

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**SHELLY STEIG**  
Claimant

**DECKER TRUCK LINE INC**  
Employer

**APPEAL 21A-UI-07135-SN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 03/15/20**  
**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Admin. Code r. 871-24.32(1)a – Discharge for Misconduct  
Iowa Code § 96.4(3) – Ability to and Availability for Work

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the March 2, 2021, (reference 02) unemployment insurance decision that denied benefits based upon the conclusion she was discharged for failing to perform satisfactory work even though she was capable of performing it. The parties were properly notified of the hearing. A telephone hearing was held on May 18, 2021. The claimant participated. The employer participated through Human Resources Assistant Libby Mueller. Exhibits 1, 2, 3, 4, and 5 were admitted into the record. The administrative law judge took official notice of the agency records.

**ISSUE:**

1. Whether the claimant's separation from employment was disqualifying?
2. Whether the claimant was able and available for work effective December 28, 2020?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

The claimant was employed full time as a custodian from October 5, 2020, until this employment ended on December 24, 2020, when she was discharged. The claimant's immediate supervisor was Lead Custodian September Harris.

The employer provided a copy of its conduct and work rules. The employer has a progressive disciplinary policy, which states an employee receives the following after each occurrence: counseling, verbal warning, written disciplinary warning, a seven day unpaid suspension and termination. The conduct and work rules indicate insubordination or other disrespectful conduct does not follow the employer's progressive disciplinary policy. (Exhibit 1) The claimant reviewed these policies on October 5, 2020. (Exhibit 2)

On November 16, 2020, the claimant finished vacuuming at 6:30 p.m. Ms. Harris told the claimant to keep busy until the end of her shift at 7:00 p.m. Ms. Harris found the claimant in a

dark room wasting time until her shift ended. The employer provided a copy of Mr. Jacobson's notes of the claimant's performance. (Exhibit 3)

On November 19, 2020, the claimant told Ms. Harris she was not going to vacuum the other half of the room because her back hurt. The claimant also was instructed multiple times to wear her mask, but Mr. Jacobson's notes state she improved after being instructed to do so. The employer provided Mr. Jacobson's notes regarding the claimant's performance. The employer provided a copy of Mr. Jacobson's notes of the claimant's performance. (Exhibit 3)

On November 19, 2020, the claimant received a verbal warning for her performance. The meeting was attended by Ms. Harris, Building and Grounds Manager Eddy Jacobson and Director of Human Resources Courtney Bachel. During the meeting, the claimant was told that she must bring issues to Ms. Harris first rather than bringing them immediately to Mr. Jacobson. The claimant was told that if she could not have a good working relationship with Ms. Harris, then she would be let go. As an aside, the claimant was told that her performance had been generally good, especially regarding cleaning duties. The employer provided a copy of the verbal warning she received on that day. (Exhibit 4)

On December 23, 2020, the claimant refused to move a large plant despite being instructed to do so by Ms. Harris. Although the claimant did not specifically say so, she did not want to move the plant because of her back condition. The claimant also told Ms. Harris that she did not want to remove items from the shelves in Don Decker's office to dust them because she was worried about breaking the items. The claimant sat at the desk in the Human Resources and Safety Department.

On December 28, 2020, Human Resources Assistant Libby Mueller and Mr. Jacobson made the decision to terminate the claimant due to unsatisfactory work performance in the first 90 days of hire. Ms. Mueller informed the claimant that she was being discharged over the telephone and said it was because she refused to perform tasks, but she did not specify which tasks. The claimant was also sent a termination notice, which states she was terminated due to unsatisfactory work in the first 90 days of her employment. The employer provided a copy of the claimant's termination notice. (Exhibit 5)

The claimant started looking for full time forklift, gas station attendant, and custodial jobs immediately after she separated from employment with the employer. The claimant was able and available for the weeks she made weekly claims. She found a custodial job at the Best Western Starlight in early March 2021.

## **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. The claimant was able and available for the weeks she made weekly claims after separating from employment with 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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Here, the employer has not met its burden because the claimant had not been previously warned about her performance. The November 19, 2020 verbal warning she received in fact states the claimant's performance was good. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment.

Iowa Admin. Code r. 871-24.32(5) provides:

(5) Trial period. A dismissal, because of being physically unable to do the work, being not capable of doing the work assigned, not meeting the employer's standards, or having been hired on a trial period of employment and not being able to do the work shall not be issues of misconduct.

Discharge within a probationary period, without more, is not disqualifying. Failure in job performance due to inability or incapacity is not considered misconduct because the actions

were not volitional. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). In this case, the claimant contends the behavior labeled as poor performance concerned behavior other employees engaged in, such as waiting for their shifts to end, or she was justified in not completing the tasks as instructed. In one instance, the claimant refused due to back pain. In another case, the claimant refused because she was afraid to break Don Decker's personal items. The administrative law judge is sympathetic to the employer's frustration that the claimant would not perform these tasks, but it should have given the claimant instruction that this type of behavior would not be tolerated. The record does not show the claimant refused these instructions without concern for the employer's interests. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

The next issue to determine is if the claimant was able and available for work.

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".

Iowa Admin. Code r. 871-24.22(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.

Iowa Admin. Code r. 871-24.22(2) provides:

**Benefit eligibility conditions.** For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for

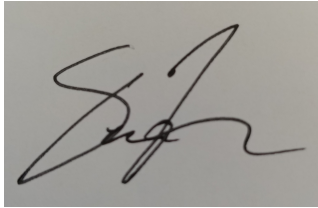
work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

**(2) *Available for work.*** The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

An individual claiming benefits has the burden of proof that she is be able to work, available for work, and earnestly and actively seeking work. Iowa Admin. Code r. 871-24.22. In this case, the claimant has satisfied her burden that she was able and available for work after her separation from employment with the employer. Benefits are granted.

**DECISION:**

The March 2, 2021, (reference 02) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The claimant was able and available after separating from employment. Any benefits claimed and withheld on this basis shall be paid.



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Sean M. Nelson  
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June 15, 2021  
Decision Dated and Mailed

smn/kmj