

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CRYSTAL L FISCHELS
Claimant

APPEAL NO. 10A-UI-12207-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**UNITED STATES CELLULAR
CORPORATION**
Employer

OC: 01/17/10
Claimant: Appellant (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 27, 2010, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on October 18, 2010. The claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Paula Rosenbaum represented the employer and presented additional testimony through John Zach.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Crystal Fischels was employed by United States Cellular Corporation (U.S. Cellular) as a full-time customer service representative from May 10, 2010 until July 16, 2010, when John Zach, Customer Service Manager discharged her for attendance. Ms. Fischels' immediate supervisor was Carla Claire. The final absence that triggered the discharge occurred on July 16, when Ms. Fischels was absent due to her child's illness and properly notified the employer of her need to be absent. Because Ms. Fischels was still within the first 90 days of starting the employment, the employer expected her to be at work 100 percent of the time. Ms. Fischels had also been absent on July 15, 2010 due to her child's illness and had properly notified the employer.

The employer discharged Ms. Fischels after she refused to use a vacation day in connection with the July 16 absence. Ms. Fischels had used a vacation day in connection with the July 15 absence. Ms. Fischels wanted to reserve the vacation day for time she anticipated taking off in the near future in connection with a family reunion.

In making the decision to discharge Ms. Fischels from the employment, the employer also considered earlier absences on July 6 and 7. Both absences were due to illness properly reported and were supported by medical documentation.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's

power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes absences due to illness properly reported on July 6, 7, 15 and 16, 2010. Each of these absences is deemed an excused absence under the applicable unemployment insurance law. The evidence fails to establish an absences that would be unexcused absences under the applicable law. Ms. Fischels' decision to not sacrifice a vacation day to cover the absence would not transform the excused absence into an unexcused absences. Employers may not graft on additional requirements to what would otherwise be an excused absences under the applicable law. See Gaborit v Employment Appeal Board, 743 N.W.2d 554 (Iowa App. 2007).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Fischels was discharged for no disqualifying reason. Accordingly, Ms. Fischels is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Fischels.

The evidence raises the question of whether Ms. Fischels is able to work and available for work. Because the claimant failed to participate in the hearing, this matter will be remanded to the Claims Division to address those issues.

DECISION:

The Agency representative's August 27, 2010, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for determination of whether the claimant has been able to work and available for work since she established the additional claim for benefits that was effective July 18, 2010.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs