

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIRK A RAINEY
Claimant

APPEAL NO. 13A-UI-07130-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC
Employer

OC: 05/19/13
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 7, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 2, 2013. The claimant did participate. The employer did participate through Bomg Chanthovaong, Human Resources Generalist; Stacey Alberts, Senior Human Resources Generalist; and James Hanson, Team Manager. Employer's Exhibit One was entered and received into the record.

ISSUES:

Was the claimant discharged due to job connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a customer support professional full time beginning October 30, 2009 through May 14, 2013 when he was discharged.

The claimant had received the company's handbook and policy book. For all 'saves' he made the claimant would earn two or three dollars per 'save' in commission. He knew that he was not allowed to record as 'saves' those situations which were not 'saves'. The employer's policy made clear that to incorrectly 'save' a call is considered a 'fraudulent' act by the employer who had a zero tolerance for such conduct as it amounted to theft from them.

The claimant had repeated and ongoing training on how to properly track calls as 'saves'. As part of their quality control process the employer regularly and routinely listens to calls. Mr. Hanson, the claimant's direct supervisor listened one of the claimant's calls from May 12 on May 14. During the call he was also able to view screen shots the claimant was viewing and using at the time of the call. Mr. Hanson was available at all times when the claimant was on the telephone if he had any questions about how to classify the call. The claimant never asked for assistance. After listening to the call in question, Mr. Hanson spoke to the claimant and his

direct supervisor. Mr. Hanson's supervisor instructed him that he was to discharge the claimant if he could not provide a credible reason for why he had incorrectly classified the call as a 'save'. The claimant classified the call as a 'save' so that he could benefit from increased commission pay. The claimant had received a warning in December 2012 putting him on specific notice that he was to correctly track calls and that failure to do so could lead to his discharge. When Mr. Hanson spoke to the claimant, the claimant had no real reason at all why he had tracked the call as a 'save' when it clearly was not.

The claimant has received unemployment benefits after the separation on a claim with an effective date of June 7, 2013.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The evidence does establish that the claimant intentionally classified the call as a 'save' in order to benefit himself by increased commissions. He knew or should have known, based on his

training, handbooks given to him and a warning in December 2012 that incorrectly tracking 'saves' was considered a fraudulent practice by the employer and would lead to his discharge. The claimant's fraudulent 'save' is sufficient misconduct to disqualify him from receipt of unemployment insurance benefits and is sufficient misconduct to disqualify him from receipt of unemployment insurance benefits. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The June 7, 2013 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

REMAND: The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css