

State of Wisconsin



Labor and Industry Review Commission

**Keyanna S Mcgee**

Employee

**Absolute Home Care LLC**

Employer

Hearing No. 24603198MW

**Unemployment Insurance  
Decision<sup>1</sup>**

**Dated and Mailed:**

October 29, 2024

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The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the employee is eligible for benefits, if otherwise qualified.

By the Commission:

/s/

\_\_\_\_\_  
Michael H. Gillick, Chairperson

/s/

\_\_\_\_\_  
Georgia E. Maxwell, Commissioner

/s/

\_\_\_\_\_  
Marilyn Townsend, Commissioner

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<sup>1</sup> **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 worked for the employer, a group home, as a resident caregiver beginning November 29, 2023. Her last day of work was April 16, 2024 and she was discharged on May 3, 2024.

The employee's shifts for the employer began at 3:00 p.m. She also worked at a childcare facility and her shifts for that facility were scheduled to end at 2:00 p.m. However, the worker who was scheduled to relieve the employee at the childcare facility at 2:00 p.m. was chronically late for work. The employee could not leave the childcare facility until her replacement arrived. She was therefore late arriving at work for the employer on approximately 30 occasions between January 2 and April 26, 2024. She communicated with the employer, including the staff member she was relieving, regarding her arrival time whenever she was going to be late for work.

The last instance of tardiness occurred on April 25, 2024. On that date, the employer gave the employee a final written warning regarding her attendance and informed her that further attendance issues would result in disciplinary action potentially including termination.

The employee was absent on three occasions. On March 5, 2024, she gave notice to the employer that she would be absent because her child was ill. On May 18, 2024, she gave notice to the employer that she would be absent because her grandmother was in hospice. On April 27, 2024, she gave notice to the employer that she would be absent because she was ill and in the hospital.

The employer had a written attendance policy. The employee did not acknowledge receipt of that policy with her signature and was unaware of the number of attendance occurrences that could result in discharge under the policy.

The employee was discharged but not for misconduct or substantial fault connected with her employment.

### **Memorandum Opinion**

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. 2d 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). The employer bears the burden of establishing that the employee was discharged for disqualifying misconduct or substantial fault. *Operton v. LIRC*, 2017 WI 46, ¶38, 375 Wis. 2d 1, 894 N.W.2d 426; *Consolidated Constr. Co., Inc. v. Casey*, 71 Wis. 2d 811, 820, 238 N.W.2d 758 (1976); *Kansas City Star Co. v. DILHR*, 60 Wis. 2d 591, 602, 211 N.W.2d 488 (1973).

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.

Under Wis. Stat. § 108.04(5)(e), “violation of an employer's attendance policy of which an employee is aware (as evidenced by a signed acknowledgement of receipt) constitutes ‘misconduct’ for the purpose of disqualification from unemployment benefits.” *Bevco Precision Mfg. Co. v. LIRC*, 2024 WI App 54, ¶ 18, \_\_\_ Wis. 2d \_\_\_, \_\_\_ N.W.3d \_\_\_ (petition for supreme court review pending). Here, the employer did not provide a copy of the policy, signed or otherwise, and the employee disputed that she acknowledged receipt of the policy with her signature. The commission credits the employee and finds that she was not aware of the specific provisions in the policy and did not sign it. Therefore, the employer's policy does not govern the commission's analysis of misconduct under Wis. Stat. § 108.04(5)(e).

The commission must apply the first clause of Wis. Stat. § 108.04(5)(e) and determine whether the employee was absent on more than 2 occasions, for which she failed to provide the employer with both notice and one or more valid reasons for her absence, within the 120-day period before the date of the employee's termination. *Lewis v. Tellurian*, UI Dec. Hearing No. 23001636MD (LIRC June 30, 2023). The relevant 120-day period is January 4 – May 2, 2024. The employee was absent on 3 occasions during that time period, but each of those absences was with notice and for a valid reason that was communicated to the employer. Therefore, the employee's conduct does not constitute misconduct under Wis. Stat. § 108.04(5)(e).

Next, the commission must determine whether the employee's conduct constitutes misconduct under Wis. Stat. § 108.04(5)(intro.). Misconduct connected with the employee's work means conduct showing an intentional and substantial disregard of the employer's interests or of the employee's job duties and obligations, or negligence so gross or repeated as to demonstrate equal culpability. *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636 (1941). The employee's absences were for valid reasons and with notice to the employer. The employee's instances of tardiness were also with notice. Because the employee could not be expected to leave children in a childcare facility without proper supervision and her coworker's arrival time was beyond her control, the employee's instances of tardiness in this case cannot be considered intentional or grossly negligent. Her attendance record as a whole, therefore, does not rise to the level of misconduct.

Last, the commission must determine whether the employee's conduct for which she was discharged constitutes substantial fault connected with her employment. Substantial fault connected with the employee's work includes those acts or omissions of an employee over which the employee exercised reasonable control and that violate reasonable requirements of the employer. 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. Wis. Stat. § 108.04(5g). Here, the employee's absences were due to illness (her own illness and that of her child and grandmother). Her instances of tardiness were due to a coworker's failure to arrive at work on time and her duty not to leave children unattended. None of these attendance infractions were within the employee's reasonable control in this instance and therefore do not constitute substantial fault connected with her employment.

NOTE: The commission has re-written the administrative law judge's decision to fully set forth its findings of fact and analysis of the law including consideration of the recent court of appeals decision in *Bevco*.

cc: ABSOLUTE HOME CARE LLC