AUG 13, 2018

Wisconsin Supreme Court Broadens the Definition of Absenteeism as Misconduct Barring Unemployment Compensation Benefits

BRENNA R. MCLAUGHLIN
BMCLAUGHLIN@BOARDMANCLARK.COM

On June 26, 2018, the Wisconsin Supreme Court issued a decision in *Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission*. The Court held employers may create and enforce their own attendance policies under Wis. Stat. § 108.04(5)(e) barring unemployment compensation benefits. If employees violate an attendance policy that they previously received and signed as part of an employment handbook, that will be grounds for "misconduct" that is a proper basis for denial of unemployment compensation benefits. This case marks a departure from prior case law holding that employees could only be denied unemployment insurance on the basis of absenteeism if they missed more than two unexcused days of work within a 120-day period.

The case involved Valarie Beres, a registered nurse employed by Mequon Jewish Campus ("MJC"). MJC's written attendance policy stated employees could be fired for incurring a single unexcused absence during their first 90 days of employment if they failed to provide two hours advanced notice before missing a shift. Within her first 90 days, Beres missed an unexcused day of work without giving notice to MJC due to "flu-like symptoms." MJC determined Beres' first and only "No Call No Show" violated its attendance policy and terminated her employment.

Beres then filed for unemployment insurance benefits. The Department of Workforce Development ("DWD") denied Beres benefits on the grounds that her violation of MJC's attendance policy was "misconduct" under Wis. Stat. § 108.04(5)(e). That statute 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.*

Wis. Stat. § 108.04(5)(e) (emphasis added). DWD interpreted the statute to mean that a violation of an

employer's previously acknowledged written attendance policy by an employee, even if stricter than the "2 in 120" day standard referenced in the statute, is grounds for misconduct that prevents employees from receiving unemployment compensation benefits. Because Beres failed to comply with MJC's attendance policy, DWD denied her benefits.

The case was appealed to the Wisconsin Courts of Appeals, which reversed DWD's decision and held that the statute only establishes unemployment insurance ineligibility for greater than two unexcused days in a 120-day period.

The controversy was ultimately appealed to the Wisconsin Supreme Court. In a unanimous decision, the Court concluded that a plain reading of Wis. Stat. § 108.04(5)(e) supported that Beres committed misconduct by violating MJC's written absenteeism policy, of which she had acknowledged receipt.

The Court reasoned "[a]n employee commits statutory 'misconduct' by absenteeism if he or she is absent on more than two occasions within the 120-day period before the date of the employee's termination, except if the employee violates his or her employer's absenteeism policy . . . ." So long as the employer's policy is included in its employee handbook and the employee signs an acknowledged receipt of the policy, employers are free to create their own attendance policies that are stricter or more generous than the "2 in 120 days" standard. Any violation of that policy is grounds for a denial of benefits.

Applying its analysis to MJC, the Court determined that Beres' unexcused "No Call No Show" within the first 90 days of employment was proper grounds for misconduct under the statute, and Beres was not entitled to unemployment compensation insurance.

The takeaway for employment professionals is that the "2 in 120 days" standard is no longer the baseline metric for determining absenteeism misconduct for unemployment compensation benefits. Employers who establish written attendance policies in an employee handbook, obtain acknowledgements from employees of the handbook's receipt, and consistently apply their policies can successfully argue that an employee who violates the attendance policy is not entitled to unemployment compensation benefits.

Employers seeking to review their attendance policies in light of this case should consult with legal counsel for advice regarding drafting, enforcement, and adequate employee notice of absenteeism policies.