

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP804

Cir. Ct. No. 2006CV3395

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

TANESHA RENEE WINDOM,

PETITIONER-APPELLANT,

v.

**PICK-N-SAVE MEGA FOODS AND LABOR
AND INDUSTRY REVIEW COMMISSION,**

RESPONDENTS-RESPONDENTS,

LOCAL 1414 UNION,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL J. DWYER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Tanesha Renee Windom appeals from an order affirming the Labor and Industry Review Commission's (Commission) affirmance of a denial of Windom's unemployment compensation benefits based on a finding of misconduct. Because we conclude that the Commission properly affirmed the denial of unemployment compensation benefits, we affirm.

BACKGROUND

¶2 Windom began work for Pick-N-Save Mega Foods (Pick-N-Save) on June 17, 2004. During her employment with Pick-N-Save, she was provided with, and signed a copy of, Pick-N-Save's attendance policy dated May 1, 2005. Windom also signed a copy of the revised policy dated October 12, 2005, with an effective date of November 1, 2005. The tardiness policy and related progressive discipline policy remained the same as the May 1, 2005 policy. The policy set forth the following:

ABSENCE/TARDY – An absence occurs any time an employee is tardy (5 minute tardy grace period) for work, does not report to work at all for a scheduled shift, or takes extended breaks or lunch periods.

CHARGEABLE TARDINESS

“If an employee is tardy (5 minute grace period) or takes extended breaks or lunches, the employee will be assessed one-half (½) an occurrence for each violation.”

EXCESSIVE ABSENTEEISM/TARDINESS

The following progressive discipline steps apply for the accumulation of chargeable absences.

First Offense – Verbal warning (written) accumulation of 2 occurrences in a 12-month period.

Second Offense – Written warning – accumulation of 3 occurrences in a 12-month period.

Third Offense – Two day suspension – accumulation of 4 occurrences in a 12-month period.

Fourth Offense – Three day suspension – accumulation of 6 occurrences in a 12-month period.

Fifth Offense – Discharge – accumulation of 8 occurrences in a 12-month period.

The 12-month period is measured from the date of the infraction not the beginning of the month. As it relates to the calculation of this 12-month period, layoffs, leaves and suspensions are viewed as “dead” time which stops the calendar. The calendar restarts with the employee’s return to work. The Company, in its own discretion, may decide to mitigate discharge imposed under this program. In the exercise of this discretion, while the Company may mitigate in one case, it shall not be obligated to mitigate in another. As such, all mitigations shall be deemed to be granted on a non-precedent setting basis.

(Formatting as in original.)

¶3 On May 13, 2005, Windom signed an employee contact form noting that she was tardy on May 1 by eleven minutes. On May 27, 2005, Windom signed an employee contact form noting that she was tardy on May 17 by thirty minutes. On June 10, 2005, Windom received and signed a number of employee contact and disciplinary forms relating to tardiness:

1. an employee contact form noting that she was eight minutes tardy on June 2, 2005;
2. an employee contact form noting that she was nine minutes tardy on June 3, 2005;
3. a First Warning for the accumulation of two occurrences within a 12-month period (for May and June to date tardies);

4. an employee contact form noting that she was seven minutes tardy on June 7, 2005;
5. an employee contact form noting that she was seven minutes tardy on June 9, 2005; and
6. a Second Warning for the accumulation of three occurrences within a 12-month period (the form notes that a 2-day suspension will be given “if 1 more occurrence”).

¶4 On July 22, 2005, Windom signed an employee contact form acknowledging that she had been eight minutes tardy on July 19, 2005. On July 24, 2005, Windom signed an employee contact form acknowledging that she had been seven minutes tardy on July 22, 2005. This form also included a notice that Windom had reached her “4th occurrence,” included a 2-day suspension which Windom served, and further noted that “should incident occur again: 3 day susp[ension] if 2 more occurrences.”

¶5 On October 7, 2005, Windom signed employee contact and disciplinary notices acknowledging that she had been tardy by: six minutes on September 9, 2005; six minutes on September 27, 2005 (notice also notes that this is her “5th occurrence”); and seven minutes on September 30, 2005. The following day, October 8, 2005, Windom signed an employee contact form and disciplinary notice acknowledging that she had been fifteen minutes tardy on October 7. This form also noted that this was Windom’s “6th occurrence” and that she was to serve a three-day suspension.

¶6 On November 4, 2005, Windom signed an employee contact form acknowledging that she had been eleven minutes tardy on October 30. Finally, on

December 9, 2005, Windom signed employee contact forms acknowledging that she had been tardy by nine minutes on November 12, 2005 (this notice also noted that this was a “7th occurrence”), and six minutes on November 23, 2005. Finally, on December 16, 2005, Windom was presented with an employee contact form noting her progressive discipline for tardiness, that she was nine minutes tardy on December 14, 2005, that this was her “8th occurrence,” and that she was being discharged. Several representatives of the employer, including the store director, met with Windom when she was provided this notice. Windom initially signed the disciplinary notice, but later during the meeting “crossed it out” because, she testified,

I knew I had proof of any of those occurrences, you know. And I also crossed it out because they had changed the attendance policy on me like four times in my period of work there, and so I wasn’t really aware of where I stood at as far as my attendance and my tardinesses. You know, they changed it on me, and each time they changed it they changed the – the agreement on it.

¶7 Windom applied for unemployment compensation benefits and on January 7, 2006, the Department of Workforce Development (DWD) issued an initial determination that she was not entitled to benefits. Windom appealed to the appeal tribunal of the DWD and a hearing was held before an administrative law judge (ALJ) on February 3, 2006.

¶8 During the hearing, the ALJ confirmed that Windom had her own transportation (a car) and that Windom lived a block away from the employer. The ALJ asked Windom several times why, if she was able to make it a few minutes late, could she not then make it to work a few minutes earlier. Windom responded that either she did not know or that it was a result of medication she was taking for various ailments. Windom acknowledged signing all of the

employee contact forms and disciplinary notices. At the completion of the hearing, the ALJ accepted all of the medical records submitted by Windom, along with all of the hearing exhibits, for consideration.

¶9 On February 8, 2006, the appeal tribunal issued its decision denying unemployment compensation benefits. The appeal tribunal concluded:

Under the circumstances, considering the totality of her attendance record, the employee's continued late arrivals evinced a willful and substantial disregard for the employer's interests and of the standards of conduct that the employer had a right to expect, and therefore constituted misconduct connected with her employment.

The appeal tribunal therefore finds that in week 51 of 2005, the employee was discharged for misconduct connected with her work for the employer within the meaning of section 108.04(5) of the statutes.

¶10 Windom appealed this decision to the Commission. On April 6, 2006, the Commission issued its opinion affirming the appeal tribunal's decision. In its reasoning for reaching this decision, the Commission noted:

[T]he record as a whole reflects that she was properly notified of her accumulation of tardies and her progression through the disciplinary process which ultimately led to her discharge. In addition to receiving disciplines at the appropriate point levels, the employee was also notified, via contact forms, of each incident of tardiness.... Further, the employee signed each of these disciplines and contact forms, acknowledging receipt of the documents.

The Commission then discussed Windom's reasons for a number of her tardies. It concluded that Windom's argument that she was tardy because she had agreed to work an additional shift the previous day such that she had to go to school to finish an assignment on the day of her tardiness on a scheduled shift "did not absolve her of the responsibility of reporting to work on time for her next scheduled shift" and that included factoring in travel time for inclement weather. The Commission also

concluded that Windom had failed to establish that any of the charged tardies related to a day that she claims she punched in late because of a conversation with her supervisor. Finally, as to Windom's medical excuses, the Commission concluded:

The record lacks any evidence that the employee ever sought to change a start time from the employer for medical reasons. Following a review of the employee's tardiness record, even if one or two incidents of tardiness were for valid reasons, her total accumulation of 16 incidents in less than one year and after warnings, evinced a willful and intentional disregard of the employer's interests and of the standards of conduct the employer had a right to expect.

¶11 The Commission also discussed Windom's attempt to add information not in the record by way of correspondence to the Commission and her challenges regarding: (1) the adjudicator's failure to wait for medical record evidence before issuing the initial determination; (2) the non-competency of the store director to testify; and (3) "the admission of the attendance summary sheet." The Commission chose not to address the first issue as it was covered in Windom's *de novo* appeal to the tribunal. As to the second and third challenges, the Commission determined that the store director's testimony was relevant and material and that because the summary sheet simply listed the "dates and times that were covered with the employee during her employment via the contact forms and the disciplinary actions[, t]he receipt of this document was also not error."

¶12 As to Windom's attempt to add information to the record, the Commission concluded that none of the information Windom sought to add met the newly discovered evidence rule as set forth in *Koss Corp. v. DILHR*, Dane County Circuit No. 153-261 (July 5, 1997) (citing *Naden v. Johnson*, 61 Wis. 2d

375, 384, 212 N.W.2d 585 (1973)).¹ Accordingly, it determined that no new hearing was required.

¶13 Windom then filed a petition for judicial review with the Milwaukee County Circuit Court. In a decision dated March 26, 2007, the circuit court affirmed the Commission’s decision, noting:

The Commission found that Ms. Windom’s tardiness constituted “misconduct” within the meaning of Wisconsin State Section 108.04(5)... I agree with the Commission’s finding that Ms. Windom’s tardiness constituted misconduct. Ms. Windom received numerous notices of her tardiness and of the consequences which could result. Furthermore, she was given a substantial amount of time to correct her behavior, but failed to do so.

