

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

DONALD A FREED

Claimant,

and

STREAM INTERNATIONAL INC

Employer.

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HEARING NUMBER: 10B-UI-06999

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5(1)D, 96.4(3)

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

STATEMENT OF THE CASE:

The claimant submitted an exhibit that was offered into evidence at the hearing, but for some unknown reason was not included in the file upon the claimant's appeal. The Board issued an Order that was sent to both parties indicating that the Board found good cause to accept Claimant's Exhibit A and allowed the parties time to respond. Having allowed the opposing party an opportunity to respond and having taken the opportunity to consider the Claimant's Exhibit A, the Board is now ready to issue its decision.

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot fully affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES, in part as to the separation issue, and AFFIRMS, in part as to the able and available issue** as set forth below.

FINDINGS OF FACT:

The claimant, Donald A Freed, was employed by Stream International, Inc. beginning October 5, 2009 as a full-time customer services representative through March 29, 2010. (Tr. 2) The claimant developed a nonwork-related health issue that required additional and extensive medical attention. (Tr. 2-3) His doctor informed him that he would need to be off work for an indefinite period of time. (Tr. 2-3) Mr. Freed presented his doctor's note excusing him from work to Josh Reimer in Human Resources (Tr. 2) who told him "...[he] didn't fall under the Family Act because [he] hadn't been there a year." (Tr. 3) Mr. Reimer went on to advise him that if he wanted to be eligible for rehire on May 5th (Tr. 3), he would have to resign. (Tr. 2, 3) The claimant left his employment on March 29th, 2010. As of August of 2010, Mr. Freed was still unable to work (Tr. 3), as he continued to be under his doctor's care. (Tr. 4)

REASONING AND CONCLUSIONS OF LAW:

The record establishes that Mr. Freed was placed between the proverbial 'rock and a hard place' when the employer told him he had to resign or, essentially, be discharged and not eligible for rehire in May. (Tr. 3)

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

It is clear that the claimant had no intention of quitting his employment, but for the employer's policy that wouldn't allow him to have any time off to manage his medical issue. If the claimant hadn't quit, he surely would have been discharged at some point in the near future based on his many foreseeable absences for medical reasons. If the claimant could have availed himself of FMLA, he could have continued his employment. However, since that option was not available to him and the employer could not offer him any other options, he was forced to end his employment. Such a separation under these circumstances cannot be considered voluntary, as he really had no choice. For this reason, we conclude that it comes under the purview of those quits done with good cause attributable to the employer as set forth in the aforementioned rule.

DECISION:

The administrative law judge's decision dated August 11, 2010 is **REVERSED, in part as to the separation issue, and AFFIRMED, in part as to the able and available issue.** The Employment Appeal Board concludes that the claimant is allowed benefits provided he is otherwise eligible.

However, because he is not currently able and available for work, he is denied benefits until he can establish he has a medical release to return to work by contacting the Iowa Workforce Development Center, Claims Section.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/kk