

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD J LEESCH
Claimant

APPEAL NO. 10A-UI-08972-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMBRANDT ENTERPRISES INC
Employer

OC: 05/23/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Rembrandt Enterprises, filed an appeal from a decision dated June 18, 2010, reference 01. The decision allowed benefits to the claimant, Ronald Leesch. After due notice was issued a hearing was held by telephone conference call on August 10, 2010. The claimant participated on his own behalf. The employer participated by Human Resources Manager Darla Thompson and Site Manager Mike Niess.

ISSUE:

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

FINDINGS OF FACT:

Ronald Leesch was employed by Rembrandt from November 29, 2004 until May 26, 2010 as a full-time grounds and fertilizer worker. He received a copy of the employee handbook at the time of hire and an updated one July 29, 2009. The updated handbook contained a new rule which specifically prohibited bringing personal cell phones or camera phones into the work area, unless authorized in advance by a supervisor or manager. The policy further stated it was grounds for discharge if this rule was violated. The employer was concerned about “trade secrets” if cells phones or cameras were allowed.

Mr. Leesch was discovered by Site Manage Mike Niess on May 26, 2010, with his personal cell phone in his possession while he was in the layer barn. The claimant stated he had been carrying his personal cell phone every Wednesday for the past three months because on that day there were not enough walk-talkies available for every worker to have one. In that three-month period he never requested permission from his supervisor or manager to do this, but took it upon himself to carry his cell phone even though he knew it was prohibited.

The claimant was interviewed by Human Resources Manager Darla Thompson and Mr. Niess and he admitted to using the cell phone. He was discharged at that time.

Ronald Leesch has received unemployment benefits since filing a claim with an effective date of May 23, 2010.

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 was aware of the policy prohibiting carrying personal cell phones in the work area. This was not an isolated incident where he forgot he had the cell phone in his pocket and inadvertently brought it into the barn with him one day. The violation had been going on for over three months on a weekly basis because Mr. Leesch did not bother to get permission from a supervisor or manager to carry the cell phone when there were not enough walkie-talkies for every worker. He could have done this at any time in those three months and did not provide any explanation for his failure to do so. 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 18, 2010, reference 01, is reversed. Ronald Leesch is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, 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/pjs