

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALAN W HUPP**  
Claimant

**APPEAL NO. 09A-UI-01516-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**JENNIE EDMUNDSON**  
**MEMORIAL HOSPITAL**  
Employer

**OC: 12/07/08 R: 01**  
**Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(8) – Current Act Requirement

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the January 29, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 19, 2009. Claimant Alan Hupp participated. Roxanna McDonald, Team Leader, represented the employer and presented additional testimony through Kathy Heuwinkel, Benefits Specialist. Exhibits One and Two were received into evidence.

**ISSUE:**

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

Whether the claimant's discharge was based on a "current act."

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Alan Hupp was employed by Jennie Edmundson Memorial Hospital as a full-time Cleaning Tech from April 7, 2008 until December 11, 2008, when Dave Paul, Systems Leader, and Roxanna McDonald, Team Leader, discharged him in connection with an incident that occurred on December 3, 2008. Ms. McDonald was Mr. Hupp's immediate supervisor. On December 3, Mr. Hupp, Ms. McDonald, and other staff were on an elevator together at the end of the shift. Richard Evans was one of the other employees on the elevator. Without warning, Mr. Hupp kicked Mr. Evans in the shin. Ms. McDonald asked Mr. Hupp what he was doing. Mr. Hupp did not respond. Within a day, Ms. McDonald interviewed Mr. Evans, who indicated that the conduct was as much a surprise to him as it was to Ms. McDonald. Mr. Evans is no longer with the employer and did not testify. Ms. McDonald's immediate supervisor was Dave Paul, Systems Leader. Mr. Paul was out-of-town on business at the time of the December 3 incident and did not return to the workplace until December 11. On December 11, Ms. McDonald spoke with Mr. Paul. The pair concluded that Mr. Hupp's conduct violated the employer's policy against "deliberate abuse of patient, employee or guest" and that the conduct subjected

Mr. Hupp to immediate discharge from the employment. Mr. Paul and Ms. McDonald summoned Mr. Hupp to a meeting and notified him of the discharge and the reason for the discharge. This was the first time the employer notified Mr. Hupp that his December 3 conduct subjected him to possible discharge, or actual discharge, from the employment.

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

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).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The evidence in the record fails to establish a "current act" of misconduct. See 871 IAC 24.32(8). The evidence indicates that the conduct that prompted the discharge occurred on December 3, 2008, but that the employer did not notify Mr. Hupp until December 11 that the conduct subjected him to possible discharge, or actual discharge, from the employment. The evidence indicates that the employer's eight-day delay in further addressing the matter with Mr. Hupp was unreasonable. Mr. Paul's absence from the workplace did not prevent Ms. McDonald or another employer representative from notifying Mr. Hupp that the conduct subjected him to possible discharge, or actual discharge, from the employment. The evidence fails to establish that it was necessary for Ms. McDonald to wait until she could have a face-to-face meeting with Mr. Paul to discuss the matter with Mr. Paul or another person with authority to discharge. Because the evidence indicates that the conduct from December 3 was no longer a current act of misconduct on December 11, the administrative law judge concludes that Mr. Hupp was discharged for no disqualifying reason. Accordingly, Mr. Hupp is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Hupp. Because there was no current act, the administrative law judge need not address whether the conduct in question constituted misconduct.

**DECISION:**

The Agency representative's January 29, 2009, reference 01, decision is affirmed. The evidence fails to establish a current act of misconduct. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/kjw