State of Wisconsin

Labor and Industry Review Commission

Quintrell D. Rowe Employee **Jacobus Energy LLC** Employer Hearing No. 24600157MW	**Unemployment Insurance Decision**[1] **Dated and Mailed:** June 28, 2024 rowequi1_urr.doc:104

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the employee is ineligible for benefits beginning in week 35 of 2023 and until seven weeks have elapsed since the end of the week of discharge and the employee has earned wages in covered employment performed after the week of discharge equaling at least 14 times the weekly benefit rate that would have been paid had the discharge not occurred. The employee is required to repay the sum of $7,400.00 to the unemployment reserve fund.

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 on January 23, 2024. The commission received a timely petition for review. The commission issued a decision on March 21, 2024, that reversed the appeal tribunal decision and found that the employee had been discharged from his employment, but not for misconduct or substantial fault. As a result, the employee was found eligible for benefits beginning in week 35 of 2023.

The department asked the commission to reconsider its decision based on newly discovered evidence that the employee had pled guilty to the crimes for which he was incarcerated in August 2023. In an order dated April 16, 2024, the commission set aside its March 21, 2024, decision and ordered an administrative law judge acting on behalf of the commission to take additional evidence on the merits of the case.

An administrative law judge held a hearing on June 10, 2024. At the hearing, the department presented a certified judgement of conviction and a certified copy of the employee's criminal court record.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at both appeal hearings. Based on its review, the commission makes the following:

Findings of Fact and Conclusions of Law

The employee worked as a logistics coordinator for the employer, a fuel provider. The employee's last day of work was August 29, 2023. The employee worked 3rd shift, 10 p.m. to 7 a.m. Sunday through Thursday.

The employee was arrested on August 30, 2023, and detained until September 4, 2023. The employee was not able to make any phone calls. However, he was able to have a detective call the mother of his child with a message for her to call his employer and inform it that he would not be able to work. The mother of his child called the employer's 1-800 number two times. No one answered her first call. The second time she was able to speak to someone and informed the employer of the employee's situation.

The employee contacted the employer on September 4, 2023, to ascertain his employment status. The employer informed him that it did not receive notice that he was going to be absent and that it considered him to have quit his employment due to three no call/no shows, which, according to its attendance policy, was considered job abandonment. The employee had signed an acknowledgement that he received the attendance policy.

The certified criminal record report submitted by the department at the June 10, 2024, appeal hearing makes it clear that the employee's arrest on August 30, 2023, was for the crime that the employee eventually pled guilty to on March 24, 2024.

The initial issue 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.

The administrative law judge found that the employer presented credible evidence that the employee was absent without notice for three consecutive shifts, and, according to the attendance policy, was therefore deemed to have quit his employment. The commission disagrees. The employer's evidence was that the supervisor who testified did not receive a call from the employee and that he asked "everyone" and no one had received any communication. The employer's only evidence is hearsay. However, the employee stated that he had someone call in on his behalf, and that individual then appeared at the hearing stating that she did indeed call in and spoke to someone. The employer stated that it was acceptable for another individual to call in on an employee's behalf and that it was an acceptable option to call the 24/7 phone number of the employer (which is the number the employee's child's mother called). The commission finds the employee's version of events credible. Therefore, the employee provided notice of his three absences to the employer. As such, he was not in violation of its attendance policy that states an employee is considered to have quit his employment if he is absent for three shifts with no notice. The employer discharged the employee.

In analyzing discharges, the commission follows a three-step approach. First, the commission determines whether the employee was discharged for misconduct by engaging in any of the actions enumerated in Wis. Stat. § 108.04(5)(a)-(g). If those provisions do not apply, the commission determines whether the employee's actions constitute misconduct as originally defined by the Wisconsin Supreme Court in *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636 (1941), and now codified in Wis. Stat. § 108.04(5)(intro.). Finally, if misconduct is not found, the commission determines whether the discharge was for substantial fault by the employee connected with the employee's work, as set forth in Wis. Stat. § 108.04(5g).

Wisconsin Stat. § 108.04(5)(e) provides that misconduct includes:

> 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.

