

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PAUL F MANN**  
Claimant

**APPEAL NO. 10A-UI-03966-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STREAM INTERNATIONAL INC**  
Employer

**Original Claim: 03/03/10  
Claimant: Respondent (2-R)**

Section 96.5-2-A – Misconduct  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

Employer filed an appeal from a representative's decision dated March 3, 2010, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 29, 2010. The claimant participated. The employer participated by Monica Ensminger, human resources associate generalist, and Steve Schmidt, team manager. The record consists of the testimony of Monica Ensminger; the testimony of Steve Schmidt; the testimony of Paul Mann; and Employer's Exhibits 1 through 12.

**ISSUES:**

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a call center that handles inbound customer service calls for customers of its clients. The claimant was hired on December 8, 2008, as a technical support professional. His last day of work was February 4, 2010, and he was terminated on February 5, 2010. The reason for his termination was his violation of the employer's attendance policy.

The claimant's attendance records showed the following:

02/02/10	Absent	Due to Weather
01/29/10	Late	
01/22/10	Absent	Sickness
01/16/10	Left Early	No Reason Given
01/09/10	Absent	Sickness

12/28/09	Absent	Car Accident
11/13/09	Late	No Reason Given
10/18/09	Absent	Car Problems
09/22/09	Absent	No Reason Given
08/31/09	Left Early	No Reason Given

(Employer's Exhibit 1)

The employer has a written attendance policy that assigns points to what are known as occurrences. When an employee reaches eight points, termination occurs. The claimant was given an attendance final written warning on January 29, 2010. He was at seven points. He knew that if he had reached eight points, he would be terminated.

The claimant did not come to work on February 2, 2010, because the roads were icy. The claimant lived 70 miles away in a rural area and did not feel he could make it to work. The employer's other workers were able to make it to work. The employer had previously rolled back occurrences when there had been blizzards. The employer did not roll back the claimant's absence on February 2, 2010, and the claimant reached eight points. He was then terminated.

#### **REASONING AND CONCLUSIONS OF LAW:**

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The absenteeism must be both excessive and unexcused. The concept includes tardiness and leaving early. Absence due to matters of "personal responsibility", e.g. transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

The evidence in this case established excessive unexcused absenteeism. Although two of the claimant's absences were due to illness and therefore excused, the remainder of his absences were due to matters of personal responsibility. An employee is responsible for arranging reliable transportation to work. Oversleeping, which was one cause for tardiness, is also a matter of personal responsibility. The claimant tried to justify his final absence due to weather. However, other employees were able to make it to work that day. Since the employer has shown excessive unexcused absenteeism, misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

This matter is remanded to the claims section for a determination of the overpayment issue.

**DECISION:**

The representative's decision dated March 3, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the claims section for determination of the overpayment issue.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw