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

SHEILA K CRAWLEY
152 – 17TH AVE SW
CEDAR RAPIDS IA 52404

UNITED STATES CELLULAR CORP
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-04558-RT
OC: 03-21-04 R: 03
Claimant: Respondent (1)

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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, United States Cellular Corporation, filed a timely appeal from an unemployment insurance decision dated April 9, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Sheila K. Crawley. After due notice was issued, a telephone hearing was held on May 13, 2004 with the claimant participating. Chris Gardner, Jason Woods, and Rusty Porter were available to testify for the claimant but not called because their testimony would have been repetitive and/or unnecessary. Angie Baily, Human Resources Coordinator, and Nicole Rauch, Customer Service Manager, participated in the hearing for the employer. Employer's Exhibit 1 was admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit 1, the administrative law judge finds: The claimant was employed by the employer as a full-time customer service representative from January 5, 2003 until she was discharged on March 24, 2004. The claimant was discharged for inappropriate use of the employer's electronic communications policy and harassment policy. The employer's policies appear at Employer's Exhibit 1. Sometime prior to March 24, 2004, the claimant sent a text message to two people stating, "fag next to me." This text message was sent over the claimant's cell phone provided by the employer to two individuals, one of whom was the claimant's boyfriend. The word "fag" was a term coined by the claimant's boyfriend to refer to the person next to the claimant. For reasons discussed below, the employer had begun to investigate the claimant's electronic communications. On March 24, 2004, Nicole Rauch, Customer Service Manager and the employer's witness, confronted the claimant and the claimant conceded that she had sent the text message. The claimant also was discharged for sending personal e-mails during work time. The employer could provide no dates or times or copies of either the e-mails or the text messaging. The e-mails were just of a personal nature and contained no other inappropriate or incendiary language. The claimant had received no warnings or disciplines for such behavior.

In the last quarter of 2003, the claimant had a conversation with another manager, Heather Sneed, who informed the claimant that someone had reported that the claimant had done something or said something inappropriate and reminded the claimant of the employer's harassment policy. The employer had no information as to what the claimant had allegedly done.

The employer began to investigate the claimant's e-mails and text messaging because of a complaint by a coworker made to the employer's other witness, Angie Baily, Human Resources Coordinator, on March 22, 2004. This coworker claimed that the claimant had approached her in the bathroom on March 20, 2004 and made some kind of proposition of a sexual nature involving the claimant, the female coworker, and the claimant's boyfriend. On that day the claimant had ripped the crotch area in her pants but had not realized that she had ripped them and did not know that they were ripped and open. The claimant was wearing underwear underneath the pants. Nevertheless the claimant was accused of displaying her genitalia to the complaining coworker. The claimant denied such proposition and denied displaying her genitalia but conceded that she had ripped her pants in the crotch area but was unaware of it. The complaining coworker was not available to testify at the hearing. In any event, the claimant was not discharged for this matter but was discharged for violation of the employer's electronic communication and harassment policy for other reasons. This matter merely led to the investigation of the claimant.

Pursuant to her claim for unemployment insurance benefits filed effective March 21, 2004, the claimant has received unemployment insurance benefits in the amount of $1,967.00 as follows: $167.00 for benefit week ending March 27, 2004 (earnings $208.00) and $300.00 per week for six weeks from benefit week ending April 3, 2004 to benefit week ending May 8, 2004 in the amount of $1,800.00.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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, (8) provide:

> 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).

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has

failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses testified that the claimant was discharged for improper use of the employer's electronic communication policy and its harassment policy arising out of the transmission of a text message on the claimant's cell phone provided by the employer to two individuals, one of whom was the claimant's boyfriend. However, the employer could not provide either a copy of the text message or the time that the messages were sent or to whom the messages were sent. The message contained the words "fag next to me." The claimant concedes that she sent this text message to her boyfriend and that her boyfriend had coined the word "fag" referring to the individual sitting next to the claimant. The claimant testified that she believed the cell phone was for her personal use. It was provided by the employer and the employer paid the cost but it was for the claimant's "training." There was no testimony as to when this text message had been sent whether during working hours or not. The administrative law judge concludes that the employer's evidence is just too sketchy and vague here to reach a preponderance of the evidence that the claimant's act was a deliberate act or omission constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. The claimant received no warnings or disciplines for such behavior prior to her discharge. The administrative law judge in no way condones the use of the word "fag" nor the text messaging of anything of a harassing nature. However, the administrative law judge notes that this message was not sent to a victim intended to harass the victim but was sent to someone else and the offending word "fag" was merely to describe someone using a word coined by one of the recipients of the text message. The administrative law judge is not completely versed in text messaging or electronic communications but notes that the employer's electronic communication policy prohibits obscene language using the employer's e-mail and internet. The administrative law judge is not convinced that the claimant used the employer's e-mail or internet and is further not convinced that the single word used by the claimant was obscene or harassing to the extent that it would violate the employer's electronic communications policy.

