

**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**

**COLLEEN M FLEMING
208 W SKILLET AVE
DAYTON IA 50530**

**UNITED STATES CELLULAR
CORPORATION
c/o FRICK UC EXPRESS
PO BOX 283
SAINT LOUIS MO 63166-0283**

**Appeal Number: 06O-UI-01291-S2T
OC: 10/09/05 R: 01
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

STATEMENT OF THE CASE:

United States Cellular (employer) appealed a representative's November 14, 2005 decision (reference 01) that concluded Colleen Fleming (claimant) was discharged and there was no evidence of willful or deliberate misconduct. A hearing was held on February 20, 2006, following due notice pursuant to Remand Order of the Employment Appeal Board dated January 31, 2006. The claimant participated personally. The employer participated by Stephanie Hood, Sales Supervisor, and Bonnie Hruska, Store Manager.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 27, 2000, as a full-time retail wireless consultant. She worked in a kiosk until the year 2003 and did not have access to a company computer. The claimant's supervisor encouraged employees to sell to family members so long as they did not reside with the employee. The employer had a policy prohibiting access, viewing or making changes to any account belonging to any family member or friend, regardless of whether the person resided in the employee's home. This policy was not stated in the handbook that the claimant received. It was a policy listed on the computer to which the claimant did not have access.

In the year 2003, the claimant began working in a store with computer access. The claimant was not computer savvy and did not understand how to negotiate within the intranet of the company. The employer e-mailed the prohibition regarding family members to all employees on April 19 and again on September 9, 2005. The claimant received neither.

The claimant's son did not live at home and had an account with the employer. The claimant regularly worked on her son's account for more than a year. She last worked on his account on September 14, 2005. The employer discovered this shortly after September 14, 2005, but did not speak to the claimant about the problem. On October 3, 2005, the employer suspended the claimant. The employer terminated the claimant on October 6, 2005. The employer did not issue the claimant any warnings during her employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was 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(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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer discharged the claimant for failure to follow instructions. The claimant's failure to follow instructions was a result of her lack of training. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

In addition, the employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on September 14, 2005. The claimant was not removed from employment until October 3, 2005. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

DECISION:

The representative's November 14, 2005 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible

bas/s