

STATE OF WISCONSIN  
LABOR AND INDUSTRY REVIEW COMMISSION  
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

---

DOUGLAS G WOLF, Employee  
2364 JACKSON ST #160  
STOUGHTON WI 53589-5404

UNEMPLOYMENT INSURANCE  
DECISION

Soc. Sec. No. \*\*\*-\*\*-1704  
Hearing No. 12000447MD

STOUGHTON TRAILERS LLC, Employer  
PO BOX 606  
STOUGHTON WI 53589-0606

**Dated and mailed:**

AUG 03 2012

wolfdo.urr:152:5

---

**SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL**

---

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission makes the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The employee worked for ten months as an industrial painter for the employer, a manufacturer of semi-trailers. His last day of work was January 16, 2012 (week 3), when he was discharged by the employer.

The employee was discharged for accumulating too many points for work rule violations. Under the employer's disciplinary policy, an employee who accumulates 18 or more work rule violation points is subject to discharge. Points accumulate even if the violations are for unrelated offenses.

In his first nine months of work, the employee was not subject to discipline. On December 19, 2011, the employee was written up and assessed three work rule violation points for telling his supervisor that he had been a Hell's Angel. The employer determined that the employee violated the employer's workplace violence policy, even though his supervisor did not feel threatened by the comment. The employee was disciplined because "what he said could have been taken as a threatening comment or perceived as a threatening comment."

Also on December 19, 2011, the employee was written up and assessed six work rule violation points for having had a beard on December 13. As a painter, the employee was required at times to wear personal protective equipment, including a respirator. "Being clean shaven is a requirement for a respirator to fit properly.

OSHA regulations require the use of a proper fitting respirator. Improper fit may cause harm to his health." The employee had been working in undercoating for the previous eight months. He was not required to wear a respirator to complete his job duties because he was not working in the spray booth.

On January 3, 2012, the employee was written up, assessed six work rule violation points, and given a one-day suspension for failing to wear required personal protective equipment. On December 20, 2011, the employee cut his wrist while scraping off tire protectors when the metal putty knife he was using slipped. The cut required six stitches to close. The employee always wore surgical gloves and had not been informed that he should be wearing other gloves to perform the job. The employer's position was that it was the employee's responsibility to know which gloves to use. A co-worker testified that all workers wore surgical gloves until after the employee had been written up. The employer described the employee's conduct as "well beyond acceptable (sic) behavior because Doug knows we wear gloves to protect ourself (sic) and the surgical gloves are not sufficient when working with undercoat and a scraper."

As a result of needing stitches, the employee was subject to a post-accident drug test. The employer informed him that the results came back as positive for marijuana. The employee asked for a retest, claiming that he did not use any drugs, legal or illegal. The employer would not allow a retest. Consequently, on January 3, 2012, the employee received a write up, was given a five-day suspension, and was required to go through an alcohol and drug use assessment before returning to work. The employee returned to work on January 11, 2012.

At the end of his shift on Thursday, January 12, 2012, the employee's supervisor told the employee that, effective on his next day of work, Monday, January 16, the employee would no longer be working in undercoating. Undercoating was getting a new supervisor. Because there were allegedly too many people working in undercoating, the employee's supervisor was bringing the employee with him to a different area of the plant. The employee's supervisor chose the employee to move with him out of undercoating because the employee had the most work rule violations. The employee was unhappy about the change in his work duties and did not wish to continue working for his supervisor.

On January 16, 2012, during the morning meeting, the employee's supervisor originally assigned the employee to work in the prime booth. However, the employee could not do so, because did not have the proper personal protective equipment. The employee was assigned other duties. After the morning meeting, the employee and his supervisor spoke for about 20 minutes. The employee felt that the company "screwed him over." The employee's supervisor said that the employee could talk to the supervisor's boss, which the employee indicated he wished to do. The employee was told to work in blow off and the small spray booth until the meeting could be set up.

The employee needed a respirator to work in the small spray booth. His respirator was still in the undercoating area. After he retrieved his respirator, the employee asked if a meeting with the boss had been set up yet. It had not. The employee was told to work in blow off and in the small spray booth until his supervisor arranged the meeting. At that time, the employee informed his supervisor that he needed a new respirator, because his was covered with undercoating. Employees obtain new equipment from their supervisors.

After throwing the employee's respirator on the floor in the *corner of his office*, the employee's supervisor told him that he would see about getting the employee a new one and that the employee should go to the spray booth and the blow off station. As he walked slowly to the spray booth with his hands in his pockets, the employee's supervisor told the employee that "this is a two-way street" and the employee needed to meet the supervisor half way. The employee replied, "Well, this is what you get. I am not going to give you ample effort after this company did to me what they did... Once I meet with your boss, it is going to be over anyway."

The employee went to the spray booth and told the three workers there that he was not going to work inside because he did not have a respirator. The employee did not get very close to the spray booth because the doors were not closed and there was overspray. Shortly after arriving at the spray booth, parts began coming out of the blow off assembly. The employee walked over to the blow off station and started the prep work. A few minutes later, after the employee's supervisor had spoken with his boss, the employee was discharged for refusing to help out in the spray booth, as directed. The employer assessed nine work rule violation points for the final incident – failure to follow instructions of a supervisor or other manager, or failure to perform the work as directed.

A discharged worker is eligible for unemployment benefits unless discharged for misconduct connected with the employment. Wis. Stat. § 108.04(5). Misconduct connected with employment means conduct showing an intentional and substantial disregard of the employer's interests or of the employee's job duties and obligations, or of negligence so gross or repeated as to demonstrate equivalent culpability. *Boynton Cab Co. v. Neubeck & Ind. Comm.*, 237 Wis. 249 (1941).

Generally, refusal to follow a reasonable employer directive is misconduct, but a single isolated incident of disobedience is not misconduct if the employee has a defensible reason for it. *White v. ARA Cory Refreshment Services*, UI Dec. Hearing No. 03600041MW (LIRC May 9, 2003). In this case, the employee was directed to work in both the small spray booth and the blow off area. The employee went over to the spray booth, where three co-workers were already working. He refused to work in or near the spray booth without a respirator, after having recently been written up and suspended for not wearing proper personal protective equipment. The employer's directive that he work in the spray booth without a respirator was not reasonable, and the employee's refusal to do so was defensible.

The employee's supervisor's contention that the employee did not need a respirator to perform his assigned duties because he was only assisting others in the spray booth is disingenuous. The employee had been disciplined twice previously for failing to properly protect himself in the workplace and had been warned that he was subject to discharge for any further offense.

The commission therefore finds that in week 3 of 2012 the employee was discharged but that the discharge was not for misconduct connected with the employee's work, within the meaning of Wis. Stat. § 108.04(5).

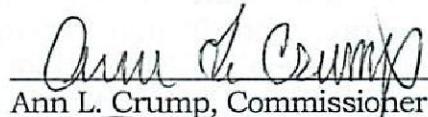
## DECISION

The decision of the administrative law judge is reversed. Accordingly, the employee is eligible for benefits beginning in week 3 of 2012, if otherwise qualified. There is no overpayment as a result of this decision.

BY THE COMMISSION:

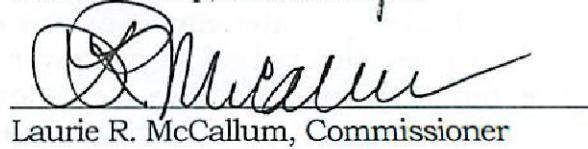
---

Robert Glaser, Chairperson



---

Ann L. Crump, Commissioner



---

Laurie R. McCallum, Commissioner

NOTE: The commission conferred with the ALJ before deciding to reverse the appeal tribunal decision in this case. The ALJ found the testimony of the employee's supervisor to be more credible than that of the employee. The ALJ believed that the employee's supervisor was honest when he testified that, after being told to work in the small spray booth, the employee stuck his hands in his pockets, said, "This is all you'll get out of me," and refused to work in the booth. The ALJ did not believe the employee's testimony that he did not follow his supervisor's directive because he did not have a respirator. The ALJ believed that the employee could have performed his assigned duties without a respirator and that the employee was upset about something other than the lack of a respirator. The ALJ did not have any particular demeanor impressions.

The commission does not agree with the ALJ's credibility determinations. The commission believes that the employer's policies required the employee to wear a respirator to perform the duties assigned to him and that he was at risk of being discharged for failing to work with the proper personal protective equipment. The commission also believes that if, after

being told to work in the small spray booth, the employee had stuck his hands in his pockets and said, "This is all you'll get out of me," his supervisor would have included the same in his notes (Exhibit 4). Instead, the employee's supervisor's notes indicate that, after the employee was told to help spray hats in the small booth, the employee very slowly walked toward the small booth with his hands in his pockets. It was the supervisor who spoke next. The supervisor's notes do not indicate a refusal by the employee to go to the small spray booth, and the employee did, in fact, go to the small spray booth.

cc: Attorney Danielle Schroder