

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

TAMRA L CHASE  
354 ROCKFORD RD SW  
CEDAR RAPIDS IA 52404

WAL-MART STORES INC  
c/o FRICK UC EXPRESS  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-01308-JTT  
OC: 01/01/06 R: 03  
Claimant: Respondent (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Wal-Mart filed a timely appeal from the January 23, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 20, 2006. Claimant Tamra Chase did not participate personally, but was represented by her father, Norman Chase. Assistant Manager Adrian Kindhart represented Wal-Mart. Exhibits One and Four were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tamra Chase was employed by Wal-Mart as a part-time cashier from March 30, 2005 until October 27, 2005, when Wal-Mart terminated the employment based on its written policy that



three consecutive “no-call, no-show” absences would be deemed a quit. Ms. Chase was aware of the policy.

Ms. Chase suffers from anxiety attacks. Ms. Chase also suffers from angina, that is, heart discomfort or pain. Ms. Chase was under the care of a doctor. Assistant Manager Adrian Kindhart was aware of Ms. Chase’s condition.

Ms. Chase last appeared and worked a shift on October 22, but left early with permission due to illness. On the morning of October 22, Ms. Kindhart told Ms. Chase that she should commence a medical leave of absence to protect her employment. Ms. Chase had missed work due to her health condition, but Wal-Mart was not considering discharging Ms. Chase. On the contrary, Ms. Kindhart considered Ms. Chase a good cashier and wanted her to continue in the employment. The employer had not reprimanded Ms. Chase for attendance. Ms. Kindhart advised Ms. Chase that to commence a leave of absence, she would need to have her doctor complete forms Wal-Mart would provide. Neither Ms. Kindhart nor Ms. Chase took any further steps regarding the leave of absence.

After October 22, Ms. Chase was absent for three shifts. For each missed shift, Ms. Chase notified the employer of the absence by telephoning Wal-Mart prior to the scheduled start of her shift. Ms. Chase’s father stood next to Ms. Chase each day she called in the absence. Wal-Mart’s written policy required Ms. Chase to contact the employer at least two hours prior to the scheduled start of a shift and to speak to a member of management. Mr. Chase does not know whether the calls were placed at least two hours prior to the scheduled start of the shift.

Ms. Kindhart had no information indicating that Ms. Chase had contacted the employer on the days in question. Ordinarily, the management staff would share information regarding whether an employee had called in to report an absence. Ms. Kindhart was unable to provide information regarding the times and/or dates of the missed shifts.

When Ms. Chase contacted Wal-Mart on October 27 to report an absence, she learned that her employment had been terminated based on three days of “no-call, no-show.”

#### REASONING AND CONCLUSION OF LAW:

The first question for the administrative law judge is whether the evidence in the record establishes that Ms. Chase quit the employment or was discharged.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.



871 IAC 24.25(4) provides:

Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The weight of the evidence indicates that Ms. Chase contacted the employer on the days she missed shifts to notify the employer of the absence. Thus, these absences cannot be characterized as "no-call, no-show" absences and 871 IAC 24.25(4) would not apply. The evidence otherwise fails to establish any intention to quit on the part of Ms. Chase or any overt act carrying out such an intention. Accordingly, the administrative law judge concludes that Ms. Chase did not voluntarily quit the employment, but instead was discharged.

The next question is whether the evidence in the record establishes that Ms. Chase was discharged for misconduct. It does not.

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(7) provides:

(7) 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 bears the burden of proof in this 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).



In order for Ms. Chase's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her 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).

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).

Assistant Manager Adrian Kindhart was unable to provide the administrative law judge with the dates of the specific absences upon which the termination was based, including the final absence that prompted the termination. As previously noted, credible testimony provided by Mr. Chase indicates that Ms. Chase did in fact contact the employer on the days she was absent. For some reason, the employer lacks any records of that contact. Without such records, the employer is unable to present evidence regarding whether the contact occurred at least two hours prior to the scheduled start of the shift. The administrative law judge concludes that the employer has failed to present sufficient evidence to corroborate the allegation that Ms. Chase failed to comply with the employer's attendance policy or that her absences were for reasons other than illness properly reported to the employer. See 871 IAC 24.32(4).

Based on the evidence in the record and the application of the appropriate law, the administrative law judge concludes that Ms. Chase was discharged for no disqualifying reason. Ms. Chase is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Chase.

#### DECISION:

The Agency representative's decision dated January 23, 2006, reference 01, is affirmed. The claimant was discharged from the employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged.

jt/kjw