

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

VICKY J PLAGMAN

Claimant

and

POLARIS INDUSTRIES INC

Employer

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HEARING NUMBER: 22B-UI-08332

**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, 96.4-3

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:

Vicky Plagman worked for Polaris Inc. (Employer) as a full time as an assembler from April 27, 2014, she was fired on September 15, 2021. At the time of the discharge, the employer had a policy that required that employees unvaccinated against COVID-19 must wear face coverings in the building. Claimant knew of the policy. Shortly before her discharge, claimant became ill. In speaking with the Employer's nurse about her illness, she was asked whether she had received the COVID-19 vaccine. Claimant said she had not. This was the first time the Employer found out the Claimant was not vaccinated.

On September 15, 2021, Krystol Carlson of Human Resources called Claimant to her office after seeing Claimant in the work area without a face covering. Carlson told claimant that she was required to wear a face covering. Claimant refused to wear a face covering, and Carlson sent her home with the warning that continued refusal could result in discharge. Later the same day, Carlson called Claimant and asked if she had considered whether she would follow the employer's policy on face coverings. Claimant said that she would not wear a face covering. The Employer told the Claimant she was fired over this refusal. The Claimant gave the Employer no reason for refusal other than her desire not to wear a mask. The Employer's mask policy allowed for medical exceptions. Claimant testified she that at the time of refusal she was aware that failure to wear a mask may jeopardize her employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) provided at the time the Claimant was discharged:

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).

More specifically, continued failure to follow reasonable instructions constitutes misconduct. *See Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. *See Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." *Myers v. IDJS*, 373 N.W.2d 507, 510 (Iowa 1983)(quoting *Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review*, 19 Cmwlth. 475, 338 A.2d 794, 796 (1975)); *Pierce v. IDJS*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. *See Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985). Good faith under this standard is not determined by the Petitioner's subjective understanding. Good faith is measured by an objective standard of reasonableness. Otherwise benefits might be paid to someone whose "behavior is in fact grounded upon some sincere but irrational belief and where the behavior may be properly deemed misconduct." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988). "The key question is what a reasonable person would have believed under the circumstances." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988); accord *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993)(objective good faith is test in quits for good cause).

As an initial matter, recent changes to the Code regarding COVID vaccinations do not affect our analysis. First off, we do not view this as a case where the Claimant was fired for refusing to get vaccinated. The Claimant was unvaccinated and yet permitted to work for the Employer. Thus the analysis would be the same as with any other insubordination case, for example, refusal of an unjustified and burdensome requirement would not usually be misconduct. Second, and much simpler, Code section 96.5A is effective as of October 29, 2021, the day the Governor signed the bill. This Claimant was terminated a month before this.

Turning then to the usual insubordination analysis we weigh the Claimant's decision to refuse to wear a mask against the Employer's reasons.

The Employer's reasons for its mask policy for unvaccinated employees is to protect workers from the spread of COVID-19. Such a policy, in the fall of 2021, was consistent with CDC and OSHA guidance. The Employer's source control requirement is the result of legitimate safety concerns. Also, of course, the Employer has the basic interest that its employees follow its lawful commands. Against this the Claimant reason for refusal was principally that she felt she was being singled out as compared to other unvaccinated workers. But the Claimant was not in a position to know key issues bearing on whether the Employer was being unfair to her. These include whether the other workers were in fact unvaccinated, whether the Employer was aware of this, whether the personnel at the Employer who knew about vaccine status were also aware the other workers were not wearing a mask, and whether the workers in question had a medical or other

compelling excuse for not wearing a mask. Nor would the Claimant know what other unvaccinated workers besides her had been spoken to about not wearing a mask. Again, the standard is an objective one and the Claimant's concern for being singled out, when she had so little relevant information, was not objectively well grounded.

The Administrative Law Judge focuses on supposed lack of notice to the Claimant. The first problem with this analysis is that the Claimant made clear she had no intention of wearing a mask. The Employer *sent her home*, and gave her chance to comply with its directives, and the Claimant expressly stated she would not be doing so. In *Myers v. IDJS*, 373 N.W.2d 507 (Iowa 1983) an employee stated that in the future he would not take orders from co-workers temporarily assigned supervisory duties. He was fired for this declaration. On appeal "Myers claims an employee's statement as to future conduct does not constitute misconduct in the absence of any actual follow-through on the statement by the employee." *Myers* at 509. The Court declared that "[a]n employer has the right to expect an employee to follow his directions" and that "there is no basis upon which to accept Myers' argument that we have to wait for the employee to act on his declared intent, i.e., to actually refuse to disobey an order before there can be good cause for discharge." *Myers* at 510. Accordingly the Court held "willful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." *Myers* at 510. This is exactly the case here. The Employer's instructions were reasonable, a reasonable person would obey them. The second problem with the lack of notice finding is that the Claimant *was sent home for her defiance of those instructions and was told continued refusal could result in termination*. The Claimant acknowledged this. Then while called at home after being sent there, the Claimant then told the employer she would not be following its mask instruction in the future. This is disqualifying insubordination.

DECISION:

The administrative law judge's decision dated July 14, 2022 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for disqualifying misconduct. Accordingly, she is denied benefits until such time the Claimant has worked in and has been paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible. See, Iowa Code section 96.5(2)(a).

The Board remands this matter to the Iowa Workforce Development Center, Benefits Bureau, for a calculation of the overpayment amount based on this decision.

James M. Strohman

Ashley R. Koopmans