

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 UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-05558-HT
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
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, US Cellular, filed an appeal from a decision dated May 9, 2006, reference 01. The decision allowed benefits to the claimant, Scott Wieser. After due notice was issued a hearing was held by telephone conference call on June 14, 2006. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Associate Relations Representative Angie Bailly and Customer Service Coach Stephanie Hutchinson .

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Scott Wieser was employed by US Cellular from September 13, 2004 until April 10, 2006. He was a full-time customer service representative (CSR). At the time of hire the claimant received a copy of the employee handbook. The disciplinary policy states an employee may be disciplined, up to and including discharge, for using profanity on the calling floor.

On the morning of April 10, 2006, another associate reported to Customer Service Manager Stephanie Hutchinson that the claimant had made an inappropriate remark on the call floor the day before. He had gotten up from his work area and said to another associate, "Jerilyn, you can have your fucking desk back. I'm fucking sick of this place and that bitch. I have my resume on Monster.com." The associate gave Ms. Hutchinson the name of another associate who was present and the manager interviewed that person as well, and the comment was confirmed.

Ms. Hutchinson consulted with Associate Relations Manager Angie Baily who recommended an interview with Mr. Wieser first. The claimant was interviewed and he was asked if he had made any inappropriate comments or remarks the day before. He denied any recollection in spite of several hints such as comments regarding his desk, as he was leaving to go on break and others. He finally was told what was reported by two other associates and admitted he might have said "fricking." The employer sent him home pending further investigation.

The customer service manager interviewed the other two associates who had been working at the time the incident was reported to have happened. One confirmed the claimant's comment and the other refused to "get involved" in the matter. The claimant was called and asked to come back to the office but he asked if he was going to be discharged and when he was told he was, he elected to be notified over the phone. Ms. Hutchinson formally notified him of the discharge at that time.

Scott Wieser has received unemployment benefits since filing a claim with an effective date of April 16, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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 policy clearly states an employee may be discharged for even one incident of profanity on the call floor. The employer has established the claimant used vulgar language on the call floor. Comments made on the call floor may possibly be overheard by customers calling into the facility which is why the language used by associates must be professional. Customer overhearing comments such as the one made by Mr. Wieser could easily be insulted and withdraw their business from the employer. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 9, 2006, reference 01, is reversed. Scott Wieser is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$2,163.00.

bgh/pjs