

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

SILVANO P GUZMAN Claimant	APPEAL NO. 07A-UI-02490-S2T
ASPLUNDH TREE EXPERT COMPANY Employer	ADMINISTRATIVE LAW JUDGE DECISION
	OC: 08/13/06 R: 02 Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Asplundh Tree Expert Company (employer) appealed a representative's March 5, 2007 decision (reference 03) that concluded Silvano Guzman (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 28 and 29, 2007. The claimant was represented by Joanie Grife, Attorney at Law, and participated personally through Susie Jacquez and Oliver Koch, Interpreters. The employer participated by Kevin Dove, Manager; Eduardo Nunez, General Supervisor; Saul Mencera, General Foreman; and Victor Gonzalez, Supervisor. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 12, 2006, as a full-time apprentice tree trimmer. The employer told the claimant to get a cellular telephone so the employer could call him. The claimant thought the employer would help pay for the cost. After he purchased the telephone the supervisor told the claimant that it would not pay for the line. The claimant asked the employer not to call him on the cellular telephone. The employer called the claimant on the cellular telephone at work.

The claimant injured his shoulder at work in November 2006, when he had to pull back his arm or be caught by the wood chipper. On December 3, 2006, the employer accompanied the claimant to the hospital. The doctor restricted the claimant from using the injured arm. The employer accommodated those restrictions. The claimant used his cellular telephone twice at work to call for help regarding his injury.

The employer terminated the claimant on January 18, 2007 for using his cellular telephone at work. The claimant received no warnings prior to his termination and thought he could use his cellular telephone if the employer called or if he needed medical attention.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes he was not discharged for misconduct.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide sufficient evidence of misconduct at the hearing. The employer failed to provide evidence that the claimant's use of the cellular telephone was not work-related or medically necessary. In addition the employer could not provide any proof that the claimant had been effectively warned prior to his termination. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's March 5, 2007 decision (reference 03) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs