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

JASON L SMITH
5979 – 139TH TRL
LOVILIA IA 50150

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

Appeal Number: 05A-UI-02815-RT
OC: 02-13-05 R: 02
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 of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated March 10, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Jason L. Smith. After due notice was issued, a telephone hearing was held on April 4, 2005, with the claimant participating. Randy Horn, Assistant Manager of Store #2935 in Knoxville, Iowa, where the claimant was employed; and Robyn Miover, Assistant Manager of Sporting Goods, participated in the hearing for the employer. Employer's Exhibit One was 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, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time sales associate from August 22, 2000 until he voluntarily quit effective February 6, 2005. On that day the claimant called and spoke to Randy Horn, Assistant Manager, and one of the employer's witnesses, and the claimant told him that he was quitting because he had another job. This is confirmed by Employer's Exhibit One which is the claimant's exit interview noting that he voluntarily terminated his employment for "career opportunities." The claimant now testifies that he quit because he felt he was in a hostile work environment and because his hours were cut. Concerning the hostile work environment, on December 17, 2004, the claimant refused to sell a gun to a customer who was angry. The customer was angry because the claimant had made some comments to the customer about not knowing federal guidelines. In any event, the claimant refused to sell the gun to the customer and the customer was angry. A couple of days later, the employer sold the gun to the customer with the claimant's approval. The claimant expressed concerns to Robyn Miover, Assistant Manager of Sporting Goods, who felt that the customer's behavior was inappropriate. The claimant did at that time threaten to quit if the employer sold the gun to the customer. However, a couple of days later the employer obtained the claimant's approval and sold the gun to the customer. The other incident that the claimant alleged created a hostile work environment was when one of two customers told the claimant on January 28, 2005 that he was going to kill the claimant and beat him up. The claimant consulted Randy Horn, Assistant Manager and one of the employer's witnesses. Mr. Horn checked the store to see that the customers had gone and they were and the claimant was still on duty. Mr. Horn informed the claimant that he could be escorted to his car or that he would call the police but the claimant did not ask for either of those options. At that time the claimant never indicated or announced an intention to quit if his concerns about this incident were not addressed by the employer. The claimant also testified that work got slow, but there was not enough help and so on one night he was "cussed out" by customers.

Concerning his hours, the claimant averaged prior to the fall of 2004 between 28 and 32 hours. The employer considers 28 hours as full time. The claimant's availability was 10:00 a.m. to 7:00 p.m. except Mondays and Thursdays. In the fall of 2004 the claimant changed his schedule asking that he be scheduled up to 32 hours but would not be available on Mondays and Thursdays and wanted one weekend per month off and would not work before 2:00 p.m. on Sundays. The employer accommodated the claimant's request and the claimant still averaged between 28 and 32 hours per week. In January and February, the employer customarily encounters a decrease in sales following Christmas and the claimant's hours were cut during that period of time but only temporarily. This is common for the employer and the hours of all employees were similarly cut. The claimant did express some concerns to the employer about the temporary reduction in hours and was told that the employer would try to do something but nothing really could be done because of the common reduction in hours every year in January and February. Irate customers are a fact of life for retail workers and frequently customers are unhappy with associates. Pursuant to his claim for unemployment insurance benefits filed effective February 13, 2005, the claimant has received unemployment insurance benefits in the amount of $940.00 as follows: $188.00 per week for five weeks from benefit week ending February 26, 2005 to benefit week ending March 26, 2005. For benefit week ending February 19, 2005, the claimant reported vacation pay sufficient to nullify benefits for that week.

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 24.25 (3), (21), provide:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee 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. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (3) The claimant left to seek other employment but did not secure employment.
>
> (21) The claimant left because of dissatisfaction with the work environment.

871 IAC 24.26(2), (3), (4), (1) provide:

> 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:
>
> (2) The claimant left due to unsafe working conditions.
>
> (3) The claimant left due to unlawful working conditions.
>
> (4) The claimant left due to intolerable or detrimental working conditions.
>
> (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 concede that the claimant voluntarily left his employment. 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 left his employment because he felt he was in a hostile work environment and cites two incidents dealing with irate customers; one on December 17, 2004 who "cussed out" the claimant when the claimant refused to sell him a gun and one on January 28, 2005 that threatened to kill the claimant and beat him up. Considering the incident on December 17, 2004, the claimant had made some comments to the customer about the customer not knowing federal guidelines which made the customer angry. The claimant reported this to his supervisor, Robyn Miover, Assistant Manager for Sporting Goods, who believed that the behavior of the customer was inappropriate. The claimant threatened to quit if the customer was sold a gun that evening. The customer was not sold the gun that evening. The customer returned a couple of days later and after the employer had obtained permission from the claimant, sold the customer a gun. Concerning the incident on January 28, 2005, the claimant reported this to Randy Horn, Assistant Manager, who searched the store for the customers and noted that they were gone and noted further that the claimant was still on duty. Mr. Horn offered to have the claimant escorted to his car and/or to call the police but the claimant selected neither. The claimant also cited an incident in January or February when he was "cussed out" by four different customers. The claimant cited no other examples of a hostile work environment. Mr. Horn and Ms. Miover both credibly testified that in retail work customers are frequently angry or irritated with sales associates. The administrative law judge can well imagine that this is not an unusual situation. It also appears to the administrative law judge that the employer addressed these matters to the extent that it was possible. The administrative law judge concludes that these incidents do not establish by a preponderance of the evidence that the claimant's working conditions were unsafe, unlawful, intolerable or detrimental.

The claimant also gave as a reason for his quit a cut in his hours in the fall of 2004. However, the claimant's hours do not appear to have been cut in the fall of 2004. Prior to the fall of 2004, the claimant averaged between 28 and 32 hours per week and the employer considers 28 hours per week full time. In the fall of 2004, the claimant also averaged 28 to 32 hours per week. The claimant's hours do not appear to have been cut. It does appear that the claimant requested a different schedule for his schooling but the employer accommodated the claimant's request. The claimant's testimony to the contrary is not credible. The claimant first testified that prior to the fall of 2004 the claimant had full-time hours of 40 hours per week. The claimant then changed this to 28 to 32 hours per week. The claimant then testified that his hours were cut in the fall of 2004 to 20 hours per week but later conceded that it averaged between 20 and 32 hours per week. The claimant's testimony is too inconsistent to be credible. The employer's witnesses testified forthrightly and were credible. There does appear to have been some reduction in hours in January and February 2005 following the Christmas holiday but the employer's witnesses credibly testified that this is common and happens to the employer every year and the cut is temporary. The administrative law judge concludes that this cut in the claimant's hours is not good cause attributable to the employer. This happens every year and the claimant should have known that from his employment with the employer and the administrative law judge, therefore, concludes that this cut in hours which was temporary, was not a willful breach of the claimant's contract of hire and, even if so, was not a substantial breach. The administrative law judge likens this situation to 871 IAC 24.25(34) that states that it is not good cause attributable to the employer to leave because work is irregular due to weather conditions and this working condition was not unusual in the claimant's type of employment. The administrative law judge concludes that a small cut in the claimant's hours in

January and February working for a retail business following Christmas is not unusual in the claimant's type of employment.

The administrative law judge concludes that the claimant really quit his employment to seek other employment but did not secure employment. The employer's witnesses credibly testified when the claimant quit he told the employer that he had another job and this is confirmed in the claimant's exit interview at Employer's Exhibit One. The claimant even conceded that he did say that he thought he had another job. However, the job did not pan out. It appears to the administrative law judge that the claimant really quit to seek other employment and did not find other employment. This is not good cause attributable to the employer. There is also some evidence that the claimant was dissatisfied with his working environment but again this is not good cause attributable to the employer. Although the claimant had expressed some concerns to the employer, the administrative law judge concludes that the claimant never specifically indicated or announced an intention to quit if any of his concerns were not addressed by the employer and, therefore, did not give the employer a reasonable opportunity to address his concerns prior to his quit. It is true that the claimant did threaten to quit if the gun was sold to the customer involved in the incident on December 17, 2004 but the employer did not sell a gun to the customer on that day but rather waited a couple of days and then sold the gun to the customer with the claimant's permission. The claimant denies giving permission but his denial is equivocal and the claimant finally stated that he informed the employer that it was totally legal for the employer to sell the gun to the customer. It appears that the claimant did not want the customer to get a gun but the administrative law judge notes that the customer could have purchased a gun from any other retail establishment as well as the employer's.

In summary, and for all of the reasons set out above, 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.

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.
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> 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 $940.00 since separating from the employer herein on or about February 6, 2005 and filing for such benefits effective February 13, 2005. 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 of Iowa law.

DECISION:

The representative's decision of March 10, 2005, reference 01, is reversed. The claimant, Jason L. Smith, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer. He has been overpaid unemployment insurance benefits in the amount of $940.00.

pjs/kjf