

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LENA FIELDS

Claimant

APPEAL NO: 11A-UI-10007-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

STREAM INTERNATIONAL INC

Employer

OC: 05-22-11

Claimant: Respondent (2R)

Section 96.5-2-a – Discharge/Misconduct

Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 14, 2011, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 23, 2011. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Hanna Cook, Human Resources Generalist and Judy Easton, Team Manager for the Sirius XM Project, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

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 customer support professional for Stream International from September 27, 2010 to May 21, 2011. The employer's attendance policy assesses one point for a full day absence and one-half point for tardiness or leaving early. The claimant had accumulated 7.5 attendance points as of May 21, 2011. She was tardy and received one-half point October 31, 2010; she left early and received one-half point November 6, 2010; she was tardy and received one-half point November 10, 2010; she was tardy and received one-half point November 13, 2010; she left early due to illness and received one-half point November 21, 2010; she left early due to family issues and received one-half point December 7, 2010; she left early and received one-half point December 14, 2010; she was absent and received one point December 20, 2010; she left early due to illness and received one-half point January 5, 2011; she was absent and received one point January 11, 2011; she was absent and received one point April 17, 2011; and she left early due to illness and received one-half point May 3, 2011, for a total of 7.5 points. On May 21, 2011, the claimant went to Judy Easton, Team Manager for the Sirius XM Project, and asked to leave early because her grandmother was in the hospital and dying. Ms. Easton was attempting to explain the claimant's attendance points and that she would be at eight points if she left early when the claimant became upset, rude and used

profanity before throwing her pen and paper at Ms. Easton, who wanted to further explain the employer would work with the claimant regarding the situation if the claimant brought documentation about her grandmother's illness, before the claimant left the building. The claimant received a documented verbal warning regarding her attendance December 20, 2010, when she reached 5.5 attendance points; a written warning January 5, 2011, when she reached six attendance points; a final written warning February 19, 2011, when she reached seven attendance points; and another final written warning April 27, 2011, when she again had over six attendance points. The claimant also received a final written warning March 1, 2011, for behavioral issues after she used profanity, specifically the "f-word," on the call center floor where customers could overhear her several times within a few days, including in front of Ms. Easton. Because of the claimant's eight attendance points and her response to Ms. Easton May 21, 2011, the employer terminated the claimant's employment.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). While the employer may have been able to work with the claimant to have her final absence due to her grandmother's illness excused, the claimant blew up, used profanity, threw her pen and paper at Ms. Easton, and left before Ms. Easton could even get to the point of discussing possible solutions to prevent the claimant from losing her job due to attendance points.

The employer has established that the claimant was warned that further unexcused absences and/or behavioral issues could result in termination of employment and the final absence was

not excused and involved an inappropriate and unprofessional response to Ms. Easton. The final absence, in combination with the claimant's history of absenteeism, behavioral and profanity issues, is considered excessive. Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The July 14, 2011, reference 02, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs