**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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| **BRYAN T KLINE**<br>Claimant | **APPEAL 14A-UI-10113-LT** |
| | **ADMINISTRATIVE LAW JUDGE DECISION** |
| **BRIDGESTONE AMERICAS TIRE**<br>Employer | |
| | **OC: 08/24/14**<br>**Claimant: Respondent (1)** |

Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from the September 17, 2014, (reference 01) unemployment insurance decision that allowed benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on October 17, 2014. Claimant participated. Employer participated through division human resources manager Jim Funcheon and tire room area business manager Chad Dowling.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a tire builder, paid by the piece, from 1995, and was separated from employment on August 29, 2014. His last day of work was August 25, 2014. The employer alleges that on that day claimant knowingly built tires incorrectly and failed to tell the supervisor it was done incorrectly. The employer skipped steps of the progressive discipline policy since it believed claimant hid information. He had been issued a written warning in February 2014, for incorrectly building a tire (missing one-ply) on his first day in that department.

On the August 25 morning briefing, supervisor Brett Russelberg indicated there was a product size change but the paperwork had not been signed. During the shift before claimants, material was loaded incorrectly into the machine he operated. He had one day of training on this machine. Because of the misloaded material, the tire strength was reduced by half because 3 of 4 ply layers went the same direction instead of at a 45 degree angle to each other. Andy Lewis told claimant the three-ply was backwards. He stopped building and checked. Of nine rolls, three had been loaded. Lewis asked claimant if he was going to tell a supervisor (Brett Russelberg) and claimant replied he would once he got the machine going. Claimant struggled with the machine until about 1 p.m. when Phil Howell approached him and said he had thought about not telling him about the problem and let him build the tires the wrong way all day. Howell finally helped claimant set up and adjust the machines. By that time there were four-and-a-half hours left in the shift to build tires. Claimant spoke with Russelberg on the radio once and again

in person about other matters but forgot to tell him about the earlier misloaded machine problem. The defective tires were not caught by the inspection department, but were pulled aside before they left the plant. He did not tell anyone he would hide or lie about the problems with the machine or resulting faulty tires. The employer claimed that the union steward and another employee both told claimant to tell the supervisor and claimant told them he did not think he would tell a supervisor since he was disciplined in February and was afraid of further discipline or discharge. The employer did not present either of these individuals to testify or any others with first-hand or direct knowledge. He acknowledged the following day that he had built some tires incorrectly and forgot to tell his supervisor.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). The decision in this case rests upon the credibility of the parties. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.

> 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 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 definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The conduct for which claimant was discharged was the result of a lack of training, incorrect placement of material by another employee, and forgetting to tell a supervisor about the issue. None of this indicates deliberate conduct in spite of less credible allegations to the contrary. Furthermore, the employer did not discipline Howell who knowingly let claimant proceed with faulty material and

delayed assistance to him; and the employer did not discipline others for not reporting what they knew and leaving it to claimant to make a report. Even though claimant was responsible for building the faulty tires and forgot to report the issue in a timely fashion, since the consequence for him was more severe than other employees received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. While the employer presented reasons based upon non-witness allegations for failure to follow the progressive discipline policy, the claimant had not been trained thoroughly on that machine and was dealing with multiple issues affecting his job performance that shift, which reasonably could have also adversely affected his recall to tell Russelberg about the tires. Certainly greater care should have been taken, but as merely an isolated incident of poor judgment without prior warning, the employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Training or general notice to staff about an issue is not considered a disciplinary warning. A warning for missing a ply on a different machine on the first day in the department is not similar to the final alleged act and the employer's simple accrual of a certain number of warnings counting towards discharge does not establish repeated negligence or deliberation and is not dispositive of the issue of misconduct for the purpose of determining eligibility for unemployment insurance benefits.

**DECISION:**

The September 17, 2014, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

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