**State of Wisconsin**
**Labor and Industry Review Commission**

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| **Jonathan J. Miller**<br>Employee<br><br>**FEDEX Ground Package System, Inc.**<br>Employer<br><br>Hearing No.18005890MD | **Unemployment Insurance Decision**[1]<br><br>**Dated and Mailed:**<br><br>March 29, 2019 |

The commission **reverses** the appeal tribunal decision. Accordingly, the employee is eligible for benefits beginning in week 43 of 2018, if otherwise qualified.

By the Commission:

/s/
David B. Falstad, Chairperson

/s/
Michael H. Gillick, Commissioner

## Procedural Posture

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits. An appeal tribunal of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision holding that the employee's attendance failures were

[1] **Appeal Rights:** See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development.

Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

misconduct within the meaning of Wis. Stat. § 108.04(5)(e). The Department of Workforce Development filed a timely petition for commission review, arguing that the employee's attendance failures were neither misconduct pursuant to that paragraph nor pursuant to Wis. Stat. § 108.04(5)(intro.), and also that they were not substantial fault pursuant to Wis. Stat. § 108.04(5g). The commission has considered the petition and the positions of the parties, and it has independently reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

## Findings of Fact and Conclusions of Law

1. The employee worked just over two years as a package handler for the employer, a courier delivery services company. The employee's last day of work and date of discharge was October 22, 2018 (week 43).

2. The employer's attendance policy, receipt of which the employee acknowledged with his signature, indicates that an employee may be discharged for having three unscheduled absences in a 30-day period. Unscheduled absences include absences due to illness of the employee or his or her dependent where paid time off was not available for use or was voluntarily not used.

3. The employee was in an automobile accident on August 8, 2018. Thereafter, the employee was absent on October 2, 2018, with notice, for a physical therapy appointment in response to injuries suffered in the accident. The employer considered this absence to be unscheduled.

4. The employee was absent, with notice, on Friday, October 12 and Monday, October 15, 2018, because of residual pain from the August automobile accident. Pursuant to the employer's policy regarding absences on consecutive work days, the employer considered these days off to be one unscheduled absence.

5. The employee was absent, with notice, on October 17, 2018, due to stomach illness (food poisoning). The employer considered this absence to be unscheduled, and discharged the employee on October 22, 2018, for having accumulated three unscheduled absences in a 30-day period.

6. The employee’s discharge was not for misconduct or substantial fault connected with his work, within the meanings of Wis. Stat. § 108.04(5) and (5g), respectively.

## Memorandum Opinion

Where the issue is an employee’s attendance, the commission first determines whether Wis. Stat. § 108.04(5)(e) applies. Pursuant to this provision, misconduct for unemployment benefit purposes includes:

> Absenteeism by an employee on more than 2 occasions within the 120−day period before the date of the employee's termination [statutory standard], 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 appeal tribunal, in concluding that the employee's attendance failures were misconduct pursuant to Wis. Stat. § 108.04(5)(e), applied the commission's reasoning in *Stangel v. Spancrete, Inc.,* UI Dec. Hearing No. 17402720MW (LIRC July 30, 2018). In that case, the commission determined that, when deciding whether an employee's violation of an employer's attendance policy was misconduct pursuant to Wis. Stat. § 108.04(5)(e), the commission would not consider common law notions of "notice" and "valid reason." Instead, notice and valid reason limitations would be as defined under the employer's policy, and so long as the termination comported with the terms of that policy the employee's violation of the policy would constitute misconduct pursuant to Wis. Stat. § 108.04(5)(e).

The commission has come to the conclusion that its reasoning in *Stangel* was incorrect, because that reasoning does not comport either with the plain language or with the structure of the statute. The notice and valid reason clause addresses absenteeism without qualification; it does not distinguish between absenteeism pursuant to the statutory standard and absenteeism pursuant to an employer's policy. As for structure, the general statutory construction rule is that qualifying or limiting clauses in a statute are to be referred to the next preceding antecedent, unless the context or plain meaning dictates otherwise.[2] The alternative of an employer's policy is a limiting clause immediately following the statutory standard clause, though, and so is not properly read as an independent par. (5)(e) misconduct standard that is not subject to the notice and valid reason clause. The latter clause, by contrast, without question applies to the first clause, the statutory standard, and to the third clause, excessive tardiness. There is no legitimate basis not to apply it to the second clause, employers' attendance policies, as well.

The commission's reasoning in *Stangel* also does not comport with all the other categories of "misconduct," whether the other specific categories enumerated in Wis. Stat. § 108.04(5)(a)-(g) or the general standard of Wis. Stat. § 108.04(5)(intro.). As the department points out in its brief, all of these standards incorporate intent, recklessness, or some other willful behavior on an employee's part. To limit the scope of notice and valid reason to how those terms are defined in an employer's policy would allow, as the instant case shows, the denial of unemployment benefits when the employee has engaged in no culpable behavior.

For the above reasons, the commission considers that a par. (5)(e) analysis of an employee's attendance failures, whether pursuant to the statutory standard or an

[2] *Vandervelde v. Green Lake,* 72 Wis. 2d 210, 215, 240 N.W.2d 399 (1976).

employer's, must use traditional, common law notions of notice and valid reason.[3] That analysis in the present case does not allow a conclusion of misconduct, because the employee's three unscheduled absences all were with notice and for valid reasons. Two of the three were due to a medical appointment and pain arising from an automobile accident, the third was due to food poisoning, and the commission has long held that illness and injury are valid reasons for absence.[4]

It also follows that the employee's attendance failures are not misconduct as originally defined by the Wisconsin Supreme Court,[5] and now codified in Wis. Stat. § 108.04(5)(intro.). Misconduct pursuant to this definition is "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." Illness and injury are valid reasons for absences, and absences for those reasons do not reflect the willful disregard of an employer's interests necessary to support a conclusion of misconduct pursuant to par. (5)(intro.).

The employee's discharge, finally, also was not for substantial fault within the meaning of Wis. Stat. § 108.04(5g). Substantial fault pursuant to this provision includes acts or omissions of an employee over which the employee exercised reasonable control and that violate reasonable requirements of the employer, but it does not include minor infractions of rules unless an infraction is repeated after warning, inadvertent errors, or any failure of the employee to perform work because of insufficient skill, ability, or equipment. The employee's absences are not fairly considered, though, to have been matters over which the employee exercised reasonable control.

For the above reasons, the commission agrees with the department that the employee's discharge was not disqualifying for unemployment benefit purposes.

**Note:** The commission did not confer with the administrative law judge before determining to reverse the appeal tribunal decision in this case. The commission's reversal is not based upon a differing credibility assessment from any made by the administrative law judge. Rather, the commission has concluded that Wis. Stat. § 108.04(5)(e) requires that common law notions of

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[3] Although this is solely an "absence" case, the commission's reasoning herein is equally applicable to "tardiness" cases. The commission therefore also disavows its application of the reasoning in *Stangel* to par. (5)(e) tardiness cases. *See, e.g., Abbott v. Cree, Inc.,* UI Dec. Hearing No. 17005864MD (LIRC Nov. 14, 2018).

[4] *See* Hohl v. Koffee Kup, UI Dec. Hearing No. 02007525MD (LIRC Apr. 25, 2003) *and* Dutcher v. American Houses/Gr. Lake Co. Ltd. Ptr., UI Dec. Hearing No. 14401425AP (LIRC July 31, 2014).

[5] *See Boynton Cab Co. v. Neubeck,* 237 Wis. 249, 259-60, 296 N.W. 636 (1941).

notice and valid reason for absences be considered when determining whether an employee's violation of an employer's attendance policy is misconduct pursuant to that paragraph.

**cc:** FEDEX Ground Package System, Inc. (Madison, WI)
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