

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JOHN J MARCO
Claimant

BRIDGESTONE AMERICAS TIRE
Employer

APPEAL 17A-UI-13271-SC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/26/17
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(9) – Disciplinary Suspension

STATEMENT OF THE CASE:

John J. Marco (claimant) filed an appeal from the December 21, 2017, reference 01, unemployment insurance decision that denied benefits based upon the determination Bridgestone Americas Tire (employer) discharged him for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on January 17, 2018. The claimant participated. Tire Operator Donald Withers participated on his behalf. Registered witness Jeremiah Johnson did not answer when called at the phone number provided and did not participate. The employer participated through Human Resource Section Manager Tom Barragan and Human Resource Division Manager Jesus Escobedo. No exhibits were offered into the record.

ISSUE:

Was the claimant suspended for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds the facts of this case are largely uncontested. The claimant was employed full-time as a Production Worker/Banner Operator beginning on July 27, 1998, and was suspended from employment for 30 days on November 21, 2017. The employer has anti-harassment and mutual respect policies in an effort to maintain a respectful work environment for its employees.

On November 17, 2017, the claimant's co-worker Lucia Medina reported that the claimant had used profanity towards her and flipped her off or extended his middle finger at her. The employer investigated the incident. The claimant acknowledged that he said "fuck you" three times to her in succession and walked away while flipping her off with both hands. The claimant understood this was a violation of the employer's policies but thought as a first time incident it would result in a lesser penalty than a 30-day suspension.

The claimant and Medina had arguments in the past. The most recent was months before the final incident. Medina would tell the claimant and other employees where to work and she

yelled at the claimant in Spanish. The claimant does not know if she was using profanity towards him as he does not speak Spanish. The claimant and his witness were unaware of any time that management had knowledge of issues similar to the final incident and did not take any disciplinary action.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was suspended from employment due to job-related misconduct. Benefits are denied.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue 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:

(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(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. This rule is intended to implement Iowa Code section 96.5 and Supreme Court of

Iowa decision, *Sheryl A. Cospers vs. Iowa Department of Job Service and Blue Cross of Iowa*.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cospers 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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). 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). "The use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents or situations in which the target of abusive name-calling is not present when the vulgar statements are initially made." *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa Ct. App. 1990).

The employer has an interest in maintaining a respectful work environment for its employees. In an effort to maintain a respectful environment it has established policies and its employees are aware of the policies. The claimant's conduct toward his co-worker on November 17, 2017 was a deliberate disregard of the employer's interest and a disregard of standards of behavior which the employer has the right to expect of employees. The claimant's argument that Medina was not disciplined following their prior disagreements is not persuasive as he has not established that she used profanity and profane hand gestures toward him. The claimant's conduct is disqualifying without prior warning.

DECISION:

The December 21, 2017, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

src/scn