IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JESSICA L TUTTLE
Claimant

STREAM INTERNATIONAL INC
Employer

APPEAL NO. 09A-UI-06249-VST

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 03/22/09
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant, Jessica L. Tuttle, filed an appeal from a representative's decision dated April 13, 2009, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 19, 2009. The employer participated by Stacy Albert, human resources generalist, and George Davis, team manager. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Stacy Albert, the testimony of George Davis, and Employer's Exhibits 1 through 7.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The claimant was hired as a full-time customer support professional on December 8, 2008. The employer is an outsourced call center and the claimant was responsible for answering incoming customer calls. The claimant was terminated on March 18, 2009 for excessive absenteeism. The last day that she actually worked for the employer was March 15, 2009.

The claimant had been scheduled to work on March 16, 2009. She contacted George Davis, her supervisor, and told him that she could not be at work because of some appointments for her children. At this time, the claimant was at the final stage of discipline for her attendance problems. Mr. Davis, in an effort to help the claimant avoid termination, moved her work hours from March 16, 2009 to March 17, 2009. The claimant did not show up for work on March 17, 2009. When asked why she did not come to work, she informed her employer that she had had family in town.

The employer had a written policy concerning attendance. If eight points were accumulated, the employee was to be terminated. On February 14, 2009, the claimant was given a final written

warning, as she had accumulated seven attendance points. Her prior points were accumulated as a result of being absent, leaving early, and being late. As a result of the written warning signed by the claimant on February 14, 2009, the claimant knew that if she were to get one additional point, she would be 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three

incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

The evidence in this case established that the claimant knowingly and repeatedly violated the employer's attendance policy. Between December 8, 2008, which is the date that she was hired, and March 18, 2009, the claimant was absent three times without excuse, left early once, and was late nine times. The claimant was given a verbal warning on January 29, 2009 and a written warning on February 5, 2009. The final written warning was given on February 14, 2009. The claimant's absences were both excessive and unexcused, and therefore constitute misconduct. Benefits are denied.

DECISION:

The representative's decision dated April 13, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/kjw