IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Ds Moines, Iowa 50319

DECISION OF THE ADMINISTRATIVE LAW JUDGE

CLAIMANT:
CRAIG ACKERMAN
705 W. Vandorn St.,
Polk City, IA 50226,

EMPLOYER:
BRIDGESTONE AMERICAS TIRE,
% TALX UCM SERVICES, Inc.
P.O. Box 283
Saint Louis, MO, 63166

IOWA WORKFORCE DEVELOPMENT:
JONI BENSON, IWD
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Appeal Number:
OC: 11/30/2014
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to the Department. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

June 10, 2015
(Dated and Mailed)

Iowa Code section 96.5-1 – Causes for disqualification

STATEMENT OF THE CASE

The Claimant Craig Ackerman ("Ackerman") filed an appeal from a decision issued by Iowa Work Force Development ("IWD") dated March 4, 2015, reference 2, holding that he was disqualified from receiving unemployment insurance benefits because he was discharged from work on February 17, 2015, for violation of a known company rule. The hearing was held on June 4, 2015, and Ackerman appeared and provided testimony. He was represented by Marlon Mormann. Jim Funcheon ("Funcheon") appeared on behalf of the Employer Bridgestone Americas Tire % Talx UCM Services, Inc. ("Bridgestone") and provided testimony. Jeff Higgins ("Higgins") and Ken McDaniel ("McDaniel") also

appeared and provided testimony for Bridgestone. Chris Behaer ("Bahear") appeared and provided testimony for Ackerman. Official notice was taken of the administrative file, and Bridgestone's exhibits were admitted into the record. In addition, the record was held open until June 9, 2015, so that Ackerman could submit additional documentation and legal authority, which was done. Such documents, as well as Bridgestone's response, were entered into the record. The matter is now fully submitted.

ISSUE

The issues are: (1) whether IWD was correct in finding that Ackerman had been discharged for misconduct; and (2) whether IWD was correct to then determine that Ackerman is ineligible to receive unemployment insurance benefits for this reason.

STATEMENT OF FACTS

Starting in June of 1997, Ackerman commenced working for Bridgestone, and at least by January 2015, his job title was powerhouse lead man. Hearing Recording, at 1:19:46-1:20:03.[1] On November 20, 2014, prior to the specific events giving rise to this case, Bridgestone placed Ackerman on a "written condition of employment" for one year in order to address certain issues. Hearing Recording, at 26:00-:25. The condition of employment was signed by both Bridgestone and Ackerman, and it states:

> This document will be filed as a written condition of employment for (1) one year from the above date due to committing an unsafe act, falsification, and failure to follow standards. If Mr. Ackerman violates any condition of this document, he will have his employment terminated per this Condition of Employment.
>
> Mr. Ackerman is also being addressed for failing to follow operator working standard by not communicating daily turnover per standard. If Mr. Ackerman fails to communicate daily turnover[,] h[e] will receive discipline up to and including discharge.
>
> This will also serve to document a 14 Working Day suspension issued to Mr. Ackerman for said incident.

Ex. 2. As indicated in the document and as confirmed by Bridgestone's representative, the alleged act giving rise to at least a portion of this condition of employment was failure to provide a status report to the next shift, i.e., a turnover report, concerning Ackerman's work in the powerhouse at Bridgestone's facility. Id.; Hearing Recording, at 29:38-31:00. Further, despite its language to the contrary, the condition of employment contained no specific set of conditions. Id.

On the night of January 6, 2015, during second shift, a pump that had previously failed in the curing system of the facility needed to be replaced. Id., at 32:00-:18. Ackerman was on duty for the second shift as the emergency maintenance/preventative maintenance ("EM/PM") individual and as the "lead man" coordinating the communication between the facility's management and the powerhouse. Id.,

[1] All evidence was considered in making each finding of fact and conclusion of law, and the specific cites to the Hearing Recording are only meant to provide some insight as to the source of the information and not meant to catalog each and every fact that gives rise to the specific finding or conclusion.

at 32:20-:49. One of duties in these roles was to provide a verbal and written turnover report at the end of the shift, and on that night, his "primary" job was to replace the pump and the related motor and coupling; to align the motor; and to bring the machinery online. Id.; 32:52-33:35. There were two other individuals with Ackerman in the powerhouse, including Steve Lyle, who was designated as the "curing man" and assigned to assist Ackerman. Id., at 33:40-:59. Randy Sellers ("Sellers") was the third individual, and he was the operator of the powerhouse and had to remain in the powerhouse. Id., at 34:00-34:16.

At approximately 4:00 a.m. on January 7, 2015, McDaniel arrived at work and read an email indicating that the pump was still down. Id. at 35:10-:18. Fifteen minutes later, he walked to where Sellers was working and inquired about the status of the repair. Id., at 35:19-:28. Sellers responded that Lyle and Ackerman were still working on it, and at approximately 4:30 a.m., Ackerman walked to the corner area in the basement where the pump was located to ask Lyle and Ackerman directly about the status of the repair. Id., at 35:29-:44, 47:45-:48. At that time, Ackerman and Lyle "were finishing their part of the project," and a separate electrician was wiring the motor, which needed to be done before being aligned and brought back into service. Id., at 35:45-:53. At approximately 5:30 a.m., after McDaniel had returned to his office, the electrician called on the radio that he had finished wiring the pump and checking its rotation. Id., at 35:54-36:34. McDaniel then left his office and found Lyle, which he instructed to return to finish the work on the pump until it was done or the shift ended at 6:00 a.m. Id., 36:35-37:00. McDaniel then began looking for Ackerman, who McDaniel found near a boiler along with Doug Brauner ("Brauner"), who was the daytime shift EM/PM individual. Id., at 37:23-:26; 39:06-39:11. McDaniel testified that he saw both Ackerman and Brauner with what appeared to be cigarettes in their hands, in violation of the smoking policy that allows smoking only in designated areas. Id., at 37:27-:35. Importantly, because the area was so noisy, requiring hearing protection, Ackerman had to yell at Brauner and Ackerman to get their attention. Id., at 37:36-:42, 44:17-:20. McDaniel testified that he "yelled at [Ackerman] and [Brauner] to get back to the . . . basement to get the pump online" because the electrician had finished, the pump was ready to bring online, and it was not the end of the shift yet. Id., at 37:57-38:11. McDaniel then left the boiler room area and walked to the basement area with the pump expecting to see Lyle and Ackerman already at that location since Lyle had a bicycle and Ackerman had a golf cart. Id., at 38:18-:34.

Importantly, McDaniel did not wait for a response from Ackerman and Brauner prior to leaving the boiler room, although he testified at one point that he saw an affirmative headshake. Id., at 46:13-:29, 50:40-51:06. Moreover, Ackerman testified that, when McDaniel approached him, he was giving Brauner a turnover report and that he only heard McDaniel state that someone needed to go down to the basement to finish the pump replacement, which Brauner indicated he would do since he had already clocked in and since only one individual was needed to finish the job after the electrician had wired the device. Id., at 1:20:31-1:21:27; 1:23:03-:22. Ackerman also testified that he had already given the turnover report to Kelly Coleman ("Coleman"), the "day shift curing man" and lead, concerning what needed to be done after the electrician finished wiring the pump. Id., at 38:41-69; 47:15-:20, 1:21:28-:37. Ackerman further credibly testified that he then spent the remainder of his shift putting tools away, which was in accord with the common practice of how the last portion of a shift is spent even if prohibited by the union contract as Bridgestone suggested. Id. 1:21:38-1:22:07,1:39:07-1:40:00, 1:46:29-:43. Ackerman finally testified that he was not smoking, but this testimony is not credible in part because of McDaniel's observations discussed below and because of Ackerman's explanation.

At approximately 5:37 a.m., McDaniel arrived on foot in the basement containing the pump, and observed both that the pump was not working and that Coleman was present and working on the pump. Id., at 38:41-69;47:15-:20. Lyle and Brauner arrived shortly thereafter to assist; however, Ackerman never returned to the pump area. Id., at 39:00-:20. Brauner indicated that Ackerman was not "behind him," and McDaniel supervised the repair project until it was completed at approximately 6:15 a.m. Id., at 39:21-:35. After this, McDaniel released Lyle to "go home" as the repair had been finished and the shift was over. Id., at 39:36-:40. McDaniel then returned the boiler room to search for evidence of smoking, and he testified to finding a cigarette butt and ash where Ackerman was standing. Id., at 39:54-40:14. McDaniel then met with Higgins, the Employer's local HR director, to turn over what he believed to be violations of company policy by Ackerman. Id., at 40:15-:37. McDaniel specifically identified three violations of company policy, including: (1) disregarding an order of management for failing to return to the basement to finish repairing the pump when requested; (2) failing to give a turnover report; and (3) smoking in a non-designated area. Id., at 40:40-:55. With respect to the turn over report, McDaniel stated he asked the other EM/PM individuals, and they indicated that there was no such report. Id., at 42:32-:45. McDaniel offered no credible testimony as to whether Ackerman prepared a written log report, as he equivocated on the issue and as Bridgestone failed to produce the log. Id., at 50:00-:15.

Higgins then initiated an investigation into this incident. The first individual he spoke with was Brauner, who purportedly admitted to smoking with Ackerman and hearing McDaniel's instruction to go to the basement. Id., at 54:42-:55:07. Higgins then placed Brauner on "Article 12," which is typically an unpaid, two-day cooling off period that can be extended as necessary to complete an investigation. Id., at 55:08-:44. In this case, though, Higgins placed Brauner on a "working Article 12," which allowed Brauner to continue working. Id., at 55:54-:56:19. Higgins next met with Ackerman on January 12, 2015, where they reviewed McDaniel's allegations and Higgins placed Ackerman on a working Article 12. Id., at 56:25-57:06. On January 14, 2015, Higgins again met with Brauner and suspended Brauner from January 14, 2015, to February 8, 2015, for violation of the smoking policy. Id., at 44:24-:41, 57:16-57:30. Brauner was not terminated and received a suspension because Bridgestone had not previously informed him that he could not smoke in the boiler area, and Brauner returned to work on or about February 11, 2015. Id., see also id., at 57:30-:36. On January 16, 2015, Higgins met with Coleman, who purportedly stated that Ackerman did not provide any turnover report on the day in question as Ackerman had previously reported to Higgins and that Ackerman left shortly after 5:00 a.m. in order to put tools away. Id., at 57:40-58:10; 1:05:41-:48. Importantly, Coleman allegedly stated he got his turnover information from Lyle. Id., at 58:22-:32. On January 18, 2015, Higgins called Brauner concerning Ackerman's other claim that Brauner indicated that he would take care of pump, and Brauner purportedly denied making the statement, stating Ackerman knew he was to go down to the basement. Id., at 58:58-59:14. On January 29, 2015, Higgins met with the electrician, and on January 30, 2015, Higgins concluded his investigation by meeting with Lyle. Id., at 59:25-:45; 59:58-1:00:13. Higgins then met with Funcheon and another Bridgestone representative, and they decided to terminate Ackerman ostensibly for violating the condition of employment. Id., at 1:00:40-:50.

On February 17, 2015, Bridgestone formally terminated Ackerman's employment. Behaer was present at the meeting, and he credibly testified that the only reason given to Ackerman for his termination was a violation of the condition of employment for failing to go to the basement when instructed. Id., at 1:16:22-:35. McDaniel was present at the separation meeting, and he mostly corroborated Behaer's testimony as he testified that Ackerman was told the termination was due to not following instructions and failing to give a turnover report. Id., at 43:47-:50. Importantly, McDaniel admitted that Bridgestone

delayed in terminating Ackerman in part to allow for Brauner to serve his suspension and return to work so that there would be sufficient coverage in the power house. Id., at 45:45-46:06 ("Q. . . . So you held off firing [Ackerman] until Brauner served his suspension, isn't that right? A. Yes."). Higgins was also present at the meeting, and while his testimony was somewhat fluid on the reasons for the discharge, he did admit that Ackerman was *not* terminated for the smoking violation and that Bridgestone did delay in the termination to provide an opportunity for Brauner to serve his suspension. Id., at 1:03:00-:57, 1:04:00-:10, 1:06:29-1:07:50, 1:07:06-:28 (testifying that Ackerman "was not fired for smoking), 1:07:34-:50, 1:16:55-:58, 1:28:00-:14.

Ackerman subsequently filed for unemployment. In a decision dated March 4, 2015, IWD denied Ackerman's application, finding that Bridgestone discharged him for violating a known company rule, i.e., misconduct. March 4, 2015, IWD decision. Ackerman appealed. On appeal, he raises two issues, namely whether Bridgestone terminated his employment for misconduct as that term is defined in Iowa employment law and whether the alleged misconduct was still a present act capable of disqualifying him from benefits or a prior act by the time Bridgestone terminated him weeks after the alleged incident. At the hearing, Ackerman provided credibly and largely unrebutted evidence of an acrimonious relationship between himself and McDaniel after he reported McDaniel for harassment in 2013. Id., at 1:24:23-1:27:58. Ackerman also presented credible evidence that Bridgestone was advertising for another powerhouse employee since at least November 2014; however, the record showed that the advertising was for another powerhouse employee that was retiring. Id., at 1:04:20-:24, 1:28:20-:50, 2:00:00-:57.

