

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Mellody was employed by USCC from May 6, 2002 until September 23, 2005 as a full-time customer service specialist. He was discharged for inappropriate use of the employer's e-mail system. The policy prohibits sending inappropriate messages, including jokes, chain letters, or messages or images of a pornographic nature. The employer held a team meeting on September 8, 2005 to review the policy and to answer any questions the team members had about the policy. Mr. Mellody was in attendance at that meeting.

On September 20, 2005, Mr. Mellody sent an e-mail to someone outside the business. The e-mail contained six photographs spoofing the MasterCard "priceless" ads that appear on television. One of the photographs is of a man sitting with his legs apart urinating. A portion of his penis is visible in the photograph. Another photograph is of a woman squatting over a urinal with her upper thighs visible. Another photograph is of a woman lying face down on the sidewalk with her buttocks exposed. The remaining photographs are fairly innocuous. Also on September 20, Mr. Mellody sent a joke to some of his coworkers. The joke was about a woman having an illicit affair and, at one point, the word "shit" is used. On September 21, Mr. Mellody sent a news article to some of his coworkers about new condoms being named for Bill Clinton and Monica Lewinsky. The employer considered it inappropriate because it referenced condoms.

None of Mr. Mellody's coworkers complained about his e-mails or otherwise indicated they found them offensive. The e-mails were discovered during an audit. Mr. Mellody had not previously been disciplined for sending inappropriate e-mails. He had received a verbal warning on March 31, 2004 for using the word "shitty" when asked how work was treating him. As a result of the e-mails he sent on September 20 and 21, Mr. Mellody was discharged on September 23, 2005.

Mr. Mellody has received a total of \$1,938.00 in job insurance benefits since filing his claim effective September 25, 2005.

#### REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Mellody was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Mellody was discharged for sending e-mails the employer considered to be a violation of policy. The violations discovered during the audit presented the first occasion on which the employer had to discipline him for inappropriate e-mails. Although Mr. Mellody had not been personally warned about his e-mails, the employer had just conducted a meeting regarding e-mails less than two weeks before he sent the e-mails that resulted in his discharge.

The article concerning condoms and the joke Mr. Mellody sent are not so outrageous as to constitute violations of the employer's e-mail policy. They do not contain graphic sexual or obscene language. However, the photographs showing partial nudity do constitute violations. Although the photographs may fall short of what most would consider pornography, the depiction of naked buttocks and male genitals was inappropriate in the workplace. The fact that

the photographs were sent to someone outside of USCC does not alter the fact that they were found on Mr. Mellody's work computer.

Given the fact that the employer had reviewed its Internet and e-mail policies less than two weeks beforehand, Mr. Mellody knew or should have known that having photographs showing partial nudity on his computer was contrary to the employer's standards. The review was, in essence, a warning to employees that violations of the policy could result in disciplinary action, up to and including discharge, as stated in the policy. For the reasons stated herein, it is concluded that the employer has satisfied its burden of proving disqualifying misconduct. Accordingly, benefits are denied.

Mr. Mellody has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated October 12, 2005, reference 01, is hereby reversed. Mr. Mellody was discharged for misconduct in connection with his employment with USCC. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Mellody has been overpaid \$1,938.00 in job insurance benefits.

cfc/kjw