IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

ANGELA M WIKE Claimant **MASON CITY SUPER 8 MOTEL INC** Employer	**APPEAL 16A-UI-01492-LJ-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/14/15** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 1, 2016 (reference 03) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on February 26, 2016. The claimant, Angela M. Wike, participated. The employer, Mason City Super 8 Motel, Inc., participated through Debbie Werstein, General Manager.

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 night auditor from July 31, 2015 until this employment ended on January 8, 2016; when she was discharged.

Claimant had been staying at a room on the property due to some personal issues. According to Werstein, claimant's friends and family members were staying in the room. When the employer spoke to claimant about this issue on January 4, claimant said she understood and told the employer they would no longer be there. These people returned every day after that. The people included claimant's son; who is 20-years old, a friend of claimant's who had previously been banned from the property, and claimant's husband. Werstein also testified that claimant's son and his friends were engaged in underage drinking on the property.

Both parties state claimant made it clear to the husband that he was not allowed to be there, though Werstein alleges he continued to show up at the property. Claimant testified that she had asked her husband to bring her medicine or other items on several occasions. However, he often came up to the property without being invited; in order to cause problems for her. Claimant testified that her husband did not visit her after Werstein talked to her on January 4.

Claimant denies there was any underage drinking happening on the property. She recalled one instance where she saw a 21-year old with a 12-pack of beer come up to her room to visit her son. Claimant went up to the room and made him leave. Claimant testified that Werstein never told her that her friend could not visit her, and she testified that her husband never stayed on the property or entered her room.

REASONING AND CONCLUSIONS OF LAW:

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

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, Werstein testified that claimant had people continue to visit her at work after she was instructed to cease this practice. However, Werstein testified that she was not on the premises during claimant's shift and relied on video cameras to learn this. The employer did not submit any video documentation of this happening. It is permissible to infer that video documentation was not submitted because it 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*.

After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant presented credible testimony when she stated she was only informed that her husband was no longer allowed to visit her at work. Common sense and experience both suggest that if an employer was issuing an employee a final warning that any further issues of a certain kind would lead to discharge, that employer should put the warning in writing to ensure that both the employer and the employee are aware of the expectations of continued employment. The employer provided no documentation and was not clear during the hearing that claimant was aware of all of the various violations that could lead to her discharge.

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.
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> 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).

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.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. In this case, the employer has not met its burden of proving claimant knew the various scenarios in which she could be discharged. Claimant credibly testified that the only circumstance that she knew would be problematic was continued visits by her husband, and she indicated he did not visit her after January 4. Benefits are allowed.

DECISION:

The February 1, 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. Any benefits claimed and withheld on this basis shall be paid.

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Elizabeth Johnson
Administrative Law Judge

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Decision Dated and Mailed

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