

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RAY L MONK**  
Claimant

**APPEAL NO. 12A-UI-06715-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FERGUSON ENTERPRISES INC**  
Employer

**OC: 05/13/12**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a - Discharge

**STATEMENT OF THE CASE:**

The employer, Ferguson Enterprises, filed an appeal from a decision dated June 1, 2012, reference 01. The decision allowed benefits to the claimant, Ray Monk. After due notice was issued, a hearing was held by telephone conference call on July 2, 2012. The claimant participated on his own behalf. The employer participated by Human Resources Administrator Debra Damge and Second Shift Floor Supervisor Darrin Carlson.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Ray Monk was employed by Ferguson from April 4, 2011 until May 10, 2012 as a full-time order picker. He had received warnings for absenteeism and safety violations, and his performance evaluation in April 2012 was substandard in many areas. He was given 30 days to improve his performance in areas ranging from attendance to safety to efficiency.

On May 10, 2012, the claimant was seen sitting on his fork truck using his cell phone. The company has a strict policy prohibiting the possession and the use of cell phones on duty on the work floor. Cell phones are to be left in the locker except on official break times. Mr. Monk was seen by Second Shift Floor Supervisor Darrin Carlson using his cell phone and was told to put it in his locker and go back to work. The matter was referred to higher management, including Human Resources Administrator Debra Damge. The decision was made to discharge him and the employer notified him by phone on May 10, 2012.

Ray Monk has received unemployment benefits since filing a claim with an effective date of May 13, 2012.

## 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 claimant had been advised his job was in jeopardy as a result of his absenteeism and poor work performance. The employer had given him 30 days to improve many aspects of his work when the evaluation as given in April 2012. In less than 30 days Mr. Monk was using his personal cell phone while on duty, on the work floor and on his lift truck. He had no good reason to provide for using the cell phone when it was to have been in his locker during work time. There were two rule violations, having the cell phone in his pocket during work hours and using it.

The claimant violated known rules in spite of prior warnings. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

**DECISION:**

The representative's decision of June 1, 2012, reference 01, is reversed. Ray Monk is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

---

Bonny G. Hendricksmeier  
Administrative Law Judge

---

Decision Dated and Mailed

bgh/css