

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BECKY J WHITMORE-KLOTH**  
Claimant

**APPEAL NO. 08A-UI-06967-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BARR-NUNN TRANSPORTATION INC**  
Employer

**OC: 06/29/08 R: 12  
Claimant: Respondent (2)**

Section 96.5-1-d – Voluntary Quit for Medical Reasons  
Section 96.5-1 – Voluntary Quit  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Barr-Nunn Transportation (employer) appealed a representative's July 25, 2008 decision (reference 01) that concluded Becky Whitmore-Kloth (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 13, 2008. The claimant participated personally and through her husband and co-driver, Dennis Kloth. The employer participated by Tracy Murphy, Human Resources Coordinator.

**ISSUE:**

The issue is whether the claimant is denied unemployment insurance benefits because she voluntarily quit work without good cause attributable to the employer.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on April 23, 2002, as a full-time over-the-road driver. The claimant failed the vision exam at her Department of Transportation required physical on April 9, 2008. The claimant told the professional during the physical that she had memorized the eye chart so she could pass previous eye exams. The claimant wanted to take the exam using the chart but the professional insisted the machine be used for testing.

The claimant could not work as a driver for the employer without passing the physical. She requested and the employer granted Family Medical Leave (FMLA) from April 9 through July 2, 2008. On or about April 10, 2008, the claimant asked the employer to complete a federal government exemption form so she could apply to drive without passing the physical. The employer chose not to complete the paperwork because the claimant had not been truthful in previous Department of Transportation exams.

The employer sent the claimant a letter on June 23, 2008, indicating the claimant needed to return to work on July 2, 2008, or the employer would consider her to have quit work. On July 1, 2008, the claimant telephoned the employer and asked why she received the letter and if she could have a different position. On July 3, 2008, the employer talked to the claimant about applying on line for a different position within the company. The claimant did not feel she was suited to hold any positions that were available and did not apply.

Unbeknownst to the claimant, the employer gave the claimant 30 days additional leave extending to August 1, 2008. The claimant did not call to report her absences from work to the employer any time after the FMLA expired or after the additional leave expired.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant voluntarily quit work without good cause attributable to the employer.

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.

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

871 IAC 24.23(10) provides:

(10) The claimant requested and was granted a leave of absence, such period is deemed to be a period of voluntary unemployment and shall be considered ineligible for benefits for such period.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant's intention to voluntarily leave work was evidenced by her words and actions. She told the employer that she could not work because she could not pass the physical. A claimant is not disqualified for leaving employment if he or she (1) left employment by reason of illness, injury or pregnancy; (2) on the advice of a licensed and practicing physician; (3) and immediately notified the employer or the employer

consented to the absence; (4) and when certified as recovered by a physician, the individual returned to the employer and offered services but the regular or comparable suitable work was not available. Area Residential Care, Inc. v. Iowa Department of Job Service, 323 N.W.2d 257 (Iowa 1982).

The claimant left work due to an eye condition under the advice of her physician. The employer consented to the claimant's leaving and the claimant took FMLA. She left work to take a leave of absence and then could not or did not return. The claimant's failure to return to work after the expiration of her leave constitutes a voluntary quit. The claimant did not provide the employer with certification that she has recovered. The claimant has failed to meet the requirements of the statute and, therefore, is not eligible to receive unemployment insurance benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

**DECISION:**

The representative's July 25, 2008 decision (reference 01) is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,865.00.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw