



AMG/fnv

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

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I would comment that while the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W. 2d 219 (Iowa App. 1983.) I find it credible that the claimant was showing the co-worker her baby's ultrasound. The policy submitted into evidence addresses the use of the cell phone. However, I do not believe that the claimant's actions constituted "use" in that she was not making a call or engaging in behavior that could constitute usage. Instead, I would find that her behavior was the equivalent of pulling out a paper photo.

The second act of insubordination does not rise to the level of misconduct since the claimant walked away in an attempt to defuse the situation. The employer would significantly enhance their case if they would have provided a direct witness to the incident. It may also be beneficial to the employer if they review their policies and procedures to ensure that they accurately reflect the intent of the facility.

In the end, I would conclude that the claimant may have used poor judgment in failing to hand over the phone, but this choice does not constitute misconduct under unemployment law. I would therefore allow benefits provided the claimant is otherwise eligible.

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Monique F. Kuester

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