

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

LIRIO S OMAR
1147 MAPLE ST
IOWA CITY IA 52240

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

Appeal Number: 04A-UI-12431-RT
OC: 10-24-04 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated November 9, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Lirio S. Omar. After due notice was issued, a telephone hearing was held on December 15, 2004 with the claimant participating. Steven Appleby, store manager at the employer's Coralville, Iowa, store, participated in the hearing for the employer. Employer's Exhibits 1 through 3 were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time overnight stocker from April 8, 2003 until she was discharged on October 21, 2004. The claimant was discharged for inappropriate conduct, in particular, the use of racial slurs and other language. The employer has a policy at Employer's Exhibit 3 prohibiting harassment, discrimination and inappropriate conduct. The claimant referred to two coworkers as "crackers." She did so in a joking manner because they were friends and they had first used that term to her. The claimant did not intend to be offensive to those two individuals. Another employee overheard this language and complained but the claimant's language was not directed at the complaining employee. The claimant also referred to her assistance as "pussy power." The claimant did this to another friend, Randy, and was only kidding when she used it. Others had first used the language to her and introduced her to the words. The claimant's use of this language had been overheard by assistant managers who never admonished her for using such language. The claimant had never received any warnings or disciplines for the use of such language. The claimant was not born in the United States but came to the United States in 1991. Pursuant to her claim for unemployment insurance benefits filed effective October 24, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,662.00 as follows: \$277.00 per week for six weeks from the benefit week ending October 30, 2004 to the benefit week ending December 4, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is 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(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).

The parties agreed, and the administrative law judge concludes, that the claimant was discharged on October 21, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Steven Appleby, store manager in the employer's store in Coralville, Iowa, credibly testified, albeit from hearsay, that the claimant used the word "cracker" in referring to coworkers and the words "pussy power" referring to her assistance. The claimant concedes that she did so. However, the claimant testified credibly that she used the word cracker only to two coworkers who were friends of hers and that they had first used the words and introduced her to those words. The claimant also conceded that she had used the words "pussy power" but to only one coworker who was a friend and, again, she was kidding and had been introduced to the term by the friend. The claimant credibly testified that at no time did she intend to be offensive or direct the comments to anyone to whom it was not welcome. The employer had no evidence to the contrary. The employee who complained about the claimant's use of such language was an observer and the language was not directed to the complaining employee. Under the evidence here, the administrative law judge must conclude that the claimant's use of the words in the context in which they were used, was not a deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor did it evince a willful or wanton disregard of the employer's interests, and, as a consequence, the claimant's use of such words is not disqualifying misconduct for those two reasons.

The more difficult question is whether the claimant's use of the language is carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Here, the administrative law judge is constrained to conclude that the claimant's use of the words do not establish recurring carelessness or negligence. The administrative law judge does believe that the claimant's use of the words was inappropriate but the claimant had never been given any warnings or disciplines for the use of the words. The claimant credibly testified that she had used those words in the presence of assistant managers and had never been warned or disciplined about it. The administrative law judge in no way condones the use of the words the claimant used or any kind of inappropriate language or behavior. However, in this case, the administrative law judge must conclude that the claimant's use of such language was not carelessness or negligence in such a degree of recurrence as to establish disqualifying

misconduct but, rather, was ordinary negligence in an isolated instance and is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive 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, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,662.00 since separating from the employer herein on or about October 21, 2004 and filing for such benefits effective October 24, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of November 9, 2004, reference 01, is affirmed. The claimant, Lirio S. Omar, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/tjc