

**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**

**VICKI S SALYERS  
N/K/A VICKI S MCMILLAM  
2103 – 4<sup>TH</sup> ST SW  
ALTOONA IA 50009**

**ABC ELECTRIC INC OF DES MOINES  
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PO BOX 71099  
DES MOINES IA 50325-1099**

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**Appeal Number: 04A-UI-05956-R  
OC: 04-25-04 R: 02  
Claimant: Appellant (4)**

**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  
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Vicki S. Salyers, now known as Vicki S. McMillam, filed a timely appeal from an unemployment insurance decision dated May 21, 2004, reference 01, denying unemployment insurance benefits to her. After due notice was issued, an in-person hearing was held in Des Moines, Iowa on June 21, 2004, with the claimant participating. The claimant was represented by Mark Hedberg, Attorney at Law. The claimant requested the in-person hearing. Tom Newton, President, and Michael Doucette, and Mark Ramsey, Service Manager, participated in the hearing for the employer, ABC Electric, Inc. of Des Moines. Sherry Rodriguez, Human Resources Director, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. This appeal is consolidated with appeal number 04A-UI-06746-R for the purposes of the hearing with the

consent of the parties. Although no notice had been sent out for that hearing, the parties permitted the administrative law judge to take evidence on and decide the issue presented in that appeal, namely, whether the claimant is overpaid unemployment insurance benefits under Iowa Code Section 96.6-2 and the parties waived further notice of that issue. Employer's Exhibit 1 and Claimant's Exhibits A, B and C, were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1 and Claimant's Exhibits A, B, and C, the administrative law judge finds: The claimant was employed by the employer as a full-time journey electrician or wireman from January 2, 1990 until she was discharged on May 14, 2004. The claimant was discharged because she was unable to perform the functions of an electrician, therefore causing a lack of production. On or about June 17, 2003, the claimant was injured while employed by the employer, which injury was work related. The claimant saw a physician on June 18, 2003, who restricted the claimant from raising her right arm. The employer was able to meet these restrictions and put the claimant to work in the warehouse, where she worked approximately one month. On June 30, 2003, the claimant's arm was placed in a sling and she was restricted from using the right arm at all. The employer was able to meet these restrictions again by placing the claimant in the warehouse. The claimant was initially employed full-time in the warehouse, and then on July 28, 2003, she was allowed to work only four hours in the warehouse and then on August 19, 2003, she was allowed only two hours working in the warehouse. During this period of time the claimant was receiving workers' compensation payments.

On or about October 14, 2003, the claimant saw another physician who did a functional capacity evaluation and placed the claimant on restrictions of no lifting 30 pounds above her shoulder, 30 times a day, and 20 pounds 200 times per day, and 10 pounds without restrictions. Further, restrictions were placed upon the claimant of no more than 15 pounds raised above her head for 30 times, and no more than 10 pounds above her head 200 times. These restrictions became permanent and have not changed. The claimant's workers' compensation benefits during this period of time were healing benefits and they ended on October 31, 2003. The employer was able to meet the claimant's restrictions and placed her as an electrician when needed, to do the things she could do, and provided help for the things that she could not do. The claimant began working as such between November 10 and 12, 2003. The claimant worked infrequently and sporadically because of the restrictions. The claimant made arrangements with the employer, that the employer would call her when they had jobs that were available for her. The claimant was not given complete and numerous assignments because she could not do much of the work, even though the work may have met most of her restrictions. The claimant complained about continued pain and difficulties with her arm, as shown at Employer's Exhibit 1. From December 31, 2003 to May 5, 2004, the claimant was given no work. During this period of time the employer's work was slow and many employees were off work. The claimant went back to work from May 5, 2004 to May 12, 2004. When the claimant reported for work at the job site on May 13, 2004, she was told to go home and come back the next day. The claimant was informed by Bill Mulstay, Foreman, that there was no more work for her, that the employer was downsizing the job, but there was some work available for the claimant, but she could not do it. During the time that the claimant did work, the claimant never refused any work, but there were occasions when she had severe pain and left work because of the pain, again as shown at Employer's Exhibit 1.

The claimant had placed no other restrictions on her ability to work, except for May 11, 2004 to April 11, 2004 the claimant was not able to work because she had donated a kidney. During that time the claimant did not file for or receive unemployment insurance benefits. During all relevant times hereto, except when the claimant had donated her kidney, the claimant had placed no restrictions on her availability for work. The claimant was seeking work by contacting her union each week because the claimant is a union member. The claimant was discharged on May 14, 2004, because she could not do the work, even work that met her restrictions. During this period of time there were electrical jobs available that met the claimant's restrictions technically, but the claimant experienced such pain that she was not able to perform them. During this period of time, work was available for the claimant in the warehouse, but the employer chose not to place the claimant there. The claimant remained job attached until May 14, 2004, when she was discharged, as shown at Claimant's Exhibit A. The claimant never voluntarily left her employment. The claimant did receive some oral warnings about her work, as shown at Employer's Exhibit 1, but the claimant was never informed that if she could not do the work she would be discharged. In addition to being placed in the warehouse, there was a period of time when the claimant was placed in the employer's office to work, from October 14, 2003 to October 31, 2003, but this assignment was discontinued by the employer. The claimant's medical evaluations, as set out above, appear at Claimant's Exhibit B.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because she is and was not able, available, and earnestly and actively seeking work. The claimant is ineligible to receive unemployment insurance benefits beginning with May 14, 2004 or benefit week ending May 29, 2004, when the claimant first applied for unemployment insurance benefits after separating from the employer.

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 parties all concede that the claimant was discharged and did not quit. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. IDJS, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The evidence establishes that the claimant was discharged for lack of production in as much as she could not do the electrical work necessary because of a job-related injury. Although there was competing evidence as to whether the claimant was able and could perform sufficient electrical work to maintain her status as an electrician, in view of her permanent restrictions as set out in the findings of fact and Claimant's Exhibit B, as discussed below, the administrative law judge concludes that the claimant was not able to sufficiently perform job functions of an electrician. The reason the claimant could not perform such work sufficiently was a work-related injury on or about June 17, 2003. The evidence does establish that there was work available for the claimant that she could do, both in the warehouse and in the office, but the employer chose not to continue those assignments. Under these circumstances, the administrative law judge is constrained to conclude that claimant's failure to do sufficient electrical work to be productive, was not a deliberate act or omission constituting material breach of her duties and obligations arising out of her workers' contract of employment nor does it evince a willful or wanton disregard of the employer's interest nor is it carelessness or negligence of such a degree of recurrence, of which would disqualifying misconduct. Rather, the administrative law judge concludes, the claimant's failures to be able to do the work were failure in good performance as a result of inability or incapacity and are not disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to

warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code Section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The claimant has the burden to prove that she is able, available, and earnestly and actively seeking work under Iowa Code Section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she is excused from the provisions requiring her to be able, available, and earnestly and actively seeking work to May 14, 2004, because she was temporarily and partially unemployed under Iowa Code Section 96.19(38) (b) and (c). The claimant was employed at her regular job but working less than the regular full-time week and earning less than her weekly benefit amount plus \$15.00. Further, the evidence establishes that, at least part of the time, the claimant was unemployed from her regular job with the employer herein, due to a lack of work and the claimant had been employed full time and her employment was not terminated. Finally, the administrative law judge believes that the claimant should not be ineligible to receive unemployment insurance benefits because of a failure to be able to work prior to her separation and after the claimant had drawn significant unemployment insurance benefits with the employer's knowledge in a prior benefit year.

The administrative law judge is constrained to conclude that the claimant has not met her burden to prove to demonstrate by a preponderance of the evidence that she was able, available, and earnestly and actively seeking work appropriately and that she was not excused from such provisions from and after May 14, 2004 and beginning with benefit week ending May 29, 2004, when she first filed a weekly claim for unemployment insurance benefits following her separation from employment on May 14, 2004. The claimant ceased to be job attached on May 14, 2004, when she was discharged. From that time, the administrative law judge concludes that the claimant was not able to work at an ordinary electrician's position. The claimant had significant permanent restrictions, as shown in the findings of fact. Although there were some parts of the ordinary work of an electrician that the claimant could do, even performing these caused her significant pain and discomfort, as shown at Employer's Exhibit 1, and even caused her to leave work on occasion. The claimant may well have been released to work, but the administrative law judge must conclude that there is not a preponderance of the evidence that the claimant was able to work as an electrician. However, the evidence does indicate that the claimant was able to perform other work. The evidence demonstrated that the claimant was able to perform warehouse work and office work where she was assigned, at least for some period of time, by the employer. It is only necessary that the claimant be physically and mentally able to work in some gainful employment, not necessarily in the claimant's customary occupation, but which is engaged in by others as a means of livelihood. The administrative law judge concludes that the claimant is physically and mentally able to work in some gainful employment, but not in her customary occupation. However, the evidence also establishes that the claimant has not been earnestly and actively seeking work for other occupations, but has only been seeking work through her union for electrical work. The administrative law judge concludes that this is not sufficient under Iowa Code Section 96.4-3. The claimant must broaden her search for work for other positions and demonstrate that she is earnestly and actively seeking such work. There is no evidence that the claimant has placed any restrictions on her availability for work, which would unreasonably impede her opportunity to gain employment.

Accordingly, and for all the reasons set out above, the administrative law judge is constrained to conclude that the claimant is not earnestly and actively seeking work in some occupation or position for which she is able to work, being unable to work in her usual occupation of electrician, and, as a consequence, the claimant is ineligible to receive unemployment insurance benefits from and after May 14, 2004, or beginning with benefit week ending May 29, 2004 and continuing thereafter, until or unless the claimant demonstrates that she is able to work as an electrician or demonstrates that she is earnestly and actively seeking work in some other occupation for which she is able. The claimant may well wish to consider job training in a different occupation in addition to the options previously mentioned. Unemployment insurance benefits are denied to the claimant from and after May 14, 2004, until she demonstrates that she is able to work as an electrician and is making appropriate union contacts or demonstrates that she is earnestly and actively seeking work in some other occupation to which she is able to work or is appropriate receiving and is excused from such provisions.

#### DECISION:

The representative's decision of May 21, 2004, reference 01, is modified. The claimant, Vicki S. Salyers, now known as Vicki S. McMillam, is not disqualified to receive unemployment insurance benefits because she was discharged, but not for disqualifying misconduct. The claimant is ineligible to receive unemployment insurance benefits beginning May 14, 2004

because she is not earnestly and actively seeking work in an occupation or position for which she is able, until or unless she demonstrates that she is able to perform the work of an electrician and is making appropriate union contacts or is actively and earnestly seeking work in some occupation for which she is able or is in appropriate retraining.

dj/kjf