Windom appealed.

DISCUSSION

¶14 At issue in this case is whether Windom’s conduct constituted “misconduct” under WIS. STAT. § 108.04(5) (2005-06).² This is a question of law,

¹ *Naden v. Johnson*, 61 Wis. 2d 375, 212 N.W.2d 585 (1973), set forth the following criteria for “newly discovered evidence”:

1. The evidence first came to the moving party’s knowledge after the hearing;
2. The moving party was not negligent in failing to discover it prior to hearing;
3. The evidence is material;
4. The evidence is not merely cumulative to that presented at the hearing; and
5. It is reasonably probable that, given this new evidence, a different result would be reached after a new hearing.

Koss Corp. v. DILHR, Dane County Circuit No. 153-261 (July 5, 1997) (citing *Naden*, 61 Wis. 2d at 384).

therefore, our review is *de novo*. *Lopez v. LIRC*, 2002 WI App 63, ¶8, 252 Wis. 2d 476, 642 N.W.2d 561. While “misconduct” is not defined in WIS. STAT. ch. 108, our supreme court has provided the following definition:

“[T]he intended meaning of the term ‘misconduct,’ as used in sec. [108.04(5)], Stats., is limited to conduct evincing such wil[ly]ful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

WISCONSIN STAT. § 108.04(5) states:

(5) DISCHARGE FOR MISCONDUCT. Unless sub. (5g) applies, an employee whose work is terminated by an employing unit for misconduct connected with the employee’s work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee’s weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee’s weekly benefit rate shall be that rate which would have been paid had the discharge not occurred. The wages paid to an employee by an employer which terminates employment of the employee for misconduct connected with the employee’s employment shall be excluded from the employee’s base period wages under s. 108.06 (1) for purposes of benefit entitlement. This subsection does not preclude an employee who has employment with an employer other than the employer which terminated the employee for misconduct from establishing a benefit year using the base period wages excluded under this subsection if the employee qualifies to establish a benefit year under s. 108.06 (2) (a). The department shall charge to the fund’s balancing account any benefits otherwise chargeable to the account of an employer that is subject to the contribution requirements under ss. 108.17 and 108.18 from which base period wages are excluded under this subsection.

the employee's duties and obligations to his [or her] employer.... [M]ere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

Lopez, 252 Wis. 2d 476, ¶8 (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 2d 249, 259-60, 296 N.W. 636 (1941)).

¶15 On an appeal from a circuit court order affirming or denying an administrative agency's decision, we review the agency's decision, not that of the circuit court. *Lopez*, 252 Wis. 2d 476, ¶9. We may not substitute our judgment for the Commission's as to the weight or credibility to be accorded any factual finding, and the Commission's findings of fact will be upheld if they are supported by credible and substantial evidence. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983). Substantial evidence is that "[e]vidence that is relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it." *Id.* at 54. Additionally, where more than one inference may be drawn from the evidence, the Commission's drawing of one such permissible inference is an "act of fact finding, and the inference so derived is conclusive on the reviewing court." *Bernhardt v. LIRC*, 207 Wis. 2d 292, 299, 558 N.W.2d 874 (Ct. App. 1996). It is not our role to determine whether factual findings "not made should have been made or could have been sustained by the evidence." *Appleton Elec. Co. v. Minor*, 91 Wis. 2d 825, 829, 284 N.W.2d 99 (1979).

¶16 As to its conclusions of law, although we are not bound by the Commission's conclusions, we may accord them deference. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). Generally, we give great weight

deference³ to the Commission’s determinations of misconduct. *Charette v. LIRC*, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995).

¶17 Great weight deference is appropriate when:

- (1) the agency was charged by the legislature with the duty of administering the statute;
- (2) the interpretation of the agency is long-standing;
- (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and
- (4) the agency’s interpretation will provide uniformity and consistency in the application of the statute.

Lopez, 252 Wis. 2d 476, ¶10. “Under the great weight standard, we uphold an agency’s reasonable interpretation of the statute if it is not contrary to the clear meaning of the statute, even if we conclude another interpretation is more reasonable.” *Id.* The burden is on the party seeking to overturn the agency’s decision to establish that the agency’s interpretation is unreasonable; the agency is not required to justify its interpretation. *Bunker v. LIRC*, 2002 WI App 216, ¶26, 257 Wis. 2d 255, 650 N.W.2d 864.

³ There are three degrees of deference which may be accorded a Commission decision. *Lopez v. LIRC*, 2002 WI App 63, ¶11 n.2, 252 Wis. 2d 476, 642 N.W.2d 561. In addition to great weight deference, a reviewing court may accord an agency interpretation either due weight deference or no deference (i.e., *de novo* review). *Id.* “We apply due weight deference when the legislature has charged the agency with the enforcement of the statute in question, but the agency has not had sufficient experience in the area to place it in a better position than the court to make judgments regarding interpretation of the statute.” *Id.* Due weight deference may also be required when all four of the great weight standards are not met. *Patrick Cudahy Inc. v. LIRC*, 2006 WI App 211, ¶9, 296 Wis. 2d 751, 723 N.W.2d 756. *De novo* review is appropriate when the issue before the agency is “clearly one of first impression or when an agency’s position on an issue has been so inconsistent so as to provide no real guidance.” *Lopez*, 252 Wis. 2d 476, ¶11.

¶18 Windom asks that this court allow her another hearing to demonstrate that her actions were not intended to get her terminated from her position and that if she did so intend, she would have

displayed misconduct in more areas than being late on days that [she] was ill and having doctor's excuses in [her] files that would justify that she was not trying to loose [sic] [her] job on purpose but that [she] was unaware of [her] job being in jeopardy [sic] because of improper notification by the Human Resources Department.

The Commission argues that great weight deference is appropriate.

¶19 Windom argues first that she did not accumulate sixteen tardies because one of the times she was charged a tardy, she had actually arrived at work early but clocked in late due to a conversation with her supervisor. Windom argues that her supervisor told her that she would notify human resources regarding the late time-clock entry. Windom argues that she did not know that this was one of the tardies charged against her because she did not have a copy of the human resources log sheet until the hearing before the ALJ. Windom further argues that some of the tardies were due to illness for which the employer had doctor excuses for her. During the hearing, however, after numerous inquiries by the ALJ as to why Windom, who only lived a block away from the store, could make it to work in the late afternoon nine or seven minutes late but not less than five minutes late, Windom merely answered that some of the medication made her sleepy and she had to "drag" herself out to work. Based on the evidence and testimony in the record, it is not an unreasonable inference that Windom's excuse that she was tardy by six to fifteen minutes sixteen times in a period of eight months, where she was employed approximately fourteen hours per week, because she had to "drag" herself to work, when she was aware of the employer's tardiness policy, when she was signing off on employee contact forms and serving

disciplinary suspensions for tardiness was an intentional disregard for the interests of her employer, constituted evidence of misconduct for unemployment compensation benefit purposes. *See Boynton Cab Co.*, 237 Wis. at 259-60.

¶20 It is undisputed that Windom was provided with employee contact and disciplinary notices relating to her tardies. She does not dispute that she signed off on all of these notices, one of which included a two-day suspension and a second which included a three-day suspension. Windom does not dispute that she received her employer's tardiness policy and that she signed a copy of the policy as acknowledgment for this receipt.

¶21 When we apply to this case the four standards for applying great weight deference set forth above, the Commission fulfills them all. The Commission meets the first two requirements in that it is charged with administering WIS. STAT. § 108.04(5), *see* WIS. STAT. § 108.09(6), and that its interpretation of § 108.04(5) is long standing, *see, e.g., Boynton Cab Co.*, 237 Wis. at 259-60. As to the third standard, in its review of the appeal tribunal's decision and the entire record before it, the Commission properly reviewed the record before the appeal tribunal and the submissions of Windom, addressed Windom's challenges to the evidence, and by incorporation of the appeal tribunal's decision, set forth the appropriate statutory references and case law relating to unemployment compensation and the standard for determining misconduct for benefit receipt purposes. We conclude that the Commission's decision reflects that it "employed its expertise or specialized knowledge in forming the interpretation." *See Lopez*, 252 Wis. 2d 476, ¶10.

¶22 Finally, the Commission's interpretation that a work rule that allows for termination of employment after incurring sixteen tardies for a customer-

service oriented employer provides uniformity and consistency in the application of the statute. *See id.* This was a policy agreed to by the union and employer. Windom had been presented with the policy and had signed an acknowledgement of this receipt twice. The employer had followed its progressive discipline procedure as set forth in the policy and Windom had acknowledged this progressive discipline by her signature on sixteen contact forms and four disciplinary notices. At the time of her discharge, Windom was given her final contact form and disciplinary notice setting forth all of the dates of her previous disciplinary notices. Misconduct under WIS. STAT. § 108.04(5), as defined since *Boynton Cab Co.*, includes the intentional disregard of an employer's interest. *See Lopez*, 252 Wis. 2d 476, ¶8. The Commission's conclusion that Windom's behavior constituted misconduct for purposes of § 108.04(5) provides uniformity and consistency in the application of this statute.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

