

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

SCOTT A WIESER
APT 1201
125 E BOYSON RD
HIAWATHA IA 52233-1266

UNITED STATES CELLULAR CORP
c/o TALX EMPLOYER SERVICES
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06O-UI-07484-DT
OC: 04/16/06 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

STATEMENT OF THE CASE:

United States Cellular Corporation (employer) appealed a representative's May 9, 2006 decision (reference 01) that concluded Scott A. Wieser (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. There had been a prior hearing and decision on the employer's appeal, but after further appeal to the Employment Appeal Board, this matter was remanded to the Appeals Section for a new hearing. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on August 10, 2006. The claimant participated in the hearing. Angie Baily appeared on the employer's behalf and presented testimony from one other witness, Stephanie Hutchinson. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 13, 2004. He worked full time as a customer service representative at the employer's Marion, Iowa, customer care center. His last day of work was April 10, 2006. The employer discharged him on that date. The stated reason for the discharge was using vulgar language on the call floor.

The claimant worked a 6:00 a.m. to 3:00 p.m. schedule Sunday through Thursday. On April 9, 2006, the claimant got up from his desk at approximately 7:45 a.m. and started heading back toward the break area. As he passed a coworker's desk he said to her, "you can have your f - - - ing desk back. I'm f - - - ing sick of this place and that b - - - ." Two other coworker's whose desks were beside the first coworker's desk also heard the statements. One of those other coworkers reported the incident to Ms. Hutchinson, the customer service coach, on the morning of April 10, 2006. Ms. Hutchinson confronted the claimant, who denied saying both "f - - - ing" or "b - - - ," but stated he might have said, "friggin'" or "flippin'" or "freakin'" and maybe "beach." Ms. Hutchinson then interviewed the coworker to whom the statement was allegedly directed as well as the other witnessing coworker; each of them confirmed the version as reported by the first complaining witness. After consulting with human resources, Ms. Hutchinson again met with the claimant; he again initially denied using the specific terms alleged, but then commented to Ms. Hutchinson that he was sorry for anything that he had said that had caused a problem. The employer concluded that the claimant had made the comments and discharged him.

The claimant established a claim for unemployment insurance benefits effective April 16, 2006. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$2,163.00.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

Iowa Code § 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).

At hearing, the employer only presented second-hand testimony regarding what language the claimant actually used, which in the face of a first-hand denial by the claimant is frequently insufficient to meet the employer's burden of proving that the incident actually occurred as alleged. However, the claimant's demeanor during the hearing demonstrated that his testimony is not credible. In the very process of identifying language that he "didn't use," he demonstrated a casual familiarity and ease of use of vulgar vocabulary that belied his denial. Further, the claimant more than once made spontaneous outbursts during the hearing, such as "b - - - s - - -" and "g - - - d - - -" which is also inconsistent with his claim that he did not use foul language.

The claimant's use of vulgar language on the call floor shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's May 9, 2006 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 10, 2006. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$2,163.00.

ld/kjw