

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WAYNE MCCALED
Claimant

APPEAL NO. 11A-UI-15468-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BRIDGESTONE AMERICAS TIRE
OPERATIONS LLC**
Employer

OC: 04/03/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer, Bridgestone, filed an appeal from a decision dated May 3, 2011, reference 02. The decision allowed benefits to the claimant, Wayne McCaleb. After due notice was issued a hearing was held by telephone conference call on January 5, 2012. The claimant participated on his own behalf. The employer participated by Human Resources Manager Jim Funcheon, Labor Relations Manager Jeff Higgins, and Unemployment State Consultant Kendra McDonald. Exhibits D-1 and One were 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 3, 2011. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 13, 2011. The appeal was not filed until December 2, 2011, which is after the date noticed on the decision. The decision was mailed to the employer's corporate office but no one can account for what happened to it. The address of record should have been the TALX address which had been the employer's representative since 2005. The employer's representative did not know about the decision until it received a third quarter 2011 statement of charges, although the employer did not account for the second quarter 2011 statements of charges which it would have been sent by Iowa Workforce Development.

Wayne McCaleb was employed by Bridgestone from November 8, 2010 until March 7, 2011 as a full-time service operator. At the time of hire he attended an orientation and received a packet containing the employer's policies. The policy states any employee may be fired for violation of any policy within the 180-day probationary period. Among the policies is one which prohibits the possession or use of any cell phone on the company premises.

On February 16, 2011, Supervisor Lydia Smith saw the claimant behind a machine using his cell phone. She reported it to the department foreman who referred it to Labor Relations Manager Jeff Higgins. Mr. Higgins met with Mr. McCaleb on February 21, 2011, at which he admitted he knew the policy but had his cell phone in the production area.

The employer's concern for cell phones is first of all they constitute a distraction for employees in a highly industrialized work area. Secondly, the capacity to take pictures with cell phones would threaten production secrets.

Mr. McCaleb was suspended February 21, 2011, after the meeting, pending further investigation. He was notified by letter on March 7, 2011, he was discharged.

Wayne McCaleb has received unemployment benefits since filing a claim with an effective date of April 3, 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 company policy prohibiting the possession or use of cell phones anywhere on the employer's premises. He violated that policy, talking on his cell phone when he should have been working. This meant he was on personal business while on the clock, distracted from his work and jeopardizing his safety and the safety of others. In addition the situation was conducive to picture taking of protected industry procedures.

In order to be disqualified from unemployment benefits for a single incidence of misconduct, the misconduct must be a deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees. *Henry v. IDJS*, 391 N.W.2d 731 (Iowa App. 1986). The administrative law judge considers the claimant's willful conduct to rise to this standard. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code § 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 he 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 3, 2011, reference 02, is reversed. The employer's appeal shall be accepted as timely. Wayne McCaleb is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he 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