

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

KAREN L WESTERN

Claimant

and

PINNACLE HEALTH FACILITIES XVII

Employer

HEARING NUMBER: 19BUI-00231

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:

Karen Western (Claimant) worked for Pinnacle Health Facilities XVIII (Employer), most recently as a full-time CMA, from January 26, 2015, until she was fired on December 6, 2018.

The Employer has a policy titled Residents Rights Under Federal Law. This policy states that each resident has the right to be free from verbal abuse and has the right to dignified existence. (Exhibit 2) Claimant knew it was prohibited to yell at a resident.

On December 3, 2018, two workers reported to Leguerrier that Claimant was working with a resident and yelled at him, telling him he did not need his brief changed and she did not want to change him. The Employer's instructions regarding this resident required two staff to enter his room because he had in the past fabricated that he had been mistreated. The Claimant was unaware of this directive because she was new to the floor in question.

Leguerrier investigated the allegations. After taking the staff-members' statements, Leguerrier went and spoke to the resident himself. The resident alleged that Claimant yelled at him. Leguerrier then spoke with Claimant, who denied the allegations. Leguerrier suspended the Claimant pending a full investigation. During her investigation, Leguerrier spoke to a family member of another resident who also reported hearing Claimant yell at the resident. Leguerrier found the accounts of Claimant yelling at the resident more credible than Claimant's denial that she was yelling. The Claimant was discharged for yelling at the resident.

The resident had also alleged he was shoved, but this allegation was not a factor in the discharge because the Employer did not credit it. When Ashley came into the room while the Claimant was still there the resident told Ashley that the Claimant had punched him in the chest. The Claimant denied this at that time, and spoke in a firm voice, but she did not yell.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2019) 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).

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). "[T]he proper weight to be given to hearsay evidence in such a hearing will depend upon a myriad of factors--the circumstances of the case, the credibility of the witness, the credibility of the declarant, the circumstances in which the statement was made, the consistency of the statement with other corroborating evidence, and other factors as well." *Walhart v. Board of Directors of Edgewood-Colesburg Community School*, 694 N.W.2d 740, 744-45 (Iowa 2005). Weighing these factors in this case favors the Claimant. 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. The only eyewitness to testify was the Claimant who has consistently denied the allegations. We understand why the resident and family member did not testify, but the staff members could have testified, and the Employer could have offered redacted versions of written notes from the investigation (if any). The Employer instead relied on hearsay. We have found credible the Claimant's testimony that she did not yell on the day in question, and that therefore she did not violate the Employer's policies. This case is largely a swearing match and we find the Claimant at least as credible as the evidence the Employer chose to present. In the end it is difficult for hearsay to overcome a flat denial when dealing with specific incidents of alleged misconduct. The Employer has the burden of proving misconduct, yet we do not have a written witness statement, nor even a written summary of the witness' statements made contemporaneous with the investigation. Even the verbal summary of the statements is lacking in much detail. The Employer has not overcome the Claimant's evidence in this case, and we find the Employer has not proven by a preponderance that the Claimant did commit the final acts that led to her discharge.

The Employer has not proven the Claimant engaged in the act alleged to constitute the final act of misconduct. Since it was this act which was a necessary and precipitating cause of the discharge the Employer has not proven that the Claimant was discharged for misconduct.

DECISION:

The administrative law judge's decision dated January 31, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was not proven to have been discharged for a disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayment entered against Claimant in the amount of \$1,804.00 is vacated and set aside.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

RRA/fnv