

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

KATHY KERN

Claimant,

and

FOUR OAKS INC OF IOWA

Employer.

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HEARING NUMBER: 08B-UI-06198

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

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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Kathy Kern, worked for Four Oaks Inc. of Iowa from September 31, 1999 through May 27, 2008, initially, as a full-time night worker and then became a day worker. (Tr. 3, 5) On April 8, 2008, the claimant's pregnant daughter had to be hospitalized. (Tr. 5) On April 12th, Ms. Kern's daughter gave birth by emergency C-section (Tr. 7) to a premature baby for which the claimant took three days of authorized paid leave to take care of her daughter who continued to have medical problems. (Tr. 3, 7)

The claimant reported to work on April 14th, and subsequently requested additional time off the next day to care for her daughter who was on bed rest (Tr. 6, 9) and new grandchild. (Tr. 3, 5) The employer granted paid leave off, which lasted through May 8th. (Tr. 3, 5, 6) The claimant spoke to the employer on April 12th with regard to additional time off, seeking to know all options available to her, as she knew she couldn't return before June 1st. (Tr. 7) The employer advised her that she could take both paid and unpaid leave to cover some of the days or she could resign her position, which she didn't want to do. (Tr. 8) The employer then directed her to wait for a letter in which the employer granted Ms. Kern an additional ten days off that were unpaid. (Tr. 3) Ms. Kern never received the May 8th letter that indicated a return deadline of May 27th, 2008. (Tr. 4, 6, 7, Employer's Exhibit 3) FMLA was not offered as an option for the claimant. (Tr. 3, 6, 9)

On May 19th, the claimant met with Travis Meiborg and Greg Gates (Tr. 3-4) who asked her when she would be returning to work. Ms. Kern was unable to give them a specific return date, but again indicated that "... the best case scenario would be June 1st and the worst case scenario would [be] July 1st." (Tr. 4, 7, 8) The two men assured her she could then take unpaid leave. (Tr. 4) The claimant learned that her daughter would be off bed rest on June 10th, 2008. (Tr. 7) When Ms. Kern did not return to work on the May 27th, she was terminated for refusing to return to work and failing to give a return date. (Tr. 3)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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).

The record establishes that the claimant was on authorized paid and unpaid leaves of absences that occurred intermittently between April 12th and May 27th. It was at this juncture that the employer severed their employment relationship based on what the employer considered to be the claimant's refusal to return to work and her failure to provide a return date. Ms. Kern testified, however, that she did provide the employer with a possible return date of June 1st (Tr. 4), which the employer ultimately found unacceptable. Additionally, she provided unrefuted testimony that she tried every angle to maintain her employment. (Tr. 7) When she spoke with Meiborg and Gates, the claimant felt assured that she could take additional unpaid leave. (Tr. 4) While the employer argues that she was sent a letter advising her of a return deadline, the claimant denied ever receiving the same. The employer also denies that either Meiborg or Gates authorized additional unpaid leave, yet the employer failed to provide either man as a firsthand witness to refute Ms. Kern's testimony. For this reason, we attribute more weight to the claimant's version of events. We find her testimony credible that she reasonably believed she could take the additional time off and that she reasonably believed her circumstances fell under FMLA, which the employer never offered her. The employer has failed to establish that the claimant's actions were an intentional disregard of the employer's interests such that would disqualify her for benefits.

DECISION:

The administrative law judge's decision dated July 22, 2008 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible. In addition, we would remand this matter to the Iowa Workforce Development Center, Claims Section to determine the issue of the claimant's being able and available for work as of June 10, 2008, and a recalculation of the overpayment amount.

John A. Peno

AMG/fnv

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

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.

Monique F. Kuester

AMG/fnv