

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN T AMEY

Claimant

APPEAL NO: 08A-UI-00813-S2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

STREAM INTERNATIONAL INC

Employer

**OC: 08/26/07 R: 01
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Stream International (employer) appealed a representative's January 16, 2008 decision (reference 07) that concluded Kevin Amey (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 7, 2008. The claimant participated personally. The employer participated by Jacqueline Kurtz, Human Resources Recruiter; Rebecca Toben, Team Manager; Andrew Eberhardt, Team Manager; and Staci Albert, Human Resources Generalist. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the 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 that: The claimant was hired on September 25, 2007, as a full-time technical support representative. The claimant signed for receipt of the employer's handbook on October 15, 2007. The claimant had no attendance issues until October 7, 2007, when he left early for an appointment. On October 20, 2007, the claimant was tardy for work. Later that day the employer talked to the claimant about disappearing from work. The employer told the claimant he could not go to the back room or outside to smoke when he was supposed to be working.

The claimant was absent on October 30, November 5, 15, 18, 26, 27, 28, 29, and December 2, 2007. On November 28, 2007, the claimant told the employer he had pneumonia. The Human Resources Generalist told the claimant that he needed to provide medical documentation for his absences. On November 30, 2007, the Human Resources Generalist reminded the claimant that he had to provide documentation for his absences since November 26, 2007. The previous Team Manager warned the claimant that his absences were excessive and he might lose his job. The Team Manager told him that he needed to appear for work on December 3, 2007, with a doctor's excuse explaining his "string of absences." That same day the Human Resources Generalist again reminded the claimant that he had to provide documentation for his absences. The doctor faxed a note to the employer stating the claimant was seen on December 3, 2007. The note did not indicate that the claimant was excused from work on any day.

On December 5, 2007, the employer talked to the claimant after the claimant failed to notify the employer of his absence. The claimant understood that he needed to appear for work on December 6, 2007, or the employer would consider him to have resigned. The Team Manager left a message for the claimant again on December 6, 2007, when the claimant did not appear for work or notify the employer of his absence. The employer terminated the claimant effective December 6, 2007, when the claimant did not contact the employer all day on December 6, 2007.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence

was an improperly reported illness which occurred on December 6, 2007. The claimant's absence does amount to job misconduct because it was not properly reported. The claimant was discharged for misconduct. He is not eligible to receive unemployment insurance benefits.

The claimant's and the employer's testimony is conflicting. The administrative law judge finds the employer's testimony to be more credible because the claimant's testimony was internally inconsistent.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's January 16, 2008 decision (reference 07) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$665.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs/kjw