IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

JAMIE L FRANSEN
Claimant

DIAMOND JO LLC
DIAMOND JO CASINO
Employer

APPEAL NO. 08A-UI-06104-JT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/25/08 R: 04
Claimant: Respondent (1)

Iowa Code Section 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

Diamond Jo Casino filed a timely appeal from the June 23, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held at the Dubuque Workforce Development Center on July 24, 2008 and concluded on July 25, 2008 by telephone. Claimant Jamie Fransen participated personally and was represented by Attorney Natalia Blaskovich. Attorney Jason Lehman represented the employer and presented testimony through Diamond Jo Legal Assistant Janet Bevan-Bries. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. Exhibits 1 through 22 and A through D were received into evidence.

ISSUE:

Whether the claimant voluntarily quit the employment for good cause attributable to the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jamie Fransen was employed by Diamond Jo Casino as a full-time bartender from December 1, 2006 until May 24, 2008, when she submitted her resignation. The resignation was effective immediately. Ms. Fransen delivered her resignation letter to Food and Beverage Manager Phil Williams.

Ms. Fransen was assigned to the evening shift and worked either 3:00 to 11:00 p.m. or 6:00 p.m. to 2:00 a.m. Three food and beverage supervisors functioned as Ms. Fransen's immediate supervisors. These were Jennifer Kline, Brian Eigenberger, and Mitch Even. Food and Beverage Manager Phil Williams was immediately above the supervisors in the chain of command. At some point during Ms. Fransen's employment, Food and Beverage Director Mary Diehl separated from the employer. Thereafter, the duties of the food and beverage director were performed either by Mr. Williams or by General Manager Todd Moyer.

In late October or early November 2007, Ms. Fransen began to accept rides home from Mr. Even. Prior to that time, Ms. Fransen had begun to socialize with Mr. Even as part of a group of Diamond Jo Casino employees. During one of the rides home, Mr. Even kissed Ms. Fransen. Ms. Fransen was not expecting the kiss and did not welcome the kiss. Mr. Even apologized for kissing Ms. Fransen and told her it would not happen again. During a subsequent ride home, Mr. Even again kissed Ms. Fransen. This act, too, was unwelcomed by Ms. Fransen. Ms. Fransen subsequently told Mr. Even that she was uncomfortable with his advances. Ms. Fransen told Mr. Even that she was worried about the potential impact on her job and her ability to support her child. Mr. Even apologized and said he would not again attempt to kiss Ms. Fransen. Despite this exchange, Mr. Even asked to see Ms. Fransen outside of work. Mr. Even told Ms. Fransen that Beverage Manager Phil Williams had already questioned Mr. Even about whether he was seeing Ms. Fransen outside of work. Mr. Even told Ms. Fransen that he had told Mr. Williams what Mr. Williams wanted to hear. Mr. Even added that he had Mr. Williams and Food and Beverage Director Mary Diehl in the palm of his hand. Mr. Even told Ms. Fransen that if she agreed to see him outside of work, the relationship would be their "little secret." After this conversation, Ms. Fransen avoided accepting rides from Mr. Even for a number of weeks.

After Ms. Fransen rejected Mr. Even's advances, Mr. Even began to make remarks at work that suggested he was jealous of Ms. Fransen's interaction with certain customers. The comments included that Ms. Fransen's slacks were too tight. Mr. Even continued to ask Ms. Fransen out. This conduct continued until December 2007 or January 2008, at which time Ms. Fransen learned that Mr. Even had directed his advances toward another female Diamond Jo employee. Ms. Fransen heard and believed that Mr. Even was involved in an intimate relationship with the other employee. Mr. Even ceased making sexual advances toward Ms. Fransen and directed fewer sexual remarks toward Ms. Fransen. Ms. Fransen lacked a car and began to again accept rides home from Mr. Even. During a ride home at the end of January, Mr. Even asked Ms. Fransen to have sexual intercourse with him. When Ms. Fransen declined, Mr. Even asked Ms. Fransen to at least perform fellatio on him. Ms. Fransen told Mr. Even that he was her supervisor and needed to behave accordingly. Mr. Even continued to request that Ms. Fransen perform fellatio. Mr. Even told Ms. Fransen that no one at Diamond Jo Casino would learn of their relationship and referenced his "connections." When Mr. Even put his hands in Ms. Fransen's lap, she slapped them away. Ms. Fransen told Mr. Even that she had a boyfriend. This statement made Mr. Even mad. Mr. Even wanted to know why Ms. Fransen would sleep with someone else, but not with him. As Ms. Fransen was about to exit Mr. Even's car, Mr. Evan grabbed her face in his hands and forced her into a kiss.

After the above incident, Ms. Fransen no longer accepted rides from Mr. Even and did not socialize with Mr. Even. At work, Ms. Fransen began to note that Mr. Even would make her wait for her breaks, but would allow others to take their breaks as usual. Ms. Fransen began to complain to Mr. Williams about the disparate treatment. Ms. Fransen noted that while the sexual advances decreased, Mr. Even began to threaten to write her up for various issues and would minimize work concerns that Ms. Fransen brought to his attention. At the beginning of March 2008, Ms. Fransen had contacted Mr. Even about a customer whom she believed was drinking too much too fast. The employer's policy was to record such information so that the customer's alcohol consumption could be monitored. Mr. Even instructed Ms. Fransen not to record anything regarding the customer. Mr. Williams and Ms. Diehl subsequently learned that the customer had been drinking heavily and reprimanded Ms. Fransen for not appropriately documenting the customer's alcohol consumption. Ms. Fransen perceived that Mr. Even was rude to her that his threats of writing her up increased. Mr. Even stated or implied that he could get people fired from Diamond Jo Casino. Ms. Fransen noticed that Mr. Even continued to delay or skip her breaks when he was assigned to supervisor her. Ms. Fransen continued to

complain to Mr. Williams about the delayed or skipped breaks. Mr. Williams continued to schedule Ms. Fransen to work with Mr. Even three or four times per week.

On May 5, 2008, Ms. Fransen encountered a disgruntled customer who insisted that Ms. Fransen summon Mr. Even. The customer was upset with how Ms. Fransen had poured the customer's coffee. Mr. Even spoke with the customer and then told Ms. Fransen that she did not know how to pour coffee. When Ms. Fransen tried to explain to Mr. Even that the same customer had been causing her grief the week before, Mr. Even told her to shut up. Ms. Fransen became upset and did not think she could perform her duties. Ms. Fransen went to a break room and told another supervisor that she was ready to quit the employment. Ms. Fransen believed that Mr. Even's response to the incident with the customer had more to do with her rejection of his sexual advances than her work performance.

On May 6, Ms. Fransen went to Mr. Williams and told him about Mr. Even's prior sexual advances. Mr. Williams had Ms. Fransen tell Cathy Anderson, a human resources representative, about the prior sexual advances and the change in the work relationship after Ms. Fransen rejected the advances. On May 9, Ms. Fransen repeated her complaint to Human Resources Director Beth Stephenson. In both discussions, Ms. Fransen indicated that Mr. Even had sexually harassed her and had behaved in a harassing and/or hostile manner in the workplace since she rejected his advances. On May 9, Ms. Fransen made Ms. Stephenson aware of text messages of a sexual nature that Mr. Even had sent to Ms. Fransen in February. Ms. Fransen asked for a change in her work hours so that she would not have to work with Mr. Even and Ms. Stephenson indicated that she would look into it. Ms. Stephenson told Ms. Fransen that she could call in absent for her next shift scheduled with Mr. Even without incurring attendance points. Ms. Stephenson indicated that the employer would look into the allegation of sexual harassment. Ms. Fransen gave the employer the names of persons she thought the employer should speak with as part of its investigation. Ms. Fransen later learned that the employer had made no meaningful inquiry when speaking with the persons she had named, but that the employer had instead only asked general questions regarding whether the employee(s) had any issues with supervisors. Ms. Fransen gave the employer the name of the other female employee Mr. Even had pursued. That employee had quit the employment. It is unclear whether the employer took any steps to contact and/or question the former employee. The employer suspended Mr. Even during the investigation. The employer subsequent notified Ms. Fransen that it could not substantiate her allegation, that Mr. Even would be returning to the employment and that Ms. Fransen would have to work her assigned shifts, including those shifts Mr. Evens was assigned to supervise. Ms. Stephenson offered to post security officers in Ms. Fransen's work area.

The employer has a written harassment policy that addressed sexual harassment and retaliatory conduct. Ms. Fransen had signed her acknowledgement of the policy and received a copy of the policy. Ms. Fransen had received minimal training regarding her rights and obligations under the policy.

On May 22, Diamond Jo employee Miriah Roath telephoned Ms. Fransen and reported that Mr. Even had been waiving a tape recorder around in the workplace and had said he was going to "cover" himself. Ms. Roath indicated that she was relaying information she had received from Supervisor Jennifer Kline. Ms. Kline was the person who had witnessed Mr. Even's conduct. On May 23, Ms. Fransen went to the workplace before the scheduled start of her shift to speak with the head of security. Ms. Fransen was concerned about the tape recorder incident. Ms. Fransen was also concerned about a comment a security had made to her, that her ability to get everything she wanted was going to end soon. Ms. Fransen was also concerned about a comment a maintenance worker had allegedly made to Ms. Kline, that it was not fair that

Mr. Even got suspended over Ms. Fransen. Ten minutes into the meeting the head of security, Human Resources Director Beth Stephenson joined the meeting. Ms. Stephenson quizzed Ms. Fransen on whom she had spoken to about Mr. Even or the investigation into the sexual harassment complaint. Soon thereafter, Ms. Stephenson presented Ms. Fransen with multiple written reprimands. One reprimand was for Ms. Fransen speaking with Food & Beverage Supervisor Jennifer Kline. Another was for writing a note while at work. The note had concerned the sexual harassment matter. Ms. Fransen concluded the employer was more concerned with reprimanding her, and possibly discharging her, than with remedying the situation Ms. Fransen had brought to the employer's attention.

On May 24, Ms. Fransen submitted her resignation. In the resignation letter, Ms. Fransen cited the employer's failure to appropriately address the concerns she had raised about Mr. Even and her concern that sudden increase in reprimands indicated that the employer intended to end her employment in the near future.

REASONING AND CONCLUSIONS OF LAW:

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.

Quits due to intolerable or detrimental working conditions are deemed to be for good cause attributable to the employer. See 871 IAC 24.26(4). The test is whether a reasonable person would have quit under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993). Aside from quits based on medical reasons, prior notification of the employer before a resignation for intolerable or detrimental working conditions is not required. See Hy-Vee v. EAB, 710 N.W.2d (Iowa 2005).

On the other hand, when a person voluntarily quits in response to a reprimand, the person is presumed to have voluntarily quit without good cause attributable to the employer. See 871 IAC 24.25(28).

When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge notes that the employer requested an in-person hearing and then elected not to present testimony from a single witness with first hand information about Ms. Fransen's employment, the sexual harassment allegation, or the investigation. The administrate law judge further notes that the employer's place of business is located within five minutes of the hearing location. At the end of the hearing, the administrative law judge inquired into the reason for the lack of employer witnesses and received a less than satisfactory explanation. With all due respect to the employer's counsel, the employer's decision not to present readily available testimony leads one to suspect the employer was interested in using the unemployment insurance appeal hearing only as a means of gathering information, and that the employer intentionally passed on the opportunity to provide direct and satisfactory evidence in the form of testimony.

On the surface, it does appear that Ms. Fransen's voluntary quit was prompted by the reprimands issued on May 23, 2008. However, the weight of the evidence is sufficient to rebut the presumption that the quit was without good cause attributable to the employer. The weight of the evidence establishes that Mr. Even inappropriately pursued a sexual relationship with a person under his supervision and continued the exploit over the course of two or three months. This scenario is one that many sexual harassment policies are enacted to address. Ms. Fransen had a right to work at Diamond Jo Casino without feeling pressured or hounded by a supervisor to submit to his requests for sexual favors. Regardless of whether the conduct meets the legal definition of harassment, it clearly amounted to conduct detrimental to Ms. Fransen. Once Mr. Even had repeatedly stepped over the line in his dealings with Ms. Fransen, it was no surprise that Ms. Fransen thereafter perceived his conduct as related to, or retaliation for, her rejection of his sexual advances. It is true that Ms. Fransen exercised poor judgment in waiting so long to report the conduct to the employer. However, regardless of the delay in bringing the complaint, Ms. Fransen presented the employer with sufficient information to warrant a thorough, bonafide investigation. The weight of the evidence indicates that employer did not conduct a thorough, bonafide investigation. The employer elected instead to reprimand Ms. Fransen for, among other things, discussing her crisis with one of her immediate supervisors and for writing a note about the matter while on duty. A reasonable person in Ms. Fransen's position would have drawn the conclusions Ms. Fransen did and would have felt compelled to leave the employment.

Based on the evidence in the record, the administrative law judge concludes that Ms. Fransen quit in response to intolerable and detrimental working conditions. Accordingly, the quit was for good cause attributable to the employer. Ms. Fransen is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Fransen.

DECISION:

The Agency representative's June 23, 2008, reference 01 decision is affirmed. The claimant voluntarily quit the employment for good cause attributable to the employer. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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