

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

IRA J RIPPATOE

Claimant

APPEAL NO. 14A-UI-09745-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC

Employer

OC: 07/20/14

Claimant: Respondent (2)

Section 96.5-2-a – Discharge

Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated September 9, 2014, reference 02, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 8, 2014. Claimant participated. The employer participated by Ms. Staci Albert, Human Resource Manager and Ms. Sara Hofer, Team Manager. Employer's Exhibits A, B, C, D, E, F, G, and H were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Ira Rippatoe was employed by Stream International, Inc. from August 26, 2013 until August 19, 2014 when he was discharged for exceeding the permissible number of attendance infraction points allowed under the company's attendance policy. Mr. Rippatoe was employed as a full-time call center employee and was paid by the hour.

Mr. Rippatoe was discharged after he exceeded the permissible number of attendance infractions allowed under the company's established attendance policy. Under the terms of the policy employees are subject to discharge if they accumulate eight attendance infraction points in a rolling six-month period. Mr. Rippatoe was aware of the policy and had received a verbal warning about attendance on June 11, 2014 and a final written warning on July 7, 2014. At the time of the final written warning Mr. Rippatoe had accumulated seven infraction points for being absent and/or leaving work early on nine occasions between February 24, 2014 and June 21, 2014. Mr. Rippatoe did not dispute any of the infraction points that had been assessed against him either when he was warned on June 11 or July 7, 2014.

The claimant left work early on June 28, 2014 resulting in a one-half point. The final incident that caused Mr. Rippatoe's termination from employment took place on August 19, 2014. On that day, Mr. Rippatoe had reported to work timely, but had neglected to bring his work identification badge or personal identification which would have allowed him to enter the building through security check points. In an effort to accommodate Mr. Rippatoe, a company manager went to the security area to provide authorization for Mr. Rippatoe to enter the building by verifying to the security guards that Mr. Rippatoe was a company employee and authorized to enter. Mr. Rippatoe declined the offer that would have allowed him to report to work on time that day, because he wanted to return home to retrieve his billfold because others would be at his residence later and he felt that his billfold might be taken. During the claimant's exit meeting with Ms. Albert, Mr. Rippatoe confirmed that he had chosen to go back home to get his billfold. Because Mr. Rippatoe was late in reporting to work on August 19 because he had gone home and then returned to work, he was assessed an additional one-half infraction point causing him to exceed the permissible number allowed under company policy and was discharged.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of the claimant. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether the absenteeism was excessive requires consideration of past acts and warnings. The evidence, however, must first establish that the most recent absence that prompted the reason to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility are considered unexcused. Absences related to illness are considered excused providing the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness or leaving early is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that the final infraction that caused the claimant's discharge was a matter of personal responsibility. Mr. Rippatoe had reported to the employer's facility on time and was authorized to enter the facility without his identification badge because a manager had come to the area and personally verified that the claimant was an employee and invited the claimant to report for work. Mr. Rippatoe declined the offer to begin work at that time because he wished to return home to pick up his billfold because he feared others might take it during the day, although he knew he would be tardy if he did so. At the time of that incident, the claimant was on a final warning for attendance and knew or should have known that any further attendance violations could result in his termination from employment. During the six-month period leading up to his termination from employment, the majority of the claimant's attendance infractions were for personal reasons such as leaving work early or child care. Only the claimant's absences on April 1, April 2, and June 21, 2014 were related to illness and properly reported for that reason.

No contract for employment is more basic than the right of the employer to expect employees will report for work on the hour and day agreed upon and recurrent failure to honor that obligation shows a disregard for the employer's interests and standards of behavior that the employer has a right to expect of its employees under the provisions of the Iowa Employment Security Law.

For the reasons stated herein, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects the claimant has received unemployment insurance benefits in the amount of \$1,750.00 since filing a claim with an effective date of July 20, 2014 for the week ending dates of August 23, 2014 through October 4, 2014. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a firsthand witness available for rebuttal.

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.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide

detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he 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 upon a reversal of an appeal of an initial determination to award benefits or 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 if it is determined they did participate in the fact-finding interview. Iowa

Code section 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did not participate in the fact-finding interview, the claimant is not obligated to repay the agency the benefits he received and the employer's account shall be charged.

DECISION:

The representative's decision dated September 9, 2014, reference 02, is reversed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,750.00. The claimant is not required to repay this amount and the employer shall be charged for the overpayment as the employer did not participate in the fact finding in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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