

**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**

**JAMES E LAFON
2718 GLOVER AVE
DES MOINES IA 50315**

**CHARLES GABUS FORD INC
4545 MERLE HAY RD
DES MOINES IA 50310**

**Appeal Number: 05A-UI-11690-H
OC: 10-23-05 R: 02
Claimant: Respondent (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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge
Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

Charles Gabus Ford Inc. (Gabus) filed an appeal from a decision dated November 14, 2005, reference 01. The decision allowed benefits to James Lafon. After due notice was issued, a hearing was held in Des Moines, Iowa, on November 30, 2005. The claimant was paged in the main waiting area at 8:29 a.m. and again at 8:42 a.m. He was not present and did not participate. The employer participated by Service Manager Lowell Dudzinski.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: James Lafon was employed by Gabus from July 14, 2003 until October 24, 2005. He was a full-time service technician working 9 a.m. until 5:30 p.m.

The claimant received several verbal warnings from Service Manager Lowell Dudzinski and his immediate supervisor, regarding his tardiness. He would be late to work three or four times per week. When no improvement was seen he was issued a written warning on June 30, 2005 which notified him that his next tardy would result in another written warning, the next tardy would result in another written warning and three-day suspension, and after that discharge would result.

Mr. Lafon received a second written warning on July 8, 2005 for being three hours late and another one on August 3, 2005 for being absent and not reporting his absence prior to the start of his shift. He was also given a three-day suspension at that time.

The claimant was tardy on September 26 for five minutes and October 1, 2005 for ten minutes. The employer did not "catch" these tardies and no disciplinary action was issued at that time. However, on October 24, 2005 the claimant was two and one-half hours late for work. He called immediately before his shift was to start and to say he had a flat tire. He was discharged at that time for another unexcused absence.

James Lafon has received unemployment benefits since filing a claim with an effective date of October 23, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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, (7) provide:

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).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant had been warned by the employer that his tardiness was unacceptable. At his first written warning the progressive discipline was spelled out specifically and he was notified his job was in jeopardy if the attendance did not improve. In spite of the warning the claimant continued to be tardy substantial periods of time for the next few months and the progressive discipline followed as laid out in the first warning. The final incident of tardiness was due to a flat tire and this is a transportation issue. Matters of purely personal consideration such as transportation are not considered excused absences. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant was discharged for excessive unexcused absenteeism and under the provisions of the above administrative code section, this is misconduct and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which he is not entitled and these must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of November 14, 2005, reference 01, is reversed. James Lafon is disqualified and benefits are withheld until he has requalified by earning ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,745.00.

tjc/tjc