

**BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319**

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**RICKY J BARRETT**

Claimant,

and

**UNITED STATES CELLULAR CORP**

Employer.

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**HEARING NUMBER: 10B-UI-19322**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2A**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

**FINDINGS OF FACT:**

The claimant, Ricky J. Barrett, was employed by United States Cellular Corp. from February 18, 2008 through September 15, 2009 as a full-time customer service representative. (Tr. 2, 24) In his position, Mr. Barrett was responsible for "...taking calls from US Cellular customers and helping to identify and address their questions and concerns." (Tr. 3) Sometime in March of 2009, the customer service coach (Tammy Miller) approached the claimant informing him that the company was going to take a new approach, as a company, to handle calls. (Tr. 24-25)

The claimant hadn't had any problems with the manner in which he had been handling calls; however, he experienced difficulty performing his job to the employer's new expectations. (Tr. 3, 24) The employer felt that Mr. Barrett did not show enough empathy toward customers. (Tr. 10, 14-15) The employer placed him on an achievement/performance plans a couple of times (March of 2009 and for which the claimant signed in acknowledgement of receipt on August 5, 2009. (Tr. 4-5, 10, 25, Exhibits 1 & 2) The objective of each plan was "...to improve [Mr. Barrett's] call qualify and ...empathy...as well communicating effectively...within a span of 45 days." (Tr. 9-10, 11, 13, 14, 30-31) The claimant was given a handbook to help him learn empathy for customers. (Tr. 25-26, 35)

Each week, Ms. Miller met with Mr. Barrett to monitor his progress. (Tr. 26) The claimant wrote up a 'game plan' to ensure he followed the employer's specific protocol. Mr. Barrett understood that he was significantly improving (Tr. 15-16, 28), but still not to the employer's expectations. (Tr. 27) The claimant had to sit with another customer service coach to observe the way he handled calls. Mr. Barrett noted that this coach handled calls in much the same fashion as he did. (Tr. 30)

In a September 14<sup>th</sup> meeting, the employer indicated that the claimant had significant improvement in his call quality. (Tr. 15, 28) However, the claimant was still below the employer's standard when it came to a particular score, required in his performance plan. (Tr. 3, 28) He was discharged the following day.

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

Iowa Code Section 96.5(2)(a) (2009) provides:

*Discharge for Misconduct.* If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that the claimant's performance became a target of concern after the employer's changed their protocol for handling calls in March of 2009, which the employer does not refute. (Tr. 24-25) He complied with the employer's efforts to assist him in improving his overall performance by shadowing other coaches, drawing up his own script so as to keep him on track with the employer's protocol. (Tr. 15-16, 28) Such behavior demonstrates his good faith attempt to rise to the employer's expectations. Yet, the record shows that Mr. Barrett's performance still fell short of the employer's standards (Tr. 27), which ultimately led to his termination.

The employer admitted the claimant improved; however, over time Mr. Barrett would lapse back into what the employer considered 'old habits.' (Tr. 16) These 'old habits' could arguably be the same methods employed by one of the coaches Barrett observed who purportedly handled calls in similar manner as the claimant. (Tr. 30) If this is so, then perhaps the training the claimant received was not adequate enough to effectuate a more lasting improvement.

It is clear that Mr. Barrett's inability to perform to the employer's expectations was not intentional. Rather, the record shows he cared about his customers and tried to assist them to the best of his ability based on this training and prior experience. The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. In the end, the claimant was terminated for performance issues for which the employer failed to satisfy their burden of proving intentional behavior on his part.

#### **DECISION:**

The administrative law judge's decision dated February 4, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

**DISSENTING OPINION OF MONIQUE F. KUESTER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/fnv