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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

1256-30 Discharge for Misconduct -General Principles

Article 1@ ELIGIBILITY AND DISQUALIFICATIONS

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Section 1256-30@ Discharge for Misconduct -General Principles

(a)

Scope. This section relates to general principles for discharge for misconduct connected with the most recent work. Sections 1256-31 to 1256-43, inclusive, of these regulations, relate to specific reasons for discharge for misconduct. An individual who accepts future work but engages in conduct which causes the employer to prevent or prevents commencement of this work, has not been discharged for misconduct but the issue is raised of whether the individual has refused suitable work without good cause and is disqualified under subdivision (b) of Section 1257 of the code. See Sections 1256-1 and 1256-2 of these regulations for interpretations of voluntary leaving, as distinguished from discharge, and of most recent work.

(b)

Elements of Misconduct. Misconduct connected with his or her most recent work exists for an individual's discharge if all of the following elements are present:

(1) The claimant owes a material duty to the employer under the contract of employment. (2) There is a substantial breach of that duty. (3) The breach is a willful or wanton disregard of that duty. (4) The breach disregards the employer's interests and injures or tends to injure the employer's interests.

(1)

The claimant owes a material duty to the employer under the contract of employment.

(2)

There is a substantial breach of that duty.

(3)

The breach is a willful or wanton disregard of that duty.

(4)

The breach disregards the employer's interests and injures or tends to injure the employer's interests.

(c)

Causal Connection. To constitute a discharge for misconduct, there must be a causal relationship between the individual's act or acts of misconduct and the discharge. Condonation results when the employer does not with reasonable promptness exercise the right to discharge an employee who has engaged or participated in an act or acts of misconduct. However, delays imposed upon the employer's prompt discharge action by collective bargaining procedures or other circumstances beyond the employer's control do not result in condonation.

(d)

Other Acts or Omissions. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not misconduct, except that in cases of ordinary negligence, misconduct may be found where the claimant has been previously warned or reprimanded for prior similar acts of ordinary negligence and has the ability and capacity to perform satisfactorily. Prior warnings or reprimands, however, do not convert to misconduct an employee's failure to perform satisfactorily due to inability or incapacity. A claimant's participation in illegal or criminal actions while away from the place of employment usually is not connected with the work and is not

misconduct.

(e)

Discharge--Right of Employer. Misconduct is not established merely because an employer has and exercises a right to discharge an employee. COMMENT.

Subdivision (a) refers to the distinction between a discharge for reasons constituting misconduct and a failure to accept suitable work because of acts of misconduct. On the one hand, the employee is already working and is discharged for engaging in an act or acts which are misconduct under Section 1256 of the code. On the other hand, the misconduct occurs before the claimant has started working for an employer. In the latter case, the claimant is disqualified under subdivision (b) of Section 1257 of the code, while in the former, the disqualification is based on Section 1256 of the code. EXAMPLE 1. A received a referral from a private employment agency. After an interview, A was told to report for work the following day. Before reporting for work, A had "a few drinks." Upon reporting for work, A was told by the foreman that there was no work because A had been drinking. A has not been discharged, but instead has refused an offer of work. The issue is whether A is disqualified for refusing an offer of suitable work without good cause, not whether A has been discharged for work-connected misconduct.

Paragraph (1) of subdivision (b) requires that a claimant owe a duty to the employer under the contract of employment. Thus, an individual subject to the misconduct provisions, must have violated an express or implied agreement of employment with his or her employer. The violation must either injure or tend to injure the employer's legitimate business interests, or both. The claimant's misconduct must be connected with the claimant's work. This includes not only acts of misconduct which occur during normal working hours at the place of employment, but also includes conduct off the job which injures or tends to injure the employer's

interests (see Section 1256-33 of these regulations). EXAMPLE 2. B, a pharmacist, was arrested in B's home and charged with illegal possession of narcotics. Upon return to work, B was suspended and ultimately discharged after being convicted of the charge. B's discharge is for misconduct as the conduct injures the interests of, and violates the material duty owed to, the employer even though B's activities took place away from the job. Paragraph (2) of subdivision (b) requires that there be a substantial breach of the material duty owed to the employer. This requires an analysis to determine the severity of the employee's actions. Where the ordinary negligence of the claimant has resulted in the minimal injury to the employer's interests, the breach is not substantial unless the claimant has been previously warned or reprimanded about this type of negligence and has the ability and capacity to perform satisfactorily. Thus, a janitor who negligently fails to empty a wastebasket or dust a desk and is discharged is not disqualified for misconduct unless there had been previous warnings or reprimands for this type of conduct and the janitor has the ability and capacity to perform satisfactorily. On the other hand, where the employer's interests have been more severely damaged by the grossly or substantially negligent or deliberate acts of the claimant, misconduct may be found even without previous warnings or reprimands for prior similar acts. Typically, such acts usually involve gross negligence or an element of willfulness and are more serious than cases of ordinary negligence. Employees having responsibility for large sums of money or valuable property, or employees whose actions directly affect the safety of themselves or others, are held to a stricter standard of conduct. EXAMPLE 3. C, a taxi driver, fell asleep while transporting passengers and became involved in an accident with another car. C admitted that prior to the accident, C had not obtained customary sleep and felt tired and that the car heater was on and the windows closed. C asserted that C

had not felt tired enough to fall asleep and had no idea that C might fall asleep. C produced no medical explanation of a physical ailment which would cause any sudden sleepiness. The employer discharged C. C's discharge was for misconduct. Since a motor vehicle is recognized as a dangerous instrumentality, C had a high degree of responsibility to the employer, to the drivers of other automobiles, and to the taxicab passengers who had to rely upon C for safe passage. It is well known that falling asleep is a common cause of automobile accidents. C, as the driver of the taxicab, had an added responsibility in taking proper precautions for C's safe handling of the vehicle. C's failure to take such precautions manifests a high degree of carelessness if not a deliberate disregard of the standards of behavior which the employer had the right to expect of C. C did not deliberately fall asleep but did willfully continue to drive the cab even though C felt tired and was fully aware of what could happen if C were to fall asleep at the wheel.

EXAMPLE 4. D, a registered nurse, changes the dosage of medication administered to a patient without first consulting with a prescribing physician or anyone else with authority to give permission. The employer discharged D. D's discharge is for misconduct since D was acting negligently in a particularly responsible position.

EXAMPLE 5. E, a normally efficient clerk, fails to file correspondence properly, causing difficulty within the office. E was discharged. E's discharge is not for misconduct since the incident is an isolated instance of negligence without prior warning. Paragraph (3) of subdivision (b) requires that the breach be a willful or wanton disregard of the duty owed by the claimant to the employer under the contract of employment. This does not mean that the claimant must deliberately perform the act of misconduct to injure the employer's interests. It means that the claimant knew or should have known that the actions were not in line with the standards of behavior expected as an employee of the employer. Thus, misconduct generally does not

exist if the claimant has been merely inefficient, has failed to perform well due to inability or incapacity, or has been inadvertent or ordinarily negligent in isolated instances or good faith errors of judgment or discretion. This is because the element of willfulness is not present. However, this element of willfulness may be found despite acts of ordinary negligence if the claimant has been previously warned or reprimanded for prior similar acts and has the ability and capacity to perform satisfactorily. Examples of unsatisfactory conduct which usually are not misconduct in the absence of prior warnings or reprimands are isolated instances of tardiness or absence, annoying other employees such as horseplay or joking or excessive conversation or talking at work, or the violation of any minor and less significant rule or standard of behavior. EXAMPLE 6. F, a pasteurizer at a creamery, failed to pasteurize milk on occasions at proper temperature. F held milk in vats an excessive time, resulting in milk with an undesirable flavor. In one instance, the improper pasteurization caused the spoilage of about three hundred gallons of milk, and a considerable financial loss to the employer. The employer discharged F. Prior to the discharge, F and supervisor had discussed the quality of work. Although F was of the opinion that the work had improved after those discussions, the supervisor believed that F had failed to improve sufficiently to warrant retention of F's services. F's discharge is not for misconduct since the facts disclose no more than inefficiency or unsatisfactory performance. F did not willfully or intentionally disregard the employer's interests. The occurrences forming the basis for the discharge were not deliberate violations of the standard of good behavior which the employer had the right to expect of F. A claimant will often be discharged for actions deliberately committed. If an employee deliberately embarks upon a course of action which the employee knew, or reasonably should have known, is substantially injurious to the employer's interests, the employee

demonstrates a willful or wanton disregard of the employer's interests.

Accordingly, in such cases the determination usually will be that the claimant was discharged for misconduct, even in the absence of prior warnings or reprimands.

On the other hand, if the injury to the employer's interests is trivial and inconsequential, and not substantial, such action standing alone, will not usually amount to misconduct, even though deliberate. Paragraph (4) of subdivision (b)

requires that the claimant's actions injure or tend to injure the employer's

interests. Acts which tend to injure the employer's interests are acts on the claimant's part that could possibly cause financial loss, or loss of business,

property, or customers, and damage incurred such as disruption of production, of normal lines of communication, or control, or discipline. The employer does not

have to actually suffer any financial loss or a loss of control or discipline or a

slow-down in production by the claimant's actions. It is sufficient if the claimant's

actions logically and reasonably injure or tend to injure the employer's interests.

This potential injury to the employer's interests may exist even if the claimant's

acts are committed away from work. EXAMPLE 7. G, a pharmacist, is arrested in G's home and charged with illegal possession of narcotics. Upon return to work, G was

suspended and ultimately discharged after being convicted of the charge. G's

discharge is for misconduct even though the act was committed at home and away

from the job. G's illegal possession of narcotics was an offense so closely related to

G's occupation with the employer as to destroy G's suitability for employment as a pharmacist. The fact that the employer was not tangibly or financially injured by

G's arrest and conviction is not relevant in view of the potential injury. Subdivision

(c) states the requirement that there be a causal relationship between the

individual's act or acts of misconduct and the subsequent discharge. The discharge

must be for misconduct in order for the claimant to be disqualified under Section

1256 of the code. If a substantial motivating factor for the discharge is not an act of misconduct, the discharge is not for misconduct. Additionally, even though the claimant has engaged in acts which are misconduct under this section, condonation may be inferred if the employer does not reasonably promptly initiate procedures to exercise the right to discharge the claimant. Several situations pose a problem as to condonation. One is where the claimant has engaged in an act of misconduct but is not promptly discharged by the employer. Subsequently, the claimant is discharged for another reason. Unless this other reason amounts to misconduct as defined under this section, the discharge is not for misconduct.

EXAMPLE 8. H, a bookkeeper, embezzled \$250 from the employer to keep H's son from going to jail. The employer discovered the embezzlement but in view of the circumstances decided to give H another chance if H agreed to repay the money in weekly payments. Two weeks later the employer concluded that the probability was high that H would again embezzle due to the need for money for the son, and discharged H. H's discharge is not for misconduct since the direct cause was the employer's conclusion that H would embezzle again. The indirect cause was the prior embezzlement. The fact that H's discharge had an indirect connection with the prior embezzlement does not mean the discharge was for embezzlement. The direct cause was not an act of misconduct committed by H. Another situation under subdivision (c) arises when the employer condones an act of misconduct and does not promptly exercise the right to discharge the employee. Later, in a change of mind, the employer discharges the employee for the prior misconduct. Once the prior misconduct has been condoned, it can no longer be the direct cause of discharge. The most frequent act of condonation occurs when the employer fails to promptly discharge an employee. EXAMPLE 9. J fought with a co-worker while on the employer's premises. This created a strained relationship between the two

workers and continued until J's discharge a year later. About nine months after the encounter J attempted to resign but was dissuaded by the employer. A few months later, while J was on vacation, two co-workers, including the one with whom J had previously fought, demanded that J be discharged or accept their resignations. The employer told J not to return to work. J's discharge is not for misconduct since the basic cause was not the altercation with the co-worker, but rather the ultimatum of the two co-workers. The one-year delay resulted in condonation in view of the employer's reluctance to accept J's previous resignation attempt. EXAMPLE 10. K was absent from work and failed to give notice to the employer. A month later, K was allegedly drinking during working hours, which led to difficulties with other employees. About a month after the alleged drinking incident, the employer discharged K. K's discharge is not for misconduct. While there was justification to discharge K for the unreported absence or for the alleged drinking on the job, the discharge was not related to these acts of misconduct. The employer's three-week delay implied condonation of the two known acts of misconduct and there was no causal connection between the acts and the discharge. The two preceding examples illustrate the need for the employer to make a prompt decision on whether to retain an employee who engages in an act of misconduct. Any delay of longer than a few days implies that the alleged act of misconduct was not the direct cause of discharge. However, it is possible for an employer to initiate procedures promptly to discharge an employee after the misconduct but have the actual termination delayed for reasons beyond the employer's control. This may occur when the collective bargaining agreement requires an employer to follow certain procedures before discharging an employee for cause. Also, the actual discharge date may be delayed due to the necessity of locating a replacement. EXAMPLE 11. L, a guard, left L's security post early and had another guard punch

L's time card out at the regular quitting time. The employer questioned L, but told L to return to work and did not dismiss L. The employer requested a guard from a plant protection service. However, the service could not obtain the needed personnel to fill the order for 13 days. When the service became available, the employer discharged L and told L that the reason was the previous misconduct. L is disqualified even though the discharge came 13 days after the misconduct. This delay did not amount to condonation since the employer immediately after the incident took steps to interview L and the others involved and initiated arrangements to replace L and did so as soon as the arrangements could be completed. In another situation a claimant may be discharged for misconduct based upon a prior pattern of misconduct for which warnings or reprimands were given even though the last act of the claimant may not be misconduct by itself (see also Section 1256-36 of these regulations relating to insubordination).

EXAMPLE 12. M repeatedly overstayed M's lunch hours and coffee breaks and was repeatedly warned. M was given one final warning about this activity. M was shown a diagram of the way the employer wanted books displayed for sale. M refused to follow the instructions and was discharged. The employer cited M's record of overstaying rest periods and M's refusal to display books as instructed as the reasons for the discharge. M's discharge is for misconduct. While the act which finally culminated in the discharge was different from the previous misconduct, M's long record of overstaying rest periods, for which prior warnings were given, indicated that the discharge was for misconduct. Subdivision (d) states a negative definition of misconduct. A claimant's mere inefficiency, unsatisfactory conduct, a failure to perform well as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment are not misconduct because the basic elements of the positive definition of misconduct are

not fulfilled. EXAMPLE 13. N had a single heated exchange with the employer in which N shouted an offensive and obscene remark after being threatened with a future discharge. N was discharged. N's discharge is not for misconduct. The conduct was a simple mistake or an error in judgment. This is not a substantial breach of the duty owed to the employer's interests. The last sentence of subdivision (d) states that a claimant's participation in alleged or criminal actions while away from the place of employment usually is not connected with the work and is not misconduct. However, Section 1256.1 of the code may be applicable; see Section 1256.1-1 of these regulations. EXAMPLE 14. (See also Example 2 above.) O was discharged from O's job as a janitor at a military base after being arrested and convicted of drunk driving while off duty. O's discharge is not for misconduct because O was off duty and the acts did not tend to substantially injure the employer's interests.