

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

RUTH BAKER
Claimant

APPEAL NO: 11A-UI-13287-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC
Employer

OC: 08-28-11
Claimant: Respondent (2R)

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 September 27, 2011, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 4, 2011. The claimant participated in the hearing. Staci Albert, Human Resources Generalist and Mike Saunders, Team Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time customer support professional for Stream International from October 18, 2010 to September 1, 2011. She was discharged for taking excessive breaks. Employees are allowed three 15-minute break periods per shift in addition to a one-hour lunch break. On April 8, 12 and 28, 2011, the claimant received documented verbal warnings for failing to return from break on time. During the April 28, 2011, verbal warning the claimant was told that if that behavior continued her employment could be terminated. On May 2, 3, 5 and 6, 2011, the claimant exceeded her allowed break times by an average of 15 minutes per day and on May 9, 2011, she received a written warning for excessive break time. On July 8, 2011, the claimant was 28.53 minutes late in returning from her breaks; on July 11, 2011, she was 12.20 minutes late in returning from her breaks; on July 14, 2011, she was 11.93 minutes late in returning from her breaks; on July 15, 2011, she was 20.60 minutes late in returning from her breaks; on July 18, 2011, she was 4.65 minutes late in returning from her breaks; on July 21, 2011, she was 16.88 minutes late in returning from her breaks; on August 5, 2011, she was 18.35 minutes late in returning from her breaks; on August 6, 2011, and she was 18.52 minutes late in returning from break. The employer issued the claimant a final written warning for her excessive break times August 9, 2011, and told her that further incidents would result in further action up to and including termination. On August 11, 2011, the claimant was 6.9 minutes late in returning from her breaks; on August 18, 2011, she was 10.98 minutes late in returning from

her breaks; on August 22, 2011, she was 10.38 minutes late in returning from her breaks; on August 27, 2011, she was 10.80 minutes late in returning from her breaks; and on August 30, 2011, she was 14.02 minutes late in returning from her breaks and the employer terminated her employment September 1, 2011. The claimant stated she was usually at her desk on time but forgot to sign back on to her computer.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was tardy in returning from her breaks on 13 occasions between July 8 and August 30, 2011. The employer has established the claimant received three documented verbal warnings, a written warning and a final written warning about this issue but continued to be late. Even if the claimant was actually at her desk but forgot to sign in, 13 incidents in four and one-half weeks, the three verbal warnings in April 2011, the written warning in May 2011 and the final written warning August 9, 2011, should

have changed the claimant's behavior and made her hypersensitive about signing in on her computer following her break periods. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The September 27, 2011, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css