

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

20110200

Valerie Joy Tronnes,)
)
 Petitioner/Appellant,)
)
 v.)
)
 Job Service North Dakota,)
)
 Respondent/Appellee.)
)
 and)
)
 Wal-Mart Associates, Inc.,)
)
 Respondent.)

Supreme Ct. No. 20110280
District Ct. No. 18-2011-CV-00249

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STATE OF NORTH DAKOTA

APPEAL FROM THE DISTRICT COURT
GRAND FORKS COUNTY, NORTH DAKOTA
NORTHEAST CENTRAL JUDICIAL DISTRICT

HONORABLE DEBBIE G. KLEVEN

BRIEF OF RESPONDENT/APPELLEE
JOB SERVICE NORTH DAKOTA

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STATEMENT OF THE ISSUE

Whether a reasoning mind could have reasonably determined that Valerie Tronnes voluntarily left her employment with Wal-Mart, Associates, Inc., without showing good cause attributable to her employer.

STATEMENT OF THE CASE

Valerie Joy Tronnes (Tronnes), appeals the decision of Job Service North Dakota (Job Service), which held she is not entitled to job insurance benefits because she voluntarily left her employment without good cause attributable to her employer.

Tronnes left her employment as a part-time employee in the vision center for Wal-Mart Associates, Inc. (Wal-Mart) on October 13, 2010. C.R. 32. On November 10, 2010, Tronnes applied for unemployment compensation benefits with Job Service. C.R. 1. Job Service subsequently determined that Tronnes was ineligible for benefits because she had voluntarily quit her employment for reasons that did not constitute good cause attributable to her employer. C.R. 15.

Tronnes requested a hearing, which was conducted by a Job Service appeals referee on February 2, 2011. C.R. 17, 18, 28. On February 4, 2011, the appeals referee issued a decision finding Tronnes quit her employment without good cause attributable to her employer. C.R. 75-76.

Tronnes appealed the referee's decision to Job Service acting as the "Bureau." C.R. 83-84. The Bureau denied Tronnes' request for review because there is no right of review when the appeals referee affirms the initial decision. C.R. 86. Tronnes filed a petition for judicial review with this court. C.R. 88.

On July 25, 2011 the district court issued its Order Affirming Appeals Referee's Decision, concluding that Tronnes failed to prove her resignation was the result of good cause attributable to her employer. App. 2, Doc ID # 16. A Judgment affirming the decision of Job Service was entered on July 26, 2011 and Notice of Entry of Judgment was served a few days later. App. 2. It is from that Judgment which Tronnes appeals. App. 68.

STATEMENT OF THE FACTS

Tronnes began working for Wal-Mart on September 1, 2002. C.R. 32. Tronnes was employed on a part-time basis as a vision center team member for which she was paid \$11.83 per hour. C.R. 32, 34. Tronnes generally worked 24 hours per week, comprised of three, eight hour shifts. C.R. 45. Tronnes was paid every other week, and her payroll was deposited directly into her account which she accessed by her debit card. C.R. 33-34. The last day Tronnes worked for Wal-Mart was on October 13, 2010. C.R. 42, 44.

On September 2, 2010, Tronnes received her regularly scheduled pay. C.R. 35. After receiving her pay Tronnes went to the courtesy counter to withdraw \$330 in cash. C.R. 35-37, 59-60. Tronnes used the cash to purchase a cashier's check to pay her rent and make other in-store purchases. C.R. 36, 59. The cashier gave Tronnes the \$330 in cash but rather than withdrawing the amount from her debit card the cashier credited Tronnes' debit card with \$330. C.R. 38, 60. As a result Tronnes received a windfall of \$660. C.R. 59. Tronnes testified she periodically checked her account balance in September 2010 and had noticed extra money on her card but did not realize there had been a mistake by the cashier. C.R. 39-40.

Tronnes admits she should have caught the error and notified her employer. App. 2, Doc. ID # 9, Argument Section, paragraph 1. It is undisputed that Tronnes is not entitled to the money.

On September 30, 2010, Tronnes met with her supervisor - vision center manager, Pat Johnson (Johnson), and Wal-Mart's asset protection coordinator, Sherry Hasier (Hasier), in regards to the overpayment. C.R. 37, 39. Johnson and Hasier believed Tronnes should have recognized the overpayment and had made attempts to rectify the error. C.R. 2. 37-39. Johnson and Hasier felt it was an issue of integrity for Tronnes. C.R. 2. Tronnes was told she was being placed on a "decision day" or "D-day" which meant she was to be given a paid day off of work to decide if she wanted to continue her employment with Wal-Mart. C.R. 40. A D-day is the next step of discipline after an employee has been given a written warning. C.R. 61. Tronnes had previously received a written warning in March 2010, due to her level of coaching. Id. Wal-Mart considered the status of the warning to be active. Id.

Tronnes believed receiving a D-day was essentially an indication that she would lose her job at some point in the future. C.R. 51. Tronnes testified she quit Wal-Mart, in part, because she believed she would be fired at some future date. Id. After receiving the D-day Tronnes left work early because she was upset. C.R. 40. Tronnes went to Job Service to look for new employment. C.R. 41.

Later that same day, Tronnes returned to work and met with the store manager, Cameron Stull (Stull) to discuss the overpayment with him. C.R. 40. Stull believed the overpayment error was not Tronnes' fault and told Tronnes he

was removing the D-day determination because of the circumstances. C.R. 53. Stull informed Tronnes that they would work out the overpayment issue and asked Tronnes to report for work as scheduled the next day. C.R. 56. Tronnes told Stull that she could not report to work on October 1, 2010 because she had made other arrangements following receipt of the D-day. C.R. 53, 56. Tronnes told Stull she had been to Job Service and was looking for other employment. C.R. 56. Stull responded that if Tronnes was quitting and looking for other employment, Wal-Mart would have to get the overpayment back from her. C.R. 57. Stull told Tronnes that if she did not come back to work he would have to offset the overpayment amount from her next paycheck. C.R. 49. Tronnes agreed to pay back the money and suggested the overpayment should be taken out of her vacation and sick pay. C.R. 51, 57. Stull believed Tronnes intended to quit. C.R. 57.

Tronnes reported for work on October 2, 2010 and continued working for Wal-Mart until October 13, 2010. C.R. 41-42, 57. During this period Tronnes also picked up another part-time job working for Pearl Vision. C.R. 33, 43. On October 13, 2010, a regularly scheduled pay day, Tronnes attempted to use her debit card but her transaction did not go through as her account had a zero balance. C.R. 42. Tronnes became aware Wal-Mart had withheld her entire paycheck to offset a portion of the \$660 she owed. C.R. 42, 48. Tronnes called Johnson about her pay and was told to call Stull or Travis Bieber (Bieber), the Regional Optical Manager. C.R. 42-43. Tronnes did not attempt to contact Stull because she was not comfortable talking with him. C.R. 43. Neither did Tronnes attempt to contact Travis Bieber. Instead, Tronnes made a call to the human resources department in

Fargo and spoke to Gordy.¹ C.R. 44. Tronnes testified that there was nothing Gordy could do for her. Id.

Tronnes did not return to work for Wal-Mart after October 13, 2010 though she gave no official notification that she was quitting. Id. Tronnes would call in on her regularly scheduled shifts and inform her employer that she would not be coming in. C.R. 45. One of the reasons Tronnes gave for not coming in to work was because she was stressed out. Id. Tronnes even told Wal-Mart she had a doctor's appointment set up for November 1, 2010. Id. When asked by management if she would be coming back to work, Tronnes said she did not know. C.R. 46. Rather than report for work at Wal-Mart Tronnes worked extra hours for Pearl Vision, because it paid more. C.R. 52. Tronnes acknowledged the extra hours she took at Pearl Vision conflicted with her work schedule at Wal-Mart. C.R. 52.

On November 10, 2010, almost one month after leaving her employment with Wal-Mart, Tronnes filed for unemployment benefits. C.R. 1, 46. Tronnes' reason for waiting to file for benefits was because she was working for Pearl Vision. C.R. 46. Tronnes acknowledged that work was still available at Wal-Mart and that it was her choice to end the employment relationship. C.R. 3-4. Tronnes subsequently contacted the North Dakota Department of Labor (NDDOL) to file a complaint due to Wal-Mart withholding her October 13, 2010 pay check. C.R. 17, 26. The NDDOL's determination, investigation, or materials have not been made a

¹ Tronnes originally testified that the human resources person she called in Fargo was named Barb. C.R. 43.

part of the record. Wal-Mart did, however, return the full amount of money it withheld from Tronnes' October 13, 2010 paycheck. C.R. 62. Wal-Mart is planning to take other action to recover the overpayment which Tronnes owes. C.R. 63. At the time of the hearing, Wal-Mart was still owed the full \$660 which was overpaid to Tronnes. C.R. 62. Tronnes has not voluntarily agreed to pay back the money she owes and expects Wal-Mart to take legal action against her to recover it. C.R. 65.

LAW AND ARGUMENT

I. The Court's review of Job Service's decision is limited.

This Court's review of Job Service decisions is governed by N.D.C.C. § 28-32-46, which requires Job Service's decision be affirmed if the findings of fact are supported by a preponderance of the evidence, the conclusions of law are supported by the findings of fact, the decision is in accordance with the law and does not violate the claimant's constitutional rights, and the procedures do not deprive the claimant of a fair hearing. See Kryzsko v. Ramsey Cnty Soc. Servs., 2000 ND 43, ¶ 5, 607 N.W.2d 237. The Court is required to affirm Job Service's decision unless one of the enumerated reasons listed in § 28-32-46 is found.

This Court has explained the standard it and district courts follow when reviewing administrative agency decisions:

“(1) [W]e do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence; (2) we exercise restraint when we review administrative agency findings; (3) it is not the function of the judiciary to act as a super board when reviewing administrative agency determinations; and (4) we will not substitute our judgment for that of qualified experts in the administrative agencies.”

Sonterre v. Job Service North Dakota, 379 N.W.2d 281, 283-84 (N.D. 1985) (quoting N.D. Real Estate Comm'n v. Boschee, 347 N.W.2d 331, 335 (N.D. 1984) (citations omitted)).

This Court reviews the decision of Job Service, not the decision of the district court. “The district court’s analysis, however, is entitled to respect if its reasoning is sound.” Grand Forks Cnty v. Tollefson, 2004 ND 161, ¶ 6, 684 N.W.2d 646.

Further, “[b]ecause of the doctrine of separation of powers, all courts must exercise restraint in reviewing administrative determinations.” Barnes Cnty v. Garrison Diversion Conservancy Dist., 312 N.W.2d 20, 25 (N.D. 1981) (citation omitted). “Ordinarily, determinations of an administrative body are presumed to be correct and valid.” Id.; see also Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 828 (N.D. 1992). An agency is also afforded a “reasonable range of informed discretion in the interpretation and application of its own rules.” Bottineau Cnty Water Res. Dist. v. N.D. Wildlife Soc’y, 424 N.W.2d 894, 900 (N.D. 1988).

II. An employee who voluntarily leaves employment without good cause attributable to the employer is disqualified from receiving unemployment benefits.

A claimant is disqualified from receiving benefits when the claimant has voluntarily left employment without good cause attributable to the employer. N.D.C.C. § 52-06-02. The employee has the burden of proving by a preponderance of the evidence that her reasons for leaving employment are for good cause attributable to her employment. Hjelden v. Job Serv. N.D., 1999 ND 234, ¶ 11, 603 N.W.2d 500 (citing Carlson v. Job Serv. N.D., 548 N.W.2d 389, 395

(N.D. 1996)); Erovick v. Job Serv. N.D., 409 N.W.2d 629, 630 (N.D. 1987); Sonterre, 379 N.W.2d at 284-85. Whether an employee voluntarily left employment with good cause attributable to the employer is a factual conclusion. Newland v. Job Serv. N.D., 460 N.W.2d 118, 120 (N.D. 1990); Hjelden, 1999 ND 234, ¶ 8, 603 N.W.2d at 502 (citing Lipp v. Job Serv. N.D., 468 N.W.2d 133, 134 (N.D. 1991)). The court's review of Job Service's factual conclusions is deferential, asking only whether a reasoning mind could have reasonably determined that the factual conclusions were proved by a preponderance of the evidence. Hjelden v. Job Service North Dakota, 1999 ND 234, ¶ 11, 603 N.W.2d 500.

The law requires both good cause to quit and that the good cause be attributable to the employer. "Good cause," has been defined as a "reason for abandoning one's employment which would impel a reasonably prudent person to do so under the same or similar circumstances." Newland, 460 N.W.2d at 123.

The Newland court explained:

[I]n order to qualify for benefits, the employee must have made a good faith effort to remain "attached to the labor market" but did not succeed through "no fault" of her own. See N.D.C.C. § 52-01-05. "Fault" in the context of section 52-01-05 means failure to make reasonable efforts to preserve one's employment.

Id. at 122. Thus, under North Dakota law, a claimant alleging good cause attributable to the employer must show she made reasonable efforts to maintain her employment status. Tronnes did not have good cause to quit her employment; nor did she make a reasonable effort to maintain her employment.

III. A reasoning mind could have reasonably determined that Tronnes did not have good cause attributable to her employer for voluntarily leaving her employment.

As finder of fact, Job Service resolves any conflicting testimony and determines credibility of witnesses. Lovgren v. Job Service North Dakota, 515 N.W.2d 143, 145 (N.D. 1994); Otto v. Job Service North Dakota, 390 N.W.2d 550, 553 (N.D. 1986) (Vande Walle, J., concurring). This Court's review of Job Service's factual findings is deferential, asking only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence.

As previously discussed, under North Dakota law, a claimant alleging good cause attributable to the employer for leaving employment must show she made reasonable efforts to maintain her employment status. Making reasonable efforts requires that the employee adequately communicate her concerns to the employer so the employer can resolve it. See Donaldson v. Unemployment Comp. Bd. of Review, 434 A.2d 912, 914 (Pa. Commw. Ct. 1981) ("[A] claimant alleging necessitous and compelling reasons for terminating his employment must have made a reasonable effort to obviate his problem and maintain his employment status."); Colduvell v. Unemployment Bd. of Review, 408 A.2d 1207, 1208 (Pa. Commw. Ct. 1979) ("[T]he claimant must sustain the burden of proving a reasonable attempt to stay on the job. Claimant's failure to give the owners an opportunity to understand the nature of her objection before resigning, did not meet that burden."); Noor v. Agsalud, 634 P.2d 1058, 1060 (Haw. Ct. App. 1981) (an employee has a duty to try reasonable alternatives to solve his problems with his

employment before quitting and that would at least include consulting the employer and attempting to find some solution to the problems); Larson v. Dep't of Econ. Sec., 281 N.W.2d 667, 669 (Minn. 1979). An employee who does not address concerns with the employer before quitting forecloses a finding of good cause attributable to the employer. Burtman v. Dealers Discount Supply, 347 N.W.2d 292, 294 (Minn. Ct. App. 1984).

- A. Tronnes did not make a good faith effort to remain employed with Wal-Mart because she did not sufficiently notify her employer regarding her paycheck concerns prior to quitting.

Tronnes did not have good cause to leave her employment simply because Wal-Mart withheld her October 13, 2010 paycheck. Tronnes has to show she made reasonable efforts to maintain her employment with Wal-Mart. Such is not the case under the record of this case. It is undisputed that Tronnes received \$660 from Wal-Mart which she was not entitled to. More importantly, Tronnes verbally agreed to return the overpayment to Wal-Mart. The store manager informed Tronnes that Wal-Mart would be withholding funds from her future paychecks to retrieve the amount of the overpayment received by her. C.R. 42, 57. Tronnes acknowledges verbally agreeing to that. C.R. 42. While Wal-Mart and Tronnes did not memorialize their agreement in writing, the understanding between the parties was that the overpayment amount would be offset from Tronnes' future paychecks. C.R. 42.

Tronnes and Wal-Mart, however, had different notions of what was going to take place. Tronnes was under the impression that the offset amount would only be a portion of her paycheck, and that she would pay off the overpayment over a

long period of time, while Wal-Mart believed Tronnes was going to be leaving their employ and starting a new job, and therefore, it was going to offset as much as it could from Tronnes' next paychecks.

When Tronnes discovered Wal-Mart had offset the entire net amount of her October 13, 2010 paycheck she became upset and chose to quit working for Wal-Mart. C.R. 2, 50. The record does not show that Tronnes did anything more than inquire about why she did not receive her October 13, 2010 paycheck. There is no evidence Tronnes expressed to Wal-Mart why it was problematic for Wal-Mart to offset the entire amount of her paycheck. Neither is there any evidence that Tronnes suggested or provided any resolutions to what she considered to be inappropriate.

The record shows that Tronnes called Johnson who instructed her to talk to Stull or Bieber, but Tronnes did not do as instructed. C.R. 42-43. Instead, Tronnes contacted Gordy with Human Resources in Fargo. C.R. 44. According to Tronnes, Gordy said there was nothing immediate that Wal-Mart could do for Tronnes. C.R. 44. The record is silent regarding what information Tronnes provided to Gordy when she contacted her. We do not know if Tronnes informed Gordy about the overpayment she received, whether she explained the discussion she had with store manager Stull, or whether she expressed any difficulties in maintaining other financial obligations.

Further, on October 13, 2010, neither Tronnes nor Stull had any inkling their agreement to offset the overpayment amount from Tronnes' paycheck violated state labor laws. In fact, there is no definitive showing on the record before this

court that Wal-Mart's offsetting of Tronnes' paycheck violated state labor laws. While Wal-Mart admitted the NDDOL had contacted the employer in November 2010, and that it subsequently returned the amount it withheld from Tronnes' October 13, 2010 paycheck, the NDDOL's determination was not made a part of the record. C.R. 62. The record is silent on whether the NDDOL held a hearing, or whether Wal-Mart voluntarily returned Tronnes' paycheck to simply avoid having to litigate the issue in court where it would have had to hire an attorney.

More importantly, it is undisputed that Tronnes did not continue to work for Wal-Mart after October 13, 2010. Tronnes did not give any official notice that she quit; she simply called in during each scheduled shift to tell her employer she was not coming. Tronnes admits her employer even inquired into whether she was coming back, and Tronnes did not respond affirmatively but said she did not know. C.R. 46.

Good faith requires more than raising an issue with the employer and then walking away from employment. The burden is on Tronnes to show she made "reasonable efforts to remain attached to the labor market". Simply informing an employer about a concern without allowing the employer an opportunity to understand the concern and rectify any error it may have made is not good faith. And here, Tronnes did not raise her paycheck concern to the proper Wal-Mart personnel. After discovering that her October 13, 2010 paycheck had been offset against her overpayment, Tronnes called Johnson about her pay and was told to contact the store manager, Stull, or the regional optical manager Bieber about her paycheck concerns. Tr. 42-43. It is undisputed that Tronnes chose not to do so.

Tronnes' failure to notify Stull or Bieber as advised shows she did not make reasonable efforts to maintain her employment with Wal-Mart.

B. Case law supports Job Service's decision.

While the North Dakota Supreme Court has not dealt directly with an issue of whether a person is entitled to unemployment benefits for quitting over a wage dispute, cases from other jurisdictions support the referee's conclusion that Tronnes voluntarily left employment and that she "has not established the conditions of her employment were so unfavorable that she could not have continued working." C.R. 76.

For example, in Central Missouri Paving Company v. Labor and Industrial Relations Commission, 575 S.W.2d 889 (Mo. Ct. App. 1978), the Paving Company paid its employees lower pay rates for private work than for public work contracts. Id. at 891. When employees were preparing for and cleaning up after public work jobs, the employer paid the employees at the private rate. Id. Three employees thought the employer's decision to pay the private rate for work spent preparing for public work jobs was wrong and so they quit. Id. The only effort made by the employees to resolve the disagreement was that one of the employees had told the employer a few days before quitting that if he and another claimant were not paid the public wage rate for preparatory work, both of them would quit. Id. The referee in all three cases found that the employees did not act as reasonable prudent persons in resolving the wage dispute and should have gone to the proper State agency in an effort to resolve the issue before quitting their jobs. Id.

The Industrial Labor Commission reversed the referee's decision stating, "it seems clear that the employer is violating the requirements of the prevailing wage law . . . and very possibly the federal wage and hour law." Id. The Missouri Court of Appeals, however, found error with the Commission's conclusion because the record did not demonstrate the claimants were correct in their assertion that the disputed time should have been paid at the prevailing wage public rate rather than at the lower private rate. Id. at 891-92. Further, the Court of Appeals determined that the question they were to be determining was whether the claimants quit their jobs for good cause attributable to their employer, not whether the claimants were entitled to the higher rate for all the time they claimed. Id. at 892.

In analyzing whether the employees quit their jobs with good cause attributable to their employer, the court stated:

[T]his court finds the reasoning of the referee to be correct when he found the applicants should have made greater efforts to resolve the dispute before resorting to the drastic remedy of quitting their jobs. Pottinger did go to the State Highway Commission after he quit, but he and the other two could have gone to the State Highway Commission or the Department of Labor and Industrial Relations before quitting in an effort to determine the existence of rules or regulations which might resolve the dispute. The referee found that on the day Pottinger quit, he merely informed the president of the Paving Company that he was quitting and made no effort to resolve the dispute. In the case of the Walker brothers, just five days before quitting they gave what amounted to an ultimatum, stating that if their demands were not met they were quitting. Likewise, they could have made efforts to discuss the matter with the employer or to obtain advice from an appropriate State agency to assist in resolving the dispute before quitting.

Id. The court went on to explain that an essential element of good cause to quit is good faith and that the three claimants failed to sustain their burden of showing good faith. The court found a lack of good faith because the three claimants did not

attempt to discuss the pay rate dispute with their employer or obtain outside assistance or advice from any State agency to help resolve the problem. Id.

Similarly, the issue in this case is not whether Wal-Mart was at fault for withholding Tronnes' paycheck under state labor laws but whether Tronnes left her employment with good cause attributable to Wal-Mart. Like the employees in Central Missouri Paving Company, Tronnes did not make a good faith effort to resolve the paycheck problem with Wal-Mart. As described earlier, Tronnes did not talk to Bieber, the regional optical manager, or to Stull, the store manager, who she was told to contact. This is a critical factor because it was the store manager Stull who had told her he was going to be off-setting her payroll due to the overpayment she received earlier. While Tronnes was under the impression the offset amount would only be a portion of her paycheck, and that she would pay off the overpayment over a longer period of time, Tronnes did not give the employer an opportunity to rectify her concern of offsetting her entire paycheck. Nor did Tronnes seek to obtain the advice of the Department of Labor to assist her in resolving the paycheck dispute with Wal-Mart prior to quitting.

Tronnes' lack of effort is particularly troubling because Wal-Mart had previously shown its willingness to discuss and resolve Tronnes' concerns when she addressed them appropriately. The record shows that after Tronnes was reprimanded and placed on a D-day for failing to notice and rectify the overpayment error, Tronnes later met with Stull, the store manager, to discuss the overpayment issue with him. Tr. 40. Stull listened to Tronnes' explanation and removed the D-day from her record because the overpayment was not her fault. Tr. 53.

However, unlike that situation, when Tronnes discovered her entire October 13, 2010 paycheck had been offset against her overpayment, Tronnes did not give Wal-Mart a chance to address her concerns. Tronnes did not contact the two individuals – Stull or Bieber – she was explicitly instructed to talk to.

Further, Tronnes did not go to the NDDOL until after she had quit working for Wal-Mart. In fact, Tronnes' application for benefits shows her reason for quitting was not so much an issue of her October 13, 2010 paycheck being withheld but because she believed Wal-Mart lied to her when it took out a lump sum rather than allowing her to pay off the overpayment over a longer period of time. C.R. 2. Tronnes, however, did not try to resolve her concern with the employer but instead stopped coming into work.

In Davis v. EE-Jay Motor Transport, Inc., 2006 WL 771995 (Minn. Ct. App. 2006) (see Addendum at pp. 1-3 pursuant to M.S.A. § 480A.08(3)), the employer made an error resulting in the claimants paycheck not arriving on the regularly scheduled pay day. 2006 WL 771995 at *1. The employer's records showed the paycheck was mailed on Wednesday September 29, 2004 but by Monday October 4, 2004 the claimant – a realtor – had not yet received it. Id. The employer told the realtor to wait a few days hoping the paycheck would arrive but when it did not come by Wednesday October 6, 2004, the employer stopped payment on the check and planned to mail the realtor another check. Id. The next day when the employer was waiting for confirmation of the stop payment in order to issue a new check, the claimant became upset. Id. The employer offered to send the new check by Federal Express so claimant could have it on Friday, October 8, but

claimant stated that was not good enough and explained he had lost \$85 as a result of not having the check on time. Id. The claimant told the employer he would not work until the problem was solved. Id. The employer asked the claimant to turn in his keys and company gas card. Id. The claimant did not again return to work and he subsequently filed for unemployment benefits. Id.

The Department of Employment and Economic Development denied benefits to the realtor and he requested a hearing. Id. The unemployment law judge found the realtor quit his employment because of a good reason caused by the employer. Id. The employer appealed and the senior unemployment review judge concluded that the claimant quit "because he testified that he told respondent he 'would not work until his paycheck problem was straightened out' and that 'the average reasonable worker would [not] quit work and join the ranks of the unemployed under similar circumstances.'" Id.

On judicial review of the senior unemployment review judge's decision, the Minnesota Appellate Court analyzed whether the realtor had a good reason to quit which was caused by the employer. In determining the realtor did not have a good reason the court stated:

Relator expected to receive a check on Saturday or Monday. When he did not receive a check on Thursday, only four or six days after he would have expected it, and was assured that he would have a check on Friday, less than a week after he would first have expected it, he quit. While not receiving his check on time was directly related to relator's employment and was adverse to relator, a delay of less than a week in receiving a check would not compel an average, reasonable worker to quit and become unemployed. An average, reasonable worker might have asked either for reimbursement of the expense incurred by the delay or for an advance. Relator did neither; he said he would not work until he had his check. He quit without a good reason caused by his employer.

Id. at *2.

Likewise, in the case at hand, a reasonable worker in Tronnes' position could have asked Wal-Mart for either reimbursement of the expenses she incurred by not receiving her paycheck or at least have asked for an advance to cover expenses she may have been unable to make prior to receiving her next paycheck. In not doing so, Tronnes did not have good cause for quitting. This is especially true when Tronnes did not attempt to discuss with Wal-Mart why the withholding of her October 13, 2010 paycheck was problematic to her.

Similarly, in Amos v. Air Lite Transport, 1998 WL 373346 (Minn. Ct. App. 1998) (see Addendum at pp. 4-6 pursuant to M.S.A. § 480A.08(3)), the employee who filed for unemployment benefits argued he voluntarily quit because his employer made several errors in his paychecks, failed to compensate him correctly, changed his pay scale from hourly to per load, and was late in paying him because it mailed his paycheck rather than hold it for him. 1998 WL 373346 at *1. The reemployment insurance judge found Amos had quit voluntarily with good cause attributable to the employer because the employer "shorted" Amos's wages and had not paid him when due. Id. On appeal, the Commissioner of Economic Security reversed the decision and found Amos disqualified from receiving benefits because in his initial statement to the department Amos explained he quit because he was experiencing car problems and needed work closer to home. Id.

The court affirmed the Commissioner's decision disqualifying Amos from benefits. Id. In doing so the court addressed Amos's wage and payment issue and found no grounds to reverse the Commissioner's decision. The Court stated:

The commissioner's representative also found that, even if Amos quit because of wage and payment issues, those reasons were not so significant as to constitute good cause attributable to the employer. Some wage issues do constitute good cause attributable to the employer to warrant an employee's voluntary termination. (Citations omitted).

Unlike those cases, Auto Lite did not materially reduce Amos's income or have insufficient funds to cash Amos's checks. Auto Lite made several alleged errors in calculating reimbursements and wages for Amos. When Amos mentioned the errors, however, Auto Lite corrected the discrepancy in the next paycheck. The record also indicates that Auto Lite mailed Amos's paychecks by oversight, not as a deliberate attempt to deprive Amos of his wages. These conditions do not rise to the level of substantial, unfair or illegal conduct, or violation of the employment contract, so as to constitute good cause attributable to the employer.

Id. at *2.

Here, the appeals referee found Tronnes' wage argument was also not so significant as to constitute good cause attributable to Wal-Mart for leaving its employ. The appeals referee specifically found:

The greater weight of the evidence in the record provides for the conclusion the claimant left her employment for a disqualifying reason. When the employer spoke to the claimant on September 30, 2010, she had already made up her mind that she was seeking other work; even though the employer was removing the disciplinary "D-Day". Under the circumstances, it cannot be said that her sole reason for leaving her job was due to the deduction of the previously credited amount to her payroll check on October 13, 2010. By verbal agreement, the employer was going to deduct a portion of the amount as long as the claimant remained employed. When the employer was placed on notice the claimant was leaving, they deducted what they were able on her next payroll. The appeals referee does not necessarily agree with the manner in which the issue was handled; however, under the circumstances, it was done as a result of the claimant's actions. She knew or should have known her debit card had been credited an additional \$330 and ultimately left her employment because of the associate's error in crediting her debit card. In reality, she had only to remain employed and the matter would have been resolved through a gradual deduction to her

future payroll. As it currently stands, the claimant still owes the employer the entire \$660.

After considering the facts of this case, it is determined the claimant left her employment for personal reasons. While she may have a good personal reason(s) for leaving her job, the claimant has not established the conditions of her employment were so unfavorable that she could not have continued working. In the absence of showing she left her job with good cause attributable to the employer, benefits are denied.

C.R. 76. These finding are supported by the record and should not be overturned.

The test for good cause attributable to the employer is not subjective; it does not depend on what Tronnes perceives as being inappropriate action on the part of her employer. Under Newland, the test is an objective test, i.e., what would cause a reasonable worker to give up employment. Here, a reasoning mind reasonably could find that Tronnes did not make reasonable efforts to remain attached to the labor market and that she did not establish "that the conditions of her employment were so unfavorable that she could not have continued working." App. 61. This is especially true where Tronnes took the drastic step of ending eight years of employment with Wal-Mart when Wal-Mart offset money from Tronnes' paycheck which Tronnes acknowledged owing her employer and for which she knew was going to be taking place.

The policy behind unemployment benefits is to provide benefits for those who "become unemployed through no fault of their own." N.D.C.C. § 52-01-05. Tronnes chose to be unemployed. Tronnes could have continued employment at Wal-Mart had she chose to do so. Rather, she chose to quit her employment. Although the unemployment compensation law should be liberally construed in favor of the claimant, "it is also important to preserve the fund against claims by

those not intended to share in its benefits. The basic policy of the law is advanced as well when benefits are denied in improper cases as when they are allowed in proper cases." Yardville Supply Co. v. Bd. of Review, 554 A.2d 1337, 1338 (N.J. 1989). In the present case, denying unemployment compensation benefits to Tronnes supports the policy of North Dakota Unemployment Compensation Law, Tronnes having voluntarily chosen to leave the labor force.

CONCLUSION

Job Service respectfully requests this Court affirm Job Service's decision finding Tronnes ineligible for unemployment compensation benefits.

Dated this 30th day of November, 2011.

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