The first clause of the statute provides a default number of absences (more than 2 occasions within the 120-day period before the date of the employee's termination) that will constitute misconduct in the absence of notice and one or more valid reasons. But, for employers that have their own absenteeism policies, the second clause permits the employer to opt out of the default provision and apply its own policy, provided that its policy meets the requirements set forth in the second clause of the statute. In this case, the employer had an attendance policy as part of its employment manual. However, unlike the first clause, the employer's policy does not specify how many days an employee may be absent before being discharged. The use of the term "unless otherwise specified" in the statute indicates that for an employer policy to be sufficient to opt out of the default statutory definition the policy must put the employee on notice of the number of times an employee can be absent before being discharged. Therefore, the policy is not applicable in determining whether the employee's absenteeism meets the definition of misconduct.[2]

Having found that the statutory conditions set forth in the second clause of Wis. Stat. § 108.045(e) are not satisfied, the facts should be analyzed under the first clause of the statute.[3] The question then becomes whether the employee was absent on more than two occasions in the last 120 days without notice and one or more valid reasons.

Here, the employee missed three shifts (August 30, August 31, and September 3, 2023). The credible evidence in the record is that the employee provided notice to the employer for at least his shift on August 30, 2023. The record is not clear exactly what the employer knew about the length of time that the employee was going to be absent. With valid notice for one of the three missed shifts, the employee does not have more than 2 absences in the last 120 days without notice.

Regarding the requirement of an absence being for a valid reason, the employee missed work due to being arrested and incarcerated. The employee has pled guilty to the conduct that led to his arrest. Missing work due to being arrested for illegal conduct is not a valid reason. As such, the employee was absent more than 2 occasions within the last 120 days prior to the termination without a valid reason. Therefore, the employee was discharged for misconduct as defined by Wis. Stat. §

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[2] *See Gehrke v. Advanced Disposal Servs.*, UI Dec. Hearing No. 19001693MD (LIRC Oct. 31, 2019) and *Silgman v. Potawatomi Bingo Casino*, UI Dec. Hearing No. 19002563MD (LIRC Oct. 31, 2019).
[3] *Lewis v. Tellurian*, UI Dec. Hearing No. 23001636MD (LIRC June 30, 2023).

108.04(5)(e). In addition, the employee was overpaid benefits in the amount of $7,400.00 to which he was not entitled.

The department must waive the recovery of overpaid benefits if the overpayment was the result of departmental error and the overpayment did not result from the fault of the employee.[4] The employee is at fault if benefits were erroneously paid because the employee committed an act of concealment or failed to provide correct and complete information to the department.[5] Departmental error is an error made by the department in computing or paying benefits which results exclusively from a mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, whether by commission or omission, or misinformation provided to a claimant by the department on which the claimant relied.[6] The commission's reversal of an appeal tribunal decision does not establish departmental error.[7]

Waiver of benefit recovery is not required under Wis. Stat. § 108.22(8)(c) because, although the overpayment did not result from employee fault,[8] the overpayment was not the result of departmental error.[9] Instead, the overpayment was the result of newly discovered evidence.

NOTE: The department will mail repayment instructions after this decision becomes final. The department will withhold benefits due for future weeks of unemployment to offset overpayment of unemployment insurance benefits and other special program benefits that are due to this state, another state, or the federal government.

Contact the Unemployment Insurance Division, Collections Unit, P.O. Box 7888, Madison, WI 53707, to establish an agreement to repay the overpayment. The amount of the overpayment set forth above may not reflect benefits withheld or payments that have been applied toward the overpayment. Information about the overpayment balance can be obtained by contacting the department at:

Madison Area: 608-232-0824
Milwaukee Area: 414-438-7713
Online: *my.unemployment.wisconsin.gov*

[4] Wis. Stat. § 108.22(8)(c)1.
[5] Wis. Stat. § 108.04(13)(f).
[6] Wis. Stat. § 108.02(10e)(am).
[7] Wis. Stat. § 108.22(8)(c)2.
[8] Wis. Stat. § 108.04(13)(f).
[9] Wis. Stat. § 108.02(10e).