

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TROY D GREEN**

Claimant

**APPEAL NO. 09A-UI-05415-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAL-MART STORES INC**

Employer

**Original Claim: 02/15/09  
Claimant: Respondent (1-R)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 24, 2009, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on May 4, 2009. Claimant Troy Green participated personally and was represented by attorney Sharon Sinnard. Richard Yates, Assistant Manager for Hardlines, represented the employer. Exhibits One through Five were received into evidence.

**ISSUE:**

Whether Mr. Green separated from the employment for a reason that disqualifies him for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Troy Green was employed by Wal-Mart as a part-time produce associate. Mr. Green started the employment on May 28, 2008. Mr. Green last performed work for the employer on August 7, 2008. Mr. Green's immediate supervisor was Jean Reuter, Assistant Manager over Fresh Areas. Ms. Reuter is still with the employer.

Mr. Green was scheduled to work on August 10, 11, 12, and 13, but did not work on those days. Before these absences, Mr. Green had notified a Co-Manager that his uncle was seriously ill in Florida and that he needed to travel to Florida for a week. The Co-Manager granted approval for the absence and instructed Mr. Green to contact the employer upon his return. This contact between Mr. Green and the co-manager was less formal than the notice and approval procedure called for under the employer's work rules. On August 10, Mr. Green called in an absence and spoke to a personnel representative. Mr. Green left for Florida on August 11 and returned to Iowa on August 17, 2008. Mr. Green did not make contact with the employer on August 11, 12, and 13. Mr. Green returned to the Wal-Mart and spoke with the personnel representative, who advised Mr. Green that his employment had been terminated due to no-call, no-show absences. Upon Mr. Green's return to the employer, he learned that the Co-Manager who approved the absence was no longer employed at the store.

## REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer has failed to present any testimony from persons having firsthand information concerning Mr. Green's employment or the events leading to his separation from the employment. The employer had the ability to present more direct and satisfactory evidence than was presented. The employer failed to present sufficient evidence to rebut Mr. Green's assertions that he had made appropriate arrangements with the Co-Manager to be off work August 10-13, 2008, and that the Co-Manager had approved the absence. Based on the weight of the evidence in the record, the administrative law judge concludes that the employment ended when the employer discharged Mr. Green for attendance. There was no voluntary quit.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

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 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 employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct

serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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. App. 1992).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 and oversleeping are considered unexcused. On the other hand, 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).

The weight of the evidence in the record indicates that the absences that prompted the discharge were approved by a Co-Manager before the absences occurred. Accordingly, the absences were excused absences under the applicable law. The evidence fails to establish excessive unexcused absences. Mr. Green was discharged for no disqualifying reason. Accordingly, Mr. Green is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Green.

There is sufficient evidence in the record to call into question Mr. Green's availability for work. This matter will be remanded to the Claims Division so that the issue may be investigated.

**DECISION:**

The Agency representative's March 24, 2009, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

This matter is remanded for determination of the claimant's work availability.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw