

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**FUZZY P WOOD**  
Claimant

**APPEAL NO. 11A-UI-13748-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACH FOOD CO INC**  
Employer

**OC: 09/18/11  
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Fuzzy Wood filed a timely appeal from the October 5, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 10, 2011. Mr. Wood participated. William Nelson represented the employer.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Fuzzy Wood as employed by ACH Food Company as a full “sanitor” until September 15, 2011, when William Nelson, Human Resources and Security Manager, discharged him from the employment. Mr. Wood had started with the company in 1996.

The final incident that prompted the discharge occurred on September 14, 2011. On that day, Mr. Wood used his cell phone on break and then forgot he still had it on his person when he returned to his duties. The employer’s work rules prohibited cell phones on the production floor. Mr. Wood later realized he had his cell phone on his person and, rather than returning his phone to his locker, set the phone on top of a fork truck to avoid damaging it while he performed his duties. Another employee took the phone from where Mr. Wood had left it and used the phone without Mr. Wood’s knowledge to call in a bomb threat concerning the production facility.

In making the decision to end Mr. Wood’s employment, the employer considered prior incidents and reprimands. In March 2011, the employer reprimanded Mr. Wood because the production machine to which he was assigned produced product that the employer could not use because it was underweight. The machine had been producing product outside the acceptable weight when Mr. Wood took over operation of the machine. After Mr. Wood had corrected the issue with the product weight, he notified a line foreman and room foreman that he needed to use the restroom and that the machine had been going outside of the acceptable weight. Mr. Wood expected the foremen would do something to address the product weight issue during his

absence. Mr. Wood was gone for 15-17 minutes. It was not unusual for operators to set a machine and then step away to use the restroom or do something else. When Mr. Wood returned he learned that the foreman had done nothing to address the production issue and the machine was again producing unacceptable product. The employer suspended Mr. Wood in connection with the incident.

In making the decision to discharge Mr. Wood from the employment, the employer considered a doctor's appointment Mr. Wood had missed in August 2010. The appointment had been set as a follow up to a worker's compensation matter. Mr. Wood had forgotten he had the appointment.

In making the decision to discharge Mr. Wood from the employment, the employer considered an instance of tardiness in June 2010, when Mr. Wood was late to work for personal reasons.

### **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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board,

616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence fails to establish that Mr. Wood intentionally took his cell phone onto the production floor on September 14. The evidence indicates instead that Mr. Wood was negligent in failing to leave the phone in his locker after using the phone during a break. The evidence indicates that Mr. Wood was then negligent in failing to return his phone to his locker or to alert the employer that he had brought the phone onto the production floor. Mr. Wood's negligence created an opportunity for another employee to disrupt production with a bogus bomb threat. The weight of the evidence establishes that Mr. Wood was negligent in March 2011 when he stepped away from his assigned machine at a time when he knew the machine was not operating properly. The evidence fails to establish an exigent circumstances that required Mr. Wood to step away from the machine for an extended period to use the restroom prior to making certain that the machine was operating properly. Given Mr. Wood's expectation that the room foreman would do something to address the problem during his absence, the evidence indicates Mr. Wood would have needed to delay his restroom break only briefly to make sure the problem with the machine was addressed and the machine was operating correctly. The weight of the evidence establishes an instance of unexcused tardiness in June 2010 and an additional unexcused absence in August 2010, but no attendance matters thereafter. The attendance matters were wholly unrelated to the final two issues that led to Mr. Wood's discharge.

The weight of the evidence establishes that the discharge was based primarily on the September 14, 2011 cell phone incident. The evidence indicates that the employer reacted strongly to that incident because of another employee's misuse of the phone to make a bogus bomb threat. While Mr. Wood was negligent in possessing his phone on the production floor that day, he cannot be held responsible for the criminal act of the coworker who misused his phone without his knowledge. The evidence establishes but two incidents of ordinary negligence that factored into the discharge. The earlier incident was six months prior to the final incident. The evidence fails to establish a *pattern* of negligence sufficient to indicate a willful and wanton disregard of the employer's interests. For that reason, the administrative law judge concludes that Mr. Wood was discharged for no disqualifying reason. Accordingly, Mr. Wood is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Wood.

**DECISION:**

The Agency representative's October 5, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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