

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov**

TYRONE D BELL

Claimant

and

CENTRAL STATES PROPERTY MGMT

Employer

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HEARING NUMBER: 22B-UI-05079

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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, 96.5-1

DECISION

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. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Tyrone Bell (Claimant) worked for Central States Property (Employer) as a full-time maintenance technician from April 2019 until he was fired on January 21, 2022. Claimant's immediate supervisor most recently was John Baker.

Claimant was fired for the stated reason that he had used threatening language toward Mr. Baker and Property Manager Jennifer Weise several days prior to the discharge. The Employer alleged that Claimant told Ms. Weise that he was going to "knock out" her and Mr. Baker. Mr. Baker was not present at the time of the alleged statements. Mr. Baker was told of the alleged threats by Ms. Weise. Mr. Baker in turn told other members of management that the statements had been reported as having been made. The Claimant was discharged as a result.

Neither Ms. Baker nor Mr. Weise testified, nor were any exhibits offered into evidence by the Employer. The Employer has not proven by credible evidence that the Claimant made the alleged threat. While the Employer has also alleged that a refusal to perform work was a factor in the discharge, the Employer also did not provide credible evidence that in fact the Claimant was not performing the work as directed. Tenant complaints were mentioned as a factor in the discharge but the Employer did not even describe what the complaints were about.

REASONING AND CONCLUSIONS OF LAW:

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

We have no doubt that the Claimant would be guilty of misconduct if he had made the threats he is accused of making. We are unable to find that the Employer proved the threats were made based on the evidence submitted at hearing. Further the allegations of not performing work were not proven by reliable and credible evidence. Also, of course, tenant complaints for something not described in the record cannot support a disqualification.

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). Here the hearing was over the telephone and the Administrative Law Judge's credibility determinations were not based on demeanor. 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 the Employer's evidence of insufficient weight to overcome the Claimant's denials. Fundamentally the Employer provides hearsay, and that is not even in the form of a contemporaneous written statement from the declarant. Hearsay is admissible, but that does not make all hearsay convincing. Here we do not credit the Employer's evidence that a threat was made, or that the Claimant failed to perform work, finding that it is just too unreliable to carry a burden of proof. While an unemployment hearing is not a court trial, and the burden of proof is interpreted accordingly "there is nevertheless a risk of non-persuasion with respect to each issue." ET Handbook No. 382, 3rd Edition p. 30 (DOLETA 2011); Iowa Code §96.6(2); *Irving v. Employment Appeal Bd.*, 883 NW 2d 179, 196 (Iowa 2016). The lack of convincing evidence from the Employer, coupled with the Claimant's denials, means the Employer did not carry its burden of proving misconduct and benefits are allowed.

DECISION:

The administrative law judge's decision dated April 12, 2022 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.

James M. Strohman

Ashley R. Koopmans

DISSENTING OPINION OF MYRON R. LINN:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Myron R. Linn

RRA/fnv