

**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**

**MARSHALL L CLARK  
23604 – 217<sup>TH</sup> AVE  
CENTERVILLE IA 52544**

**OSCEOLA FOODS CORPORATION  
C/o JON-JAY ASSOCIATES  
PO BOX 182523  
COLUMBUS OH 43218-2523**

**Appeal Number: 04A-UI-12056-S2T  
OC: 10/10/043 R: 03  
Claimant: Respondent (1)**

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Osceola Foods Corporation (employer) appealed a representative's November 1, 2004 decision (reference 01) that concluded Marshall Clark (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 13, 2004. The claimant participated personally. The employer participated by Judy Callahan, Personnel Manager, and Kyle Hill, Team Leader. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

#### 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 15, 2004, as a full-time production employee. The claimant received a copy of the employer's handbook and signed for its receipt on March 15, 2004. The handbook indicates that new employees can be terminated if they are incompatible with the company. The claimant received a written warning for performance issues on April 6, 2004. On June 25, 2004, the employer gave the claimant a verbal warning for attendance.

On July 9, 2004, the claimant tried to tell the employer he would be absent on July 10, 2004, due to lack of child care. The employer walked away from the claimant acting like he did not want to hear what the claimant said. The claimant was absent from work on July 10, 2004. The employer considered the claimant to not have properly reported his absence even though he told the employer on July 9, 2004.

On July 19, 2004, the employer tried to get the claimant to work faster. The claimant told the employer that his wrist was hurting. On July 20, 2004, the employer terminated the claimant for attendance issues and for failure to properly perform his work during his entire employment.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

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).

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's work performance was consistent throughout his employment. The claimant never demonstrated he was capable of performing at a higher level. Consequently the employer did not meet its burden of proof to show misconduct through poor work performance.

The employer also terminated the claimant because he did not appear for work or notify the employer of his absence. The claimant properly report his absence but the employer chose not to listen to the claimant when he was reporting his upcoming absence. The employer did not provide sufficient evidence that the claimant did not properly report his absence. The employer has not met its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's November 1, 2004 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/tjc