6-11-2018

Keller v. Ameritel Inns, Inc. Respondent's Brief 2 Dckt. 45555

IN THE SUPREME COURT OF THE STATE OF IDAHO

MEGAN D. KELLER

Claimant/Respondent,

vs.

AMERITEL INNS, INC. d/b/a HAMPTON INN AND SUITES

Employer/Appellant,

and

IDAHO DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 45555

BRIEF OF RESPONDENT
IDAHO DEPARTMENT OF LABOR

ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
THOMAS E. LIMBAUGH, CHAIRMAN

IDAHO DEPARTMENT OF LABOR

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STATEMENT OF THE CASE

A. Nature of the Case

This is an unemployment benefits case. Appellant Ameritel Inns, Inc. ("Ameritel") appeals from a decision of the Idaho Industrial Commission ("Commission") that concluded Respondent Megan D. Keller ("Keller") was eligible for unemployment benefits. Ameritel asks this Court to overturn the Commission's factual findings that: (a) Keller was discharged by Ameritel; and (b) Ameritel failed to meet its burden of proving that Keller was discharged for misconduct in connection employment.

B. Course of the Proceedings

On or about June 14, 2017, Keller applied for unemployment benefits with the Idaho Department of Labor ("Department") following her separation from employment with Ameritel. Exhibit, p.3.

On July 5, 2017, the Department issued a personal eligibility determination that found Keller was not eligible for unemployment benefits. Exhibit, pp.16-17.

Keller timely filed an appeal from the eligibility determination on July 19, 2017. Exhibit, pp.22-23.

On August 8, 2017, a telephonic hearing was held on Keller's appeal before an Appeals Examiner with the Department. R., p.1.

On August 10, 2017, the Appeals Examiner issued a written decision which found that Keller was eligible for benefits because Ameritel discharged her, but not for employment-related misconduct. R., p.6.

Ameritel timely appealed from the decision of the Appeals Examiner to the Commission by filing a notice of appeal on August 18, 2017. R., pp.9-11.

The Department entered its notice of appearance. R., pp. 16-17.

The Commission conducted a *de novo* review of the record, R., p.46, and on October 2, 2017, entered its decision finding Keller was eligible for benefits because she had been discharged by Ameritel, and Ameritel failed to meet its burden of proving her discharge was for misconduct in connection with employment. R., pp.45-55.

On November 7, 2017, Keller timely appealed from the Commission's decision to the Idaho Supreme Court. R., p.57-59.

C. Statement of the Facts

Keller began working as a housekeeper at Ameritel on April 9, 2016. Tr., p.14, ll.6-14. She later became pregnant and had a due date of mid-September 2017. Tr., p.67, ll.20-22.

Keller was at all times a good worker. She was never disciplined or reprimanded by her employer. Tr., p.65, ll.20-24, p.66, ll.1-3. Her supervisor conceded there were no disciplinary notes in her personnel file. Tr., p.63, ll.4-8.

During the latter months of her pregnancy, Keller was absent from work due to complications from her pregnancy, namely, that she "was in and out of

the hospital a few times and [she was having] a lot of nausea . . . and throwing up all the time." Tr., p.69, ll.4-8. The chemicals at work were contributing to Keller's complications to the point that she "would have to wear a mask, and even that [didn't] work, it made [her] even more sick." Tr., p.71, ll.12-19. In May of 2017, Keller's "illnesses started getting worse." Tr., p.70, ll.3-10.

Keller's supervisor, Cody Black, said he would start looking into arranging her work to address these difficulties. Tr., p.75, ll.2-4. Keller also was asked if she wanted to reduce her schedule. Tr., p.75, ll.7-14.

On June 2, 2017, Black called Keller to discuss what could be done for her:

> I called her and asked her what she wanted to do, if she would like to be taken off the schedule and go on leave, if she wanted less days, and she agreed that we could figure out some sort of leave situation, like medical leave the next time she came into work.

Tr., p.43, ll.20-25.

