IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

BRIANNA L MOSS Claimant **HANDICAPPED DEVELOPMENT CENTER** Employer	**APPEAL 16A-UI-05990-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/01/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 23, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on June 15, 2016. The claimant, Brianna Moss, participated and testified. Witness, Jeremiah Terry, was also present and testified on behalf of claimant. The employer, Handicapped Development Center, participated through vice president of intermediate care facility for the intellectually disabled services, Linda Gill. Employer's Exhibit 1 through 3 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a program lead from May 11, 2013, until this employment ended on May 9, 2016, when she was discharged.

The employer has a policy in place which requires employees to call in to a shift supervisor within three hours of their scheduled shift if they are unable to come in to work. This policy is explained in the employee handbook, which claimant received a copy of upon hire.

On May 5, 2016, claimant was scheduled to work from 6:00 a.m. to 2:00 p.m. At 7:25 a.m. the employer received a call from claimant stating she had been in the emergency room the previous day, needed to follow up with her doctor that day, and would not be in. Previously, on April 26, 2016, claimant was issued a warning and given a suspension for failing to follow the proper call in procedures. Claimant was warned that further incidents would lead to termination. The employer determined, following the May 5 incident, that claimant's employment should be terminated. Claimant was notified of such by her immediate supervisor, Cynthia Simmons, on May 6, 2016.

Claimant testified she had first called in the day before, May 4, 2016, at 10:00 a.m. According to claimant she told the shift supervisor on duty she would not be in for her 1:00 p.m. shift that day and would also be out the following day due to a severe migraine. Terry, who was present with claimant in the emergency room and for her phone call to the employer, corroborated this statement. Claimant explained the only reason she called again on May 5 was because she had woken up that morning to a series of text messages from her coworkers informing her that the supervisors were saying she was a no-call/no-show and she wanted to clarify. Claimant explained this to Simmons on May 6, when she called to terminate her, but was told the decision was final.

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.

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(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).

This decision rests, at least in part, on the credibility of the parties. When the record is composed 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. Gill relied entirely on information given to her by other employees. No request to continue the hearing was made and no written statement of the other individuals involved 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 concerning. Claimant, on the other hand, presented direct firsthand knowledge from both herself and a witness. 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.

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. A failure to report to work without notification to the employer is generally considered an unexcused absence. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard.

Claimant called in sick on May 4, 2016, three hours prior to her shift, in accordance with the employer's policy. Claimant reported that same day that she would not be at work the following day, May 5. This is also in accordance with the employer's policies. Because her 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.

DECISION:

The May 23, 2016, (reference 01) unemployment insurance decision is reversed. 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.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

nm/pjs