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Title 22@ Social Security

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Division 1@ Employment Development Department

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Subdivision 1@ Director of Employment Development

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Division 1@ Unemployment and Disability Compensation

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Part 1@ Unemployment Compensation

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Chapter 5@ UNEMPLOYMENT COMPENSATION BENEFITS

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Article 1@ ELIGIBILITY AND DISQUALIFICATIONS

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Section 1256-38@ Discharge for Misconduct -Manner of Work Performance

1256-38 Discharge for Misconduct -Manner of Work Performance

(a)

Scope. This section relates to whether misconduct exists under Section 1256 of the code where an employee is discharged for neglect of duty or failure to perform the assigned work properly. Section 1256-30 of these regulations set forth general principles also applicable under this section. An individual's failure to perform work properly or neglect of duty is willful and misconduct if he or she intentionally, knowingly, or deliberately fails to perform, or performs in a grossly negligent manner, or repeatedly performs negligently after prior warning or reprimand and in substantial disregard of the employer's interests. EXAMPLE 1. Deliberate Failure. A was employed by a large winery. A was assigned to assist the operator of a filter pump in transferring wine to an empty vat. A's known duty was to attach the end of the hose to the intake valve of the tank and then to check the lower valve to see that it was closed. A and other employees, however, had devised an alternate form of operation which was at variance with the one prescribed by the employer. In performing this transferring operation, A failed to check the lower valve and several hundred gallons of wine were lost before it could be closed. The employer discharged A. A's action was deliberate and was misconduct.

(b)

Intentional, Knowing, or Deliberate Failures. Some of the situations in which intentional, knowing, or deliberate failures of work performance occur are failures in quality or quantity of work or in relationships with the public. (1) Quality of Performance. Ordinarily inability or incapacity to perform the job or inefficient performance is not misconduct. However, misconduct exists if inability, incapacity, or inefficiency is due to one's willful failure to perform to the best of his or her abilities. Thus, if an employee's inadequate performance is the result of circumstances within his or her control and he or she does nothing to improve the performance, there is a willful failure to perform adequately which is misconduct. An employee's inefficiency may be misconduct if he or she previously demonstrated the ability to do better, work performance has substantially deteriorated, and there is no reasonable explanation for the deterioration.

EXAMPLE 2. Deliberate Inefficiency in Quality. B was a precision assembler who was discharged from employment. For the first three years of employment, B's work had been entirely satisfactory but then had deteriorated. B had no excuses to the employer for B's poor work other than the fact that B's poor eyesight had hampered B in doing close work. B refused to consult an optometrist because B was unwilling to wear corrective lenses. The employer discharged B. B's discharge was for misconduct since the reason for B's inefficiency was within B's power to control and the failure was willful. (2) Quantity of Work. An employee's failure to produce the required quantity of work is misconduct if the employee was capable of meeting, could have met, and continually failed to meet the employer's reasonable quantity standards after reprimands or warnings. If an employee's unsatisfactory quantity of work is caused by some factor within his or her control, there is a duty to do whatever is reasonably necessary to bring the quantity of work up to an acceptable level. To establish misconduct for failure to perform

the required quantity of work, the employer's quantity standards must be reasonable. A standard is reasonable if the employee has, in the past, met or surpassed that quantity standard. Moreover, standards are reasonable if other employees of like age, experience, intelligence, and abilities have consistently met or surpassed the employer's quantity standard. The fact the employer has, on several occasions, raised the quantity standards does not alone negate misconduct. It is the employer's right to adjust the standards in a manner consistent with the best interests of the employer so long as this adjustment does not exceed the bounds of reasonableness. If an employee has a logical and reasonable explanation justifying failure to provide the minimum quantity of work required, this negates misconduct.

EXAMPLE 3. Deliberate Inefficiency in Quantity. C was a salesperson expected to call on old customers, develop new customers, and submit weekly reports. The employer had reprimanded C for poor performance. C agreed that C should call on at least 30 customers each week. Yet C, without excuse, in 5 weeks made 14 calls in a week, 19 calls in another, and 12 calls in the other 3 weeks, and failed to file 3 weekly reports. The employer discharged C. C's discharge was for misconduct due to repeated inexcusable failure to meet reasonable quantity standards after reprimands and was willful failure to perform satisfactorily.

(3) Relations with the Public. An employee's discourtesy to the public is misconduct if the acts of discourtesy continued after prior warning or reprimand and the employee has the ability to control the performance. Usually a single or isolated instance of discourteous behavior is not misconduct, but the degree of discourtesy to a patron may be so serious that a single instance alone is misconduct.

EXAMPLE 4. Deliberate Discourtesy to Public. D was a cab driver. His passengers, a group of women, became somewhat noisy and boisterous. D then made improper and suggestive remarks to them and was

discharged. D's discharge was for deliberate serious acts of misconduct.

(1)

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(2)

Quantity of Work. An employee's failure to produce the required quantity of work is misconduct if the employee was capable of meeting, could have met, and continually failed to meet the employer's reasonable quantity standards after reprimands or warnings. If an employee's unsatisfactory quantity of work is caused by some factor within his or her control, there is a duty to do whatever is reasonably necessary to bring the quantity of work up to an acceptable level. To establish misconduct for failure to perform the required quantity of work, the employer's quantity standards

must be reasonable. A standard is reasonable if the employee has, in the past, met or surpassed that quantity standard. Moreover, standards are reasonable if other employees of like age, experience, intelligence, and abilities have consistently met or surpassed the employer's quantity standard. The fact the employer has, on several occasions, raised the quantity standards does not alone negate misconduct. It is the employer's right to adjust the standards in a manner consistent with the best interests of the employer so long as this adjustment does not exceed the bounds of reasonableness. If an employee has a logical and reasonable explanation justifying failure to provide the minimum quantity of work required, this negates misconduct.

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Relations with the Public. An employee's discourtesy to the public is misconduct if the acts of discourtesy continued after prior warning or reprimand and the employee has the ability to control the performance. Usually a single or isolated instance of discourteous behavior is not misconduct, but the degree of discourtesy to a patron may be so serious that a single instance alone is misconduct. EXAMPLE 4. Deliberate Discourtesy to Public. D was a cab driver. His passengers, a group of women, became somewhat noisy and boisterous. D then made improper and suggestive remarks to them and was discharged. D's discharge was for deliberate serious acts of misconduct.

(c)

Gross Negligence. A single incident of grossly negligent work performance or failure at work, including an accident due to gross negligence, is misconduct. To be gross negligence, the following elements must be present: (1) The employer's rules require the work to be performed in a certain manner, since if the employee is allowed to use his or her discretion, there is no gross negligence while operating within the limits of reasonable discretion. (2) The employee is aware of the employer's rules relative to how the work is to be performed. (3) The employee knows that failure to perform the work as required could result in substantial loss to the employer. (4) The employee has no logical and reasonable explanation for the failure to perform the work as required. EXAMPLE 5. Gross Negligence. As a captain-pilot for a large airline, E was in charge of a plane with 29 passengers and 5 crew members aboard. The first officer was piloting the plane as it approached for a landing, with the captain-pilot under flight rules responsible to carry out the first officer's orders. The first officer ordered "gear down" for landing, but E failed to put the gear lever in full operating position and check the performance in accord with standard procedures. E thought the gear was down. The plane landed with wheels up, resulting in about \$250,000 damage but no injury to passengers or crew. The employer discharged E. E's failure was gross negligence and was misconduct. E knew and failed to follow employer rules resulting in the hazard of substantial loss of life and property with no reasonable explanation.

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The employee has no logical and reasonable explanation for the failure to perform the work as required. **EXAMPLE 5. Gross Negligence.** As a captain-pilot for a large airline, E was in charge of a plane with 29 passengers and 5 crew members aboard. The first officer was piloting the plane as it approached for a landing, with the captain-pilot under flight rules responsible to carry out the first officer's orders. The first officer ordered "gear down" for landing, but E failed to put the gear lever in full operating position and check the performance in accord with standard procedures. E thought the gear was down. The plane landed with wheels up, resulting in about \$250,000 damage but no injury to passengers or crew. The employer discharged E. E's failure was gross negligence and was misconduct. E knew and failed to follow employer rules resulting in the hazard of substantial loss of life and property with no reasonable explanation.

(d)

Repeated Negligence--Substantial Disregard. (1) Repeated negligent performance after prior warning or reprimand and in substantial disregard of the employer's interests is misconduct where the employee has the ability and capacity to perform satisfactorily. Substantial disregard of the employer's interests is determined after consideration of the following criteria: (A) The number of negligent acts or omissions. (B) The span of time within which the negligence occurred. (C) The seriousness of each incident. (D) The similarity of the incidents. (2) It is neither desirable nor feasible to establish arbitrary numerical limits or

descriptions in determining the number, time span, seriousness, or similarity of negligent acts or omissions which will constitute an employee's substantial disregard of the employer's interests. Rather, the totality of the circumstances of each case must be considered. **EXAMPLE 6. Repeated Negligence After Warning.** F was a cutter in a shirt factory. F was instructed that in order to prevent damage to the shirts, each cutting machine was equipped with a wide blade for use with heavy materials and a smaller blade for use with light materials. Nevertheless F continued to use a wide blade on light materials. On each occasion the employer admonished F to use the proper blade for the proper material until finally the employer discharged F. F's action was negligent after repeated warnings and was misconduct.

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(B)

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(C)

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(D)

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(e)

Accidents. Accidents or behavior creating a danger of an accident are a frequent cause for the discharge of employees. Involvement in an accident or near-accident is not misconduct unless an individual's actions which lead to an accident or could have led to an accident were grossly negligent or substantially negligent. Gross negligence is discussed in subdivision (c) of this regulation. To determine whether an accident or a near-accident is due to an employee's negligence, relevant factors include: (1) The degree of one's job responsibilities and the failure to meet such responsibilities. (2) The nature of the loss or possible loss from an accident. An accident which could cause loss of life is much more serious, for example, than one involving only loss of property. (3) The probability of one's actions causing an accident. (4) The manner in which the accident occurred. (5) The costs of the accident. (6) The number, frequency, and regularity of accidents in which the individual has been involved. **EXAMPLE 7.**

Substantial Negligence. G, a taxicab driver, was involved in a series of six accidents within a short period of time while driving a cab. In addition, G repeatedly violated traffic laws by failing to make boulevard stops, by driving on the wrong side of the street, and by making prohibited mid-block "U" turns. The employer had given G a safety course and as each accident occurred discussed preventive measures. The employer gave G a disciplinary suspension following one of the accidents. Shortly after a later accident, the employer was held liable in damages and discharged G. G's action was misconduct because it was clearly substantial, prejudicial to the employer's interests, and not the result of mere inefficiency. EXAMPLE 8. Good Faith Error in Accident. H was a cab driver. H was en route to pick up a passenger when H was hailed by a person on the opposite side of the street. H glanced off the road toward the person in accordance with a company policy to identify possible customers and report cab requests to the company dispatcher. H was involved in a minor accident as a result of this action. The employer discharged H. H's action was not misconduct, but at most was a good faith error in judgment in an attempt to carry out company policy.

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(f)

Judgment. An individual's good faith error in judgment is not misconduct if he or she has exercised reasonable diligence and has not knowingly acted in a manner prejudicial to his or her employer (see Example 8 above for good faith error in an accident situation; see Section 1256-30 of these regulations for general discussion of several types of acts or omissions that are not misconduct).

EXAMPLE 9. Good Faith Error in Judgment Not Shown. I, a security guard who has

been assigned to a certain highly classified radio installation in an aircraft plant, was informed of its priority and importance. I was told that I cannot receive overtime pay but was never specifically instructed to remain on guard until such time as relief arrives. At I's normal quitting time, no one was sent to relieve I. I left the classified area unguarded. The employer discharged I for leaving the post unguarded. In this instance, I, unrelieved at quitting time, was called upon to make a decision that requires considerable judgment--whether to continue work and possibly receive no overtime pay for time worked or whether to leave the radio installation unguarded. I's failure was misconduct because I failed to exercise reasonable diligence and knowingly acted in a manner prejudicial to the employer.