

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

GILBERTO M MARCOS
211 N BENTON
OTTUMWA IA 52501

EXCEL CORPORATION
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166

Appeal Number: 05A-UI-04458-JTT
OC: 04/10/05 R: 03
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 Workforce Development. 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)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Gilberto Marcos filed a timely appeal from the April 25, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 19, 2005. Mr. Marcos participated in the hearing with the assistance of Spanish-English interpreter Guadalupe McCarney. The employer did not provide a telephone number at which a representative could be reached for the hearing. The employer requested a postponement of the hearing, but failed to provide good cause for a postponement. After conferring with the Chief Administrative Law Judge, on May 16, 2005 this administrative law judge communicated to the assigned Claim Service Representative at TALX UC eXpress that the request for a postponement was denied.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Gilberto Marcos was employed by Excel Corporation as a full-time meat cutter in the ham department from December 5, 2000 until April 6, 2005, when he was suspended for misconduct. Mr. Marcos was subsequently discharged from the employment.

The final incident that prompted the discharge occurred on April 6, 2005. On that date, supervisor Rick Bennett discovered Mr. Marcos facing a wall in a communal shower stall in his full uniform, and concluded that Mr. Marcos was urinating in the shower stall. Mr. Bennett obtained identification information from Mr. Marcos. Approximately 40 minutes later, Mr. Marcos was summoned to a meeting that lasted approximately 15 minutes. An interpreter arrived midway through the meeting and assisted from that point. Mr. Marcos understood the allegation against him was that he had in fact urinated in a shower stall. At the end of the meeting, Mr. Marcos was sent home and told to wait for a telephone call from the employer. Mr. Marcos did not receive a telephone call, but did receive a letter advising him that his employment was being terminated as a result of the incident on April 6, 2005.

Mr. Marcos had gone to work on April 6, 2005, despite the fact that he had been experiencing a burning sensation in his genital area since the previous night. When Mr. Marcos arrived for work, he went to his locker and put on his uniform. This consisted of putting on a mesh apron; placing a metal sleeve on his left arm; putting on a "frock;" placing a metal chain around his waist with a sheath for his knife; placing a metal glove on his left hand; and finally putting on safety glasses and a hard hat. By the time Mr. Marcos had finished putting on his uniform, he was pressed for time to get to the production line. Mr. Marcos had been late getting to the production line on the two previous days and was concerned about the consequences of being late again. Mr. Marcos proceeded to head in the general direction of the production line. Though Mr. Marcos was experiencing a sensation that he needed to urinate, he did not believe he had time to travel the approximate 25 yards back to his locker, remove his uniform, go to the restroom to urinate, go back to his locker, put his uniform on, and get to the production line on time. The communal shower area was on his way to the production line. Mr. Marcos had entered the communal shower area with the intention of possibly urinating there. When supervisor Rick Bennett discovered Mr. Marcos in the shower stall, Mr. Marcos was "contemplating" urinating. Mr. Marcos denies that he actually did urinate or remove his penis from his work uniform so he could urinate. These are the circumstances under which supervisor Rick Bennett discovered Mr. Marcos: facing the wall, "contemplating" urinating. Mr. Bennett instructed Mr. Marcos to go to the restroom. Mr. Marcos indicated that he did not have time.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Marcos was discharged for misconduct in connection with his employment.

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).

Since the claimant was discharged, 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. Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. 871 IAC 24.32(8). Allegations of misconduct without additional evidence shall not be sufficient to resolve in disqualification for benefits. 871 IAC 24.32(4). If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. 871 IAC 24.32(4). In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved. 871 IAC 24.32(4).

Because the employer declined to produce the first-hand witness, supervisor Rick Bennett, for the hearing, the evidence in the record is limited to the testimony of Mr. Marcos. The evidence in the record indicates that Mr. Marcos was discovered standing in a shower stall thinking about urinating, but had not actually taken any steps to commence the act of urinating. The employer has failed to meet its burden of corroborating the allegation of misconduct. See 871 IAC 24.32(4). Based on the evidence in the record and application of the appropriate law,

the administrative law judge concludes that Mr. Marcos was not discharged for misconduct in connection with his employment. Accordingly, no disqualification for benefits will enter.

DECISION:

The Agency representative's decision dated April 25, 2005, reference 01, is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/pjs