BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CHRISTOPHER M MARLIN	:	
	:	**HEARING NUMBER:** 13B-UI-05357
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
REVSTONE CASTING FAIRFIELD LLC	:	
Employer.		

N O T I C E

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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. Two 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 Administrative Law Judge's findings of fact are adopted by the Board as its own, with the following additions:

> The Claimant was not given a copy of a policy manual setting out the Employer's attendance point system. The Claimant was unaware that he was facing termination for an additional absence. The Claimant was unaware how far away he was from the maximum point total.

REASONING AND CONCLUSIONS OF LAW:

Quit: The Administrative Law Judge ruled that the Claimant effectively quit by the operation of law through his incarceration. While we have in the past acknowledged the self-executing nature of 871 IAC 24.25(16) we have not previously faced a situation where a Claimant continues to work for an extended period of time following an incarceration that is alleged to be a disqualifying quit. Where a Claimant is incarcerated, the Employer knows of the incarceration, the Employer has time to decide what action to take based on the incarceration, and still the Claimant continues to work for the Employer after missing work due to that incarceration, the resulting separation is not a quit under 871 IAC 24.25(16). We do not rule that the separation must be cotemporaneous with the incarceration, but only that where the Claimant is jailed, released, and the Employer has a reasonable opportunity to react to the jailing and its absence, then the Claimant cannot be *deemed* to have quit when he keeps working past this time.

Here the Employer did not show to the hearing. Without some explanation for the delay, we find that the fact that the Employer allowed the Claimant to continue working a week after his release means the Claimant cannot be deemed to have quit by being jailed.

Discharge: The case thus becomes one of discharge, and whether the discharge was based on misconduct.

Iowa Code Section 96.5(2)(a) (2013) 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.

"This is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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).

Here the Employer did not appear at the hearing. Even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. *See Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1, 3 (Iowa 2005)(In finding that claimant, who did not appear, had proved good cause for her quit the Court holds that the "fact that the evidence was produced by [the employer]). Under the rules of the Department "a party's failure to participate in a contested case hearing shall not result in a decision automatically being entered against it." 871 IAC 26.14(9). Thus judgment is not automatic when the party with the burden fails to present evidence at hearing. Nevertheless it is markedly difficult to carry a burden based on no testimony at all.

While the record does disclose a number of legally unexcused absences by the Claimant, the Employer has failed to show notice to the Claimant. It is not enough to be denied benefits that you act contrary to policy. You have to know you are acting contrary to policy. *E.g. Infante v. IDJS*, 364 N.W.2d 262, 265 (Iowa App. 1984). The violation, in other words, must be a willful or wanton disregard of an employer's interest. 871 IAC 24.32(1)(a). For example, in *Henry v. Iowa Dept. of Job Service*, 391 N.W.2d 731 (Iowa App. 1986) an employee had mishandled cash register receipts. The Court found that since the employer had no manual explaining its rules on handling cash, then the employer had failed to show that the claimant's "actions were motivated by anything other than a good faith misunderstanding of this rule and did not amount to deliberate disregard." *Henry* at 737. Also in *Peck v. Employment Appeal Bd*., 492 N.W.2d 438 (Iowa App., 1992) the Court found that since the employer's handbook gave three days of unexcused absences before the employer would consider it job abandonment, the claimant could not be disqualified for only one such absence. In the absence of a policy then specific warnings may, of course, provide the necessary notice for a finding of willful misconduct. *E.g. Flesher v. IDJS*, 372 N.W.2d 230, 232 (Iowa 1985). We have no evidence of warning that give adequate notice to the Claimant. True, at some point, someone can be expected to know to come to work without a specific policy. But this is not a case of extended absence without notice, or routinely skipping work. It is a point system case. We have found misconduct in such cases, but in so doing the Claimant must be in a position to know what points are being counted. We note, for example, that the Claimant had counted against him illness, which many employers would excuse. We do not fault the Employer for this, but only note that what is excused and what isn't is not the sort of common-sense issue that we could expect a claimant to know without some notice. Since no such notice is shown we conclude that under these circumstances we find that the Employer has not proved the Claimant not guilty of willful misconduct.

Note to Employer: The procedural aspects of this case are a little odd. The Employer did not attend the hearing. We do not know if the Employer had a legally sufficient excuse for not attending since it has filed no argument with the Board. We recognize, of course, that until today the Employer had prevailed and thus has no reason to try to explain its absence at hearing. We point this out now so that the Employer is explicitly aware of the ability to apply for rehearing of today's decision within 20 days of issuance of today's decision. The Employer may make whatever argument for reopening that it thinks appropriate, and this would include argument explaining why the Employer failed to attend the hearing. We are not saying the argument would necessarily prevail, only that we would consider it. We do caution that the 20-day deadline for applying for rehearing is not flexible.

DECISION:

The administrative law judge's decision dated June 19, 2013 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Cloyd (Robby) Robinson

RRA/fnv