

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CHARLINE M LINGLE
Claimant

R C CASINO LLC
Employer

APPEAL 17A-UI-05523-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 04/30/17
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 18, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on June 12, 2017. The claimant participated personally. Candice Boyd, former employee, testified for the claimant. The employer participated through Sara Minard, senior business partner. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

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: The claimant was employed full-time as a hotel housekeeper and was separated from employment on April 28, 2017, when she was discharged.

Prior to separation, the claimant had demonstrated ability to satisfactorily clean rooms. She had previously been issued disciplinary action on December 23, 2017, for failure to complete her assigned rooms in time, and on January 3, 2017, for failure to complete the making of beds to her assigned rooms.

The final incident occurred on April 28, 2017, when the employer determined the claimant had failed to satisfactorily clean 5 of her 13 assigned rooms. The claimant's checker for the final incident was Amber Bolio, who the claimant had filed a complaint against for bullying and harassment the month prior to discharge. As a result of the complaint, there was a meeting held and the claimant was present with human resources representative, Kim Lewis, who agreed to move the claimant to another floor as to avoid Ms. Bolio being the checker for her rooms. At the meeting, Ms. Lewis also informed the claimant she could fire her anytime she wanted. Ms. Lewis was known to be the close friend of Ms. Bolio.

According to the employer, on April 28, 2017, Ms. Bolio discovered the claimant had left hair on the floor in five rooms, failed to replace an ice bucket bag, left a soap wrapper, did not clean a makeup holder, left soap scum and did not clean a second shower, had failed to replace a toiletry item, and had left three dirty toilets during her cleaning of rooms 324, 325, 326, 327 and 328. Ms. Bolio also reported the claimant had a negative attitude. During her break, the claimant went to Ms. Lewis to complain that Ms. Bolio was her checker. At the same time, she was issued a disciplinary warning for a prior incident of leaving an empty pizza box on a closet shelf.

Ms. Lewis then informed the claimant of her room conditions and the claimant returned to fix them. She found only the soap wrapper and not the rooms to be in the condition reported by the employer. Neither Ms. Lewis, nor Ms. Bolio, the checker, participated in the hearing or submitted written statements in lieu of participating, to detail their observations of the rooms. Nor was any photograph or other evidence presented by the employer showing the room conditions after the claimant serviced them. She was subsequently discharged.

REASONINGS 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(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).

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In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

This case rests on 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). 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 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.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the

applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The two people with any direct knowledge of the situation, (Ms. Lewis and Ms. Bolio) other than the claimant, did not attend the hearing and no written statements of those individuals were offered. No photographs or evidence was presented showing the conditions of the rooms cleaned by the claimant on April 28, 2017. Given the serious nature of the proceeding and the employer's allegations resulting in the claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. 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.

In this case, the claimant was discharged for failure to satisfactorily clean five of her thirteen rooms on April 28, 2017. The employer alleged the claimant failed to clean hair off floors, left soap scum and dirty showers, did not clean toilets, failed to replace ice bags and toiletry items, and left trash/wrappers out. When the claimant was called back to review the rooms, the only issue she discovered that she had failed to remove a soap wrapper. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). At most, the claimant failed to pick up a soap wrapper. This is not "substantial" to warrant a finding of misconduct and to deny benefits. Based on the evidence presented, the administrative law judge concludes the employer has failed to establish that the claimant was discharged for reasons that would constitute misconduct. Therefore benefits are allowed.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law.

DECISION:

The May 18, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed
jlb/scn