TABLE OF CONTENTS

5 GENERAL
- A. General
- B. Actual Cause of the Discharge
- C. Evidence
- D. Misconduct in Connection with the Work
- E. Definition of Misconduct
- F. Injury to Employer
- G. Efforts to Control or Prevent

15 ABSENCE OR TARDINESS
- A. Compelling reason
- B. Notice, continual notice and proof
- C. Warnings for repeated absences or tardiness
- D. Excused absences or tardiness - permission
- E. Overstaying leave
- F. Unexcused absence or tardiness – permission denied

45 ATTITUDE TOWARD EMPLOYER

45.05 General
- A. General
- B. Dispute with Superior
- C. Exceeding Authority
- D. Warnings or Reprimands

45.1 Agitation or Criticism
- A. General
- B. Complaints about Working Conditions
- C. Complaints about Wages
- D. Incitement of Fellow Employees
- E. Complaints about Supervisor

45.15 Conflict of Interest
- A. General
- B. Self-employment
- C. Aiding Competitor

45.35 Indifference

45.4 Injury to Employer by Behavior to Customer or Client

85 CONNECTION WITH WORK
- A. General
- B. Violation of a Law
- C. Injury to Employer
- D. Worker Unfit or Unable
- E. Activities before Entering Employment
- F. Garnishment
- G. Behavior in the Workplace while off Duty

135 DISCHARGE OR LEAVING

140 DISHONESTY

140.05 General
- A. General
- B. Handling of Money
- C. Dishonesty to a Fellow Employee

140.1 Aiding and Abetting

140.2 Falsification
- A. General
- B. Falsification of Records
- C. Falsification of Work Application
- D. Falsification of Time Clock or Attendance Records

140.3 Theft of Property
- A. General
- B. Theft of Employer's Property
- C. Theft of Property Other Than the Employer's
- D. Purchase of Employer's Goods

140.4 Felony or Theft
- A. General
- B. Commission of a Felony or Theft
- C. Report of Act or Charges Filed
- D. Preponderance of Evidence
- E. Act Was Not Justified

150 EFFORTS TO CONTROL OR PREVENT
- A. Condoning
- B. Warnings

160 INJURY TO EMPLOYER
- A. General
- B. Reasonable Rules

255 DISOBEDIENCE

255.05 General

255.1 Violation of a Rule or Policy
- A. General
- B. Clothes and Appearance
- C. Confidentiality
- D. Gambling
- E. Safety Regulation

255.2 Insubordination
- A. General
- B. Refusal to Accept Disciplinary Action
- C. Refusal to Increase Production
- D. Refusal to Work Scheduled Hours
- E. Refusal to Work Overtime

F. Refusal to Accept Changed Duties or Location

270 USE OF DRUGS OR ALCOHOL
A. Definitions
B. Evidence and Proof of Alleged Behavior
C. On-the-Job Use of Drugs or Alcohol
D. Off-the-Job Use of Intoxicants
E. Testing for the Presence or Evidence of Use of Drugs or Alcohol
F. Employer Policies Not Consistent with AS 23.10.620
G. Reliability of a Test of Intoxicants
H. Alcoholism and Drug Addiction as a Disease

300 MANNER OF PERFORMING WORK

300.05 General

300.15 Damage to Equipment or Materials
A. General
B. Damage by Negligence
C. Damage by Accident

300.3 Quality or Quantity of Work

300.4 Neglect of Duty
A. General
B. Duties Not Performed
C. Sleeping on the Job
D. Temporarily Stopping Work
E. Horseplay

385 RELATION OF OFFENSE TO DISCHARGE
A. General
B. Discharge for Reason Other than Alleged Misconduct
C. Acts Occurring After Discharge

390 RELATIONS WITH FELLOW EMPLOYEES

390.05 General

390.2 Fighting
A. General
B. Verbal Battles
C. Threats

390.25 Annoyance of Fellow Employee

390.3 Debt

390.4 Uncooperative Attitude

390.45 Sexual Harassment

440 SEPARATION DATE
A. Unemployment Status
B. Suspension, Administrative Leave, or Leave Without Pay

475 UNION RELATIONS
A. General

B. Strike
C. Grievance Procedure
D. Agreement to Refrain from Union Activity
E. Dispute with Union Representatives

490 VULGAR OR PROFANE LANGUAGE
A. General
B. Towards a Supervisor
C. Towards Fellow Employee

500 WILLFUL MISCONDUCT
A. General
B. Willful Violation of Rule or Order
C. Knowledge of Rule
D. Uncontrollable Behavior

5 GENERAL

Law: AS 23.20.379(a)(2)

A. General

The provisions of AS 23.20.379(a)(2) apply only in relation to the worker's **last work**. It is necessary to determine:

- Did the employer discharge the worker?
- Was the reason for the worker's discharge misconduct? **and**
- Was the act of misconduct in connection with the worker's work?

In all cases the burden of proof is on the employer at each step.

Note that "[f]or unemployment purposes, a disciplinary suspension from work is considered the same as a discharge if the claimant files for benefits during the period of suspension." (95 0783, May 30, 1995)

B. Actual Cause of the Discharge

The action for which the worker was discharged is always the reason for the discharge. An employer may overlook behavior from a worker who is otherwise satisfactory, but discharge a worker whose performance or behavior is poor for the same behavior. Therefore, it is necessary to look at the behavior that is the immediate cause of the discharge, and determine whether that behavior was misconduct.

> Example: A claimant was discharged because he was incarcerated for having failed to make a court appearance on a charge of DWI. He had in fact done so, but by the time this was verified and he was able to hitchhike to work, he missed half a day of work and was discharged. The employer had warned him about his tardiness, his work performance, and his failure to complete an ICAR class. However, since the immediate cause of his discharge was the absence due to erroneous incarceration, the discharge was not for misconduct. (99 1805, August 12, 1999)

C. Evidence

For a complete discussion of evidence, see the Evidence Section of the Benefit Policy Manual.

1. Preponderance

In cases where the worker denies having committed the act that led to the discharge, the decision is made on the basis of the preponderance of evidence. This is a less strict standard than that of the courts' "beyond

reasonable doubt," and simply means that it appears more likely than not that the disputed event occurred.

Example: A claimant was discharged for theft. He was credited for multiple merchandise returns for goods that he had never purchased. The funds were credited to his personal account. He at first agreed to refund the money to the employer, but later decided not to do so. He did not bring bank statements to the hearing to substantiate his claim that the money came from other sources. In view of the facts, the Tribunal held that the preponderance of evidence supported the view that he had illegally obtained the money. (97 1625, November 25, 1997)

Example: An employer may discharge a worker not only for the use of intoxicants while on the job but simply for reporting for work while intoxicated or hung over. The employer's statement regarding the worker's alleged intoxication or hangover is a conclusion, and there must be facts to support this conclusion. Appearance, lack of coordination, or the inability to perform the work support the employer's conclusion that the worker was in fact intoxicated or hung over.

2. Proof

There must be proof of the misconduct, not merely allegations. Misconduct cannot be established on the basis of unproven allegations. (85H-UI-006, January 22, 1985)

3. The employer must have obtained any supporting evidence legally.

4. Rebuttal of allegation

A worker's denial may rebut the employer's allegation of the alleged misbehavior. However, the Commissioner held a denial alone does not rebut the facts. The worker must rely on competing facts to rebut the employer's conclusion (94 8636, December 13, 1994.)

Example: A railroad conductor was discharged from work for impairment by alcohol or drugs, a violation of the employer's operating procedure. The claimant, along with two other railroad workers, was assigned to the train at Healy, Alaska. The dispatcher felt that the claimant communicated in a way suggesting impairment by alcohol or drugs, because the claimant was unable to clearly and accurately repeat the order that he had received. The dispatcher reported this to her supervisor, and the crew was ordered to "tie-up" the train. During the time that the claimant was repeating the order back to the dispatcher, the brakeman entered the train cab. He noticed that the claimant wasn't talking very loudly and that the claimant had a swollen mouth, but saw no signs that the claimant was

impaired in any way by alcohol or drugs. Two supervisors investigated and determined that the claimant appeared fit for duty, but had taken Motrin for a toothache. After a hearing, the claimant was discharged. The superior court found that the claimant's explanation was supported by other evidence, and upheld the Division's finding that the claimant's discharge from work was not misconduct in connection with the work. (Alaska Railroad Corporation v. State of Alaska, Department of Labor, Employment Security Division and Terrace L. Manning, Alaska Superior Court 4JD, No. 4FA-90-2077 Civil, July 2, 1992)

D. Misconduct in Connection with the Work

Regulation: 8 AAC 85.095(d)

Behavior, no matter how reprehensible in itself, that was not done in connection with the work and does not affect the worker's ability to do the work, is not misconduct under the statute.

E. Definition of Misconduct

For a worker's conduct to be "misconduct:"

1. The worker's conduct must be:

   - a willful and wanton act that breached a duty owed to the employer; or

   - gross or repeated negligence that showed a substantial disregard of a duty owed to the employer; and

2. The worker's conduct must injure or tend to injure the employer's interest.

3. Misconduct is **not**

   - inefficiency resulting from lack of job skills or experience,
   - unsatisfactory performance as the result of inability or incapacity,
   - inadvertence,
   - ordinary negligence in isolated instances, or
   - good faith errors in judgment or discretion.

4. Alaska law permits employment "at will." That is, an employer's right to discharge a worker is limited only by applicable labor laws and the terms of a collective bargaining contract. Therefore, an employer may discharge a worker for no reason or any reason, and an adjudicator must not assume that a worker's discharge was for misconduct in connection with the work just because the employer had a right to discharge the worker. The discharge is not for misconduct in connection with the work, **unless**

the cause of the discharge meets the definition of misconduct under the statute.

5. The statute does not require that the employer show that the worker is guilty of a moral or ethical wrong. The term "misconduct," as used in the statute, simply describes certain conduct that results in a worker's disqualification.

F. Injury to Employer

In many cases, the misconduct clearly is injurious to the employer. An employer is injured, for example, when an employee fails to appear as scheduled, damages equipment, drives customers away by a poor attitude, and the like. Of course, the mere fact that an employer is injured by an employee's behavior does not in and of itself show misconduct. First, misconduct must be shown, and then the employer must have been injured by the misconduct.

Example: A worker is faultlessly involved in an accident with the employer's vehicle. The employer, for insurance reasons, discharges the worker. Although the damage clearly injured the employer, since the worker was without fault in the accident, there is no misconduct.

See MC 16O Injury to Employer for further discussion on this topic.

G. Efforts to Control or Prevent

In order to show misconduct, the worker must have known what behavior was required or forbidden.

Some acts of misconduct, such as theft, on-the-job-drunkenness, and the like, are generally accepted as wrongdoing and the employer needs no company rules or previous warnings to establish misconduct. Other misbehavior may require advance warning, such as a company policy of discharge for tardiness after the third offense. Where there is no fixed company policy, the employer may warn the employee that the next offense will result in a discharge.

On the other hand, the employer may have condoned a particular action by having knowingly allowed it in the past, either from the discharged employee or from others. In such a case, for a discharge to be considered misconduct, the employer must:

- specifically have informed the employee (or all employees) that the previously-tolerated action would thereafter be considered misconduct, and
- not thereafter condone the behavior again.

15 ABSENCE OR TARDINESS

Separations due to absence from work must first be carefully examined to determine the moving party. In some cases, a worker may be absent from work with no intention of returning. The employer's subsequent action to discharge the worker for the absence does not make the separation a discharge, because the worker has already abandoned the work. Such a separation is considered a voluntary leaving. See VL 135.1 Absence from Work. For cases involving leaving work early, *see* MC 300.4, D. Temporarily Stopping Work.

The duty to be at work on time and to stay at work is implicit in the contract of hire. This duty is not, however, absolute. It is qualified by the terms of the working agreement, customs and past practices in the occupation and the particular employment, the reason for the absence or tardiness, and the worker's attempts to protect the employment. In all cases, the injury to the employer may be assumed.

A. Compelling reason

Absence or tardiness without permission is misconduct in connection with the work unless the worker had a compelling reason for the absence or tardiness, and took reasonable steps to protect the job. The compelling reason for absence must continue throughout the period of the absence.

> Example: A claimant (97 0499, March 28, 1997) walked off the job in order to avoid a fight with the manager who continually cursed and yelled at him. He had previously complained to one of the owners of the business who had advised him to "take it with a grain of salt." The claimant did not intend to quit and returned following his regular days off. The employer believed that he had quit, and advised him that he no longer had a job. In view of the provocation, and the claimant's efforts to remedy the situation, the Tribunal held that he had good reason to leave the job at the time, and there was no misconduct in his leaving to avoid an altercation.

> Example: A claimant was discharged from his job because of excessive absences and tardiness. In the final incident, he called in sick with the flu from Monday through Thursday. When the employer learned that the claimant had been playing darts with his league on Wednesday, he discharged him, feeling that if he was well enough to play darts, he was well enough to go to work. The Tribunal concurred, holding that the claimant had substantially disregarded his employer's interest, and had therefore committed misconduct in connection with his work. (98 0438, March 20, 1998)

B. Notice, continual notice and proof

Regardless of the reason for the absence or tardiness, a worker must still properly notify the employer, unless the worker has a compelling reason for the

failure to give notice. Continuing notice is usually necessary in lengthy absences and employers often have rules governing such absences. If the employer requires proof of the reason for the absence or tardiness, the worker must supply that also.

> Example: A claimant was discharged because he went home sick without notifying his employer. The employer was at lunch at the time. The claimant did not leave a note because he could not spell. He went home but did not call the employer because he was so sick that he immediately fell asleep. In allowing benefits, the Tribunal held that he was prevented with good cause from notifying the employer promptly of his absence. (97 2186, October 30, 1997)

> Example: A claimant was discharged for failing to notify his employer that he was going to be late two hours in advance of his scheduled work time. He was ten minutes late due to a dead battery and had called the employer as soon as he discovered the problem. The employer had a firm rule, but the Tribunal held that the situation was not misconduct as the claimant had acted reasonably under the circumstances. (98 1863, September 17, 1998)

> Example: A claimant was discharged for failing to provide his employer with a required doctor's slip to account for his absence of more than five consecutive days. He was warned that his absenteeism, which exceeded 247 hours, was grounds for termination. Since the claimant did not provide the doctor's slips, and stated at the time of his termination that he had wanted to quit, the Tribunal questioned the legitimacy of the absences and found him to have committed misconduct in connection with the work. (99 0828, May 5, 1999)

> Example: On the other hand, a claimant was fired for overextending her medical leave and failing to call in. The employer's policy required daily notice of absence, unless the employee submitted a medical report detailing the amount of leave required. The claimant did not return to work at the expiration of the first medical leave, but she did continue to supply medical forms which, although they did not cover a specific period as required by company policy, did state that the claimant should remain at rest for "at least one week" more. In allowing benefits, the Commissioner held in this case that the claimant's violation of a technicality in the employer's policy did not show a "willful or wanton disregard" of the employer's interest. (82H-UI-051, March 31,1982)

In some cases, notice of absence or tardiness is unnecessary or waived, such as when the employer has independent knowledge of a worker’s inability to be at work, or when it has been established by custom that notice is unnecessary.

When a worker receives a severe shock, such as the death of a family member, failure to give notice of absence may be excused.

C. Warnings for repeated absences or tardiness

A worker who is persistently absent or tardy is guilty of misconduct. Although such thing as oversleeping or missing the bus may excuse an isolated instance of minor tardiness, they are not compelling reasons for repeated tardiness.

Even if the worker was warned that further absence or tardiness could result in dismissal, it is necessary to examine the reason for the specific absence or tardiness and the worker's ability to control it. When the last instance of absence or tardiness is totally outside the worker's control, even though the worker may previously have been warned, misconduct is not shown. Warnings or reprimands are not necessary if the worker knew the required conduct. If there is a question, the presence or absence of such warnings is material in determining misconduct.

Example: A claimant (97 1189, August 15, 1997) was discharged by his employer for repeated absences on the day following payday. The employer on the absence preceding the discharge required the claimant to bring a medical slip documenting the reason for his absence, which he did. The absence that caused the discharge was because he had hit a moose. The employer did not dispute the fact of the occurrence. The Commissioner allowed benefits as there was no evidence that the claimant had willfully missed work.

Example: A claimant was discharged from his job for repeated tardiness. He had been warned that the level of tardiness was unacceptable. Although some of the reasons for his tardiness were with good cause, the occasion for which he was discharged was because he had stopped at the bank in preparation for leaving town. Since the final occasion was without good cause, the Tribunal held that he had been discharged for misconduct in connection with the work. (97 2216, October 23, 1997)

A worker who has had previous problems with absence or tardiness may be held to a higher standard of notification of the employer, such as speaking to the employer directly rather than simply leaving a message. Except in cases where adherence to this would be unreasonable, failure to follow these procedures is misconduct.

Example: A claimant had been warned for previous attendance problems and was required to call his immediate supervisor. He had the supervisor's work, home, and cell phone numbers. He had a sprained ankle and was advised by his doctor to stay off work. He called and spoke to a salesman on one of the two days and the office manager on the other. The third day the supervisor contacted the claimant and told him he needed a work tolerance report from his doctor. After a verbal interaction that indicated to the supervisor that the claimant was determined to follow his own way, the claimant was discharged. In finding misconduct, the Tribunal held that the previous attendance problems warranted a more

stringent requirement to report absences. And the worker's failure to comply was a blatant disregard of the employer's interests. (98 1506, August 25, 1998)

Example: A claimant was discharged from his job for failure to follow proper leave procedures. He traded shifts with another employee, but failed to clear it ahead of time with the supervisor. Because he had another earlier disciplinary warning involving attendance, the Tribunal held that the discharge was for misconduct. (99 0585, April 6, 1999)

D. Excused absences or tardiness - permission

An absence or tardiness with the express permission of the employer cannot be misconduct in connection with the work, unless the permission was obtained under false pretenses.

Example: A claimant had been moved to a new work location because the printing press at which he normally worked was down. He did not know how to do the different type of work in the new location and the foreman was unable to help him. Therefore the claimant asked to leave early, and was given permission by his supervisor. When he returned after the press was operational, he was discharged. The Tribunal held that, since he had been given permission to leave, the claimant was not discharged for misconduct. (97 1610, August 4, 1997)

Permission is not, however, implied just because the employer does not expressly forbid the worker to be absent or tardy from work.

Example: A worker with a history of absenteeism or tardiness without cause or notice is warned that further unexcused absences or tardiness will result in dismissal. The worker telephones the employer ten minutes before the shift to inform the employer that the worker will again miss work. The employer raises no objection at that time but discharges the worker on the following day. Even though the employer necessarily assented to the absence when notified, the employer did not excuse the absence and the worker's record of absenteeism indicates a willful disregard of the employer's interest. A finding of misconduct is appropriate unless the reason for the absence was compelling and the method of giving notice was proper.

E. Overstaying leave

Overstaying leave is considered an absence constituting misconduct in connection with the work unless:

- The reason for overstaying leave is compelling; and

- The worker made a reasonable attempt to give notice of not returning as expected.

  Example: A claimant was granted two weeks of leave, during which time a medical checkup indicated he required surgery. This resulted in an additional two weeks away from his work. However, the claimant did not notify his employer of the circumstances. The employer held the job open for one week, and then hired a replacement. The Tribunal held that the claimant was discharged for misconduct in connection with the work. (A-1210)

  Example: A claimant (05 0528 May 23, 2005) was incarcerated on January 11. The employer approved paid leave until January 17, when the worker thought he would be released. When he was still not released as of January 27, the employer discharged for absence. Citing a prior case, (88H-UI-140, March 6, 1988) the Commissioner found "the claimant's inability to report to work was therefore a willful disregard of his employer's interest." The claimant was discharged for misconduct.

  Example: A claimant did not return to work in a logging camp following a weekend off because his wife was experiencing difficulty with her pregnancy. Since the camp was located 150 miles from his home, he would be unable to get home except on weekends. The claimant called in to tell the employer that he was unable to return to work until the baby was born. He kept in touch with his employer on two separate occasions before reporting back to work approximately two weeks later. In allowing benefits, the Tribunal held, "Necessary absence from work accompanied by proper notice to one's employer falls short of 'misconduct' as defined for unemployment insurance benefit purposes." (75A-37)

F. Unexcused absence or tardiness – permission denied

Unexcused absence or tardiness is considered misconduct in connection with the work unless there is a compelling reason for the absence or tardiness and the worker makes a reasonable attempt to notify the employer (92 25438, June 18, 1992.) If a worker takes leave for which the employer has specifically denied permission, the reason for the leave must be considered. If the employee has a compelling reason for the leave, they are not leaving with the intention of quitting work, but only because they feel they must. This is not considered a voluntary quit. If the employer refuses to allow the worker to return, the worker has been discharged.

However if a worker takes leave for a frivolous reason, after the employer has specifically denied permission, this is considered a voluntary leaving of work. See VL135.1 Leave of Absence for more discussion.

Example: A claimant (04 0750 April 16, 2004) requested leave for March 4, 2004. His wife was having medical testing in Anchorage and he wanted to accompany her, although it was not essential that he be present for her testing. His leave was denied by both the parts manager and the general manager. The claimant took the day off anyway and accompanied his wife. He was discharged after returning back to work for his failure to appear for work on March 4, 2004.

The Tribunal held that a compelling reason may justify an unexcused absence. However, because it was not medically necessary for Mr. Weil to be presence at his wife's appointment, his failure to attend work on March 4, 2004 was a clear act of insubordination and is misconduct.

Example: A claimant was absent from her job in order to be with her fiancé due to his illness and his father's. When she attempted to return to work, the employer informed her that she was discharged due to her absences. Even though she had not adequately informed the employer about her proposed absences, the Tribunal held that her attempt to return showed that she had not intended to quit, and the separation was adjudicated as a discharge. (97 1441, July 8, 1997)

45 ATTITUDE TOWARD EMPLOYER

45.05 General

A. General

"Attitude toward employer" refers to the manner in which the worker performs the services. Although the worker's dislike of the employer or the job may underlie a discharge, the discharge is not for misconduct unless the worker's attitude is shown in acts or statements against the employer's interest. Subjective qualities of attitude, such as disloyalty, poor attitude, or lack of ambition are not misconduct unless they are displayed in **specific concrete behavior** that is itself misconduct.

> Example: A claimant (97 1343, July 22, 1997) was discharged for disloyalty to her employer, as well as rudeness --- although the latter was not documented. The disloyalty was manifested in her having a voodoo doll on her desk with a picture of the company president's face on it and pins stuck in it. In allowing benefits, the Tribunal held that the act, although disloyal, was not, in the absence of warnings, misconduct, but rather a case of poor judgment.

In cases where a worker was discharged for poor attitude, the final reason for the discharge may be the last in a series of incidents. Often no single incident shows a disregard of the employer's interest amounting to misconduct. If the worker has been warned for attitudinal problems, the whole series of incidents may show a sufficient disregard of the employer's interest to be misconduct.

B. Dispute with Superior

A dispute between a worker and a supervisor or an employer is not by itself misconduct in connection with the work. "Not all disputes with a supervisor rise to the level of insubordination constituting misconduct." (92 25160, June 30, 1992.) The normal give and take of the work situation nearly always causes some disputes. Disagreements over how the work is to be done, wages, and the like are common in the workplace.

However, the manner, time, or place of the dispute may turn a normal dispute into a case of misconduct. For instance, insolence or abuse of a supervisor, especially when carried on before fellow employees, tends to undermine the supervisor's authority and can, in fact, be misconduct in connection with the work.

> Example: A cocktail server at a restaurant was terminated for refusal to accept her supervisor's authority. The claimant had been warned on different occasions for disobeying the employer's rules, for being argumentative in front of customers, and for being insubordinate. On the day of her termination, the claimant's supervisor asked the claimant if she

had the name tag that was mandatory for all employees to wear. After being asked a second time, the claimant responded that she would not put on her name tag nor would she pay the $2 deposit to borrow a name tag. When the supervisor told her to sign a warning regarding the name tag incident, she became profanely angry. Her supervisor told her to remain in his office, because he wanted to have another manager witness the fact that she had refused to sign the warning. The claimant left her supervisor's office. Her supervisor discharged her as she left his office. In denying benefits, the Commissioner held, "[The claimant] was clearly insubordinate. . . Her behavior . . . constituted a refusal to accept the employer's authority. She was therefore discharged for misconduct connected with the work." (92 25160, June 30, 1992)

Example: On the other hand, a claimant was discharged from his job when he protested being suspended and put on probation because he was (incorrectly) accused of violating company rules. The Commissioner, in overturning the Tribunal's decision, allowed benefits on the grounds that the behavior was more a matter of office give and take. (98 2175, January 25, 1999)

Example: A journey-level carpenter was fired from the project on which he was working because he continually argued with his employer and his foreman and insisted that the structure was not being built correctly, safely, or in keeping with the building codes. The structure in question was being built in the "old-fashioned" way of log building construction from trees located on the building site. The claimant had never before been involved in log construction. In allowing benefits, the Tribunal was persuaded that the claimant's argumentativeness arose from his sincere belief that the structure was not being safely built. The Tribunal held that the employer may have had good reason to discharge the claimant, but that the claimant was not discharged for misconduct connected with his work. (A-5073, January 31, 1975)

Example: A claimant was discharged from his job for saying that his supervisor and the personnel director should learn what their jobs were. In denying benefits, the Tribunal vacated a previous holding that had been remanded by the Commissioner for further testimony. The Tribunal held that the claimant had " carried that complaint beyond the normal bounds of workplace propriety. . . . [He] did it in such manner as to be insolent and insubordinate." (98 1857, September 17, 1998)

Example: 97 2629 deleted.

Example: A claimant was employed as a mechanic for a catering company. The claimant was discharged for his unreasonable reaction to his supervisor's criticism. The claimant had installed an incorrect size of battery. The claimant's supervisor brought this to the claimant's attention.

The claimant became abusive and profane with his supervisor, feeling that his supervisor had it in for him and that it was another example of his supervisor's continuing criticisms. The supervisor discharged the claimant for his conduct. The Commissioner held that the claimant was discharged for misconduct in connection with the work. (83H-UI-263, October 17, 1983)

C. Exceeding Authority

The authority granted to an employee defines the extent to which the employee can act on behalf of the employer. If this authority is clearly exceeded, there may be harm to the employer's interest, and thus misconduct.

As with any other case of alleged misconduct, however, it must be shown that the behavior was a "wanton or willful disregard" of the employer's interest. Good faith errors in judgment or discretion cannot be misconduct, however. If the contract of hire is not explicit as to the employee's authority, the employee may exceed the worker's authority without even being aware of it.

Example: A worker may temporarily exceed the worker's authority in emergency, or when the worker honestly believes the worker is acting in the employer's best interest. Or a poor exercise of judgment on the part of the employee might be viewed by the employer as exceeding the employee's authority. None of these cases are misconduct.

Before misconduct is shown, it must be established that the worker was clearly aware of the extent of the worker's authority and willfully exceeded it. The terms of the employment agreement and any earlier reprimands or warnings are important considerations.

Example: A waitress was fired for having a "bossy" attitude toward fellow employees, even though she was not in a position of authority over them. The discharge was apparently the result of a single incident. The claimant requested the bus boys to clean off some dirty tables before their shift actually started. The claimant testified that it was an established practice to request assistance from the bus boys during busy periods, even though it was prior to their regular duty hours. She had asked for assistance under similar circumstances in the past and the manager had voiced no protest. In addition, she had not been warned or informed that her conduct was less than satisfactory before this incident. In allowing benefits, the Tribunal decided that the incident was simply not of sufficient magnitude to be misconduct in connection with the work. (AW 2689)

Example: A claimant was discharged for using the company security system to lower the listed price on a guitar that a customer wanted to buy. Only managers had this authorization, which the claimant knew because he had been a manager and had taken a voluntary demotion from that

position. A member of management had given him the security code, he stated, and he had already discussed the change in price with a manager. In denying benefits, the Tribunal held that the claimant knew that the mere possession of the code did not give him authority to change the price without management approval. (98 1387, July 23, 1998)

D. Warnings or Reprimands

Warnings or reprimands are usually necessary to show that the worker's actions showed a willful disregard of the employer's interests. If the worker continues the behavior after such warnings, this tends to show that the behavior was willful.

Example: A receptionist was discharged for poor attitude. She had come in late through the shop door, and stopped there to talk with the shop employees. When the foreman said everyone should get back to work, she did not follow the directive. Since the foreman was not her supervisor, and she had not been warned about poor attitude, the Tribunal held that the discharge was not for misconduct. (99 1763, August 10, 1999)

45.1 Agitation or Criticism

A. General

Agitation or criticism includes behavior such as a worker making disparaging remarks about the employer or the business, either at work or elsewhere, or stirring up resentment or dissatisfaction among other employees. In order to show misconduct, the worker's **conduct** must have gone further than mere injudicious language or a lapse in judgment. The worker's actions or statements must show a conscious disregard of the employer's interest. Only when an overt act such as insubordination, a work slowdown, or wanton negligence accompanies a resentful or discontented attitude, is it a violation of the employer's interest and therefore misconduct.

B. Complaints about Working Conditions

The registering of a complaint through normal and proper channels concerning equipment, fellow employees, wages, or other working conditions is not misconduct. This is true whether the complaint is significant or is trivial or unjustified.

> Example: A claimant was discharged for complaining both anonymously and openly regarding suspicions of federal violations and criminal misconduct of his supervisor. The employer and the police investigated and found the complaints to be groundless. Nevertheless, the Tribunal held in allowing benefits that the claimant had a moral obligation to pass on his suspicions. (98 2530, December 23, 1998)

However, misconduct may be found in:

- Repeated unjustified or baseless complaints, following warning;
- Any complaint or discontent which reaches a point that it injures the employer's interest, as shown by:
  - a detrimental effect on the worker's job performance;
  - agitation of co-workers; or
  - insubordination.

In determining misconduct, both the reasonableness of the complaint and the reasonableness of the worker's action in trying to alleviate the cause of the complaint should be considered. A reasonable complaint, reasonably expressed, cannot substantiate a finding of misconduct.

> Example: A claimant was employed as a waitress. The employer came in to work one shift, because the regular cook was absent. In the middle of the shift, the claimant went to a cab stand next door and asked the

dispatcher to contact a relief waitress for her. The cab dispatcher reported that she stated that she did not want to work with the employer. However, no relief was obtained, and the claimant did finish out her shift. The employer testified that the primary reason for the discharge was the report that the claimant did not want to work with the employer. The Tribunal held that the claimant was not discharged for misconduct in connection with her work. (IA-4640)

C. Complaints about Wages

A wage dispute by itself is not misconduct in connection with the work. It is normal for a worker to make wage demands upon the employer, and a discharge solely because of such demand is not for misconduct.

Example: A claimant was discharged for repeatedly asking his employer if he would be paid for doing a particular diagnosis and repair on a car whose difficulty the employer had asked him to diagnose. He had not been paid for other repairs he had done, although he had requested the pay several times. In allowing benefits, the Tribunal held, and the Commissioner affirmed, that he had good reason to ask about the pay for the job, and therefore it was not misconduct. (97 2202, November 3, 1997)

If the worker threatens to resign if the wage demand is not met, and the employer merely denies the request without taking further action, any resultant separation is a voluntary quit.

Often a discharge following a wage dispute is actually caused by some other behavior associated with the dispute.

Example: A janitor was discharged because of an ongoing wage dispute that caused him to neglect his duties when his demands were not met. The Commissioner held it was the claimant's laxness and insubordination that were misconduct, rather than the demand for more wages.

D. Incitement of Fellow Employees

A worker may have a legitimate grievance, but harangue the employer in front of fellow employees and the public to such an extent that it injures the employer's interest and indicates a willful disregard of that interest. Even a reasonable complaint, if expressed in such a way that it injures the employer's interest, may be misconduct.

Example: A manager of one of five service stations owned by the employer was discharged when he and two of the other managers gave the employer an ultimatum that they intended to quit unless the employer abandoned a business policy that the managers felt cut into their bonus

checks. The employer agreed to give it a two-month trial to determine the results. The claimant decided, with the other two managers, to attempt to pressure the employer into dropping the new policy. The Tribunal found the claimant's actions to be a willful disregard of the employer's interest. AW-3343

Example: A Prudhoe Bay electrician and four of his fellow employees were discharged for refusing to take their eating trays from their cafeteria table to the dishwasher. They objected to a sign posted in the cafeteria stating: "Will all personnel please carry trays to the dishwashing area. Thank you." The Tribunal held that the employer's request was reasonable and logically designed to promote the health, safety and welfare of employees in an isolated camp situation. The manner in which the claimant chose to protest the employer's request challenged the employer's authority and jeopardized the employer's best interest. Therefore, the claimant was discharged for misconduct connected with his work. 75A-556,

E. Complaints about Supervisor

A worker may have complaints about a supervisor and may legitimately voice such complaints through proper channels, including a company or union grievance procedures, EEO or ADA complaints, and through the company personnel office. These complaints cannot be considered as misconduct unless they are false, and known by the employee to be so at the time of making them.

On the other hand, an employee who bypasses the normal chain of command in order to complain about a supervisor acts against the employer's interests, and so commits misconduct.

Example: A claimant complained about her supervisor to the regional, state, and international board members and to the state and international executive board members. She charged that he was not doing a good job, and continued these charges after a warning. The Tribunal held that, "Such blatant and conscious acts, which were obviously against the employer's interests, established misconduct." (98 1492, September 11, 1998)

45.15 Conflict of Interest

A. General

A worker's duty to the employer is violated if the worker, whether on or off the job, acts in conflict of interest to the employer. The employer is clearly harmed, and does not need to have previously warned the worker.

> Example: A pilot in a federal wildlife refuge who also had his own air taxi charter business submitted an application for a permit to fly hunters into the refuge, which was denied because of a potential conflict of interest. He was discharged for having violated the federal law in transporting hunters within the refuge without a permit and for being insubordinate in doing this when he had been denied the permit. In denying benefits, the Tribunal held, "If the public were to believe, whether true or not, that a departmental employee was using knowledge of big game positions to further the aims of the hunters he transported, the damage to the department's integrity and, thusly, its ability to successfully manage the refuge would be great." (98 2586, January 12, 1990)

B. Self-employment

The discharge of a worker who is self-employed independently of, and in competition with, the employer is for misconduct. This is true even if the worker solicits the work outside the hours of employment.

> Example: A claimant was discharged from his job for violating an employer agreement that he would not take work in competition with the employer. He had taken two jobs in self-employment; one that the employer agreed was left over from his previous employment, the second one in which he underbid his present employer. The Commissioner overruled the Tribunal and allowed benefits, holding that the employer was aware of the second job and had given tacit approval. (99 0206, March 1, 1999)

A worker who merely discusses becoming self-employed is not guilty of misconduct, even though the business is of the same nature as that performed for the employer.

C. Aiding Competitor

Misconduct is shown when a worker recommends a competitor of his employer to a customer who wants a service or product that the employer can furnish. However, an employee who in good faith believes that the employer cannot fulfill a customer's requirement, and so recommends a competitor, has not willfully disregarded the employer's interest, and the discharge is not for misconduct.

> Example: In response to a customer complaint on the charge of the employer's service, a claimant said that he thought the employer

overcharged and recommended that the customer check out the competition. The Tribunal found that he was discharged for misconduct. (97 0985, June 25, 1997)

Misconduct is also shown if the worker reveals confidential information or trade secrets of his employer to a competitor. See MC 255.1 "Confidentiality."

If an employer has an established company rule that prohibits a salesperson from carrying a competing line of merchandise, a worker who violates this rule is guilty of misconduct.

45.35 Indifference

A worker may be discharged for lack of interest in the work. Some workers may feel complete apathy and indifference to the job or occupation in which they work. However, the feeling of indifference does not matter as long as the employee performs the job satisfactorily. Misconduct may be found only where the employer is damaged or potentially damaged by the acts of indifference.

> Example: A claimant worked as a security guard at Prudhoe Bay at the time of his discharge. The claimant was found in the recreation hall taking a break when he was supposed to be on duty, and on one occasion was found sitting in the security office with his feet up on a desk reading a magazine when he should have been working. This occurred at a time when all of the security guards had been told to be on special alert because a corporate security officer was coming for an inspection. In denying benefits, the Tribunal held that, although the two incidents may not have been considered misconduct in themselves, when considered with the fact that an inspection tour was being carried on, these acts took on additional magnitude. The Tribunal held that the claimant's behavior was not in the employer's best interest and that his obvious indifference to his work amounted to misconduct. (76A-493)

> Example: A claimant was discharged from her job as a branch manager (and offered another position, which she declined) because, after she had taken time off work to be with her husband, she agreed with her employer in saying that she thought more of her husband than she did of the job. In allowing benefits, the Tribunal held, "Reasonably, one's family takes precedence over a job, and misconduct is not established simply by vocalizing that sentiment." (97 2652, January 29, 1998)

A lack of ambition to advance may make a worker less desirable to the employer, particularly if the employer is interested in developing the employee for more responsible work. However, an employee who is discharged because of not being considered suitable for promotion is not discharged for misconduct.

Acts showing inefficiency, incapacity, isolated incidents of negligence, and good faith errors in judgment or discretion do not necessarily by themselves indicate indifference.

> Example: A claimant was discharged from his job because his employer believed that he was disdainful of the company and its goals. The claimant had remained on the telephone during a staff meeting for 15 to 30 minutes; delinquency rates had doubled within two months of his employment; his management style was not that of the employer; and he had not completed assigned tasks. In allowing benefits, the Tribunal held that failure to perform to expectations, when the worker is attempting to do so, is not evidence of misconduct. (97 2212, October 30, 1997)

45.4 Injury to Employer by Behavior to Customer or Client

Employers who depend for the success of their businesses on the good will of their clients or customers are clearly injured if their employees behave in such a way as to injure those relations, whether by rudeness, indifference, inappropriate humor, or because of criticism of the employer's service or product to a customer.

Discourtesy to a customer or client may be misconduct. An employer may reasonably expect that employees behave so that customers are not driven away. However, the evidence must indicate that the worker acted unreasonably or was at fault. Misconduct must be shown, not merely alleged. Either there must be witnesses to the behavior complained about, or the employee must have been previously warned about documented incidents. The worker should not be penalized because of the unreasonable actions of a patron.

> Example: A claimant worked as a food server/cashier. She was discharged from her job for rudeness and indifference to the customers. She had been advised in evaluations and in written warnings that she needed to improve her attitude. Both customers and other employees filed written complaints with the management. In spite of warnings, she continued to joke with customers in a way that they perceived, and reported to management, as rudeness. In finding that her behavior was misconduct, the Tribunal held that the warnings should put the claimant on notice that her behavior was inappropriate. (98 1032, June 5, 1998)

> Example: On the other hand, a claimant was a bartender in a hotel. She closed the bar early when there was no business, according to company policy, but was persuaded by a patron to re-open it. After waiting 45 minutes for payment of the bar tab, she began arguing with the patron, using profanity. In finding the incident to be an isolated instance of poor judgment, rather than misconduct, the Tribunal cited the lack of previous warnings for misconduct, and extenuating circumstances. (97 0997, June 10, 1997)

> Example: A front desk clerk at a hotel was discharged for alleged rudeness to a patron. She was not aware that she had been rude. She had been warned by the general manager the previous day that there had been complaints from guests, but was not otherwise warned or counseled. In allowing benefits, the Tribunal held that the lack of warnings, and the fact that she had not been given time to correct her behavior did not cause her behavior to be misconduct. (97 2109, October 22, 1997)

Injury to Employer by Behavior to Customer or Client

> Example: A claimant (98 0719, April 30, 1998) was working on call. On a Sunday, he informed a customer that there would be a two to three hour delay in water delivery. The reason for the delay was that the claimant was caring for his dependent children and could not get relief until that time. The customer found a

competitor with lower prices. The claimant was discharged, but, the Tribunal held, not for misconduct, as the reason that the employer lost the customer's business was the lower prices, not the claimant's reasonable action in delaying delivery.

85 CONNECTION WITH WORK

A. General

AS 23.20.379(a)(2) refers only to cases when an employer discharges the worker for misconduct **in connection with the work.** If the act leading to the discharge is not in connection with the work, the act is not misconduct under the statute.

> Example: A fish processing worker was released from duty, along with all other processors, on a seagoing processor in Dutch Harbor at the conclusion of his work to be flown back to his home. When management learned that all flights from Dutch Harbor were canceled due to weather conditions, they ordered the workers to return to the ship to be transported back to Seattle and then flown back home. This was because, since Dutch Harbor did not have sufficient hotel space, the workers would have to camp on the beach, giving the company a bad name. The claimant at first refused, even when threatened with termination, because he knew the weather conditions would mean a rough voyage back. When he returned to the ship he worked at his usual rate. He was discharged by letter, based on his initial refusal to return to the ship. The Tribunal held that there was no misconduct shown, since had not been employed by the company at the time of the refusal. (98 0722, May 1, 1998)

In most cases, the place and time of the act establishes the connection with the work. Only in cases where the time and place of the act does not definitely establish the connection with the work does the adjudicator specifically note that there was a connection between the act and the work.

B. Violation of a Law

A violation of law is not misconduct under the Employment Security Act unless it occurs in connection with the work. A violation of law occurring outside working hours and away from the employer's premises is not misconduct unless the violation injures the employer's interest.

> Example: A clerk at the Division of Child Support Enforcement was discharged from her job because she was convicted of a felony in that she improperly claimed welfare benefits. The felony was committed before she went to work for the Division and she was to repay the money, but there were no fines or penalties because it was an "honest mistake." The Division discharged her because, although there were no problems with her work, the potential for conflict was too great. The Tribunal allowed benefits and held that the misconduct was not in connection with her work. (99 0935, May 21, 1999)

> Example: A transporter lost his driver's license for 90 days for driving under the influence. The claimant stated he was not on duty and should not be denied benefits. However, the Commissioner held the employer was unable to use his services as a result [of the DUI]. The claimant's

actions in this case amounted to a willful disregard of the employer's interest that had an adverse impact on the employer and was discharged for misconduct. (01 0058, March 28, 2001)

C. Injury to Employer

See MC 160 INJURY TO EMPLOYER for a further discussion of this topic.

An act outside working hours and off the employer's premises is misconduct if it has a direct and adverse impact on the employer's interest regardless of the circumstances under which the act occurred.

Example 97 0700 deleted.

Example: A claimant was discharged by his employer because his name appeared in the paper in connection with a drug bust, and the employer did not want the name of his enterprise associated with a drug connection. The drug bust article was not work-related, and the Tribunal held there was no misconduct in connection with the work. (97 2656, January 9, 1998)

D. Worker Unfit or Unable

There is a connection between a worker's conduct while off the job, if it makes the worker unfit or unable to perform an essential task of the job.

Example: A claimant was discharged because he had violated his parole by having left the State of Oregon. He was arrested and spent time in jail. The employer did not hold the job for him because of the circumstances of his absence. In holding that the claimant was discharged for misconduct in connection with his work, the Tribunal stated, "[The claimant] knew or reasonably should have known that a parole violation could result in his incarceration and the removal of his services from his employer. His action was willful, and his resultant discharge was for misconduct connected with his work." (97 2417, November 4, 1997)

E. Activities before Entering Employment

In most cases, a worker's activities prior to entering employment are not misconduct connected with the work.

Example: A claimant who was a sex offender and prohibited from being around children unless another adult was present was discharged. The sex offense occurred before he was hired, and he told the employers about it, and also that he had registered as a sex offender. The employers learned that they might lose their State license, as it was possible that the claimant might meet children in the course of his work. The Tribunal held, in allowing benefits, that the claimant had committed the act before being

employed, and had not withheld information concerning it from the employers. (98 1249, June 22, 1998)

An exception to this is where a worker deliberately falsifies a work application and conceals information that would have prevented the employer from hiring the worker. *See* MC 140.2 Falsification.

F. Garnishment

Garnishing a worker's wages due to debts is rarely misconduct in connection with the work. Although there is an obvious, if probably minor, inconvenience for the employer or the possibility of other harm to the employer's interest, it is not misconduct unless:

- It is within the worker's control to pay the debts timely; and
- The worker's failure to pay the debts is repeated after warnings from the employer.

Note that it is illegal for an employer to discharge an employee for one occurrence of garnished wages. Therefore, a discharge for a first offense is not misconduct.

G. Behavior in the Workplace while off Duty

Whether the worker is actually working or merely on the employer's premises, misconduct in connection with the work can be shown if the worker's conduct unduly interfered with other employees or if the worker's conduct affected the employer's relationship with the employer's customers.

Example: A claimant went into his employer's bar, where he was a senior cook and manager. Accompanying him was a former employee, who was asked to leave. After some altercation, she left with the claimant. As he left, he said loudly, "F___ this place." Although his behavior was contrary to the employer's interest and was in the employer's place of business, the Tribunal, in allowing benefits, concluded that the one isolated incident did not rise to the level of misconduct in connection with the work. (97 0585, April 4, 1997)

Example: On the other hand, a worker at a fast food restaurant, on her off-duty time, went into another branch of the employer's business. After an exchange of words with another employee who was working, there, she went to the back of the building, knocked and was admitted, and had a confrontation of some (disputed) degree of heat. In denying benefits, the Tribunal held that the claimant's off-work unauthorized entry created a potentially volatile situation that violated a standard the employer had a right to expect, and was misconduct. (99 1701, July 22, 1999)

135 DISCHARGE OR LEAVING

For a discussion regarding the principles involved in the determination of whether a separation is a discharge or a voluntary leaving, *see* VL 135, "Discharge or Leaving."

140 DISHONESTY

140.05 General

A. General

The duty of honesty is the clearest of the duties owed an employer. It is not necessary to show that a worker's dishonesty was illegal or criminal. The dishonesty need only injure the interest of the employer or breach a duty owed to the employer. Charges of dishonesty, however, must be proven, just as any other charge of misconduct.

Such acts as misappropriation, fraudulent claiming of unearned wages, falsification of records, and the like are considered misconduct. Similar acts against someone other than the employer are misconduct when the acts are so bound up with the employment as to be connected with the work.

> Example: Misconduct in connection with the work includes such actions as a worker's being discharged for stealing a fellow worker's tools; or a worker's theft of the property of a third person to which the worker gained access by virtue of the employment.

Even a clear attempt at theft or falsification may be considered misconduct.

> Example: A claimant came into the employer's place of business intending to print a 12-page assignment for her college class, which was a direct violation of the employer's written policy. However, she was unable to do this because the computer failed. The employer found pages of the assignment, which the claimant contended that she had printed on the university's computer, and discharged her. The Tribunal held that the attempt, in view of the employer's rule, was misconduct. (99 1104, June 10, 1999)

B. Handling of Money

The willful violation of a reasonable employer rule regarding the handling of money is misconduct. It is not necessary to show that the worker had any dishonest intent. However, care must be taken to distinguish between cases in which the violation was deliberate and cases in which the violation represented merely a good faith error in judgment or discretion. In most cases, especially where the violation is not substantial, prior warnings are necessary to substantiate misconduct.

For a discussion of cash shortages *see* MC 140.3, B.2. Theft of Employer's Property.

.

C. Dishonesty to a Fellow Employee

Dishonesty to a fellow employee is not misconduct unless the dishonesty is connected with the employment --- that is, it occurs on the job as a consequence of the job.

140.1 Aiding and Abetting

If a worker aids, encourages, or incites another person to actions against the employer that the worker knows are illegal or dishonest, or if the worker knows that the employer has been defrauded and does not inform the employer of the dishonest act, the worker is aiding and abetting the act of dishonesty and a discharge is for misconduct in connection with the work.

The act of aiding and abetting must be proved. A mere suspicion on the part of the employer is not sufficient (A-4631.)

It is also possible that a worker may innocently aid and abet another person in the commission of a dishonest act.

> Example: A worker may help a co-worker carry articles from the business thinking the co-worker had permission to take the articles. It must be shown that the worker reasonably could have acted unknowingly and innocently. For example, if the employer had a rule prohibiting the taking of any property from the plant, a worker who helps a co-worker remove articles from the employer's premises could not reasonably have believed that the co-worker had permission to take the articles.

Failure to report acts of dishonesty is misconduct in connection with the work if the act is a substantial one. However, the worker is not under an obligation to report a petty or trivial, such as the taking of a pencil, even though the act is actually dishonest. On the other hand, if the worker is a supervisor responsible for the actions of subordinates, the obligation to report or prevent acts of dishonesty may be considered absolute.

140.2 Falsification

A. General

Although any falsehood may be ethically wrong, not every falsehood is misconduct in connection with the work. To be misconduct, the falsehood must affect some aspect of the work or work situation and must harm the employer's interest or breach an obligation to the employer.

In addition, willful falsification must be distinguished from inadvertent misrepresentation. A worker may make a wrong statement that is not misconduct, even though the employer's interest is injured. For example, a commission salesman may inflate a sales total by a simple error in addition. Only if the worker's action is willful is it misconduct.

B. Falsification of Records

Falsification by an employee to cover up shortages, to inflate production records, to obtain leave, or to indicate performance of duties not carried out is misconduct connected with the work.

> Example: An airline reservation agent was discharged for presenting a forged doctor's excuse to obtain the payment of a sick leave benefit. It was the airline's policy, after six absences due to illness in a year's time, to require a doctor's verification from that point on. The claimant's supervisor had issued him a letter of warning that further absences would require a doctor's verification. The claimant called in sick for three consecutive days with the flu. When he returned to work, he submitted a forged medical slip, because he felt he would be discharged without a doctor's verification of illness. The Tribunal held that the forged medical slip was a clear violation of the claimant's duty to his employer and was misconduct in connection with his work. (82UI-2054, September 28, 1982)

> Example: A claimant was discharged from his job for padding his store inventory by throwing away a merchandise transfer invoice. The claimant felt his judgment may have been impaired due to depression over his mother's death earlier in the year. The Tribunal held that, in view of past reprimands for similar behaviors, his action amounted to misconduct. (98 2080, October 23, 1998)

C. Falsification of Work Application

A worker who **willfully** falsifies a **material** and **reasonable** request for information on a work application has acted against the employer's interest and is guilty of misconduct in connection with the work.

> Example: A claimant, when filing an application for federal employment, listed two recent arrests for drunkenness, but failed to list eight other

arrests. When the federal agency completed a security check four months after the claimant was hired, he was discharged for failure to report his complete arrest record. The claimant would not have been hired if his record had been known. The Commissioner held that the claimant's omission of material information on an application for employment was misconduct in connection with his work.

Example: A claimant was discharged because she did not show on her application with the employer that she had been convicted of a felony. She believed that she had answered the question correctly because a plea bargain had reduced the charge to a misdemeanor. The Tribunal held that she had not intentionally falsified the application, and that there was no misconduct. (97 0827, April 29, 1997)

D. Falsification of Time Clock or Attendance Records

Even a single instance of deliberate falsification of time clock or other attendance records is misconduct.

Example: A claimant was discharged from her job after she lied to her employer about the length of her jury service, telling the employer that she was released at 2:30 p.m. instead of 9:45 a.m., the correct time. In denying benefits, the Tribunal held that she had violated a standard of behavior that the employer had a right to expect. (98 2511, December 19, 1998)

Example: A claimant was discharged for failing to mark on her time sheet that she had left early on one day. She had left with the permission of her supervisor, and had no previous infractions regarding her timesheet. The Tribunal held that it was an oversight and not misconduct. (99 0928, May 26, 1999)

Example: A claimant was discharged for falsifying the time clock records in order to take a longer lunch hour. The employer testified that the time clock showed the variation in time, and a fellow employee testified that the claimant had shared the method with him, and that they had both committed the falsification on a previous occasion. In view of the fellow employee's testimony against his own interest, and the employer's explanation, the Tribunal found that the claimant had committed misconduct in connection with the work. (97 1191, June 20, 1997)

Example: A hotel housekeeping supervisor was discharged for not clocking out before changing from her uniform, putting on her hat and coat, and waiting in the lobby for her ride. This incident was the third time that week that she had done this, and the employer had warned her about the practice. The Tribunal held that she was discharged for misconduct. (99 1008, June 4, 1999)

If attendance records were not actually falsified, violations of an employer's rule regarding attendance records are handled like any other violations of an employer's rule. *See* MC 255.1 Violation of Rule or Policy.

140.3 Theft of Property

For a discussion of felony-theft, *see* MC 140.4 Felony or Theft.

A. General

A worker who is discharged for stealing or improperly acquiring property is discharged for misconduct. The problem may lie in determining whether the act complained of was in fact done by the worker. Often, the only evidence of theft is that the property is found to be in the possession of a worker who is not authorized to have it. In such cases, it is the worker's burden to show how and why it was acquired.

> Example: A claimant had an ice cream freezer in the back of his van to return to the site from which his employer borrowed it. Unbeknownst to him, his wife took it, thinking it was the one she had ordered for her new snack bar business. Not seeing the freezer, the claimant forgot that he had it to return to the owner. When personnel asked him about it, he in turn asked the security chief to locate it. The same day, he visited his wife at her new business, and saw and recognized the freezer. He returned it about 10 days later. He could not return it immediately, because his wife needed a freezer or her product would be lost. It was allowable for the workers to take company property for their personal use. In allowing benefits, the Tribunal held that the claimant had given an adequate explanation for his possession of the property and the employer's concurrence in such actions. (99 2149, September 20, 1999)

Even though it cannot be conclusively proven that the worker actually stole the property, a discharge is for misconduct in connection with the work if:

- a worker possesses property knowingly, and
- the worker is knowingly without authorization to have it.

> Example: A claimant was suspended from her job because five bags of video tapes from her employer's store, valued at several thousand dollars, were found accompanied by some videos that the claimant had checked out from a branch store. The claimant stated that the tapes she had checked out were later stolen from her home. While the matter was under investigation by the police, she was suspended and subsequently quit. Since the claimant was indefinitely suspended, she was discharged. In finding that the discharge was not for misconduct in connection with her work, the Tribunal held that the evidence that the claimant had stolen the tapes was circumstantial and unpersuasive, as the videos were not in her possession; there were no witnesses; and it was not reasonable that videos connected with her name would be mixed with those stolen if she were in fact guilty. (97 1261, June 18, 1997)

B. Theft of Employer's Property

1. General

Theft is:

- actual taking of money or property;
- personal use of property or equipment of the employer without permission and in excess of allowable usage;
- changing prices to obtain property at a reduced cost; or
- access to employer's property without permission.

2. Theft of cash or property

a. General

Theft of cash is misconduct, regardless of the amount taken and regardless of the worker's intention to repay the employer. It is not necessary that formal charges be filed or that the worker be found guilty in a court of law. It is also unnecessary that the employer have an explicitly stated policy against such acts or that the employer warns the claimant before such theft is considered misconduct. However, the theft must be proved. The fact that the employer suspects the worker of theft may be cause for discharge, but the discharge is not for misconduct without both proof and a finding that the behavior had not been condoned.

> Example: A claimant was discharged from his job for theft of cash. He rang up a sale of $250 and charged the customer $350, and another sale for $.45 and charged the customer $144.45. The employer had the computerized cash register sales receipts that showed the transactions that were credited to the claimant, and the customer identified him as the person ringing up the first sale, while the employer witnessed the second one. The Tribunal held that misconduct was shown. (98 2568, December 21,1998) (Note: This case was appealed to the Commissioner who remanded it to the Tribunal for further testimony. In 99 0348, the Tribunal affirmed the previous finding.)

b. Cash shortage

Cash shortage refers to loss of the employer's money by the worker. Cash shortage, as distinguished from cash misappropriation, is not misconduct unless caused by the

claimant's negligence that shows an intentional disregard for the employer's interest. Prior warnings are usually necessary to establish negligence of such a degree as to be misconduct. However, even in the face of reprimands, a worker who acts in good faith, to the best of the worker's ability, and does not violate any of the employer's rules, is not guilty of misconduct.

Example: A claimant was discharged from her job after her till was short about $32. It was her third cash handling violation. Because on this occasion she had not been allowed to count her till at the beginning of her shift, the Tribunal held that misconduct in connection with the work was not shown. (99 0694, April 20, 1999)

c. Writing of bad checks

A worker who purchases goods from an employer with checks that do not clear the bank has in effect taken money from the employer. The worker may be found to have committed misconduct if the worker knowingly wrote NSF checks, but an inadvertent error may be considered an "isolated incident," regardless of the employer's policy in the matter.

Example: A claimant wrote checks for purchases from his employer that were overdrawn because the payments to cover them had been deposited to a wrong account. When the employer contacted him, he agreed to repay it by the following payday. He was not able to repay the full amount, and was discharged as a result. In allowing benefits, the Tribunal held that he was discharged, not for the writing of the bad check, but for the failure to repay the full amount. Since the claimant had made a good faith effort to repay the full amount, the Tribunal held that misconduct was not shown. (97 0903, July 8, 1997)

3. Unauthorized use of equipment

Theft includes use of computers, copiers, and the like for personal projects, even where the worker furnishes the necessary supplies, if the worker has been informed that this is contrary to the employer's rules, and the practice has been not previously tolerated. Copying computer programs also falls under this category. Use of the employer's telephone for long distance calls that are not business-related and where the employee has not made prior arrangements to reimburse the employer also comes under this classification. Use of the telephone for personal local calls does not fall in this category, as no cost to the employer ensues.

Example: A claimant was discharged from her job for excessive use of long distance calls to and from (collect calls in the latter instance) her friend. She was warned that her making and receiving these calls was excessive. The Tribunal held that the failure to curtail the calls was misconduct in connection with her work. (97 0830, June 4, 1997)

Example: A claimant was discharged from his job for using the company fax machine during office hours to send his resume' to other employers. The employer permitted the use of the equipment if there was no cost to the employer. The Tribunal held that the use of the equipment even for local calls did cost the employer, and therefore was misconduct in connection with the work. (99 0572, April 26, 1999)

4. Changing prices

An employee who willfully and incorrectly changes the price downward on an item that the employer has for sale in order that the employee or another person can buy it at the reduced price has committed misconduct.

Example: A salesperson was discharged for marking down merchandise without authorization for her own benefit. The Tribunal held that her action cost the employer, and was therefore misconduct. (99 1099, July 1, 1999)

5. Impermissible access

A worker who accesses the employer's property, including records and reports, knowingly and without authorization, has committed theft.

Example: A claimant "routinely searched her supervisor's desk top, desk drawers, computer, and trash. She made copies of memos and e-mail correspondences . . ." without permission to protect herself against the monitoring of her job performance that she knew was occurring. The Commissioner upheld the Tribunal in denying benefits, on the grounds that the acts were not justified by her desire for information and that the employer's interests were "blatantly" disregarded. (98 1733, December 21, 1998)

C. Theft of Property Other Than the Employer's

A worker who takes articles under the care of the employer that belong to fellow employees, customers, or other persons is discharged for misconduct in connection with the work. Likewise, the taking of property of others during working hours and during the course of the worker's employment is misconduct, even if the act takes place outside the premises of the employer.

Example: A claimant was discharged because she did not return to a customer $40 that he had dropped nor give it to a supervisor, in accordance with company policy. The employer had set up and videotaped the event because they had reason to doubt the claimant's honesty. In denying benefits, the Tribunal held that the claimant violated the standard of behavior that the employer had a right to expect. (98 0427, April 7, 1998)

D. Purchase of Employer's Goods

Employers in wholesale or retail trade usually have rules governing the purchase of goods by their employees. An employee who clearly understands these rules and deliberately violates them is guilty of misconduct. A single flagrant violation of such a rule may be misconduct, although minor violations of the rules would usually require prior warnings in order to substantiate that the worker was clearly aware of the rules.

Example: A claimant was discharged for discounting the employer's goods more than the maximum of 50% and then purchasing them. She did not get permission to make the greater discount before the purchase. In denying benefits, the Tribunal held that she had violated a policy known to her and had harmed the employer thereby. (98 2509, December 14, 1998)

Example: A dinner server was discharged for failing to pay for a "growler" of beer. Another worker had been given permission to take a growler at the same time for an event they were both attending, and the claimant, when picking it up, realized that a second one would be necessary. She was not able to pay for it at the time as it was after hours and the till was closed, but she intended to pay the next day, a cost of approximately $6. When she arrived at work the next day, she was busier than usual, with a staff meeting following, and she forgot. It was common practice for employees to pay the next day when the till was closed. In finding no misconduct, the Tribunal held, "[The claimant]'s failure to pay for the growler was the result of a . . . unexpected business increases. There has been no showing that [the claimant] was willfully attempting to violate her employer's work rules." (97 1091, June 3, 1997)

Also included in this type of dishonesty is use of the employer's purchasing system for private purchases without reimbursing the employer.

Example: A claimant who had worked at a music store was discharged because, after repeated warnings, he continued to make personal special orders without paying in advance for them, as was required. In denying benefits, the Tribunal held that the blatant disregard of the employer's warnings without cause was misconduct. (99 0965, May 28, 1999)

140.4 Felony or Theft

For instances of theft that do not meet the standards of the statute below, *see* MC 140.3 Theft of Property.

Law: AS 23.20.379(e)

Regulation: 8 AAC 85.095

A. General

In order for the provisions for AS 23.20.379(e) to apply, establish:

1. The employer discharged the worker for the commission of a felony or theft;

2. The employer reported the act to the appropriate law enforcement authority, or there were charges filed against the worker;

3. There was a preponderance of evidence that the worker committed the act;

4. There was a preponderance of evidence that the act was not justified; and

5. The act was in connection with the work.

If all these facts are shown, the claimant has committed misconduct under the provisions of AS 23.20.379(e). If any one of these facts cannot be shown, adjudicate the worker's discharge under AS 23.20.379(a)(2). For a discussion of the adjudication of a discharge under the provisions of AS 23.20.379(a)(2), *see* MC 5. General.

Example: A claimant admitted to having misappropriated more than $500 from the employer without justification. The employer reported the theft to the appropriate authorities. Since all five criteria were established, the act was misconduct under the provisions of AS 23.20.379(e). (97 0290, March 10, 1997)

Example: A sales clerk at a lumber store stole lumber valued at $1800 from his employer. He was arrested and pled no contest. He argued that the employer's reduction in hours forced him to take the lumber and that the employer had not furnished him with an employer handbook, which said theft was grounds for discharge. The Tribunal found that neither circumstance mitigated the finding of felony or theft misconduct. (97 1000, May 15, 1997)

B. Commission of a Felony or Theft

Note: Consult your supervisor to assist with the adjudication of a worker's discharge under AS 23.20.379(e), if the employer discharged the worker for a theft or felony.

1. Theft

Law: 8 AAC 85.095(g)(2)

"Theft" for purposes of this statute must be of $50 or more. It may be of property or services, including the use of computer time and services. Theft may occur by direct taking of the property or services, by failure to restore lost or mislaid property, by deception, by the receipt of stolen property, or by failure to dispose properly of funds received or held.

> Example: A clerk was discharged by Carr Gottstein Foods Co, her employer, for giving her Carr's courtesy card to a friend to cash checks at the store. Doing this was against company rules, and the checks bounced. Although Carr Gottstein filed charges with the police regarding the bounced checks, and the claimant was discharged for misconduct in connection with her work, since she did not commit nor benefit from the felony, she was not adjudicated by the Tribunal as having committed misconduct under the felony/theft provisions of the statute. (97 2566, December 30, 1997)

The felony need not be against the employer, although it does need to be in connection with the work.

> Example: A cook at a hospital was discharged from her job for having stolen a check from another employee for $800. She pled *nolo contendere* to the charge, and was convicted. Although the claimant stated that she had only done so because she could not afford to have an attorney argue her case, the Tribunal, in finding that she had committed felony/theft misconduct in connection with her work, held that the court's decision was binding in the matter. (98 0330, March 17, 1998)

2. Felony

A felony is a serious crime against persons, property or the State. These crimes are:

a. Offenses against the Person

- Homicide
- Assault and Reckless Endangerment

- Kidnapping and Custodial Interference
- Sexual Offenses
- Robbery, Extortion, and Coercion

b. Offenses against Property

- Theft and Related Offenses
- Burglary and Criminal Trespass
- Arson, Criminal Mischief, and Related Offenses
- Forgery and Related Offenses
- Business and Commercial Offenses

c. Offenses against the Family

d. Offenses against Public Administration

- Bribery and Related Offenses
- Perjury and Related Offenses
- Escape and Related Offenses
- Offenses Relating to Judicial and Other Proceedings
- Obstruction of Public Administration

e. Offenses against Public Order

- Riot, Disorderly Conduct, and Related Offenses
- Weapons and Explosives

f. Offenses against Public Health and Decency

- Prostitution and Related Offenses
- Gambling Offenses

g. Controlled Substances

As with all misconduct statutes, only felonies committed in connection with the work are considered misconduct for the purposes of this statute.

C. Report of Act or Charges Filed

Either an employer must report the worker's felony or theft to the appropriate law enforcement authority, or someone must file charges against the worker.

D. Preponderance of Evidence

There must be a preponderance of evidence that the worker committed the act. Therefore, the worker does not need to have been convicted, and even an acquittal, dismissal of the charge, or plea to a lesser charge allows a finding of misconduct under this statute. A preponderance of evidence means that the balance of the evidence, as weighed against the contrary position, convinces the adjudicator that the claimant committed the act.

> Example: A claimant was discharged from her job as postmistress because money was missing at a random audit. She was forced to sign a paper that said she was responsible, but she adamantly denied it, refused to resign to avoid having the matter placed in her file, passed a polygraph test that she had not taken the money, and refused to plea bargain by admitting her guilt. The charges were dropped. Other reasons for the shortage could have been that her accounting procedures were faulty or other employees could have taken the money, or there could have been honest errors due to the amount of cash handled. In allowing benefits, the Tribunal held that the preponderance of evidence did not show that she had taken the money. (99 2151, September 24, 1999)

E. Act Was Not Justified

In this statute "justification" is a legal term allowing the commission of an otherwise illegal act when it is necessary to protect life or property, when it is coerced, or when the perpetrator was entrapped. If the preponderance of evidence establishes that there was no justification for the act, then adjudicate the discharge under AS 23.20.379(e), felony or theft. If the preponderance of evidence establishes that there was justification for the act, adjudicate the worker's discharge under AS 23.20.379(a)(2), misconduct.

150 EFFORTS TO CONTROL OR PREVENT

A. Condoning

An act that is condoned by the employer cannot be considered misconduct. An act is "condoned" either expressly or if, through long practice, it is clear that the employer does not object to the act.

> Example: A part time on call security guard was discharged by his employer for repeated absences without permission. This had continued for some time, and the employer had not warned the claimant that the practice was not allowable, thus tolerating it. Under these circumstances, the Tribunal held that misconduct in connection with the work was not shown. (97 0527, April 21, 1997)

> Example: A claimant was discharged from his job for allegedly failing to call in about his tardiness. The employer stated that the claimant was told to report directly to his supervisor, but there was no evidence to substantiate that. In rebuttal, the claimant stated that another employee was late as often and also failed to call in, and that he (the claimant) had in fact called in on the date in question. As the employer had condoned a substantially greater degree of tardiness on the part of the other worker, the Tribunal based the decision to allow benefits on the claimant's sworn testimony that he did call in to report in a manner he believed to be allowable. (97 1724, September 4, 1997)

The employer's condoning of the worker's conduct may also tend to show:

- The lack of actual harm to the employer;
- The worker's discharge was for reasons other than that stated by the employer; or

> Example: A claimant was discharged for tardiness. The employer had often discussed her tardiness with her, and had a policy of fining employees a dollar for each minute of lateness. The claimant told the employer that she had discussed this with the Division of Wage and Hour, and planned to file a claim with them if the employer persisted in the system of fines. The employer felt she had no intention of improving her tardiness. The Commissioner upheld the Tribunal who allowed benefits, holding that the discharge was not for misconduct, as the employer had condoned the tardiness in the past, but rather for her statement about the fine structure. (9323007, July 9, 1993)

- The worker was not aware that the employer prohibited the worker's conduct.

Any of these factors are sufficient to negate a finding of misconduct.

B. Warnings

1. General

In many cases, warnings to the worker that the conduct that caused the discharge was undesirable are important in order to establish misconduct. If the facts in a case cause an adjudicator to question whether the worker knew the required conduct, then the presence or absence of warnings may be decisive in a determination of misconduct. However, warnings are only material to the extent that they show that the worker knew the required conduct. If the facts show that a worker knew the required conduct, and the worker's willful action injured or tended to injure the employer's interest, then the act is misconduct, even without previous warnings.

Example: A bartender was observed by video to make several errors in handling her till, which to the employer amounted to misappropriation of funds, although the employer did not report her to any authority. She felt that she was following correct procedures to deal with the situations that arose and was not warned that her actions were incorrect. Because she was not warned, the Tribunal held that her actions were poor judgment, rather than misconduct in connection with her work. (97 0296, March 11, 1997)

2. Prior warnings or reprimands

If the specific action that caused the worker's discharge was not within the worker's control, then the discharge was not for misconduct no matter how many warnings or reprimands that the worker has received.

Example: A worker may be reprimanded for absences or tardiness that were necessary and with proper notice. These warnings cannot be used to support a finding of misconduct in connection with a later absence or tardiness.

Example: On the other hand, a claimant was discharged from his job for absence after warnings. Although his absence itself was for illness and therefore with good cause, he did not call the employer, but did call a fellow employee. In view of the fact that the claimant had been warned about absenteeism, in denying benefits, the Tribunal held that failing to call in properly was a final straw in a series of behaviors. (98 0010, January 21, 1998)

160 INJURY TO EMPLOYER

A. General

In many cases, the actual or potential injury to an employer is obvious. However, where the infraction is so trivial that no substantial injury would result to the employer, the discharge is not for misconduct.

Often the potential of injury to the employer is obvious by the action. The employer does not need to demonstrate that the worker's failure to appear for work was injurious, or that a worker's carelessness with equipment or money harmed or potentially harmed the employer. In no case does the employer need to show actual injury occurred; that is, if the offense was leaving a safe unlocked, the employer need not have been actually robbed. However, there must be some real injury or potential for it for there to have been misconduct.

> Example: The Superior Court held that a claimant was improperly denied benefits when he was discharged from his employment for failure to comply with a Division of Parks regulation requiring that the hair of seasonal park rangers be "off the collar and ears." The court held that the long length of the claimant's hair in no way interfered with his conduct in fulfilling his duties, nor was there any "compelling governmental interest" which necessitated the abridgement of his right to fashion his own appearance. (Winter v. State of Alaska, Alaska Superior Court, 3rd Judicial District, No. 72-6090)

> Example: A registered nurse was placed on administrative leave for failing to take the vital signs of a patient when she had made a home visit. The patient's personal care attendant (PCA) had arrived, and the claimant refused further services. The nurse asked the PCA to take the vitals. The PCA did so, and the nurse entered them on the patient's record. The employer notified her they were considering termination for unprofessional conduct, and the nurse resigned. PCA's are trained and authorized to take vitals, and therefore the Tribunal held that there was no potential of injury to the employer in the nurse's having delegated the task under the circumstances. (99 0503, April 7, 1999)

In some cases, the potential harm to the employer caused by a relatively minor action may transform it into misconduct.

> Example: A customer service representative was discharged by her employer for failing to complete the prepays according to her supervisor's direction for timeliness. Instead of doing them at once, she did her flyers and then took a break, making them late. She had been warned that her work production was unsatisfactory. It was necessary to complete the prepays before the end of the day to allow time to contact the field representative if needed. Because the claimant had been warned about her work, and because the altering of the priority was within her control,

and did affect the employer detrimentally, the Tribunal held that her failure to complete the assignment as directed was misconduct in connection with the work. (97 2525, January 13, 1998)

B. Reasonable Rules

The employer has the right to establish rules necessary to conduct the business and is injured if a worker fails to obey a reasonable rule or order. In most cases, a rule is reasonable if the employer considered it necessary for the proper conduct of the business. The fact that the worker could not readily see the need for the rule does not mean that the rule is unreasonable.

However, if the employer's rule was clearly unreasonable, the worker is not guilty of misconduct, regardless of the reason for failure to comply with the rule. The worker, however, has the burden of showing that the order was unreasonable. A rule or order is unreasonable:

- If it is totally unrelated to the conduct of the employer's business, or
- If compliance is impossible, unlawful, or would threaten the health or safety of the worker.

  Example: An employer wanted the workers to sign a statement saying that they would be responsible for any shortages in their tills. The claimant who worked as a bartender, refused to do this unless she was allowed to count the till at the beginning of her shift. The employer refused to allow this and discharged her. The Tribunal held that the rule was unreasonable, and allowed benefits. (98 1530, July 31, 1998)

255 DISOBEDIENCE

255.05 General

For cases involving violation of a company rule, *see* MC 255.1 Violation of a Rule or Policy.

For cases involving the willfulness of the disobedience, *see* MC 500 Willful Misconduct.

For cases involving the reasonableness of the rule or order, *see* MC I60, B. Reasonable Rules.

A single act of **willful** disobedience of an employer's reasonable rule or order is misconduct in connection with the work. Only the **unreasonableness** of an order itself justifies a refusal to comply. If a worker understood an order and **knowingly** failed to comply, the worker is guilty of misconduct if the violation of the rule or order **materially affected** the employer's interest.

If the disobedience is based upon a worker's fear for health or safety, it is not necessary for the worker to establish that the worker would actually be injured by complying with the order. If the worker's fear was reasonably based, then the refusal to comply with the rule or order is with good cause, even if an investigation later reveals that the worker would not be injured.

> Example: A tug boat captain was discharged from his job because he refused to tow a leaking barge back to Ketchikan for repairs. The claimant refused because he believed it was necessary for the Coast Guard to inspect the vessel and find that it was sufficiently seaworthy to make the voyage. The employer did not believe that the Coast Guard had jurisdiction in the matter. However, in allowing benefits, the Tribunal held that in any case towing the leaking barge put the claimant’s safety at risk more than was normal for the occupation. (98 1157, June 29, 1998)

255.1 Violation of a Rule or Policy

For cases involving insubordination, *see* MC 255.2 Insubordination.

For cases involving the willfulness of the violation, *see* MC 500 WILLFUL MISCONDUCT.

For cases involving the reasonableness of the rule, *see* MC I60, B. Reasonable Rules.

A. General

Whether a rule or policy of the employer is mandatory, due to governmental standards or the like, or a fabrication of the employer to meet a specific business need is immaterial. The employee is obligated to obey any reasonable rule.

1. Worker does not know rule or policy

A discharge for violating a rule or policy that the worker does not know is not for misconduct.

Example: A food service worker was discharged for taking unsalvageable meat scraps from her employer to feed her dog. She had been doing this for several years, not knowing that it was against the employer's rules. Written company policy said that unsalvageable meat scraps were to be thrown away. The employer meant by this that employees were to pay for any unsalvageable meat scraps that they took. The claimant signed a document saying that she understood company policy, but she had a language barrier, and did not realize that what she was doing was wrong. No one told her that she was wrong. Under the circumstances, the Tribunal held that the claimant did not knowingly break a company rule, so that there was no misconduct. (98 0018, January 28, 1998)

2. Rule unnecessary

If an explicit rule prohibiting the worker's behavior was unnecessary, the worker's knowledge or lack of knowledge of the rule is immaterial.

Example: A secretary was discharged for taking and shredding documents from her personnel file without the knowledge or permission of her supervisor. She stated that she did not know the act was illegal or against the employer's policies. In denying benefits, the Tribunal held that she knew, or should have known that the action was improper. (99 1806, August 6, 1999)

Example: A claimant was discharged for using the company account to purchase auto parts for a friend. He was allowed to use

it for himself only, although he was not told this at the time he opened the account. A coworker told him that he was only allowed to use the account for his own vehicle, but he continued to make purchases for friends. In denying benefits, the Tribunal held that even though he had not formally been made aware of the policy, he had been told; since he had been asked to provide his vehicle registration, he should have understood that there was such a rule; and he was responsible for checking further before continuing to act in violation of the rule. (98 0728, April 24, 1998)

3. Manner of dissemination of rule or policy

A rule or policy that has been disseminated generally to all employees or made known to the worker individually either orally or in writing is considered to be within the knowledge of the worker. If the worker has been given a written copy of company rules, the worker's failure to read the rules would not clear the worker of misconduct.

Example: A school bus driver was discharged from his job after a series of incidents for which he had been warned. The final action that caused his discharge was a letter of complaint about a school principal that he wrote to parents of kindergarten children, using the addresses that he had from his driving. He was aware of company policy stating that the addresses were to be used only for the purpose of transporting children. The rule was reasonably designed to protect the company interest by protecting the children. The Tribunal held that he was discharged for misconduct in connection with the work. (97 1504, August 5, 1997)

4. Allowable discretion

If the company rule allows for discretion in the manner of its performance, and the worker acted within those limits, the worker has not committed misconduct.

Example: A claimant was discharged from her job because she discussed a work-related problem with the office manager when her own supervisor was away from her desk. She had previous disciplinary warnings and had been warned both orally and in writing about not addressing problems through her supervisor. However, she had permission to do this if her supervisor was not available. The Commissioner overruled the Tribunal's denial of benefits, holding that her action was at best a good faith error in judgment. (9323504, November 23, 1993)

B. Clothes and Appearance

A deliberate violation of a reasonable employer rule relating to a worker's appearance is misconduct. Although a worker has a right to set personal standards for dress and grooming, the employer also has the right to prescribe reasonable standards of dress and appearance.

For a discussion of the reasonableness of an employer rule regarding dress and appearance *see* MC 160, B, "Reasonable Rules."

If the rule is reasonable, the employer is injured by the worker's failure to follow it. Clearly, if safety or sanitation is involved, the worker is expected to follow the rules of the employer regarding dress. In lines of work with public contact, the Commissioner has held that an employer's requirement that the worker present a neat and tidy appearance is reasonable. (9323557, October 26, 1993)

> Example: An ironworker working in Prudhoe Bay was fired for refusal to wear prescribed arctic gear. In denying benefits, the Commissioner affirmed that the employer's requirement was reasonable, and the claimant's refusal to use the arctic gear therefore amounted to misconduct connected with his work. (76H-262)

> Example: A claimant was discharged from his job because he refused to go home and shave when his employer told him to. He had just started a beard, and he also did not have the money to make a round-trip taxi ride. Because he did not explain either of these matters to the employer, the Tribunal held that he was discharged for misconduct. (98 2780, January 22, 1999)

C. Confidentiality

Generally an employer's rule regarding confidentiality of information is reasonable. This is always true when the employer is required by law to keep confidential the information received from clients. Employers may also have rules regarding the passing of their confidential business matters to their competitors or clients that are reasonable.

See also MC 45.15 Conflict of Interest. In some cases these rules are so obvious that it is not even necessary that they be spelled out in the form of written directives, such as the passing of the construction employer's bid to a potential competitor. The harm to the employer is obvious.

> Example: A claimant who had worked as a hotel front desk clerk, gave information from her employer's files regarding names, credit card numbers and expiration dates to another person who was incarcerated in the Lemon Creek Correctional Facility. That person was able with these numbers to defraud the credit cards of some $100,000. The claimant

> admitted to having done this, and was aware of the confidentiality rules governing credit cards. The Tribunal denied benefits because she willfully violated her employer's rules governing confidentiality. (98 2002, October 2, 1998)

Often employers have rules regarding the giving of information regarding salaries to other employees. These rules, as well as any others governing confidential material that are not clearly obvious, must have been given to the employee before there can be a finding of misconduct.

What is often harder to learn in a discharge for a breach of confidentiality is whether the employee who was discharged was the sole possessor of the information disclosed.

> Example: It was alleged that a claimant who was in charge of shredding confidential personnel documents read these files and shared that information with other workers. The claimant denied the allegation and stated that the information was common knowledge at the work site. In view of his denial under oath, as opposed to unsupported hearsay, the Tribunal found that the claimant had been discharged for reasons other than misconduct. (97 1012, June 20, 1997)

If the claimant admits to having passed on the information or there is clear evidence that the claimant did in fact do so:

- Did the claimant know that the information was confidential?
- Did the claimant pass on the confidential information deliberately or was it accidentally revealed?
- If the information was revealed accidentally, was the claimant at fault for having left the material where this could occur?

> Example: A claimant discussed a case with the mother of one of the patients who approached her outside the office to ask her opinion of the doctor to whom she had taken her daughter. The claimant responded that he was an excellent doctor. The mother then told her the diagnosis and the claimant responded that patients with that diagnosis often saw that doctor. The patient complained to the administrator who dismissed the claimant. Although there is a company rule that discussing patients outside the office is grounds for immediate dismissal, the Tribunal, in finding that there was no misconduct involved, held that, since the patient's mother had approached the claimant and given the information to her, rather than the reverse, her behavior was a good faith error in judgment, rather than misconduct. (97 1197, June 6, 1997)

Example: A claimant was overheard by a co-worker giving confidential information to a competitor about one of the customers. Although he denied having done so, other witnesses failed to substantiate his version of the conversation. The Tribunal held that misconduct was established. (97 0994, June 13, 1997)

D. Gambling

An employer's rule forbidding gambling on the premises is reasonable. Therefore, a discharge for a properly disseminated rule against gambling on the employer's premises is a discharge for misconduct. Gambling on company time is clearly a violation, and no rule or warning is necessary.

Example: A bull cook on the Alaska Pipeline was discharged for taking part in a poker game held in the room of one of the pump station workers, during the course of which a fight broke out. At the time of the incident, there was a rule against drinking, gambling, and fighting in camp. The claimant knew this rule. However, he asserted that security personnel allowed drinking and gambling in the camp and were selective in enforcing the rule. The Tribunal ignored the claimant's assertions, holding that the claimant's violation of the company's anti-gambling rules was misconduct. (76B-178)

E. Safety Regulation

Employers have safety rules for the protection of employees, insurance carriers, and the general public. A worker who is discharged for a willful violation of a safety rule is discharged for misconduct connected with the work.

There is still misconduct if a safety rule is violated:

- Even if the employee is the only one endangered. The employer is obviously harmed by the injury of any employees.

- Even if no actual injury results

  Example: A claimant was discharged because he started a fire while smoking in bed, apparently in company-furnished quarters, which resulted in first and second degree burns only to himself. He had been issued company rules that specifically prohibited smoking in bed. The claimant contended that although he was guilty of this offense, it was not misconduct because it was the result of an "accident." In denying benefits, the Tribunal said, "Though it was no doubt an accident that the fire resulted from the claimant's smoking in bed, it is also evident that he was in violation of company rules . . . " (76B-603)

255.2 Insubordination

For cases involving violation of a company rule, *see* MC 255.1 Violation of a Rule or Policy.

For cases involving the willfulness of the insubordination, *see* MC 500 Willful Misconduct.

For cases involving the reasonableness of the order, *see* MC I60, B. Reasonable Rules.

A. General

Insubordination, disobeying a direct order, is misconduct in connection with the work. The Commissioner has stated that an employer has the right to expect that a reasonable order will be obeyed (9123334, April 2, 1992.) In most cases it is not necessary to show that the employer was injured; an employer who cannot rely on the worker to perform as directed is injured, except in exceptional circumstances.

Violation of an order of a supervisor follows the same principles as violation of a rule:

- the order must be reasonable;
- the worker must understand the order; and
- the worker must know that the supervisor has the authority to give the order.

Example: A claimant was told by his supervisor not to chew tobacco while working. Although he complied for the most part, he chewed out-of-doors where he could spit on the ground, and in the company truck, when he spat out the window. The supervisor instructed the claimant to take the truck and pick up some items. When the claimant returned, the supervisor found tobacco spit on the door and window handle of the truck and discharged him for disrespect to company property. Even though the claimant had not been told that he would be fired if he chewed tobacco on the job, the Tribunal held that his failure to obey a reasonable order of his supervisor was misconduct in connection with his work. (97 0991, June 10, 1997)

Example: A claimant was discharged for failure to return company documents that he had taken. He had taken them because, in reviewing Workers' Compensation and OSHA payments, he noticed that there were many more incidents reported to the database than what had been reported to Workers' Compensation and OSHA. He made this fact known to his supervisor, but became concerned that the company would destroy

the files showing the discrepancy. The company wanted the files returned for fear that they would be liable for the violation of confidential health information of the employees. In denying benefits, the Tribunal held that Mr. Smith could have copied the files and returned the originals or shown the company that they did not contain sensitive information. (98 0904, June 2, 1998)

Example: A claimant was discharged because he did not present a medical certificate for his absence when requested to do so. He refused because he could not afford the $100 cost. The Tribunal held that, since there was no previous pattern of abuse of sick leave, and the claimant had not been warned that failure to produce the certificate would result in his discharge, the employer's request was unreasonable, and there was no misconduct shown. (98 1365, July 16, 1998)

An employer's mere allegation that a worker is guilty of insubordination is insufficient to prove misconduct. Insubordination, and misconduct in connection with the work, is only established by proven acts or statements. The customs of the occupation and the reasonableness of the employer's orders are important factors in the determination of whether the worker's actions or words were insubordination.

A single act of insubordination may be misconduct, if it is serious enough. However, the Commissioner has held that reprimands or warnings are necessary in most cases to make certain that the worker was aware that the conduct was unsatisfactory. (9225160, June 30, 1992)

B. Refusal to Accept Disciplinary Action

An employer may send a worker home or formally suspend a worker as a form of discipline. The worker often has the option of appealing this to upper management or through whatever grievance procedures are in place; the worker who refuses to accept this discipline, however unjustified it may be, has committed misconduct.

Example: After previous reprimands for poor work performance, customer complaints of rudeness, and a demotion; a customer service rep refused to leave the workplace, as directed by her supervisor, until she could meet with upper management. The Tribunal held that, in view of her previous history of reprimands, the final incident amounted to insubordination that was misconduct in connection with her work. (97 0285, March 25, 1997)

The disciplinary process may also include written warnings that the worker is required to sign. Failure to do so may be misconduct, particularly in conjunction with other acts.

Example: A claimant was discharged after she refused to sign, as having received, a letter indicating five points on which the employer wanted the claimant's written response. One of the points was that the claimant had, as bookkeeper, incorrectly paid herself for in excess of 80 hours per week for some time. The Tribunal held that the combination of the refusal to sign and the incorrect payment gave a finding of misconduct. (99 1306, July 9, 1999)

Example: On the other hand, a claimant was warned in writing about a number of problems. She refused to sign the written warning and requested to see the Human Resource Manager (HRM) to discuss the matter, as she did not agree with some of the items. At the time she saw the HRM, her supervisor gave her a letter discharging her for failure to accept the outlined changes. She had improved on each point after the first warnings. Since the request to talk with the HRM was reasonable, the Tribunal held that it was not misconduct. (99 1970, August 27, 1999)

C. Refusal to Increase Production

A worker who refuses to raise production to the agreed level, which is within the worker's capacity, is guilty of insubordination. However, distinguish willful refusal from cases in which the failure to increase production is due to inability, incapacity, or inefficiency.

D. Refusal to Work Scheduled Hours

A worker who refuses to work the hours assigned by the employer is in most cases discharged for misconduct. Only if the employer's scheduling is clearly unreasonable, and the worker has attempted to adjust the matter without success is the discharge for other than misconduct.

Example: A claimant was discharged for refusal to report for work as scheduled. He did not do so because he owned rental property that he needed to work on. The Tribunal held, in denying benefits, that the claimant could have made other arrangements to care for the property. (97 1486, July 24, 1997)

Example: A claimant refused to work as scheduled unless he was given a raise or assistance when needed. While refusing to grant the raise, the employer offered to assist or to have an installation worker assist. The claimant continued to refuse to work the scheduled hours and was discharged. In denying benefits, the Tribunal held that the employer had offered reasonable concessions, and that the work schedule was not unreasonable. (97 1776, September 5, 1997)

Example: A claimant was discharged for failure to work a scheduled Saturday. He had been scheduled to work for the weekend, but informed

his supervisor that he could not work on Saturday because he needed to care for his two young children. He was discharged for not being a team player and not being concerned about the company's deadlines. In allowing benefits, the Tribunal held that his failure to work was with good cause and that he had given proper and adequate notice. (97 2178, October 29, 1997)

E. Refusal to Work Overtime

Refusal of a reasonable request to work overtime is misconduct, unless the worker can show good cause for refusing.

Refusing an unreasonable request for overtime is not misconduct regardless of the reasons for refusing it. A request for overtime is unreasonable if:

- the overtime would be illegal;
- the overtime is requested without any compensation, or without the overtime premium when required by law; or
- the request for overtime work is made without notice, unless the urgency of the situation makes notice impossible.

F. Refusal to Accept Changed Duties or Location

An employer may for a number of reasons choose to transfer a worker to another position or to another location of the employer's business, or both. For a discussion on cases where the transfer is a discharge from the former position and an offer of new work, *see* VL 315, C, "New Work vs. Changed Work Conditions."

Where the contract of employment is such that the transfer is not new work, the employee's failure, without good cause, to accept the transfer is misconduct.

Example: An assistant store manager was transferred to another store, but refused to accept the assignment because she had been moved thirteen times in the past four years and because she had heard that the manager was difficult to work with. The employer wanted to transfer her for her to learn inventory control and theft prevention. Since the employer had initiated the steps leading to the separation, the discharge was for misconduct. Therefore the Tribunal held that the employer had sound business reasons for the transfer and the claimant's discharge was for misconduct. (99 0425, April 2, 1999)

270 USE OF DRUGS OR ALCOHOL

A. Definitions

Alcohol has the meaning given in AS 23.10.699 .
Drugs has the meaning given in AS 23.10.699 .

B. Evidence and Proof of Alleged Behavior

An employer may discharge a worker not only for the use of drugs or alcohol while on the job but also simply for reporting for work while intoxicated or hung over. The employer's statement regarding the worker's alleged intoxication or hangover is a conclusion, and there must be substantial evidence to support this conclusion.

Appearance, lack of coordination, or the inability to perform the work would support the employer's conclusion that the worker was in fact intoxicated or hung over.

"Substantial evidence" is considered to be of such relevance that a reasonable mind might accept as adequate to support a conclusion. See Evidence Policy Section for more information on weighing evidence.

> Example: A worker was discharged by the Alaska Railroad Corporation for violation of the employers operating procedures that prohibits use of any substance that affects the workers alertness within 8 hours prior to being on duty. The claimant was not tested and explained he had taken Motrin for a toothache and was still groggy due to the early hour of the morning. The Department, as later upheld by Superior Court, found the claimant presented substantial credible evidence to refute the employer's allegation and was found discharged for reasons other than misconduct. (Alaska Railroad Corporation v. State of Alaska, Department of Labor, Superior Court 4JD, No. 4FA-90-2077 Civil, July 2, 1992)

C. On-the-Job Use of Drugs or Alcohol

1. General

It is not necessary to show the existence of prior warnings or rules prohibiting the use of drugs or alcohol while on the job, nor is it necessary to prove that the act was willful or that it injured the employer's interest. If the worker's discharge is for drunkenness or drug use, and consequently, the inability to perform the duties of the job, then the discharge is for misconduct in connection with the work, regardless of any explicit rules or warnings.

2. Accepted practice

In certain occupations, the use of alcohol while on the job may be an accepted practice. For example, it is not uncommon for a salesperson to have a drink with clients. If the worker's discharge is solely for this reason, then the discharge is not for misconduct in connection with the work unless there were explicit rules or warnings prohibiting the use of alcohol while on the job.

D. Off-the-Job Use of Intoxicants

1. General

A worker's discharge for off-the-job use of intoxicants is generally not misconduct unless the off the job use affects the worker or the workplace and thus can reasonably be connected to the work.

Off the job use of intoxicants is connected with work if:

- use of drugs or alcohol makes the worker unfit to perform an essential task of the job, or
- has a direct and adverse impact on the employer's business interests, or
- is in violation of a written drug or alcohol policy consistent with AS 23.10.620. See Section E. Testing for details of AS 23.10.620.

Whether or not a worker's off-the-job use of drugs or alcohol has a direct and adverse impact on the employer's interests depends on the type of service the worker performs.

> Example: As the result of a DWI charge/conviction, a claimant's driver's license was suspended. At that point, he was no longer able to perform the duties required of his position. He knew or should have known a DWI charge/conviction would adversely affect his job as a driver. It was within his ability to avoid such action. (00 1072, June 16, 2000)

2. Worker-employer agreement

There may also be a connection with the work if the employer required specific behavior, such as no off-duty use of intoxicants or participation in counseling, and the employee has agreed to this.

E. Testing for the Presence or Evidence of Use of Drugs or Alcohol

Applicable Law Citation: AS 23.20.379

1. Employer policy

Under AS 23.10.600 – 23.10.699, an employer may carry out testing or re-testing for the presence or evidence of use of drugs or alcohol after adopting a written policy for testing and re-testing and informing employees of the policy.

Discharge for violation of an employer's written policy is considered misconduct in connection with the work if the policy:

- informs employees that they must undergo drug testing, and
- informs employees of the policy in the same manner as the employer informs employees of other personnel practices, and
- meets the requirements of AS 23.10.620.

2. Requirements of AS 23.10.620(b)

At a **minimum**, an employer's written policy must include all of the following:

(1) a statement of the employer's policy respecting drug and alcohol use by employees;

(2) a description of those employees or prospective employees who are subject to testing;

(3) the circumstances under which testing may be required;

(4) the substances as to which testing may be required;

(5) a description of the testing methods and collection procedures to be used, including an employee's right to a confirmatory drug test to be reviewed by a licensed physician or doctor of osteopathy after an initial positive drug test result in accordance with AS 23.10.640(d);

(6) the consequences of a refusal to participate in the testing;

(7) any adverse personnel action that may be taken based on the testing procedure or results;

(8) the right of an employee, on the employee's request, to obtain the written test results, and the obligation of the employer to provide written test results to the employee within five working days after a written request to do so, so long as the written request is made within six months after the date of the test;

(9) the right of an employee, on the employee's request, to explain in a confidential setting, a positive test result; if the employee requests in writing an opportunity to explain the positive test result within 10 working days after the employee is notified of the test result, the employer must provide an opportunity, in a confidential setting, within 72 hours after receiving the employee's written notice, or before taking adverse employment action;

(10) a statement of the employer's policy regarding the confidentiality of the test results.

3. Conditions for testing

Employers may require the collection and testing of a sample of an employee's urine or breath for any job-related purpose consistent with business necessity and the terms of the employer's policy including the following, as long as it meets the requirements of AS 23.10.620:

- investigation of possible impairment;
- investigation of accidents in the workplace providing the test is conducted as soon as possible after the accident;
- maintenance of safety for employees, customers, clients, or the public at large;
- maintenance of productivity, quality of products or services, or security of property or information; or
- reasonable suspicions that an employee may be affected by the use of drugs or alcohol and that the use may adversely affect the job performance or the work environment;
- random or chance basis.

4. Requirement to be notified.

An employer must test all or part of the work force based on consideration of safety for employees, customers, clients, or the public at large. If an employer institutes a policy of drug testing or alcohol impairment testing under AS 23.10.600 – 23.10.699, the policy must:

- identify which employees or positions are subject to testing; and
- notify employees 30 days prior to implementing a new drug or alcohol program; and
- make written copies of the policy available to all affected workers.

a. Worker aware of employer requirement

Before misconduct can be found a worker must be aware of the requirement to abstain from behavior that would result in a failed test for intoxicants. The employer must inform the worker that there is a rule regarding the random testing for intoxicants because the rule introduces an additional term to the worker's contract of hire.

The Alaska Supreme Court held, "By requiring a [random] test, an employer introduces an additional term of employment. An employee should have notice of the additional term so that he may contest it, refuse to accept it and quit, or prepare for the test, so he will not fail it and thereby suffer sanctions." (Luedtke v. Nabors Alaska Drilling, Inc. 768 P.2d 1123, Alaska 1989).

b. Random test proximate to the worker's time of duty

A discharge for failure of a random test for intoxicants is misconduct in connection with the work if the test was conducted proximate to the worker's time of duty.

The Alaska Supreme Court held, "The test for intoxicants must be conducted at a time reasonably contemporaneous with the employee's work time. The employer's interest is in monitoring intoxicant use that may directly affect employee performance. The employer's interest is not in the broader police function of discovering and controlling use of illicit intoxicants in general society." (Luedtke v. Nabors Alaska Drilling Inc, ibid.)

5. Refusal to submit to a test for intoxicants

a. General

To determine whether a worker's discharge for the refusal to submit to a test for intoxicants is for misconduct in connection with the work, determine why the test was requested.

A worker's refusal to submit to a test for intoxicants may be considered misconduct in connection with the work only if the testing is required as part of a written drug policy that complies with the conditions of AS 23.10.620 or State or Federal testing requirements.

F. Employer Policies Not Consistent with AS 23.10.620

1. General

A worker's discharge for violation of an employer drug test is generally not misconduct if the employer's policy is not in compliance with AS 23.10.620.

The Commissioner has held:

> "AS23.20.379(f) specifically sets the standard for a claimant's violation of drug policy that may lead to disqualification for misconduct. If that standard is not met, and the claimant was fired for violating the employer's drug policy, as was this claimant, the other sections of that same statute cannot be used to find misconduct. Therefore, in spite of the fact that the claimant knew she would test positive for use of marijuana, we must hold she was fired for reasons other than misconduct connected with her work." (00 2523, June 21, 2001)

2. State or federal testing required

Regardless of the employer's policy, misconduct can be found in cases where state or federal testing is required.

The Commissioner has cited AS 23.10.670:

> Effect of mandatory testing obligations. An employer who is obligated by state or federal requirements to have a drug testing or alcohol impairment testing policy or program shall receive the full benefits of AS23.10.600-23.10.699 even if the required policy or program is not consistent with AS 23.20.600-23.10.699, so long as the employer complies with the state or federal requirements applicable to the employer's operations. (03 0356, May 5, 2003)

Industries affected by the federal regulations include, but are not limited to:

- Railroad;
- Marine, excluding commercial fishing boats under 200 gross tons or 26 feet;
- Pipeline;
- FAA, including flight crews;
- Solid waste transport;
- School bus drivers'
- Motor carriers, including those who load or unload freight and those who work in the yard. Included are motor coaches carrying 16 passengers or vehicles weighing 26,000 lbs. or more.

3. Pre-employment Test

A worker who is discharged after beginning work because the worker failed a pre-employment drug test is not guilty of misconduct in connection with the work.

G. Reliability of a Test of Intoxicants

The reliability of a test for intoxicants is rebuttable by the worker. The worker may refute:

- the reliability of the test administered, or
- the maintenance of the chain of custody of the sample, or
- the skill and expertise of the laboratory staff that conducted the test.

In the case of a test for intoxicants, an adjudicator must consider any evidence that an employer has submitted regarding a positive test for intoxicants in the worker's system in the context of the reliability of the test for intoxicants. With a specific test for intoxicants, also consider the degree of impairment at the time that the employer selected the worker for the test.

H. Alcoholism and Drug Addiction as a Disease

Claiming alcoholism and/or drug addiction as a disease, does not in itself, absolve the claimant of their actions. It is the claimant's responsibility to take steps that a reasonable and prudent person would take to preserve their employment.

The Commissioner has ruled:

"Even though the claimant is an alcoholic that does not excuse her decision to drive while intoxicated. Society has passed laws to ensure the

public is protected from drunken driving and even though the disease affects a person's judgment, the person is still liable for her actions." (03 0573, May 14, 2003)

300 MANNER OF PERFORMING WORK

300.05 General

A worker is expected to perform the work to the best of the worker's ability. However, a failure to perform the work is not misconduct, if it is "isolated instances of poor judgment, good faith errors, unavoidable accidents, or mere inefficiency resulting from lack of job skills or experience."

> Example: A claimant was discharged from his job for failure to perform the work to the employer's satisfaction. He was unable to retain instructions, and on several occasions had accidents with the forklift. The employer felt that his inability to follow instructions created a safety hazard. The Tribunal held that the claimant was simply unable to do the work, and there was no misconduct involved. (98 0336, March 10, 1998)

Misconduct can be established by:

- A willful failure to perform properly;
- Gross negligence; or
- Recurrent carelessness or negligence after warning (9225760, July 6, 1992.)

300.15 Damage to Equipment or Materials

A. General

A worker must work with ordinary care and diligence. Ordinary care is that degree of care which persons of ordinary prudence exercise under the same or similar circumstances. Ordinary care in the case of a locomotive engineer entrusted with the safety of many persons and with valuable property is a different thing from ordinary care in the case of a stage doorman. The care expected of a precision machinist varies considerably from the care expected of a ditch digger. In any of these cases, however, the standard of obligation is "ordinary care under the circumstances."

Deliberate carelessness or destructiveness in the use of company property implies a disregard of the employer's interests and is misconduct in connection with the work. However, it must be shown that the worker was guilty of a reckless or wanton disregard of life or property, either by a positive act or an unreasonable lack of care.

Damage to equipment or materials is misconduct only if:

- The damage is caused by deliberate, intentional acts of the worker;
- The damage is caused by gross negligence; or
- the damage is caused by ordinary negligence that is repeated in the face of warnings.

B. Damage by Negligence

1. Gross negligence

A single instance of ordinary negligence does not show disregard of the employer's interest, unless the single act of negligence or carelessness is "gross negligence." By "gross negligence" is meant "such negligence as evidences a reckless disregard of human life or of the safety of persons, or such an entire want of care as would raise a presumption of a conscious indifference to the interest of the employer, which is equivalent to an intentional violation of the employer's interest." Gross negligence thus means the lack of care that even an inattentive person takes of the person's own property.

Example: A claimant was discharged because the employer charged that he had allowed the fuel truck's windshield to become cracked, and had failed to gas the truck up at the end of the shift. The claimant had not gassed up because he did not want it to get stuck in heavy snow, and there was still three-quarters of a tank left.

He had not intentionally damaged the windshield. In allowing benefits, the Tribunal held that there was no evidence that he had deliberately damaged the equipment and that his failure to gas up was reasonable under the circumstances. (97 2470, December 5, 1997)

Example: A package deliverer was discharged from his job when he failed to report having backed his truck into a customer's satellite dish, scratching the truck and causing $750 in damages. Although he stated that he did not know he had hit the dish, he got out of his truck to see what the problem was and was able to see both the damage to the dish and the scratches on his truck. In denying benefits, the Tribunal held that it was clear that the claimant ought to have been aware of the damage he had caused. (98 2570, December 30, 1998)

Example: An oiler was discharged when a generator under his care failed. The claimant had been warned by his supervisor to service every piece of equipment at the required interval, and to keep service records. One generator was using three to four gallons of oil per day, and the claimant had noted this in his daily reports. On the date of his discharge, his oiling truck broke down and he was forced to transfer his equipment to a second truck, which caused a delay in the number of items he could service. The generator in question did not receive oil, and later "blew up." He had reported that the generator had not been oiled and he was not authorized to work overtime to complete service jobs that were delayed. The employer contended that the claimant could have written a special note pointing out specifically that the generator had not been serviced. As the claimant had repeatedly noted that the generator used excessive amounts of oil, he felt that one of the mechanics should have noticed it and added the oil themselves. This was the claimant's first job as an oiler after graduating from his training. In allowing benefits, the Tribunal concluded that the claimant's actions may have demonstrated poor judgment, but fell short of a deliberate or reckless disregard of his employer's property. (82UI-2126, October 4, 1982)

Example: A carpenter was discharged for moving a boom truck without authorization. He did not know how to do it safely, and the boom tripped over, resulting in some damage to it. Because he was neither authorized nor capable of moving the boom, and because of the potential of damage to the employer's equipment and danger to employees, the Tribunal held that the claimant was grossly negligent and thus had committed misconduct. (99 0451, March 25, 1999)

2. Repeated negligence

Even if a single act of negligence is not misconduct, repeated acts may lead to a finding of misconduct. Warnings are not necessary, as the damage to the employer's property may be considered as a warning in itself.

Example: A bus driver was discharged after a citizen complained that he had forced her off the road when changing lanes. This was the final incident of 23 complaints and incidents over the three years of his employment. Because the claimant had a long history of counseling and warnings for infractions, the Tribunal held that he was discharged for misconduct. (99 1736, August 5, 1999)

3. Other damage

Damage to equipment or materials is not misconduct if caused by inefficiency, inability, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment or discretion.

C. Damage by Accident

An accident is not expected, foreseen or intended. Therefore, a worker who is discharged simply because the worker is a **party** to an accident involving company property or the liability of the employer is not discharged for misconduct connected with the work unless the evidence indicates the worker willfully or wantonly disregarded the employer's interest. This is true even if the worker was discharged after warnings. There must be some showing that the claimant was guilty of willfulness, gross negligence, or recurrent carelessness.

Example: A chip sealer with no previous experience in this type of work had several minor accidents. He had attempted to do the work to the best of his ability, but he and the employer felt that he could not keep up with the speed of the operation. In allowing benefits, the Tribunal held that he had not acted in willful or wanton disregard of life or property. (97 1858, November 24, 1997)

Example: A claimant was discharged after two driving accidents with the employer's vans within a four-month period. In the first, he was driving 15 mph over the speed limit. In the second, he had failed to follow proper safety procedures, including not wearing a seat-belt. The total cost in damage to the employer's vehicles was in excess of $20,000. In holding that the claimant had been guilty of misconduct in connection with his work, the Tribunal stated, "[The claimant's] inattention and violation of state laws represented a danger to himself, pedestrians, and other motorists. His actions also caused the employer harm monetarily. Although other

employee accidents failed to result in termination, sufficient evidence was not presented to show that the employer was unduly discriminatory when dealing with [the claimant's] accidents. In this case, [the claimant] failed to exercise ordinary care in the performance of his duties at least twice within a short period of time." (97 0451, March 25, 1997)

300.3 Quality or Quantity of Work

A discharge for the failure to produce the required quality of work that is due to inefficiency, inability, or incapacity is not misconduct in connection with the work. However, if a worker has previously shown the ability to perform the work properly, and can give no reasonable explanation for the deterioration of the work, it may be concluded that the worker's failure to perform is willful. Similarly, a discharge for the failure to produce the required quantity of work is considered a discharge for reasons other than misconduct in connection with the work, unless it is clear that the worker's failure to produce was willful.

> Example: A boiler operator in probationary status was discharged for poor work performance. In allowing benefits, the Commissioner held, "[I]t appears that the claimant simply did not make probation. There is no clear evidence that he was ever able to perform the job satisfactorily. His supervisor stated that [the claimant] tried but couldn't do it. We conclude. . . that he was discharged for inefficiency resulting from lack of job skills or experience, but not for misconduct connected with the work." (9225760, July 6, 1992)

> Example: A claimant was discharged by his employer for poor performance of his work clearing tables. He had previously done the work well, but after he returned to college he was no longer performing to the employer's standard. The Tribunal found that he was guilty of misconduct in connection with the work since he had previously shown the ability to perform his duties satisfactorily. (97 1039, May 23, 1997)

> Example: A parts counter person was discharged for failing to price out parts correctly. The computer priced parts differently depending upon whether it was a retail sale or an internal sale. He had been warned about his performance, and was finally discharged, rather than being further warned, because his supervisor noted still more errors in his pricing. The claimant stated that the errors happened on busy days. The Tribunal held in denying benefits that there was potential of loss to the company, and that being busy was insufficient to excuse his lack of attention. (99 0637, April 27, 1999)

300.4 Neglect of Duty

A. General

Neglect of duty is grounds for a worker's discharge. Whether such negligence is misconduct in connection with the work under AS 23.20.379(a)(2) depends on the degree of negligence.

Under 8 AAC 85.095(d), "ordinary negligence in isolated instances" is not misconduct. Only gross negligence or repeated negligence is misconduct in connection with the work.

1. Gross negligence

A **single instance** of gross negligence is misconduct in connection with the work, even though the worker's actions were not willful. A finding of "gross negligence" can be made only if:

- The worker was aware that the work must be performed in a certain manner. If discretion was allowed as to how to perform a given task, there can be no finding of gross negligence so long as the worker operated within the limits of this discretion;

- The worker was aware that the failure to perform properly could result in substantial loss of life or property. It is not necessary that such loss actually occurred; and

- The worker has no logical explanation for the failure to perform as required.

A finding of "gross negligence" depends primarily on the **standard of care** demanded by the occupation. A janitor's inadvertent failure to close a window is not gross negligence. However, an airline pilot's inadvertent failure to lower the landing gear before landing would be considered gross negligence unless the pilot had a satisfactory explanation for the failure to lower the gear.

Example: A resident assistant at a nursing home was discharged for giving the wrong medicine to a client because she did not check the name on the box, and for failing to watch another client take the medicine she had been given. Both errors had the potential for serious life-threatening damage to the clients. In denying benefits, the Tribunal held that she should have known, even without formal training to check the name on the medication and that she had been told to watch the patients take the medicine. (97 1663, August 13, 1997)

Example: On the other hand a community living specialist was discharged from his job for leaving a developmentally disabled client alone in his car for five minutes while he went to the store, although he had been told that the client required twenty-four hour care. He had cared for the client for some time and believed that he had a rapport with the client that would allow him to leave him; another employee had also left him similarly. In allowing benefits, the Tribunal held that the claimant's lack of formal training for the job reduced the case to a good faith error in judgment in spite of the potential of harm to the employer. (97 1631, August 21, 1997)

2. Recurrent carelessness or negligence

Repeated carelessness or negligence after warning is misconduct in connection with the work, even if no single act would have been considered misconduct standing alone. The frequency and seriousness of the acts must, however, indicate a "intentional and substantial disregard of the employer's interest."

Example: A night clerk was discharged from his job for repeated negligence in performing his work. He was given five corrective interviews and two written warnings for failures to perform various checks and tasks that were part of his job duties, many of which put the employer at risk of losing accounts. Finally the employer offered him another position, but he refused it. The Tribunal held that his recurrent carelessness was misconduct. (98 1464, August 24, 1998)

Example: A cardio-technologist, was discharged from his job for failing to insure the availability of back-up surgery personnel if needed. The patient was not harmed by his failure, and there were no other surgery personnel available in any case. He had previously been warned about other actions that showed a lack of attentiveness to the patients during surgery. The Tribunal held, in allowing benefits, that willful misconduct was not shown. (98 0417, March 26, 1998)

B. Duties Not Performed

The same principles that apply to any alleged neglect of duty apply to cases where the worker neglected to perform all the duties of the job, or did not do a particular task. The worker is not guilty of misconduct if the non-discharge of duties is because of ordinary neglect in isolated instances, or inefficiency, inability, incapacity, good faith errors in judgment or discretion. There is misconduct only if the non-discharge of the duties is repeated or due to gross negligence.

Example: In Palmer vs. Alaska Department of Labor (3AN-997-03993 CIV) a manager was warned after an audit that he had not kept food at the required temperatures, and had failed to discard food after the expiration of hold dates. About three hours later, a second inspection showed that he had still not carried out these instructions. The company had policies known to the employees regarding the storage of food to insure that the food was not contaminated. The Superior Court upheld the Commissioner in finding that the claimant had been discharged for misconduct in connection with his work.

Example: An assistant manager at a fast food restaurant was discharged from his job for failing to lock the safe. He testified that he thought that he had locked it, but the dial was difficult to turn, and he may have been mistaken in thinking it was locked. Nothing was missing from the safe. The Tribunal held, in allowing benefits, that he had not been recklessly or wantonly indifferent to the employer's interests. (98 0310, March 12, 1998)

Example: In 75H-51 the claimant was employed as a security guard at a pier gate. He was aware that he was expected to stay at his post until he was relieved. He nevertheless left his post at the end of his shift, even though his relief had not reported for duty, because he had made previous arrangements to pick his mother up at her place of employment one half hour after his shift ended. The claimant was aware that his position as a guard entailed a serious obligation to remain at his post until relieved. His transportation arrangement with his mother did not establish an emergency of sufficient magnitude to excuse the abandonment of his duty station. He was therefore discharged for misconduct in connection with his work.

A worker who is fired for failure to perform the duties of the job may contend that the failure was not willful, but the result of inability. If the claimant could not in fact do the work, the claimant must attempt accommodations if this is possible.

Example: In 76B-484, the claimant was discharged for refusing a task that he did not feel capable of doing. The claimant was limited to carrying weights of less than 35 pounds. He refused a request to carry and dump buckets of scraps in a cannery because he was certain the bucket weighed at least 50 pounds. The employer contended that the claimant himself could have regulated the weight of the bucket and was not required to carry it when it was too heavy. The Tribunal concluded that the claimant did not follow reasonable instructions given him by his employer. The work was within his capabilities and he was not justified in refusing without an attempt to comply with the request.

Example: A claimant was discharged from her job for failure to perform the assigned job duties. Although she contended that she was not able to complete them because of the absence of a co-worker, the Commissioner

upheld the Tribunal in finding misconduct because she had ignored the priority tasks assigned by the employer. (98 0137, September 2, 1998)

C. Sleeping on the Job

Sleeping on duty is, in most cases, misconduct. Harm to the employer does not need to be shown. However, it must be shown, as is true in all cases of alleged neglect of duty, that sleeping on the job was a deliberate and substantial disregard of the employer's interest. It is possible that sleeping on duty can, under certain circumstances, be no more than mere unsatisfactory conduct. It would not, in such cases, be misconduct.

The worker's explanation for falling asleep is of primary importance. The fact that the worker was tired, or did not get enough sleep the night before, is generally not a sufficient reason. The worker may be expected to get enough sleep to perform the job satisfactorily, or at least inform the employer why the worker could not report for work. The acts of a worker, who has a satisfactory explanation for falling asleep, such as the taking of prescription sedative drugs, may not be misconduct. However, the worker is still expected to inform the employer of the problem.

If the reason for not getting enough sleep is frivolous, then the worker is discharged for misconduct, even if the worker attempted to obtain leave, or otherwise inform the employer of the problem. This follows the principle that off-the-job conduct affecting the worker's job performance can be misconduct.

Example: A night worker at a residential facility was fired for continually falling asleep on the job, although the final incident causing his discharge was his leaving work because he was too sleepy to function. The reason for his sleepiness was that he had been entertaining visiting relatives. In denying benefits, the Tribunal held that it was the claimant's responsibility to get enough sleep to function, including informing relatives of his need to sleep. (97 2354, November 25, 1997)

The willfulness of the act is also important. An office worker who is fired for momentarily dozing at his desk with his pencil in his hand is not fired for misconduct, unless his conduct is repeated on the face of warnings. On the other hand, the worker who seeks out a place to sleep and is found lying down away from his work site has deliberately and substantially disregarded the employer's interest.

Example: A booth cashier for a car rental company was discharged for sleeping on the job. He was sleeping on the couch in the employee lounge during work hours. He had consciously planned ahead of time to extend the company's telephone line into the lounge and have a TV available. Since he had deliberately chosen to sleep on duty, the Tribunal

held that this was misconduct in connection with the work. (97 1434, October 7, 1997)

Example: A claimant was discharged for sleeping on the job. On both her breaks she took a nap because she was ill. A coworker failed to awaken her. In denying benefits, the Tribunal considered this misconduct finding that if she was ill, she should have called in sick, not counted on a coworker to awaken her. (99 1802, August 6, 1999)

D. Temporarily Stopping Work

When a worker stops work without authorization or leaves before quitting time, a determination of misconduct depends on:

- the worker's reasons for stopping work;
- the worker's reason for failing to obtain prior authorization for leaving;
- the length of time the worker ceased working; and
- the damage to the employer which could have resulted from the worker's ceasing work.

A worker, who has a compelling reason for stopping work and a compelling reason for failing to obtain prior authorization before leaving, is not guilty of misconduct, if the worker returns to work as soon as possible.

Example: A part time housekeeper left his job because he was feeling ill and could not get a response from his supervisor to his request to leave early. He finally told the supervisor that he was going to work only four hours instead of his usual six-hour shift. Not understanding that he was ill, the supervisor told him that he need not return if he left, and he was terminated for insubordination. Because the claimant had leukemia and had left for a compelling reason, the Tribunal held that he had not been discharged for misconduct. (98 0540, April 10, 1998)

A worker who does not have a compelling reason for ceasing work, or fails to request prior authorization, has violated a standard of behavior implicit in the work relationship. Whether this is misconduct depends on how substantial the violation is. The longer a worker is away from the job, the more substantial is the harm to the employer's interest, and thus the finding of misconduct is more likely.

Example: A clerk was discharged from his job for fixing his truck in the company shop on company time. Although the claimant contended that he was using his break time, he conceded that he had taken longer than the break time allotted. Since he had been previously warned about bringing personal items into the workplace, the Tribunal held that he was

discharged for misconduct connected with the work. (98 0596, April 10, 1998)

Briefly stopping work, such as unnecessary conversation with fellow employees, or leaving a few minutes early, is misconduct if persisted in after warning. However, in the absence of warning or reprimand, such occurrences are not misconduct unless they can cause substantial injury to the employer.

E. Horseplay

In some work situations a certain amount of horseplay is allowable. Where this has been tolerated in the past, if it is now to be considered misconduct, it must be shown that:

- the worker was specifically warned that the behavior was no longer permitted; or
- the amount of horseplay was clearly injurious to the employer; or
- the nature of the horseplay resulted in harm to the employer or to the other workers.

Example: A worker at a fast foods restaurant was assigned dishwashing duties, while other employees hosed the back deck. He left his dishwashing duties to join in the hosing. There was some horseplay by the employees using the hose, in which the claimant pointed the hose toward another employee inside the facility. When the claimant re-entered the building and water was thrown at him by another employee, who tripped running away. Because the claimant had previously been warned both about horseplay and about failure to complete his assigned duties, the Tribunal found his actions constituted misconduct. (98 1864, September 11, 1998)

385 RELATION OF OFFENSE TO DISCHARGE

A. General

A worker is discharged for misconduct only if the worker acts of misconduct are the direct cause of the discharge. The worker may commit an act of misconduct, after which the worker is discharged, but unless the discharge directly results from the act of misconduct, the worker is not discharged for misconduct in connection with the work (9122251, January 6, 1992.)

> Example: A claimant was employed as a manager of a fast food restaurant. The claimant was discharged for lying about violations regarding the illegal employment of minors at her restaurant. In March of 1991, the employer was cited for the illegal employment of minors at the claimant's restaurant. On May 3, the employer's vice-president asked the claimant whether there were any violations at her restaurant during the immediately preceding pay period. The claimant replied that there were no violations. However, the claimant admitted at the hearing that she had scheduled two minors for more than the legal hours, but not in the pay period that the vice-president was questioning. The claimant was told that if she had any more violations, she would be terminated. She had no further violations. At the end of May, the vice-president decided to change restaurant managers but deferred his decision. On June 11, a surprise inspection of the claimant's restaurant was conducted, and the restaurant received a score of 62 or 63. On July 2, the day of the claimant's discharge, the vice-president discovered that the claimant had lent $150 from the restaurant's petty cash account to an assistant manager. The claimant contended that the operations supervisor was aware of the loan. She further testified that on July 2, the vice-president told her she was being discharged because her restaurant was not generating enough cash flow and because she had lied to him. In allowing benefits, the Commissioner held:
>
> > "A lengthy delay between the act and the discharge is one piece of evidence in determining whether the act was the cause of the discharge. A delay does not necessarily negate misconduct, so long as the surrounding facts indicate that the act caused the discharge. If the delay, and other surrounding facts, show that the act of misconduct was not the triggering cause of the discharge, but show instead that the worker was discharged for some other reason not constituting misconduct, then there was no discharge for misconduct. This does not rule out a finding of misconduct, however, if the subsequent act is simply the latest in a series of acts against the employer's interests which, taken together, constitute misconduct." (9122251, January 6, 1992.)

B. Discharge for Reason Other than Alleged Misconduct

If the act causing the discharge either is not misconduct or cannot be substantiated, then the discharge is not for misconduct, even if the worker has committed other acts of misconduct. The fact that the worker commits an act of misconduct and has been discharged does not by itself mean that the discharge was for misconduct. If the actual reason for the discharge is for a reason not constituting misconduct, then there is no misconduct under the statute even if other alleged acts of misconduct did occur. The act of misconduct must be the direct cause of the discharge.

> Example: A resident assistant was discharged for several actions relating to her care of patients. The final action that resulted in her discharge was a patient's complaint that she was unnecessarily rough with him. Since that action was denied by the claimant and unsubstantiated by the employer, the Tribunal held that she was not discharged for misconduct. (97 1292, September 4, 1997)

However, this example should not be confused with situations in which the direct cause of the discharge, though not by itself misconduct, is nevertheless **the latest in a series of incidents that taken together are misconduct**. In the previous example, the worker was discharged for behavior denied by the claimant and not proven by the employer. This is not misconduct under any circumstance. On the other hand, a worker may be discharged for a minor infraction, such as reporting a few minutes late for work, which is simply the last occurrence in a series of repeated minor infractions of reasonable employer rules, for which the worker has been warned. In this case, the discharge would be for misconduct, because tardiness can be misconduct, when substantial or repeated.

This does not mean that a "laundry list" of reasons for discharge can be used to support a finding of misconduct. The direct triggering cause of the discharge must be, standing alone or in conjunction with previous actions which harm the employer's interest, misconduct.

C. Acts Occurring After Discharge

Any act on the part of the worker that occurs or was discovered after the worker has been terminated cannot be considered in the determination of whether the worker was discharged for misconduct in connection with the work.

390 RELATIONS WITH FELLOW EMPLOYEES

390.05 General

An employer has the right to expect that employees conduct themselves toward each other in a manner that does not interfere with the efficient conduct of the business. However, not all examples of bad or inharmonious relations with fellow employees are misconduct. To be misconduct, the worker's actions must be willful.

It is not realistic to expect a worker to have perfectly harmonious relations with fellow employees all the time. Occasional disputes and antagonism are normal and to be expected. Some examples of discordant relations with fellow employees are so flagrant as to be misconduct on the first occurrence, such as assault or stealing from fellow employees. However, in most cases --- such as agitation, annoyance, or uncooperative attitude --- it must be shown that the worker persisted in the conduct after warnings.

390.2 Fighting

A. General

Fighting on duty is a serious violation of the contract of employment. As such, it is usually misconduct connected with the work. It is not necessary that the employer have rules against fighting on the job. Likewise, it is not necessary that the worker receive prior warnings or reprimands in order to have fighting on the job considered misconduct.

Fighting off the employer's premises but during working hours is nevertheless misconduct, as is fighting on the employer's premises while off duty.

> Example: A railway worker was discharged for becoming involved in a fistfight with another employee during one of their days off. The fight occurred while they were in one of the "outfit cars" provided by the railroad for the employees to stay in. The worker stated that the fight did not damage the employer's property in any way, nor were either employee injured in the fight. The worker told the employer that he and the other employee "worked everything out" and did not want to discuss it further. The Tribunal held that the claimant had been discharged for misconduct. (76A-118)

> Example: A fish processor was discharged for fighting while off work but on the employer's premises. He was assaulted over the first three days of his employment by a group of workers of a different ethnic background from his. On the third day he beat up one of his attackers. In denying benefits, the Tribunal held that the claimant had the responsibility of first seeking assistance from management or the police, rather than fighting himself. (98 2262, November 4, 1998)

The only case in which a fight on the job is not misconduct is when the worker is acting in self-defense and the worker did not provoke the altercation either physically or verbally.

> Example: A warehouse foreman was discharged from his job for fighting. He was struck by a subordinate, and restrained the worker by putting him in a headlock. Both workers were dismissed, according to company policy. In finding that the claimant had not committed misconduct in connection with his work, the Tribunal stated, "A worker has a right to defend himself against physical attack, regardless of a company policy forbidding such actions. In this case, (the claimant) defended himself against the attack of another. No evidence was presented to show that the claimant was the instigator." (97 1021, June 20, 1997)

Care must be taken to distinguish self-defense, where the worker is attacked without provocation, from starting a fight even if under extreme provocation. **No matter what the provocation, a worker who starts the fight is guilty of misconduct.**

B. Verbal Battles

Provoking a verbal battle with another employee may be misconduct if it disrupts the course of the employer's business or is within the hearing of the employer's patrons. A worker who is the recipient of another employee's verbal attack is not guilty of misconduct unless the worker provoked it by an egregious course of conduct.

