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

JESSICA D KARLEN	:	
	:	HEARING NUMBER: 09B-UI-10946
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
MOTHER GOOSE DAYCARE	:	

Employer.

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. 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, Jessica D. Karlen, was employed by Mother Goose Daycare from November 19, 2007 through June 1, 2009, first as full-time assistant, and during the last eight months as a lead teacher. (Tr. 2-3, 16, 17) As a lead teacher, Ms. Karlen was responsible for having weekly or bi-weekly meetings (working lunches) with her subordinates to go over the lesson planning for the three-year olds. (Tr. 3-4) Every week, the claimant requested "… information… ideas for… themes every week and Leah always brought ideas… Ashley would just go to the library and get books mostly… her contribution… and [she] wrote up the lesson plan… " (Tr. 21, 27)

In early January, Ms. Comreid gave the claimant a performance evaluation in which she discussed improvements Ms. Karlen needed. (Tr. 5) She told her she needed to hold weekly meetings and to delegate. (Tr. 20, 22-23)

On May 18th, Sheri Comreid (owner) met with the claimant directing her "… to make sure the girls knew what was going on…" (Tr. 20-21, 23) She told Ms. Karlen that she needed to be holding either weekly or bi-weekly meetings with her assistants; she directed her to hold one the following day without any excuses to which the claimant complied. (Tr. 4-5, 6, 10, 15, 18, 21, 27) This was the first time Ms. Karlen had ever been directed to hold weekly or bi-weekly meetings. (Tr. 21, 27) When the claimant was an assistant, she was never part of any weekly meetings. (Tr. 21) Ms. Comreid also advised the claimant that she needed to see more commitment on the claimant's part and improvement with her performance and tardiness. (Tr. 5) The claimant would sometimes go home for lunch, take a nap, and return to work 15-20 minutes late. (Tr. 6-7) The employer did not issue a verbal or written warning to her about her performance. (Tr. 20, 31)

On May 19th, Ms. Karlen held a meeting and prepared lesson plans for two weeks in advance (May 25-29 and June 1-5) since she planned to take vacation on June 2nd. (Tr. 18, 23, 28, 29-30) She did not complete the standard weekly lesson plan form at that time (Tr. 30), which was supposed to be turned in by May 25th. (Tr. 29) The claimant intended to hold another bi-weekly meeting in two weeks (June 3rd or 4th) (Tr. 28)

Around 9:15 a.m. on June 1st, Ms. Comreid came into the claimant's classroom looking for lesson plans. (Tr. 17, 19) The claimant had delegated the transcribing of the plans onto the standard form to one of her assistants who did not return the form to the claimant. (Tr. 17) The claimant went home to retrieve her copy of the lesson plans. (Tr. 17) Ms. Comreid called each assistant out of the room to question them about the lesson plans for the week. The employer believed that neither assistant knew what was going on in the classroom. (Tr. 3-4, 17, 20) Ms. Comreid terminated Ms. Karlen for no lesson plans and not having weekly meetings.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 claimant had been lead teacher for eight months during which time the record reflects that her performance did not meet the employer's satisfaction. (Tr. 5, 20, 22-23) Although the employer argues that she failed to hold the required weekly or bi-weekly meetings (working lunches), the claimant provided credible testimony that she was never told that such meetings were mandatory. Thus, her failure to do as the employer expected was not intentional. In fact, her lack of knowledge was not unreasonable in light of her testimony that she, herself, as an assistant was never part of such meetings. (Tr. 21)

Aside from the employer's accusation that Ms. Karlen was essentially insubordinate in not holding these meetings, we find that the claimant had, in fact, met regularly with her assistants to design 'themes' for her weekly lesson plans, which were sometimes two weeks out. (Tr. 21, 27) The Board must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985). Good faith under this standard is not determined by the Petitioner's subjective understanding. Good faith is measured by an objective standard of reasonableness. "The key question is what a reasonable person would have believed under the circumstances." Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330, 337 (Iowa 1988); accord O'Brien v. EAB, 494 N.W.2d 660 (Iowa 1993) (objective good faith is test in quits for good cause). While Ms. Karlen may have not have recorded her plans on the correct form, she nonetheless made notes from her collaboration with her assistants so that each assistant was apprised of the weekly

lesson plan.

(Tr. 20-21, 27) The employer failed to present any witnesses (two assistants) to corroborate their hearsay testimony. Thus, we attribute more weight to the claimant's version of events and conclude that she substantially complied with the employer's directive in the past, as well as when she held the May 19th meeting.

Ms. Karlen also complied with the employer's instructions to delegate more of her work. (Tr. 23, 29) We note that for all the employer's complaints about the claimant's performance, the employer never issued any verbal or written warnings to her for failing to hold weekly or bi-weekly meetings over the past seven months. She never knew that her job was in jeopardy. It appears that once the employer's concerns were raised in the May 18th meeting, the claimant immediately sought to rectify the matter more to the employer's expectations.

The employer's decision to terminate the claimant rested primarily on the fact that she, initially, had no lesson plan for the week of June 1st and her supposed failure to hold weekly meetings after their May 18th meeting. Ms. Karlen provided unrefuted testimony that she presented the June 1st lesson plan after going home to retrieve it that same day. (Tr. 17) In addition, her last meeting included lesson plans for the following two weeks (up to June 5th). (Tr. 18) The next scheduled meeting would not have occurred until she returned after Tuesday, June 2nd. (Tr. 28) While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). At worst, the claimant's may have performed poorly in handling her job responsibilities as lead teacher; however, the court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. For these reasons, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated September 18, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

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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.

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Monique F. Kuester

AMG/kjo