

State of Wisconsin



Labor and Industry Review Commission

Joseph M. Poore

Employee

KS Large Bore Pistons LLC

Employer

Hearing No. 24400968AP

**Unemployment Insurance
Decision¹**

Dated and Mailed:

June 21, 2024

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The commission **reverses** the appeal tribunal decision. Accordingly, the employee is eligible for benefits beginning in week 12 of 2024, if otherwise qualified.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

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>.

Procedural Posture

This case is before the commission to consider the employee's eligibility for unemployment insurance benefits. An administrative law judge (ALJ) of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based upon its review, the commission makes the following:

Findings of Fact and Conclusions of Law

The employee worked for the employer, a piston manufacturer, as a machine operator from July 17, 2023, until March 10, 2024. The employment relationship ended on March 19, 2024 (week 12), when the employer considered the employee to have abandoned his job after he was absent without notice on four occasions.

The employee worked a full-time schedule on the "C shift" of Friday, Saturday, and Sunday from 6:00 a.m. until 6:00 p.m. He was responsible for running a mill/turn machine, which included performing quality checks and completing paperwork. When he was first interviewed, the employee told the employer he could not work overnight shifts due to obligations to his children and in order to attend Alcohol and Other Drug Abuse (AODA) counseling meetings.

At some point, a coworker who worked on the "B shift" of Monday through Thursday, 8:00 p.m. until 6:00 a.m., passed away. This adversely impacted the employer's ability to meet its production needs. After some discussion, during a meeting on March 5, 2024, between the employee and employer, the employer informed the employee that he would be temporarily moved to the B shift for approximately eight weeks until another worker could be trained to replace him on the B shift; he was projected to return to his C shift on May 5, 2024. The employee would be performing the same job duties at the same rate of pay.

The employee did not immediately object to this change but, three days later, the employee informed the employer that he could not work the B shift due to his "life right now," noting that he had already told the employer during his interview that he could not work overnight shifts. The employer reiterated that the employee was expected to work the B shift and stated that it tried to make a business decision based on "as much fairness as possible." The employee reiterated that he could not work the B shift.

The employee was scheduled to begin working the B shift on March 11, 2024. However, the employee did not appear or provide notice for his scheduled shifts on March 11, 12, and 13. The employee did not inform the employer of his absences as he believed he had clearly explained to the employer that he could not work overnight. On March 14, the employer suspended the employee for a period of three days, with his expected return date being March 18. The employee again did not report for work or provide notice on March 18, and on March 19, the employer

informed the employee that it considered the employee to have abandoned his job. The employee responded, stating that he did not abandon his job and that he was still available for C shift work.

The initial issue before the commission is whether the employee quit or whether the employer discharged the employee. If the employee quit, a secondary issue is whether the quitting was for any reason that would permit the immediate payment of unemployment benefits. If the employer discharged the employee, a secondary issue is whether the discharge was for misconduct or substantial fault connected with the employee's work.

An employee may be found to have voluntarily terminated his or her work despite the fact that the employee has never expressly stated "I quit." For unemployment insurance purposes, a quit can include a situation in which an employer actually discharges a worker.² An employee can voluntarily terminate his or her work by knowingly refusing to take action that would have allowed the work to continue.³

Here, the employee's separation from employment is best characterized as a quit. The employee failed to appear for his last five scheduled shifts without providing notice to the employer. The employee's actions were inconsistent with the continuation of the employment relationship.

Next, the commission considers whether the employee's voluntary termination of his employment was for any reason which would permit the immediate payment of benefits. The statutes provide that when an employee voluntarily terminates his or her employment, benefits shall be suspended until the employee has earned wages in covered employment after the termination equaling at least six times his or her weekly benefit rate.⁴ Several exceptions exist, however. One exception is Wis. Stat. § 108.04(7)(b), which provides that where the employee terminated his or her work with good cause attributable to the employing unit, paragraph (a) does not apply.

"Good cause attributable to the employing unit" means some act or omission by the employer justifying the employee's quitting; it involves "some fault" on the part of the employer and must be "real and substantial."⁵ For the exception to apply, the quitting must be "occasioned by" the act or omission of the employer which constitutes good cause.⁶ "[T]he commission has generally held that while an employee is not required to exhaust alternatives, in most cases she is expected to at least pursue some alternatives to resolve an employment issue short of quitting."⁷

² *Nottelson v. DILHR*, 94 Wis. 2d 106, 119, 287 N.W.2d 763 (1980)

³ *Shudarek v. LIRC*, 114 Wis. 2d 181, 188, 336 N.W.2d 702 (Ct. App. 1983).

⁴ Wis. Stat. § 108.04(7)(a).

⁵ *Hanmer v. DILHR*, 92 Wis. 2d 90, 98, 284 N.W.2d 587 (1979) (citing *Kessler v. Industrial Comm.*, 27 Wis. 2d 398, 401, 134 N.W.2d 412 (1965)).

⁶ *Id.*

⁷ *Lichtfuss v. Bemis Specialty Films*, UI Dec. Hearing No. 98402102AP (LIRC July 30, 1999) (citing *Gilkay v. Servicemaster of Stevens Point* UI Dec. Hearing No. 95002242WR (LIRC, Sept. 28, 1995)).

When discussing a unilateral change in job duties, the commission has recently stated that for a change to amount to good cause attributable for quitting, the change and its consequences to the employee must be significant enough that the employee's quitting is a reasonable reaction.⁸ The commission has also considered whether the employer had a valid business reason for the change.⁹

Here, the proposed change to the employee's working hours was significant enough that the employee's quitting was a reasonable reaction. The proposed shift change was substantial: the employee's working hours would essentially invert entirely from daytime to nighttime, and the employee would be required to work an additional day each week. Further, the employee had informed the employer during his initial interview that he could not work overnight shifts. Finally, the employer failed to articulate a valid business reason for its decision to transfer the employee to a new shift. While it was reasonable for the employer to seek to train a replacement following the death of one of its workers, there is no evidence in the record that the employer had no other option but to transfer the employee, as opposed to any other worker, to the new shift. Under these circumstances, given the significance of the shift change, the fact that the employee had already expressed his inability to work overnight shifts, and the lack of evidence supporting the employer's decision to transfer the employee rather than any other worker, the employee quit with good cause attributable to the employer.

The commission, therefore, finds that in week 12 of 2024, the employee voluntarily terminated his work with the employing unit, within the meaning of Wis. Stat. § 108.04(7)(a), and that this quitting was with good cause attributable to the employing unit, within the meaning of Wis. Stat. § 108.04(7)(b).

Memorandum Opinion

The commission did not consult with the ALJ prior to issuing its decision because the commission's reversal was not based on a differing view as to credibility of witnesses whose testimony conflicted. Instead, the reversal was based on a differing interpretation of the relevant law as applied to the facts of this case.

⁸ *Murray v. Hiller Ford Inc.*, UI Dec. Hearing No. 23003806MD (LIRC Aug. 25, 2023) (internal citations omitted).

⁹ See *Wilke v. Animal Clinic of Sturgeon Bay LLC*, UI Dec. Hearing No. 10401892AP (LIRC Nov. 5, 2010) and cases cited therein.