

# New York State Department of Labor

## Section 1100

### MISCONDUCT

### Index 1100

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## **1100. Introduction**

### **A. Misconduct**

Under Section 593.3, if a claimant lost employment prior to the filing of his claim through misconduct in connection with his employment, he is disqualified from benefits beginning with such loss of employment and ending when he has worked in subsequent employment and earned remuneration at least equal to five times his weekly benefit rate. In addition, any wages earned in employment which ended due to misconduct in connection with that employment cannot be

used to establish a valid original claim for benefits. (See Field Memo 2-99 for further detail)

The term "misconduct" is not defined in the statute. However, the Court of Appeals in Matter of James (34 NY 2d 491; [A-750-1775](#)) has indicated that "misconduct" is any volitional act or omission which is detrimental to an employer's interests. Subsequent Appeal Board decisions have indicated that "misconduct" may include acts or omissions off the job as well as on the job, if adverse effect on the employer is demonstrated.

Notwithstanding the broad concept of misconduct now applied, there remain circumstances which would not justify the imposition of a disqualification for misconduct, including:

Mere inefficiency,

Inadequate performance as the result of inability or incapacity,

Inadvertence or ordinary negligence in isolated instances,

Good faith errors in judgement or discretion.

On the other hand, even inadequate performance may be misconduct if it can be shown that it resulted from gross negligence, indifference, or recurrent carelessness.

#### B. Criminal acts

In addition to the above disqualification, Section 593.4 of the Law provides:

Criminal acts. No days of total unemployment shall be deemed to occur during a period of twelve months after a claimant loses employment as a result of an act constituting a felony in connection with such employment, provided the claimant is duly convicted thereof or has signed a statement admitting that he or she has committed such an act. Determinations regarding a benefit claim may be reviewed at any time. Any benefits paid to a claimant prior to a determination that the claimant has lost employment as a result of such act shall not be considered to have been accepted by the claimant in good faith. In addition, remuneration paid to the claimant by the affected employer prior to the claimant's loss of employment due to such criminal act may not be utilized for the purpose of establishing entitlement to a subsequent, valid original claim. The provisions of this subdivision shall apply even if the employment lost as a result of such act is not the claimant's last employment prior to the filing of his or her claim.

1105. GeneralEvidence required

For the sustainment of a charge of misconduct there must be clear proof that an act detrimental to employer's interests was indisputably committed by claimant. (A.B. 1008-39)

Misconduct under the Law was established even though acts did not result in criminal conviction. (Ref. Dec. 532-78-39R. Principle confirmed by Matter of Colello, No.76-443 App. Div., 3rd Dept., Dec. 2, 1976, unreported)

There is no statutory authority for a disqualification on the grounds of a "provoked discharge" and, therefore, if an employer decides to discharge a claimant because of an act or omission which is detrimental to his interests, there can only be a misconduct disqualification. (Matter of James, 34 N.Y. 2d 491; [A-750-1775](#))

Facts established at a hearing authorized by law for review of the discharge of a permanent civil service employee, are binding on the Unemployment Insurance Appeal Board. (Matter of Corbett, 47 A.D. 2d 596; [A-750-1838](#))

The facts found by an impartial arbitrator, although binding, do not preclude the finding of additional facts which are necessary to resolve the issue of misconduct. (Matter of Guimaraes, 68 NY 2d 989; [A-750-1981](#))

Although an impartial arbitrator reinstates claimant without back pay because the procedure under which he was discharged, was instituted in violation of the union contract, the claimant is not excused from the consequences of his actions if the actions which caused his discharge constitute misconduct under the Unemployment Insurance Law. (A.B. 389,858; [A-750-1996](#))

The additional facts found by either a local office, an administrative law judge or the Appeal Board to resolve the Unemployment Insurance issue of misconduct may not contradict those facts previously found by an impartial arbitrator in the arbitrator's decision resolving the validity of claimant's discharge from employment. (Matter of Lester, 149 AD 2d 880; [A-750-2013](#))

Relation of offense to discharge

There must be a direct relation in point of time between the offenses committed and the discharge, and misconduct must be proved to be the direct cause of discharge.

