

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIMBERLEE A FONTENOT
Claimant

APPEAL NO: 08A-UI-03768-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC
Employer

OC: 03/16/08 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Stream International, Inc. (employer) appealed a representative's April 7, 2008 decision (reference 01) that concluded Kimberlee A. Fontenot (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 2, 2008. The claimant participated in the hearing. Jackie Kurtz appeared on the employer's behalf and presented testimony from two other witnesses, Brad Green and Laura Carmann. During the hearing, Employer's Exhibits One through Four were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on April 3, 2007. She worked full time as a support professional at the employer's Sergeant Bluffs, Iowa call center. Her last day of work was March 17, 2008. The employer discharged her on March 18, 2008. The reason asserted for the discharge was excessive absenteeism.

The claimant had received a written warning on December 31, 2007 for having five partial day absences. She also received a final written warning on December 31 for having four full day absences. She was advised that should she have an additional full day absence she was subject to termination. Additionally, on January 29, 2008 she was given a further final warning. Her prior absences had been due to illness.

On March 17, 2008 the claimant was scheduled to work from 8:30 a.m. to 5:00 p.m. Prior to reporting for work the claimant had been feeling ill with sinus and ear pain; she had called her doctor's office and had taken the only available appointment time, which was at 10:30 a.m. At approximately 9:00 a.m. she reported to her acting team manager, Ms. Carmann, that she was not feeling well and that she had scheduled a doctor's appointment for 10:30 a.m.

Ms. Carmann attempted to persuade the claimant to try to reschedule the doctor's appointment for a non-scheduled work time in order to try to avoid the claimant accumulating any additional attendance occurrences that might result in her termination. However, the claimant declined and reasserted her intent to attend her 10:30 a.m. doctor's appointment. Ms. Carmann advised the claimant to return to work after the doctor's appointment so as to avoid being gone the majority of the day, which would be treated as a full day absence, which would trigger discharge. The claimant agreed to return to work after her doctor's appointment if she was able to do so, and agreed to inform the employer of her status. She left for the doctor's appointment at approximately 10:00 a.m.

The doctor diagnosed the claimant with both sinus and ear infections, and gave her a note that she was to be off work for three days. At approximately 11:30 a.m. the claimant called the employer's attendance administrator and informed the employer that she was not going to be back that day or for the next several days. On March 18 the employer contacted the claimant and advised her that she no longer had a job due to her attendance.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance

policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's April 7, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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