

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE I BURGOS

Claimant

APPEAL NO. 10A-UI-12148-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION

Employer

OC: 08/01/10

Claimant: Appellant (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Jose Burgos, filed an appeal from a decision dated August 25, 2010, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on October 18, 2010. The claimant provided a telephone number where he could be reached. That number was dialed several times and no connection could be made and the claimant did not participate. Steve Rhoades was present to be the interpreter. The employer, Burke Marketing, participated by Human Resources Generalist Shelly Seibert.

ISSUE:

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

FINDINGS OF FACT:

Jose Burgos was employed by Burke Marketing from February 23, 1998 until August 21, 2010 as a full-time pack room worker on the first shift. He received a copy of the employee handbook, which contains the zero tolerance harassment policy.

On July 27, 2010, a female employee, Heather, came to Human Resources Director Terry Ubben with a complaint about Mr. Burgos. She stated that on July 22, 2010, he had pulled her trousers down around her knees. The delay in reporting the incident was caused by her embarrassment over the incident.

Mr. Ubben asked Heather if there were any witnesses and she provided him with the name of one other person. That witness agreed Mr. Burgos had pulled Heather's pants down around her knees. That same day the claimant was interviewed and he maintained he had only "tugged" on the woman's pants. He gave three witnesses to support his story, but none of them had been present and had not seen anything. But, two of the witnesses were women who confirmed Mr. Burgos had harassed them in the past but had stopped when they told him to.

Mr. Burgos was suspended pending further investigation on July 27, 2010. The employer reviewed the incident and the witness statements. It was determined the incident had occurred and violated the harassment policy. The claimant was informed of the discharge by Mr. Ubben and Human Resources Generalist Shelly Seibert in person on August 2, 2010.

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 claimant had received the employee handbook and was aware that violation of the harassment policy was ground for immediate discharge. The employer thoroughly investigated the allegations and two witnesses stated Mr. Burgos had pulled the woman's pants down. No other witnesses named by the claimant could refute the complaint. The claimant has failed to provide any testimony to counter the testimony of the employer. The record establishes the claimant was discharged for conduct not in the best interests of the employer and he is disqualified.

DECISION:

The representative's decision of August 25, 2010, reference 01, is affirmed. Jose Burgos is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw