

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALANA J JUNG**  
Claimant

**APPEAL NO. 07A-UI-10455-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OLD NAVY LLC**  
Employer

**OC: 05/20/07 R: 02**  
**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:**

Old Navy, L.L.C., filed a timely appeal from the November 1, 2007, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on November 29, 2007. Claimant Alana Jung participated. Cris Scheibe of TALX UC eXpress represented the employer and presented testimony through Ryan Witte. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Ten into evidence.

**ISSUES:**

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

Whether the claimant's discharge was prompted by a "current act" of misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Alana Jung was employed by Old Navy as a part-time "customer experience associate/logistics associate" from August 20, 2006 until September 20, 2007, when Store Manager Ryan Witte discharged her. Ms. Jung worked at the employer's store at the Merle Hay Mall.

The final incident that prompted the discharge occurred on September 20, 2007, when Ms. Jung was 15 to 20 minutes tardy. Ms. Jung was late because the bus she rode to work was delayed due to a traffic accident. The bus was not involved in the accident and Ms. Jung did not witness the accident. Law enforcement officers were at the scene and halted traffic several minutes before letting the bus through. Had the bus not been delayed due to the accident, Ms. Jung would have arrived at work on time. When Ms. Jung arrived at work, Store Manager Ryan Witte summoned Ms. Jung to a meeting. Ms. Jung attempted to explain the situation with the bus, but Mr. Witte was more interested in reviewing Ms. Jung's attendance history. Ms. Jung's most recent prior unexcused absence had occurred on August 17, when Ms. Jung notified the employer immediately before her start time that she could not come to work because she lacked

a ride. Ms. Jung had been tardy on February 8, 13, 14, and 21, 2007. The employer erroneously recorded Ms. Jung as a “no-call, no-show” on February 21, 2007, after another employee misrepresented to the employer that Ms. Jung had agreed to pick up a shift. Ms. Jung has also been tardy on November 28, 2006. The employer was unprepared for the hearing, despite receiving adequate notice of the hearing, and was not able to provide evidence to establish additional unexcused absences.

Though Ms. Jung’s discharge was prompted by the attendance issues, Mr. Witte also considered non-attendance-related matters in making the decision to discharge her. The most recent non-attendance-related incident had occurred on August 30, when Ms. Jung was observed using her cell phone on the sales floor. The employer’s policy prohibited employees from having their cell phones on the sales floor.

### **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).

In order for a claimant’s absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant’s *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer’s policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The greater weight of the evidence establishes that the final incident that prompted the discharge, the tardiness on September 20, 2007, was attributable to the unforeseeable circumstances that were beyond Ms. Jung’s control. The evidence indicates that Ms. Jung got herself on the appropriate bus at the appropriate time. Ms. Jung had no control over the traffic accident that stopped traffic, had no control over the law enforcement officers who delayed traffic, and had no control over the bus on which she was riding. In other words, Ms. Jung’s tardiness on September 20 was not the result of a deliberate, intentional, or culpable act. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). The evidence persuades that administrative law judge that the final incident that prompted the discharge was an excused absence under the applicable law. Accordingly, the evidence fails to establish a “current act” of misconduct. See 871 IAC 24.32(8). The next most recent event that factored into the discharge occurred on August 30, was addressed by the employer on that day, and no longer constituted a “current act” on September 20.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Jung was discharged for no disqualifying reason. Accordingly, Ms. Jung is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Jung.

**DECISION:**

The claims representative's November 1, 2007, reference 03, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she 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

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