial fault under Wis. Stat. § 108.04(5g), as stated in the department's petition for review. Regardless of whether the issue provides a separate basis for granting review in this case, this Court should review the commission's determination that Fish was not discharged for substantial fault. The Court of Appeals did not reach the issue of substantial fault. However, this Court reviews the commission decision, and its review is not limited by the decision of the Court of Appeals or the circuit court. *See Friendly Vill. Nursing & Rehab, LLC v. DWD*, 2022 WI 4, ¶13, 400 Wis. 2d 277, 969 N.W.2d 245.

Wisconsin Stat. § 108.04(5g) defines "substantial fault" to include only acts or omissions "over which the employee exercised reasonable control." In this case, the commission found as a fact that the final two absences for which Bevco discharged Fish occurred because Fish was ill and could not work. In other words, he could not exercise reasonable control over his attendance on those days. This Court should thus affirm the commission's conclusion that Bevco did not establish a discharge for substantial fault under sub. (5g).

Conclusion

The Court of Appeals' decision in this case will dramatically increase the number of workers found ineligible for unemployment benefits. It drastically over-reads this Court's limited holding in *Beres,* and it is entirely at odds with the plain meaning of the statutes as well as this Court's repeated, longstanding pronouncements that the unemployment insurance statutes should be liberally construed to favor the payment of benefits to unemployed workers. It also contradicts the "next preceding antecedent" rule of statutory construction, as well as the rule disfavoring statutory surplusage, in an unnecessary attempt to protect no-fault attendance policies, contrary to the Legislature's express requirement in Wis. Stat. § 108.04(5)(e) that absence-based misconduct requires proof of employee "fault"—that is, the lack of either notice or a valid reason. The decision will result in an almost unrestricted delegation to employers of the authority to define "misconduct" related to attendance in unemployment insurance claims—regardless of whether their definition is reasonable—effectively enabling employers to transfer the burden of unemployment following a single absence with notice and valid reason to workers and their families, despite the evident lack of legislative intent to achieve that result.

The Court should grant this petition and reverse the decision of the Court of Appeals.

Respectfully submitted,

Dated September 19, 2024.

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Certification of Form and Length

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (bm) and 809.62(2) and (4) for a petition for review with a proportional serif font. The length of this petition for review (exclusive of the caption, table of contents, table of authorities, and certifications) is 7,669 words.

Dated September 19, 2024.

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Certification Regarding Appendix Contents and Confidentiality

I hereby certify that filed with this petition for review is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (3) any other portions of the record necessary for an understanding of the petition; and (4) a copy of any unpublished opinion cited under Wis. Stat. § 809.23 (3) (a) or (b).

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

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