

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

MARY R THILL
8763 N BADGER RD
EAST DUBUQUE IL 61025

PENINSULA GAMING COMPANY LLC
DIAMOND JO CASINO
3RD ST & ICE HARBOR
PO BOX 1750
DUBUQUE IA 52004-1750

Appeal Number: 04A-UI-11717-HT
OC: 10/0304 R: 12
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, 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 – Quit
Section 96.3-7 – Overpaid

STATEMENT OF THE CASE:

The employer, Diamond Jo Casino, filed an appeal from a decision dated October 19, 2004, reference 01. The decision allowed benefits to the claimant, Mary Thill. After due notice was issued, a hearing was held by telephone conference call on November 24, 2004 and was concluded on December 16, 2004. The claimant participated on her own behalf and was represented by Attorney Chris Fry. The employer participated by Director Human Resources Troy Wright, Director of Corporate Finance Dustin Manternach and Controller Wendy Runde. Exhibit A was admitted into the record.

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: Mary Thill was employed by Diamond Jo Casino from August 14, 1995 until September 30, 2004. She had worked first in the cage, then in October 1995, had transferred to the employee bank as a supervisor. She averaged between 35 and 38 hours per week and earned \$11.76 per hour at the time of separation.

On September 7, 2004, Controller Wendy Runde notified the three employees who worked in the bank that their hours were being reduced to 32 per week. On September 17, 2004, she called the claimant on the phone and told her the decision had been made to close the employee bank and the workers there would be transferred. There were two positions open in the cage and one in accounting. The cage jobs would pay the same as Ms. Thill had earned at the employee bank, but the accounting job would start at the lowest rate of pay and be adjusted upward based on her seniority. The cage jobs would have a minimum of 35 hours per week with a possibility of more. She was being given the opportunity to apply for one of the jobs.

On September 27, 2004, Ms. Runde again called the claimant and asked if she had made any decision regarding which available position she wanted to take. She was unhappy about the transfer and said to "just put [her] in the cage." The next day Ms. Runde and Merrill, who was the manager of the cage, called and talked to the claimant. She said the schedule was "not what she had hoped" and was upset because the supervisor, Karla, had said she had the lowest seniority and would have to take whatever hours were left over. Merrill told her explicitly this was not the case, he did not schedule the workers by seniority, but on a rotation. He also assured her he was aware she was a good employee and would be an asset in the cage because it would be responsible for the employee bank matters and her experience would be valuable.

On September 28, 2004, Ms. Runde again called the claimant at her office to see how she was doing. Ms. Thill was very emotional and unhappy and wanted to talk to Director of Human Resources, Troy Wright. The controller had her first come to her office to talk, where she was vague about why she was unhappy, only that she was nervous about going to the cage as it had never cooperated with the employee bank. The two of them went to Mr. Wright's office and continued the discussion.

Ms. Thill was allowed to take vacation for September 29 and 30, 2004, although request had to be expedited due to the short notice. She stated she "needed to get out of here," and wanted information on how to take a leave of absence or apply for FMLA. Mr. Wright told her that she would have to use all of her available vacation before a personal leave of absence could be granted, and she said that was fine because she had about three weeks of vacation. He further told her that FMLA was for serious or chronic medical conditions and she would need to submit documentation from her physician and she could start the paperwork on that whenever she wanted.

The claimant left that day and contacted her physician, but never submitted the request and supporting documentation for FMLA. Instead she submitted a resignation to General Manager Natalie Schramm on September 29, 2004, indicating only that she was quitting because she did not want to wait until "all the good feelings" were gone.

Mary Thill has received unemployment benefits since filing a claim with an effective date of October 3, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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 claimant has asserted she quit due to a substantial change in the contract of hire. The record does not support this contention. She worked 32 hours per week as a supervisor in the employee bank before it closed and accepted a position as a cage worker at the same salary and for slightly more hours. Although she would not have been a supervisor, she would have been largely responsible for those functions of the employee bank which were being incorporated into the cage. She asserted she did not receive any "transfer papers" for her job in the cage but this is because the bank and the cage are the same department. The only papers she would have received would be a reclassification of her status from supervisor to cage worker, but with no change in pay.

The claimant felt she was not receiving information from the employer regarding a leave of absence or FMLA, but the record also does not support this. It appears Ms. Thill was entirely too upset, for reasons which are still not clear, and did not "take in" what Mr. Wright, Ms. Runde and Merrill were saying to her. In any event, she was given two days off for vacation even though it cost the employer extra effort to expedite her request. During that time off she could have explored her options for FMLA, consulted with her doctor, requested additional time off or set up further meetings with the employer to discuss her options. She elected to do none of these things but resigned, even before her final day of vacation.

There is no evidence of any "substantial change" in the contract of hire, as she would have been paid the same, worked slightly more hours and had many of the same duties as she had while working in the bank. Her decision to quit was apparently based on her dislike of working in the cage, and other problems which have not been established to be work-related. The administrative law judge notes "good cause" for leaving employment must be that which is reasonable to the average person, not to the overly sensitive individual or the claimant in particular. Uniweld Products v. Industrial Relations Commission, 277 So.2d 827 (Florida App.

1973). Good cause attributable to the employer does not exist in this case and the claimant is disqualified.

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 claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of October 19, 2004, reference 01, is reversed. Mary Thill is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible. She is overpaid in the amount of \$2,385.00.

bgh/tjc