

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

NAJWA E OMER
2420 BARTELT RD APT 2C
IOWA CITY IA 52246

WAL-MART STORES INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

RETA NOBLETT-FELD
ATTORNEY AT LAW
386 BOYD LAW BLDG
IOWA CITY IA 52242-1113

Appeal Number: 05A-UI-02401-JTT
OC: 01/16/05 R: 03
Claimant: Appellant (2R)

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Najwa Omer filed a timely appeal from the March 2, 2005 reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 20, 2005. Ms. Omer was represented by Professor Reta Noblett-Feld and Student Legal Intern John Koeshadi. Ms. Omer did participate personally in the hearing. Cheryl Roethemeier of Frick UC Express represented Wal-Mart and presented testimony through Kurt Penfold, Store Manager. Exhibits One, Three through Seven, and A through H were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Najwa Omer was employed by Wal-Mart as a full-time overnight cashier from July 18, 2000 through

November 23, 2004, when Kirk Penfold, Store Manager, discharged her for failure to produce a new Employment Authorization Document in a timely manner.

Ms. Omer is from Sudan and cannot work in the United States without an Employment Authorization Document. Ms. Omer's ability to get an Employment Authorization Document is dependent upon the Secretary of Homeland Security extending the Temporary Protected Status designation for Sudan. Most recently, this protected status was set to expire on November 2, 2004. Sudanese nationals who wished to extend their stay in United States were notified that they needed to re-register during a 60-day re-registration period that began October 7, 2004 and ended December 6, 2004. To this end, Ms. Omer enlisted the assistance of the legal clinic at the University of Iowa College of Law. Ms. Omer's application for Temporary Protected Status Renewal and Employment Authorization Renewal was completed on October 11, 2004 and received by the Des Moines District Office of the USCIS on October 12, 2004. Ms. Omer's previous Employment Authorization Document expired on October 16, 2004.

On November 5, 2004, Wal-Mart informed Ms. Omer that she needed to present a new Employment Authorization Document no later than Monday, November 8, 2004. On the same day, the legal clinic submitted a letter to Julie Johnson at the Office of Senator Charles Grassley, enlisting the Senator's assistance in expediting Ms. Omer's application. The letter specifically referenced Ms. Omer's circumstances at Wal-Mart. It subsequently became apparent to the legal clinic and the Senator's staff that the federal government had misplaced the application. Rather than benefiting from an expedited application, Ms. Omer was forced to contend with a delay in the processing of her application.

On January 10, 2005 Ms. Omer became eligible for an interim employment authorization document, since it had been 90 days since the filing of her application. On January 13, 2005 Ms. Omer traveled to Des Moines to obtain her new Employment Authorization Document, which is valid through November 13, 2005.

Throughout her employment with Wal-Mart, Ms. Omer had been in the position of having to renew her Employment Authorization Document on an annual basis. Because of delays in the application process, Ms. Omer was forced to separate from the employment with Wal-Mart, reapply for her position, and return to work at a reduced wage.

The employer was aware that Ms. Omer's employment authorization expired on October 16, 2004. A few days after the expiration date, the personnel manager advised Mr. Penfold of the status of Ms. Omer's employment authorization, and Mr. Penfold became involved in the discussion with Ms. Omer about the status of her application. It should be noted that Ms. Omer has limited English language skills, and that the language barrier may have prevented her from fully informing the employer of the difficulties that she faced in renewing her Employment Authorization. However, Ms. Omer did advise Mr. Penfold that she was having problems with the reauthorization process.

At some point prior to November 9, Mr. Penfold advised Ms. Omer then if she did not present an Employment Authorization Document By November 9, she would no longer be able to work for Wal-Mart. Ms. Omer did not work after November 9. However, Mr. Penfold, then gave Ms. Omer until November 16 to provide the Employment Authorization Document. On November 23, Mr. Penfold terminated Ms. Omer's employment with Wal-Mart based on her failure to produce the Employment Authorization Document in a timely manner. There was no other reason for the discharge.

Ms. Omer did not understand that she had been discharged. Ms. Omer functioned under the belief that once she obtained the reauthorization document, she would be allowed to go back to work for Wal-Mart as a full-time overnight cashier.

Ms. Omer went to the Wal-Mart store on December 27, 2004 to pick up a paycheck. At that time, the personnel manager, Rita Edmund, instructed Ms. Omer to sign an exit interview document that Mr. Penfold had completed on November 23, 2004. The document indicated that Ms. Omer had voluntarily terminated her employment. The document further indicated that Ms. Omer was not recommended for re-hire because she had been given ample opportunity to provide work authorization documents, and had failed to do so. Ms. Omer could not read the document and did not understand what she was signing.

On January 13, 2005, when Ms. Omer received her new Employment Authorization Document, she contacted Mr. Penfold to offer her services. Mr. Penfold indicated he did not have work for her. At some later date, Mr. Penfold contacted Ms. Omer, and advised her that he had an opening for an evening full-time maintenance worker. Ms. Omer declined this employment due to the hours of the employment and the nature of the work. Ms. Omer is a single parent to four children and had worked the overnight shift because it did not conflict with her parental responsibilities. Ms. Omer's decision not to accept the maintenance worker position was also based on her observation that the maintenance work was much more physically taxing than her position as a cashier had been.

Ms. Omer did not establish her claim for benefits until January 16, 2005, after she had obtained her new Employment Authorization Document.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Omer was discharged for misconduct in connection with her employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8). Alleged misconduct without corroboration is not sufficient to result in disqualification. See 871 IAC 24.32(9).

The evidence in the record fails to establish a "current act" of misconduct, or any misconduct, on the part of Ms. Omer. See 871 IAC 24.32(1)(a). On the contrary, the evidence indicates that Ms. Omer and her counsel did everything possible to expedite the application process for Ms. Omer's new Employment Authorization Document. Wal-Mart may very well have been justified in terminating Ms. Omer's employment so that it could move into compliance with the federal law. However, for purposes of determining eligibility for unemployment insurance benefits, the employer had the burden of proving that Ms. Omer intentionally acted against the employer's interests or acted with carelessness or negligence that was so recurrent that it indicated a willful and wanton disregard of the employer's interests. See 871 IAC 24.32(1)(a). Based on the evidence in the record, the administrative law judge concludes that Ms. Omer was discharged for no disqualifying reason.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The evidence in the record establishes that Ms. Omer has been able and available for employment since the effective date of her claim. However, testimony at the hearing raised the question of whether there has been a refusal of suitable work since Ms. Omer established her claim. See Iowa code section 96.5(3)(a). That issue was not before the administrative law judge, and will need to be addressed on remand to the factfinder.

DECISION:

The Agency representative's decision dated March 2, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The claimant has been able and available since establishing her claim for benefits. The matter is remanded to the factfinder on the issue of whether there has been a refusal of suitable work.

jt/pjs