

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAVIER GUAJARDO
Claimant

APPEAL NO. 08A-UI-02348-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS
Employer

**OC: 02/03/08 R: 04
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Javier Guajardo filed an appeal from a representative's decision dated February 29, 2008, reference 01, which denied benefits based on his separation from West Liberty Foods. Due notice was issued scheduling a hearing by telephone on March 25, 2008. Neither party responded to the notice of hearing. The decision herein is based on information provided by the parties during the fact-finding interview held by Workforce Development on February 28, 2008.

ISSUE:

At issue in this matter is whether Mr. Guajardo was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Guajardo was employed by West Liberty Foods from December 25, 2006 until February 8, 2008. He was employed full time as a member of the sanitation crew. He was discharged for allegedly spitting on another employee on February 2, 2008. He denied the allegation when questioned by the employer.

According to witness statements, Mr. Guajardo was sitting in a chair in the conference room but left the room for a period of time. When he returned, another employee, Jocelyn, was sitting in the seat he had been using. He told her to get out of his "fucking" chair, but she did not move. Except for Jocelyn, none of the others who were present indicated that Mr. Guajardo spit on her. He did touch her on the shoulder and then went to sit in a different area. As a result of the incident, Mr. Guajardo was discharged on February 8, 2008.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). It was incumbent upon the employer to provide specific details

concerning the reason for discharge as mere allegations of misconduct are not sufficient to result in disqualification from benefits. See 871 IAC 24.32(4). It was alleged that Mr. Guajardo was discharged for spitting on Jocelyn. The written statements supplied by the employer are conflicting regarding whether Mr. Guajardo spit on her. Of the several individuals who were present at the time, only Jocelyn said he spit on her.

If Mr. Guajardo and Jocelyn were having a verbal confrontation in the presence of others, it seems likely that others would have been paying attention to what was occurring. If he did, in fact, spit on her, it seems more likely than not that at least one other individual would have been able to observe him doing so. Given the state of the evidence, the administrative law judge cannot find that he did spit on Jocelyn on February 2. Several witnesses indicated that Mr. Guajardo told Jocelyn to get out of his “fucking” chair. The record does not contain any information regarding the employer’s policy regarding the use of profanity. Moreover, the profanity was not used in a name-calling context. There was also evidence that Mr. Guajardo touched Jocelyn on the shoulder. However, it does not appear that the touching was intended to be harmful or sexual.

The employer has failed to satisfy its burden of proving disqualifying misconduct. While the employer may have had good cause to discharge Mr. Guajardo, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). For the reasons cited herein, benefits are allowed.

DECISION:

The representative’s decision dated February 29, 2008, reference 01, is hereby reversed. Mr. Guajardo was discharged, but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw