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

HOLLY A COCHRAN
209 W GIBSON ST
WEST LIBERTY IA 52776

GOVERNMENT EMPLOYEES INSURANCE COMPANY
c/o EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000

Appeal Number: 04A-UI-00593-RT
OC: 12-07-03 R: 03
Claimant: Appellant (2)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Holly A. Cochran, filed a timely appeal from an unemployment insurance decision dated January 13, 2004, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 9, 2004, with the claimant participating. Tina Kueter, Human Resources Supervisor, and Betty Dizard, Customer Service Supervisor, participated in the hearing for the employer, Government Employees Insurance Company. The employer was represented by Sandy Fitch of Employers Unity, Inc. Employer's Exhibits 1, 2, 4, and 5 were admitted into evidence. Employer's Exhibit 3 was not admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

This appeal was consolidated with appeal number 04A-UI-01255-RT for the purpose of the hearing with the consent of the parties. That appeal dealt with an overpayment and no notice for that appeal was sent to the parties. However, the parties consented to permit the administrative law judge to take evidence on and decide that issue, if necessary, and waived further notice of that issue.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1, 2, 4, and 5 but excluding Employer's Exhibit 3, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time customer service representative for approximately two years, from July 13, 1998 until she was discharged on December 5, 2003 for poor performance. The employer has a complicated ratings system for customer service representatives involving five or possibly six areas. These areas are shown at Employer's Exhibit 5 and 2 and 4. The ratings ranged from 1 which is low to 5 which is high. During the first year that the claimant was a customer service representative, her ratings were satisfactory in the No. 3 area and she received a merit raise. However, the claimant's ratings in the first three months of 2003 were low: 1.5 in January, 1.4 in February, 1.1 in March. This was because the claimant was working under a different supervisor who was very negative and although the claimant tried very hard to do her job, her ratings were low. Betty Dizard, Customer Service Supervisor, became the claimant's supervisor in the spring of 2003 and the claimant's ratings immediately jumped to 2.6 in April and 3.0 in May and 2.9 in June. This was most acceptable to the employer. In July, the claimant's ratings dropped to 1.7 but there was no explanation as to why. The claimant continued to do the job as she always had and tried very hard. Some of the categories for which the claimant was rated are quite subjective and other areas are objective. In any event, in August 2003, the claimant's rating was back up to 2.5. The claimant was then put on a performance improvement plan as shown at Employer's Exhibit 1. The performance improvement plan stressed two areas, referring customers to umbrella products or policies and to be customer available. The claimant worked on these two areas and showed improvement in those two areas but her overall rating in September was 2.3 which was down slightly from August. At that time, as shown by Employer's Exhibit 2, the claimant's improvement plan was extended and focused on the same two goals. In September the claimant's ratings dropped to 1.6 and both of the goals mentioned in the improvement plan were lower. Some of the claimant's ratings were reviewed with her as shown by Employer's Exhibit 4 on November 18, 2003. The claimant's rating for November was 2.1 and although this was up from her October rating, she was discharged. The employer's witnesses testified that the claimant was not consistent in her goals but reaching some of the goals set by the employer were difficult and depended upon customers and customers' whims. Further, the employer's goals changed from 2002 when the claimant received a merit raise to 2003, at least in some respects. There were no other reasons for the claimant's discharge.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from the employment was a disqualifying event. It 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).

In order to be disqualified to receive unemployment insurance benefits pursuant to her 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. Iowa Department of Job Service, 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. At the outset, the administrative law judge must note that the employer's rating system is extremely complicated. Employer's Exhibit 5 seems to indicate that there are only five areas to rate a customer service representative but Employer's Exhibit 2 and 4 indicate otherwise in the small square in the middle which indicates six areas. Some of these areas are quite subjective in their ratings where others are objective. The claimant's ratings in 2002 were satisfactory and she received a merit raise. The claimant's ratings in the first three months of 2003 were lower but the claimant explained that this was because she had a different supervisor who was very negative and although the claimant tried hard to do her job, her ratings were low. It does appear to the administrative law judge that the ratings can depend upon the supervisor and the person who is doing the rating.

For the next three months in 2003 the claimant's ratings were up; 2.6 in April, 3.0 in May, and 2.9 in June. This was acceptable to the employer. In July, the claimant's ratings dropped to 1.7 but no one could testify as to why. The claimant credibly testified that she was doing her job the same way and was trying hard. The claimant did indicate in her testimony that meeting some of the goals which would cause her ratings to increase was difficult and depended upon the customers and the customers' whims. In any event, the claimant's ratings were up to 2.5 in August. The employer's witnesses testified that this was not acceptable but the administrative law judge does not understand how a rating of 2.5 cannot be acceptable when the employer's witnesses had just testified that a rating of 2.6 in April was acceptable. In any event, the claimant was put on a performance improvement plan after the August rating of 2.5 as shown at Employer's Exhibit 1. This performance improvement plan focused on two areas, referring customers to umbrella products or policies and to be more customer available. In September, the claimant improved on both of these but her overall rating dropped slightly to 2.3. However, the employer was satisfied with this because the claimant had met her goals in the performance improvement plan. Nevertheless, the claimant's performance improvement plan was extended for the same goals.

The claimant's rating was low in October, 1.6, and both of her performance improvement plan goals were down. No one could testify as to why specifically. In any event, some of the claimant's ratings were discussed with her as shown at Employer's Exhibit 4 where claimant signed a statement containing her ratings. The employer's witnesses testified that the claimant was given a specific warning at that time but the claimant refused to sign it. The claimant denied any specific written warning and testified credibly that she never received a specific written warning and did not know that Employer's Exhibit 4 was in the form of a warning. The administrative law judge must conclude that there is not a preponderance of the evidence that the claimant was, in fact, given a specific written warning on November 11, 2003. The claimant signed a statement on November 18, 2003 which was the claimant's goals as reviewed with the claimant by her supervisor at the time, Betty Dizard, Customer Service Supervisor, one of the employer's witnesses. The administrative law judge does not understand how the claimant would sign this but would not sign a written warning and must conclude that there is not a preponderance of the evidence that a written warning was actually reviewed with and/or given to the claimant. The claimant's ratings in November went up to 2.1 but nevertheless she was discharged.

On the evidence here, the administrative law judge is constrained to conclude that the employer has failed to demonstrate by a preponderance of the evidence any deliberate act by the claimant constituting a material breach of her duties or evincing a willful or wanton disregard of the employer's interest. The employer's witnesses testified that the claimant was capable of doing a better job than she did. The administrative law judge is not convinced. The claimant's ratings rose and fell. It appears to the administrative law judge that ratings do depend, to some extent at least, on the supervisor as noted in the claimant's low ratings in the first three months of 2003. The employer's witnesses also testified that her rating of 2.6 in April was acceptable but that a rating of 2.5 in August was not. The administrative law judge cannot see a difference. The claimant's rating in October was low, 1.6, but then in November was back up to 2.1 but she was discharged in any event. The administrative law judge is constrained to conclude on the evidence here that the claimant was working as best she could with a complicated ratings system that depended at least in part on subjective matters beyond the claimant's control.

The more difficult question here is whether the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that here it was not. The administrative law judge is constrained to conclude on the evidence here that the employer has failed to demonstrate by a preponderance of the evidence that the claimant's behavior was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. As noted above, there is not a preponderance of the evidence that the claimant was ever given a specific written warning. It is true that the claimant was given a performance improvement plan but she met her goals in the first month after the performance improvement plan but it was nevertheless extended and then she did not meet her goals the next month. The third month, November 2003, the claimant seemed to improve but was nevertheless discharged. Accordingly, the administrative law judge concludes that the claimant's behavior was not carelessness or negligence to such a degree of recurrence as to establish disqualifying misconduct but was rather at the most mere inefficiency or unsatisfactory conduct or failure in good performance as a result of inability or incapacity and is not disqualifying misconduct.

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

DECISION:

The representative's decision of January 13, 2004, reference 02, is reversed. The claimant, Holly A. Cochran, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

pjs/kjf