

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROGER W WHITEBEAR**  
Claimant

**APPEAL NO. 12A-UI-10914-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STREAM INTERNATIONAL INC**  
Employer

**OC: 08/12/12**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Stream International, Inc. filed a timely appeal from a representative's decision dated September 4, 2012, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 4, 2012. The claimant participated. The employer participated by Ms. Bangone Chanthavong, human resource generalist.

**ISSUE:**

At 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: Roger Whitebear was employed by Stream International, Inc. from June 27, 2011, until June 15, 2012, when he was discharged by the employer. Mr. Whitebear was employed as a full-time customer service representative and was paid by the hour.

The claimant was discharged when he exceeded the permissible number of attendance infraction points allowed under company policy. Under company policy, employees are subject to discharge if they accumulate eight infraction points within a six-month rolling period. Mr. Whitebear was aware of the policy and had been warned when he reached five points. The claimant received a written warning when he accumulated six points and a final warning when he accumulated seven infraction points. The majority of Mr. Whitebear's absences were due to illness and were properly reported. The final incident that caused the claimant to be discharged took place when Mr. Whitebear called in sick on June 16, 17, and 18, 2012. Mr. Whitebear was sick with the flu at that time and could not work and properly notified the employer in advance of his work shift of his inability to report for scheduled work.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

871 IAC 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. Conduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment 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 App. 1992).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held the excessive unexcused absenteeism is a form of misconduct. The Court held that the absences must both be excessive and unexcused. The Court further held, however, that absences due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for these reasons, but whether the discharge is disqualifying under the provisions of the Employment Security Act. While the decision to terminate Mr. Whitebear may have been a sound decision from a management viewpoint, the evidence in the record does not show disqualifying misconduct at the time of job separation. The claimant was ill and properly reported his impending absence. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated September 4, 2012, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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