

DISMISSING AN EMPLOYEE FOR MISCONDUCT

Dismissal for misconduct is one of the more commonly misunderstood aspects of the unemployment insurance program.

Case law defines misconduct as a substantial or intentional disregard of the employer's interests. The deliberate nature of the act is a crucial component of the definition. For a definition of simple AND gross misconduct, please refer to page 3 of this document **"MISCONDUCT" AS IT RELATES TO DISQUALIFICATION FOR UNEMPLOYMENT BENEFITS**

Case law exempts from the discharge of misconduct definition "inefficiency, unsatisfactory conduct, failure in performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion."

Some examples that **DO NOT** fall under the definition of misconduct include:

- Ineptitude
- An argument between employer and employee
- A difference in work habits
- An unintentional error
- A temporary lapse of good judgment
- A single instance (except in extreme cases such as arson)

For examples of what falls under misconduct, please refer to page 3 of this document **"MISCONDUCT" AS IT RELATES TO DISQUALIFICATION FOR UNEMPLOYMENT BENEFITS**

Burden of proof is placed on the employer to prove two things:

- Deliberate disregard of the employer interests, and
- At least one prior warning for misconduct was issued

Warnings are Important

At least one warning must usually be issued for the specific behavior that eventually leads to a discharge. A warning for something else does not qualify.

If an employee receives a warning for lateness, but then is discharged for neglecting to follow safety standards, misconduct would probably not be found.

The initial warning for lateness is not the same as the actual reason for discharge (safety violations).

Employers who keep records of warnings given to employees usually prevail in supporting the discharge for misconduct.

To meet this burden of proof, complete and accurate record keeping is essential.

Ideally, a warning should:

- **Be in writing, dated and signed by both the employer and employee.** (*In case of a dispute over the issuance of a warning, the employee's signature on the warning constitutes clear evidence that he was indeed given a warning*).
- Warnings should clearly list the unacceptable behavior(s).
- Cite specific recommendations on how to improve, and specific standards to be achieved.

Incomplete or vague records seldom contain these essential items and will not generally meet the burden of proof requirement.

Finally, this proof must be provided to the Adjudication Unit or presented at an Administrative Law Judge appeal hearing.

Failure to substantiate an allegation of misconduct with evidence or credible testimony will result in a determination in favor of the claimant.

An employer must participate in the initial fact-finding process, as well as any appeals, or evidence will be lacking and the unemployment claim will be allowed.

“MISCONDUCT” AS IT RELATES TO DISQUALIFICATION FOR UNEMPLOYMENT BENEFITS

Vermont’s unemployment law recognizes two types of misconduct as disqualifying; simple misconduct and gross misconduct. Discharge for inability to meet performance standards is generally not considered misconduct.

SIMPLE MISCONDUCT

Definition: Simple misconduct is work related conduct that is in substantial disregard of an employer’s interests. Such conduct may be willful or intentional, but it may also be unintentional conduct that results from extreme carelessness, indifference, or lack of effort. Simple performance deficiencies will generally not be considered misconduct. Employers will generally be expected to provide employees notice and an opportunity to improve their conduct, except in extreme cases. The misconduct **MUST** be work related; off duty conduct is generally not the basis for a finding of misconduct.

Written warnings are often the best method for advising and documenting the worker’s need to improve conduct.

Consequence: Disqualification from receiving benefits for up to 15 weeks, with a minimum of 6 weeks, from the time the unemployment claim is filed. The employer’s experience rating record is relieved of charges, provided the initial request for information was received in a timely manner.

Examples:

- Repeated tardiness or unexcused absences
- Rudeness to customers or other employees
- Insubordination
- Intentional misrepresentation on a job application

GROSS MISCONDUCT

Definition: Gross misconduct is work related conduct that demonstrates a flagrant and wanton disregard of an employer’s interests. 21 V.S.A §1344 defines gross misconduct as: “For purposes of this section, “gross misconduct” means conduct directly related to the employee’s work performance that demonstrates a flagrant, wanton, and intentional disregard of the employer’s business interest, and that has direct and significant impact upon the employer’s business interest, including but not limited to theft, fraud, intoxication, intentional serious damage to property, intentional infliction of personal

injury, and conduct that constitutes a felony, or repeated incidents after written warnings of either unprovoked insubordination or public use of profanity.”

Written warnings are often the best method for advising and documenting the worker's need to improve conduct.

Consequence: Total disqualification from receiving benefits until the claimant once again secures employment and works long enough to earn the equivalent of 6 times their weekly benefit amount. The employer's experience rating record is relieved of charges, provided the initial request for information was received in a timely manner. Effective July 1, 2012, wages earned from the employer against whom the gross misconduct was committed are excluded from use in computing the weekly benefit amount.

Examples:

- Loss or damage of property due to extreme carelessness or indifference;
- Use of company vehicle to run personal errands while on the clock, when the employee is supposed to be conducting company business;
- Creating a hostile workplace environment through repeated insubordination or continued use of profane language;
- Refusing to participate in an employer-mandated safety exercise;
- Failure of an employee in charge of adult sexual offenders to maintain close physical proximity to their charges at all times while they were in certain public places.
- Inappropriate behavior by employee when handling or supervising children;
- Unprovoked outburst when asked to move from a preferred workstation to a different station that the employer needs and inappropriate behavior detrimental to the employer's business;
- Heavy equipment operator ignoring safety protocols, after warnings, when the safety violation leads to an accident or property damage;
- Employee discharged after yelling at supervisor and using the F-word within proximity of children in his charge at the time.

PERFORMANCE

Generally speaking, performance deficiencies will not be considered misconduct. An employer may certainly choose to fire an employee for being a slow learner, or for not performing tasks quickly or carefully enough. However, the department will not consider this misconduct unless the employer can demonstrate deliberate indifference, malingering, or complete lack of effort on the employee's part.