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STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2023AP001057
Waukesha County Circuit Court Case No. 2022CV001241

Bevco Precision Manufacturing Co.,
Plaintiff-Respondent,

v.

Wisconsin Labor and Industry Review Commission,
Defendant-Appellant,

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

Jacob Fish,
Defendant.

PETITION FOR REVIEW OF THE
WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Do common law principles of notice and valid excuse apply when determining eligibility for unemployment insurance benefits for employees terminated under an employer's attendance policy?

The Labor and Industry Review Commission answered "yes."

The Court of Appeals answered "no."

Is Jacob Fish, who was fired for attendance failures, ineligible for unemployment insurance benefits due to misconduct in connection with his employment?

The Labor and Industry Review Commission answered "no."

The Court of Appeals answered "yes."

Is Jacob Fish, who was fired for attendance failures, ineligible for unemployment insurance benefits due to substantial fault in connection with his employment?

The Labor and Industry Review Commission answered "no."

The Court of Appeals did not decide this issue.

STATEMENT OF CRITERIA FOR REVIEW

The Court of Appeals' decision is the first statewide court decision in the 92-year history of the unemployment insurance program that has found misconduct to disqualify a person from receiving unemployment benefits without a finding that the employee engaged in culpable conduct. Under Wis. Stat. § 809.62(1r)(c), a Wisconsin Supreme Court decision will help develop, clarify, or harmonize the law because the Court should clarify its decision in the *Beres* unemployment insurance case¹ regarding the proper interpretation of the attendance misconduct statute, section 108.04(5)(e). Also, the Court of Appeals' decision conflicts with *Beres* because the Court of Appeals incorrectly expanded this Court's holding in *Beres*, which further necessitates review by this Court. Wis. Stat. § 809.62(1r)(d).

The Court should harmonize the law and confirm that a misconduct disqualification always requires a finding of intentional or reckless conduct that shows a willful disregard of an employer's interests. The Court of Appeals' decision incorrectly created a new doctrine for certain misconduct cases—where the discharge is for attendance failures under a signed attendance policy—by finding no need to show intentional or reckless conduct. Wis. Stat. § 809.62(1r)(c)1. The Supreme Court should restore the law to well-settled principles of misconduct to ensure fairness and conformity to federal law.

The Supreme Court should also accept review because the Court has never directly addressed the proper application of the applicable part of section 108.04(5)(e), the resolution of which will have a statewide impact on thousands of unemployment insurance benefit claimants. Wis. Stat. § 809.62(1r)(c)2.

¹ *Wisconsin Dep't of Workforce Dev. v. Wisconsin Lab. & Indus. Rev. Comm'n* (“*Beres*”), 2018 WI 77, 382 Wis. 2d 611, 914 N.W.2d 625.

As the Commission argues in its petition, this Court should grant review of this case because of the constitutional issue raised by the potential for improper delegation of legislative power under Wis. Const., art. IV, § 1. Wis. Stat. § 809.62(1r)(a).

Finally, the Court should accept review of this case to develop the law by explaining the standard for finding substantial fault under section 108.04(5g) in unemployment insurance attendance discharge cases. Specifically, the Court should determine whether absences should be analyzed under common law principles of notice and valid reason for determining whether an “employee exercised reasonable control” over their actions when they were fired for attendance failures. Like the issues raised above with misconduct, this issue calls for the application of a new doctrine, is a novel issue with statewide importance, and is one that is likely to recur unless it is resolved by this Court. Wis. Stat. § 809.62(1r)(c)1.-3. Although the Court of Appeals did not address substantial fault, the Circuit Court found substantial fault in the alternative to misconduct. If this Court reverses the Court of Appeals, it must address the substantial fault issue in order to determine Fish’s unemployment benefit eligibility.

STATEMENT OF THE CASE

I. Nature of the case and posture.

This is an unemployment insurance matter involving Jacob Fish's benefit eligibility after he was fired from Bevco Precision Manufacturing for his attendance failures. A fired employee is ineligible for unemployment insurance benefits on the grounds of misconduct if the criteria of section 108.04(5)(e) are met. Alternatively, a fired employee is ineligible for benefits if "general misconduct" is found or if "substantial fault" is found. Each of these standards will be discussed further below.

After Mr. Fish was fired, he applied for unemployment insurance benefits. The Wisconsin Department of Workforce Development initially determined that Mr. Fish was eligible for unemployment insurance benefits. Based on additional information, the Department determined that Mr. Fish was ineligible for unemployment insurance benefits due to substantial fault under section 108.04(5g). (R. 17:74, App. 51) Mr. Fish appealed the benefit denial and a de novo hearing was held before an appeal tribunal (administrative law judge). The appeal tribunal decided that Mr. Fish was ineligible for unemployment insurance benefits due to misconduct under section 108.04(5)(e). (R. 17:46-52, App. 45-50) Mr. Fish appealed again. The Labor and Industry Review Commission, in a de novo review, held that Mr. Fish's discharge was not for misconduct or substantial fault, so he was found eligible for unemployment benefits. (R. 17:2-7, App. 39-44)

Bevco appealed to the Circuit Court for Waukesha County, which reversed the Commission and held that Mr. Fish was ineligible for unemployment insurance benefits on the grounds of misconduct under section 108.04(5)(e) and, in the alternative, was ineligible under substantial fault under section 108.04(5g). (R. 40:1-17, App. 20-38) The Department and the Commission appealed. The Court of Appeals, in a decision recommended for publication, held that Mr. Fish was ineligible for unemployment insurance benefits on the grounds of misconduct

under section 108.04(5)(e). (*Bevco Precision Mfg. Co. v. Wisconsin Lab. & Indus. Rev. Comm'n*, No. 2023AP1057 (Wis. Ct. App. Aug. 21, 2024), App. 3-19) The Department seeks Supreme Court review of the Court of Appeals' decision.

II. Factual background.

The facts found by the Commission, as recited in the Commission's petition for Supreme Court review, accurately describe this case.

ARGUMENT

I. The Supreme Court should grant review for the reasons listed in the Commission's petition.

To avoid repetition, the Department of Workforce Development agrees with and incorporates by reference the Commission's arguments in favor of Supreme Court review without restating those arguments here.

II. The Supreme Court should grant review to ensure that Wisconsin's unemployment insurance law conforms to federal requirements.

The Wisconsin unemployment insurance program is part of a federal-state partnership. The US Department of Labor allocates federal funding to Wisconsin for administration of the unemployment insurance program. As a condition of receiving the federal funds, Wisconsin's state law must conform to federal unemployment law and Wisconsin's administration of state unemployment law must substantially comply with federal unemployment law requirements.² For the 2024-2025 fiscal year, the unemployment insurance program was allocated \$73,278,000 in federal funds.³

The Federal Unemployment Tax Act permits states to totally reduce (deny) unemployment benefits to a worker only for "discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of

² See 20 C.F.R. § 601.5.

³ 2023 Wis. Act 19 § 49, allocating unemployment insurance federal funds in Wis. Stat. § 20.445(1)(n).

disqualifying income.”⁴ The US Department of Labor interprets federal law to mean that states may only find misconduct where the worker’s conduct is “an intentional or controllable act or failure to take action, which shows a deliberate disregard of the employer’s interests.”⁵ “Section 3304(a)(10) protects claimants’ right to compensation by preventing states from enacting overly-severe denial provisions except for serious offenses.”⁶ The US Department of Labor’s Employment and Training Handbook, which states must follow when administering the unemployment program,⁷ describes misconduct as

...a willful or controllable breach of an employee’s duties, responsibilities, or behavior that the employer has a right to expect. Stated another way, the misconduct may be an act or an omission that is deliberately or substantially negligent, which adversely affects the employer’s legitimate business interests. Simple negligence with no harmful intent is generally not misconduct, nor is inefficiency, unsatisfactory conduct beyond the claimant’s control, or good-faith errors of judgment or discretion.⁸

If a state totally reduces unemployment benefits to a worker on grounds that are prohibited by federal law, it will put the state’s federal funding for the unemployment insurance program at risk and potentially risks employers’ federal

⁴ 26 U.S.C. § 3304(a)(10).

⁵ *Benefit Denials*, UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, available at <https://oui.doleta.gov/unemploy/content/denialinformation.asp> (last visited Sept. 16, 2024).

⁶ Total Reduction/Cancellation of Wage Credits, UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, Benefit Standards of Conformity Requirements for State UC Laws, available at https://oui.doleta.gov/unemploy/pdf/uilaws_wagecredits.pdf (last visited Sept. 16, 2024).

⁷ The Legal Authority of Unemployment Insurance Program Letters and Similar Directives, UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, Unemployment Insurance Program Letter No. 01-96 (Oct. 5, 1995) available at <https://www.dol.gov/sites/dolgov/files/ETA/advisories/UIPL/1996/UNEMPLOYMENT%20INSURANCE%20PROGRAM%20LETTER%20NO.%2001-96.html> (last visited Sept. 16, 2024) (explaining the legal effect of US-DOL directives, including that such directives “state or clarify the Department’s position, particularly with respect to the Department’s interpretation of the minimum Federal requirements for conformity or compliance, thereby assuring greater uniformity of application of such requirements by the States.”).

⁸ *Guide Sheet 2 – Discharge*, UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, ET Handbook No. 301, 5th Edition, p. IV-4 (July 29, 2005) available at https://www.dol.gov/sites/dolgov/files/ETA/handbooks/2005/ETHand301_5th.pdf (last visited Sept. 16, 2024).

tax credits.⁹ The Commission’s interpretation of “misconduct” eliminates that risk because it requires a finding of culpable conduct. If an employee has not engaged in culpable conduct evincing a substantial disregard for the employer’s interests, a finding of misconduct would be contrary to federal unemployment law. The Court of Appeals’ decision results in a finding of misconduct by, in effect, strict liability: anyone fired under a signed attendance policy is ineligible for unemployment benefits on the grounds of misconduct.¹⁰ The Court should reject the lower courts’ clearly erroneous interpretations of section 108.04(5)(e).

III. The Court of Appeals’ novel approach to unemployment insurance discharge cases is likely to lead to confusion for employers and workers.

Under the Court of Appeals’ decision, “misconduct” would have different meanings for fired workers based only on whether the employer has an attendance policy that the worker acknowledged with their signature. The Court of Appeals’ interpretation of Wis. Stat. § 108.04(5)(e) prohibits analysis of the reasons for the worker’s absences if there is a signed attendance policy, which will more likely lead to a misconduct finding—and a denial of unemployment insurance benefits—when the worker was simply too sick to work. Conversely, if the employer did not have the employee sign the attendance policy, then the absences would be reviewed to determine whether the worker’s conduct was intentional or reckless before misconduct could be found.

The Commission’s interpretation of Wis. Stat. § 108.04(5)(e) is more consistent because it always requires analysis of the notice and reasons for the absences to determine the employee’s culpability, which aligns with 83 years of

⁹ *Pickering v. LIRC*, 156 Wis. 2d 361, 365, 456 N.W.2d 874 (Ct. App. 1990) (citation omitted).

¹⁰ “...we conclude that *Beres* holds that 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 purpose of disqualification from unemployment benefits, full stop.” *Bevco Precision Mfg. Co. v. Wisconsin Lab. & Indus. Rev. Comm’n*, No. 2023AP1057, ¶18 (Wis. Ct. App. Aug. 21, 2024).

jurisprudence on misconduct.¹¹ Courts have long held that, for example, general misconduct may be found for chronic attendance failures and that factfinders consider health reasons as part of the analysis.¹²

The parties agree that Wisconsin is an “at will” employment state and that an employer is free to terminate a worker for attendance failures. However, similarly situated employees’ eligibility for unemployment benefits when their attendance failures are blameless should be determined with consistent legal standards.

IV. The Supreme Court should grant review to develop the law of substantial fault in unemployment insurance attendance cases.

When an employee is fired but is not found ineligible for unemployment insurance benefits on the grounds of misconduct, the analysis turns to whether the employee is ineligible for benefits on the grounds of substantial fault.¹³

¹¹ “‘Misconduct’ [under the unemployment insurance law] is limited to conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.” *Boynnton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 640 (1941).

¹² *Charette v. State, Lab. & Indus. Rev. Comm’n*, 196 Wis. 2d 956, 962, 540 N.W.2d 239, 242 (Ct. App. 1995) (general misconduct found for excessive tardiness; facts showed that worker’s medical condition was not a valid excuse in this case).

¹³ Wis. Stat. § 108.04(5g) defines “substantial fault” for unemployment insurance eligibility purposes as:

(a) An employee whose work is terminated by an employing unit for substantial fault 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 termination occurs and the employee earns wages after the week in which the termination 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 benefit rate shall be the rate that would have been paid had the discharge not occurred. For purposes of this paragraph, “substantial fault” includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee’s employer but does not include any of the following:

If the Court grants review, it reviews the Commission's decision, not the opinion of the Court of Appeals or the Circuit Court.¹⁴ Assuming that the Supreme Court reverses the Court of Appeals, it must also determine Mr. Fish's eligibility under substantial fault. The Circuit Court held that Fish was ineligible under misconduct and, in the alternative, substantial fault. (R. 40:15-16, App. 36-37).

Few reported court decisions in Wisconsin have dealt with substantial fault, which is an unemployment insurance eligibility provision that appears to be unique to Wisconsin. No known reported Wisconsin court cases involve substantial fault for attendance failures.

This Court allowed unemployment benefits and found no substantial fault in a case involving multiple cash handling errors by a cashier on the grounds that all of the errors were inadvertent.¹⁵ The Court of Appeals also found no substantial fault in a case where a bus driver forgot to secure a passenger's wheelchair because that error was inadvertent.¹⁶

Here, the Commission found no substantial fault because Mr. Fish did not have reasonable control over his illnesses on two occurrences.¹⁷ However, the Circuit Court found it "immaterial" whether "Mr. Fish had legitimate excuses that prevented him from working on" some of the days he was absent, including the last absence that caused Mr. Fish to exceed the maximum points under the attendance policy.¹⁸

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1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
 2. One or more inadvertent errors made by the employee.
 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

¹⁴ *Friendly Vill. Nursing & Rehab, LLC v. Dep't of Workforce Dev.*, 2022 WI 4, ¶ 13, 400 Wis. 2d 277, 287, 969 N.W.2d 245, 251.

¹⁵ *Operton v. Lab. & Indus. Rev. Comm'n*, 2017 WI 46, 375 Wis. 2d 1, 894 N.W.2d 426.

¹⁶ *Easterling v. Lab. & Indus. Rev. Comm'n*, 2017 WI App 18, 374 Wis. 2d 312, 893 N.W.2d 265.

¹⁷ LIRC decision, p. 4.

¹⁸ Circuit Court decision, R. 40:16.

This Court should therefore grant review to determine whether common law concepts of notice and valid reason apply when analyzing attendance cases under substantial fault. Also, if some or all of the absences are outside of the employee's "reasonable control," substantial fault should not be found, and Mr Fish should be eligible for unemployment insurance benefits.

CONCLUSION

The Supreme Court should review the Court of Appeals' decision to establish standards for misconduct and substantial fault in unemployment insurance attendance cases. The many workers who apply for unemployment benefits each year should be treated consistently. State laws should not be interpreted to put Wisconsin's federal funding and employers' federal tax credits at risk.

Dated: September 20, 2024

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this Petition for Review conforms to the rules contained in Wis. Stats. §§ 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of the petition is 2,770 words, as calculated by Microsoft Word.

Dated: September 20, 2024.

Electronically signed by:

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