

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WITT, DOUGLAS, W**  
Claimant

**APPEAL NO. 13A-UI-03473-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CLINTON COMMUNITY SCHOOL DIST**  
Employer

**OC: 02/24/13**  
**Claimant: Respondent (2-R)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the March 18, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 24, 2013. Claimant Douglas Witt participated. Jess Terrell, Human Resources Director, represented the employer and presented additional testimony through Brad Jones, Transportation Director. Exhibits One through Four were received into evidence.

**ISSUE:**

Whether Mr. Witt was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Douglas Witt was employed by the Clinton Community School District as a full-time school bus driver from 2001 until February 27, 2013, when he quit in lieu of being discharged from the employment. Mr. Witt's immediate supervisor was Brad Jones, Transportation Director.

On the morning of February 25, 2013, Mr. Witt was transporting elementary students to school. During his morning route, Mr. Witt stopped his bus to address a dispute between two sisters, Natalie and Emily, who were sitting together several rows behind Mr. Witt. Natalie was eight-years old and a second grader. Mr. Witt had previously been advised that Natalie had a medical condition. Emily was five-years old. Mr. Witt believed that Natalie had hit Emily while riding on the bus. Mr. Witt stopped his bus so that he could remove Emily from where she was sitting and move Emily to another seat toward the front of the bus. Mr. Witt walked back to where Natalie and Emily were sitting. Natalie was sitting next to the aisle. Emily was sitting next to the window. The sisters were not fighting at that time Mr. Witt arrived at their seat. Mr. Witt used both hands to grab Natalie by her coat sleeves in her upper arm area next to her shoulders. Mr. Witt forcibly lifted Natalie up out of her seat and forcibly set her down in the seat immediately behind. Mr. Witt had Emily come out of the seat and walk toward the front of the bus. Mr. Witt then used one hand to forcibly lift Natalie out of the seat where he had placed her and moved Natalie back to the seat she had been sharing with Emily. Mr. Witt shoved Natalie

into the seat such that she fell onto her side as she was entering the seat and had to right herself in the seat. Mr. Witt's actions and comments were recorded by cameras located at each end of the passenger compartment. In the course of dealing with Natalie, Mr. Witt yelled at her. Mr. Witt told Natalie that he and she were going to meet with the principal the next morning to discuss the fact that she would not be riding the bus anymore. Mr. Witt lacked authority to bar a student from riding the bus.

The matter came to the attention of Transportation Director Brad Jones when Natalie's father contacted Mr. Jones to ask whether Natalie had been kicked off the bus. At that time, Mr. Jones reviewed the surveillance video and observed Mr. Witt's actions and comments. Mr. Witt's use of force had been in violation of established policies, which allowed use of reasonable physical force only when necessary to prevent a student from harming herself or other students. Mr. Jones brought the matter to the attention of Jess Terrell, Human Resources Director. Mr. Terrell reviewed the video surveillance.

Mr. Terrell interviewed Mr. Witt the next day. A union representative also sat in on the meeting. During the meeting, Mr. Terrell asked questions of Mr. Witt, but did not do so in a manner that indicated he was interrogating Mr. Witt. During the meeting, Mr. Terrell asked Mr. Witt whether he ever yelled at students. Mr. Witt said he did not. Mr. Terrell asked Mr. Witt who had the authority to remove a student from the bus. Mr. Witt answered that the Transportation Director or the Principal had such authority. Mr. Witt acknowledged that he did not have the authority to remove a student from the bus. When questioned about Natalie's father's inquiry about Natalie being barred from the bus, Mr. Witt said he could not recall telling Natalie anything about being barred from the bus. Mr. Witt acknowledged that he had raised his voice while speaking to Natalie. Mr. Witt asserted that he had instructed Natalie three times to move from her seat before he made physical contact with her to remove her from the seat. The audio surveillance record did not support that assertion. Mr. Witt denied that he had ever used force with a student. Mr. Witt acknowledged that he had been aware that Natalie had a medical condition. Mr. Terrell then played the video surveillance multiple times. When asked whether Mr. Witt had physically removed Natalie from her seat, Mr. Witt asserted he had merely "guided her." Mr. Terrell and Mr. Jones observed that Mr. Witt did not demonstrate any remorse regarding his handling of the matter involving Natalie. Mr. Terrell notified Mr. Witt that he was being placed on administrative leave with pay while the employer further considered the matter.

On February 27, Mr. Terrell prepared a written recommendation for submission to Deb Olson, Superintendent. Mr. Terrell recommended that Mr. Witt be discharged from the employment. The recommendation was based on the use of force when interacting with Natalie and based on Mr. Terrell's belief that Mr. Witt had been deceitful during the February 26 interview. Mr. Terrell had Mr. Witt sign the recommendation to be submitted to Ms. Olson. On that same day, Superintendent Olson affirmed the decision to recommend to the School Board that Mr. Witt be discharged from the employment. Mr. Terrell presented Mr. Witt with Ms. Olson's written notice of employment termination/recommendation at a meeting in which Mr. Witt again had the assistance of a union representative. Ms. Olson indicated in writing that at the next School Board meeting, scheduled for March 4, 2013, she would be recommending that Mr. Witt be discharged from the employment. All parties fully expected that the School Board would approve the recommendation.

During the meeting on February 27 to discuss Superintendent Olson's decision to recommend Mr. Witt's discharge, Mr. Witt asked to resign in lieu of being discharged and was given the opportunity. Mr. Witt provided the employer with a one-sentence resignation memo.

## REASONING AND CONCLUSIONS OF LAW:

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

In analyzing quits in lieu of discharge, the administrative law judge considers whether the evidence establishes misconduct that would disqualify the claimant for unemployment insurance benefits.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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.

871 IAC 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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this case, the video surveillance is the most critical piece of evidence. The video surveillance clearly documents an unnecessary and unreasonable use of force by Mr. Witt when interacting with the eight-year-old second grade student. The video surveillance depicts conduct on the part of Mr. Witt that no parent, and no school administrator, wants to see. The video surveillance indicates that Mr. Witt acted out of anger when he addressed the situation concerning sisters Natalie and Emily. Out of anger, Mr. Witt yelled at the young student. Out of anger, Mr. Witt forcibly removed Natalie from her seat by lifting her up out of the seat and dropping her in the seat immediately behind. Out of anger, Mr. Witt grabbed Natalie again and forcibly moved her back into the seat she had shared with Emily. Out of anger, Mr. Witt shoved Natalie into the seat. There was no legitimate reason for Mr. Witt to touch Natalie to remove her from the seat. There was no legitimate reason for Mr. Witt to touch Natalie to move her back into the seat she had shared with Emily. Mr. Witt's conduct was in knowing and intentional violation of the School District's policy against physical punishment. When Mr. Terrell questioned Mr. Witt, Mr. Witt was indeed less than truthful in answering Mr. Terrell's questions. Mr. Terrell in no manner interrogated Mr. Witt. Mr. Witt's less than forthcoming approach to the matter carried over into the appeal hearing, when Mr. Witt provided testimony that was clearly and soundly refuted by the video surveillance record.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Witt quit in lieu of being discharged for misconduct. Accordingly, Mr. Witt is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

**DECISION:**

The Agency representative's March 18, 2013, reference 01, decision is reversed. The claimant quit in lieu of being discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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