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

EMILY N BAIN	:	
	:	**HEARING NUMBER:** 15B-UI-07217
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
WHIRLPOOL CORPORATION	:	
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: 96.5-2A, 96.3-7

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:

The Claimant, Emily N. Bain, worked for Whirlpool Corp. from June 13, 2013 through May 27, 2015 as a full-time assembler. (5:42-6:46) The Employer has a no fault attendance policy. (15:33-15:57) The Claimant had a history of attendance issues for which the Employer issued several disciplinary warnings. (18:05-18:25; Exhibit 1-unnumbered pp. 6-9) Finally, on January 29, 2015, the Employer terminated the Claimant for excessive unexcused absences (Exhibit 1- unnumbered p. 3), but allowed her to return after a grievance procedure that conditioned her return upon her signing a 'last chance agreement' on January 29, 2015. (Exhibit 1- unnumbered p. 4) (8:25-8:34; 9:04; 16:04-16:18) According to this agreement, the Claimant was not to miss work for the next 6 months; a breach of this agreement would result in immediate termination. (8:35-8:49; 16:23-16:27)

Ms. Bain signed the agreement and resumed her employment with Whirlpool. She did not miss any days until April 27th & 28th, 2015. She called in these days to report her absences, which were due to illness. (9:29; 10:05-10:39; 17:13-17:26) She attempted to obtain FMLA for these absences, but was later denied.

(9:45-9:49; 11:45-12:02) The Employer subsequently determined that the absences were unexcused and terminated her on May 27, 2015 pursuant to the last chance agreement. (8:29-8:49; 10:00; 16:55-17:01)

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).

The Employer has a no fault attendance policy which allows for excused absences on a very limited basis. Ms. Bain acquired numerous unexcused absences that led to her termination. The only reason she was allowed to return was based on the last chance agreement. Ordinarily, a person on a last chance agreement

is given no leeway, as such persons are not afforded the same protection as other employees not in such a probationary status. See, *Warrell v. Iowa Department of Job Service*, 356 N.W.2d 587 (Iowa App. 1984)

In the instant case, however, the Employer provided unrefuted testimony that the Claimant's absences on April 27th and 28th that led to her termination were due to illness. The court in *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982) held that absences due to illness, which are properly reported, are excused and not misconduct. And we would also note that an employer's no fault attendance policy or point system is not dispositive of the determination of a claimant's eligibility for benefits. The court in *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007) held that an absence can be excused for purposes of unemployment insurance eligibility even if the employer was fully within its rights to assess points or impose discipline up to or including discharged for the absence under its attendance policy. The fact that the Claimant was on a last chance agreement does not diminish the fact that her last absences, which were due to illness and properly reported, were excused. Based on this record, we conclude that the Employer failed to satisfy their burden of proving that the Claimant committed job-disqualifying misconduct.

DECISION:

The administrative law judge's decision dated July 29, 2015 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

The Claimant has requested this matter be remanded for a new hearing. The Employment Appeal Board finds the applicant did not follow the instructions on the notice of hearing. Therefore, good cause has not been established to remand this matter. The remand request is **DENIED.**

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv