IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Supreme Court Docket No. 20110280
Grand Forks District Court No. 18-2011-CV-00249

VALERIE JOY TRONNES,
Petitioner-Appellant,

vs.

JOB SERVICE NORTH DAKOTA,
Respondent-Appellee,

and

WAL-MART ASSOCIATES, INC.,
Respondent-Appellee.

APPEAL FROM THE ORDER OF NORTHEAST CENTRAL JUDICIAL DISTRICT
AFFIRMING JOB SERVICE NORTH DAKOTA DECISION
HONORABLE DEBBIE G. KLEVEN

BRIEF OF APPELLANT

CLINICAL EDUCATION PROGRAM
SALY ABD ALLA
ELIZABETH FISCHER
RACHEL FODE
LU JIANG
Certified Student Attorneys

MARGARET MOORE JACKSON
ND ID# 05655
ROBIN R. RUNGE
ND ID# 06685
University of North Dakota School of Law
Clinical Education Program
215 Centennial Drive Stop 9003
Grand Forks, ND 58202-9003
(701) 777-2932 Fax: (701)-777-6301
Attorneys for Petitioner-Appellan

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I. STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Section 1, Chapter 28-27 of the North Dakota Century Code, as an appeal from the judgment of the Northeast Central Judicial District of Grand Forks County. N.D.C.C. §§ 28-27-01, 52-06-27. Notice of Appeal was timely filed and served in accordance with the North Dakota Rules of Appellate Procedure. N.D.R.App.P. 4(a)(1).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether Job Service North Dakota's ("the Agency") order denying unemployment benefits is in accordance with the law when the employer unlawfully withholds pay and the employee leaves involuntarily as a result.

B. Whether a reasoning mind could reasonably find that the Agency's findings of fact are supported by a preponderance of the evidence, when the evidence presented by all parties regarding the amount of the pay being withheld is inconsistent with the Agency's findings of fact and the employer's denial of wages due caused the employee to quit.

C. Whether a reasoning mind could reasonably find that the findings of fact made by the Agency sufficiently address all evidence presented by the appellant, when there is no reference to the unlawful nature of the employer's withholding of the employee's entire paycheck without written authorization.

III. STATEMENT OF THE CASE

This matter involves an appeal from the decision of a state administrative agency.

The Agency denied unemployment insurance benefits sought by the appellant, Valerie Joy Tronnes ("Ms. Tronnes"). (Appendix "App." at 9.)

Ms. Tronnes became unemployed after her former employer, Wal-Mart Associates, Inc. ("Wal-Mart"), withheld her entire paycheck on October 13, 2010. (App. at 33, Line "L." 8.) On November 10th, 2010, Ms. Tronnes filed a claim for unemployment insurance benefits with the Agency. (App. at 31, L. 16-17.) On January 3, 2011, The Agency issued a non-monetary determination denying Ms. Tronnes unemployment insurance benefits, effective November 7, 2010. (App. at 9.) Ms. Tronnes requested an administrative hearing, and a telephone hearing was held on February 2, 2011. (App. at 13, L. 3.)

On February 4, 2011, the administrative hearing referee ("the Hearing Referee") issued his findings of facts and decision affirming the Agency's determination dated January 3, 2011. (App. at 59-60.) On February 7, 2011, Ms. Tronnes filed a request to appeal the Hearing Referee's decision to the Agency Appeals Bureau. (App. at 62.) On February 16, 2011, the Agency Appeals Bureau denied further review of the Hearing Referee's decision, holding that no right to an appeal exists when the Hearing Referee affirms the initial Agency determination. (App. at 64-65.)

On February 23, 2011, Ms. Tronnes timely filed and served a Petition for Judicial Appeal with the Northeast Central Judicial District ("the District Court") to review the Hearing Referee's decision. (App. at 67.) Oral argument was not requested. Ms. Tronnes represented herself, pro se, throughout both the Agency and District Court proceedings.

On July 25, 2011, an Order was entered by the Honorable Debbie G. Kleven

affirming the Hearing Referee's decision. (App. at 2.) On July 29, 2011, Ms. Tronnes was served with the Notice of Entry of Judgment, the Order for Judgment, and the Judgment indicating that the District Court had affirmed the Agency's decision in denying her unemployment insurance benefits. (App. at 2.)

Ms. Tronnes timely filed and served her Notice of Appeal with the District Court on September 21, 2011. (App. at 68-69.)

IV. STATEMENT OF FACTS

Ms. Tronnes began her employment at Wal-Mart on September 1, 2002. (App. at 17, L. 2.) Ms. Tronnes was hired as part-time employee at the Wal-Mart Vision Center, where she worked approximately twenty-four hours per week. (App. at 17, L. 10-16.) Wal-Mart disburses wages to its employees through a debit card system, and Ms. Tronnes received her paycheck through this system every two weeks, from the time her employment began. (App. at 18, L. 18; App. at 19, L. 3-8.)

On September 2, 2010, Ms. Tronnes retrieved her paycheck by obtaining a cashier's check from Wal-Mart's Customer Service Center. (App. at 20, L. 20-22; App. at 21, L. 1-3.) Ms. Tronnes' cashier's check was $317, and she simultaneously made a few store purchases, making the total amount deductible from Ms. Tronnes' debit card $330. (App. at 21, L. 1-3). This $330 total should have been deducted from Ms. Tronnes' debit card, but instead the amount was mistakenly credited to Ms. Tronnes' account. (App. at 22, L. 17-21; App. at 23, L. 15-17.) The mistakenly credited $330, in addition to the original deductible amount of $330, resulted in a $660 negative balance to Wal-Mart. (App. at 22, L. 21; App. at 23, L. 1-2.) Both parties agree that another Wal-Mart employee was responsible for the mistakenly credited amount; therefore, the dispute

originated by no fault of Ms. Tronnes. (App. at 23, L. 15-17; App. at 40, L.1-2; App. at 41, L. 11-13.)

Prior to September 30th, Ms. Tronnes was unaware that her employee account had been mistakenly credited by the Wal-Mart cashier on September 2nd. (App. at 25, L. 3-5; App. at 24, L. 7-8; App. at 45, L. 12-13.) On September 30th, Ms. Tronnes was confronted by her Vision Center Manager, Pat Johnson, and the Asset Protection Coordinator, Sherry Hasier, regarding the $660 that had been mistakenly credited to her account. (App. at 24, L. 1-8.) Ms. Tronnes acknowledged that the balance on her debit card was high; however, her wages were being garnished in the amount of $73 every two weeks at this time, and she thought the extra money was a payment being returned as a result of the garnishment. (App. at 20, L. 17-18; App. at 25, L. 1-2; App. at 41, L. 3-6.) Also, the balance on her employee debit card varied depending on the day. (App. at 24, L. 14-17.) At the time of the meeting, she assumed the amount to be accurate because she presumed, had an error been made, Wal-Mart would have or should have noticed the error shortly after it was made. (App. at 24, L. 3-8; App. at 25, L. 1-4.)

As a result of the meeting with Pat Johnson and Sherry Haiser, Ms. Tronnes was issued a "decision day," or "D" day. (App. at 25, L. 8-10.) A "D" day is a paid day off for the employee to decide whether to remain employed with Wal-Mart or resign. (App. at 25, L. 8-12.) After Ms. Tronnes was informed she had been issued a "D" day, that same day, she went to the Agency to explore other possible job opportunities. (App. at 26, L. 1-5.) Ms. Tronnes understood a "D" day at Wal-Mart as something that is very egregious, and that she would most likely be fired at a future date. (App. at 36, L. 1-3, 6-7.) Despite Ms. Tronnes' concerns regarding the repercussions of the "D" day, she

continued working her part-time job at Wal-Mart for the next two weeks, from October 2nd to October 13th. (App. at 26, L. 21-22; App. at 27, L. 1-3.)

On the same day she was issued the "D" day, September 30th, Ms. Tronnes later spoke with the Store Manager, who revoked the "D" day that was issued by her supervisors earlier that day. (App. at 33, L. 20-21; App. at 34, L. 1-2.) Ms. Tronnes understood from her conversation with the Store Manager on September 30th that the Store Manager intended to take her whole paycheck if she did not show up to work again. (App. at 33, L. 11-14.) During the meeting, Ms. Tronnes informed the Store Manager that she had already visited the Agency, as a result of being issued a "D" day. (App. at 35, L. 1-7.) Although she had committed to other plans for the next day, she informed the Store Manager that she would return to work at Wal-Mart the following day, on October 2, 2010. (App. at 26, L. 21-22; App. at 34, L. 5-7.) As Ms. Tronnes promised, she did in fact return and worked all of her scheduled shifts at Wal-Mart between October 2nd and October 13th. (App. at 26, L. 21-22; App. at 27, L. 1-2.)

When Ms. Tronnes attempted to use her Wal-Mart debit card on October 13, 2010, it was declined, and she was told her account had a zero balance, even though it was her regular payday. (App. at 27, L. 4-5.) As a result, Ms. Tronnes called her supervisor, Pat Johnson, to inquire why the balance on her debit card was zero dollars when she should have received a paycheck. (App. at 27, L. 6-7.) Pat Johnson reasoned that Ms. Tronnes did not receive a paycheck because the Store Manager stated he was going to take her paycheck, as a way to offset the mistakenly credited $660. (App. at 27, L. 7.) Ms. Tronnes responded by explaining that she agreed to pay the mistakenly credited $660, but no written agreement to have money deducted from her paycheck was

ever made with the Store Manager. (App. at 27, L. 9-10, 16-17; App. at 34, L. 8-16.)

Once Ms. Tronnes learned of the mistakenly credited amount, she had told the Store Manager she would attempt to contribute some money towards the amount every payday. (App. at 36, L. 19-20; App. at 50, L. 18-19.) In addition, Ms. Tronnes had stated that if she was unable to pay the $660, she had her paid time off and vacation that could be used to cover the repayment, rather than withholding her paycheck. (App. at 36, L. 19-22; App. at 37, L. 1-2.)

Following the phone call with Pat Johnson, Ms. Tronnes called the Human Resource Department in Fargo, because she did not feel comfortable confronting the Store Manager. (App. at 28, L. 15; App. at 29, L. 9-16.) The representative from Human Resource Department informed Ms. Tronnes that there was nothing Wal-Mart could do for at least two weeks. (App. at 28, L. 15-17; App. at 29, L. 16.) At this time, to the best of her knowledge, Ms. Tronnes had exhausted Wal-Mart's internal steps to present her claim for wages due. (App. at 32, L. 1-10.)

Upon learning her paycheck had been withheld on October 13th, and recognizing the uncertainty of her next paycheck from Wal-Mart, Ms. Tronnes made the decision to keep working as a temporary employee with Pearle Vision for the next week and a half. (App. at 28, L. 17-19; App. at 37, L. 2-5.) Ms. Tronnes continued working for Pearle Vision part-time, because she was guaranteed payment for hours worked. (App. at 28, L. 21-22; App. at 37, L. 4-5.) Ms. Tronnes remained employed with Pearle Vision until approximately October 30, 2010. (App. at 28, L. 18-19.)

Despite having her whole paycheck being withheld on October 13th, Ms. Tronnes continued to notify Wal-Mart that she was unable to work her scheduled shifts due to

stress. (App. at 30, L. 1-2, 8-9; App. at 31, L. 1-2; App. at 33, L. 8-9.) Ms. Tronnes called in for her scheduled shifts between October 13th and October 30th, and she never indicated that she had quit her part-time position at Wal-Mart. (App. at 31, L. 10-11.)

Ms. Tronnes filed a claim for unemployment insurance benefits on November 10, 2010. (App. at 31, L. 16-17.) During the administrative hearing, the Hearing Referee questioned Ms. Tronnes about why she looked for additional employment with the Agency. (App. at 35, L. 11-17.) When Ms. Tronnes attempted to explain, she was repeatedly interrupted. (App. at 35, L. 2-6, 11-17.)

The Store Manager informed the Hearing Referee that he interpreted Ms. Tronnes' visit to the Agency to mean that she would be quitting her position at Wal-Mart, despite no actual confirmation from Ms. Tronnes herself. (App. at 42, L. 1-2.) Based on the presumption that she would be quitting her position, the Store Manager described the payment as an advance, to recover the mistakenly credited $660 from Ms. Tronnes. (App. at 48, L. 7-11.)

According to the record, both parties agree that Ms. Tronnes' whole paycheck was withheld on October 13, 2010. (App. at 33, L. 8-10; App. at 47, L. 17-18.) When Ms. Tronnes contacted the North Dakota Department of Labor ("Department of Labor"), she was told that her "check was illegally withheld." (App. at 58.) Ms. Tronnes received the wages she was previously denied when the Department of Labor contacted Wal-Mart, as a result of her complaint. (App. at 48, L. 12-16.)

The Agency denied Ms. Tronnes' claim for unemployment benefits and the Hearing Referee affirmed. (App. at 61.) The Hearing Referee found that Ms. Tronnes quit voluntarily when Wal-Mart withheld a portion of her paycheck and that Wal-Mart's

conduct did not constitute good cause attributable to the employer under North Dakota unemployment law. (App. at 60-61.)

V. ARGUMENT

A. Standard of Review

The standard of review for an appeal of an agency determination is found in the North Dakota Century Code:

> A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:
>
> 1. The order is not in accordance with the law.
> 2. The order is in violation of the constitutional rights of the appellant.
> 3. The provisions of this chapter have not been complied with in the proceedings before the agency.
> 4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
> 5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
> 6. The conclusions of law and order of the agency are not supported by its findings of fact.
> 7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
> 8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

The North Dakota Legislature has declared as public policy regarding involuntary unemployment and unemployment insurance benefits that:

> the public good and general welfare of the citizens of the state requires that for laboring people genuinely attached to the labor market there be a systematic and compulsory setting aside of financial reserves to be used as compensation for loss of wages during periods when they become unemployed through no fault of their own.

N.D.C.C. § 52-01-05.

As the policy statement suggests, a person cannot receive benefits when the person has "left [their] most recent employment voluntarily without good cause attributable to the employer." N.D.C.C. § 52-06-02(1).

The Supreme Court has held that "the Legislature . . . intended to strike a balance between the rights of the unemployed worker who genuinely wants to work . . . and the protection of the former employer from quits that have nothing to do with the employer or the employment." Newland v. Job Serv. N.D., 460 N.W.2d 118, 121 (N.D. 1990). In addition to the legal standard of review, this Court should also consider the policy underscoring the purpose of unemployment insurance: "because unemployment compensation laws are remedial legislation, the balance should be struck in favor of the employee." Newland, 460 N.W.2d at 121.

B. The Order is Not in Accordance With the Law [N.D.C.C. § 28-32-46(1)]

1. An agency order supporting uncorrected, illegal withholding of pay is not in accordance with the law.

An employer is required to pay its employees, regularly and on time, for work performed. According to North Dakota law, "[e]very employer shall pay all wages due to employees at least once each calendar month on regular agreed paydays designated in advance by the employer." N.D.C.C. § 34-14-02. Federal law is in accord. See 29 U.S.C. § 206(a) (requiring employers to pay at least minimum wage for all hours worked) and Biggs v. Wilson, 1 F.3d 1537, 1538 (9th Cir.1993) (holding that failure to pay employees on regular paydays violated minimum wage provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-19). Regardless of whether Ms. Tronnes had decided to look for other employment on September 30, 2010, Wal-Mart still had a

statutory duty to pay her for the hours she worked in the pay period for the October 13, 2010, paycheck. N.D.C.C. § 34-14-02.

At the administrative hearing, it was undisputed by the parties that Ms. Tronnes was not paid on her regular payday (October 13, 2010). (App. at 33, L. 6-10.) Wal-Mart's failure to pay Ms. Tronnes her wages due on her regular agreed payday, regardless of the date her employment terminated, was contrary to the requirements set for employers under both state and federal law. N.D.C.C. §§ 34-14-02, 34-14-03; 29 U.S.C. § 206(a).

Wal-Mart asserted that it was allowed to withhold Ms. Tronnes' wages through an agreement with Ms. Tronnes, characterizing the $660 error made by a Wal-Mart employee back in September as an advance. (App. at 47, L. 7-8; 48, L. 7-11.) When asked by the Hearing Referee about the legality of calling the mistake an advance and withholding wages to recover the money, the Store Manager did not directly answer, but conceded that the correct method to recoup the money was through a garnishment action. (App. at 47, L. 11-14.)

In fact, even if Wal-Mart's September mistake was considered an advance, Wal-Mart was not authorized to withhold Ms. Tronnes' wages unless she had agreed in writing that they could do so. According to North Dakota law, an employer "may deduct advances paid to employees . . . [when] authorized in writing by the employees." N.D.C.C. § 34-14-04.1. States with similar statutes have interpreted them to mean that deductions taken from an employee's pay without a signed agreement are improper, even where money is owed to the employer. See, e.g., Schlessman v. Trans Coastal Corp., 651 A.2d 380, 381-82 (Me. 1994) (holding that employer who mistakenly overpaid employee

could not withhold employee's regular paycheck because there was no written agreement) and Fowler v. Town of Seabrook, 765 A.2d 146, 148-50 (2000) (holding that when the source of the right not to have money withheld from a paycheck is statutory, the employer is not allowed to engage in "self-help" to recover money even if the employee concedes the money is owed).

Ms. Tronnes never entered into a written agreement authorizing Wal-Mart to withhold any portion of her paycheck to repay what she acknowledged she owed. (App. at 27, L. 9-17.) It is undisputed that Wal-Mart did not pay Ms. Tronnes her full wages due on October 13, 2010. (App. at 33, L. 6-9; 47, L. 17-18.) Wal-Mart did not obtain written consent to withhold her pay as a means of recovering the $660 "advance payment," nor did any employee testify that an attempt to obtain a written agreement was forthcoming. (App. at 27, L. 9-17; 47, L. 11-14.)

Assuming, *arguendo*, that Ms. Tronnes had continued to work her scheduled shifts past October 13, 2010 - as the Hearing Referee indicated was the "reasonable" course of action (App. at 61) - and that Wal-Mart had continued to deduct any portion of Ms. Tronnes' pay for the $660 error, Wal-Mart's withholding of Ms. Tronnes' pay still would not have been in accordance with the law. Although this would have "fixed the [$660] issue over time," as found by the Hearing Referee (App. at 61), Wal-Mart would still have been in violation of the statute requiring employers to obtain a written agreement for the deductions to wages earned. N.D.C.C. § 34-14-04.1.

The Hearing Referee's decision was not in accordance with the law because it condoned Wal-Mart's unlawful withholding of Ms. Tronnes' pay beyond the date of her regular payday and without any written agreement.

2. Ms. Tronnes' departure from her job after Wal-Mart refused to pay wages due was not voluntary; Ms. Tronnes had no intent to quit, but was forced to seek income elsewhere when Wal-Mart refused to pay her.

"An employee who leaves employment 'voluntarily without good cause attributable to the employer' is not entitled to unemployment benefits." Six v. Job Serv. N.D., 443 N.W.2d 911, 913 (N.D.1989) (quoting N.D.C.C. § 52-06-02(1)). In North Dakota, "Whether a person left employment 'voluntarily' is a mixed question of fact and law, where the evidence must support findings of fact which, in turn, must sustain the conclusion of 'voluntariness.'" Carlson v. Job Serv. N.D., 391 N.W.2d. 643, 645 (N.D. 1986) (citing State Hospital v. N.D. Employment Sec. Bureau, 239 N.W.2d 819 (N.D. 1976), which held that whether an individual voluntarily left his employment was a *question of law*). "[I]t is not possible to determine accurately whether the act of a worker in leaving his job was voluntary unless one takes account of the causes which led to his action." Wahlstrom v. Job Serv. N.D., 406 N.W.2d 693, 694-95 (N.D.1987) (citing Charles Liebert Crum, "Constructive Voluntary Quit" Disqualification – A Study in Employment Security, 44 N.D.L. Rev. 309, 311 (1968)).

In North Dakota, "an employee voluntarily quits if the person freely chooses to stop working for the employer." Holiday Inn v. Karch, 514 N.W.2d 374, 376 (N.D. 1994). In that case, the North Dakota Supreme Court determined that Karch, who did not intend to come to work on Christmas Day as scheduled, did not voluntarily leave her employment, but was discharged. Id. The court reasoned that Karch did not quit because she said she was not quitting, when asked on Dec. 23, and she returned to work on her first scheduled day of work after Christmas Day. Id.

Similarly, Ms. Tronnes did not voluntarily leave her employment with Wal-Mart.

When asked if she was quitting on September 30, 2010, Ms. Tronnes said that she was not, but that she was looking for additional part-time employment. (App. at 26, L. 4-5; 38, L.16-20.) Ms. Tronnes informed the Wal-Mart store manager that she was not coming to work on her scheduled "D" day, which was an involuntary paid day off, because she had already made plans for that day. (App. at 25, L. 20-21; 26, L. 15-20.) Similar to Karch, Ms. Tronnes returned to work on her first scheduled day of work after the "D" day. (App. at 38, L. 11-15.) In addition, Ms. Tronnes returned to work at Wal-Mart for her regularly scheduled shifts through Oct. 13, 2010, when she discovered that her entire paycheck had been withheld. (App. at 26, L. 21-22; 27, L. 1-2.)

Other states have held that a finding of voluntary termination of employment usually requires a claimant to have a conscious intention to leave her employment. Cheatem v. Review Bd. of Indiana Dep't of Employment and Training, 553 N.E.2d 888, 892 (Ind. Ct. App. 1990) (holding that Review Board erred in finding employee voluntarily left her employment, absent intent to quit, after leaving the employer's premises because of employer's imposed disciplinary action in the form of a three-day suspension); Fitzhugh v. N.M. Dep't of Labor, Employment Sec. Div., 922 P.2d 555, 563 (N.M. 1996) (holding that an employee who did not come to work for over a month did not quit because she had no intention to quit); Roberts v. Commonwealth, 432 A.2d 646, 648 (Pa. 1981) (holding that the Board of Review erred in finding employee voluntarily quit when employee failed to return to work after receiving a misleading letter from the employer saying he would no longer function under the job description, because there was lack of intent to quit); Smith v. Elec. Data Sys. Fed. Corp., 1990 WL 140068, 2 (Del. Super. Ct. 1990) (court reversed the Unemployment Insurance Appeal Board's

determination that employee who failed to notify her employer of the date of her return following a medical leave voluntarily left work).

In this case, Ms. Tronnes had no intent to leave her employment on September 30, 2010, after Wal-Mart gave her a "D" day for the mistake of another employee. (App. at 38, L. 16-20.) In fact, Ms. Tronnes continued to work her scheduled shifts until Wal-Mart withheld her entire paycheck on Oct. 13, 2010. (App. at 29, L. 1-5.) At that point, Ms. Tronnes was forced to devote her hours to another part-time employer from whom she was guaranteed payment, but she still called Wal-Mart on the days she was not coming into work, in order to preserve her job. (App. at 30, L. 10-12; 31, L. 1-3; 37, L. 3-5.) The constant effort to preserve her employment at Wal-Mart shows that Ms. Tronnes had no conscious intention to leave her employment, but did so only after Wal-Mart failed to pay her and refused to correct the non-payment of wages once she brought it to the attention of management. (App. at 28, L. 10-19; 29, L. 6-19; 37, L. 3-5.) Under these circumstances, her "quit" was involuntary as a matter of law.

