

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DONNA L BLUE**  
Claimant

**BEST REST INN & SUITES LLC**  
Employer

**APPEAL 16A-UI-10605-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/21/16**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 21, 2016, (reference 03) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on Thursday, October 27, 2016. The claimant, Donna L. Blue, participated. The employer, Best Rest Inn and Suites, LLC, participated through Jonathan Molinas, owner and operator; and Janice Williams, front desk clerk; and attorney Jeffrey E. Clements represented the employer. Claimant's Exhibits 1 through 9 were received and admitted into the record without objection.

**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, most recently as a manager, from July 15, 2006, until August 14, 2016, when she was discharged for theft of company property.

Molinas testified that claimant wrote out company checks to pay her daughter's personal expenses. Claimant's daughter, Gerilynn Blue, is a former employee of this employer. According to Molinas, claimant wrote checks to a personal gym, a utilities company, and an attorney who was representing claimant's grandson. Molinas learned about these checks sometime between May 2016, when he took over ownership of the motel, and the end of claimant's employment. Molinas asked claimant about these checks one week before she was discharged and she admitted that she had written them. Claimant testified that her daughter received a portion of her compensation from the employer through these bill payments instead of a paycheck, as she needed to remain qualified for an income-based government healthcare benefit.

Previously, claimant either personally punched in and out for Gerilynn when she was absent or instructed other employees to do this. Williams testified that this was an ongoing issue.

Williams explained that claimant required her to punch herself (Williams) out and punch Gerilynn in, even though Gerilynn had not arrived at work yet and Williams had to stay and cover her. Later, Williams found an envelope containing cash for these extra hours taped to her time card. Williams recalled this happened three times during her employment. Gerilynn was discharged on July 21, 2016.

Molinas claims claimant attempted to cover up Gerilynn's theft from the employer after Gerilynn's employment ended. Specifically, on one occasion after Gerilynn's employment ended, she took \$50.00 out of the cash register. When Molinas confronted claimant about this, she said she would look into the issue. The following day, claimant placed a \$50.00 personal check into the employer's account. Claimant denies this occurred. She testified that the \$50.00 is related to some outside cleaning assistance she hired for the motel. When Molinas objected to paying for this assistance, claimant explained, she paid for it personally and repaid the employer for the amount.

Molinas and Williams claim claimant ordered personal items on the employer's regular grocery order and kept the employer's property at her home. Molinas testified he learned about this issue immediately upon taking over the motel. Claimant explained that when she added personal items to the grocery order, she reimbursed the employer for these items. Claimant had permission to do this from the former owner. Molinas referred to claimant's conduct as a "mosaic of theft." He denies permitting claimant to take any of the property she took or to compensate her daughter by paying her bills with the employer's funds. Molinas also testified about televisions that he believes claimant stole, but he discovered these after determining that he was going to discharge claimant. Molinas also testified that claimant stole mattresses at the end of July. Claimant testified she bought a personal mattress on a separate invoice at the same time the employer ordered new mattresses. These orders were somehow combined so all the mattresses could be shipped for free.

#### **REASONING AND CONCLUSIONS OF LAW:**

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

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). Here, the employer did not provide any documentation of claimant's alleged theft of company property. It is permissible to infer that any related records were not submitted because they would not have been supportive of the employer's position. See, *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience. While the administrative law judge appreciates that the employer provided two witnesses with firsthand knowledge for testimony, the employer failed to provide any corroborating documentation for its numerous allegations against claimant. The employer referred to testimony the former owner gave in a different unemployment hearing, but it did not offer any such testimony for this hearing. Nor did the employer submit a copy of any relevant employment policy. After assessing the witness credibility and remaining mindful of the ruling in *Crosser, id.*, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

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(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.

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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011). In reviewing past acts as influencing a current act of misconduct, the ALJ should look at the course of conduct in general, not whether each such past act would constitute disqualifying job misconduct in and of itself. *Attwood v. Iowa Dep't of Job Serv.*, No. \_\_-\_\_, (Iowa Ct. App. filed \_\_, 1986).

Here, the credible evidence shows that claimant's discharge was based on information the employer had as early as mid-May 2016. The major objection the employer had with claimant's conduct stemmed from issues related to Gerilynn's employment. It does not appear that the employer gained any new information about claimant's conduct after Gerilynn was discharged on July 21. Inasmuch as there were no incidents of credibly alleged misconduct and no new information about previous misconduct after July 21, the employer has not met the burden of proof to establish that claimant acted deliberately or negligently after a recent warning. The employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

**DECISION:**

The September 21, 2016, (reference 03) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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