

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

SALLY A TURNER
3560 E DOUGLAS AVE BLDG F
DES MOINES IA 50317-4337

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

Appeal Number: 06A-UI-04343-RT
OC: 03/19/06 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Wal-Mart Stores, Inc., filed a timely appeal from an unemployment insurance decision dated April 6, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Sally A. Turner. After due notice was issued, a telephone hearing was held on May 8, 2006, with the claimant participating. Lee Fogo, Store Manager of the employer's store on SE 14th Street in Des Moines, Iowa, where the claimant was employed; Jim Mott, Market Manager, and Juley Imoehl, Assistant Manager; participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, most recently as a full-time Deli associate for one week, from July of 1999, until she voluntarily quit on February 8, 2006. The claimant was on a leave of absence from approximately December 28, 2005 and was to return to work on February 8, 2006. The claimant was on this leave of absence for medical reasons involving two surgeries, which were unrelated to her employment. The claimant was released to work on February 8, 2006, but the claimant did not return to the employer and therefore quit. The claimant did not tell anyone she was quitting nor did she so indicate in writing. The claimant quit because she was going to be making or earning less per hour than she was told.

Before her leave the claimant was an assistant manager at the employer's store on SE 14th Street in Des Moines, Iowa. However, the claimant was moved to a different store in West Des Moines, Iowa in a position of Deli associate. The claimant made this change between December 18 and 20, 2005. When the claimant was assistant manager she was making \$36,000.00 per year or an hourly wage of \$18.45. However, as Deli manager she was told she would be making \$13.50 per hour. The claimant's hours were going to change as well. The claimant moved to the West Des Moines, Iowa, store and worked 24 hours but was paid only \$11.30 per hour when the claimant thought she was to be paid \$13.50 per hour. The claimant was moved because of performance problems. At the time the claimant was informed of the move she was told that she would be earning \$13.50 per hour or perhaps \$.50 less than that but at that hourly wage the move was acceptable to the claimant. However, when the claimant discovered that she was only being paid \$11.30 per hour she was dissatisfied and expressed concerns to the personnel manager, Kelly. The claimant told Kelly that this was not the rate of pay agreed upon. Kelly told the claimant that she would call Jim Mott, Market Manager and one of the employer's witnesses. She did so and Mr. Mott told her that there was no agreement for \$13.50 or \$.50 less than \$13.50. The claimant then went on her leave of absence and quit on February 8, 2006 after she had been released by her physician to return to work. The claimant quit because of the reduction in her pay from what she had been told. Pursuant to her claim for unemployment insurance benefits filed effective March 19, 2006, the claimant has received unemployment insurance benefits in the amount of \$2,592.00 as follows: \$324.00 per week for eight weeks from the benefit week ending March 25, 2006 to the benefit week ending May 13, 2006.

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 parties agree, and the administrative law judge concludes, that the claimant left her employment voluntarily effective February 8, 2006 when she deliberately failed to return to the employer following a leave of absence and when she was released to return to work. The employer shows the claimant as being terminated effective March 6, 2006 but the administrative law judge concludes, based upon the claimant's testimony, that she voluntarily left her employment intentionally on February 8, 2006 when she did not return to work even though she was able to work and was released to work. The issue then becomes 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 the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has 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 she left her employment because she understood that she was going to be making \$.50 less than the usual rate for a Deli associate, \$13.50, but when she started working as a Deli associate she discovered that she was only making \$11.30 per hour. All the parties concede that the claimant had been an assistant manager at a different store at a salary which paid approximately \$18.45 per hour. The parties all agreed that the claimant was to move to a different store as a Deli associate because of performance problems. Where the parties disagree is what the claimant was told about her pay. The claimant credibly testified that she was told that she would be paid \$.50 less than the \$13.50, which was apparently the maximum for a Deli associate. This was acceptable to the claimant. Lee Fogo, Store Manager at the employers store on SE 14th Street in Des Moines, Iowa, and one of the employer's witnesses, denied telling the claimant that she would be getting that pay but later equivocated and stated that he did not "recall" telling the claimant that. Jim Mott, Market Manager, testified that he did not tell the claimant that she would be making \$.50 less than \$13.50. However, he also seemed to equivocate. The claimant was adamant and testified credibly that she was told by Mr. Fogo that she would be making \$13.50 or that she would be making \$.50 less than that amount, which was acceptable to her. All the witnesses seemed to agree that when the claimant moved to the new store in West Des Moines, Iowa, as a Deli associate; she was paid \$11.30 per hour. Mr. Mott testified that this was the amount paid generally to Deli associates at the West Des Moines store.

Although it is a close question, the administrative law judge concludes that the claimant was informed in some fashion that she would be making \$13.50 or \$.50 less than \$13.50 and based upon this the claimant accepted the change. The administrative law judge notes that the claimant had been paid a salary, which on an hourly basis was approximately \$18.45 per hour.

The claimant had already agreed to accept a very significant cut in her pay and then encountered another cut of almost \$2.00. The testimony of the claimant was unclear as to whether she was told she would be paid \$13.50 an hour and this was \$.50 less than she had been making or whether the claimant was told that she would be making \$.50 less than \$13.50 per hour. In either case, the claimant believed that she would be making no less than \$13.00 but discovered that she was being paid \$11.30 per hour. The administrative law judge concludes that this is a substantial change in her pay. The administrative law judge further concludes that by paying the claimant less, the employer willfully breached its contract of hire with the claimant as amended which breach is substantial involving remuneration. The claimant credibly testified that she expressed concerns to the personnel manager at the West Des Moines store where she was transferred but to no avail. Since the claimant's transfer to the new store and some reduction in pay to either \$13.50 per hour or \$13.00 per hour was acceptable to the claimant, the administrative law judge does not believe that that pay and the transfer and the change to Deli associate was a willful breach of her contract of hire since the claimant had agreed to those items. The willful breach of her contract of hire was the failure to pay the claimant at least \$13.00 per hour and instead pay the claimant \$11.30 per hour. 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.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,592.00 since separating from the employer herein on or about February 8, 2006 and filing for such benefits effective March 19, 2006. 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 April 6, 2006, reference 01, is affirmed. The claimant, Sally A. Turner, 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.

cs/pjs