

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, click [here \[PDF\]](#).

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, click [here \[PDF\]](#).

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.