

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

ALEXANDRA N WEIR

Claimant

and

JAMES W STEINBERG

Employer

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HEARING NUMBER: 17BUI-12775

**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, 24.32-7

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer 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:

The Claimant, Alexandra N. Weir, worked for James W. Steinberg from April 6, 2015 through March 11, 2016 as a full-time nanny for the Employer's three infant children. (4:20-4:49) According to the Employer's employment contract, the Claimant was allowed 40 hours sick leave per year. (13:07-13:11; Exhibit 1, paragraph 11) The contract also provided that "persistent absenteeism or tardiness" would be grounds for termination. (13:51-14:00; Exhibit 1, paragraph 15) The Claimant signed in acknowledgement of receipt the employment contract on April 6, 2015. (20:10-20:19; Exhibit 1, unnumbered p. 3)

In November 17, 2015, the Claimant temporarily left to have a baby. She resumed working on February 8, 2016. (14:25-14:37; Exhibit 2A) After Ms. Weir returned, she began experiencing numerous attendance issues, i.e., tardiness, leaving early (19:44-19:47), and absences that she

attributed to her newborn's illness (medically unexplainable seizures). (6:45-7:00; 18:56-19:15; Exhibit 2A) The Claimant was absent two

days during the first week of March and absent for the entire 2nd week (5:00-5:31; 18:50-18:55), which caused the Employer to seek an additional childcare option. (8:00-8:08; 19:51-19:54) By this time, March 11th, Ms. Weir had already exceeded her yearly allotment of sick leave (13:13-13:33), as she had missed ten days of work since her return from giving birth. (19:19-19:33; Exhibit 2A) When Mrs. Steinberg visited the Claimant in the hospital, the latter was unable to indicate when she could return. (15:12-15:25; 17:45-18:04) The Employer informed her that they could no longer float her time and ended the employment. (20:20-20:30) The Employer later learned that the purported reasons for the Claimant's absences were false. (7:01-7:20; Exhibits 2A, 2B)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) 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).

871 IAC 24.32(7) provides:

Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The Employer provided credible, unrefuted firsthand testimony regarding to events that led to the Claimant’s termination. The Claimant was well aware of the Employer’s attendance policy based on both parties’ review of the contract as well as the Claimant’s signature in acknowledgement of the terms at the start of her employment. Ms. Weir’s absences not only exceeded the 40 hours allotted for the year, her absences exceeded the number of days she worked since her return from maternity leave. According to the Employer’s policy, she was rightfully subject to termination by March 11, 2016.

In addition, the Claimant’s absences were not, in fact, for the purported reason asserted. And even though the Employer did not know this at the time of separation, that fact does not detract from the nature of the absences for the purposes of unemployment benefits eligibility. The Employer provided evidence at the hearing that the Claimant’s actions were the proximate cause of her absences. Ms. Weir’s illicit behavior in the first place caused the child to be ill, which secondarily caused the Claimant’s excessive absences. Her lack of attendance was due to her own actions, which were contrary to the Employer interests in having an available nanny throughout the week, and therefore unexcused. Based on this record, we conclude that the Employer satisfied their burden of proof.

DECISION:

The administrative law judge’s decision dated December 28, 2016 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for disqualifying reasons. Accordingly, she is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)”a”.

Kim D. Schmett

Ashley R. Koopmans

James M. Strohman

AMG/fnv