

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY L KESSLER SR
Claimant

APPEAL NO. 06A-UI-10245-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FERGUSON ENTERPRISES INC
Employer

OC: 09/10/06 R: 03
Claimant: Appellant (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jeffrey Kessler filed an appeal from a representative's decision dated October 16, 2006, reference 05, which denied benefits based on his separation from Ferguson Enterprises, Inc. After due notice was issued, a hearing was held by telephone on November 6, 2006. Mr. Kessler participated personally. The employer participated by Debra Damage, Human Resources Administrator, and Peggy Surley, Receiving Team Leader. Exhibits One through Five were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Mr. Kessler was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Kessler was employed by Ferguson Enterprises, Inc. from July 18, 2005 until September 11, 2006 as a full-time receiving clerk. He was discharged after two incidents of inappropriate behavior at work.

On August 4, 2006, Mr. Kessler's team leader, Peggy Surley, questioned him as to where he had been after she observed that he had not been at his work station. He responded that he had been to the "fucking bathroom." He continued to explain his whereabouts and his intentions and used the term "fucking" on at least three additional occasions during the explanation. As a result of his actions, he received a written warning on August 9, 2006. The warning indicated that further instances of unprofessional conduct would result in immediate termination of employment.

The decision to discharge Mr. Kessler was based on his conduct of September 8, 2006. Another employee, Michael Brown, asked Mr. Kessler to move pallets because he did not have room to drop additional pallets. Mr. Kessler indicated that they needed to be taped and Mr. Brown took the tape and walked away with the intent of taping product. As he was walking away, Mr. Brown suggested that the others "step it up." Mr. Kessler indicated that, since there

was only one shrink-wrap machine, Mr. Brown either had to tape the pallets himself or wait until he got to them. Mr. Brown indicated he did not care if they were shrink-wrapped or not, he wanted them out of his way so he could keep the line going. He then stated that people should stop being lazy. Mr. Kessler took offense because he felt Mr. Brown was calling him lazy. He told Mr. Brown that he carried his weight at work and not to tell him how to move. Mr. Kessler said "do you got that boy?" Mr. Brown, who is African-American, took offense at the reference to "boy" and confronted Mr. Kessler. At that point, Peggy Surley intervened and directed both parties back to work.

Mr. Kessler continued to be confrontational after Ms. Surley directed the parties back to work. He told Mr. Brown that he had started it and that he was going to "release all four dogs" on Mr. Brown. As he made the statement, he had his fist in the air. Ms. Surley again intervened and told both parties to get back to work. When Mr. Kessler rammed a pallet jack into a pallet, Mr. Brown thought he intended to hit him with it. He told Mr. Kessler that they would have issues on the floor if he hit him with the pallet. Mr. Kessler stated "all right, boy, I'll see you later." The employer considered Mr. Kessler's conduct to be threatening towards Mr. Brown and discharged him because it was a second occurrence of inappropriate conduct at work. Mr. Brown received a written warning for his part in the incident.

REASONING AND CONCLUSIONS OF LAW:

Mr. Kessler was discharged by Ferguson Enterprises, Inc. as a result of two incidents at work in which he was inappropriate towards a coworker. He directed profanity towards his lead person on August 4, 2006 when asked of his whereabouts. There was no name-calling involved, just the repeated use of the word "fucking" in explaining where he had been. It was not unreasonable for the lead worker to ask him where he had been. Mr. Kessler's repeated use of profanity in response to a legitimate question evinced a substantial disregard of the standards of behavior the employer had the right to expect. Mr. Kessler was clearly on notice after the warning of August 4, 2006 that further incidents of inappropriate behavior would result in his discharge.

The decision to discharge was prompted by the fact that Mr. Kessler was again inappropriate on September 8. Mr. Brown was out of line in addressing his concerns about the work pace to coworkers rather than to a team leader or supervisor. Mr. Kessler was out of line in responding to Mr. Brown rather than ignoring him or taking the matter to a supervisor. Both Mr. Brown and Mr. Kessler were at fault in the argument that occurred on that date. However, Mr. Kessler was the only one who made a threat of physical harm. His statement that he was going to "release all four dogs," accompanied by an upraised fist, and his statement that he would see Mr. Brown later were reasonably construed as a threat.

The employer had the right to maintain a workplace free from violence and the threat of violence. Mr. Kessler's conduct of September 8 was contrary to the employer's interest in maintaining a safe work environment. His conduct was contrary to the standards he knew the employer expected of him by virtue of the warning he received on August 4. For the reasons cited herein, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

DECISION:

The representative's decision dated October 16, 2006, reference 05, is hereby affirmed. Mr. Kessler was discharged for misconduct in connection with his employment. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs