STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
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Employee

Employer

UNEMPLOYMENT INSURANCE DECISION

Soc. Sec. No. ***-**-
Hearing No.

Dated and mailed:
OCT 30 2014

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SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued an appeal tribunal decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modifications:

1. Delete the last two paragraphs of the ALJ's FINDINGS OF FACT and CONCLUSIONS OF LAW, and replace them with the following:

> A number of circumstances contributed to the employee's failure to secure the passenger's wheelchair to the floor of the van. First, she did not have the help of the experienced volunteer she usually had to assist passengers onto the van. Second, she had three extra passengers that she was not expecting to have. Third, she felt pressure to hurry because some of the passengers were eager to get on the van, and the van was parked at a crosswalk. The employee made sure that the passenger's wheelchair was positioned properly and that the wheelchair's brakes were applied, but in her haste to tend to the other passengers, she forgot to secure the straps from the floor mounts of the van to the wheelchair. The employee did not willfully disregard this responsibility; it was an act of negligence. To amount to misconduct, acts of carelessness or negligence must be of such a degree or recurrence as to manifest the equivalent of willful disregard. In this case there

was no recurrence—the employee committed only a single act of negligence—and given the mitigating circumstances, her negligence was not of a severity equivalent to willful disregard of the employer's interests. Her failure to secure the wheelchair was not misconduct under Wis. Stat. § 108.04(5).

The next issue to be decided is whether the employee was discharged for substantial fault connected with her work.

An employee discharged for substantial fault connected with the employee's work is ineligible to receive benefits until 7 weeks have elapsed since the week of the termination and the employee earns wages in covered employment equal to at least 14 times the employee's weekly benefit rate. Wis. Stat. § 108.04(5g)(a). "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, but 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).[1]

The two primary elements of a showing of substantial fault are that the employer had a reasonable requirement and that the employee, through acts or omissions within his or her

[1] Wis. Stat. § 108.04 (5g) provides:

DISCHARGE FOR SUBSTANTIAL FAULT. (a) An employee whose work is terminated by an employing unit for substantial fault by the employee 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 termination occurs and the employee earns wages after the week in which the termination 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 benefit rate shall be the rate that would have been paid had the discharge not occurred. For purposes of this paragraph, "substantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following:

1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
2. One or more inadvertent errors made by the employee.
3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

(b) The department shall charge to the fund's balancing account the cost of any benefits paid to an employee that are otherwise chargeable to the account of an employer that is subject to the contribution requirements under ss. 108.17 and 108.18 if the employee is discharged by the employer and paragraph (a) applies.

reasonable control, violated that requirement. The employer's requirement that drivers securely strap wheelchairs to the floor of the van was manifestly reasonable for the safety of the passengers. The employee acknowledged that she was aware of her responsibility to carry out this requirement, and she in fact carried out that responsibility herself, or made sure her assistant had done so, consistently prior to June 22nd. The distractions of June 22nd might have made it more challenging for her to fulfill her responsibility, but they did not make it beyond her reasonable control to do so. The evidence does not show that the employee's failure was a minor infraction, that the error was merely an inadvertence, or that she lacked sufficient skill, ability or equipment to perform her responsibility.

Therefore, the commission finds that in week 26 of 2014, the employee was discharged for substantial fault within the meaning of Wis. Stat. § 108.04(5g).

2. Delete the NOTE following the decision of the ALJ, and replace it with the following:

> For purposes of computing benefit entitlement, an employee's base period wages from work for the employer prior to the discharge for substantial fault are not excluded from the computation of the maximum benefit amount for this or any later claim. However, any benefits otherwise chargeable to a contributing employer's account shall be charged to the unemployment insurance fund's balancing account, rather than the contributing employer's account. Wis. Stat. § 108.04(5g)(b). To seek judicial review, a party must be aggrieved by the commission's decision. The courts have held that an employer's account must be affected by the commission's decision for the employer to be considered a "party aggrieved." *Cornwell Pers. Assoc. v. ILHR Dep't*, 92 Wis. 2d 53, 63, 284 N.W.2d 706 (Ct. App. 1979).

DECISION

The appeal tribunal decision, as modified, is affirmed. 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 which would have been paid had the discharge not occurred.

BY THE COMMISSION:

Laurie R. McCallum, Chairperson

C. William Jordahl, Commissioner

David B. Falstad, Commissioner

MEMORANDUM OPINION

The employee argued in her petition for review that the employer failed to show that the requirements of its wheelchair tip policy were reasonably applied to the employee. First, she argued that the expectation was not sufficiently communicated to the employee—but it was. The employee was given a special page devoted solely to the policy and was asked to read and sign it, which she did. In plain English, the policy required drivers to fully secure wheelchairs in vehicles, and warned that failure to comply will result in termination of employment. Furthermore, the employee acknowledged at hearing that she knew it was her responsibility to secure wheelchairs to the vehicle. Second, the employee argued that it was not shown that she fully understood her responsibility, because there was no evidence that she was trained or that she had any questions about her responsibility answered. Whether or not she understood any particular detail of her responsibility, however, is not relevant to what happened on June 22nd. The employee's negligence that day was not based on any confusion as to *how* to do her job; she forgot to engage in *any* effort to secure the wheelchair to the floor. Third, the employee argued that the employer had to show uniform enforcement of its wheelchair tip policy as part of showing that it was reasonable, and failed to do so. Here, the reasonableness of the policy is manifest, and does not require the employer to put historical evidence in the record about how it has been enforced in order to support the conclusion that requiring van drivers to securely strap wheelchair passengers to the floor of the van was a reasonable policy.

The employee also argued that the employee did not have sufficient ability, skills or equipment to exercise reasonable control over whether she could have avoided violating the wheelchair tip policy on June 22nd. The commission disagrees. The employee's problem on June 22nd was not a lack of ability, skills or equipment. She never alleged that she did not know how to secure a wheelchair to the van floor. She apparently had successfully secured the chair that morning before taking the passenger to church. She simply forgot to do so on the return trip. This was substantial fault under Wis. Stat. § 108.04(5g).

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