

**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**

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

**Appeal Number: 06A-UI-02147-H2T  
OC: 01-22-06 R: 02  
Claimant: Respondent (2)**

**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/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 10, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 13, 2006. The claimant did participate. The employer did participate through Gilbert Nunez, Sales Manager. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an agent account executive full time beginning March 3, 2003 through January 27, 2006 when he was discharged.

On February 11, 2005, the claimant was given a final written warning for violating the soliciting code of conduct of the employer. The claimant ran an Amway business on the side in addition to working for the employer. In February 2005 the claimant was warned not to solicit co-workers or customers for his Amway business. If any of the claimant's co-workers did start working for the claimant in his Amway business or if he recruited them to work in his Amway business, he was to notify the employer. In January 2006 the employer discovered that two of the claimant's co-workers were selling Amway and were working with the claimant in his Amway business.

The employer first approached Jamie Henley, a peer of the claimant's, and asked her if she was selling Amway. The first two times that Jamie Henley was asked if she was selling Amway with the claimant she denied any involvement. When asked a third time, Ms. Henley admitted that she was selling Amway and had denied her involvement because the claimant, Mr. Gymer, had advised her to do so. Mr. Gymer told Ms. Henley and Ms. Devris to conceal from United States Cellular that they were selling Amway with him. The claimant admitted that if both Ms. Devris and Ms. Henley were very successful at selling the product that he could benefit financially from their sales.

When Ms. Devris was asked if she was selling Amway with the claimant, she immediately admitted her activity and that Mr. Gymer had asked her to conceal the information from anyone at United States Cellular.

The claimant was not discharged because he had other employment, or because he had other United States Cellular employees working in his own business, but because he concealed the information from the employer. If the claimant had notified the employer about the business relationship with both Ms. Henley and Ms. Devris when it began back in August 2005, he would not have been discharged.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

#### REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

The employer did not prohibit the claimant from running an Amway business on the side but rather insisted that he be honest and forthcoming with them about any other United States Cellular employees that worked with him. The claimant was told back in February 2005 that if any employees of United States Cellular were to work with him, that he needed to let the employer know that. The claimant instructed both Ms. Henley and Ms. Devris to conceal from the employer that they were selling Amway with him, illustrating that they knew the employer would be interested in having that information. The claimant had only to let the employer know that Ms. Henley and Ms. Devris were involved with his side business so the employer could monitor to make sure that all of their employees were focusing on the employer's business. The claimant did not provide the information to the employer until after the employer discovered it when one employee heard another discussing a meeting. The claimant's failure constitutes disqualifying misconduct. Benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The February 10, 2006, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,047.00.

tkh/kkf