State of Wisconsin

Labor and Industry Review Commission

Jordan L Martin Employee **Hormel Foods Corp** Employer Hearing No. 24004045MD	**Unemployment Insurance Decision**[1] **Dated and Mailed:** October 11, 2024 martijo1_urr.doc:111

The commission **reverses** the appeal tribunal decision. Accordingly, the employee is ineligible for benefits beginning in the week of the discharge 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 initial benefit computation (Form UCB-700) is set aside. If benefits become payable based on other employment, a new computation will be issued as to those benefit rights.

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 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 on its review, the commission makes the following:

Findings of Fact and Conclusions of Law

The employee began working for the employer, a cannery, in December 2020 as a storeroom clerk. She was discharged on April 26, 2024 (week 17) due to excessive absenteeism.

During the employee's employment, the employer had a written attendance policy that assigned points for attendance infractions and provided for discharge if an employee accrued 9 points. The employee acknowledged receipt of this policy with her signature.

The employee had a poor attendance record and was given a last chance agreement in December 2023. As part of the agreement, the employee's point total was reduced to 8 points and she was informed that if she had another unapproved absence she would be discharged.

The employee was approved to take intermittent FMLA leave and was not assessed points when she missed days that were approved for FMLA leave. The employer used a third-party leave provider to administer FMLA leave. To take a day of approved FMLA leave, the employee was required to give the employer notice that she would be absent and contact the leave provider within two days of the absence. The employee was aware of these requirements and had multiple approved FMLA absences, for which she was not assessed points, prior to April 9, 2024.

On April 9, 2024 the employee contacted the employer and informed it she would be absent for an FMLA event, but she forgot to contact the FMLA leave provider. The absence was therefore not approved for FMLA leave.

The employer became aware that the employee's April 9 absence was not approved for FMLA leave. On April 22, 2024, the employer asked the employee to call the leave provider to fix the issue. The employee called, but the leave provider would not approve the request because she had not contacted it within two days of the absence. Because the absence was not approved for FMLA, it was considered an unexcused absence. The employee was assessed a point and discharged, in accordance with the employer's written attendance policy and the employee's last chance agreement.

The commission finds that the employee was discharged for misconduct, within the meaning of Wis. Stat. § 108.04(5)(e).

Memorandum Opinion

An employee who is discharged is eligible for unemployment insurance benefits unless the discharge was for misconduct or substantial fault by the employee connected with the employee's work. Wis. Stat. §§ 108.02(11), 108.04(5), and 108.04(5g). Wisconsin Stat. § 108.04(5)(e) provides that misconduct includes:

> [a]bsenteeism 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.

Here, the employer had a written attendance policy and the employee acknowledged receipt of it with her signature. She was discharged pursuant to that policy. Therefore, the conduct for which she was discharged constitutes misconduct within the meaning of Wis. Stat. § 108.04(5)(e).

The commission notes that it has previously held that employer attendance policies that assess points for different types of attendance infractions (here, absences, instances of tardiness, and early departures) may not be considered under the second clause of Wis. Stat. § 108.04(5)(e), which applies to situations in which the employer has an attendance policy of which the employee has acknowledged receipt with his or her signature. *See Gehrke v. Advanced Disposal Servs.*, UI Dec. Hearing No. 19001693MD (LIRC Oct. 31, 2019). However, the court of appeals' recent decision in *Bevco Precision Mfg. Co. v. LIRC*, 2024 WI App 54, ___ Wis. 2d ___, ___ N.W.3d ___ (petition for supreme court review pending) compels a contrary result. Therefore, the appeal tribunal decision is reversed.

NOTE: The commission did not consult with the administrative law judge about witness credibility and demeanor prior to reversing because its reversal is not based upon a differing assessment of witness credibility, but was as a matter of law.

NOTE: For purposes of computing benefit entitlement, base period wages from work for this employer prior to the discharge shall be excluded from any computation of the maximum benefit amount for this or any later claim.

cc: HORMEL FOODS CORP