

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

SHEILA L WOODS
1207 N ST SW
CEDAR RAPIDS IA 52404

UNITED STATES CELLULAR
CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-04901-RT
OC: 04-03-05 R: 03
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, 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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, United States Cellular Corporation, filed a timely appeal from an unemployment insurance decision dated April 25, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Sheila L. Woods. After due notice was issued, a telephone hearing was held on May 26, 2005, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer is represented by TALX UC eXpress, which is well aware of the need to call in a telephone number in advance of the hearing if the employer wants to

participate in the hearing. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time customer service representative (CSR) from June 2003 until she was discharged on March 30, 2005 for tardies returning from lunch and attendance. On March 23 and 24, 2005, the claimant was late four minutes each day in returning from lunch. To record the times when the claimant is off work she logs off on her telephone and then logs back on her telephone and these times are recorded much like punching a time clock. The claimant was late in returning from lunch on both days because none of the clocks in the building are the same. The claimant does not wear a wristwatch because she has two small children and they claw at her watch and besides, she cannot afford a battery. In July 2004, the claimant received a written warning for a tardy when her car would not start. In September 2004, the claimant received a final written warning for a tardy when she overslept. The claimant overslept because her children were ill and she was up late the night before. The claimant received a second written warning in October 2004 because she was injured in a car accident and was out of work for a period of time because of her injuries. She had a doctor's excuse for these injuries but the claimant was out of sick time and, therefore, received a second warning for her attendance. The claimant reported these absences due to her injuries to the employer. The claimant was tardy on February 28, 2005, again because her children were sick and she was up late and overslept. The claimant then had the two tardies noted above returning from lunch and was discharged. The claimant received no other warnings or disciplines nor did she have any other absences or tardies. Pursuant to her claim for unemployment insurance benefits filed effective April 3, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,512.00 since filing for such benefits effective April 3, 2005 as follows: \$314.00 per week for eight weeks from benefit week ending April 9, 2005 to benefit week ending May 28, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant testified, and the administrative law judge concludes, that she was discharged on March 30, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences or tardies that were not for reasonable cause or personal illness and not properly reported so as to establish excessive unexcused absenteeism and disqualifying misconduct.

The claimant testified that she was discharged for returning from lunch late four minutes on each of two days, March 23 and 24, 2005. The claimant testified that she was late in returning from lunch because the clocks in the building did not show the same time and she did not know which clocks to rely upon. The claimant's testimony is not particularly credible because she testified that she did not wear a wristwatch; first, because she had two small children that would claw at the watch; and then later, because she could not afford a battery. A battery for a wristwatch is cheap especially if it keeps one from being fired or discharged. In any event, in the absence of any evidence to the contrary, the administrative law judge accepts the claimant's explanation and finds that these two tardies in returning from lunch were for reasonable cause and properly reporting was not really a relevant matter here. The claimant also testified that she had three prior tardies. The first was in July 2004 when her car would not start and resulted in a written warning. The second occurred on September 12, 2004 when she overslept because her children had been sick the night before and she had been up with them. This resulted in a final written warning in September 2004. The third tardy resulted again from oversleeping because her children were sick the night before and this tardy was on February 28, 2005. The claimant also testified that she was injured in an automobile accident in October 2004 and was absent for a number of days because of her car accident injuries. However, because the claimant was out of sick time, she was given a second final written warning in October 2004. The employer was aware of the claimant's injuries and the claimant properly reported her absences due to the car injuries. The claimant had a doctor's excuse. The claimant testified that she had received no other warnings or disciplines and had no other absences or tardies. On the record here, and in the absence of any evidence to the contrary, the administrative law judge must accept the claimant's explanation and, therefore, determine that the claimant's absences and tardies including the two occasions when she was late returning from lunch were for reasonable cause or personal illness and properly reported or the claimant had justification in not properly reporting them and, therefore, are not excessive unexcused absenteeism. The administrative law judge notes that it is the employer's burden to establish disqualifying misconduct by a preponderance of the evidence and the employer has not done so here.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,512.00 since separating from the employer herein on or about March 30, 2005 and filing for such benefits effective April 3, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 25, 2005, reference 01, is affirmed. The claimant, Sheila L. Woods, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

pjs/pjs