**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**CHRIS R ESSER**
Claimant

**WHELAN SECURITY OF ILLINOIS INC**
Employer

**APPEAL NO. 17A-UI-11545-S1-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 10/15/17**
**Claimant: Respondent (1)**

Section 96.5-1 - Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Whelan Security of Illinois (employer) appealed a representative's November 1, 2017, decision (reference 01) that concluded Chris Esser (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 November 30, 2017. The claimant participated personally. The employer was represented by Karen Stonebraker, Hearings Representative, and participated by Michael Berrier, Site Manager, and Amber Wilcoxson, Human Resources Manager. Exhibit D-1 was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**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 February 10, 2016, as a full-time security officer assigned to work at Transamerica. The claimant signed for receipt of the employer's handbook on February 10, 2016. The handbook describes post abandonment as "stopping work before the end of your shift without authorization from your immediate Whelan supervisor, or leaving a post during or at the end of a tour of duty without being properly relieved". The handbook goes on to say, "Any of the following will constitute job abandonment; abandonment of a post, absence without notifying your supervisor, or failure to return to work after the expiration of vacation, leave of absence, Family and Medical Leave, or when called back after a layoff. If you abandon your job for any of the aforementioned reasons, the Company will assume that you have resigned your position and you will not be eligible for rehire." The employer did not issue the claimant any warnings during his employment. The claimant suffered from migraine headaches infrequently. He was rarely absent from work.

On October 13, 2017, the claimant was transferred to a different building but had not been trained. He sent an e-mail to the site manager about his lack of training. On October 16, 2017, the claimant went to work even though he was suffering from a migraine headache. He opened an e-mail response from the site manager regarding the training issue. The claimant responded

to the e-mail. After doing so he told his supervisor that he felt sick and had to go home. The supervisor said "okay" while she was listening to another employee. She heard the claimant say he was going home but did not hear him say he was sick. On October 17, 2017, the site manager called the claimant on the telephone and terminated him for abandoning his job.

The claimant filed for unemployment insurance benefits with an effective date of October 15, 2017. The employer participated personally at the fact finding interview on October 31, 2017, by Amber Wilcoxson.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work.

Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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.

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 had no intention to voluntarily leave work. The separation must be analyzed as a discharge.

The claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties

> and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence occurred on October 16, 2017. The claimant's absence does not amount to job misconduct because it was properly reported and due to illness. The employer admitted that the claimant told the supervisor he was going home. The claimant never told the employer he was quitting. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The claimant's and the employer's testimony is inconsistent with regard to whether the claimant told the supervisor he was leaving due to his medical condition. The administrative law judge finds the claimant's testimony to be more credible because he was an eye witnesses to the events for which he was terminated. The employer provided no eye witnesses or statements.

**DECISION:**

The representative's November 1, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs