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

MARIA THERES B PAYTON	:	
	:	**HEARING NUMBER:** 15B-UI-03661
Claimant	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
DOHERTY STAFFING SOLUTIONS	:	
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, 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, Maria Theresa B. Payton, initially worked for Doherty Staffing Solutions, assigned to Polaris from June 20, 2014 through December 1, 2014 while going to weld school. (20:11-20:25) Polaris allowed the Claimant to work around her school schedule. On December 1, 2014, she opted to focus on her finals for weld school. (10:57-11:10) Polaris suggested that when she finished school, she return to work for them.

On December 22, 2014, the Claimant returned to Doherty and was rehired to work at Polaris as a full-time assembler. (11:12-12:06) Her attendance record started anew. (20:45-21:05; 21:43-21:47) Under the Employer's attendance policy, employees are allowed to have only 2 attendance occurrences for emergencies during their probationary period. (13:24-16:27- 16:41; Exhibits 1 & 2)

Ms. Payton left early on January 22, 2015 due to an emergency. (15:43-14:45) Her supervisor marked her absent the following day for an unknown reason. (15:45-15:54; 16:21-16:34) The Employer issued a warning to her regarding her attendance on January 29th, 2015. (14:42) The Claimant didn't report to work as scheduled neither on February 11th, 2015, nor on the 12th because she called in sick. (15:22-15:24) The Employer believed she was taking a weld test on the 11th. (14:52-15:03; 15:05-15:18) Polaris asked the Employer to end the assignment based on Ms. Payton's attendance. (12:38-12:43; 18:35-18:52; 19:01-19:18)

The Employer spoke to the Claimant about Polaris' decision to end the assignment on February 13, 2015 for attendance issues. (11:42-11:49; 13:02-13:13) The Claimant remains an employee of Doherty as of the date of the hearing. (19: 20-19:34)

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).

871 IAC 24.32(4) provides:

> *Report required*. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established…

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 does not distinguish between excused or unexcused absences based on its probationary attendance policy. However, we find this policy is similar to a point system in which we have noted that exceeding the allotted number of points in a no-fault attendance policy is not dispositive of misconduct. 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. See also, Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007) wherein the court held 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 discharge for the absence under its attendance policy.

Here, the Employer testified that Ms. Payton accumulated two absences in January, one of which was due to a stated emergency and presumably excused by the Employer's own standards. As for the January 23, 2015 absence, there was not excuse. In considering the February 11th absence, the Employer alleges that the Claimant indicated she had to take a weld test. However, this testimony is contrary to the Employer's earlier testimony that Ms. Payton finished her weld school in early December and returned to work at the end of December. Why then if she had finished school, would the Claimant be taking a weld test two months after the conclusion of her studies? This testimony makes no sense, and we find the Employer's testimony that she called with this excuse not credible. As for the February 12th absence, it would be deemed excused under the precepts of Cosper, supra.

Based on this record, the only unexcused absence would the January 23rd absence. One unexcused absence is not excessive for the purposes of disqualifying the Claimant for unemployment benefits. For this reason, we conclude that the Employer has failed to satisfy its burden of proving that the Claimant was discharged from her assignment due to job-disqualifying misconduct.

DECISION:

The administrative law judge's decision dated April 30, 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.

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Kim D. Schmett

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Ashley R. Koopmans

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James M. Strohman

AMG/fnv