The employer's witnesses also testified that the claimant was discharged for personal e-mails but conceded that the e-mails were not otherwise inappropriate but just that they were personal. The employer's electronic communications policy "permits occasional personal use of electronic communication devices while at work," but provides that such personal use is "typically limited to scheduled break and/or meal periods . . . provided it does not interfere with the associate's work responsibilities . . ." The e-mails were not provided to the administrative law judge nor were the specific dates and times of such e-mails. The employer's witnesses merely testified that the claimant sent the e-mails during dates and times when she was not on break or lunch. Therefore, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's personal e-mails were sent while she was on duty and, even if so, the administrative law judge is not convinced that it violates the employer's policy for personal e-mail use because the policy merely says "typically limited to scheduled break and/or meal periods . . ." and does not seem to prohibit absolutely personal e-mails during work time. The employer did not provide any evidence that the claimant's e-mails interfered with her work responsibilities or negatively impacted the business operations or system performance of the employer or violate otherwise company policies as also provided in the employer's electronic communications policy. It is true that the employer's electronic communications policy maintains a zero tolerance for pornographic and other sexually explicit material but there is no evidence that the claimant's e-mails were such and the administrative law judge as noted above is not convinced that the word "fag" is pornographic to the extent that it violates the employer's policies. The particular provisions of the harassment policy cited by the employer's witnesses

prohibit display or transmission of materials or illustrations of a sexual nature including derogatory posters, cartoons, drawings, or computer images or e-mail messages. The administrative law judge does not believe that there is a preponderance of the evidence that the claimant's use of the word "fag" violates this policy. Again the administrative law judge notes that the claimant received no warnings or disciplines for this behavior prior to her discharge. There was evidence that another manager, Heather Sneed, talked to the claimant about a report made by a coworker about some inappropriate comments the claimant had allegedly made but the claimant testified that this was merely a statement for her information and was not in the nature of a warning. The administrative law judge further notes that it did not involve the employer's electronic communication policy. Finally, the employer could offer no information about what the claimant allegedly did that gave rise to this discussion with Ms. Sneed.

At the end of the hearing to explain the employer's investigation of the claimant's electronic communications, the employer's witnesses raised a very serious and contentious matter concerning a complaint by a coworker that the claimant had made a sexual proposition involving the claimant, her boyfriend, and the female coworker. The employer's witnesses further stated that the coworker had complained that the claimant had ripped out the crotch of her pants and displayed her genitalia. First, the employer's witnesses did not testify that the claimant was discharged for this complaint or these actions but merely pointed out that this is what led to the investigation. If in fact the claimant was discharged for this matter, according to the employer's own witnesses, the claimant would have been discharged for past acts and a discharge for misconduct cannot be based on past acts. It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct but as noted above there is not a preponderance of the evidence of any current act of disqualifying misconduct. The administrative law judge also must note that waiting until the very end of the employer's case in chief to bring out such an allegation merely to establish the reason for an investigation is itself a questionable practice. Further, the claimant denied the proposition stating that her boyfriend was 900 miles away and such a liaison would be impossible. The claimant conceded that she had ripped her pants in the crotch area but did not realize that they were ripped and that she had on underwear therefore she was not displaying her genitalia. Finally, even after requesting the testimony of the complaining coworker concerning these allegations, the employer was unable to produce the coworker. Therefore, the administrative law judge must conclude that the claimant's direct testimony outweighs that of the hearsay testimony of the employer's witnesses. Accordingly, the administrative law judge concludes that even if the claimant was discharged for this alleged incident, there is not a preponderance of the evidence that the claimant committed the offenses charged.

In summary, and for all the reasons set out above, the administrative law judge is constrained to conclude that the employer has not met its burden of proof to demonstrate by a preponderance of the evidence any disqualifying misconduct on the part of the claimant. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.
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> 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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1,967.00 since separating from the employer herein on or about March 24, 2004 and filing for such benefits effective March 21, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 9, 2004, reference 01, is affirmed. The claimant, Sheila K. Crawley, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/kjf