

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

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

Appeal Number: 06A-UI-02589-RT
OC: 01/29/06 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, 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 February 16, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Mark S. Ladage. After due notice was issued, a telephone hearing was held on March 21, 2006, with the claimant participating. Matt Sampson, Business to Business Support Manager, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. 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, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time business to business customer support supervisor, from June 29, 2003, until he was discharged on February 1, 2006. The claimant was discharged for allegedly violating the employer's Electronic Communications Policy. The employer has policies concerning the use of the employer's computer and internet by employees as shown at Employer's Exhibit One. The first policy is two pages and permits occasional personal use typically limited to scheduled breaks and/or meal periods. The claimant signed an acknowledgement of this policy. The employer also has a policy in its handbook, a copy of which the claimant received and for which the claimant signed an acknowledgement, also as shown at Employer's Exhibit One, again permitting the occasional personal use of the internet and email as long as it does not interfere with work and is kept to a reasonable level. The claimant was familiar with these policies.

Prior to January 12, 2006, the claimant accessed the "form" of a computer game which was sort of a message board. He would keep that up on his computer and would occasionally read about the game on the message board but not while doing work for the employer. The claimant did not play the game except on one occasion when he did so after hours. On January 12, 2006, the employer sent out to all employees a reminder of its Electronic Communications Policy. Upon receipt of that, the claimant immediately spoke to a manager, Nicole. The claimant told Nicole about keeping the "form" of the game on his computer. Nicole told the claimant not to do that anymore but not to worry about it. The claimant then also spoke to the employer's witness, Matt Sampson, Business to Business Support Manager. Mr. Sampson told the claimant basically the same thing to immediately discontinue the practice. The claimant did so.

Because of the claimant's inquiries, the employer obtained an internet usage report on the claimant but this took five business days. Mr. Sampson received the report and then reviewed it and then consulted with others and then determined to discharge the claimant. The internet usage report showed that the claimant accessed the game 19 days from November 9, 2005 to January 13, 2006. Thereafter the claimant did not access the game. The claimant was discharged. The claimant received no specific warnings about internet use prior to January 12, 2006 and the only warning received was the reminder sent to all employees on January 12, 2006. The claimant did not feel that his accessing the form of the game on his computer violated the employer's Electronic Communications Policy or any other employer internet usage policies because occasional personal use is permitted. The claimant did not play the game but only would read the message board on the form. The claimant did so only when not working for the employer. Pursuant to his claim for unemployment insurance benefits filed effective January 29, 2006, the claimant has received unemployment insurance benefits in the amount of \$1,805.00 as follows: \$185.00 for the benefit week ending February 4, 2006 (earnings \$220.00); and \$324.00 per week for five weeks from the benefit week ending February 11, 2006 to the benefit week ending March 11, 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 not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is 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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on February 1, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only reason for

the claimant's discharge was alleged violations of the employer's Electronic Communications Policy and other internet usage policies all as shown at Employer's Exhibit One. The claimant received copies of these policies and signed acknowledgements therefore and was familiar with the policies. The policies permit occasional personal use. Prior to January 12, 2006, the claimant accessed a computer game but did not play the game but rather accessed the "form" of the game as a message board. This permitted the claimant to read about the game on occasions when he was not working for the employer. The "form" or the message board would be up on his computer but not necessarily being used by the claimant. The claimant probably accessed this "form" or message board 19 days from November 9, 2005 to January 13, 2006. However, the claimant honestly believed that his use of the computer in such a fashion was permitted by the employer's policies which permit occasional personal use. The employer sent out a written reminder concerning its policies to all of its employees on January 12, 2006.

The claimant consulted two managers, one of which was the employer's witness, Matt Sampson, Business to Business Support Manager. Both managers told the claimant to immediately discontinue this use and he did so thereafter and the employer has no evidence to the contrary. Nevertheless, the inquiry made by the claimant to the two managers raised the employer's suspicions and the employer obtained an internet usage report for the claimant which divulged the claimant's usage as noted above. The claimant was then discharged.

The claimant testified that he did not play the game but merely accessed a "form" of the game and read the message board occasionally when not working for the employer. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant's use did not violate the employer's policies and, and if it did violate the employer's policies, the administrative law judge concludes that the claimant honestly and justifiably believed that his use did not violate the employer's policies but was permitted. When the claimant learned otherwise and was told to discontinue his use he did so immediately and there is no evidence that after he was told to do so that he used his computer in any inappropriate way. The claimant did concede that he played the game on one occasion but after hours. The administrative law judge concludes that this also does not violate the employer's policy, or, if so, the claimant justifiably and honestly believed that it did not. The claimant received no warnings or disciplines until he was given a written reminder of the employer's policy on January 12, 2006 and then was told by two managers to discontinue his usage and the claimant did so thereafter. There is no evidence that the claimant received any kind of warning but continued his usage. The administrative law judge does not believe that the employer's policies themselves were warnings. Therefore, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's computer usages were deliberate acts or omissions constituting a material breach of his duties and obligations arising out of his worker's contract of employment or evinced a willful or wanton disregard of the employer's interests or were carelessness or negligence to such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes that claimant's usage was ordinary negligence in an isolated instance or a good faith error in judgment or discretion and is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that

there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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 \$1,805.00 since separating from the employer herein on or about February 1, 2006 and filing for such benefits effective January 29, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 16, 2006, reference 01, is affirmed. The claimant, Mark S. Ladage, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

cs/s