

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LORETTA VANWAGENEN**

Claimant

**APPEAL NO: 18A-UI-06198-JC-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAUKEE COMMUNITY SCHOOL DISTRICT**

Employer

**OC: 05/28/17**

**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant, Loretta Vanwagenen, filed an appeal to the May 30, 2018 (reference 09) initial decision that denied benefits based upon her separation with this employer. After proper notice, a telephone hearing was scheduled for 10:00 a.m. on June 21, 2018. The claimant, through counsel, requested postponement at the scheduled hearing time. A second hearing was scheduled and conducted by telephone on July 5, 2018. The claimant participated personally, and with attorney Randy P. Schueller. Roxy Livermore, human resources manager, testified for the employer. Employer Exhibits 1-5 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a special education program associate and was separated from employment on May 15, 2018, when she was discharged (Employer Exhibit 1).

The claimant's primary job duties included being assigned to provide one-on-one support to a special education student in the high school. The claimant acknowledged she would sometimes interact with other students in an attempt to motivate and encourage her student to engage.

When the claimant was hired, she attended a half day orientation which included segments on issues related to mandatory reporting child abuse, blood borne pathogens, and various human resources topics. She also signed off receipt for the claimant handbook and rules. Amongst the employer rules and procedures provided to the claimant was Policy 0413.9, which notifies staff that they are role models for students and reminds them to conduct themselves "in a manner appropriate to the educational environment" (Employer Exhibit 2). A second policy regarding

employee conduct and appearance notifies employees they are not to use their relationship with students for any kind of advantage and discourages gifts that might impair or appear to impair professional judgment” (Employer Exhibit 3). The claimant denied attending training or receiving any training on topics related to professionalism, boundaries, or access to the handbook. The claimant also denied attending orientation before beginning her employment.

Prior to separation, the claimant was counseled on April 26, 2018 by her manager for sleeping on the job. The claimant attributed the sleeping to new medication. The claimant was also issued a written warning on May 8, 2018, for sleeping on the job again (Employer Exhibit 5). The claimant refused to sign the warning (Employer Exhibit 5) which stated in part, “be advised future violations or similar performance issues may result in more severe disciplinary action, up to and including termination”.

On May 10, 2018, the claimant met with Ms. Livermore about the May 8, 2018, warning from her manager. The claimant had refused to sign it and was upset. During this conversation, the issue of a male student came up unrelated to the sleeping on the job warning. The claimant informed Ms. Livermore that a 10th grade male student had previously tried to hug her. In response, the claimant was informed she should refrain from hugging students and that an appropriate response to a student trying to hug her would be “throw a handshake out”. During this conversation, the issue of setting boundaries with students was also discussed. Ms. Livermore documented the meeting contemporaneously with notes. The claimant denied having any conversation about hugs or boundaries or handshakes with Ms. Livermore.

On May 11, 2018, while in a classroom, a male student went up to the claimant and hugged her, putting his arms around her neck. The claimant responded by putting both of her arms around the student in return. This was witnessed by the teacher in the classroom, who reported it to the employer (Employer Exhibit 4). There was no evidence presented that this student was in a state of emotion or upset when he hugged the claimant. The claimant did not know this student or his family before joining employment. It was unclear from the evidence presented how a discussion about both the claimant and student both experiencing a death in the family arose, given that the claimant was not assigned to this student. The undisputed evidence presented is the student also gave the claimant a craft style bracelet. It was not a silicone/rubber type bracelet promoting a social or health issue, which are common for various diseases or causes. The claimant in return went to the store and purchased a bracelet to give back to him. She explained she gave a bracelet to him because she was “just being kind.”

When discussing the final incident with human resources, the claimant’s manager also indicated the claimant had previously requested hugs from staff and students (Employer Exhibit 4). The claimant denied asking students for hugs but acknowledged she had previously asked her manager for a hug at work. She was subsequently discharged (Employer Exhibit 1). The claimant chose not to contest her recommendation for discharge, stating she “didn’t want to fight.”

#### **REASONINGS AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

This case rests on the credibility of the parties. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002).

Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as well as the claimant's demeanor and conduct at the hearing, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer's hearsay evidence to be more credible than the claimant's evidence. The employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the Unemployment Insurance law.

In this case, the claimant worked with high school students and was in a position of authority. As such, she could not logically be "friends" with students due to the imbalance of power. The employer has policies that remind employees that they are to conduct themselves professionally with students in the context of the educational environment (Employer Exhibit 2) and discourages gifts or actions that may impair judgment or "appear to impair" judgment (Employer Exhibit 3). Arguably, this would also include limiting unnecessary physical contact between adult staff and minor students as well.

The undisputed evidence is the claimant and a male high student to whom she was not assigned, had engaged in personal discussions (about their families) and were observed hugging in a classroom on May 11, 2018. The student initiated the hug, wrapping his arms around the claimant's neck, and she responded by putting her arms around him. There was no evidence that this physical display of affection was in response to an unexpected emotional situation, such as the claimant trying to comfort a student in a time of being upset, which may justify an impulsive attempt to be empathetic. Rather, the claimant voluntarily chose to hug this student back. The claimant could have chosen to keep her arms at her side, pull away, or acknowledge a handshake would be more appropriate between the parties. This display of affection was after the claimant had previously received a bracelet as a gift and chose to purchase a bracelet for the student in response. The bracelets in question were not part of generic social or health issue (as are common) but rather hand selected for each other. At a minimum, the claimant's exchanging of a personal gift and accepting a gift, (albeit small ones), would violate the employer's reasonable policy which direct staff to avoid conduct which may impair or *appear to impair professional judgment* (Employer Exhibit 3). To an outside student or staff member, this could reasonably appear to reflect favoritism or more than a professional student-adult staff member relationship. In addition, these policies are in place for the safety and welfare of students, as well as potential liability for the employer.

In light of the claimant's denial of any training, orientation, or receipt of rules, the administrative law judge finds the employer's evidence about the claimant's training to be more credible, and concludes that the claimant knew or should have known her conduct was contrary to employer rules and expectations. This training, coupled with the conversation with Ms. Livermore the day on May 10, 2018, in which she specifically discussed not hugging students, and was reminded to establish boundaries cannot be ignored. The claimant knew or should have known after

May 10, 2018, (regardless of any prior warning for sleeping on the job) that her job could be in jeopardy if she engaged in unprofessional conduct with students. Her actions on May 11, 2018 with the male student were contrary to the best interests and reasonable expectations of the employer. For these reasons, the administrative law judge concludes the claimant was discharged for disqualifying job related misconduct. Accordingly, benefits are denied.

**DECISION:**

The May 30, 2018, (reference 09) initial decision is affirmed. The claimant was discharged for disqualifying job related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

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