

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

DARLENE E BALLENSKY  
1150 RIPLEY CT  
MUSCATINE IA 52761

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

Appeal Number: 05A-UI-07885-RT  
OC: 06-26-05 R: 04  
Claimant: Respondent (5)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated July 20, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Darlene E. Ballensky. After due notice was issued, a telephone hearing was held on August 18, 2005, with the claimant participating. Carla Smith, Photo Center Manager at the employer's store in Muscatine, Iowa, where the claimant was employed, participated in the hearing for the employer. Two other persons sat in on the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. Employer's Exhibit 1 was admitted into evidence.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, most recently as a photo technician, from January 11, 2000 until she was separated from her employment on June 6, 2005. The claimant became a photo technician on November 13, 2003. On June 6, 2005, the claimant met with the photo center manager, Carla Smith, the employer's witness. At that time the claimant was informed that she would no longer be allowed to work as a photo technician because she didn't meet the job requirement of being able to lift 40 pounds. The old job description for a photo center technician appears at Employer's Exhibit 1 and provides for lifting 50 pounds, but that has been changed to 40 pounds. The claimant was then offered a position at the credit card counter where she would be presenting credit card applications to customers and trying to sign them up for credit cards. The claimant would be paid the same amount and would work the same amount of hours but the claimant's specific hours of work would change. While a photo technician, the claimant worked from 8:00 a.m. or 9:00 a.m. to 5:00 p.m., Monday through Saturday. When working at the credit card counter the claimant would work from 12:00 p.m. to 8:00 p.m. and perhaps even be able to leave at 6:00 p.m. However, this time change was unacceptable to the claimant because she had diabetes and must eat at 6:00 p.m. As a photo technician, the claimant sold cameras and operated a machine to print pictures and performed customer service matters. Occasionally, it was necessary to lift "paper magazines" weighing 40 or 50 pounds.

Sometime prior to becoming a photo technician on November 14, 2003, the claimant had heart surgery and had a lifting restriction preventing her from lifting 40 or 50 pounds. The claimant and the employer were aware of this at the time the claimant became a photo technician. At that time the claimant informed the employer that she could not meet the lifting restrictions required of a photo center technician. The employer said that was acceptable because others could do the required lifting. The claimant then worked as a photo technician until she was separated on June 6, 2005, almost two years, and had no problems doing her job. Other employees lifted or carried the heavy boxes. However, one employee complained about the claimant's not lifting, which precipitated the meeting on June 6, 2005, when the claimant was informed that she could no longer work as a photo center technician. As far as the claimant knows the lifting restriction has not been lifted or removed. The claimant refused the credit card position because of the change in hours and the different type of work. Pursuant to her claim for unemployment insurance benefits filed effective June 26, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,030.00 as follows: \$206.00 per week for five weeks from benefit week ending July 2, 2005 to benefit week ending August 20, 2005. For benefit weeks ending, July 16, 23, and 30, 2005, the claimant filed no weekly clearings.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(1) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (1) A change in the contract of hire. An employer's willful breach of contract of hire shall not be a disqualifiable issue. This would include any change that would jeopardize the worker's safety, health or morals. The change of contract of hire must be substantial in nature and could involve changes in working hours, shifts, remuneration, location of employment, drastic modification in type of work, etc. Minor changes in a worker's routine on the job would not constitute a change of contract of hire.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she refused to accept a move or transfer to the credit card position. The claimant maintains that she was discharged when she was told on June 6, 2005, that she would no longer be allowed to work as a photo technician. The administrative law judge concludes that there is a preponderance of the evidence that the claimant voluntarily quit. It is true that the claimant was prohibited from continuing to work as a photo center technician, but was offered other employment at the credit card position. The claimant seemed to testify that she was not offered this credit card position until after the meeting on June 6, 2005, but this is not in keeping with the testimony of Carla Smith, Photo Center Manager, who testified that the claimant was offered the position on June 6, 2005. In any event, even the claimant concedes that in just a day or two after June 6, 2005, she was offered a credit card position and refused it. On the record here, the administrative law judge concludes that the claimant was offered a new position at the credit card counter after being denied continuing work as a photo center technician and that therefore, she was not discharged from the employer. The administrative law judge concludes that the claimant voluntarily quit when she was offered the new position on June 6, 2005, and declined it. Accordingly, the administrative law judge concludes that the claimant voluntarily left her employment on June 6, 2005. The issue then become whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant credibly testified that for almost eight years, from November 13, 2003 until June 6, 2005, the claimant had satisfactory work as a photo center technician. The claimant credibly testified that she did so even though she did not meet one of the requirements of the job, that she be able to pick up, lift, carry and place items weighing up to 50 pounds, as shown at Employer's Exhibit 1. This weight limit has been reduced to 40 pounds, but the claimant can still not meet that. When the claimant was assigned to the photo center as a photo technician, she informed the employer of

the weight restriction and the employer, at that time, told the claimant that that was acceptable, that others could do the lifting. Throughout the claimant's tenure as a photo center technician, the claimant performed her duties without a problem. On June 3, 2005, however, a co-worker complained about the claimant's not lifting, which resulted in the claimant being prohibited from continuing as a photo center technician on June 6, 2005. The claimant was offered a credit card position at the credit card counter, presenting credit card applications to customers and trying to sign them up. However, the claimant credibly testified that although she would be paid the same, and the number of hours remained the same, the time of the hours would change. As a photo center technician, the claimant worked from 8:00 a.m. or 9:00 a.m. to 5:00 p.m., Monday through Saturday. At the credit card counter the claimant would work from 12:00 p.m. to 8:00 p.m., and perhaps some evenings until 6:00 p.m. This time change was not acceptable to the claimant because of her diabetic condition requiring that she eat at 6:00 p.m. The administrative law judge concludes that what in effect occurred here was the employer's willful breach of the claimant's contract of hire as amended, which breach was substantial involving changes in working hours and modification and type of work. The claimant had worked for almost two years from 8:00 a.m. or 9:00 a.m. to 5:00 p.m., as a photo center technician. Even though the claimant technically did not meet one of the requirements of a photo center technician, namely, that she be able to lift, carry, and place items weighing up to fifty pounds, the claimant satisfactorily performed her job during that time. The employer was aware of the lifting restriction, and told the claimant it was not important and not to worry about it. By allowing the claimant to work as a photo center technician for almost two years, without being able to meet the weight restriction, the administrative law judge concludes that the employer in effect waived that requirement for the claimant. Again, the administrative law judge reiterates that the claimant had no problems performing her other duties and did so satisfactorily throughout the time that she was a photo center technician. The claimant was then prohibited from continuing as a photo center technician and was offered another job. This was a willful breach of the claimant's contract of hire as amended, which breach was substantial and without good cause. This change is good cause attributable to the claimant for her quit. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily with good cause attributable to the employer and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged, but not for disqualifying misconduct and she would still not be disqualified to receive unemployment insurance benefits. There is not a preponderance of the evidence that the claimant did anything that would either be a deliberate or willful act constituting material breach of her duties or evincing a willful or wanton disregard of the employer's interest or in carelessness or negligence of such a degree of recurrence, all as to establish disqualifying misconduct. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged, but not for disqualifying misconduct and she would still not be disqualified to receive unemployment insurance 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.

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 \$1,030.00 since separating from the employer herein on or about June 6, 2005 and filing for such benefits effective June 26, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of July 20, 2005, reference 01, is modified. The claimant, Darlene E. Ballensky, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she left her employment voluntarily with good cause attributable to the employer. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

dj/pjs