

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JERAMY M. SIMMONS
Claimant

APPEAL NO. 09A-UI-07259-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**UNITED STATES
CELLULAR CORPORATION**
Employer

**Original Claim: 11/02/08
Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated May 6, 2009, reference 02, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 5, 2009. The employer participated by Diana Johnson, customer service coach, and Paula Rosenbaum, associate relations representative. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Diana Johnson, the testimony of Paula Rosenbaum, and Employer's Exhibits 1 through 9.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was hired on November 17, 2008, as a customer service representative. He worked in a call center and answered customer inquiries about their cellular phone services, such as billing and pricing. When the claimant was hired, the employer's attendance policy was explained to him in detail. He was informed that if he was not going to be at work, he was to call in one-half hour prior to his shift and speak with Diana Johnson if at all possible. Text messages were not a sufficient means of apprising his employer that he would not be at work.

The claimant was terminated on April 14, 2009, for excessive absenteeism and violation of the employer's attendance policy. The incidents that immediately led to the claimant's termination occurred on April 12, 2009 and April 13, 2009. The claimant was arrested on April 12, 2009, but informed his employer that his girlfriend had been arrested and that he did not have a ride to work. On April 13, 2009, the claimant sent a text message that he was in court. It was, however, the claimant himself and not his girlfriend that was arrested and he was incarcerated on April 13, 2009.

The claimant had previously received a verbal warning for a failure to come to work on March 14, 2009 and March 15, 2009, due to transportation problems. A written warning was given for incidents on March 29, 2009, and March 30, 2009, when the claimant did not report to work and did not call. Again, he used text messages rather than calling as he had been instructed to do. A final written warning was given for incidents on April 3, 2009, and April 4, 2009. This absence was covered by unapproved personal time and unapproved vacation time, as his daughter was sick.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 24.32(8) provides:

(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.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and

was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

The evidence in this case established misconduct that disqualifies the claimant from receiving unemployment insurance benefits. The claimant repeatedly violated the employer's attendance policy and accumulated excessive and unexcused absences. The final two incidents that led to the claimant's termination were his arrest and incarceration on April 11, 2009, and April 13, 2009. The claimant first told the employer that it was his girlfriend who had been arrested but then admitted that it was him. There were four other instances of the claimant's unexcused failure to come to work and his improper reporting of his absences. The claimant received verbal and written warnings and each time was informed about the employer's attendance policy and how absences were to be reported. He continued to text the employer instead of calling and did not return phone calls when messages were left for him. Misconduct has been established.

DECISION:

The representative's decision dated May 6, 2009, reference 02, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw