

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JIMMY PHILLIPS
Claimant

APPEAL NO: 06A-UI-08392-ET

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

FERGUSON ENTERPRISES INC
Employer

**OC: 07-02-06 R: 03
Claimant: Respondent (2)**

Section 96 5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 8, 2006, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 6, 2006. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Deb Dange, Human Resources Administrator, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time receiving associate for Ferguson Enterprises from May 2, 2005 to July 1, 2005. He was discharged from employment due to a final incident of absenteeism that occurred on June 27, 2005. The employer's policy states that three unexcused absences, or eight total absences, within a rolling 12-month period will constitute a written counseling and final warning advising the associate of the development of significant attendance concerns (Employer's Exhibit One). On June 3, 2005, the claimant received a verbal warning about his attendance. On June 16, 2005, the claimant received a final written warning for attendance after he missed all or part of ten days in the previous ten weeks, including two no-call/no-shows (Employer's Exhibit One). On June 27, 2005, the claimant was five minutes late for pre-shift stretching and when he did arrive he did not have the "appropriate Ferguson attire." He was sent home to change and did not return until nearly an hour after the start of his shift. Later that night the claimant told his supervisor he had to go home and his supervisor told him to talk to another supervisor. The claimant failed to talk to that supervisor but did tell another employee he was leaving because his daughter needed medication that was left in his vehicle. The claimant left on several other occasions and because he had received a

final written warning the employer terminated his employment for excessive absenteeism. There is no evidence that these absences were related to illness.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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(7) provides:

(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are withheld.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The August 8, 2006, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,356.25.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/cs/cs