IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MINDY S WENDT
Claimant

UNITED STATES CELLULAR CORPORATION
Employer

APPEAL NO. 13A-UI-00942-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/09/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

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. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 25, 2013. The claimant participated personally. The employer participated by Paula Rosenbaum, Associate Relations Representative and 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, the claimant sent five texts during work hours. A co-worker who knew the claimant was working sent the claimant four texts in response. The co-worker showed the employer the texts and the employer terminated the claimant on December 11, 2012, for texting while at work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer had not previously warned claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer did not provide sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

The claimant's and the employer's testimony is inconsistent with regard to a previous verbal warning regarding the use of her phone. The administrative law judge finds the claimant's testimony to be more credible. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony about the warning but chose not to do so. The employer did not provide first-hand testimony of the warning at the hearing and, therefore, did not provide sufficient eye witness evidence to rebut the claimant's denial of the warning.

DECISION:

The representative's January 15, 2013 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css