

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATTHEW L MCQUERRY
Claimant

APPEAL NO. 08A-UI-00174-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED STATES CELLULAR CORP
Employer

**OC: 12/02/07 R: 03
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, US Cellular, filed an appeal from a decision dated December 27, 2007, reference 01. The decision allowed benefits to the claimant, Matthew McQuerry. After due notice was issued, a hearing was held by telephone conference call on January 22, 2008. The claimant participated on his own behalf. The employer participated by Associate Relations Manager Shelly Lawless and Customer Service Manager Nicole Rauch.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Matthew McQuerry was employed by US Cellular from November 17, 2003 until December 3, 2007, as a full-time technical customer service representative. On November 19, 2007, the employer was advised by another associate the claimant was showing co-workers how to bypass the authorized Internet application on company cell phones, thus avoiding charges.

Five employees were interviewed and three claimed Mr. McQuerry had shown them how to set up the cell phones to bypass the application and had specifically told them not to tell management he had done it. The claimant was interviewed by Customer Service Manager Nicolle Rauch and Association Relations Manager Shelly Lawless on November 26, 2007. He denied knowing anything about the allegations and authorized them to examine his data to prove he had not bypassed the application on his equipment. The employer declined to do this but asked him to demonstrate how to bypass the authorized application, which he was able to do. This was considered “suspicious” and after further interviews with other associations and consultations, the decision was made to discharge the claimant for violation of the code of conduct and the phone program policy.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). In the present case the employer did not present testimony from any of the employees who alleged the claimant had shown them how to bypass the authorized application. The determination to discharge was based on these allegations and the employer's assumption that since Mr. McQuerry was able to navigate a bypass application in their presence, he was guilty of violating the code of conduct. He stated he was able to bypass the application because of his technical skills alone.

If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of December 27, 2007, reference 01, is affirmed. Matthew McQuerry is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css