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

LEROY HOLLOWAY	:	
	:	**HEARING NUMBER:** 10B-UI-06190
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
HEARTLAND EXPRESS INC OF IOWA	:	
Employer.		

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: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer 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 majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Leroy Holloway (Claimant) worked for heartland Express of Iowa (Employer) as a full-time over-the-road truck driver from June 1, 2002 until he quit by job abandonment on January 8, 2010. (Tran at p. 2-3).

The Claimant has been off work since November 20, 2009 due to non-work related illness. (Tran at p. 2; p. 4). On December 3, 2009 the Claimant requested medical leave under the Family Medical Leave Act. (Tran at p. 2). The Employer requested that the Claimant provide medical certification under that Act. (Tran at p. 2). The deadline for the certification was December 18, 2009. (Tran at p. 2). When the Claimant missed that deadline the Employer extended the deadline to January 5, 2010. (Tran at p. 2). When the Claimant missed that deadline the Employer called the Claimant on January 7 and explained that unless he returned a certification by the end of the day on January 8 he would be considered separated. (Tran at p. 2-3). The Claimant called the Employer on January 8 and said he

would not be returning the necessary papers, and by that act was separated. (Tran at p. 3).

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> *Voluntary Quitting*. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Generally a quit is defined to be "a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces." 871 IAC 24.1(113)(b). Furthermore, Iowa Administrative Code 871—24.25 provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit rather than a discharge has taken place. On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2). "[Q]uitting requires an intention to terminate employment accompanied by an overt act carrying out the intent." *FDL Foods, Inc. v. Employment Appeal Board,* 460 N.W.2d 885, 887 (Iowa App. 1990), *accord Peck v. Employment Appeal Board,* 492 N.W.2d 438 (Iowa App. 1992).

The Employer gave the Claimant ample opportunities to comply with its request for documentation. The Claimant chose not to receive the medical certification, and neither did he come to work. Based on this record we find that the Claimant knew that he would separated if he did not comply, and that he chose to quit by abandonment rather than comply with the request for separation. We find that the Claimant quit by job abandonment and that he had an intent to do so. We therefore disqualify the Claimant for quitting without good cause attributable to the Employer.

DECISION:

The administrative law judge's decision dated May 26, 2010 is **REVERSED**. The Employment Appeal Board concludes that the claimant quit but not for good cause attributable to the employer. Accordingly, he is denied benefits until such time the Claimant has worked in and was paid wages for insured work equal to ten times the Claimant's weekly benefit amount, provided the Claimant is otherwise eligible.

The Board remands this matter to the Iowa Workforce Development Center, Claims Section, for a calculation of the overpayment amount based on this decision.

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Monique F. Kuester

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Elizabeth L. Seiser

RRA/ss

DISSENTING OPINION OF JOHN A. PENO :

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. On January 7 the Employer told the Claimant that if documentation was not returned by the end of the 8th then "his employment would end." (Tran at p. 3). This is a termination. The reason for the termination was that the Claimant had been absent but without certification. This case falls under the rule of *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554, 557-58 (Iowa App. 2007).

In *Gaborit* the Court of Appeals found that the mere failure to supply a physician's note for a properly reported absence did not negate the reasonable grounds for the absence just because the employer imposed a physician note requirement. The Court held instead that the question of whether an absence is excused under the Employment Security Law turns on the law and not on conditions imposed by employers. I think this holding disposes of any argument that the Claimant's failure to certify FMLA leave prior to the deadline means that absences before that date are unexcused for the purposes of the Employment Security Law. To be sure, the failure to fill out the FMLA forms may mean that those absences are not protected by federal law. But it does not make them "unexcused" for the purposes of the Employment Security Law. The Employer can, for its purposes, insist that absence in this case are only excused for illness if the employee applies for FMLA. Indeed, the employer in *Gaborit* insisted that a physician's note is required before an absence can be excused for illness. Employers are free to count against employees such employer-defined unexcused absences. But employer-imposed conditions on the excusing of absences have no bearing on whether absences are considered excused under the Employment Security Law. This was the holding of *Gaborit* and it applies here. Just as the failure to have a physician's excuse did not by itself render Ms. Gaborit's absence unexcused, the failure to have a FMLA certification does not by itself render the Claimant's non-FMLA absences unexcused.

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John A. Peno

RRA/ss