

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

ANGEL DEVERS

Claimant,

and

SIGNATURE PROPERTIES OF COUNCIL
BLUFFS

Employer.

HEARING NUMBER: 09B-UI-11230

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5(3)a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Angel Devers, worked for Signature Properties of Council Bluffs, LLC/Woodlands Rehab from March 21, 1989 through October 13, 2008 as a full-time assistant dietary manager. (Tr. 2, 9) In her position, the claimant worked from 6:00 a.m. until 2:30 p.m. (Tr. 2, 9), working primarily as an office assistant to the dietary manager. (Tr. 13) Ms. Devers did little to no cooking in this position. (Tr. 11, 12, 14) The assistant dietary manager position also carried a weight lifting requirement of up to 25 pounds, occasionally up to 50 pounds. (Tr. 5, Claimant's Exhibit, faxed pp. 2, 8, 11, 14) The claimant had a weight restriction of no more than 30 pounds. (Tr. 5, 10, Employer's Exhibit, faxed pp. 2, 6, Claimant's Exhibit faxed p. 5)

On or about October 8, 2008, the employer terminated the dietary manager (Pat Mass). (Tr. 4, 9, 13, 16) The employer noted that it no longer needed both a full-time dietary manager and assistant dietary manager as these positions took up too many hours in one office. (Tr. 3) The next day, the employer offered Ms. Devers a choice of positions, i.e., dietary manager or housekeeping supervisor. (Tr. 3, 7, 9) The claimant was very upset about this change and the offers because she didn't believe she was qualified for the dietary manager's position and she believed the responsibilities were drastically different from the duties she had performed for the past 19 years, mainly in the office. (Tr. 9) The employer offered to provide additional training. (Tr. 4) And the claimant's pay would have increased. (Tr. 6)

In her current position, Ms. Devers spent very little time in the kitchen (45 minutes each for breakfast and lunch) occasionally frying eggs and serving them for the Alzheimer's Unit. (Tr. 9, 12, 14, Claimant's Exhibit, faxed pp.2-3) As a dietary manager, she would be required to work in the kitchen half the day. (Tr. 4, 9) Additionally, her acceptance of that position would entail her bumping the kitchen supervisor who had been there longer (28 years) than the claimant. (Tr. 9, 13, Claimant's Exhibit, faxed p. 2) The kitchen supervisor (Pam Carman) was the actual assistant to the dietary manager (Tr. 13) and worked every other weekend and was on-call every other weekend. (Tr. 14)

Ms. Devers preferred to continue working in her same capacity with the same duties and hours as she had done for the past 19 years. The employer told her to take some time to think about their job offers. On October 13th, Ms. Devers informed the employer that she did not want to accept the changes particularly because of her physical limitations, the added responsibility of cooking, and having to work weekends. (Tr. 10-11) The employer, in turn, told her that her current position could not be guaranteed because it, too, may soon be eliminated. (Tr. 10) The claimant rejected their offers to which the employer requested that she stay on for either two weeks or another 30 days until another person could be trained. (Tr. 10) Ms. Devers declined, clocked out and did not return to work. (Tr. 7, 11)

REASONING AND CONCLUSIONS OF LAW:

IAC 871 24.24(14) "b" provides in relevant part:

Employment offer from former employer. The employment offer shall not be considered suitable if the claimant had previously quit the former employer and the conditions which caused the claimant to quit are still in existence.

The record establishes that the claimant was offered work prior to her separation. Her rejection of those offers was due to what she perceived would be the substantial increase in physical activity she would experience in her new position given her weight restriction. Additionally, her belief that she was *not* qualified for the dietary manager was corroborated by her two witnesses (Tr. 13) even though the employer offered to provide her with additional training. The fact that she would be subject to regular weekend hours as her predecessors also contributed to her rejection of the employer's offers. Even if the employer were to offer her employment subsequent to her separation, her original position would no longer exist and she would be faced with the same choices. For this reason, the Board concludes that Ms. Devers was not made a suitable offer of work at the time she rejected both positions.

DECISION:

The administrative law judge's decision dated January 7, 2009 is **REVERSED**. The claimant did not refuse a suitable offer of work within the statutory meaning as the offer was made prior to the claimant's separation from employment. Accordingly, the claimant is allowed benefits provided she is otherwise eligible.

Elizabeth L. Seiser

AMG/fnv

SEPARATE AND CONCURRING OPINION OF JOHN A. PENO:

I agree with my fellow board member that the administrative law judge's decision should be reversed; however, I would reverse the decision and find the claimant eligible for benefits on different grounds.

IAC 871 24.24(8) provides in relevant part:

Refusal disqualification jurisdiction. Both the offer of work or the order to apply for work and the claimant's accompanying refusal must occur within the individual's benefit year, as defined in subrule 24.1(21), before the Iowa Code subsection 96.5(3) disqualification can be imposed. It is not necessary that the offer, the order, or the refusal occur in a week in which the claimant filed a weekly claim for benefits before the disqualification can be imposed.

I would also note that based on the aforementioned administrative rule, the court in Dico v. Employment Appeal Board, 576 N.W.2d 352 (Iowa 1998) held that a valid claim for benefits cannot be filed until a claimant becomes unemployed, which only then can the refusal-to-work disqualification be applicable.

John A. Peno

AMG/fnv

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv