



To: Unemployment Insurance Operations Divisions
Appeals Division
Unemployment Insurance Review Board
Legal Support

From: Josh Richardson, Chief Operating Officer
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REA JDR

Date: June 16, 2016

Subject: DWD Policy 2015-10
Evidentiary Standards for Establishing Discharge for Gross Misconduct in -
Unemployment Insurance Benefit Claim Disputes

Purpose

To provide the evidentiary standards for establishing discharge for gross misconduct in unemployment insurance benefit claim disputes.

Rescission

DWD Policy 2008-41

References

Indiana Code §§ 22-4-1-2; 22-4-15-1(d); 22-4-15-6.1; 9-13-2-49.1; 14-15-8-3; 35-42-2-1; 35-42-4-2; Black's Law Dictionary 522, 660 (6th Ed. 1990).

Content

The Indiana Department of Workforce Development (DWD) establishes this policy in the interest of providing a fair and consistent standard for determining eligibility in unemployment insurance (UI) benefit claim disputes. This policy applies to initial determinations of eligibility, as well as any subsequent appeals of those determinations to DWD's UI Appeals Division or UI Review Board. This policy concerns UI benefit claim disputes involving discharge for gross misconduct. Each of the actions listed in the statute as conduct constituting gross misconduct is further defined in this policy. Additionally, the presentation and treatment of certain evidence is outlined in this policy.

In the past, a person claiming unemployment insurance benefits had the burden of proving that he or she voluntarily left the employment for good cause in connection with the work. See *Brown v. Ind. Dep't of Workforce Dev.*, 919 N.E.2d 1147, 1151 (Ind. Ct. App. 2009). Alternatively, an employer had the burden of proving that it discharged an employee for just cause. See *City of Carmel v. Ind. Dep't of Workforce Dev.*, 970 N.E.2d 239, 242 (Ind. Ct. App. 2012). However, on July 1, 2014, the Indiana General Assembly mandated that there is no burden of proof, for any party, in relation to an individual's eligibility for unemployment insurance benefits: "An applicant's entitlement to unemployment benefits is determined based on the information that is available without regard to a burden of proof." Ind. Code § 22-4-1-2(c). Further, "[t]here is no presumption of entitlement or nonentitlement to unemployment benefits. There is no equitable or common law allowance for or denial of unemployment benefits." Ind. Code § 22-4-1-2(d).

In order to meet eligibility requirements for UI benefits, a claimant must, among other prerequisites, be unemployed through no fault of the claimant's own. If a claimant is discharged by the claimant's most recent employer for just cause or gross misconduct, or by a non-separating base period employer for gross misconduct, that claimant may be ineligible for UI benefits. See Ind. Code § 22-4-15-1 *et seq.* The term "just cause" is defined in Indiana Code § 22-4-15-1(d).

"Gross Misconduct" Defined and Examples

Indiana Code § 22-4-15-6.1 reads:

IC 22-4-15-6.1

Gross misconduct

Sec. 6.1. (a) Notwithstanding any other provisions of this article, all of the individual's wage credits established prior to the day upon which the individual was discharged for gross misconduct in connection with work are canceled.

(b) As used in this section, "gross misconduct" means any of the following committed in connection with work, as determined by the department by a preponderance of the evidence:

- (1) A felony.
- (2) A Class A misdemeanor.
- (3) Working, or reporting for work, in a state of intoxication caused by the individual's use of alcohol or a controlled substance (as defined in IC 35-48-1-9).
- (4) Battery on another individual while on the employer's property or during working hours.
- (5) Theft or embezzlement.
- (6) Fraud.

(c) If evidence is presented that an action or requirement of the employer may have caused the conduct that is the basis for the employee's discharge, the conduct is not gross misconduct under this section.

(d) Lawful conduct not otherwise prohibited by an employer is not gross misconduct under this section.

In a UI benefit claim dispute, whether at the initial determination or appeals stage, DWD must determine by a preponderance of the evidence that the claimant's conduct that was the basis for the claimant's discharge was gross misconduct. See Indiana Code § 22-4-15-6.1(b). The statute lists the actions that, when in connection with work, constitute gross misconduct. In order to ensure consistent application of the law, DWD will use the following definitions in making its determinations pursuant to the law. Examples provided in this Policy are not an exhaustive list of possibilities.

Felony: Any action constituting a felony by Federal law, Indiana law, or the law of any other state, regardless of whether the claimant was charged or convicted.

Example: Claimant is a suspect in the homicide of his coworker. The incident was recorded on a security tape, which is provided to DWD. At the time of Claimant's discharge, he has not been formally charged with a crime. Homicide is a felony. Therefore, Claimant's conduct is gross misconduct.

Class A Misdemeanor: Any action constituting a Class A misdemeanor under Indiana law or any comparably-classified offense under Federal law or the law of any other state, regardless of whether the individual was charged or convicted.

Example 1: Driving from Lafayette to Indianapolis with a client, Claimant drives in excess of 15 miles over the speed limit. Claimant's actions constitute reckless endangerment, a Class A Misdemeanor, under Indiana law. Claimant's conduct is gross misconduct.

Example 2: Driving from Lafayette to Indianapolis with a client, Claimant is ticketed for missing a tail light. Driving a vehicle with a missing tail light is not a Class A Misdemeanor in Indiana. Claimant's conduct is not gross misconduct. However, Claimant's conduct may constitute just cause for discharge.

