

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BINDNER, JOHN, B**  
Claimant

**APPEAL NO. 10A-UI-17604-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**STREAM INTERNATIONAL INC**  
Employer

**OC: 11/21/10**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 16, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 2, 2011. Claimant participated and presented additional testimony through Sherrie Johnson. Hannah Cook represented the employer and presented additional testimony through Valerie Petersen. Exhibits One and Two were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for 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 full-time tech support professional from December 2008 until November 17, 2010, when Hannah Cook, human resources generalist, and Debbie Nelson, human resources manager, discharged him from the employment. The final incident that triggered the discharge occurred on November 17, 2010. Claimant was on the telephone with a representative of Intuit and was providing assistance to that representative. The person to whom the claimant was speaking was someone with whom he had regular contact as he performed telephone tech support work on the Intuit account. The claimant made the comment that it was his last week on the Intuit contract because the pregnant lady had it out for him. Claimant was referring to an Intuit representative who was on site at the workplace. The claimant did not recall the name of the on-site Intuit representative and had referred to her as the pregnant lady for that reason. The claimant had not intended anything derogatory by the remark.

On November 10, 2010, the claimant had been assisting a customer who is located in Nebraska. The customer engaged the claimant in good-natured banter about college athletics and the rivalry between Iowa State University and the University of Nebraska. In response to a remark by the customer, the claimant had responded in kind by asking the customer if he was one of those Nebraskans who could read. The customer responded with laughter and was not

offended by the remark. The employer deemed the remark inappropriate. An Intuit representative heard the remark, found the remark offensive, and demanded that the claimant be removed from the Intuit contract.

The above incidents followed an incident on October 19, 2009, when the claimant was assisting on a one-time basis with responding to customer e-mail while working on the TurboTax contract. A customer sent an angry e-mail about being left on hold and extended when the customer had attempted to obtain assistance with their taxes at the last minute before a tax filing deadline. The claimant had responded with a message that mildly chastised the customer about waiting until the last minute to file their taxes and to request assistance.

The employer had a written policy that prohibited inappropriate or unprofessional conduct. The claimant was all aware of the policy and had signed his acknowledgment of the policy.

### **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.

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. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a 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 Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record fails to establish misconduct in connection with the employment. The evidence establishes that the claimant exercised poor judgment by referring to the Intuit representative as the pregnant lady, but the evidence also establishes that the claimant meant no offense by the remark. A reasonable person would not have been offended by the remark in the context in which it was uttered. The evidence establishes that the comment to the Nebraska customer on November 10 was nothing more than a good-natured banter concerning college athletics and that the employer overreacted to the situation. The claimant was in fact establishing rapport with the customer, something that was clearly in the interests of the employer and the employer's client. The evidence indicates that the 2009 incident was the most egregious. Rather than providing a response to the customer's angry e-mail, claimant had a choice of not responding at all, but in any event should not have chastised the customer. The evidence fails to establish that the claimant acted with a willful or wanton disregard of the employer's interests in connection with any of the above incidents, but especially fails to establish any such intent, carelessness, or negligence in connection with the two final incidents that factored into the discharge.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

**DECISION:**

The Agency representative's December 16, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs