

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**KELLY WILMOT  
305 N DEARBORN ST  
MAQUOKETA IA 52060-2428**

**CAR-FRESHNER CORPORATION  
ATTN CHRIS WALTERS PERSONNEL  
MGR  
PO BOX 23  
DEWITT IA 52742**

**Appeal Number: 06A-UI-06994-JTT  
OC: 06/04/06 R: 04  
Claimant: Appellant (2)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.6(2) – Timeliness of Appeal  
Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Kelly Wilmot filed an appeal from the June 26, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 20, 2006. Ms. Wilmot participated. Personnel Manager Chris Walters represented the employer. Production Coordinator Sue Patchin was available to testify on behalf of the employer, but did not provide any testimony. The administrative law judge took official notice of the Agency's administrative file. Department Exhibits D-1 and D-2 were received into evidence. Employer's Exhibits One, Two and Three were received into evidence.

ISSUES:

1. Whether the claimant's appeal was timely. It was.
2. Whether the claimant was discharged for a current act of misconduct that disqualifies her for benefits. She was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The June 26, 2006, reference 01, decision was mailed to Kelly Wilmot's last-known address of record on June 26, 2006. Ms. Wilmot received the decision on June 29, 2006. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 6, 2006. On July 6, Ms. Wilmot went to her local Workforce Development Center and obtained an appeal form. Ms. Wilmot then went home, completed the appeal form and placed in a mailbox at the Maquoketa post office at approximately 3:00 p.m. The United States Postal Service did not postmark Ms. Wilmot's appeal at Maquoketa. Instead, the Postal Service forwarded the appeal to a processing center in Cedar Rapids, which postmarked the appeal on July 7, 2006, one day after the deadline for appeal.

Kelly Wilmot was employed by Car-Freshner Corporation as a full-time machine operator from June 14, 2004 until June 6, 2006, when the management team discharged her for exceeding allowable attendance points under the employer's attendance policy.

The final absence that prompted the discharge occurred on May 31, 2006, when Ms. Wilmot notified the employer at 5:40 a.m. that she would be absent for her shift that started at 6:00 a.m. Ms. Wilmot notified the employer that both she and her daughter had gotten into poison ivy. The employer's attendance policy required Ms. Wilmot to notify the employer between 5:30 and 6:00 a.m. if she needed to be absent.

REASONING AND CONCLUSIONS OF LAW:

The first question is whether Ms. Wilmot's appeal should be deemed timely. The administrative law judge concludes it should.

Iowa Code section 96.6-2 provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit

pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten-day deadline for appeal begins to run on the date Workforce Development mails the decision to the parties. The "decision date" found in the upper right-hand portion of the Agency representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. Gaskins v. Unempl. Comp. Bd. of Rev., 429 A.2d 138 (Pa. Comm. 1981); Johnson v. Board of Adjustment, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

An appeal submitted by mail is deemed filed on the date it is mailed as shown by the postmark or in the absence of a postmark the postage meter mark of the envelope in which it was received, or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion. 871 IAC 24.35(1)(a). The submission of an appeal not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States Postal Service. 871 IAC 24.35(2).

The evidence in the record establishes that Ms. Wilmot's one-day delay in filing her appeal was attributable to delay on the part of the United States Postal Service. Based on the evidence in the record and application of the appropriate law, the administrative law judge deems the appeal timely.

The next question is whether the evidence in the record establishes that Ms. Wilmot was discharged for misconduct in connection with the employment. It does not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 order for Ms. Wilmot's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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 evidence in the record establishes that the final absence on May 31 that prompted the discharge was for illness properly reported to the employer. Accordingly, the evidence in the record fails to establish a "current act" that might serve as a basis for disqualifying Ms. Wilmot for unemployment insurance benefits. See 871 IAC 24.32(8). Because the final absence that

prompted the discharge was an excused absence under the applicable law, the administrative law judge need not consider whether prior absences were excused, unexcused or excessive.

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

**DECISION:**

The claimant's appeal was timely. The Agency representative's decision dated June 26, 2006, reference 01, is reversed. 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.

jt/cs