

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

RANDY D HANKS
4060 AVE D
COUNCIL BLUFFS IA 51501

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

Appeal Number: 04A-UI-12699-RT
OC: 10-31-04 R: 03
Claimant: Respondent (2)

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 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated November 19, 2004, reference 01, allowing unemployment insurance benefits to Randy D. Hanks. After due notice was issued, a telephone hearing was held on December 20, 2004, with the claimant participating. Jamie Thompson, Store Manager for the employer's store in Council Bluffs, Iowa, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development 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 most recently as a full-time cashier, from February 18, 2003 until he voluntarily quit on October 15, 2004. The claimant began his employment in February 2003 at an employer's store in West Plains, Missouri. He was transferred to the employer's store in Council Bluffs, Iowa in October 2003. In October 2003, the claimant suffered arm problems including bursitis, tendonitis, bone spurs, and a hyperextension of his elbow which were allegedly caused by employment. At that time the claimant was placed on restrictions of no lifting over five pounds and no pulling. The employer met these restrictions by placing the claimant in a position as a greeter. The claimant was then off work under a leave of absence in the summer of 2004 and returned on September 22, 2004. At that time, the claimant informed the employer that he could perform the work as a cashier and that he was approved by his physician to perform such work. The claimant then performed that work for approximately one month and then quit because he felt that the work as a cashier was still not meeting his restrictions and it was causing his arm problems. The claimant quit when he informed the employer's witness, Jamie Thompson, Store Manager in Council Bluffs, Iowa, on October 15, 2004, that he was quitting. At that time he gave no reasons; he simply said that he had to quit. The claimant also informed Shelly a couple of days before he quit of his concerns about his job and was told that this was not a daycare center. The claimant never, after September 22, 2004, when he returned to work as a cashier, ever asked the employer for any accommodation or expressed any concerns to the employer about his work or threatened to quit if his concerns were not addressed, except possibly to Shelly two days before he quit. The claimant has not returned to the employer and offered to go back to work. Pursuant to his claim for unemployment insurance benefits filed effective October 31, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,086.00 as follows: \$181.00 per week for six weeks from benefit week ending November 6, 2004 to benefit week ending December 11, 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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

871 IAC 24.26(6)b provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (6) Separation because of illness, injury or pregnancy.

b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

The parties agree, and the administrative law judge concludes, that the claimant left his employment voluntarily on October 15, 2004. The issue then becomes whether the claimant left his employment without good cause attributable to the employer. The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant testified that he quit because the employer was not meeting the restrictions placed upon him by his physician after injuring his arm in October 2003. However, the evidence indicates that the claimant was given a position as a greeter, which did meet his restrictions, and then he was off of work on a leave of absence and returned on September 22, 2004 and returned without restrictions or, at least, informed the employer that he was returning without restrictions as a cashier and could perform the functions of a cashier. The claimant was then placed as a cashier, where he worked for a month. The claimant believed that the position of cashier was causing problems to his arm and believed that it did not meet his restrictions, assuming that the old restrictions were still in place. The claimant then quit. The administrative law judge is constrained to conclude here that the claimant has not presented competent evidence showing adequate health reasons to justify his quit. The evidence establishes that the claimant returned to the employer on September 22, 2004 and informed the employer in some fashion that he could perform the work of a cashier and he was placed as a cashier. There is no evidence thereafter that there were adequate health reasons for the claimant to quit. There is also not a preponderance of the evidence that the claimant specifically went to the employer after returning to work in September 2004 and informed the employer of the work-related health problem and that he intended to quit unless the problem was corrected or reasonably accommodated. The claimant conceded that he asked for no accommodation after September 22, 2004 and had no explanation why. The claimant did not consult the employer's witness, Jamie Thompson, Store Manager at the employer's store in Council Bluffs, Iowa, until the day of his quit. The claimant testified that he informed Shelly two days before his quit about his problems and was told that the employer was not a daycare center. However, the claimant's testimony is not particularly credible since he testified that he had been a greeter immediately prior to his quit, which did meet his restrictions, and then later said that the greeter's position did not meet his restrictions. Under the evidence here, the administrative law judge concludes that if the claimant did speak to Shelly, he did not make his case specific

enough so that the employer had a reasonable opportunity to address any of the claimant's concerns prior to his quit. The administrative law judge notes that the employer had accommodated the claimant by placing him as a greeter until he returned to work as a cashier. The administrative law judge also concludes that there is not a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental, or that he was subjected to a substantial change in his contract of hire. The claimant had some responsibility, after returning from a leave of absence and informing the employer that he could work as a cashier, to go to the employer and carefully set out that he might not be able to work as a cashier and further, obtain doctor's statements indicating that and provide them to the employer. The claimant did not do so. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

There was an issue raised during the hearing about whether the claimant would be ineligible to receive unemployment insurance benefits because he is, and was, at relevant times, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3. However, this issue is not set out on the notice of appeal and the administrative law judge has no jurisdiction to determine that issue. The administrative law judge concludes that it is not now necessary to remand this matter for an investigation and determination as to whether the claimant is able, available, and earnestly and actively seeking work because, as noted above, the administrative law judge concludes that the claimant is disqualified to receive unemployment insurance benefits.

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 \$1,086.00 since separating from the employer herein on or about October 15, 2004 and filing for such benefits effective October 31, 2004. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions Iowa law.

DECISION:

The representative's decision dated November 19, 2004, reference 01, is reversed. The claimant, Randy D. Hanks, is not entitled to receive unemployment insurance benefits until or unless he requalifies for such benefits, because he left work voluntarily without good cause attributable to the employer. He has been overpaid unemployment insurance benefits in the amount of \$1,086.00.

b/tjc