

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBIN L GUERRERO
Claimant

APPEAL NO. 11A-EUCU-00849-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BRIDGESTONE AMERICAS TIRE
OPERATIONS LLC**
Employer

OC: 05/01/11
Claimant: Respondent (2-R)

Section 96.5(2) – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer, Bridgestone, filed an appeal from a decision dated May 31, 2011, reference 01. The decision allowed benefits to the claimant, Robin Guerrero. After due notice was issued a hearing was held by telephone conference call on January 3, 2012. The claimant participated on her own behalf. The employer participated by Human Resources Manager Jim Funcheon, Human Resources Section Manager Tom Barragan, and Unemployment State Consultant Kendra McDonald.. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely and whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

A disqualification decision was mailed to the employer's last-known address of record on May 31, 2011. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 10, 2011. The appeal was not filed until December 2, 2011, which is after the date noticed on the decision.

Robin Guerrero was employed by Bridgestone from October 25, 2010 until May 3, 2011 as a full-time employee in the shipping department. The claimant was advised, along with all other employees, that smoking is allowed in the designated area only between the times of 10:00 p.m. and 1:00 a.m.

This policy is in effect to allow employees to smoke when it would otherwise be banned as being prohibited by law in “public places.” The limited time frame is so that the employer may know who is legitimately on break to smoke rather than having to investigate every single person out smoking.

While she was still on her six-month probationary period the claimant was seen by a security guard smoking in the designated area at 1:50 a.m., outside the allowable time period. She was interviewed by her supervisor and she admitted she had been smoking outside the allowable time frame but it was “an honest mistake” because she had not looked at a clock or a watch.

The matter was reported to Human Resources Section Manager Tom Barragan and due to the claimant's schedule, he was not able to speak with her until April 28, 2011. At that time she admitted to smoking outside the allowed time period. She was suspended pending further investigation which consisted of interviewing the security guard and checking the surveillance cameras. She was discharged on May 3, 2011, for violation of a known company rule during the probation period.

Robin Guerrero has received unemployment benefits since filing a claim with an effective date of May 1, 2011.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 96.6-2 provides in pertinent part:

The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. . . . Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision.

The decision was not mailed to the employer's designated representative, although it was mailed to the corporate office. There is no testimony about what happened to the decision when it arrived at the corporate office but it is evident nothing was done until the third quarter 2011 statement of charges was mailed to TALX. As there is no substantial proof as to the actual date of receipt of the earlier mailings, the appeal shall be accepted as timely.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

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 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.

871 IAC 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.

The claimant was aware of the policy regarding the time frame during which employees may smoke. She went outside to smoke without looking at a clock or a watch. The administrative law judge finds this unlikely as she knew there was only a specific period of time she was allowed for a break and if she did not check to make sure what time she left, she would not know what time she was to return.

Ms. Guerrero was still on her six-month probation period and knowingly violated a known company policy. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7, 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) 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. 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. The employer shall not be charged with the benefits.

(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.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The decision of the representative dated May 31, 2011, reference 01, is reversed. The appeal in this case shall be accepted as timely. Robin Guerrero is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs