

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MINDY S WENDT
Claimant

APPEAL NO. 130-UI-05055-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**UNITED STATES CELLULAR
CORPORATION**
Employer

OC: 12/09/12
Claimant: Respondent (2/R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

United States Cellular Corporation (employer) appealed a representative's January 15, 2013 decision (reference 01) that concluded Mindy Wendt (claimant) was discharged and there was no evidence of willful or deliberate misconduct. This administrative law judge issued a decision on February 26, 2013, affirming the representative's decision. A decision of remand was issued by the Employment Appeal Board on April 30, 2013, to further add to the case record. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 5, 2013. The claimant participated personally. The employer participated by Kileen Martin, Customer Service Coach. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 4, 2009, as a full-time customer service representative. The claimant signed for receipt of the employer's handbook. The employer issued the claimant a verbal warning for checking on a customer account after the customer's call was over to make certain the customer's request had been taken care of. The employer issued the claimant a final written warning on December 11, 2012, for performance expectation issues. The employer notified the claimant that further infractions could result in termination from employment.

The claimant saw other employee's texting during work hours. She saw her customer service coach sending and receiving texts during meetings. The claimant had never been warned about sending or receiving texts during work hours. She was unaware that any other employee had been warned about sending or receiving texts during work hours. On December 10, 2012, while the claimant was working and had customers, she sent texts to a co-worker who was not working. The claimant thought that this coworker had printed out a private Facebook conversation between the two of them and given it to Kileen Martin. The claimant sent five texts before she went to break. During break the conversation continued and the co-worker asked

the claimant three times to stop texting her. The claimant did not. After her 30-minute break, the claimant sent one more text while working. The co-worker showed the employer the texts and the employer terminated the claimant on December 11, 2012, for texting while she had customers and violating the anti-harassment policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. The claimant's actions were volitional. She intentionally continued to text a co-worker when the co-worker told her to stop three times, in violation of the employer's anti-harassment policy. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits may now constitute an overpayment. The issue of the overpayment is remanded for determination.

DECISION:

The representative's January 15, 2013 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount provided the claimant is otherwise eligible. The issue of the overpayment is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css