BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

HAL M SMITH Claimant and **LAMONT LTD** Employer	:	**HEARING NUMBER:** 17BUI-10409 **EMPLOYMENT APPEAL BOARD DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Hal Smith (Claimant) worked for Lamont Ltd. (Employer) as a full-time maintenance technician from April 6, 2015 until he was fired on September 11, 2017. Claimant last worked for employer on Friday, September 8, 2017. Employer discharged the Claimant on September 11, 2017 for the stated reason that the Claimant entered a meeting carrying a pair of scissors, and he was perceived as wielding them in a menacing manner.

On his final day the Claimant was called to a small meeting room where people were making plans about who would go to New York, but by the time he arrived at the meeting room, the people in the room had decided that the Claimant was not needed at the meeting. Claimant was told that there was a private meeting and he wasn't needed.

Minutes later the Claimant's co-worker went out to visit Claimant to ask if he would go on a trip with him. The Claimant was working, and by the time he'd finished what he was working on, it was decided by those in the meeting room that the co-worker would take his wife on the trip and not Claimant. Claimant did not know this and in response to the invitation of his co-worker he came into the small meeting room. He had scissors in his hand. Claimant had been working with the scissors and just happened to have them in his hand. The room is small, the door was closed, and one of those in the room was leaning on the door when Claimant came into the room. When he opened the door it pushed against this co-worker who then moved. This was jarring to those in the room, although not to the co-worker in question. The Claimant was told that he was not needed in the meeting and that he should leave. The Claimant said nothing intelligible in response and left. The Employer has failed to prove that the Claimant *deliberately* said or did anything that could reasonable be taken as a threat. The Employer failed to prove that the Claimant deliberately handled the scissors in a threatening way. The Claimant uses scissors as part of his job duties, and was working on the "sheeter" using the scissors at the time he was told to come to the meeting.

Claimant was put on a three day suspension after the incident. After further discussions with those involved in the incident, Claimant was terminated for the stated reason of making threats with the scissors on Monday, September 11, 2017. Claimant had never received a warning for improper or aggressive behavior to his co-workers prior to his termination.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2017) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects the intent of the legislature." *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d, 445, 448 (Iowa 1979).

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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

In consonance with this, the law provides:

> *Past acts of misconduct.* While past acts and warning 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.

871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). A final warning or last chance agreement may operate to reduce the protections of a claimant as compared to other employees. *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984). At the same time, where the incidents leading to the final warning do not, even in aggregate, constitute misconduct "the impetus is not thereby provided to elevate the [subsequent] warning or the whole to the status of misconduct." *Infante v. IDJS*, 364 N.W.2d 262, 266 (Iowa App. 1984). In such a case the final act would have to independently constitute misconduct in order to disqualify a Claimant. Conversely, while prior incidents affect the weight of the final incident they do not dictate its character, that is, if the final incident does not involve intentional action or demonstrate negligence of equal culpability it cannot be the basis of a disqualification. Past acts of possible misconduct are taken into account when considering the "magnitude of a current act". They do not convert innocent actions into misconduct. Otherwise the discharge would not be for a current act of "misconduct".

It is the duty of the Board as the ultimate 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 Board, as the finder of fact, 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, as well as the weight to give other evidence, a Board member should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what evidence to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence the Board believes; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). The Board also gives weight to the opinion of the Administrative Law Judge concerning credibility and weight of evidence, particularly where the hearing is in-person, although the Board is not bound by that opinion. Iowa Code §17A.10(3); *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission*, 322 N.W.2d 293, 294 (Iowa 1982). The findings of fact show how we have

resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence considering the applicable

factors listed above, and the Board's collective common sense and experience. We have found credible the testimony of the Claimant that he neither intentionally made any threating statements nor intentionally handled the scissors in a way meant to threaten anyone nor intentionally had a disturbing look in his eye. At most we have evidence of perceptions, much of it second hand. It is entirely possible that the innocent opening of the door and bumping into someone in a crowded room added to the happenstance of having scissors startled the co-workers and influenced their perceptions of the Claimant. The Employer has not proven anything more than this by the greater weight of the evidence. The Claimant is responsible for his actions, not the perceptions of others. Those actions have not been proven to be deliberate violation or disregard of standards of behavior or repeated carelessness manifesting equal culpability, wrongful intent or evil design

While the Employer complains of other conduct of the Claimant, none of this caused the Claimant's discharge. The only proper use of alleged *prior* problems would be as background for assessing the seriousness of the final act. In other words, the prior acts could operate as a contributing cause to the termination – by enhancing the seriousness of the final act. But if no final act occurred then, of course, there is nothing to enhance. Had the Employer proven that the Claimant actually did something wrong on his last day, we would then take into account any alleged "vociferous" objection to New York City. But, under the rules and precedent, the only role past acts may have in disqualifying a claimant for benefits is that they be used to enhance the seriousness of a current act. They cannot themselves be the basis of a disqualification. On the final day all the Claimant was doing was come into a room, which was crowded, and with scissors in his hand which he had been using when bidden to come into the room. This has not been proven to be a disregard of the Employer's interests. Thus there is no final act whose seriousness can be enhanced by the past acts. Finally, conduct occurring after the decision to terminate was made cannot factor into our analysis. *E.g. Larson v. Employment Appeal Bd*., 474 N.W.2d 570, 572 (Iowa 1991); *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 669 (Iowa 2000). Misconduct thus is not proved.

DECISION:

The administrative law judge's decision dated October 31, 2017 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

_____
Kim D. Schmett

_____
Ashley R. Koopmans

_____
James M. Strohman

RRA/fnv