

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov**

WILLIAM G WITTSTOCK

Claimant

and

**CENTRAL IOWA POWDER COATING
INC**

Employer

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HEARING NUMBER: 22B-UI-06031

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1, 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, William Wittstock, worked for Central Iowa Powder Coating, Inc. from May 28, 2019 until February 20, 2022 as a full-time general laborer working 6:30 a.m. until 5:00 p.m. The Employer has a point system attendance policy that sets forth once an employee accumulates five points in a rolling six-month period, that employee is eligible for termination. The Employer allowed six sick days per year. The Claimant received a copy of that policy at the time of hire, as well as a copy of the policy is posted by the time clock.

Mr. Wittstock had a history of attendance issues and he frequently called in sick. The Employer kept account of Claimant's absences and related the Claimant had called off of work 31% of every Monday, 24% of every Tuesday, 18% of every Wednesday, and 27% of every Thursday, which is the Employer's last workday of the week. The Employer did not believe the Claimant was ill, as he professed, during all the days he called off work, as he was often seen around town.

In August of 2021, the Employer verbally warned the Claimant about his attendance as he had missed 41 days of work in the past couple of months. The Employer issued a written warning on December 8, 2021 regarding the Claimant's continued attendance issues (absences and tardies). That warning stated that if the Claimant was going to be late, he must call in to report, instead of failing to report the entire day. It also warned that any further attendance issues could result in his termination.

On January 3, 2022, the Claimant reported to work and informed the Employer he had been exposed to COVID. The Employer directed him to go home, get tested, and if negative, return to work. The Claimant did not go home, rather he was seen around town throughout the day. The next day, the Claimant did not report to work. When the Employer called him, he hadn't gotten tested; instead, the Claimant said he was planning to take the next ten days off since he'd get paid anyway. The Employer directed him to get tested, which the Claimant did on the 4th, and he returned to work on the 5th.

On January 17, 2022, the Employer met with the Claimant to discuss his attendance. The Employer issued a red letter, which put the Claimant on notice that his job was in jeopardy should he call off work again.

The Claimant's final absence occurred on a Monday, February 24, 2022 when he called in sick. However, the Employer did not believe him based on his past habit of calling in sick on Mondays. The Employer terminated him for his excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2021) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(a):

Misconduct is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in the carelessness or negligence of such degree of 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 the employee's duties and obligations to the employer. On the other hand, mere 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

871 IAC 24.32(7) provides:

Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

We find the Employer provided credible testimony regarding the Claimant's habit of calling off work on certain days of the week throughout his employment. Although the Employer has a point system for which the Employer practiced leniency, it is clear the Claimant took full advantage of the Employer's trying to work around his attendance issues. The Employer has a right to depend on each and every employee to perform his particular duties to maintain the steady flow of business. That flow was interrupted when the Claimant repeatedly failed to do his part because he was routinely unavailable, allegedly, due to illness or whatever other reason he proffered.

Mr. Wittstock's behavior can easily be characterized as "...conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees..." 871 IAC 24.32(1)(a), *supra*. As to the Claimant's final absence, we find the Employer was not wholly unreasonable in disbelieving the Claimant was sick on February 24, 2022 given his past history. The Claimant failed to participate to rebut the Employer's evidence. Based on this record, we conclude the Employer satisfied their burden of proof.

Finally, since the Administrative Law Judge allowed benefits and in so doing affirmed a decision of the claims representative the Claimant falls under the double affirmance rule:

871 Rule of two affirmances. IAC 23.43(3)

a. Whenever an administrative law judge affirms a decision of the representative or the employment appeal board of the Iowa department of inspections and appeals affirms the decision of an administrative law judge, allowing payment of benefits, such benefits shall be paid regardless of any further appeal.

b. However, if the decision is subsequently reversed by higher authority:

- (1) The protesting employer involved shall have all charges removed for all payments made on such a claim.
- (2) All payments to the claimant will cease as of the date of the reversed decision unless the claimant is otherwise eligible.
- (3) No overpayment shall accrue to the claimant because of payment made prior to the reversal of the decision.

Thus, the Employer's account may not be charged for any benefits paid so far to the Claimant for the weeks in question, but the Claimant will not be required to repay benefits already received.

DECISION:

The administrative law judge's decision dated April 26, 2022 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)" a".

No remand for determination of overpayment need be made under the double affirmance rule, 871 IAC 23.43(3), but still the Employer's account may not be charged.

James M. Strohman

Ashley R. Koopmans

AMG/fnv

Myron R. Linn