IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANTHONY A HACKERT Claimant **MASTERBRAND CABINETS INC** Employer	**APPEAL 16A-UI-13593-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/27/16** **Claimant: Respondent (1)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the December 12, 2016, (reference 01) unemployment insurance decision that allowed benefits based upon its failure to show misconduct. The parties were properly notified of the hearing. A telephone hearing was held on January 13, 2017. The claimant Anthony Hackert participated and testified. The employer Masterbrand Cabinets Inc. participated through Human Resource Generalist Amy Mosley.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a material handler from September 21, 2015, until this employment ended on November 19, 2016, when he was discharged.

The employer has a points-based attendance policy in place. Employees accumulate a half point any time they miss less than two hours of work and a full point each time they miss more than two hours of work. If an employee is not able to come to work they must call in 30 minutes

prior to the start of their shift. Employees are given written warnings once they reach four and six points and are up for termination at eight points. Points are accumulated by rolling calendar year.

On November 18, 2016, claimant called in sick in accordance with the employer's attendance policy. According to Mosley, the following day claimant asked his supervisor, Pat McGrane, if his November 18 absence was going to lead to termination based on his points. Mosley testified McGrane told claimant the determination would be made by human resources. According to what McGrane told Mosley, claimant then clocked out and handed McGrane his security badge. Had claimant not left work his employment would have been terminated based on his attendance points.

Claimant testified, on November 19, 2016, he was still feeling sick while at work and told McGrane he was going home due to illness. According to claimant McGrane advised him that if he left he was going to be terminated based on his points. Claimant told McGrane he was too sick to work and had to go home. Claimant testified McGrane told him to go clock out and turn in his security badge, indicating he was fired.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 27, 2016. The claimant filed for and received a total of $891.00 in unemployment insurance benefits for the weeks between November 27 and December 17, 2016. The employer did not participate in the fact finding interview on December 9, 2016. The fact finder determined claimant qualified for benefits.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

There is a dispute in the testimony as to whether claimant was discharged by McGrane or voluntarily quit. The employer argues claimant left work voluntarily prior to a decision being made regarding his future employment, but admits his employment would have been terminated. Claimant testified McGrane told him that if he went home sick he would be terminated. According to claimant when he told McGrane again that he was too sick to work, he was told to clock out and asked for his badge.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Given the serious nature of the proceeding and the employer's allegations resulting in claimant's

discharge from employment, the employer's nearly complete reliance on hearsay statements is troubling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. Claimant was discharged from employment by McGrane.

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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007).

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of Iowa Employment Security Law because it is not

volitional. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

Claimant was absent from work on November 18 and left work early on November 19 due to illness. Because his last 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. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed. As benefits are allowed, the issues of participation and overpayment of benefits are moot and will not be further discussed.

DECISION:

The December 12, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant. The issues involving participation and overpayment of benefits are moot.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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