

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARTIMIANA MARQUEZ**  
Claimant

**CURLY'S FOODS**  
Employer

**APPEAL NO. 07A-UI-07071-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/24/07 R: 01  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Martimiana Marquez (claimant) appealed a representative's July 16, 2007 decision (reference 02) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Curly's Foods (employer) for failing to perform satisfactory work for which she was capable. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 6, 2007. The claimant participated personally through Ike Rocha, Interpreter. The employer participated by Kathy Peterson, Human Resources Manager. Beatriz Lopez observed the hearing.

**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 March 3, 2006, as a full-time laborer. The employer issued the claimant a verbal warning on April 27, 2007, for not crowding ribs on the racks after pushing the claimant to prepare more product. On May 14, 2007, the employer issued the claimant a written warning for putting her hand under the guard of a machine when the claimant did not do so.

On June 21, 2007, the claimant was working as fast as she could. The employer told her to work faster. She explained she worked as fast as she could but the employer sent her home. On June 22, 2007, the employer terminated the claimant for failing to follow instructions.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the claimant's testimony to be more credible because the employer did not supply an eyewitness to the events when it could have done so.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant 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.

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). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant was working as fast as she could. The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which she was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

**DECISION:**

The representative's July 16, 2007 decision (reference 02) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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