

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMBER M SENG

Claimant

APPEAL NO. 08A-UI-11138-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

UNITED STATES CELLULAR CORP

Employer

**OC: 11/11/07 R: 03
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, US Cellular, filed an appeal from a decision dated November 17, 2008, reference 02. The decision allowed benefits to the claimant, Amber Seng. After due notice was issued, a hearing was held by telephone conference call on December 15, 2008. The claimant participated on her own behalf. The employer participated by Associate Relations Representative Paula Rosenbaum and Customer Service Coach Crystal Miller.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Amber Seng was employed by US Cellular from January 7, 2008 until October 27, 2008 as a full-time customer service representative. Employees are allowed to access non-work-related web sites during lunches and break periods, but not while on duty. On May 8, 2008, she received a first and final written warning regarding inappropriate use of company electronic communication. She had forwarded a "chain e-mail" which is against policy.

On October 25, 2008, another coach, Nicole Cochran, observed the claimant in "after call work status." This is intended to be used to stop incoming calls so the representative can update customer files from a previous call. On Ms. Seng's computer screen was the "My Space" web site, which she closed as soon as she saw Ms. Cochran. The incident was reported to Customer Service Coach Crystal, the claimant's direct supervisor. Ms. Miller consulted with her manager on the next working day, October 27, 2008. The claimant's disciplinary history was reviewed and it was determined this was another violation of the electronic communication policy and she was interviewed by Ms. Miller.

At that interview Ms. Seng denied she had been on My Space, but maintained it was because of the manner in which the question was phrased. She was asked if she had been on My Space while in the "after call work status" which she felt was not correct, because she had been on My

Space during her break, and had merely left the browser open. The claimant was discharged later that day by Ms. Miller and Associate Relations Representative Paula Rosenbaum.

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 claimant was discharged for violation of the company policy prohibiting the use of the company electronic communications for personal purposes while on duty. The claimant does not deny being on My Space but has asserted it was during a break and the browser page was merely "popped up" on the screen because she had forgotten to close it. The employer has not presented any eye-witness testimony regarding the incident from Ms. Cochran to refute the claimant's testimony. While it is true she should have closed the browser after accessing My Space, if it was on her break, this would be a mistake on her part rather than a willful violation of the company policy.

Without more direct evidence to rebut the claimant's testimony, the administrative law judge cannot conclude the employer has met its burden of proof to show the claimant was guilty of willful and deliberate misconduct. Therefore, disqualification may not be imposed.

DECISION:

The representative's decision of November 17, 2008, reference 02, is affirmed. Amber Seng is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css