

OCTOBER 16, 2018

WISCONSIN SUPREME COURT ON WIS. STAT. § 108.04(5)(E): EMPLOYERS MAY ADOPT THEIR OWN ABSENTEEISM POLICIES

Recently, the Wisconsin Supreme Court affirmatively ruled that an employee's violation of his or her employer's written absenteeism policy constituted "misconduct" under Wis. Stat. § 108.04(5), even where the employer's absenteeism policy was more stringent than the definition of absenteeism outlined under the statute. In doing so, the Court reversed a decision by the Wisconsin Court of Appeals and concluded that Valerie Beres, a registered nurse, was properly denied unemployment compensation benefits by the Wisconsin Department of Workforce Development ("DWD"). This decision serves as a reminder to employers of the importance of communicating written policies and obtaining employee acknowledgements of those policies.

The full Wisconsin Supreme Court decision can be found [here](#).

BACKGROUND

Valerie Beres sought unemployment compensation benefits after being terminated by her former employer, Mequon Jewish Campus ("MJC"), for failing to comply with MJC's absenteeism policy. MJC's written attendance and absenteeism policy in its employee manual stated that an employee may be discharged during his or her probationary period if that employee does not provide advance notice of an absence for any single instance. The policy indicated that calling in two hours ahead of the time when an employee could not work satisfied the advance notice requirement. Beres acknowledged receipt of this policy in the employee manual by signature.

During her probationary period, Beres did not come to work and failed to communicate this absence with MJC two hours prior to the start of her shift. MJC terminated her in accordance with its absenteeism policy. Because she was terminated for engaging in employee misconduct, namely absenteeism based on MJC's policy, DWD denied Beres' application for unemployment compensation benefits. DWD grounded its decision on Wis. Stat. § 108.04(5), which states that a discharge for misconduct by an employee is a termination that includes

absenteeism by an employee on more than two 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 communicated to the employee (emphasis added).

Beres objected to DWD's denial, appealing to the Labor and Industry Review Commission ("LIRC") and contending that MJC's absenteeism policy differed from Wis. Stat. § 108.04(5)(e) and, in fact, was more restrictive than the statute. LIRC reversed DWD's decision, determining that Beres did not commit "misconduct" under Wis. Stat. § 108.04(5)(e) because she did not violate the standard outlined in the statute. DWD appealed and the Ozaukee County Circuit Court agreed with the DWD and held that Wis. Stat. § 108.04(5)(e) allows an employer to adopt its own rules regarding employee absenteeism that do not need to be consistent with the statutory definition. Upon appeal, the Wisconsin Court of Appeals sided with Beres and LIRC in its reversal, finding that an employer's absenteeism policy would not bar an employee from unemployment compensation benefits unless the employee's conduct violates Wis. Stat. § 108.04(5). Furthermore, the Court of Appeals determined that a former employee cannot be denied benefits for violating an employer's absenteeism policy that is stricter than the statute.

But, the Wisconsin Supreme Court reversed the Court of Appeals' decision, adopting the position of the Circuit Court and DWD. The Court reasoned that the plain language of the statute allows an employer to set its own absenteeism policy that differs from the standard set in Wis. Stat. § 108.04(5)(e). A violation of that employer's policy would result in disqualification from receipt of unemployment compensation benefits even if that policy is more restrictive because it is "misconduct" that makes an employee ineligible to receive benefits. The Court focused on the word "unless" in Wis. Stat. § 108.04(5)(e), noting that an employee commits statutory misconduct by being "absent on more than two occasions within the 120-day period before the date of the employee's termination, *except if* the employee violates his or her employer's absenteeism policy that is specified in an employment manual of which the employee has acknowledged receipt with his or her signature." The Court also rebutted LIRC's alternative argument that a former employee would only be disqualified if the employee violated both the employer's policy and the statutory standard. As a result, the Court found that DWD's decision to deny Beres unemployment

compensation benefits was appropriate and proper.

PRACTICAL TAKEAWAYS

This decision by the Wisconsin Supreme Court supports employers' autonomy in developing attendance and absenteeism policies specific for their industry and the issues presented in the management of their particular operation.

In light of this decision, employers should confirm that they have prepared written policies, including those for attendance and absenteeism, and that they receive express acknowledgements of those policies. To the extent you, as an employer, present attendance as one of many policies captured in a single acknowledgement, a separate acknowledgement for the attendance policy may better protect your unemployment compensation interests. If you have any questions or would like additional information about this topic, please contact:

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