

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

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UNITED STATES CELLULAR
CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12124-RT
OC: 10/03/04 R: 03
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits
Section 96.6-2 – Initial Determination (Timeliness of Appeal)

STATEMENT OF THE CASE:

The employer, United States Cellular Corporation, filed an appeal from an unemployment insurance decision dated October 27, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Erin G. Longaker. After due notice was issued, a telephone hearing was held on December 3, 2004, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she or any of her witnesses could be reached for the hearing, as instructed in the notice of appeal. Angie Bailey, Human Resources Coordinator, and Paula Gehrls, Customer Service Supervisor, participated in the hearing for the employer. Joy Myers of TALX UC eXpress, participated in the hearing to testify about the timeliness of the appeal. Department Exhibit One was 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 Department Exhibit One, the administrative law judge finds: An unemployment insurance decision dated October 27, 2004, reference 01, determined that the claimant was eligible to receive unemployment insurance benefits because records indicated that she was dismissed from work on July 14, 2004 for alleged misconduct but the employer did not furnish sufficient evidence to show misconduct. That decision was sent to the employer's representative, TALX UC eXpress, on October 27, 2004. That decision indicated an appeal had to be postmarked or otherwise received by the Appeals Section by November 6, 2004. However, November 6, 2004 was a Saturday and therefore the appeal would actually be due the next business or working day, November 8, 2004. As shown at Department Exhibit One, the appeal filed by the representative on behalf of the employer was postmarked November 8, 2004, as well as dated November 8, 2004. The employer's appeal was timely.

Because the administrative law judge hereinafter concludes that the employer's appeal was timely, the administrative law judge further finds: The claimant was employed by the employer as a part-time customer service representative from August 5, 2002 until she was discharged on June 28, 2004. The claimant averaged approximately 25 hours per week. The claimant was discharged for violating the employer's policy concerning abusive behavior and profanity to a supervisor. The employer has a policy in its associate handbook, a copy of which the claimant received and for which she signed an acknowledgement, providing that the employer expects employees to conduct themselves in an appropriate and professional manner and prohibits specifically abusive behavior and profanity. On June 24, 2004, the claimant had spilled a soft drink on her shoes and was walking around without her shoes. A supervisor, Josh, told the claimant that she needed to put on her shoes because it violated certain health codes. The claimant responded that she knew she was breaking the health codes, but she stated that she was not going to put on her shoes. The claimant then walked by a second supervisor and asked that supervisor why the first supervisor, Josh, was so "tight." The second supervisor asked the claimant what she meant. The claimant responded that she thought the first supervisor, Josh, had a "2x4 twisted up his butt." After that statement, the first supervisor, Josh, asked for a meeting between he, the claimant, and Paula Gehrls, Customer Service Supervisor and one of the employer's witnesses. At that meeting, the claimant focused comments on the supervisor, Josh, repeatedly calling him, "idiot" and repeatedly referring to him as a "jack-ass." The claimant was suspended that day in order to consult with human resources and then was discharged on June 28, 2004. The employer had no records of any warnings or disciplines for this behavior.

Pursuant to her claim for unemployment insurance benefits filed effective October 3, 2004, the claimant has received no unemployment insurance benefits.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the employer filed a timely appeal of the decision dated October 27, 2004, reference 01, or, if not, whether the employer demonstrated good cause for such failure. The administrative law judge concludes that the claimant's appeal was timely and that it should be accepted and the administrative law judge has jurisdiction to reach the remaining issues.
2. Whether the claimant's separation from the employment was a disqualifying event. It was.
3. Whether the claimant is overpaid unemployment insurance benefits. She is not because she has received no such benefits.

Iowa Code Section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the employer has the burden to prove that its appeal was timely or that it had good cause for a delay in the filing of its appeal. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that its appeal was timely. The employer's witness, Joy Myers, of TALX UC eXpress, the employer's representative for unemployment insurance matters, credibly testified that the employer's appeal was dated and mailed in an envelope bearing a postmark of November 8, 2004. This was confirmed by Department Exhibit One. The decision from which the employer seeks to appeal indicates that an appeal

had to be postmarked or otherwise received by the Appeals Section on November 6, 2004. However, November 6, 2004 was a Saturday and therefore the appeal would be due the next business or working day, November 8, 2004. Accordingly, the administrative law judge concludes that the employer's appeal was timely. Therefore, the administrative law judge concludes that the employer's appeal should be accepted and that he has jurisdiction to reach the remaining issues.

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's witness, Angie Bailey, Human Resources Coordinator, credibly testified, and the administrative law judge concludes, that the claimant was discharged on June 28, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Ms. Bailey credibly testified that the employer has an associate handbook containing rules among which divide that employees must conduct themselves in an appropriate and professional manner and specifically prohibits profanity and abusive behavior and provides the

discipline up to and including discharge for a violation. Ms. Bailey further testified credibly that the claimant received a copy of this handbook and signed an acknowledgement. The employer's other witness, Paula Gehrls, Customer Service Supervisor, credibly testified that after being admonished by a supervisor Josh, for walking without shoes she refused to put the shoes back on. The claimant then told another supervisor that she thought the first supervisor, Josh, had a "2x4 twisted up his butt." The first supervisor, Josh, asked for a meeting with the claimant and Ms. Gehrls. At that meeting, the claimant repeatedly referred to the supervisor, Josh, as an idiot and a jackass. The claimant was then suspended and discharged.

Because of the employer's clear policies and the claimant's repeated violations using profanity and other disrespectful language, the administrative law judge concludes that claimant's use of such language was a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment and evince a willful or wanton disregard of the employer's interests and is disqualifying misconduct. In Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990), the Iowa Court of Appeals held that the use of profanity or offensive language in a confrontational, disrespectful, or name-calling context, may be recognized as misconduct even in the case of isolated incidents or situations in which the target of abusive name-calling is not present. Even though this may have been an isolated incident, the target of the abusive name-calling was present and the claimant repeatedly used profanity and offensive language. This was directed to a supervisor at a meeting between the supervisor, the claimant, and the claimant's direct supervisor. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant's use of such language was disqualifying misconduct. And, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received no unemployment insurance benefits since separating from her employer herein on or about June 28, 2004 and filing for such benefits effective October 3, 2004. Since the claimant has received no unemployment insurance benefits she is not overpaid any such benefits.

DECISION:

The representative's decision dated October 27, 2004, reference 01, is reversed. The claimant, Erin G. Longaker, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct. Since the claimant has received no unemployment insurance benefits, she is not overpaid any such benefits. The employer's appeal is timely and therefore the employer's appeal should be accepted.

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