

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

TRACIE L KIRKPATRICK  
8011 SUNCREST DR  
DES MOINES IA 50320

GROUND'S FOR CELEBRATION  
3159 40<sup>TH</sup> ST  
DES MOINES IA 50310-4107

N TRE CRITELLI  
ATTORNEY AT LAW  
317 6<sup>TH</sup> AVE #950  
DES MOINES IA 50309

Appeal Number: 04A-UI-03294-A  
OC: 02/22/04 R: 02  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 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 Quit  
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

Grounds for Celebration filed a timely appeal from an unemployment insurance decision dated March 18, 2004, reference 01, which allowed benefits to Tracie L. Kirkpatrick. After due notice was issued, a hearing was held in Des Moines, Iowa on April 14, 2004. Ms. Kirkpatrick participated and was represented by N. Tre Critelli, Attorney at Law. Co-owners George Davis, Jan Davis, and Brian Marker participated for the employer.

#### 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: Tracie L. Kirkpatrick was employed as a Barista from September 2002 until she resigned on October 1, 2003. She was a full-time employee. Mike Kirkpatrick, the claimant's spouse, operates a small business. About a week before Ms. Kirkpatrick's resignation, George Davis, one of the co-owners of Grounds for Celebration, placed an order with Ms. Kirkpatrick for a specific piece of glass to be used in a fixture at a new location soon to be opened. The glass was to be ready by October 1, 2003 because it needed to be sent to Kansas City for tempering. Mr. Kirkpatrick called Mr. Davis on October 1 with some questions about the order. It became obvious to Mr. Davis that the glass was not ready as scheduled. An argument ensued between Mr. Kirkpatrick and Mr. Davis. Tracie Kirkpatrick was not present at the time. Mr. Kirkpatrick called her after the argument and stated that he did not understand how she could continue to work for someone such as Mr. Davis. Shortly thereafter Ms. Kirkpatrick gave two weeks notice of her intention to resign to Brian Marker, another of the co-owners of Grounds for Celebration. Mr. Davis in the meantime had realized that his argument with Mr. Kirkpatrick had been unprofessional. He had attempted unsuccessfully to reach Mr. Kirkpatrick to apologize before he learned of Ms. Kirkpatrick's resignation. He reached Mr. Kirkpatrick after learning of the resignation. Ms. Kirkpatrick did not attempt to withdraw her resignation.

Early in Ms. Kirkpatrick's employment, Mr. Davis had become frustrated because he had not completely prepared a customer's order. He threw some of the unusable order into a wastebasket near where Ms. Kirkpatrick was standing. She felt that Mr. Davis had thrown the food at her. She had complained then to Mr. Marker who thereafter attempted not to schedule Ms. Kirkpatrick and Mr. Davis to work together. Despite this attempt to separate the two, Ms. Kirkpatrick had been present on another occasion when Mr. Davis used the term, "fucking retard" while speaking to some co-workers. One of the co-workers has a sister with a learning disability. Mr. Davis had not been thinking of that at the time that he used the phrase.

The company culture of Grounds for Celebration allows for a good deal of banter, some of it using strong language and some of it being addressed to co-worker's appearance and even sexual orientation. Mr. Davis engaged in that banter, receiving comments as well as making them. The banter is generally understood by all to be good-natured.

Ms. Kirkpatrick has received unemployment insurance benefits since filing a claim effective February 22, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Kirkpatrick left work with good cause attributable to the employer. It does 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.

The claimant has the burden of proof. See Iowa Code Section 96.6-2. Although an individual may receive unemployment insurance benefits if the individual has resigned because of intolerable or detrimental working conditions, benefits are withheld if the claimant has resigned because of a personality conflict with a supervisor, an inability to work with co-workers or because of general dissatisfaction with the working environment. See 871 IAC 24.26 and 871 IAC 24.25.

The evidence establishes that Ms. Kirkpatrick's only involvement in the final incident leading to her resignation was receiving implicit encouragement from her husband to resign because of his argument with Mr. Davis. The evidence establishes that Mr. Davis attempted to apologize to Mr. Kirkpatrick and that Mr. Kirkpatrick was indeed late in delivering the goods, which Mr. Davis had ordered. The evidence establishes a few earlier instances of inappropriate language but it does not establish that Mr. Davis had actually thrown food at Ms. Kirkpatrick. These incidents and the employer's argument with the claimant's husband gave her good personal cause to resign. The evidence is not strong enough to establish intolerable or detrimental working conditions, however. Benefits must be withheld.

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.

Ms. Kirkpatrick has received unemployment insurance benefits to which she is not entitled. They must be recovered in accordance with the provisions of law.

#### DECISION:

The unemployment insurance decision dated March 18, 2004, reference 01, is reversed. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. She has been overpaid by \$889.00.

kjf/b