

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FERNANDO MEDRANO
Claimant

APPEAL NO. 14A-UI-00097-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIRSTCO INC
Employer

OC: 12/08/13
Claimant: Appellant (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Fernando Medrano filed a timely appeal from the December 30, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 28, 2014. Mr. Medrano participated. Bill Kozlowski represented the employer and presented additional testimony through Dan Kozlowski.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Fernando Medrano was employed by Firstco, Inc., as a full-time tire mounter until December 11, 2013, when Trevor Thompson, Plant Manager, discharged him from the employment. The final incident that triggered the discharge occurred on December 11, 2013, when supervisor Chris Burney observed Mr. Medrano outside his assigned work area shortly after the start of the workday. Mr. Medrano and another employee were immediately outside the employer's building smoking a cigar. Mr. Medrano was supposed to be at this workstation. Mr. Medrano was not in a designated smoking area, which was at the other end of the plant. Mr. Medrano was in the general vicinity of stored tires. The employer's written work rules prohibited smoking outside of the designated smoking area. The employer reviewed the policy with Mr. Medrano at the start of his employment and during monthly safety meetings. Mr. Medrano was aware of the work rule. The nature of the employer's business, mounting tires, made smoking in undesignated areas a safety issue. Mr. Burney initially suspected that Mr. Medrano and the coworker were smoking marijuana. Mr. Burney located an empty cigar wrapper. Mr. Burney escorted Mr. Medrano and the other employee to the office, where Dan Koslowski, and Bill Kozlowski, Human Resources Manager, separated the two employees and interviewed them separately. Mr. Medrano denied that he had been smoking and asserted instead that he had been using his cell phone. The employer prohibits cell phones in its facility. Mr. Medrano was aware of the policy. The employer makes a telephone available for employees to use as needed. Mr. Medrano had not notified the employer of any emergency that necessitated him being on his

cell phone at a time when he was supposed to be working. The other employee admitted to smoking, identified the item being smoked as a cigar, and indicated that Mr. Medrano was last in possession of the cigar. When Mr. Thompson appeared at the workplace to start his workday, he met with Mr. Medrano and discharged him from the employment.

The employer considered prior incidents when making the decision to end the employment. In November 2012, the employer issued a reprimand to Mr. Medrano after a cigar and lighter were discovered in his work area. Mr. Medrano was allowed to take the items to his car and did so. In August 2013, the employer subjected Mr. Medrano to drug testing based on an off-duty arrest for possession of a controlled substance and drug paraphernalia. The employer's drug testing policy did not provide uniform discipline, but instead left discipline to the discretion of the employer. In March 2013, the employer suspended Mr. Medrano for part of a day when Mr. Medrano was noted to be outside his work area at a time when he was supposed to be working. In September 2013, the employer reprimanded Mr. Medrano after he used a piece of plastic to bypass a recently installed safety mechanism on a machine he operated as part of his work duties. The employer had installed the safety button after an employee suffered injury in the workplace. The employer reviewed with employees, including Mr. Medrano, the need to use the button mechanism to ensure safe operation of the machine.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record establishes misconduct in connection with the employment. On the last day of the employment, Mr. Medrano was outside his work area at a time when he was supposed to be working and was smoking a cigar in a non-designated area in violation of the employer's policy. Mr. Medrano's testimony that he was only on his cell phone and was paying no attention to the coworker who was outside with him is implausible and the administrative law judge concludes it is not credible. Mr. Medrano may well have been on his cell phone in addition to smoking the cigar with coworker. In any event, Mr. Medrano knew at the time that he was committing multiple violations of the employer's written work rules. The final incident followed an earlier tobacco-related incident, a prior incident of Mr. Medrano being reprimanded for being outside his work area at a time he was supposed to be working, and a prior incident of Mr. Medrano intentionally bypassing safety equipment the employer had installed on the machine he operated. The weight of the evidence indicates that Mr. Medrano repeatedly and intentionally disregarded the employer's work rules.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Medrano was discharged for misconduct. Accordingly, Mr. Medrano is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The Agency representative's December 30, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css