

**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**

**KELSEY M SCHMITT  
865 BENTLEY DR APT 17  
MARION IA 52302**

**UNITED STATES CELLULAR  
CORPORATION  
c/o FRICK UC EXPRESS  
P O BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-06069-S2T  
OC: 05/08/05 R: 03  
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, 4<sup>th</sup> 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 (employer) appealed a representative's May 25, 2005 decision (reference 01) that concluded Kelsey Schmitt (claimant) was discharged for excessive absences but the absences were for illness. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 27, 2005. The claimant did not provide a telephone number where she could be reached and, therefore, did not participate. The employer participated by Angie Baily, Human Resources Coordinator. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on August 2, 2004, as a full-time customer service representative. The claimant received a copy of the employer's Code of Business Conduct and Associate Handbook and signed for receipt on July 29, 2004. The employer issued the claimant warnings for absences due to properly reported illness on October 20, 2004, and March 30 and April 23, 2005.

On April 27, 2005, the claimant was supposed to begin work at 9:00 a.m. At 9:10 a.m. the claimant notified the employer she had been pulled over by law enforcement and would be late for work. The employer terminated the claimant on April 28, 2005, for excessive absenteeism.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 275 N.W.2d 187 (Iowa 1984). Three incidents of tardiness or absenteeism after a warning constitutes misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). The employer must establish more than one incident of absenteeism for an employee's absences to be considered excessive. In this case, the claimant's absences prior to the final incident do not amount to job misconduct because they were for properly reported illness. The employer has provided one incident of unexcused absenteeism. The employer has failed to provide any evidence of excessive unexcused absenteeism that would be considered willful and deliberate misconduct. The claimant was discharged, but there was no misconduct. Benefits are allowed.

#### DECISION:

The representative's May 25, 2005 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/kjw