

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MYRNA FISHER
Claimant

APPEAL NO. 11A-UI-00654-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GE CAPITAL CORP
Employer

OC: 11/28/10
Claimant: Respondent (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.5-1 - Voluntary Quit

STATEMENT OF THE CASE:

GE Capital Corporation (employer) appealed an unemployment insurance decision dated January 3, 2011, reference 01, which held that Myrna Fisher (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 24, 2011. The claimant participated in the hearing. The employer participated through Becky Meyer, human resources generalist, and Cindy Maher, customer service manager. Employer's Exhibit One and Claimant's Exhibit A were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time customer service representative from March 25, 2002 through October 29, 2010. She was placed on a Performance Improvement Plan (PIP) on July 29, 2010. The employer expected the claimant to improve her My Fair Share Performance from 85.97 percent to be at or above 91 percent. The claimant's My Fair Share Performance was at 88.10 percent on September 30, 2010 and at 88.40 percent on October 29, 2010. Since she had not successfully met the expectations set forth in the PIP, the employer discharged her effective October 29, 2010.

The claimant opted to retire effective November 1, 2010 so that she could take advantage of the potential opportunity to receive reduced healthcare benefits.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if she voluntarily quit without good cause attributable to the employer or if the employer discharged her for work-connected misconduct. Iowa Code §§ 96.5-1 and 96.5-2-a.

The claimant did elect to retire from employment on November 1, 2010. However, she had already been terminated effective October 29, 2010. The claimant and the employer dispute who brought up the retirement option first, but it is really a moot point. When an employee is compelled to resign when given the choice of resigning or being discharged, it is not considered a voluntary separation. See 871 IAC 24.26(21). The same can be said for a retirement after being discharged. Consequently, it must be analyzed as a discharge.

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). 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. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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 claimant was discharged for failure to improve her performance percentages. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. *Id.* In the case herein, there is no evidence the claimant intentionally tried to lower her performance scores and, in fact, the evidence demonstrates the claimant was doing her best to improve her scores. Consequently, work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated January 3, 2011, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw