

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EDWARD J HULETT**  
Claimant

**APPEAL NO. 09A-UI-18073-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**UNITED STATES CELLULAR CORP**  
Employer

**OC: 11/01/09**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

United States Cellular Corporation filed a timely appeal from a representative's decision dated November 20, 2009, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was conducted on December 31, 2009. The claimant participated personally. Participating as a witnesses for the claimant were Rebecca Alon and Victor Hyman. The employer participated by Ms. Yvette Ardolino and Ms. Paula Rosenbaum.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record the administrative law judge finds: Edward Hulett was employed as a full-time customer service specialist for United States Cellular Corporation from September 2, 2002 until October 28, 2009 when he was discharged from employment. The claimant was paid by the hour. His immediate supervisor was Yvette Ardolino.

On Monday, October 26 Ms. Ardolino, the claimant's supervisor, overheard a telephone conversation between the claimant and a customer. Ms. Ardolino then monitored the call and felt that the claimant was not being as helpful as possible and was using a condescending tone. The supervisor placed a sticky note on the claimant's desk urging the claimant to demonstrate "empathy." Mr. Hulett responded that he had and as the claimant walked away Ms. Ardolino believed that the claimant had mouthed the word "fuck" to her in an exasperated manner.

Based on the call, the supervisor spoke privately with Mr. Hulett about the matter in an informal way as they walked outside the building. Mr. Hulett stated that he did not recall mouthing that word to his supervisor.

The following day, October 27, Ms. Ardolino was reviewing calls during a quality review session and discovered a call during which Mr. Hulett had hung up on a customer. The claimant's

memo with respect to the call had indicated that the caller had used profanity and that the claimant had warned the caller several times to stop doing so before hanging up. Before monitoring the call, Ms. Ardolino determined that profanity had been used by the caller but concluded that the profanity was not specifically "directed" to Mr. Hulett and the claimant had not sufficiently warned the customer before disconnecting. Based upon these two events a decision was made to terminate Mr. Hulett from his employment, the employer believing that the claimant demonstrated inappropriate attitude and demeanor towards his supervisor and that the claimant had failed to follow work instructions with respect to procedures to be taken before disconnecting from a call. The matter was reviewed by other management personnel who were in agreement that the claimant's call demeanor did not meet acceptable standards and the claimant's discharge was confirmed.

It is the claimant's position that he did not mouth the inappropriate epithet to his supervisor on October 26 and that he did not disconnect from the call being monitored on October 27 until he felt he had no other reasonable alternative after he believed that profanity had been directed towards him by the caller and the caller had been sufficiently warned.

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

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It does 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify the denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer declines to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiency in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in this case is disputed. The employer maintains that Mr. Hulett inappropriately mouthed a sexually explicit epitaph to his supervisor on October 26, 2009 while the supervisor was attempting to assist Mr. Hulett in performing his job duties. The claimant denied under oath mouthing the epitaph and denies that he admitted to doing so during a private counseling session that was held informally between the parties.

The final decision to terminate the claimant occurred the following day when a review of telephone conversations between Mr. Hulett and company customers revealed that the claimant had disconnected from a call after the caller had repeatedly used profanity. Under company rules customer service representatives are allowed to disconnect if they believe a customer is acting inappropriately and or using profanity towards them after they provided sufficient warning to the caller.

In this case the employer's witness maintains that the profanity although used was not directed personally to Mr. Hulett and maintains that the claimant did not sufficiently warn the caller. In contrast, Mr. Hulett maintains that the profanity was directed towards him and that he did warn the caller. The recording of the telephone conversation in question was not made available at the time of hearing for an independent determination of Mr. Hulett's actions or the reasons for them.

The question before the administrative law judge in this case is not whether United States Cellular Corporation has a right to discharge a worker for this reason or for any reason whatsoever. The question is whether the claimant's acts were sufficient the denial of unemployment insurance benefits. While the decision to terminated Mr. Hulett from his employment may have been a sound decision from a management viewpoint, the administrative law judge concludes based upon the evidence in the record that sufficient evidence of intentional disqualifying misconduct on the part of the claimant has not been shown. The employer did not elect to discharge Mr. Hulett after they believed that he had mouthed an inappropriate statement to his supervisor and the contents of the recorded conversation between Mr. Hulett and the customer that was reviewed on October 27, 2009 was not furnished by the employer, although available, to corroborate the employer's allegation of misconduct by Mr. Hulett. Benefits are allowed provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated November 20, 2009, reference 01, is affirmed. The claimant was dismissed for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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