

**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**

**ERIK J FARRELL
318 LAKE ST
SHENANDOAH IA 51601-2024**

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

**Appeal Number: 06A-UI-05830-RT
OC: 04-30-06 R: 01
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 May 22, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Erik J. Farrell. After due notice was issued, a telephone hearing was held on June 22, 2006, with the claimant participating. Phillip Prusa, Sales Store Manager in Shenandoah, Iowa, participated in the hearing for the employer. Dennis LeRoy, Associate Relations Representative, and Chris Yllescas, Sales Manager, were available to testify for the employer but not called because their testimony would have been repetitive and unnecessary. 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 full time retail wireless consultant from July 9, 2004 until he was discharged on May 4, 2006. The claimant was discharged for claiming hours that he had not worked. The employer keeps track of the employees' hours by having each employee report his or her own time by entering the time on the computer. On May 3, 2006, the claimant reported eight hours of work. However, the claimant opened the store at 9:45 a.m. and then went to lunch from 11:30 a.m. to 1:00 p.m. and then left at 2:00 p.m. to prepare for a corporate function and then he returned to work at 3:30 p.m. The employer had sent out a market wide e-mail informing the employees how to report their time for that day and informing them that they should be reporting between four and five hours. On April 28, 2006, the claimant opened the store at 9:45 a.m. and was supposed to work until 5:45 p.m. However, the claimant left the employer's store at 4:00 p.m. but reported eight hours for the day. The employees are to receive a one-hour lunch that is not paid. On April 19, 2006, the claimant arrived at 12:00 noon and left work at 4:00 p.m. but reported eight hours. On April 11, 2006, the claimant left work early before 12:30 p.m. but reported eight hours for that day. The employer's witness, Phillip Prusa, Sales Store Manager in Shenandoah, Iowa, where the claimant worked, testified from the employer's computer records. The claimant's time reporting was brought to the employer's attention and the employer began reviewing the claimant's time and noticed the above discrepancies and then discharged the claimant. The claimant had never received any specific written warnings or disciplines for this behavior but at least on one occasion the entire sales team had received a warning for opening the store late. Pursuant to his claim for unemployment insurance benefits filed effective April 30, 2006, the claimant has received unemployment insurance benefits in the amount of \$2,523.00 as follows: \$255.00 for benefit week ending May 6, 2006 (earnings \$150.00); and \$324.00 per week for seven weeks from benefit week ending May 13, 2006 to benefit week ending June 24, 2006.

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. He 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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on May 4, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes 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. The employer's witness, Phillip Prusa, Sales Store Manager in Shenandoah, Iowa, where the claimant worked, credibly testified that the claimant reported eight hours of work for four days in the last month of his employment without working a full eight hours as set out in the Findings of Fact. The claimant did not deny any of these matters but simply testified that he did not recall or that the hours worked and reported were possible. Mr. Prusa testified credibly from employer computer records of the time entered by the claimant and of matters reported to him by employees. Although this testimony was hearsay, the administrative law judge concludes that it is the kind of evidence that a reasonably prudent person would be accustomed to rely upon in the conduct of their serious affairs and was further credible.

The claimant seemed to defend his actions by testifying that for one whole week he forgot to log in his time. This does seem credible to the administrative law judge. The claimant then testified that he would put down eight hours everyday before he even worked them because he had additional duties such as taking telephone calls or participating in telephone conferences when he was not at the office. The claimant testified that he was told not to work over 40 hours. Therefore, the claimant testified that he always reported eight hours. The claimant then testified that if he did not work eight hours he simply forgot to go back and adjust his time accordingly. The claimant's testimony here is simply not credible. If the claimant had obligations away from the office he should have noted the specific times of those obligations and reported those along with the actual time worked at the office. The claimant would also then be able to determine if he was reaching the 40 hours per week limit by the employer and

then take time off accordingly. The claimant simply did not do this. The claimant just reported eight hours every day and then came and went apparently as he pleased. Although the claimant received no direct specific warnings, the entire team received a warning about opening the store late. The claimant should have been on notice that the employer was concerned about the hours worked by the employees. Accordingly, the administrative law judge concludes that the claimant's entering of his time as eight hours a day when he did not work eight hours was a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he 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 \$2,523.00 since separating from the employer herein on or about May 4, 2006 and filing for such benefits effective April 30, 2006. 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 May 22, 2006, reference 01, is reversed. The claimant, Erik J. Farrell, is not entitled to receive unemployment insurance benefits until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. The claimant is overpaid unemployment insurance benefits in the amount of \$2,523.00.

kkf/pjs