

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

JULIE A LOVE
19071 – 125TH ST
ALDEN IA 50006

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

Appeal Number: 05A-UI-03747-RT
OC: 03-06-05 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge for Misconduct
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, United States Cellular Corporation, filed a timely appeal from an unemployment insurance decision dated March 28, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Julie A. Love. After due notice was issued, a telephone hearing was held on April 29, 2005 with the claimant participating. Ryan Sullivan, Sales Supervisor, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time retail wireless consultant from November 26, 2002 until she was discharged on March 4, 2005. The claimant averaged between 20 and 29 hours per week. The claimant was discharged for poor attendance and, in particular, tardies. On February 28, 2005, the claimant was tardy 4 minutes. Her shift began at 9:00 a.m. but the claimant logged on the computer at 9:04 a.m. The employer keeps track of employee's time through log-ins on the computer. However, at that time the claimant was supposed to be at work 15 minutes before the start of her shift and logged on to the computer and ready to begin work by 9:00 a.m. This was as the result of a final warning dated February 1, 2005. The claimant did not call in this tardy. The employer has a rule in its handbook, a copy for which the claimant signed an acknowledgement, requiring that an employee who is going to be absent or tardy call the employer 30 minutes before the start of that employee's shift. The claimant did not report any of the tardies because she did not have a cell phone or long distance coverage. On February 22, 2005, the claimant was tardy 2 minutes, clocking in at 9:02 a.m. and also an additional 15 minutes per the final warning. The claimant was tardy on February 21, 2005, 2 minutes, clocking in at 9:02 a.m. and then also an additional 15 minutes due to the final warning. The claimant was tardy on February 20, 2005, 5 minutes, clocking in at 9:05 a.m. plus the additional 15 minutes per the final warning. The claimant gave no reasons to the employer for any of these tardies and did not notify the employer of any of the tardies. It takes between 5 and 10 minutes to log on to the computer to register the start time of the employee. On these occasions when the claimant was tardy she was responsible for opening the kiosk by 9:00 a.m. for business.

The claimant was tardy on February 18, 2005 17 minutes, clocking in at 9:17 a.m. plus an additional 15 minutes for the final warning because of daycare problems. The claimant did not call the employer. The claimant was tardy 19 minutes, clocking in at 9:19 a.m. plus an additional 15 minutes on February 7, 2005 again for daycare problems. On February 1, 2005, the claimant was tardy one and one-half hours. The employer called the claimant at 9:22 a.m. The claimant had been to the doctor and had a doctor's excuse and did not know that she was to work that day. She informed the employer that she would come in as soon as possible and did so. The claimant had a doctor's excuse for that day because she had to take her son to the doctor. She had notified the employer in advance of that. For this tardy the claimant received a final written warning dated February 1, 2005 requiring that she be at work 15 minutes early and that she be clocked in on the computer and ready to start work before the start time of 9:00 a.m. The claimant was offered a copy of this written warning but chose not to take one. However, the claimant was aware of the written warning and signed it. The claimant changed daycare providers in mid January 2005 and her new daycare provider was not always reliable. Prior to mid January 2005 the claimant did not have an attendance problem. Pursuant to her claim for unemployment insurance benefits filed effective March 6, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,088.00 as follows: \$261.00 per week for eight weeks from benefit week ending March 12, 2005 to benefit week ending April 30, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.

2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The parties agree, and the administrative law judge concludes, that the claimant was discharged for disqualifying misconduct. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative

law judge is constrained to conclude that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism and, in particular, tardies.

The evidence establishes that the claimant had six tardies in three weeks as set out in the findings of fact and all the tardies followed a final written warning dated February 1, 2005 for her tardies. That final written warning required that the claimant be at work 15 minutes early and be clocked into the computer and ready for business by the time her shift was to start at 9:00 a.m. The claimant was responsible for opening the employer's kiosk and be ready for business at 9:00 a.m. The last four tardies were for short amounts of time. The claimant testified that she was tardy on those occasions because it took her up to 10 minutes to log into the computer and that she might have to wait on a customer prior to logging in on the computer. The administrative law judge notes however that according to the written warning the claimant was to be logged into her computer and ready to start business at 9:00 a.m. and on these four occasions the claimant was not. The claimant also could not say that on each of those four tardies she was with a customer prior to logging in on the computer. The administrative law judge is skeptical of this defense because the claimant should have been at work 15 minutes early allowing her plenty of time to log in and then deal with customers. If a customer was waiting the claimant could simply have asked the customer to wait a few minutes while she logged in on the computer and entered her time. The claimant was, after all, under a final written warning. The claimant also had two substantial tardies of 17 minutes plus 15 minutes for the final warning and 19 minutes plus 15 minutes for the final warning as set out in the findings of fact. These tardies were for daycare problems. The claimant also had a tardy on February 1, 2005 of one and one-half hours but this tardy was because the claimant had to take her daughter to the doctor and the claimant provided a doctor's excuse and further was not aware that she was to work that shift.

The administrative law judge concludes that the tardy on February 1, 2005 was for reasonable cause and properly reported and not excessive unexcused absenteeism. However, the administrative law judge is constrained to conclude here that the six other tardies in three weeks were not for reasonable cause or personal illness and not properly reported and were excessive unexcused absenteeism. The claimant did not notify the employer of any of the tardies because she did not have a cell phone. The administrative law judge notes that the claimant worked for United States Cellular Corporation which deals with cell phones. The written warning provided to the claimant was clear about the expectation that she be at work 15 minutes early and logged in on the computer and ready to work at 9:00 a.m. The claimant testified that she did not read the written warning. However, the evidence establishes that the claimant was offered a copy of the written warning but refused it. The administrative law judge does not understand why the claimant would refuse a copy of the written warning. Finally, even the claimant concedes that she thought she needed to be logged in and ready to work by 9:00 a.m. but concedes that she was not on the six tardies in question. The evidence establishes that the claimant had no attendance problems prior to mid January 2005 when she switched daycare providers and that thereafter her new daycare provider was not reliable. This really seems to indicate that all of the claimant's tardies may well have been due to daycare. The administrative law judge understands an occasional but rare tardy for childcare difficulties but not six in three weeks. Accordingly, the administrative law judge is constrained to conclude that claimant's tardies were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,088.00 since separating from the employer herein on or about March 4, 2005 and filing for such benefits effective March 6, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of March 28, 2005, reference 01, is reversed. The claimant, Julie A. Love, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct, namely excessive unexcused absenteeism and tardies. The claimant has been overpaid unemployment insurance benefits in the amount of \$2,088.00.

tjc/pjs