

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

JOEL J GAVIN  
407 S GUNNISON ST  
BURLINGTON IA 52601-4148

UNITED STATES CELLULAR CORP  
c/o TALX EMPLOYER SERVICES  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-05735-DT  
OC: 04/30/06 R: 04  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

United States Cellular Corporation (employer) appealed a representative's May 19, 2006 decision (reference 01) that concluded Joel J. Gavin (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 22, 2006. The claimant participated in the hearing. Christine Versteegen appeared on the employer's behalf and presented testimony from two other witnesses, Larry Post and Dave Neuhaus. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 23, 2003. Since about October 1, 2005, he worked full time as a sales supervisor at the employer's West Burlington, Iowa, store. His last day of work was May 5, 2006. The employer discharged him on that date. The reason asserted for the discharge was failing to perform to the employer's expectations.

On April 13, 2006, the store manager, Mr. Post, had placed the claimant on a performance improvement plan because of concerns regarding the claimant's lack of strength in his communication with associates and failing to officially initiate an investigation of alleged unethical behavior made against an associate in March 2006. The allegation proved to be unfounded, but the employer was concerned that there were problems between associates that could have been avoided had there been a formal investigation initiated and the results made known to the associates.

Between April 27 and April 29, there were three incidents that led the employer to conclude that the claimant should be discharged. On April 27 an associate came into the store and became upset because the claimant was using the office "pod" she liked to use. The claimant only said a few words to her at the time regarding her attitude, and waited until the afternoon until the associate had calmed down to discuss the incident with her in more detail. The employer felt the claimant should have addressed the matter more directly at the time of the incident instead of waiting.

On April 28 the claimant was assisting an associate who was leaving the company to change their associate phone plan to a consumer plan. There was another associate who was waiting to discuss an issue with the claimant. After the claimant had been on the phone with the call center for about 20 minutes working on making the associate to consumer plan change, he asked the call center representative if his involvement was further needed, and was told it was not. He then arranged for a third associate to come on the line for the remainder of the transaction. He had taken steps to ensure that there was no commission that would be generated as a result of the transaction; however, the employer was concerned that by having the third associate come onto the line for the remainder of the transaction, it was potentially causing the third associate to be in violation of the employer's associate phone policy prohibiting associates from doing transactions involving friends and family.

On April 29 the claimant was doing a counseling with an associate regarding her attitude. At one point during the counseling, the associate asked the claimant a question which he was not able to answer, and Mr. Post, who was also in the meeting, filled in and then finished out the meeting. The employer concluded that the claimant had lost control of the situation and had not effectively communicated as a manager should.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is

misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or

2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or
    2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is, in essence, unsatisfactory job performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to perform to the employer's expectations. Under the circumstances of this case, the claimant's actions were at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or were good faith errors in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's May 19, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/kkf