

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**SAMANTHA S MYERS**  
Claimant

**APPEAL NO. 16A-UI-11874-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABCM CORPORATION**  
Employer

**OC: 02/21/16**  
**Claimant: Respondent (1-R)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from a representative's decision dated October 27, 2016, reference 05, which held claimant eligible to receive unemployment insurance benefits finding the claimant was dismissed from work on August 26, 2016 for excessive absences but finding the absences were due to illness and properly reported. After due notice was provided, a telephone hearing was held on November 17, 2016. Claimant participated. The employer participated by Ms. Geri Gulbranson, Human Resource Coordinator. Employer's Exhibits A, B, C, D and E were admitted into the hearing record.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Samantha Myers was employed by the captioned employer d/b/a Harmony House Healthcare Center from June 8, 2016 until August 26, 2016 when she was discharged for being excessively tardy. Ms. Myers was hired to work as a full-time housekeeper and was scheduled to work 7:30 a.m. until 3:15 p.m. five days a week and was paid by the hour. Her immediate supervisor was Jessica Crawford.

Ms. Myers was discharged when she exceeded the permissible number of hours at work allowed under the company's attendance policy. Under the terms of the policy employees are subject to discharge if they accrue seven unexcused late arrivals at work within a 90-day period while employed by the company. Employees who arrive to work late are given warnings by the company on the third incident of tardiness and are warned each time they are tardy thereafter. If the employee accumulates seven instances of tardiness within a 90-day period, they are subject to discharge.

The claimant was discharged after she punched in late to work by one minute on August 26, 2016. The claimant had been told in a previous warning that any additional tardiness would result in her termination from employment. The employer verified that the claimant had been discharged via telephone that morning. It is the claimant's position that six of the seven attendance infractions that caused her termination from employment took place because she was ill and delayed in reporting to work by a chronic digestive condition. Ms. Myers testified that on each occasion she called in to report her impending tardiness or absence in advance and had stated to her supervisor that the cause was illness. On one occasion the claimant was late reporting to work due to transportation issues. Ms. Myers testified that the final infraction causing her termination from employment took place because she punched in one minute late due to the unexpected issue with her Crohn's digestive malady that morning and had notified her supervisor of her impending tardiness.

### **REASONING AND CONCLUSIONS OF LAW:**

In discharge cases the employer bears the burden of proof in establishing disqualifying misconduct on the part of a claimant. Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation or oversleeping are considered unexcused. Absences related to illness are considered excused provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

In the case at hand, the claimant appeared personally and testified under oath that she had been tardy in reporting to work on six of the final seven occurrences that caused her discharge, because she was ill and delayed in reporting to work due to the illness. Ms. Myers further testified that on each occasion she had notified her immediate supervisor in advance that she would be late arriving to work and that the delay was because of illness.

Based upon the evidence in the record, the administrative law judge concludes that the claimant's attendance infractions due to illness were excused for the purposes of the Iowa Employment Security Act because the claimant had notified the employer in advance of her impending tardiness and that the reason for the late arrival was due to illness, a factor beyond the claimant's control. Under the circumstances, the claimant's attendance infractions are considered excused and do not constitute misconduct in connection with the work. Accordingly, unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Based upon the claimant's testimony regarding the recurrent nature of her chronic digestive tract condition, the administrative law judge concludes that there is a question regarding whether the claimant is able and available for work. The issue of whether the claimant is able and available for work is, therefore, remanded to the Claims Division for an investigation and issuance of an appealable determination.

**DECISION:**

The representative's decision dated October 27, 2016, reference 05, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible. The issue of whether the claimant is able and available for work is remanded to the Claims Division for an investigation and the issuance of an appealable determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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