Ameritel's general manager, Gary Horton, testified that on June 2nd, Keller "called out sick after her shift had started" and texted Black to inform him of that fact and let him know "that she still wasn't feeling good and that most likely she might not be in on the 3rd, but wasn't sure." Tr., p.19, ll.13-18. Horton testified that Keller sent a text message to Black five minutes before her shift on June 3rd "stating that she would come in and speak with him about a discussion of possibly some leave or modification of employment, provided she was continually sick." Tr., p.20, ll.9-13. Horton conceded that Black "may have been able to take that as her calling in and letting him know that she wasn't

going to be available for her work on the 3rd by that statement." Tr., p.20, ll.14-16. Black, in his testimony, stated that Keller texted him on June 3rd "saying she wasn't coming to work." Tr., p.47, ll.13-14.

Keller did not show up for work June 4, 2017, and, according to Ameritel, it received no notice from Keller that she would be absent. Tr., p.20, l.19. Keller testified that she thought she had sent a text message to Black on June 4th to inform him that she would be out sick, but that the text message may not have transmitted due to "user error" or some other reason. Tr., p.74, ll.2-11.

The next day, June 5, 2017, Keller texted Black that she would be coming in to "discuss her sick leave" with him. Tr., p.48, ll.12-16. When Black received this text from Keller, he immediately contacted his general manager, Gary Horton, for instructions on how to respond her text. Black testified that his manager "just told me to text her that since she no call, no showed that she broke policy and that she was done." Tr., p.48, ll.17-21 (emphasis added). Black testified further that he then communicated to Keller "that with her no call, no showing on Sunday that she was no longer employed with us and that I was just going to take her off the schedule." Tr., p.49, ll.13-15 (emphasis added).

Keller testified that she did not quit her job, but, rather, was discharged by Ameritel. Tr., p.64, ll.11-17.

As discussed *infra,* despite the fact that Keller's policies regarding employee attendance were unclear and loosely applied, particularly as to Keller, Ameritel chose to treat Keller's "no call, no show" as a job abandonment and

voluntary quit. Tr., p.20, l.25 – p.21, l.2.

This was the first time during Keller's employment with Ameritel that she was a "no call, no show." Tr., p.67, l.23 – p.68, l.5.

After Keller filed for unemployment benefits, Ameritel contested her eligibility and has continued to assert that Keller quit her job.

Ameritel appeals from the Commission's decision that found Keller eligible for unemployment benefits. R., p.57-59.

ISSUES ON APPEAL

I. Does substantial competent evidence support the Commission's findings that Keller was discharged by Ameritel, and that Ameritel failed to prove it discharged Keller for misconduct in connection with employment?

II. Should the Department be awarded its reasonable attorney fees and costs on appeal pursuant to I.C. § 12-117(1) and I.A.R. 41?

ARGUMENT

I.

Substantial Competent Evidence Supports the Commission's Findings that Keller Was Discharged By Ameritel, and that Ameritel Failed to Prove Keller Was Discharged for Misconduct in Connection with Employment

A. Standard of Review

This Court's jurisdiction in appeals from decisions of the Commission is confined by the Idaho Constitution "to questions of law." Idaho Const., Art. V, § 9. Accordingly, the Court is "constitutionally compelled" to uphold Commission findings of fact supported by substantial competent evidence. Locker v. How Soel, Inc., 151 Idaho 696, 699, 263 P.3d 750, 753 (2011); Folks v. Moscow School District No. 281, 129 Idaho 833, 836, 933 P.2d 642, 645 (1997). *See also,* I.C. § 72-732(1) (Commission findings must be upheld unless they "are not based on any substantial competent evidence").

Substantial competent evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Folks, 129 Idaho at 836, 933 P.2d at 645. When applying this standard on appeal, all facts and inferences are viewed in the light most favorable to the facts found by the Commission, and the Commission's determinations as to credibility of witnesses and weight of evidence must be upheld unless clearly erroneous. Bell v. Idaho Dept. of Labor, 157 Idaho 744, 746-747, 339 P.3d 1148, 1150-1151 (2014). This Court will not "re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented." Bell, 157 Idaho at 747, 339

P.3d at 1151, *quoting* Hughen v. Highland Estates, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002).

B. Substantial Competent Evidence Supports the Commission's Finding That Keller Was Discharged By Ameritel

An unemployment compensation claimant bears the burden of proving statutory eligibility for benefits. Parker v. St. Maries Plywood, 101 Idaho 415, 417, 614 P.2d 955, 957 (1980).

Idaho Code § 72-1366(5) provides that a claimant is not eligible for benefits if the claimant "left his employment voluntarily without good cause connected with his employment" or "was discharged for misconduct in connection with his employment." Under Section 72-1366(5),

> [t]he first step in proving eligibility . . . is establishing whether an employee quit or was discharged. The second step in proving eligibility depends upon the outcome of the first step. If the employee quit, the second step is establishing whether it was with good cause. If the employee was discharged, the second step is establishing whether it was for misconduct.

Johnson v. Idaho Cent. Credit Union, 127 Idaho 867, 869, 908 P.2d 560, 562 (1995). Once a claimant proves that he or she was discharged, the burden shifts to the employer to prove the claimant was discharged for misconduct in connection with employment. *Id. Accord,* IDAPA 09.01.30.275.01 ("The burden of proving that a claimant was discharged for employment-related misconduct rests with the employer.").

An employee is discharged when an "employer's actions or statements could reasonably be interpreted as discharging the claimant." Hart v. Deary

High School, 126 Idaho 550, 552, 887 P.2d 1057, 1059 (1994); *accord,* Johnson v. Idaho Central Credit Union, *supra* (test is whether words or actions of employer would logically lead prudent person to believe he or she had been terminated by employer). Viewed from the opposite perspective of a "voluntary quit," as a general rule there must be an intent on the part of the employee to leave employment and "absence from the job is not a [voluntary quit] where the worker intends merely a temporary interruption in the employment relationship." Taylor v. Burley Care Center, 121 Idaho 792, 796, 828 P.2d 821, 825 (1991), *quoting*, Totorica v. Western Equipment Co., 88 Idaho 534, 542, 401 P.2d 817 (1965). Further, whether an employee quit or was discharged is question of fact. Johnson v. Idaho Central Credit Union, *supra.*

In the case at bar, after carefully reviewing the evidence, the Commission found that Keller did not quit her job but, rather, was discharged by Ameritel:

> Although Employer treated Claimant's failure to report to work on June 4, 2017 without informing her supervisor of her absence as job abandonment, the evidence in this case establishes that Employer discharged Claimant. Claimant did not quit.

Decision and Order, p.4 (emphasis added). Substantial competent evidence supports this finding.

It is undisputed that Keller was absent from work on June 3, 2017, and that she informed her immediate supervisor, Cody Black, by text message that she would not be coming to work that day. Tr., p.47, ll.13-14 (testimony of Cody Black).

Keller also did not appear for work on June 4, 2017. The Commission

found that she had prepared a text message to inform Cody Black of this fact, "but for whatever reason, the message never transmitted." Decision and Order, p.3, ¶ 9. This finding is supported by the testimony of Keller:

> Q. . . . Megan, why did you no show, no call on the 4th? Why did you not come in that day?
>
> A. I honestly had - - I honestly had written out the text message and I had thought that I had sent it. So, I don't know if it was - - I was sick, obviously. That's the only reason why I wouldn't have came in, but - - yeah. So, I don't know if it was a user error as in I didn't send it, because I was so sick and I didn't - - I thought I had and I didn't or if it was a technical fault.

Tr., p.74, ll.2-11.

The fact that Keller neither quit nor intended to quit when she did not show up for work on June 4, 2017, is supported by her testimony:

> Q. Ma'am, were you discharged or did you quit your job?
>
> A. Discharged.

Tr., p.64, ll.11-13.

The finding that Keller did not quit is further supported by her conduct on the day after her June 4th absence from work. It is undisputed that on June 5, 2017, Keller texted her supervisor to inform him that she would be coming in to "discuss her sick leave" with him, which is what the parties had planned to do on June 3, 2017. Tr., p.48, ll.12-16. From this fact alone, a reasonable mind could conclude that Keller had no intention of quitting when she missed work on June 4th. Keller never informed her employer that she had, or was planning to, quit her job. To the contrary, the very next day after Keller's so-called job

abandonment she texted her supervisor to make arrangements to come in and discuss her sick leave. If there no longer was an employer-employee relationship, then any discussion of sick leave would have been a moot point.

What does make sense and what, frankly, is the only reasonable conclusion to be drawn from the evidence, is that Ameritel terminated Keller. The Commission's finding that Ameritel did just that follows directly from the testimony of supervisor Black. When Keller texted Black on June 5th about coming in to discuss sick leave, Black immediately contacted his general manager for instructions on how to respond to her text. Black testified that his general manager "just told me to text her that since she no call, no showed that she broke policy and that she was done." Tr., p.48, ll.17-21 (emphasis added). Black testified further that he then communicated to Keller "that with her no call, no showing on Sunday that she was no longer employed with us and that I was just going to take her off the schedule." Tr., p.49, ll.13-15 (emphasis added).

Under the facts of this case, a statement such as this, made by a supervisor to his subordinate, that "you are no longer employed with us," Tr., p.49, ll.13-15, is undeniably a statement that "could reasonably be interpreted as discharging the [employee]." Hart v. Deary High School, 126 Idaho 550, 552, 887 P.2d 1057, 1059 (1994).

Keller testified to her surprise at this abrupt termination:

> Q. . . . Were you surprised when they said you voluntarily quit due to no call, no show?
>
> A. Yes.

Q. And why were you surprised?

A. Because I wasn't really expecting that. It was my first time ever no call, no showing or having portrayed any kind of that – any kind of behavior at work.

Tr., p.67, l.23 - p.68, l.5.

Keller's surprise was understandable for the additional reason that she and her employer were in the early stages of discussions to try to find an accommodation or other workplace solution for the complications she was experiencing due to her pregnancy, and on June 2nd they had agreed to discuss those issues.

One would have to disbelieve the testimony of both Keller and Black to conclude that Keller was not discharged. Ameritel's "no call," no show voluntary quit argument is, at best, a red herring in the truest sense of that expression, and, at worst, a patent sophism.

Substantial competent evidence supports the Commission finding that Ameritel discharged Keller. Under the deferential standard of review constitutionally compelled in these cases, that finding must be upheld. Locker v. How Soel, Inc., 151 Idaho at 699, 263 P.3d at 753.

C. Substantial Competent Evidence Supports the Commission's Finding That Ameritel Failed to Prove It Discharged Keller For Misconduct In Connection With Employment

Because Keller was discharged from her employment, the burden of proof shifted to Ameritel to establish that it discharged her for misconduct in connection with employment. Johnson v. Idaho Cent. Credit Union, 127 Idaho

at 869, 908 P.2d at 562; IDAPA 09.01.30..275.01 Whether an employee's behavior constitutes misconduct in connection with employment is a question of fact and reviewed on appeal for substantial competent evidence. Adams v. Aspen Water, Inc., 150 Idaho 408, 413, 247 P.3d 635, 640 (2011).

"Misconduct" in unemployment benefits cases turns not on whether the employer had reasonable grounds for discharge, but rather on whether the facts resulting in the discharge constitute misconduct under Idaho Code § 72-1366(5) and IDAPA 09.01.30.275.02. *See* Adams, *supra,* 150 Idaho at 413, 247 P.3d at 640. The salient flaw of Ameritel's arguments on appeal is its failure to grasp this important distinction.

The Department's administrative rules describe the proof needed for an employer to meet its burden of establishing "misconduct" in this setting:

> **02. Disqualifying Misconduct.** Misconduct that disqualifies a claimant for benefits must be connected with the claimant's employment and involve one of the following:
>
> **a. Disregard of Employer's Interest.** A willful, intentional disregard of the employer's interest.
>
> **b. Violation of Reasonable Rules.** A deliberate violation of the employer's reasonable rules.
>
> **c. Disregard of Standards of Behavior.** If the alleged misconduct involves a disregard of a standard of behavior which the employer has a right to expect of his employees, there is no requirement that the claimant's conduct be willful, intentional, or deliberate. The claimant's subjective state of mind is irrelevant. The test for misconduct in "standard of behavior cases" is as follows:
>
> **i.** Whether the claimant's conduct fell below the standard of behavior expected by the employer; and

ii. Whether the employer's expectation was objectively reasonable in the particular case.

IDAPA 09.01.30.275.02. This three-pronged approach follows well-established Idaho case law. *E.g.*, Johns v. S. H. Kress & Co., 78 Idaho 544, 548, 307 P.2d 217, 219 (1957); Jenkins v. Agri-Lines Corp., 11 Idaho 549, 602 P.2d 47 (1979); Folks, *supra*, 129 Idaho at 836-837, 933 P.2d at 645-646.

The Commission considered all three potential factual bases for misconduct – violation of employer's reasonable rules, disregard of standards of behavior, and disregard of employer's interest – and found that Ameritel failed to demonstrate misconduct under any of them. These factual findings of the Commission are supported by substantial competent evidence and should be upheld.

1. Ameritel failed to prove misconduct based upon a deliberate violation of its reasonable rules

In evaluating the evidence under the "rules" prong of misconduct, the Commission correctly looked first to Ameritel's written rules, and observed:

> Employer's policy requires employee communication with supervisors. Employer's policy states that "Whenever an employee intends to be absent from work (whether for one shift or for a longer period of time), or is going to be late, he or she must provide notice to the property manager. Employees are expected to contact their property manager or other designated point-of-contact as soon as possible so that a replacement may be brought in for your [sic] shift." (Exhibit C: p.4.)
>
> Although Employer contends that Claimant's absences were "excessive," the policy does not define "excessive absences."

Decision and Order, pp.4-5. Ameritel's policy did not describe the means by

which an employee must use to make contact. *Id.,* p.5. The Commission concluded:

> The evidence in the record establishes that Claimant and Black established a practice of using text messages. Employer's policy is too vague to put Claimant on notice that her attendance was unacceptable and put her job in jeopardy. Employer's witnesses agree that no one specifically told Claimant that her attendance was violating Employer's policy. Consequently, Employer cannot establish that Claimant deliberately violated an established rule or even the "spirit" of the rule.

Id.

Substantial competent evidence supports these findings. First, one of Ameritel's witnesses, general manager Gary Horton, testified that what was "adequate notice" under employer's attendance policy was "subjective" and that the policy itself did not specifically state what notice was "adequate." Tr., p.23, ll.4-7. Horton testified that Ameritel did not begin to feel that Keller's absences were excessive until the end of May 2017, and that because of her work absences due to illness from that point forward, Ameritel never had a discussion with Keller to let her know that her absences had become excessive and no longer would be tolerated:

> Q. . . . [E]xplain to me at what point here did the employer feel that claimant's attendance was – that her absences were excessive?
>
> A. The – we were feeling that it was excessive, but trying to give her the benefit of the doubt, understanding her condition and what she was going through.
>
> Q. At what point?
>
> A. Let's call it end of – end of May.

Q. End of May? Was there some sort of discussion with claimant?

A. There had not been a discussion with the claimant, because she never showed up for work.

Q. Well, no –

A. She kept calling in sick by the time we decided what we wanted to –

Tr., p. 26, ll.1-15. Ameritel conceded that, if Keller's inconsistent attendance has gotten out of hand, it "absolutely" was Ameritel's fault for not enforcing its claimed attendance policy earlier on. Tr., p.31, ll.13-16 (testimony of Gary Horton).

The Commission's finding regarding the absence of a specific company rule or policy governing the manner in which an employee should communicate an absence finds direct support, again, from Ameritel's own witness. Kristi Bachman, Ameritel's human resources manager, testified:

> Our company does not say in [its policy] that you cannot text, it just asks to provide sufficient notice. Each property sets their own policies as to whether or not they well accept text messages as notice.

Tr., p.61, ll.6-9.

Last, and most important, to establish misconduct under the rules prong, an employer must prove that the violation of the employer's reasonable rules was "deliberate." IDAPA 09.01.30.275.02(b). Ameritel argues on appeal that the rules violation of significance in this case is the failure of Keller to timely communicate her June 4th absence to her supervisor. However, the unrebutted

testimony of Keller, quoted *supra* at pp.9-10 of this brief, is that she attempted to send a text message to Black on June 4th to inform him that she would be out sick, but that for some unknown reason it did not transmit. *See* Tr., p.74, ll.2-11. This testimony supports a finding that Keller's apparent failure to communicate her June 4th absence to Black was not deliberate; she tried to do so but, unbeknownst to her, the communication failed.

The finding that Ameritel failed to establish misconduct with proof of a deliberate violation of its reasonable rules is supported by substantial competent evidence and must be upheld.

2. Ameritel failed to prove misconduct based upon a disregard of a standard of employee behavior that it had a right to expect of its employees

The "standards of behavior" basis for establishing misconduct is set forth in the Department's administrative rules:

> **c. Disregard of Standards of Behavior.** If the alleged misconduct involves a disregard of a standard of behavior which the employer has a right to expect of his employees, there is no requirement that the claimant's conduct be willful, intentional, or deliberate. The claimant's subjective state of mind is irrelevant. The test for misconduct in "standard of behavior cases" is as follows:
>
> **i.** Whether the claimant's conduct fell below the standard of behavior expected by the employer; and
>
> **ii.** Whether the employer's expectation was objectively reasonable in the particular case.

IDAPA 09.01.30.275.02(c). This Court explained in Adams v. Aspen Water, Inc., 150 Idaho at 413, 247 P.3d at 640, that "[t]he first prong of the [standards of behavior] test addresses only what the employer subjectively expected from the

employee." Under the second prong of this test, to be "objectively reasonable,"

> an employer's expectation . . . must be communicated to the employee, unless the expectation is the type that flows naturally from the employment relationship. An expectation flows naturally from the employment relationship when the expectations are common among employees in general or within a particular enterprise. Such expectations are generally limited to fundamental expectations and do not involve specific rules unless clearly embodied in the job at issue.

Adams, 150 Idaho at 413, 247 P.3d at 640 (citations omitted).

Here, Ameritel's ambiguous policy concerning what is "adequate notice" of an employee's absence from work, *see supra*, brief at pp.14-16, supports a finding that Ameritel's expectations were not communicated to Keller. Further, because of Ameritel's course of conduct with Keller, particularly the "leniency" that Black afforded her regarding attendance, "in this particular enterprise" the strict attendance expectation now being asserted on appeal by Ameritel did not "naturally flow" from the employment relationship that existed between Ameritel and Keller. In a more typical employment context, this expectation might be expected to "naturally flow" from the employment relationship, but the relationship here was not typical.

Manager Gary Horton testified that Keller's attendance was "very spotty and unreliable." Tr., p.16, l.8. He explained that

> [l]ots of times [Keller called in] even after her shift had started, five, ten minutes following the start of her shift, maybe even shortly prior to her shift letting us know that she wouldn't be able to come in, that she was feeling sick over again. A couple of times when we would notify her that she would need to bring a doctor's note and she would call us the next day saying she was going to be a little bit late, because she still had to run by a clinic to pick up a

doctor's note to excuse her previous absence . . . .

Tr., p.16, ll.8-17.

The attendance expectation that flowed from the particular relationship between Ameritel and Keller was, in a word, lenient. Horton testified:

> A. . . . I believe we were trying to – we were making an attempt to be as accommodating as possible.
>
> Q. What would you do to – what would occur to any other employee that no called or no showed to a shift -- a scheduled shift?
>
> A. You know, typically we would – it depends on – on the individual and the history the individual had with us. If – if they had just been hired and they didn't call in for a shift, we would just assume that they didn't want their employ and – and terminate – and consider them a no show, no call, and a voluntary quit. There are times that – like we did with Ms. Keller, reach out to her and try to contact them following the shift, giving them the benefit of the doubt that maybe they had not seen the schedule properly or not been on there and maybe reached out to them.

Tr., p.18, ll.8-24. Ameritel never suggested to Keller that her absences from work had become unacceptable:

> EXAMINER LITTLE: . . . And what I'm hearing from testimony is that the employer and claimant both discussed some sort of accommodations for her at work. However, at no time did the employer indicate to the claimant that her absences – her absences from work was [sic] unacceptable. Is that correct, Mr. Horton?
>
> MR. HORTON: I suppose so, Your Honor.

Tr., p.83, l.21 - p.84, l.2.

It bears emphasis that, under the teachings of this Court, "[a]n expectation flows naturally from the employment relationship when the expectations are common among employees in general or within a particular

enterprise." Adams, 150 Idaho at 413, 247 P.3d at 640 (emphasis added). At Ameritel – which is the "particular enterprise" involved here – its claimed expectation that no failures to appear for a scheduled shift would be tolerated, is not an expectation that flowed naturally from the relationship that existed between Keller and Ameritel. The parties' course of conduct demonstrates that the expectation was much less rigorous.

Substantial competent evidence supports the Commission's finding that Ameritel failed to demonstrate misconduct under the "standards of behavior" test.

3. Ameritel failed to prove misconduct based upon a willful, intentional disregard of its interest

As noted above, an employer can prove misconduct by demonstrating a claimant willfully and intentionally disregarded an employer's interest. IDAPA 09.01.30.275.02(a). The Commission found that Ameritel also failed to prove misconduct under this standard:

> In this case, Claimant maintains that she did the best that she could to keep in touch with her supervisor. She cannot explain why the text message she drafted on June 4, 2017 was never sent, but the failure was not intentional. (Audio Recording.) There is no evidence that Claimant's failures to meet Employer's standards were the result of some willful or intentional behavior. Therefore, it is concluded that Claimant acted without a "willful, intentional disregard" of Employer's interest.

Decision and Order, p.9.

The evidence discussed above under the "employer's rules" and "standards of behavior" prongs of misconduct supports this finding and need not

be reiterated here, except to say that Keller attempted to send a text message to Black that she would be out sick on June 4th but that for some unknown reason it did not transmit. *See* Tr., p.74, ll.2-11. Keller's apparent failure to communicate her June 4th absence to Black was neither deliberate nor willful and intentional.

Substantial competent evidence supports the Commission's finding that Ameritel failed to prove that Keller willfully and intentionally disregarded its interest. The finding must be upheld.

II.

Attorney Fees and Costs Should Be Awarded to the Department Under I.C. § 12-117(1) and I.A.R. 41 Because Ameritel's Appeal Has No Reasonable Basis in Law or Fact

Idaho Code § 12-117(1) provides as follows:

> Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

The 2012 amendments to Idaho Code § 12-117(1) make clear that, if certain findings are made, attorney fees shall be awarded in appeals from decisions of the Commission. *See* 2012 Idaho Sess. Laws ch.149, p.419 (amending language of I.C. § 12-117 to enlarge its scope to include "any proceeding" and to direct an award of attorney fees to the prevailing party by the court "hearing the proceeding, including on appeal").

Section 12-117(1) provides that the court "shall award the prevailing party reasonable attorney's fees . . . if it finds that the nonprevailing party acted without a reasonable basis in law or fact." (Emphasis added.) *See also* Rule Steel Tanks, Inc. v. Idaho Dept. of Labor, 115 Idaho 812, 819, 317 P.2d 709, 716 (2013) (awarding attorney fees to Department in employer's appeal regarding transfer of experience rating account).

As in Locker, *supra,* in this appeal, Ameritel simply asks this Court to engage in its own fact finding, and to reach a conclusion different from that of the Commission. This the Court cannot do. *E.g.,* Idaho Const. Art. V, § 9. Ameritel has presented on appeal no legal issues of any significance. This is simply an appeal where Ameritel disagrees with the Commission's factual findings. Because this appeal was brought frivolously, and without a reasonable foundation in both law and fact, it is respectfully requested that the Department be awarded its reasonable attorney fees and costs pursuant to I.C. § 12-117(1) and I.A.R. 41.

CONCLUSION

It is for the Commission to determine the credibility and weight to be accorded testimony; its findings will not be disturbed unless clearly erroneous. Locker, *supra,* 151 Idaho at 699, 263 P.3d at 753. Substantial competent evidence supports the Commission's findings that Ameritel discharged Keller, and that Ameritel failed to prove that she was discharged for misconduct in connection with employment. The Commission's decision must be affirmed.

Further, pursuant to I.C. § 12-117(1) and I.A.R. 41, because Ameritel's appeal has been brought without a reasonable foundation in fact or law, the Department as the prevailing party shall be awarded its reasonable attorney fees and costs on appeal.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 11th day of June, 2018, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

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