

**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**

**TAMMY M SURDEZ
PO BOX 96
NEW LIBERTY IA 52765**

**TRANSPORT LEASING CONTRACT INC
c/o FRICK UC EXPRESS
PO BOX 66508
ST LOUIS MO 63166-6508**

**Appeal Number: 05A-UI-08078-S2T
OC: 06/12/05 R: 04
Claimant: Respondent (2)R**

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 - Voluntary Quit
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Transport Leasing Contract (employer) appealed a representative's July 25, 2005 decision (reference 03) that concluded Tammy Surdez (claimant) was discharged for excessive absences but the absences were for illness. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 24, 2005. The claimant participated personally. The employer was represented by Constance Hickerson, Hearings Representative, and participated by Scott Szymanek, Chief Financial Officer. The claimant offered one exhibit, which was marked for identification as Exhibit A. Exhibit A was

received into evidence. The employer offered one exhibit, which was marked for identification as Exhibit One. Exhibit One was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 10, 2005, as a full-time driver payroll clerk. The claimant had a personality conflict with a co-worker. The claimant complained about the co-worker's conduct and the employer reprimanded the co-worker.

On June 9, 2005, the co-worker bothered the claimant. The employer found out and reprimanded the co-worker. After work the claimant saw her physician who changed her medication and told her not to work. On June 10, 2005, the claimant telephoned the employer and reported she was in her car on her cellular telephone. She said she had personal business and would not be at work. The claimant said she might appear for work later and would contact the employer to let them know when or if the claimant could return to work. The claimant did not contact the employer or appear for work on June 10, 2005.

On June 12, 2005, the claimant sent an e-mail to a co-worker stating she would not be in on June 13, 2005. On June 13, 2005, the claimant's physician supplied her with a written excuse from work for June 9, 10 and 13, 2005. The physician verbally told the claimant she could not return to work for the employer. The claimant did not provide the written excuse to the employer. Sometime during this week the claimant applied for unemployment insurance benefits by filing on line. Her effective date for benefits was June 12, 2005. The claimant understood she was to make two job contacts to search for work per week.

Early on June 14, 2005, the claimant e-mailed a co-worker she would not be in that day. On June 15, 2005, the claimant did not appear for work or notify the employer of her absence. The employer sent an e-mail to the claimant asking her to report her absences each day by telephone to claimant's supervisor and gave the telephone number. The employer requested the claimant telephone that day. The claimant did not call but communicated by e-mail with the supervisor. She said that she was heavily medicated and sleeping most of the time. She told the employer that she thought the employer was going to fire her and wondered why the employer was wasting time. The supervisor supplied a toll-free number so the claimant could contact him. The claimant never telephoned the employer.

On June 16, 2005, the claimant did not appear for work or notify the employer of her absence. The employer e-mailed the claimant and outlined what the claimant needed to do to report her absence. The employer warned the claimant that failure to notify the employer of her absences would be considered desertion of her position. The claimant did not respond to the employer.

The claimant reported to Iowa Workforce Development that she was able and available for work and she made two job contacts for the weeks ending June 18 and 25, 2005.

The employer did not hear from the claimant from June 15 to 28, 2005. On June 28, 2005, the employer sent an e-mail and certified letter to the claimant accepting the claimant's resignation. The claimant received the letter. The claimant did not contact the employer. She was released to return to work in July 2005, by her physician.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes she did.

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.

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). 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 injury under the advice of her physician. That advice was not communicated to the employer and, therefore, the employer did not have the opportunity to consent to the claimant's leaving. 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 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 benefits in the amount of \$3,437.00 since filing her claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

The issue of whether the claimant is able and available for work is remanded for consideration.

DECISION:

The representative's July 25, 2005 decision (reference 03) is reversed. The claimant voluntarily left work without good cause attributable to the employer. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant is overpaid benefits in the amount of \$3,437.00. The issue of whether the claimant is able and available for work is remanded for consideration.

bas/pjs