C. The Findings of Fact Made By the Agency Are Not Supported by a Preponderance of the Evidence [N.D.C.C. § 28-32-46 (5)]

An administrative decision is properly reversed on appeal where the findings of fact made by the agency are not supported by a preponderance of the evidence. N.D.C.C. § 28-32-46(5). In determining whether an agency's findings of fact are supported by the preponderance of the evidence, the reviewing court considers "whether a reasoning mind reasonably could have determined the agency's factual conclusions were proved by the weight of the evidence from the entire record." Kaspari v. Olson, 2011 ND 124, ¶ 6, 799 N.W.2d 348. Reversal of the agency decision is appropriate where it is contrary to the weight of the evidence. Newland, 460 N.W.2d at 124 (reversing determination that shift

change did not constitute good cause attributable to the employer, because "a reasoning mind on the weight of this evidence, could not have found anything other than a substantial change in shift").

1. A preponderance of the evidence does not support the Agency's conclusion that Wal-Mart withheld only part of Ms. Tronnes' wages.

The Hearing Referee affirmed the Agency's decision denying Ms. Tronnes unemployment insurance benefits, finding that Ms. Tronnes quit when Wal-Mart withheld *part* of her pay. (App. at 61.) In the Decision in the Matter of a Claim for Job Insurance Benefits, the Hearing Referee erroneously determined Wal-Mart "had deducted *a portion of* her future payroll." (App. at 60, [emphasis added].) This finding of fact is unsupported by the weight of the evidence.

Evidence in the record indicates the Hearing Referee's finding of fact is expressly contradicted by both parties. (App. at 33, L. 6-10; 47, L. 17-18.) First, Ms. Tronnes indicated that her "whole paycheck" was taken when she filed for unemployment insurance benefits with the Agency. (App. at 53; 54). The Agency determined that Ms. Tronnes was not eligible for unemployment insurance benefits because she "quit this job when they withheld [her] last paycheck." (App. at 56.) Second, Ms. Tronnes expressly stated during the administrative hearing that her employer "took [her] whole paycheck." (App. at 33, L. 6-10.) At this time the Hearing Referee confirmed he was aware Ms. Tronnes' check had been taken in its entirety, because he stated Wal-Mart "took the whole paycheck." (App at 33, L. 6-10.) Furthermore, Ms. Tronnes indicated on her request for appeal from the Agency's decision denying her unemployment insurance benefits that her "paycheck was withheld" by her employer. (App. at 58.) Wal-Mart does not dispute the fact that her entire paycheck was withheld. (App. at 47, L. 17-18.)

The Store Manager confirmed the amount withheld from Ms. Tronnes' paycheck totaled "$300 or whatever her check was" for that payroll. (App. at 47, L. 17-18.) The Hearing Referee erroneously concluded, against the weight of the evidence, that only a portion of Ms. Tronnes' paycheck was withheld. (App. at 60, 61.)

When Ms. Tronnes was notified of the mistakenly credited amount to her debit card, she notified Wal-Mart she was willing to gradually pay back the wrongfully credited amount back to Wal-Mart. (App. at 27, L. 9-17.) Ms. Tronnes informed the Store Manager that if she later decided to end her employment before the entire amount was paid back to Wal-Mart, she would give them permission to use her paid time off and vacation time to pay any remaining balance. (App. at 36, L. 19-22; 42, L. 10-13.) In the Hearing Referee's conclusion he states that if Ms. Tronnes would have remained employed with Wal-Mart the pay discrepancy would have been resolved, because "the matter would have been resolved in a gradual deduction of her future payroll." (App. at 61.) This finding also is unsupported by the evidence in the record, which reasonably only can support the finding that Ms. Tronnes' entire paycheck was withheld, not any incremental amount.

Evidence that could only support the conclusion that Ms. Tronnes was deprived of her entire paycheck was presented to the Hearing Referee several times during the administrative hearing, by both parties, and was expressly stated in Ms. Tronnes' unemployment benefit claim, the agency's decision, and the request for appeal. (App. at 33, L. 6-10; 47, L. 17-18; 53-58.) Based on the evidence in the record, a reasoning mind could not reasonably conclude, as the Agency did, that "the employer deducted *a portion of* her future payroll." (App. at 60.) The Hearing Referee's determination that Ms.

Tronnes is ineligible to receive unemployment insurance benefits relies upon findings of fact that are not supported by a preponderance of the evidence, providing a proper basis for reversal under N.D.C.C. § 28-32-46(5).

2. A reasoning mind could not reasonably have determined that quitting in response to Wal-Mart's refusal to pay wages due is anything but "good cause attributable to the employer."

Recent precedent for determining "good cause attributable to the employer" in the context of unemployment benefits considers the issue a finding of fact. Willits v. Job Serv. N.D., 2011 ND 135, ¶7, 799 N.W.2d 374. However, there is contrary authority. In at least one case, "good cause attributable to the employer" was reviewed as a mixed question of fact and law. Blueshield v. Job Serv. N.D., 392 N.W.2d 70, 73 (N.D. 1986). In another case, "good cause attributable to the employer" was reviewed as a question of law alone. State Hospital, 239 N.W.2d at 822. However, this issue is analyzed herein as an issue of fact.

There is considerable authority that an employee has good cause to quit her employment after an employer has failed to uphold or substantially changed the terms of the employment relationship. In North Dakota, failure to pay promised bonuses could constitute good cause attributable to employer. Lipp v. Job Serv. N.D., 468 N.W.2d 133, 135 (N.D. 1991). The North Dakota Supreme Court also has held that "[a] substantial shift change is good cause attributable to the employer," and noted that "a decrease in hours with accompanying reduction in pay" might also provide good cause to quit. Newland, 460 N.W.2d at 123-24.

Other states with laws similar to North Dakota's have also held that an employee has good cause to quit her employment after an employer has engaged in wrongful

conduct with regard to wages. In Minnesota, like North Dakota, an employee is disqualified from receiving unemployment compensation if he or she quits without good cause attributable to the employer. Minn. Stat. § 268.09, subd. 1(a) (1992). Minnesota courts have repeatedly held that "[a]n employee has good cause to quit voluntarily if the employer refuses to pay a statutorily mandated wage." Miller v. Int'l Express Corp., 495 N.W.2d 616, 618 (Minn. Ct. App. 1993); see also, Mitchell v. Crookston Welding Mach. Co., 492 N.W.2d 256, 257 (Minn. Ct. App. 1992); Minn. Stat. § 268.09, subd. 1(a) (1990). Similarly, Oregon courts, using a "good cause"[1] definition similar to North Dakota's, have repeatedly held that "[a] reasonable and prudent person, exercising ordinary common sense, would not continue to work for an employer who violated applicable wage and hour law, thereby depriving him of . . . wages he was legally entitled to receive." J. Clancy Bedspreads & Draperies v. Wheeler, 954 P.2d 1265, 1266 (Or. Ct. App. 1998).

In the case at hand, Wal-Mart violated N.D.C.C. § 34-14-02, requiring Wal-Mart to pay Ms. Tronnes her owed wages on the agreed upon paydays. Wal-Mart's customary practice was to pay Ms. Tronnes every two weeks. (App. 19, L. 2-3.) On the designated payday of October 13, 2010, Wal-Mart withheld Ms. Tronnes's scheduled paycheck for hours she had already worked. (App. at 32, L.21-22; 33, L. 1-10.) As a result of Wal-Mart's refusal to pay Ms. Tronnes her statutorily mandated wages, Ms. Tronnes left her employment. (App. at 29, L. 1-5.) Ms. Tronnes, or any other reasonable person, should not be expected to continue working for an employer who does not pay her for work

[1]"Good cause" in the state of Oregon is defined as "such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work. The reasons must be of such gravity that the individual has no reasonable alternative but to leave work." J. Clancy Bedspreads & Draperies v. Wheeler, 954 P.2d 1265, 1266 (Or. Ct. App. 1998).

performed. The preponderance of the evidence supports the finding that Ms. Tronnes was forced to leave her employment due to Wal-Mart's wrongful withholding of her pay under North Dakota law, and is thus eligible for unemployment compensation.

Moreover, other states, like North Dakota, that require written authorization from the employee before withholding any portion of the employee's paycheck, have held that partial withholding of a paycheck without written authorization is good cause to voluntarily quit, deeming the applicant eligible to receive unemployment compensation. The Idaho Supreme Court held the partial withholding of $100 from the employee's paycheck, without mandatory written authorization from the employee as required by Idaho law[2], was good cause to quit. Smith v. Johnson's Mill, 536 P.2d 755, 756 (Idaho 1975). Similarly, the Superior Court of Delaware held that withholding the full amount of the employee's pay, without mandatory written authorization from the employee as required by Delaware law[3], constituted good cause to voluntarily quit, even if the withholding was the direct result of the employee's misconduct. Dahling v. Sure Equipment Co., 1994 WL 146791, 3-4 (Del. Super. Ct. 1994).

In the case at hand, Wal-Mart violated N.D.C.C. § 34-14-04.1, prohibiting Wal-Mart from withholding any portion of Ms. Tronnes' pay without her written authorization. Ms. Tronnes never gave written authorization to Wal-Mart regarding the withholding of any portion of her paycheck, much less her entire paycheck. (App. at 27, L. 12-17.) Such wrongful withholding constitutes good cause to terminate her employment, deeming Ms. Tronnes eligible to receive unemployment compensation.

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[2] I.C. § 45-611(2). (No employer may withhold any portion of an employee's wages unless the employer has a written authorization by the employee for deductions for a lawful purpose.)

[3] 19 Del. C. §1107(3). (Employer may not withhold any portion of an employee's wages unless the employer has signed authorization by the employee for deductions.)

Even without the requirement for written authorization by the employee before withholding of pay, courts have found that quitting for withheld wages is quitting for "good cause," rendering the applicant qualified to receive unemployment compensation. The New York Court of Appeals held that it was unreasonable "to expect that an employee will continue to work without receiving any part of the wages he earns, even though the indebtedness for which those wages are taken is just and the levy thereon resulted from the employee's own fault or neglect in failing to satisfy that debt." In re Jones' Claim, 198 N.E.2d 40, 40 (N.Y. 1964). Similarly, Oregon Courts have also held that no one should be expected to continue working for an employer who does not pay wages, and "[l]eaving employment under such circumstances is for 'good cause,' and no rational trier of fact could find otherwise." Cavitt v. Employment Div., 803 P.2d 778, 780 (Or. Ct. App. 1990).

In the case at hand, Wal-Mart's decision to withhold Ms. Tronnes' paycheck was not only wrongful, but illegal under N.D.C.C. §§ 34-14-02 and 34-14-04.1. It is unreasonable to expect Ms. Tronnes to work without any pay, but even more so when the initial $330 credit to her account was due to the negligence of another Wal-Mart employee, and no fault of her own. (App. at 23, L. 9-17.) Although the initial mistake was not Ms. Tronnes', she made reasonable efforts to resolve the matter. Ms. Tronnes spoke to the Store Manager about paying back the money owed. (App. at 27, L. 12-17.) She offered Wal-Mart the option of deducting the money owed from her vacation and sick days, if she left before the money had been paid. (App. at 36, L. 19-22.)

When she received no wages on her regular payday, she contacted her immediate supervisor, Pat Johnson, to report the withheld paycheck. (App. at 27, L. 4-11.) Ms.

Tronnes then utilized Wal-Mart's open door policy and attempted to contact the regional manager, Gordi, to complain about the not being paid, but was referred to Barb in Human Resources. (App. at 29, L. 9-12.) After being notified of the problem, Wal-Mart informed Ms. Tronnes that they would not be able to help her for another two-week pay period, leaving Ms. Tronnes without compensation for about a month. (App. at 28, L. 12-19; 29, L. 13-16.)

In addition to the previously discussed unsupported factual findings, the Hearing Referee appears to have misconstrued the proper weighing of evidence concerning good cause attributable to the employer. The Hearing Referee found that "it cannot be said that [Ms. Tronnes'] sole reason for leaving her job was due to the deduction of the previously credited amount to her payroll check on October 13, 2010," and that she left for "personal reasons." (App. at 61.) However, in determining whether Ms. Tronnes qualifies for unemployment benefits, *all* reasons for leaving must be considered. "[W]here several reasons are asserted, Job Service must consider all reasons which may have combined to give the claimant good cause to quit, then consider whether any of those reasons was a cause attributable to the employer." Newland, 460 N.W.2d at 122. If any one of those reasons is sufficient to qualify the claimant for benefits, then benefits should be awarded "notwithstanding the existence of other disqualifying reasons." Id. Moreover, Exhibit 2 of the record explicitly states Ms. Tronnes "quit this job when they withheld [her] last paycheck." (App. at 56.)

The preponderance of the evidence supports the finding that Ms. Tronnes left her employment as a result of Wal-Mart's wrongful withholding of her paycheck in violation of N.D.C.C. § 34-14-04.1. The employer was on notice about the transgression, because

Ms. Tronnes notified not only her immediate supervisor, but also the Fargo regional office. (App. at 29, L. 9-12.) Wal-Mart failed to take action to correct the misdeed and refused to pay Ms. Tronnes her wages, in violation of N.D.C.C. § 34-14-02. Ms. Tronnes did not receive the wages she was owed until after she had complained to the North Department of Labor. (App. at 49, L. 10-14.)

A reasoning mind could not reasonably have determined, as the Agency did, that voluntarily leaving after Wal-Mart failed and then refused to pay her in violation of the law is anything but "good cause attributable to the employer." The Agency's factual conclusion on this issue is not supported by the preponderance of the evidence and should be reversed on this basis alone, pursuant to N.D.C.C. 28-32-46 (5).

D. The Findings Of Fact Made By The Agency Do Not Sufficiently Address The Evidence Presented By The Appellant [N.D.C.C. § 28-32-46(7)]

The Hearing Referee's unexplained disregard of evidence regarding the unlawful conduct of Wal-Mart undermines the validity of the Agency's findings of fact. The failure of an administrative decision to weigh, analyze, and adequately explain any reasons for rejecting evidence favorable to the claimant requires modification or reversal pursuant to N.D.C.C. 28-32-46(7). Richter v. N.D. Dept. of Transp., 2008 ND 105, ¶ 9, 750 N.W.2d 430, 432; Curran v. N.D. Workforce Safety & Ins., 2010 ND 227, ¶ 21, 791 N.W.2d 622. See; Thomas v. Workforce Safety & Ins., 2005 ND 52, ¶ 9, 692 N.W.2d 901. See also Manske v. Workforce Safety & Ins., 2008 ND 79, ¶ 14, 748 N.W. 2d 394.

The Hearing Referee in the current case failed to address evidence from the entire record on two legally significant issues: (1) the illegality of Wal-Mart's failure to pay Ms. Tronnes for the hours she undisputedly worked; and (2) the illegality of Wal-Mart's unilateral decision to withhold her pay in its entirety as an advance, absent written

authorization. The Hearing Referee discounted the evidence indicating the unlawful nature of Wal-Mart's conduct without clarification or explanation in his findings of fact, in contravention of his responsibility to explain. See Curran, 2010 ND 227, ¶ 21, 791 N.W.2d at 627; Huwe v. Workforce Safety and Ins., 2008 ND 47, ¶10, 746 N.W.2d 158.

Due to the absence of any explanation at all, it is unclear whether the evidence of Wal-Mart's violation of established employment law was analyzed or, if not, for what reasons it was disregarded. As set forth previously, under North Dakota law, "[e]very employer shall pay all wages due to employees at least once each calendar month on regular agreed paydays designated in advance by the employer." N.D.C.C. § 34-14-02. See Fowler, 765 A.2d at 148; see also Combs v. Bunn W. Robertson, Inc., 166 S.W.2d 665, 667 (Ark. 1942) (holding that employee could not be expected to continue working after his pay was stopped and his wages which had been earned and were due). Moreover, employers may only withhold from compensation due "those amounts which are required by state or federal law to be withheld and may deduct advances paid to employees, other than undocumented cash, and other individual items authorized in writing by the employees." N.D.C.C. § 34-14-04.1. Wal-Mart was therefore expressly prohibited from withholding Ms. Tronnes' paycheck as an advance without written authorization.

Clear evidence of Wal-Mart's failure to abide by its obligations as an employer is present in the record. There is no question that Ms. Tronnes worked at Wal-Mart between October 2, 2010 and October 13, 2010. (App. at 60-61.) Wages for the hours she worked were not paid as a result of Wal-Mart's withholding of her entire pay to offset the $660 balance, the amount mistakenly credited to her employee account by another

Wal-Mart employee. (App. at 61.)

Attempts were made by Ms. Tronnes to direct the Hearing Referee's attention towards Wal-Mart's unlawful conduct, but to no avail. During the administrative appeal hearing held on February 2, 2011, Ms. Tronnes articulated that on October 13, 2010, her employee account had a zero balance because Wal-Mart had taken her entire paycheck. (App. at 27, L. 4-5; 33, L. 4-8, 34, L. 17-18.) When the Hearing Referee asked whether her entire paycheck was withheld on October 13, 2010, Ms. Tronnes once again answered in the affirmative. (App. at 33, L. 9-10.) Most importantly, Wal-Mart did not contest the allegation that Ms. Tronnes' entire paycheck was indeed withheld when questioned by the Hearing Referee. In fact, the Store Manager bluntly admitted to withholding Ms. Tronnes' entire paycheck. (App. at 47, L. 17-18.) Furthermore, Ms. Tronnes did not give written consent to withhold any portion of her paycheck. Therefore, the unauthorized withholding of Ms. Tronnes' pay as an advance is in direct violation of N.D.C.C. § 34-14-04.1.

Ms. Tronnes made numerous attempts to present credible evidence to implicate Wal-Mart's conduct as expressly illegal. For instance, Ms. Tronnes indicated specifically that the Department of Labor informed her of Wal-Mart's illegal conduct, because she did not sign a written consent for her pay to be withheld. (App. at 58.) At one point, Ms. Tronnes attempted to question her Store Manager regarding the manner in which she received her withheld paycheck after filing a complaint with the Department of Labor. (App. at 49, L. 10-14; 50, L. 10-13.) The questions she asked were aimed at exposing Wal-Mart's meritless excuse for treating Wal-Mart's September mistake as an advance, as no written consent or authorization was ever solicited or signed. (App. at 49, L. 10-14;

50, L. 10-13.)

The Hearing Referee himself questioned the Store Manager about whether Wal-Mart's actions were done in accordance with applicable labor law, in response to which the Store Manager admitted that "there was another way . . . [and] we should have done that." (App. at 47, L. 11-14.) The Store Manager further elaborated his answer to add that "[w]e should have went through the garnishment process" to recover the money owed by Ms. Tronnes. (App. at 47, L. 9-14.)

Finally, towards the end of the administrative hearing, Ms. Tronnes made a final attempt to raise the illegality of Wal-Mart's action, and other legal means available for Wal-Mart to recover the $660 balance. (App. at 50, L. 10-13.) The Hearing Referee however, undermined her effort by interrupting before she could finish her full explanation. (App, at 36, L. 19-22, 37, L. 1-5, 50, L.10-15.)

The facts and circumstances set forth above demonstrate the inadequacy of the findings of fact issued by the Hearing Referee: They are devoid of any reference to the evidence offered by Ms. Tronnes establishing the unlawful nature of Wal-Mart's conduct. The Hearing Referee was made aware of Wal-Mart's illegal conduct when Ms. Tronnes referenced her conversation with the Department of Labor during the administrative hearing. The Hearing Referee was also made aware of Wal-Mart's illegal conduct when the Store Manager bluntly admitted to withholding Ms. Tronnes' entire paycheck. Moreover, the Hearing Referee showed concern about Wal-Mart's practice of withholding employee pay without written authorization when he specifically asked the Store Manager about the legality of Wal-Mart's action. Ultimately, the Hearing Referee opted to ignore all evidence offered, referenced, and conceded to on the matter of Wal-Mart's

illegal conduct from his final findings of fact without explanation, examination, or clarification of its impact on his conclusions. (App. at 60-61).

The Hearing Referee's failure to weigh, address, consider, appraise or even acknowledge the uncorrected illegal conduct by Wal-Mart in his findings of fact inhibits a reasonable person from reasonably concluding that the Agency's decision was reached by weighing all evidence from the *entire* record, as required by N.D.C.C. § 28-32-46(7). Ms. Tronnes seeks reversal of the Agency's decision on that basis.

VI. CONCLUSION

A preponderance of the evidence in this case shows that withholding Ms. Tronnes' paycheck was not in accordance with the law, and established good cause attributable to the employer. The Hearing Referee did not address the illegality in any way, and instead found it reasonable for an employee to continue in such a situation. This determination cannot be reached by a reasoning mind; nor is it in accordance with the law.

North Dakota law and public policy require that unemployment benefits be awarded when employees become unemployed through no fault of their own. N.D.C.C. § 52-01-05. Appellant Valerie Tronnes became unemployed after Wal-Mart mistakenly overpaid her, and then engaged in improper "self-help" by illegally refusing to pay her for work performed. Pursuant to N.D.C.C. § 52-06-27, Ms. Tronnes respectfully asks this Court to reverse the Agency decision and hold that she is entitled to unemployment benefits.

In the alternative, she respectfully requests this Court to remand the order of the Agency to make findings that are in accordance with the preponderance of the evidence

and that sufficiently address the evidence presented.

Dated this 28th day of October, 2011.

Respectfully Submitted,

CLINICAL EDUCATION PROGRAM

SALY ABD ALLA
Certified Student Attorney
University of North Dakota School of Law
Clinical Education Program
215 Centennial Drive Stop 9003
Grand Forks, ND 58202-9003
(701) 777-2932 Fax: (701)-777-6301
Attorney for Petitioner-Appellant

ELIZABETH FISCHER
Certified Student Attorney
University of North Dakota School of Law
Clinical Education Program
215 Centennial Drive Stop 9003
Grand Forks, ND 58202-9003
(701) 777-2932 Fax: (701)-777-6301
Attorney for Petitioner-Appellant

RACHEL FODE
Certified Student Attorney
University of North Dakota School of Law
Clinical Education Program
215 Centennial Drive Stop 9003
Grand Forks, ND 58202-9003
(701) 777-2932 Fax: (701)-777-6301
Attorney for Petitioner-Appellant

LU JIANG
Certified Student Attorney
University of North Dakota School of Law
Clinical Education Program
215 Centennial Drive Stop 9003
Grand Forks, ND 58202-9003
(701) 777-2932 Fax: (701)-777-6301
Attorney for Petitioner-Appellant

MARGARET MOORE JACKSON
ND ID# 05655
ROBIN R. RUNGE
ND ID# 06685
University of North Dakota School of Law
Clinical Education Program
215 Centennial Drive Stop 9003
Grand Forks, ND 58202-9003
(701) 777-2932 Fax: (701)-777-6301
Attorney for Petitioner-Appellant

IN THE SUPREME COURT FOR THE STATE OF NORTH DAKOTA

Valerie Joy Tronnes, Petitioner -Appellant,	)	Docket No. 20110280
vs.	)	**CERTIFICATE OF SERVICE**
Job Service North Dakota Respondent-Appellee,	)	
and	)	
Wal-Mart Associates, Inc., Respondent-Appellee.	)	

I, Rachel Fode, hereby certify that on October 28, 2011, I served a true and correct copy of the below-listed documents in *Valerie Joy Tronnes v. Job Service North Dakota; Wal-Mart Associates, Inc.,* North Dakota Supreme Court Case No. 20110280:

1. **Request for Oral Argument**
2. **Brief of Appellant**
3. **Appendix of Appellant**
4. **Certificate of Service**

The above-enumerated documents were mailed to the offices of the following via overnight Fed Ex, correct postage paid, addressed to:

Michael Pitcher
Office of Attorney General
500 North 9th Street
Bismarck, ND 58505-0041

Wal-Mart Associates, Inc.
1845 Borman Court
Saint Louis, MO 63146

Dated this 28th day of October, 2011

Rachel Fode

RACHEL FODE