

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

KYLE N STOOS

Claimant

STREAM INTERNATIONAL INC

Employer

APPEAL NO. 14R-UI-10462-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/20/14

Claimant: Appellant (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 13, 2014, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 28, 2014. Employer participated by Bangone Chanthavong, with witnesses Brent Jepsen and Sara Hofer. Claimant failed to respond to the hearing notice and did not participate. Employer's Exhibits One through Seven were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on July 14, 2014.

Employer discharged claimant on July 21, 2014 because claimant had violated employee agreements in multiple ways, with the latest being effectively receiving tokens which were intended for customers and putting them into his own account. Claimant received a Customer Account Access agreement when initially employed. Said agreement was signed by claimant. This agreement lists numerous things that an employee must do and cannot do. Included within that agreement is a statement that agents must not access their own account while working. Claimant signed a document admitting that he had accessed his own account.

Claimant received written warnings about other types of improper conduct. Claimant received a written warning on March 8, 2014 concerning typing credit card numbers into notes, and another written warning on July 13, 2014 concerning creating alerts or SR's for customer concerns. (This warning states that this was his first error in the last three months).

The incident which led to claimant's termination involved claimant securing tokens which were to be put with customer's accounts allowing those customers free time for usage of Xbox live. The tokens had values ranging from \$9.99 to \$74.97. When claimant admitted to accessing his

own account, he did not admit to these actions. After working for employer for three months, claimant received free usage of Xbox live. Throughout the rest of claimant's employment, he had free access to Xbox live. Employer posited that claimant could have done this action in anticipation of when he did not work for employer and his Xbox usage was no longer free.

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(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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Dep't of Job Serv., 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Dep't of Job Serv., 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Dep't of Job Serv., 425 N.W.2d 679 (Iowa Ct. App. 1988).

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. Here, claimant had received warnings for other actions that were deemed to be improper by employer. Claimant had never received a warning as to the action that led to his dismissal.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning access of a private account during work. Claimant was not warned concerning this policy, but had received a Customer Account Access Agreement upon his hiring.

The last incident, which brought about the discharge, fails to constitute misconduct because employer has not shown that claimant's actions were willful. The actions allegedly took place months before claimant was terminated. For the next number of months claimant continued to work for employer with few incidents, continued to have free use of Xbox live, and did nothing towards any further accumulation of Xox tokens. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated August 13, 2014, reference 03, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

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