

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

FRANCISCO CASIANO

Claimant

APPEAL NO. 16A-UI-07579-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE AMERICAS TIRE

Employer

OC: 06/12/16

Claimant: Respondent (2)

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

Bridgestone Americas Tire filed a timely appeal from a representative's decision dated July 1, 2016, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that he was dismissed from work on June 16, 2016 for excessive absences but found the absences were due to illness and were properly reported. After due notice was provided, a telephone hearing was held on July 28, 2016. Claimant participated. The employer participated by Mr. Jim Funcheon, Division Human Resource Manager, and Mr. Jeff Higgins, Labor Relations Manager. Employer's Exhibits A, B, C, and D were admitted into the hearing record.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with his work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Francisco Casiano was employed by Bridgestone Americas Tire until June 16, 2016 when he was discharged from employment. Mr. Casiano was employed as a full-time production worker and was paid by the hour.

Mr. Casiano was discharged on June 16, 2016 after the employer concluded that the claimant's absences from work were excessive and unexcused and in violation of the bargaining agreement between the company and the union.

Mr. Casiano had previously been granted a medical leave of absence by the company and was expected to return to work on May 23, 2016 after being released by his doctor the previous day. Although Mr. Casiano had been released by his physician, he did not report for work on May 23, but called off work citing "personal business" as the reason for his absence. Neither Mr. Casiano continued to call off work each work day between May 23, 2016 through June 2, 2016 citing "personal business" each day as the reason for his nonattendance. The claimant did not

call in or report on June 3, but once again called off work using the same reason on June 4, 2016.

On June 6, 2016, the claimant spoke with Jeff Higgins, the company's Labor Relations Manager, and at that time Mr. Higgins advised the claimant to "come to work" further stating that the company would look into Mr. Casiano's previous request for family medical leave. The claimant reported to work the next day, June 7, 2016 but did not remain or work. The claimant discontinued reporting in each day as required by company policy and the agreement between the company and the bargaining unit and after he had not reported or called off work as required between June 6, 2016 and June 16, 2016, he was discharged from his employment with the company.

On May 24, 2016, the claimant had requested additional time away from work under the Family Medical Leave Act for the purposes of providing child care to his two children because his wife was being investigated by DHS on May 23, 2016 regarding potential neglect of the children due to substance abuse. Mr. Casiano also wanted time away from work so that he could find substance abuse treatment for his wife.

After the claimant had been absent from work without authorization for an extended period and most recently had failed to report or provide daily notification as required by both company policy and the bargaining agreement, he was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

In discharge cases the employer bears the burden of proof in establishing disqualifying conduct on the part of a claimant. See Iowa Code section 96.5-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused. The Court further held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer. In the case of Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) the Court held that absence due to matters of "personal responsibility" such as transportation, child care or oversleeping are considered unexcused.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent attendance violation that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no fault absenteeism policy is not dispositive of the issue of qualification for benefits.

The evidence in the record establishes that the claimant's unexcused absences with this employer were excessive. After the claimant had been released to return to work from the medical leave of absence, the claimant did not report back to work but began calling off work each day citing "personal business" as the reason for his continuing absenteeism. Mr. Casiano nor his children were ill. The claimant cited "personal business" because he did not have child care arrangements for one of his children and because he felt that he needed time to find substance abuse counseling for his wife. Although the claimant's work shift did not begin until midafternoon, he felt that the daytime hours before he began work each day were not sufficient and initially called off work each day. At the end, the claimant elected not to call each day as required and he was discharged after he failed to report or provide notification for seven work days in violation of the employer's policies and the company union bargaining agreement. Mr. Casiano had been put on notice by the employer that he needed to be reporting for work each day and was given the opportunity to have the company further consider his request for an additional leave of absence.

Although sympathetic to the claimant's situation, the administrative law judge concludes that reasonable alternatives were available to Mr. Casiano. The claimant did not follow the employer's attendance policy in connection with his recent absences. Based upon the claimant's failure to properly notify the employer of his recent absences and the previous reasons given for failing to report to work, the administrative law judge concludes that the claimant's unexcused absences were excessive and constituted misconduct in connection with the employment.

Based upon the evidence in the record and the application of the appropriate law, the administrative law judge concludes the claimant was discharged for misconduct. Accordingly, the claimant is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount providing that he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Casiano. Any benefits claimed or received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,315.00 since filing a claim with an effective date of June 12, 2016 for the week ending dates of June 18, 2016 through July 16, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview or make a firsthand witness available for rebuttal.

Iowa Code § 96.3(7)a-b, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for

information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period

of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code section 96.3-7. In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the agency the benefits he received and the employer's account shall not be charged.

DECISION:

The representative's decision dated July 1, 2016, reference 01, is reversed. Claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,315.00 and is liable to repay this amount. The employer's account shall not be charged based upon the employer's participation at fact finding.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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