

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDGAR PENA
Claimant

APPEAL NO. 12A-UI-10215-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BRIDGESTONE
Employer

OC: 07/22/12
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Bridgestone, filed an appeal from a decision dated August 13, 2012, reference 01. The decision allowed benefits to the claimant, Edgar Pena. After due notice was issued, a hearing was held by telephone conference call on September 18, 2012. The claimant participated on his own behalf. The employer participated by Human Resources Manager Jim Funcheon and Labor Relations Manager Jeff Higgins.

ISSUE:

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

FINDINGS OF FACT:

Edgar Pena was employed by Bridgestone from March 21, 2011 until July 3, 2012 as a full-time production worker. He was aware of the policy which requires employees to call in if they are going to be absent for a scheduled shift. In addition, he knew how to apply for an approved leave for a prolonged absence as he had done so in March 2012.

Mr. Pena's last day of work was June 12, 2012. His next scheduled day of work was June 15, 2012, and he called into the guard shack, as required, to report he would be absent. He had injured his back at home and went to a doctor on June 16, 2012. That note excused him from work "until further notice" but Mr. Pena never gave that note to the employer.

He continued to call in for the next five scheduled workdays, June 16, 17, 20, 21, and 25, 2012. He assumed the guard shack was conveying the information to human resources on his behalf that the absence would be for some time, but this is not correct. The guards only report who called in and why they were absent.

On June 20 and 26, 2012, Mr. Pena talked to his supervisor and explained he intended to come back to work but did not know when that would be. At no time did he contact human resources to ask for a leave of absence since the doctor had not given him any definite return to work date. He was no-call/no-show to work on June 26, 29, 30 and July 1, 2012. The employer sent

him a letter July 3, 2012, stating he was terminated for failing to report to work. Bridgestone does have a policy which considers no-call/no-show to work to be a voluntary quit.

After receiving the letter by certified mail Mr. Pena made no attempt to contact the human resources department to explain the situation and provide medical documentation. Instead he decided to move to California to be with family.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer

has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The claimant considers he was discharged but the letter he received specifically states the separation was a voluntary quit for failing to report to work. He was no-call/no-show to work for four scheduled shifts.

It may be true Mr. Pena had a doctor's note excusing him from work "until further notice" but this does not excuse his absences since he did not give the note to the employer. It is unclear why he thought four days of no-call/no-show to work would be excused, along with two weeks of calling in absent, if he produced the note retroactively. In any event he did not make even the slightest effort to contact the employer after receiving the letter and attempt to work it out, apply for a leave of absence or file a grievance. He elected not to try to preserve his job and moved to California.

The record establishes the claimant quit without good cause attributable to the employer and he 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 he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of August 13, 2012, reference 01, is reversed. Edgar Pena 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/css