BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

MARICELA T TAPIA Claimant, and CURLYS FOODS Employer.	:	HEARING NUMBER: 08B-UI-05159 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5(2)a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Maricela T. Tapia worked for Curly's Foods from May 25, 2005 through May 2, 2008 as a full-time production worker/general laborer. (Tr. 4-5, 14-15) The claimant received a written warning and three-day suspension on May 4, 2007 for failing to perform an assigned task. (Tr. 12) She received another warning on March 27, 2008 for not keeping the production floor clean. (Tr. 13)

On May 1, 2008, Louis Hermosillo (lead personnel) directed Ms. Tapia " … to break boxes and stack them in trash combos." (Tr. 6, 16) The claimant had difficulty with these boxes, as they were larger than the boxes she was accustomed to breaking down. (Tr. 17, 19, 24) Mr. Hermosillo did not believe that the

claimant was performing this task to his satisfaction, plus she was moving too slow. (Tr. 10, 16-17) She did not completely collapse the boxes, which caused them to take up more space. This also caused "… more combos to have to be taken to the recycling trailer." (Tr. 11, 24) When the employer redirected her, she told him that she didn't know how to do it correctly. (Tr. 10-11, 18, 21, 22) Another employee ("… a big man, very tall… ") helped her to refold the boxes. (Tr. 18)

The employer met with the claimant and questioned her about her performance. Ms. Tapia explained that the boxes were coming out slowly and they were difficult to flatten because of the boxes' size. (Tr. 16-17, 20-21, 24) The employer terminated the claimant for insubordination.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6

(Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to

misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that the claimant received two warnings regarding her performance during the past year of her employment. The employer did not provide any corroborating documentation to support their testimony. Thus, we attribute little weight to the claimant's past acts, as these acts have little bearing on her termination.

As for the final act, the employer provided hearsay testimony that Ms. Tapia refused to follow Hermosillo's directive. The claimant, on the other hand, denied refusing the employer's directive. (Tr. 8) Rather, she testified that the boxes were different in size and that the pace at which the boxes came to her was slow, which further impacted her ability to quickly flatten them. The employer does not deny that she requested additional assistance; instead he testified that she already knew how to break the boxes down. (Tr. 23) The claimant was the only party at the hearing who could provide firsthand testimony about the incident. Neither of the employer's witnesses, Ms. Lopez (Human Resources Assistant) or Richard Cox (Production Manager) admittedly, had any firsthand knowledge to contribute to the hearing. (Tr. 7, 9) Thus, we attribute more weight to the claimant's version of events.

According to the claimant's testimony, she complied with Hermosillo's directive and even solicited the assistance of a large male co-worker when the boxes were returned. (Tr. 18) Hermosillo never approached her with a 'problem' (Tr. 16) until he called her to meet with him and another supervisor just prior to her termination. The claimant provided credible testimony that she worked to the best of her ability. (Tr. 19) When she asked her supervisor for additional assistance, he rebuked her stating she knew what she had to do. (Tr. 19, 23) The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. The claimant's failure to adequately flatten the boxes was not intentional. At worst, it was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct. For the foregoing reasoning, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated June 19, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv