

**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**

**EBONY MIMS
400 LINDALE DR
MARION IA 52302**

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

**Appeal Number: 05A-UI-05171-H2T
OC: 04-19-05 R: 03
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/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 5, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 13, 2005. The claimant did participate. The employer did participate through Julie Melchior, Customer Relations Manager (representative) Karri Downs, Customer Relations Coach. 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 a customer relations associate full time beginning September 9, 2002 through April 19, 2005 when she was discharged. On or about April 4, 2005 the claimant was talking with another coworker, Jens Mcillece, when she reached up and grabbed his chest and told him he was flabby. Candy Levi witnessed the claimant's words and actions. At hearing the claimant could not remember whether she had or had not touched Mr. Mcillece. The claimant had been given a copy of the employer's handbook that prohibits unwanted touching of other coworkers.

While Mr. Mcillece was upset about the claimant touching him, he waited approximately two weeks before he reported the incident to Ms. Downs. Ms. Downs interviewed the claimant, Mr. Mcillece and Ms. Levi. Ms. Levi confirmed Mr. Mcillece's version of events including that the claimant had grabbed Mr. Mcillece's chest and told him he was flabby.

When Ms. Downs spoke to the claimant on April 19, 2005 the claimant admitted that she vaguely remembered the conversation. At that time the claimant did not deny that she had grabbed Mr. Mcillece's chest.

The claimant had been previously disciplined for violation of the harassment policy on February 21, 2005 when she made an inappropriate comment about the sexual orientation of another coworker who was gay. In November 2004 the claimant had also been disciplined for violating the harassment policy when she directed an employee to go talk to another employee who she told him was gay and would be able to discuss how gay people were treated in the workplace.

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).

An employer has a right to expect employees to conduct themselves in a certain manner. The claimant disregarded the employer's rights by touching another employee on the chest and telling him he was flabby. The employer has a duty to provide as much as possible a workplace free of sexual harassment for employees. The claimant had been given a copy of the employer's policy that explicitly prohibited unwanted touching of other employees. The administrative law judge is persuaded that the claimant did touch or grab Mr. Mcillece's chest on or about April 4. In light of the claimant's violations for the same or similar conduct, that is violation of the harassment policy and the claimant's unwanted touching of a coworker, the claimant's actions are misconduct sufficient to disqualify her from receiving unemployment insurance benefits. The claimant's disregard of the employer's rights and interests is misconduct. As such, the claimant is not eligible to receive unemployment insurance benefits. 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 May 5, 2005, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,787.00.

tkh/pjs