

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

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Appeal Number: 04A-UI-11126-H2T
OC: 09-05-04 R: 04
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 96.5-3-a – Work Refusal
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 5, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 30, 2004. The claimant did participate. The employer did participate through Charles Ash, Jeri Wookey, Mary Yocum, Sharon Harmon, Mike Blazing (Owner) and was represented by Steven Kundel, Attorney at Law. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a bar manager full time beginning August 14, 2001 through September 2, 2004 when she voluntarily quit after declining to be moved from a bar manager to a bartender position that paid two dollars less per hour. The claimant was demoted because her actions were driving customers away from the business. Numerous customers complained to the owner about the claimant using foul language in the bar and that she was baring her breasts for male customers to suck on and fondle. The claimant also admitted that on occasion she would squirt whip cream on her breasts and allow some of the male customers to lick off the whip cream. Other witnesses complained that the claimant and another bar maid were kissing and caressing each other in front of customers to encourage some of the male customers to leave bigger tips. The claimant's behavior was witnessed by a number of witnesses, each of whom credibly testified at the hearing that they each witnessed the claimant engaging in groping and fondling with some of the male patrons of the bar. The claimant also was using profanity in front of customers, what was described as the "f-word". Mike Blazing warned the claimant that her behavior had to change in order to maintain her job. While the claimant's behavior did improve, the damage done to customer relations had already taken a toll on business. Instead of accepting the demotion the claimant chose to quit.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did refuse a suitable offer of work.

Iowa Code Section 96.5-3-a provides:

An individual shall be disqualified for benefits:

3. Failure to accept work. If the department finds that an individual has failed, without good cause, either to apply for available, suitable work when directed by the department or to accept suitable work when offered that individual. The department shall, if possible, furnish the individual with the names of employers which are seeking employees. The individual shall apply to and obtain the signatures of the employers designated by the department on forms provided by the department. However, the employers may refuse to sign the forms. The individual's failure to obtain the signatures of designated employers, which have not refused to sign the forms, shall disqualify the individual for benefits until requalified. To requalify for benefits after disqualification under this subsection, the individual shall work in and be paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

a. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness, prior training, length of unemployment, and prospects for securing local work in the individual's customary occupation, the distance of the available work from the individual's residence, and any other factor which the department finds bears a reasonable relation to the purposes of this paragraph. Work is suitable if the work meets all the other criteria of this paragraph and if the gross weekly wages for the work equal or exceed the following percentages of the individual's

average weekly wage for insured work paid to the individual during that quarter of the individual's base period in which the individual's wages were highest:

- (1) One hundred percent, if the work is offered during the first five weeks of unemployment.
- (2) Seventy-five percent, if the work is offered during the sixth through the twelfth week of unemployment.
- (3) Seventy percent, if the work is offered during the thirteenth through the eighteenth week of unemployment.
- (4) Sixty-five percent, if the work is offered after the eighteenth week of unemployment.

However, the provisions of this paragraph shall not require an individual to accept employment below the federal minimum wage.

The claimant was justifiably demoted for her conduct as the bar manager. Allowing customers to fondle her breasts and groping and fondling the male customers was sufficient reason for the claimant to be demoted. At least three of the witnesses testified that they each personally observed the claimant using profanity, groping male customers, baring her breast and allowing male customers to touch her bare breasts. The testimony of Mr. Ash, Ms Wookey, Ms. Yocum and Ms. Harmon convinces the administrative law judge that the claimant was engaging in inappropriate sexual conduct while working. Her conduct was sufficient grounds for the demotion. As such, the claimant's refusal to accept the demotion amounts to a refusal to accept suitable work.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The October 5, 2004, reference 01, decision is reversed. The claimant did refuse a suitable offer of work. The claimant is overpaid benefits in the amount of \$1,961.00.

tkh/kjf