

**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**

**JERICA A PARKER
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**UNITED STATES CELLULAR CORP
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-10606-H2T
OC: 08-29-04 R: 03
Claimant: Respondent (2)**

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/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 17, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 21, 2004. The claimant did participate. The employer did participate through Kerrie Engle, Customer Service Supervisor, (representative) Angie Bailey, Human Resources Coordinator and Angie Albright, Customer Service Manager. Employer's Exhibit One was received. The hearing continued on November 18, 2004 and the claimant did participate. The employer did not participate at the continuation of the hearing on November 18, 2004. Employer's Exhibit Two was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a customer service representative full time beginning November 1, 2001 through August 30, 2004 when she was discharged. The claimant was discharged for sending an exorbitant amount of text messages between August 16 and August 20 to some of her coworkers. The employer's policy allows for employees like the claimant to use text messaging while at work "for occasional personal use, typically limited to schedule break and/or meal periods and in a manner similar to personal use of company telephones, provided it does not interfere with associate's work responsibilities, negatively impact business operations and system performance, or violate company policies." The reports found at Employer's Exhibit Two show the amount of the claimant's text messaging on August 5, 8, 9, 10, 12, 15, 16, 17 and 18. The claimant worked from 6:00 a.m. to 3:00 p.m. and typically took a lunch break from 10:00 a.m. until 11:00 a.m. A review of the company records indicates that the majority of the claimant's text messages were made during hours when she was not at work or scheduled to be at work. However, the same records show that on numerous days during her regular work hours and not including her lunch break the claimant was making as many as 15 to 17 text messages per day. The claimant was also receiving numerous text messages, particularly from one coworker. The claimant's use of the text-messaging feature offered by the employer during work hours was excessive.

The claimant was also disciplined and discharged for saying to another employee, "were you dipping your pen in company ink". Her coworker, Mark Ladge complained to management about the comment. At hearing the claimant admitted making the comment but denied that Mr. Ladge found it offensive. The fact that Mr. Ladge complained about the comment convinces the administrative law judge that he found it offensive.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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).

An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's rights by violating the policy permitting only occasional use of the text-messaging feature while at work. A review of the many days the claimant used the feature indicate that her use was much more than occasional while on work hours. Additionally the claimant's comment to her coworker violated the employer's sexual harassment policy. The claimant's disregard of the employer's rights and interests is misconduct. As such, the claimant is not eligible to receive unemployment insurance benefits. Benefits are denied.

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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The September 17, 2004, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$288.00.

tkh/kjf