

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

JEREMY L MCCAIN
108 S CODY ST
NEW SHARON IA 50207

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

Appeal Number: 04A-UI-08317-RT
OC: 06/27/04 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 96.5-1 – Voluntary Quitting
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 July 22, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Jeremy L. McCain. After due notice was issued, a telephone hearing was held on August 23, 2004, with the claimant participating. Tammy Harrison, Co-Store Manager for the employers store in Oskaloosa, Iowa, participated in the hearing for the employer. 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 department manager for the hardware and paint department from March 3, 1998 until he voluntarily quit effective June 3, 2004. Throughout the claimant's employment with the employer, he had been a department manager for hardware and paint. During that period of time, his hours had also been from 7:00 a.m. to 4:00 p.m. or 5:00 p.m., Monday through Friday, working occasional Saturdays or Sundays. The employer opened a new store and the claimant transferred to that store on March 17, 2004, but retained his position as department manager for hardware and paint and the same hours. The employer was dissatisfied with the claimant's performance and gave him a coaching for improvement on February 18, 2004 and a decision making day on April 14, 2004. The claimant was having some personal problems so the employer approved a three-week leave of absence for the claimant in May 2004. When the claimant returned from his leave of absence on May 17, 2004, he learned that he would no longer be department manager but would rather be in inventory control service and that he would be facing a pay reduction from \$9.03 per hour as a department manager to \$8.63 per hour in inventory control service. Further, the claimant learned that his hours would be from 11:00 a.m. to 8:00 p.m. and the days would vary. The claimant expressed concerns to several individuals at the employer including Chad Mitchell, Co-Manager; Dan Costner, Co-Manager; and the employer's witness, Tammy Harrison, Co-Store Manager. Whether the claimant specifically indicated an intention to quit if his concerns are not addressed is not clear, but the claimant did indicate his displeasure about the changes especially the hours. The claimant needs weekends off and evenings off because he has visitation with his children at least every other weekend and on some evenings during the week. The claimant explained to the employer that the new hours and position would simply not work out. The claimant worked May 17, 18, and 20, 2004 and did not show up for work until June 1, 2004. The claimant quit going to work because he was not on any particular specific schedule. The claimant returned June 1, 2004 to discuss his position with the employer. The claimant indicated that he was willing to work daytime hours, but could not work the schedule as established by the employer. Ms. Harrison explained to the claimant that there were no other hours available for him at that time. The claimant then quit effective June 3, 2004, by not showing up to work thereafter.

Pursuant to his claim for unemployment insurance benefits filed effective June 27, 2004, the claimant has received unemployment insurance benefits in the amount of \$1,840.00 as follows: \$230.00 per week for eight weeks from benefit week ending July 3, 2004 to benefit week ending August 21, 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. He is not.

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(1) 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:

(1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable 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 on the job would not constitute a change of contract of hire.

The parties testified and the administrative law judge concludes that the claimant voluntarily left his employment effective June 3, 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 good cause attributable to the employer. See Iowa Code Section 96.6-2. Although it is a close question, the administrative law judge concludes that the claimant has met 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 credibly testified that prior to a leave of absence in May 2004 that he had been throughout his employment with the employer a department manager in hardware and paint and that his hours were from 7:00 a.m. to 4:00 or 5:00 p.m., Monday through Friday, working an occasional Saturday or Sunday when requested. It appears that the claimant did change stores on March 17, 2004 but at that time, did not change either his position or his hours or his pay. The employer was dissatisfied with the claimant's work performance and gave the claimant both a coaching for improvement and a decision making day as set out in the Findings of Fact. The employer also approved a three-week leave of absence for the claimant to get himself straightened out because the claimant was having some personal problems.

When the claimant came back from the leave of absence on May 17, 2004, the claimant learned that he would no longer occupy the position of department manager for hardware and paint, but would be working in inventory control service and that his pay would be reduced from \$9.03 per hour to \$8.63 per hour and that his schedule would be changed to 11:00 a.m. to 8:00 p.m. with the days that he worked varying. Ms. Harrison testified that these changes had been discussed with the claimant prior to his leave of absence, but the claimant adamantly denies that any of those changes were discussed with him or approved by him prior to his leave of absence. Although it is a close question, the administrative law judge finds the claimant's testimony more credible than that of Ms. Harrison. Ms. Harrison was reluctant and somewhat equivocal about testifying as to how long the claimant had been a department manager for hardware and paint and how long his hours had remained the same and his pay, but ultimately conceded to the matters set out above. The claimant did work a few days in May, but then quit coming to work because he was not on any firm or written schedule. Ms. Harrison testified that

the claimant was given an oral schedule. It seems to the administrative law judge that the claimant could have been given a set scheduled of some sort for inventory control service since the claimant was entitled to know when he would be working at least to some extent in advance. The claimant was not given any such schedule.

The claimant returned on June 1, 2004 and met with Ms. Harrison to discuss his schedule and the claimant again indicated his concerns about the hours and Ms. Harrison told him that there were no other hours for him at that time. The claimant then quit by failing to show up for work. The claimant did express concerns to the employer about these changes on and after May 17, 2004. Even Ms. Harrison conceded that the claimant had done so. Ms. Harrison denied that the claimant had specifically indicated that he would have to quit, but the claimant testified that he did. Even if the claimant had not specifically indicated an intention to quit, it would have been or should have been clear to the employer from the claimant's expressions of concerns that he would quit if his concerns were not addressed. Accordingly, the administrative law judge concludes the claimant expressed concerns and indicated sufficiently that he would quit to give the employer notice and an opportunity to address the claimant's concerns prior to his quit. Further, the administrative law judge concludes that the employer breached its contract of hire with the claimant when it changed the claimant's position and pay and hours. The administrative law judge further concludes that this breach was substantial involving changes in working hours, shifts, remuneration, and type of work. The administrative law judge finally concludes that the employer's breach of the claimant's contract of hire was not justified.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant left his employment voluntarily with good cause attributable to the employer and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he 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 \$1,840.00 since separating from the employer herein on or about June 3, 2004 and filing for such benefits effective June 27, 2004. The administrative law judge concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision dated July 22, 2004, reference 02, is affirmed. The claimant, Jeremy L. McCain, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he left his employment voluntarily with good cause attributable to the employer. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of this separation from the employer herein.

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