State of Intoxication: Under the influence of 1) alcohol; 2) a controlled substance; 3) any drug¹ other than alcohol or a controlled substance; or 4) any combination of alcohol, controlled substances, or drugs so that there is an impaired condition of thought and action

¹ See Indiana Code § 9-13-2-49.1.

and the loss of normal control of an individual's faculties to such an extent as to endanger any person. Prescription medications or controlled substances taken as directed which may impair normal function so greatly as to impact one's job performance may qualify as discharge for just cause but will not be considered gross misconduct.

Example 1: Claimant operates a pallet forklift in a warehouse store. Claimant reports to work drunk and stocks shelves using a forklift. Claimant is intoxicated and his conduct endangers customers and coworkers. Claimant's conduct is gross misconduct.

Example 2: Claimant is a secretary and works in an office. Claimant uses marijuana during his lunch break. Claimant returns to work after lunch and falls asleep at his desk. Claimant is intoxicated, but his conduct did not endanger any person. Claimant's conduct is not gross misconduct. However, Claimant's conduct may be just cause for discharge.

Battery: A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery. In order to constitute gross misconduct, the battery must occur on the employer's property or during work hours.

Example 1: Claimant shoves her coworker during an argument at a staff meeting. Claimant's conduct is gross misconduct.

Example 2: Claimant meets with Employer's client at the client's place of business. While negotiating a business deal with the client, Claimant becomes angry and shoves the client. Claimant's conduct is gross misconduct.

Example 3: On her way home from work, Claimant stops at a convenience store. The store's cashier tells Claimant that the store is closed. Claimant becomes angry and shoves the cashier. Claimant's conduct is battery but not gross misconduct because Claimant's conduct was not performed in connection with the work. Nevertheless, Claimant's conduct may constitute just cause for discharge.

Theft: A person who knowingly or intentionally exerts unauthorized control over the property of another person with the intent to deprive the other person of any part of its value or use commits theft. See Ind. Code § 35-43-4-2.

Example 1: Claimant works for a convenience store. Claimant takes a candy bar from the store without paying for it. Claimant's conduct is theft. Therefore, Claimant's conduct constitutes gross misconduct.

Example 2: Claimant works for a jewelry store. At a customer's request, Claimant models a diamond necklace. Forgetting she has it on, Claimant wears the necklace home but returns it to work the following day. Claimant's conduct in wearing the necklace home was not an intentional action and, as a result, is not theft. Therefore, Claimant's conduct is not gross misconduct. However, Claimant's conduct may constitute just cause for discharge.

Embezzlement: To willfully take or convert to one's own use, another's money or property, of which the wrongdoer acquired possession lawfully, by reason of some office or employment or position of trust. See Black's Law Dictionary 522 (6th ed. 1990).

Example 1: Claimant is a bank teller. Claimant takes \$110 from his cash drawer and places it in his wallet. Claimant's conduct is embezzlement because it was his job to safeguard the money in his cash drawer. Claimant's conduct is gross misconduct.

Example 2: Claimant is a bank teller. At the end of the day, Claimant's cash drawer is short \$110 due to Claimant's customer transaction mistakes. Claimant's conduct is not embezzlement because Claimant did not willfully take the bank's money. Therefore, Claimant's conduct is not gross misconduct. However, Claimant's conduct may constitute just cause for discharge.

Fraud: A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed, that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury. See Black's Law Dictionary 660 (6th ed. 1990).

Example: Claimant knows she is not authorized to sign contracts on behalf of her employer. Claimant negotiates and signs a contract to purchase inventory on behalf of his employer. Claimant's conduct is fraud because he intended to deceive the person who sold him the inventory and caused that person loss of the legal right to payment for the inventory. Claimant's conduct constitutes gross misconduct.

Determining Gross Misconduct

Whether at the initial determination or appeals stage, DWD will determine by a preponderance of the evidence whether gross misconduct occurred. The preponderance of the evidence standard of proof is a significantly lower standard than the standard used in criminal cases. As long as the evidence submitted by or obtained from one or more parties to the benefit claim dispute supports a determination on a preponderance of that evidence that gross misconduct occurred and that evidence is not successfully rebutted by one or more parties to the dispute,

DWD will issue a determination that the claimant's conduct constituted gross misconduct and will apply a wage cancellation penalty.

Analysis of Gross Misconduct Evidence

It is not necessary for the employer to state at the time of the claimant's discharge, at the initial determination, or appeal stages of a UI benefit claim dispute that the employer discharged the claimant for gross misconduct. If the information received by DWD establishes by a preponderance of the evidence that the conduct that was the basis for the claimant's discharge constituted gross misconduct, then DWD will issue a determination that the claimant was discharged for gross misconduct. If the information received by DWD does not establish by a preponderance of the evidence that the conduct that was the basis for the claimant's discharge constituted gross misconduct, DWD will evaluate the information presented to determine whether the claimant was discharged for just cause pursuant to Indiana Code § 22-4-15-1(d).

Effective Date

Immediately

Ending Date

Upon rescission

Contact for Questions

policy@dwd.in.gov

Action

Indiana's workforce investment system will follow the guidance contained in this policy. Directors and managers will ensure that employees who work with this policy's subject matter are aware of the details contained in this policy and follow its guidelines.