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REASONING AND CONCLUSIONS OF LAW

A.

"The purpose of [Iowa's] unemployment compensation law is to protect from financial hardship workers who become unemployed through no fault of their own." Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997). As a result, the governing employment provisions "should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 10 (Iowa 1982).

As part of the statutory framework, an individual is disqualified from receiving unemployment benefits when he or she has been discharged for "misconduct." Iowa Code § 96.5(2). "Misconduct" is defined by the governing regulations to be "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." 871 Iowa Administrative Code § 24.32(1)(a); see also Freeland v. Employment Appeal Board, 492 N.W.2d 193, 196 (Iowa 1992) (noting that "the agency rule definition is an accurate reflection of legislative intent"). In explaining what this means, the governing regulation states:

> 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.

871 I.A.C. § 24.32(1). Summarizing this, "[m]isconduct must be substantial in order to support a disqualification from unemployment benefits." Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986).

Importantly, "[m]isconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant denial of unemployment benefits." Id. In fact, "[w]hat constitutes misconduct justifying termination of an employee, and what is misconduct which warrants denial of unemployment benefits are two separate decisions." Brown v. Iowa Dept. of Job Service, 367 N.W.2d 305, 306 (Iowa App. 1985). By statute, "[t]he employer has the burden of proving a claimant is disqualified for benefits." Bartelt v. Employment Appeal Bd., 494 N.W.2d 684, 686 (Iowa 1993) (citing Iowa Code § 96.6(2)).

B.

In this case, Bridgestone has failed to meet its burden of proof that Ackerman was discharged for misconduct within aforementioned definition of the term. As an initial matter, Bridgestone takes the position that it fired Ackerman for violating the November 20, 2014, condition of employment. However, this is somewhat of a misnomer because, despite the condition of employment stating Ackerman may be terminated if he "violates any condition of this document," the document contains no such conditions. Exs. 1, 2. Instead, the condition of employment only summarizes an alleged prior infraction on the part of Ackerman. Ex. 2. When pressed, Bridgestone representatives appear to interpret the document as a prohibiting a violation of any policy even though it does not contain such language, and whatever the merits of interpreting the document in such a fashion, it is clear that the document does not provide any material insight in the reason for Ackerman's discharge. Id.

Setting the condition of employment aside, the record indicates that the motivating decision to terminate Ackerman was his alleged insubordination on January 7, 2015, when he failed to return to the basement despite McDaniel's instructions. See, e.g., Hearing Recording, at 1:16:22-:35. While "[w]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer[,] . . . an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause." Pierce v. Iowa Dept. of Job Service, 425 N.W.2d 679, 680 (Iowa App. 1988). Here, Bridgestone has shown at most a good faith mistake on the part of Ackerman. At the time McDaniel purportedly ordered Ackerman to return the basement, they were in an extremely noisy boiler room that required shouting to communicate. See, e.g., Hearing Recording, at 37:36-:42, 44:17-:20. In addition, McDaniel shouted his purported instructions not only to Ackerman but also Brauner, who was standing next to him. See, e.g., id.. at 37:57-38:11. The claimed instruction was joint in nature, as it referenced both Ackerman and Brauner, and McDaniel chose not to confirm that his instruction was received and understood as he intended before he left the area. See, e.g., id., at 46:13-:29, 50:40-51:06. Thus, there is little reason to doubt Ackerman's credible testimony that he understood the instruction to be that someone was to go back to the basement to finish work on the pump, particularly given the limited workspace and nominal work left to be performed after the electrician had finished. See, e.g., id., at 1:20:31-1:21:27; 1:23:03-:22. Such an interpretation would also be reasonable in light of the fact that Ackerman's shift was nearly over and he needed to clean up not only his tools—as

was common—but also a fellow employee's and the powerhouse's tools and that Brauner's shift was just beginning. See, e.g., id., at 37:23-:26, 39:06-39:11, 1:21:38-1:22:07,1:39:07-1:40:00, & 1:46:29-:43.

Brauner's statements concerning his and Ackerman's understanding of McDaniel's instruction does not change this. See, e.g., id., at 58:58-59:14. Brauner was not placed under oath and called as a witness; instead, Bridgestone presented his statements primarily through Higgins. Id. While such hearsay is admissible, it only has limited weight because Brauner's credibility has not been established in this proceeding and because Higgins and the other individuals who have relayed Brauner's testimony have an interest in the outcome of this investigation that could shade, even unintentionally, their recollection of the conversations. The concern over the reliability of these statements is heightened under the facts and circumstances of this case in part because of the lack of details concerning the exact statements Brauner made, the fact that Brauner would seem to have had an incentive to view the facts in Bridgestone's favor given the then ongoing disciplinary action against him, and the utter lack of evidence as to why Ackerman would chose that moment to disregard a direct instruction. Indeed, no explanation exists for why Ackerman— having worked on the pump all night and having no altercation or incident during his shift— would have simply decided to ignore a direct instruction to finish the job. Couple this with the fact that Higgins's testimony was somewhat fluid and the acrimonious relationship McDaniel had with Ackerman after Ackerman reported McDaniel for harassment, Brauner's hearsay statements lack credibility, and without this, Ackerman's account of his understanding of the conversation remains credible. Accordingly, at most there was a misunderstanding or a good faith mistake on the part of Ackerman. There was no willful disregard of McDaniel's instructions capable of giving rise to misconduct.

Bridgestone has additionally not shown that Ackerman's other conduct on January 7, 2015, was misconduct giving rise to his termination. With respect to the alleged smoking violation, Bridgestone expressly acknowledged that it did *not* discharge Ackerman for the violation. See, e.g., id., at 1:07:06-:28. This is consistent with Bridgestone's action because it did not terminate Brauner for the same offense, due to lack of notice, and because it did not show that Ackerman had any more notice of the smoking restriction than Brauner. See, e.g., id., at 44:24-:41, 57:16-57:30. Since Ackerman was not terminated for this action, unemployment benefits cannot be denied on this ground. See Iowa Code § 96.5(2).

With respect to discharging Ackerman for failing to provide a proper turnover report, Bridgestone has not proven that the offense occurred even assuming that it was a reason for the discharge. Ackerman testified that he did provide a turnover report to two individuals. See, e.g., id., at 38:41-69; 47:15-:20, 1:21:28-:37. In response, Bridgestone only offered hearsay testimony to the contrary that is filtered through their representatives. Hearing Recording, at 42:32-:45. As just discussed, such evidence is not sufficiently credible to overcome Ackerman's testimony, particularly since the record indicates that Ackerman was working alongside at least one or two of the daytime shift powerhouse employees and since it is difficult to understand how the information would not have been imparted. See, e.g., id., at 37:23-:26; 39:06-39:11. Moreover, Bridgestone, which bears the burden of proof, failed to even produce the log that would have shown whether a written report was done and failed to have a witness that was able to testify with certainty as to whether such a written report was entered. See, e.g., id., at 50:00-:15. Moreover, even assuming that Ackerman failed to provide a report and this was material to Bridgestone's decision to terminate him, Bridgestone still could not prevail because such an omission is an isolated event that does not reveal anything more than negligence. See, e.g., Flesher v. Iowa Dept. of Job Service, 372 N.W.2d 230, 233-34 (Iowa 1985) ("On the other hand[,] inadvertencies or ordinary negligence in isolated instances are not to be deemed misconduct[.]" (Internal alterations omitted)). Even considering

the prior alleged act of failing to provide a report that gave rise to the November 2014, condition of employment, which Bridgestone stated was irrelevant to this matter during the first part of the hearing, two such instances in the course of months is not sufficiently routine so as to satisfy the stringent misconduct standard, especially when courts and administrative agencies "are to interpret strictly the law's disqualification provisions[.]" Bridgestone/Firestone, Inc., 570 N.W.2d at 96.

Accordingly, because Bridgestone has failed to carry its burden of proving the Ackerman was discharged for misconduct as that term is defined in law, his unemployment benefits cannot be denied on this basis. Further, while the substantial delay between the date of the alleged infraction and the date of separation due in part to reasons apart from Ackerman creates concerns for finding that the claimed misconduct was a present act, there is no need to consider this issue in light of the foregoing, and this decision makes no comment on it. IWD's decision is REVERSED.

DECISION AND ORDER

IWD's decision dated March 4, 2015, disqualifying Ackerman from receiving benefits on the basis of misconduct is REVERSED. IWD shall take all necessary measures to effectuate this decision.

JMG