C. Threats

Threats of damage or bodily harm made against an employer or fellow-employee are verbal aggression and are misconduct unless they are clearly not serious in intent.

> Example: A claimant made two statements threatening bombing and "going postal" in the context of a Christmas party discussion. These were reported to the management, which took them seriously, reported them to the police, and, in conjunction with other disciplinary actions against the claimant, discharged him. In denying benefits, the Tribunal held that, although the statements were undoubtedly intended as jokes, "[d]ue to increased terrorist acts in this country over the last few years, the public has a heightened sensitivity to such statements." Therefore, they were considered misconduct. (99 0051, February18, 1999)

390.25 Annoyance of Fellow Employee

It is the responsibility of workers to get along with other employees to the best of their ability. However, because it is unlikely that anyone can have continually smooth working relationships with everyone, isolated instances of minor verbal disagreements among employees are not generally misconduct.

If a worker molests, irritates, or otherwise annoys fellow employees, after a warning, and such conduct actually interrupts the efficient operation of the employer's business, the worker has committed an act of misconduct connected with the work (9125524, February 14, 1992.)

> Example: A claimant was discharged from his job after several warnings because his fellow workers complained that he was "harassing, antagonistic, and uncomplimentary in terms of their abilities and productivity." The Tribunal denied benefits, as there was no showing that the claimant was incapable of getting along with his fellow workers. (98 2599, December 31, 1998)

The fact alone that a worker's fellow employees object to working with the worker does not make a discharge one for misconduct. If the employer fires the worker merely to keep peace, this is not misconduct on the part of the worker. The worker's **actual conduct** in violation of the employer's interest must be verified.

390.3 Debt

A debt to a fellow employee is a matter between the two parties and by itself is not misconduct. Consequently, if an employer discharges an employee solely because a worker had failed to pay a debt to a co-worker, the discharge would not be for misconduct.

Although it is possible that non-payment of a debt to a fellow employee could lead to bad relations between the two employees, this fact alone would not support the finding of misconduct, since the employer's interest cannot be substantially injured solely by bad relations between employees. However, if the bad relations lead to such things such as disputes, altercations, or other things which would tend to injure the employer's interest, then the moving party in the dispute or altercation could be guilty of misconduct. The moving party may or may not be the one who had defaulted on the debt.

390.4 Uncooperative Attitude

A worker's "uncooperative attitude" is often given as the reason for discharge by an employer. Although cooperation between employees is essential to an employer's business, an uncooperative attitude must be shown by **evidence of specific acts** showing a willful disregard of the employer's interest.

Certain acts are not misconduct, even if substantiated by the employer.

> Example: A refusal to join with other workers in cash and other contributions for charitable purposes, buy savings bonds, or the like cannot be construed as misconduct.

390.45 Sexual Harassment

Sexual harassment is unwanted language, touching, gestures, or displays that are sexual in nature and intent. Sexual harassment is illegal in the workplace, and therefore is clearly injurious to the employer. However, it is important to distinguish between sexual harassment and merely playful conversation. A stricter standard should be employed when the harasser is in supervisory line of authority, as the person being harassed may feel less able to correct the behavior. To be sexual harassment, the behavior must be known to the harasser to be unwelcome.

> Example: A maintenance supervisor was discharged from his job for sexual harassment of other workers and tenants of the mall where he was employed. He was warned about this type of behavior in November. He stopped it, except for conversations of the type that he had always had with certain persons, and which they had never indicated to him that they found distasteful. In allowing benefits, the Tribunal held that, "In most instances, the comments, if made, would have been made to people who had listened to him make such comments for months if not years. After such an extended duration, the sexual comments became part of the fabric of the workplace. The sexual comments encroached upon harassment only if they continued after a clear protest to (the claimant), which they did not." (98 0429, May 28, 1998)
>
> Example: A claimant was employed as a drug and alcohol counselor. He was discharged from his employment after he made a remark to a female mental health aide that his employer considered sexual harassment. The claimant had previously spoken to the mental health aide on several occasions but did not know her well. The mental health aide didn't react to the claimant's remark immediately but later she complained to the employer. The claimant described the remark as a "joke." He said that the remark could be interpreted to refer to working, rather than to sex. The claimant testified during the hearing that "it was just a word that came out . . . I wasn't trying to make any . . . sexual remarks." In allowing benefits, the Commissioner held:
>
>> This case does not turn on whether the claimant's behavior met some approved definition of "sexual harassment." The question is whether it was a willful violation of the employer's reasonable standards of behavior showing a willful disregard of the employer's interest, or whether it was simply an isolated instance of poor judgment. Sexual harassment may show such disregard, but we see no reason to view harassing remarks of a sexual nature as necessarily more serious or offensive than other kinds of verbal harassment . . .
>>
>> "The ESD already has a policy which states that annoyance of a fellow employee is misconduct connected with the work only if repeated after warning. Benefit Policy Manual. MC 390.25-1. We think this is a sensible policy for cases of verbal annoyance, molestation, or harassment. This case falls within that policy. We agree that the claimant's remarks were

> very likely offensive and demeaning to his co-worker, and that is clearly how she took them. But we also note that the claimant regarded it as a joke, that it was an isolated instance, that the remark was made on the spur of the moment, and that the claimant had received no prior explicit warnings. We also note that both meanings ascribed to the word are recognized slang definitions. The employer may have been justified in firing the claimant. This isolated remark, made under these circumstances, did not show a willful and substantial disregard of the employer's interests. It was an exercise of poor judgment or at most harassment which did not constitute misconduct without prior warnings. The claimant was therefore discharged for reasons other than misconduct connected with the work. "(9123544, February 14, 1992)

Example: A claimant was discharged from his job for inappropriate sexual behavior in the workplace, touching and making comments to a female worker. Because he had been warned previously about his behavior, the Tribunal found that the claimant had committed misconduct in connection with the work. (98 1405, August 18, 1998)

440 SEPARATION DATE

A. Unemployment Status

A worker's unemployment status under AS 23.20.505 does not determine the worker's separation date. A discharge may in fact occur while the worker is already technically unemployed under AS 23.20.505, if there is a severance of an ongoing employer/employee relationship.

B. Suspension, Administrative Leave, or Leave Without Pay

1. Suspension without pay

a. Indefinite suspension

An involuntary leave of absence (which may be called suspension, administrative leave, or leave without pay) for an indefinite period severs the employer-employee relationship. The separation date is the date of the suspension. No further separation issue can arise regardless of the actions of either party.

b. Definite suspension

An involuntary leave of absence (which may be called suspension, administrative leave, or leave without pay) for a definite period does not sever the employer-employee relationship. If the worker files during the period of suspension, the separation date is the date of the suspension. A worker who fails to return at the close of a definite suspension has voluntarily left work effective on the date they were scheduled to return.

2. Suspension with pay

A worker who is suspended but paid by the employer is not unemployed under AS 23.20.505 because the worker is paid for the "service" of not coming to work for the employer. If the worker is discharged, the separation date is the date of the discharge.

475 UNION RELATIONS

A. General

Union membership is a right protected under state and federal law. Therefore, a discharge solely for union membership is not for misconduct. Likewise, it is perfectly legal to persuade an employee to join a union. However, if a worker engages in other activity, as a result of membership in or in advocacy for a union, that is misconduct, then a finding of misconduct connected with the work is justified.

> Example: A worker may intimidate fellow employees, or fail to perform the job satisfactorily because of the union activities. The determination of misconduct would be made on the basis of the worker's action, not the union membership.

In determining whether union activities, as opposed to union membership, are misconduct, consider:

- Whether the worker's activities were illegal;
- Whether the worker's activity violated provisions of the collective bargaining agreement;
- Whether the worker's activities violated employer rules; and
- Whether the worker had previously been warned or reprimanded.

Just as any worker has the right to join a labor organization, any worker has the right to not to join. Consequently, a discharge because a worker refuses to join a union is not for misconduct. However, if union membership is required under the terms of a collective bargaining contract, refusal to join the union is voluntary leaving. See VL 475.05, Union Relations, General.

B. Strike

In most cases, engaging in a strike is not misconduct. The unemployment of striking workers is in most cases considered under AS 23.20.383. However, the Commissioner has held that engaging in an illegal strike is misconduct.

> Example: Striking members of the Professional Air Traffic Controllers Association were discharged by the Federal Aviation Administration for participating in an illegal strike against the federal government, specifically in violation of 5 USC 7311 and 18 USC 1918. In denying benefits, the Commissioner stated, "The facts clearly demonstrate that the petitioners were discharged by their employer for misconduct connected with their work (an illegal strike)." 81H-168 LD

C. Grievance Procedure

The findings and conclusions of a grievance or arbitration procedure may be considered along with any other evidence of misconduct or lack of misconduct. However, reinstatement or refusal of reinstatement is not conclusive evidence. What is important is the basis for the reinstatement or settlement. A vigorous union may gain reinstatement of a worker who is clearly guilty of misconduct. Conversely, a union may lose or not even consider a grievance on behalf of an employee who has not committed an act of misconduct.

> Example: In 75A-70 the claimant was discharged by his employer initially because of alleged neglect of duty and disobedience. The claimant then initiated a grievance through his union contesting his discharge. As a result of the grievance, the employer modified the worker's personnel record negating the discharge and acknowledging that the claimant was "unjustly discharged" under the company's labor agreement with the union. This in effect removed the basis for the discharge and negated misconduct.

D. Agreement to Refrain from Union Activity

Because union membership and activity is a protected right, any agreement with the employer to refrain from such activity is illegal and unenforceable. Therefore, a discharge for violating an agreement to refrain from union activity is not misconduct.

E. Dispute with Union Representatives

A dispute between the worker and the worker's union does not often involve the employer. If the employer intervenes and discharges the worker there would seldom be misconduct because the employer's interest has not been materially affected. However, if the employee's disagreement with the union results in a dispute on company premises or otherwise interferes with the work, the resulting discharge is for the dispute, not the union dispute as such.

A violation of a union rule is not by itself misconduct. The violation of a union rule is misconduct only if the violation of the union rule also violates a duty owed to the employer.

If the violation of a union rule makes it impossible for the employer to retain the worker in employment, and the worker was aware that the violation of the rule would have that effect, it is considered a discharge for misconduct. For example, this might occur when the worker’s willful behavior results in expulsion from the union, such as failure to remain in good standing by payment of dues.

490 VULGAR OR PROFANE LANGUAGE

A. General

In occupations involving public contact, such as bank tellers or receptionists, there is a definite harm to the employer's interest in the use of any vulgar or profane language within the hearing of the employer's customers. Use of such language in this occupation is misconduct, and, depending on the provocation, may be misconduct in the absence of prior warnings and even without posted rules against such language.

Repeated violations of an expressed rule prohibiting the use of vulgar or profane language by a worker are misconduct in connection with the work. However, a single outburst by a worker as a result of provocation is not misconduct in connection with the work, unless it is extremely obscene or insulting. A worker who uses the same language to a supervisor that the supervisor uses with the worker is not guilty of misconduct.

> Example: A claimant was employed as a mechanic for a catering company. The claimant's supervisor brought to the claimant's attention the fact that he had installed an incorrect size of battery. The claimant became abusive and profane with his supervisor, feeling that his supervisor had it in for him and that it was another example of his supervisor's continuing criticisms. The supervisor discharged the claimant for his conduct. The Commissioner held that the claimant was discharged for misconduct in connection with the work. (83H-UI-263, October 17, 1983)

B. Towards a Supervisor

Vulgar or profane language to a supervisor is misconduct in connection with the work if it shows a willful disregard of the employer's interest. A determination of misconduct depends on the nature of the occupation and the circumstances under which the worker made the remarks.

Acceptable language used in the long shoring occupations differs from that expected in the public contact occupations. If an employer discharges a long shore worker for vulgar language, then the discharge is probably not for misconduct in connection with the work. However, what may be normal banter among co-workers may be misconduct in connection with the work if the language is directed to a supervisor, even in the rougher occupations. An employer has the right to expect that a supervisor receive such respect that a worker's vulgar or profane language does not undermine the supervisor's authority. Hot-tempered remarks, threats, or insolence, without due provocation, are misconduct in connection with the work (9029364, August 9, 1991.)

> Example: A worker at a fast foods restaurant was discharged for using vulgar language in the workplace in response to a supervisor's direction to clean the refrigerator. There was a company policy prohibiting such

language, especially in the hearing of customers. Although the claimant testified that he spoke under his breath, the employer testified that several customers appeared to notice the language. In denying benefits, the Tribunal held that, whether or not the customers had heard, the supervisor's authority had been undermined by his language in response to her proper direction. (97 1723, August 20, 1997)

Example: A claimant was discharged for responding to her employer's question as to what was wrong with her that she was in a "bad f____ing mood." Since the employer had allowed the behavior in the past and the claimant had not been warned it could lead to termination, the Commissioner held that her response was not misconduct in connection with the work. (99 1135, August 26, 1999)

C. Towards Fellow Employee

The use of vulgar or profane language may or may not be misconduct connected with the work. In many lines of employment, mild abuse and profane language are accepted as part of the normal give and take of the work situation. The use of such language under those circumstances is misconduct only when it is used in such a belligerent or abusive manner that there is interference with the good order and discipline of the employer's business.

Example: A claimant was employed as a baker, with her husband as supervisor. When he was terminated, the claimant profanely addressed her co-worker who would be replacing him, whom she had trained. She was discharged as management felt she would not be able to work with the new supervisor. The Tribunal held that the occurrence was a one-time misjudgment, and not misconduct in connection with her work. (97 1259, June 16, 1997)

Example: On the other hand, a claimant was discharged for using vulgar and profane language to a fellow employee, who was a former roommate. The claimant had been previously warned that any problems resulting from their interactions could cause one or both of them to be discharged. In the instance that led to her being fired, the claimant was the instigator of the exchange. Since it was unacceptably descriptive, and in the hearing of customers, the Tribunal held that it was misconduct in connection with the work. (97 1850, September 18, 1997)

500 WILLFUL MISCONDUCT

A. General

Willful misconduct means that a worker intentionally acted.

A single instance of a willful failure to perform properly is misconduct in connection with the work. It is not necessary to show actual harm to the employer; it is only necessary to show that harm reasonably could have resulted from the worker's failure to perform. It is also not necessary to show that the worker acted with malice or intended injury to the employer. It is only necessary to show that the worker was aware of the required conduct and intentionally or deliberately failed to perform. Care must be taken, however, not to confuse inability or inefficiency with willfulness.

Warnings or reprimands are usually necessary to establish that the worker's actions showed a willful disregard of the employer's interest. If the worker continues the behavior after warnings or reprimands, this tends to show that the behavior was willful. However, warnings about attitude, **unaccompanied by detrimental behavior**, cannot be used to substantiate a finding of misconduct.

B. Willful Violation of Rule or Order

If a worker has good cause for the violation of a rule, or if the violation is due to "mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies, or ordinary negligence in isolated instances, or good faith errors in judgment or discretion," then there is no misconduct involved. Under these circumstances, the violation of the rule is not willful.

> Example: A teller was discharged from her job at a credit union for keeping money in her lock box overnight, forcing a computer balance and accepting Canadian money, all of which were against company policy. She had not deliberately kept the money in her lock box, but was unaware that it was there because she had not accessed it all day. She had not forced the computer balance, but had forgotten that she had purchased money from the vault, which was the same money that was in the lock box. She had accepted the Canadian money, planning to sell it to another customer. In allowing benefits, the Tribunal held that her actions were errors in judgment, rather than a failure to attempt to follow the employer's rules. (97 2173, October 29, 1997)
>
> Example: An x-ray technician at a medical clinic was discharged for accessing a computer terminal without identification and erasing a balance on his account owed to his employer, although he was actually being billed in error, as company policy allowed him to receive the employer's services without cost. He contended that he had done this accidentally. Testimony from the employer showed that accessing the terminal could not have been done by accident. It was contrary to company policy to access the

computer without logging on properly. The Tribunal held that the claimant's actions were misconduct in connection with the work. (97 1406, July 22, 1997)

C. Knowledge of Rule

If the worker knowingly violates a rule, the violation is willful even though there was no intention of harm to the employer. In addition, forgetfulness would not necessarily clear a worker of misconduct, especially where the worker has received prior warnings.

Example: A claimant was discharged from her job for violating the employer's policy on nepotism by hiring her brother. She had been given a copy of the employer's policy manual to study, in which nepotism was defined and given as a reason for dismissal. Although the claimant claimed that she did not know what nepotism meant, the Tribunal found misconduct, as she had been told to read the manual and the word was defined. (98 2160, October 21, 1998)

Example: was discharged from his job when he refused to take an order for a pizza that he did not think he had time to complete before closing time. He had previously been instructed to do this by someone else. The Tribunal held, in allowing benefits, that Mr. Wheatfield had no reason to believe his actions were incorrect. (98 2746, January 27, 1999)

D. Uncontrollable Behavior

Behavior that is beyond the control of the worker is not willful.

Example: A claimant was discharged from her job for screaming and using profanity at her employer in front of others. Ms. Moyer had a letter from her doctor that said that her behavior was out of control due to the medication she was on to control her "agitated depression" state. The Tribunal held that the evidence showed that Ms. Moyer was not able to control her behavior. (98 0669, April 24, 1998)

Example: A claimant was discharged from her job when she failed either to return to work on her scheduled date or to make timely contact with her employer. Her physician gave testimony that she was at the time mentally disturbed and unable to comply. The Tribunal held that, as she was not able to respond, she was not discharged for misconduct. (97 1284, July 30, 1997)