

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

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JOE L DOUTHART

Claimant,

and

NORDVIK INDUSTRIES INC

Employer.

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HEARING NUMBER: 08B-UI-09806

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: 96.5-2-a**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member concurring and one member dissenting, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

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John A. Peno

AMG/fnv

**CONCURRING OPINION OF MONIQUE F. KUESTER:**

I agree with my fellow board member that the administrative law judge's decision should be affirmed. Although the employer established legitimate business reasons for discharging the claimant, unfortunately under the circumstances, I would conclude that the claimant must be granted

unemployment insurance benefits. See Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

The claimant clearly lacked a credible rationale for missing work. His story was inconsistent and the employer had eyewitness evidence that the claimant's story was weak in light of the multiple versions and inconsistent facts he relayed. The claimant previously requested the aforementioned day off, but was denied the request. He claimed that his wife was so ill that he couldn't "leave her side," yet, he was able to get away to pick up his paycheck. I am also troubled by the fact that the claimant refused to bring in any substantiating evidence that he had taken his wife to the doctor as he claimed.

All that aside, the employer has the burden to establish disqualifying misconduct. Here, the employer failed to provide specific documentation that proved the claimant had excessive unexcused absences. The resulting discharge was because of a one-day absence. I agree with the administrative law judge regarding "the lack of a current warning." For these reasons, I find it difficult to deny the claimant benefits

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Monique F. Kuester

AMG/fnv

#### **DISSENTING OPINION OF ELIZABETH L. SEISER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge on the following basis.

#### **Findings of Fact:**

The employer's manufacturing operations relocated from Minneapolis to Corydon. Several major clients are still in the Minneapolis area and production schedules are attuned to transport schedules to ensure timely delivery of product to Minnesota. The claimant was a production employee. There were numerous attendance issues during his relatively short-term employment (November 2, 2006 – September 3, 2008).

It's undisputed that at claimant's most recent performance review he was denied a wage increase due to attendance in 2007. (Tr. 8, lines 26– 34) The claimant acknowledges that he had been warned verbally and in writing about attendance and that continued problems would result in his discharge. (Tr. 19, lines 7– 9) Some of the employer's concerns involved days when the claimant took full days off to take a family member to a medical appointment when he should have been able to work for part of the day. The claimant acknowledged having supplied medical documentation on several occasions to verify his need for personal sick leave when the employer so requested.

The final incident that triggered the discharge occurred on September 2, 2008. The claimant called and left a phone message at 7:30 am, his normal start time, to say that he would be off all day due to his wife's illness which required him to take her to a doctor's appointment. The Employer doubted the veracity of claimant's stated need to be off work for several reasons. September 1st (the day prior) had been the Labor Day holiday, which all employees had off. Three days prior on August 29<sup>th</sup>, the

Claimant's request to have September 2 off was denied; claimant wanted time off contiguous to the 3-day

Labor Day week-end to work on his roof. The employer denied the request because the Labor Day holiday already reduced the work week from five days to four days, which impacted production schedules; full staff was needed for the balance of the week in order to meet customer deadlines. Additionally, in spite of having informed the employer that it was necessary to be with his wife all day, the claimant came in to work mid-afternoon on September 2 to get his paycheck. Since the claimant had previously provided authorization for a co-worker to pick up the check on his behalf, the employer thought the claimant's appearance at work was inconsistent with his assertion earlier that morning that he couldn't leave his wife's side and he needed to care for her the entire day.

On September 2 the employer told the claimant to bring in some verification of a medical appointment that day if he wanted to preserve his employment. The employer expected verification sometime on the next day; the employer would have accepted something as simple as a payment slip, which the doctor's office could fax. The claimant said that neither he nor his wife received any kind of document showing that she had been to the doctor. The claimant never provided verification in any form to the employer.

#### Reasoning and Conclusions of Law:

The employer was reasonably suspicious of claimant's last minute call-in missing work on September 2 in the context of the claimant's recent request for this day off, and in light of claimant's prior history of warnings and loss of a raise related to attendance issues.

The employer has established a set of facts that justified requiring the claimant to supply verification of his wife's medical visit on September 2. The claimant had supplied medical verification on request several times previously. The claimant's testimony that there was no document available to verify his wife's doctor's appointment is not credible. The claimant was discharged for failing to comply with a reasonable supervisory directive. See, Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). For all the foregoing, I would conclude that the employer has met the burden of proof to establish disqualifying misconduct.

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Elizabeth L. Seiser

AMG/fnv