



INDIANA
WORKFORCE
DEVELOPMENT
AND ITS **WorkOne** CENTERS

TO: Indiana's Workforce Investment System

FROM: Teresa L. Voors 
Commissioner, Indiana Department of Workforce Development

THROUGH: Mary Johnson, Deputy Commissioner of Unemployment 
Dustin Stohler, General Counsel 

DATE: June 30, 2009

SUBJECT: DWD Policy 2008-41
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

None

References

Indiana Code §§ 22-4-15-1(d); 22-4-15-6.1; 9-13-2-49.1; 14-15-8-3; 35-42-2-1; 35-43-4-2;
BLACK'S LAW DICTIONARY 522, 660 (6th ed. 1990).

Contents

Applicability

The Indiana Department of Workforce Development (DWD) establishes this policy in the interest of providing a fair and consistent standard for determining whether an employer discharged a claimant for gross misconduct for purposes of 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.

Background

A claimant must, among other requirements, be unemployed through no fault of the claimant's own to be eligible for UI benefits. If a claimant is discharged by the claimant's most recent employer for just cause or gross misconduct, that claimant is ineligible for UI Benefits. The term

“just cause” is defined in IC § 22-4-15-1(d) and in case law. The term “gross misconduct” was recently amended and is defined in statute at IC § 22-4-15-6.1. The amended statute also sets forth guidelines for presentation and use of certain evidence regarding discharges for gross misconduct. This policy relates to 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.

Gross Misconduct Defined

In a UI benefit claim dispute, whether at the initial determination or appeals stage, the employer must prove by a preponderance of the evidence that the claimant’s conduct that was the basis for the claimant’s discharge was gross misconduct.¹ The statute lists the actions or conduct that, when in connection with work, constitutes gross misconduct. In order to ensure consistent application of the law, DWD will use the following definitions in making its determinations pursuant to this law.²

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

Example: Claimant is a suspect in the homicide of his coworker. The incident was recorded on a security tape, which is then admitted into evidence at the hearing. At the time of the Claimant’s discharge, he has not been formally charged with the crime. Homicide is a felony. Therefore, claimant’s conduct is gross misconduct.

- **Class A Misdemeanor:** Any action constituting a Class A misdemeanor by Indiana law or a conviction for any comparably classified offense by Federal law or the law of any other state, regardless of whether the individual has been charged or convicted.

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

Example 2: Driving from Lafayette to Indianapolis with a client, Claimant is ticketed for a missing 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 be just cause for discharge.

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

¹ IC § 22-4-15-6.1(c)(1)

² The examples provided in this policy are not intended to be an exclusive list of possibilities.

³ as defined in IC§ 9-13-2-49.1

action and the loss of normal control of an individual's faculties to such an extent as to endanger any person.⁴ 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 to be 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 co-workers. Claimant's conduct is gross misconduct.

Example 2: Claimant is a secretary and works in an office. Claimant uses marijuana during her lunch break. Claimant returns to work after lunch and falls asleep at her desk. Claimant is intoxicated, but her 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,⁵ regardless of whether the individual has been charged or convicted. In order to constitute gross misconduct, the battery must occur on the employer's property or during working hours.⁶

Example 1: Claimant shoves her co-worker 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 convenience store. The store's cashier tells Claimant that the store is closed. Claimant becomes angry and shoves cashier. Claimant's conduct is battery, but is not gross misconduct because it is not in connection with work. However, Claimant's conduct may be just cause for discharge.

- **Theft:** A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft.⁷ For purposes of finding of gross misconduct in UI benefit claim disputes, the value of the property must equal or exceed \$100.

⁴ IC § 14-15-8-3

⁵ IC § 35-42-2-1

⁶ IC 22-4-15-6.1(b)(4)

⁷ IC § 35-43-4-2

Example 1: Claimant takes home a new laptop from work and keeps it for personal use without permission. Claimant's conduct is theft and therefore gross misconduct.

Example 2: Claimant works for a jewelry store. At a customer's request, she 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 be 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.⁸ For purposes of a finding of gross misconduct in UI benefit claim disputes, the value of the property must equal or exceed \$100.*

Example 1: Claimant is a bank teller. Claimant takes \$110 from her cash drawer and places it in her wallet. Claimant's conduct is embezzlement because it was her job to safeguard the money in her 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 she did not willfully take the bank's money. Claimant's conduct is not gross misconduct. However, Claimant's conduct may be 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.⁹*

Example: Claimant knows he is not authorized to sign contracts on behalf of his 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 is gross misconduct.

Burden of Proving Gross Misconduct

In a UI benefit claim dispute, whether at the initial determination or appeals stage, the employer must prove by a preponderance of the evidence that the claimant's conduct that was the basis for the discharge was gross misconduct.¹⁰ In other words, if the employer establishes that it is more

⁸ BLACK'S LAW DICTIONARY 522 (6th ed. 1990)

⁹ BLACK'S LAW DICTIONARY 660 (6th ed. 1990)

¹⁰ IC § 22-4-15-6.1(c)(1)

likely than not that the claimant committed one of the offenses defined as gross misconduct and the claimant's commission of that offense was the reason the employer discharged the claimant, the employer has met its burden of proof.

The preponderance of the evidence standard of proof is a significantly lower standard than the standard used in criminal cases, which is commonly known as beyond a reasonable doubt. As long as the evidence provided by the employer meets the preponderance of the evidence standard and the claimant does not successfully rebut the employer's evidence, DWD will find that the claimant's conduct was gross misconduct and apply the wage cancellation penalty.¹¹

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 appeals stages of a UI benefit claim dispute that the employer discharged the claimant for gross misconduct. If the facts provided establish that the conduct that was the basis for the claimant's discharge constitute gross misconduct, then DWD will find the claimant was discharged for gross misconduct. Further, if the facts do not establish that the claimant's conduct was gross misconduct, DWD will evaluate the facts presented to determine whether the employer had just cause for discharging the claimant pursuant to IC § 22-4-15-1(d).

Evidence Establishing Employer Maintained Claimant's Position

The statute sets forth that evidence may be presented by the employer to show that the employer filled or maintained the claimant's position.¹² The fact that the position was filled or maintained is not, by itself, sufficient to establish either discharge for gross misconduct. However, such evidence may indicate the employer's decision to discharge the claimant was, in fact, motivated by the claimant's conduct and not a lack of work and, therefore, may weigh in favor of DWD finding that the employer discharged the claimant for gross misconduct.

Evidence Establishing Claimant's Conduct Did Not Result in Prosecution or Conviction

The statute further provides that evidence establishing the claimant's conduct did not result in a prosecution or conviction may be presented in a UI benefit claim dispute.¹³ Evidence that the claimant was not arrested, prosecuted, or convicted may weigh in favor of a determination that law enforcement officials did not believe the claimant committed one of the listed offenses, but is not dispositive of the issue. Evidence of this nature may merely indicate a choice to not pursue criminal charges for any number of reasons including expense of prosecution, higher burden of proof in criminal cases, and strict adherence to the rules of evidence or other rules of legal procedure, which may have dissuaded law enforcement officials from taking further action.

While an employer may present evidence of the claimant's arrest, prosecution, or conviction for the conduct that was the basis of the claimant's discharge, or evidence of an admission by the claimant of the conduct that was the basis for the claimant's discharge, such evidence is not necessary to meet the employer's burden of proving that the claimant's conduct was gross misconduct. However, if an employer can establish that a claimant was convicted of one of the

¹¹ IC § 22-4-15-6.1(a)

¹² IC § 22-4-15-6.1(c)(2)

¹³ IC § 22-4-15-6.1(d)

offenses defined as gross misconduct, DWD will find that the claimant was discharged for gross misconduct. Evidence that a claimant was arrested or prosecuted for a listed offense will weigh in favor of a finding of gross misconduct to the extent the arrest or prosecution indicates that law enforcement officials have probable cause to believe claimant committed the offense

Evidence of Action or Requirement of Employer Causing Claimant's Conduct

The statute provides an exception to a finding of gross misconduct in circumstances where the claimant's conduct would suggest otherwise. The exception relates to whether the employer played a role in the claimant's conduct. Thus, if evidence is presented indicating that an action or requirement of the employer may have caused the conduct that is the basis for the claimant's discharge, DWD is prohibited from finding that the claimant's conduct constituted gross misconduct.¹⁴

Lawful Conduct Not Otherwise Prohibited by the Employer

The statute specifically sets forth that lawful conduct not otherwise prohibited by the employer is not gross misconduct. In other words, evidence of the degree or severity of a claimant's conduct, by itself, is not sufficient to constitute gross misconduct. DWD must find that the claimant committed one of the enumerated actions defined in the statute as gross misconduct.¹⁵

Review Date

July 1, 2011

Ownership

Director of UI Benefits
Indiana Department of Workforce Development
10 North Senate Avenue
Indianapolis, IN 46204
Telephone: 317.234.5822

Director of UI Policy
Indiana Department of Workforce Development
10 North Senate Avenue
Indianapolis, IN 46204
Telephone: 317.232.0198

Effective Date

July 1, 2009

Action

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

¹⁴ IC § 22-4-15-6.1(e)

¹⁵ IC § 22-4-15-6.1(f)