

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2010

A. John Voelker
Acting 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. 2009AP2157

Cir. Ct. No. 2009CV1284

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BARBARA GANDY,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND VAN RU CREDIT
CORPORATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
MAXINE A. WHITE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Barbara Gandy, *pro se*, appeals the circuit court's order affirming a decision of the Labor and Industry Review Commission. She

argues that the Commission erred in concluding that she was fired for misconduct.¹ We affirm.

¶2 Gandy contends the Commission erred in concluding that her absences from work due to her incarceration constituted “misconduct” under WIS. STAT. § 108.04(5) (2007-08).² What actions an employee took are questions of fact. *See Millonig v. Bakken*, 112 Wis. 2d 445, 450, 334 N.W.2d 80, 83 (1983) (what a person did or did not do is a question of fact). We will uphold the agency’s findings of fact if they are supported by substantial evidence. *See* WIS. STAT. § 227.57(6); *Kannenber v. LIRC*, 213 Wis. 2d 373, 384, 571 N.W.2d 165, 171 (Ct. App. 1997).

¶3 Whether the employee’s actions constitute “misconduct” under WIS. STAT. § 108.04(5) is a question of law. *McGraw-Edison Co. v. DILHR*, 64 Wis. 2d 703, 713, 221 N.W.2d 677, 683 (1974). We give great weight to an agency’s determination of questions of law where, as here, the agency: (1) has the duty of administering the statute; (2) has a long-standing interpretation of the statute; (3) used its expertise or specialized knowledge to form the interpretation; and (4) has interpreted the statute in a manner that “will provide uniformity and consistency in the application of the statute.” *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995). When we accord an agency’s determination great weight, we will sustain that interpretation if it is reasonable. *Id.* at 661, 539 N.W.2d at 102. “The burden of proof to show that the agency’s

¹ We review the decision of the Labor and Industry Review Commission, not the circuit court. *Bunker v. LIRC*, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 265, 650 N.W.2d 864, 869.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

interpretation is unreasonable is on the party seeking to overturn the agency action; it is not on the agency to justify its interpretation.” *Ibid.*

¶4 According to Gandy’s testimony, she was incarcerated after a traffic stop that occurred while she was on her lunch break on a day she was working. She was incarcerated because she had failed to appear to serve a previously imposed sentence. Korilyn Hecker, Gandy’s manager, testified that Gandy was absent from work for half of her shift on the day she was arrested and all day for the next three days. The Commission found that Gandy missed three and one-half days of work due to her incarceration and that she did not give notice when she failed to return to work the first day or for two of the subsequent days. We affirm these factual findings because they are supported by the testimony of Gandy and her supervisor. *See Kannenberg*, 213 Wis. 2d at 384, 571 N.W.2d at 171 (we affirm the agency’s findings of fact if they are supported by substantial evidence).

¶5 Based on these factual findings, the Commission concluded that Gandy’s absences from work constituted misconduct under the statute because they were Gandy’s fault; she was incarcerated due to her conviction of a crime and subsequent failure to appear for her previously imposed sentence. This conclusion is consistent with other decisions in which the Commission has held that intentional behavior that leads to an employee’s incarceration and absence from work constitutes misconduct under WIS. STAT. § 108.04(5). *See, e.g., Albrecht v. Farm & Fleet of Monroe, Inc.*, UI Hearing Decision No. 05003647JV (LIRC November 28, 2007).³ Gandy has not shown that the Commission’s decision was

³ While Commission decisions are not binding authority, we may consider prior Commission decisions on review. *See, e.g., Gilbert v. LIRC*, 2008 WI App 173, ¶10, 315 Wis. 2d 726, 735, 762 N.W.2d 671, 675.

unreasonable. Therefore, we affirm the Commission's conclusion that Gandy's absences from work due to her incarceration constituted misconduct.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

