

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMIE P WALLACE**  
Claimant

**APPEAL NO. 08A-UI-08927-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT & COMPANY**  
Employer

**OC: 07/20/08 R: 04**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 23, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 20, 2008. Claimant Jamie Wallace participated. Tony Luse, Employment Manager, represented the employer and presented additional testimony through Aaron Vawter, Human Resources Coordinator. Exhibits One and Two were received into the record.

**ISSUE:**

Whether the claimant voluntarily quit or was discharged from the employment. The administrative law judge concludes that the claimant was discharged.

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Jamie Wallace was employed by Swift & Company as a full-time production worker. Mr. Wallace started his employment on December 4, 2006. On June 24, 2008, Mr. Wallace notified the employer that he would be absent due to illness. The employer's absence reporting policy required that Mr. Wallace call an absence reporting number at least an hour before the scheduled start of his shift and leave a message that included the reason for the absence. Mr. Wallace followed the employer's established call in procedure in connection with the June 24, 2008 absence. On May 29, 2008, the employer had placed Mr. Wallace on a 90-day probation for attendance. The employer notified Mr. Wallace that if he missed any work during the 90-day probation period, he would be discharged from the employment.

On June 25, 2008, Mr. Wallace returned to work at the scheduled start of his shift, but was unable to clock in by swiping his card through the card reading machine. Mr. Wallace reported to the Human Resources office and met briefly with Aaron Vawter, Human Resources Coordinator. Mr. Vawter told Mr. Wallace that his June 24 absence violated the 90-day probation agreement and discharged Mr. Wallace from the employment.

The employer subsequently documented Mr. Wallace as a “no-call, no-show” on June 25, 26, and 27, 2008. On June 30, Mr. Vawter completed paperwork to document a voluntary quit.

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

The first question is whether Mr. Wallace voluntarily quit or was discharged from the employment. 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.

The administrative law judge concludes that Mr. Wallace's testimony is more reliable than the employer's testimony. The evidence indicates that Mr. Wallace had previously been placed on probation for attendance. The evidence indicates that Mr. Wallace's absence on June 24 would impact on that probation. Mr. Wallace testified in detail about his contact with the employer on June 25, 2008. Mr. Wallace's testimony at the appeal hearing was consistent with the statement he had previously provided at the time of the September 16, 2008 fact-finding interview and consistent with the information he provided to Workforce Development at the time he first applied for benefits. The employer's witnesses did not participate in the fact-finding interview. With regard to the June 25 encounter that Mr. Wallace says occurred and that Mr. Vawter denies occurred, the administrative law judge notes that Mr. Wallace only had the one encounter to consider and remember, whereas Mr. Vawter may have had many encounters with many employees and may not accurately remember a brief meeting with this employee.

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 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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 indicates that the June 24, 2008 absence was due to illness and was properly reported. Accordingly, the absence was excused under the applicable law. Because the final absence was excused, the evidence fails to establish a current act of misconduct. Because there was no current act, the administrative law judge concludes that Mr. Wallace was discharged for no disqualifying reason. Accordingly, Mr. Wallace is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wallace.

**DECISION:**

The Agency representative's September 23, 2008, reference 01, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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