BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

KELBY BEHREND

Claimant,

and

WAL-MART STORES INC

Employer.

HEARING NUMBER: 09B-UI-04580

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Kelby Behrend, worked for Wal-Mart Stores, Inc. from September 13, 2008 through December 9, 2009 as a full-time overnight stocker in the deli department. (Tr. 2-3, 5, 8) In October of 2009 (Tr. 11), Scott Berryman (assistant manager) informed Mr. Behrend that the employer intended to phase out his position and he would be reassigned. (Tr. 4, 7, 9)

During November of 2009, the claimant's hours were reduced from 40 hours/week to only 8 hours a week. (Tr. 3, 4, 5, 10) Mr. Behrend questioned Manager Mikey about the cut and requested to come in his regular hours. (Tr. 10, 11-12) The employer did not reassign him and directed him not to report to work unless he was scheduled. (Tr. 9, 10) Mr. Behrend did not like the change in his hours and quit

on November 22, 2009. (Tr. 5)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) (2009) provides:

> An individual shall be disqualified for benefits: *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 24.25 provides:

> *Voluntary quit without good cause*: In general, a voluntary quit means discontinuing the employment because the employer 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…

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

871 IAC 24.26(1) provides:

> The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifying issue. This would include any change that would jeopardize the worker's safety, health, or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine of the job would not constitute a change of contract of hire.

"Change in the contract of hire" means a substantial change in the terms or conditions of employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986). Generally, a substantial reduction in hours or pay will give an employee good cause for quitting. See Dehmel v. Employment Appeal Board, 433 N.W.2d 700 (Iowa 1988). In analyzing such cases, the Iowa Courts look at the impact on the claimant, rather than the employer's motivation. Id. The test is whether a reasonable person would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988); O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). An employee acquiesces in a change in the conditions of employment if he or she does not resign in a timely manner. See Olson v. Employment Appeal Board, 460 N.W.2d 865 (Iowa Ct. App. 1990). The touchstone in deciding whether a delay in resigning will disqualify the Claimant from benefits is whether his "conduct indicates he accepted the change in his contract of hire." Olson at 868.

Both parties agree that the claimant was forewarned that his position as an overnight stocker was coming

to an end. According to the employer's testimony, Mr. Behrend was told he would be relocated to another department. The claimant refutes this testimony stating that no other employment was offered to him either back in October or in November when his hours were actually cut. There is no dispute that the claimant's hours were reduced from full-time (40 hours/week) to 8 hours weekly, which was more than a

50% reduction. The court in Dehmel, *supra*, held that a reduction in the claimant's working hours by 25-35% is deemed substantial. Thus, a claimant's quit as a result of said reduction is considered to be with good cause attributable to the employer regardless if the reduction was due to economic conditions beyond the employer's control.

It is clear from this record that the claimant found this change unacceptable and attempted to modify his circumstances by going to Manager Mikey to ask for additional hours. The only direction he received was to report only when scheduled; no other employment option was offered. The employer failed to provide Manager Mikey as a firsthand witness to refute the claimant's testimony. Thus, we attribute more weight to the claimant's version of events. We conclude that the claimant was justified in quitting his employment based on a change in his contract of hire that we deem to be substantial.

DECISION:

The administrative law judge's decision dated April 17, 2009 is **REVERSED**. The claimant voluntarily quit with good cause attributable to the employer. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/ss

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/ss