

**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**

**DONALD D MESCH  
2588 WINDY HILL CIR  
CENTRAL CITY IA 52214**

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

**Appeal Number: 05A-UI-01072-JTT  
OC: 12/19/04 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

United States Cellular filed a timely appeal from the January 12, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 16, 2005. Donald Mesch participated personally. United States Cellular was represented by Angie Bailey, with witness Tom Baker, Regional Radio Frequency Engineer Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Mesch was employed by United States Cellular as a full-time radio frequency engineer from June 2, 1997 until December 22, 2004, when Mr. Baker discharged him for alleged misconduct.

The incident that prompted Mr. Baker to discharge Mr. Mesch was Mr. Mesch's admission to Robert Jakubek, Director of System Performance, on December 22, 2004, that Mr. Mesch had engaged in sexual behavior on company property in late 2002 or early 2003. Mr. Jakubek spoke with Mr. Mesch on December 22, 2004, as part of an alleged investigation into rumors of more recent sexual conduct between Mr. Mesch and another employee on company property. The employer abandoned the investigation into the alleged recent behavior when Mr. Mesch admitted to prior sexual conduct on company property.

The sexual behavior that Mr. Mesch admitted to was between Mr. Mesch and his wife and occurred on a weekend and outside Mr. Mesch's normal working hours of Monday through Friday, 8:00 a.m. to 5:00 p.m. The behavior took place on one occasion. On that one occasion Mr. Mesch was in or near his office. His wife was with him at the office. No one else was present at the facility. The couple engaged in kissing and some fondling behavior for approximately 10 to 15 minutes. Mr. and Mrs. Mesch were fully clothed at the time. The couple ceased this behavior when they heard a noise and thought someone else might be present at the facility. Hearing the noise caused Mr. Mesch to consider the appropriateness of his conduct, given the location. He decided it was not appropriate and ceased the behavior.

Mr. Jakubek and Mr. Baker concluded that Mr. Mesch's behavior on 2002 or 2003 had been in violation of company policies prohibiting unethical and "unbusiness-like" behavior, use of company facilities for a purpose other than proper conduct of the company's business, and conflicts of interest that impair an employee's performance of his duties.

Mr. Mesch concluded that the timing of the employer's decision to discharge him was suspect. The decision to discharge Mr. Mesch coincided with the hiring of another radio frequency engineer. The decision to discharge Mr. Mesch for the allegedly inappropriate sexual behavior that occurred in 2002 or 2003 came after Mr. Mesch had made statements in recent months that were critical of Mr. Baker and Mr. Jakubek.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Mesch was discharged for misconduct in connection with his employment.

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.

Since Mr. Mesch was discharged from the employment, the employer has the burden of proving in this matter that Mr. Mesch was discharged for misconduct. 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).

A discharge for misconduct must be based on a "current act." See 871 IAC 24.32(8). The offending behavior in this case took place approximately two years prior to the decision to discharge Mr. Mesch. If indeed the behavior came to the employer's attention for the first time on December 22, 2004, then the evidence could at least establish a "current act, but a question would remain as to whether the "current act" constituted misconduct. See 871 IAC 24.32(8). If the administrative law judge were to conclude that the offending behavior came to the attention of the employer for the first time on December 22, 2004, the administrative law judge must also conclude that the offending conduct was an isolated occurrence and that Mr. and Mrs. Mesch were exceedingly discreet. If, on the other hand, the administrative law judge concludes that the employer actually had knowledge of the behavior well in advance of the decision to discharge Mr. Mesch, then the administrative law judge must conclude there was no "current act" that could justify a discharge for misconduct. See 871 IAC 24.32(8).

What is peculiar about this case is the employer's wholesale abandonment of its investigation into allegations of recent misconduct between Mr. Mesch and another employee. Such a decision does not make sense if the employer's concern is genuinely about inappropriate sexual conduct in the workplace. What about the other employee allegedly involved in the misconduct? What about the rumors that were allegedly circulating at the facility? The employer's wholesale abandonment of the investigation into the more recent allegations as soon as Mr. Mesch admitted to conduct with his wife two years prior lends weight to Mr. Mesch's argument that his discharge was intentionally timed to coincide with the hiring of another engineer and a result of the critical comments he had made in the months prior to his discharge.

The administrative law judge must also decide whether Mr. Mesch's conduct with his wife on that one occasion in 2002 or 2003 constituted misconduct under the law. Mr. Mesch's behavior with his wife on that one occasion did not evince "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 had the right to expect of employees." See 871 IAC 24.32(1)(a). The evidence does not indicate that Mr. Mesch took his wife to his workplace specifically for the purpose of having sex with her. Nor does the evidence indicate that Mr. Mesch did in fact have sex with his wife on company property. Instead, the evidence establishes that there was a brief, mildly amorous episode involving kissing and petting that ended when Mr. Mesch considered where he was at the time. At most, the incident amounted to a momentary lapse of judgment or discretion on the part of Mr. Mesch. As such, it was not misconduct. See 871 IAC 24.32(1)(a).

The employer asserts that Mr. Mesch engaged in unethical and "unbusiness-like" behavior, use of company facilities for a purpose other than proper conduct of the company's business, and a conflict of interest that impaired his ability to perform his duties. Based on the evidence in the record, the law, and the reasoning set forth above, the administrative law judge concludes those assertions are baseless.

Based on a careful review of the evidence in the record and application of the appropriate law, the administrative law judge concludes that the employer has failed to prove a "current act" of misconduct. The administrative law judge further concludes that the employer has failed to prove any misconduct whatsoever. Mr. Mesch was discharged for no disqualifying reason. Accordingly, no disqualification will enter.

**DECISION:**

The Agency representative's decision dated January 12, 2005, reference 01, is affirmed. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/pjs