(A.B. 15-38; A.B. 259-38)

A Federal employee who is disqualified for loss of employment due to misconduct, but who is then temporarily reinstated to his job during the pendency of appeal of his discharge, is subject to a second disqualification for misconduct upon the filing of a new claim after final removal from his job, even though no act of misconduct occurred during the period of reinstatement. (Matter of Williams, 51 A.D. 2d 1097; [A-750-1817](#))

The City of New York is one employer, so that a claimant who commits acts of misconduct while employed at one City agency is subject to disqualification when discharged for that reason by another City agency for which he had started work before the discovery of the misconduct. (A.B. 322,622; [A-750-1908](#))

A layoff due to lack of work with no definite date of recall severs the employer/employee relationship, notwithstanding claimant's retention of union seniority and recall rights. (A.B. 329,932; [A-750-1913](#))

A claimant may be disqualified for an act of misconduct committed on the day he is scheduled for layoff due to lack of work (A.B. 375,601; [A-750-1976](#))

Claimant, having given two weeks notice, is subject to a misconduct determination when discharged earlier if, by her actions, she demonstrates she does not intend to perform her job duties. (A.B. 394,334; [A-750-2022](#))

In determining separation from "last employment", the statutory definition of "employment" and its exceptions will govern the interpretation of the words "last employment" (Matter of David Gruber, 89 NY 2d 225; [A-750-2100](#))

An employee's use of profanity when informed by her employer that she was to be discharged is not misconduct since the employer had already decided to discharge her for a different reason. (A.B. 547893; [A-750-2136](#))

#### Condonation

In circumstances where violations of a company rule have been with knowledge and tacit consent of an employee's immediate supervisor, such infractions did not amount to misconduct. (Hotel handyman performed work for tenant without prior notification to management). (A.B. 664-39)

A breach of trust resulting in termination of employment constitute misconduct, even though the impropriety (falsifying records to signify usual closing time of a store

rather than an actual earlier closing) is sanctioned by claimant's immediate supervisor, who also disregards the employer's interest. (A.B. 53,843-55; [A-750-1408](#))

A claimant discharged for falling asleep on the job is not subject to disqualification when his sleeping is caused by a medication prescribed for his chronic medical condition, and when the employer who has knowledge of claimant's medical condition, condoned claimant's behavior in the past. (A.B. 545303; [A-750-2135](#))

A discharge of a claimant for a final incident of lateness is not excused by the fact that the employer apparently condoned minor lateness's that took place after a final warning because it is the employer's prerogative to determine if a claimant's actions rise to the level of misconduct warranting discharge. ([A-750-2154](#))

#### Termination of disqualification

Vacation pay is not usable in terminating a disqualification since it is not "subsequently" earned remuneration. (A.B. 114,502; [A-750-1696](#))

A back-pay award is "earned" remuneration for employment usable in terminating a disqualification. (A.B. 129,914; [A-750-1652](#))

Obsolete See [A-710-36](#) (Oct. 19, 1998)

Members of the Reserve Components of the Armed Forces of the United States are totally unemployed while engaging in weekly drill sessions. Participation in any pay received for such drills are neither employment nor remuneration, and may not be used to terminate a disqualification. (A.B. 344,489; A.B. 344,490; [A-750-1949](#))

A disqualification from benefits can only be terminated by "employment" as defined in the statute. The statutory definition of "employment" and its exceptions will govern the interpretation of the term "employment". (Matter of Kent A. Green, 89 NY 2d 225, [A-750-2101](#))

Employment performed in another state which is not excluded employment in that state can be used for the purpose of terminating a prior disqualification. (A.B. 462,249; [A-750-2102](#))

#### E. Non-Controlling Discharge

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1. The rule previously reported here is now obsolete.

1110. Absence and lateness

Absence for a non-compelling reason after the employer has indicated its displeasure with an excessive absence record, is misconduct. (A.B. 197,674; [A-750-1777](#))

Failure without good reason in violation of employer's rule to contact employer on the first day of absence after having been warned to do so, is misconduct. (A.B. 195,977; [A-750-1778](#))

Repeated lateness for non-compelling reasons despite warning by supervisor, is misconduct. (A.B. 199,635; [A-750-1779](#). Principle confirmed by Matter of Greene, 48 A.D. 2d 747)

Claimant's precipitous action in announcing that he would take the next two days off for vacation, and then doing so in defiance of supervisor's denial of permission, is misconduct. (Matter of Bischoff, 48 A.D. 2d 1010; Affg. A.B. 197,338; [A-750-1780](#))

Overstaying a leave of absence and failing to communicate promptly with employer to explain why, is misconduct, unless there is a compelling reason for both infractions. (A.B. 196,403; A.B. 199,005; [A-750-1781](#))

Discharge for extended absence due to incarceration for a crime committed by the claimant even though outside the course of employment is a loss of employment due to misconduct because the absence was caused by claimant's own actions and violated a reasonable condition of employment-regular and punctual attendance. (A.B. 365,575; [A-750-1971](#))

Falsely informing employer that absence was due to illness, is misconduct. (A.B. 211,294; [A-750-1801](#))

When an employer decides to reduce his work force and selects claimant because of a poor attendance record, the separation is not due to misconduct. (A.B. 247,934; [A-750-1841](#))

Failure to notify one's employer when absent is misconduct, notwithstanding reliance on a friend to inform the employer of the absence. (A.B. 323,434; [A-750-1910](#))

Continued absenteeism or tardiness after warning constitute misconduct if claimant failed to investigate prudent and available alternatives that might have eliminated the absence or reduced the tardiness. (A.B. 364,698; [A-750-1972](#))

Tardiness caused by a transportation delay on claimant's last day of work is not misconduct when claimant had followed the employer's prior advice to leave home at an earlier hour to overcome these delays, but was nevertheless unavoidably late. (A.B. 390,570; [A-750-1999](#))

Failure to notify an employer of an extended absence (one week), constitutes misconduct whether or not claimant knew of the employer's notification policy. (A.B. 393,737; [A-750-2019](#))

Despite the lack of a previous personal individualized warning, an absence of three days for non-compelling reasons, is misconduct when claimant, who had frequently

been late to and/or absent from work, had been made aware of the employer's need for regular attendance, e.g. through a staff meeting. (A.B. 394,807; [A-750-2020](#))

Discharge because of absenteeism caused by court appearances resulting from claimant's arrest for an offense committed outside the course of employment is misconduct, if the claimant ultimately is convicted of the offense, since the absence is a result of claimant's own act and not from circumstances beyond his control. (A.B. 400,973; [A-750-2031](#))

Discharge for failure to report for work on a date set by her employer, based on a single examination by its doctor, is a loss of employment under non-disqualifying conditions if the claimant's own physician has determined, based on a continuing course of treatment, that she was claimant's own physician has determined, based on a continuing course of treatment, that she was unable to work at that time. (A.B. 401,183; [A-750-2033](#))

A discharge for repeated absence from work is not misconduct, if claimant's absences are attributable to claimant's disease of alcoholism. (A.B. 382,990; [A-750-2042](#))

Discharge for absenteeism caused by a verified illness is not misconduct despite a probation agreement that any future absences would be cause for immediate dismissal. (A.B. 408,972; [A-750-2044](#))

a. Claimant was discharged when he notified his employer of his admittance to a hospital for drug rehabilitation sometime after being admitted. Claimant's absenteeism is not excused because it was caused by his admittance to a drug abuse rehabilitation program inasmuch as his drug abuse problem was a foreseeable result of his use of an illegal substance.

b. After reemployment, it was not good cause for claimant to voluntarily leave his job in order to avoid the location near the worksite where alleged drugs were available for purchase. (A.B. 409,188; [A-750-2058](#))

Unsatisfactory attendance is not excused by claimant's addiction to both a controlled substance and alcohol. Because the controlled substance is illegal, the claimant's alcoholism should not be considered in determining the reason for separation. (A.B. 445,500; [A-750-2071](#))

#### 1115. Accidents and damage

An avoidable motor accident caused by lack of judgement but not by an act deliberately prejudicial to employer's interests did not constitute misconduct. (A.B. 850-39)

Deliberate failure to follow employer's reasonable procedures, set up to maximize efficiency and minimize accidents, waste or defective product, is misconduct. (A.B. 195,280; 195,383; 195,514; [A-750-1787](#)).

#### 1120. Acknowledgments and agreements

Refusal to sign an acknowledgment of the imposition of a probation period is insubordination constituting misconduct, when the form states that signature does not mean agreement with the reasons for the probation. (A.B. 218,171; [A-750-1811](#). Principle Affirmed by Matter of Spiropoulos, No.77-222 (App. Div., 3rd Dep't., Sept. 15, 1977 not reported) Affg. A.B. 240,518)

Failure to attend a drug abuse treatment and counselling program, in violation of a condition of probation imposed after a formal disciplinary hearing for drug related absenteeism, is misconduct. (Matter of Restifo, 88 A.D. 2d 1045; [A-750-1950](#))

Discharge for absenteeism caused by a verified illness is not misconduct despite a probation agreement that any future absences would be cause for immediate dismissal. (A.B. 408,972; [A-750-2044](#))

#### 1125. Alcohol

Alcoholism can excuse misconduct only if there is substantial evidence to show that the claimant is an alcoholic, and that alcoholism caused the behavior for which claimant was terminated. (Matter of Allen 162 AD 2d 753; [A-750-2039](#))

Reporting to work in an inebriated condition is misconduct, whether or not there has been a warning to that effect. (A.B. 220,981; [A-750-1813](#))

A discharge for reporting to work intoxicated is not misconduct, if the claimant is an alcoholic whose drinking is beyond his control (A.B. 191,630; [A-750-2040](#))

Reporting to work with odor of alcohol on breath despite warning against such conduct, is not misconduct, unless claimant has contact with customers or the condition makes the working environment unpleasant for co-employees, or there is other evidence of an adverse effect on the employer. (Matter of Llano, 46 AD 2d 841; [A-750-1803](#))

Intoxication in the course of employment constituted misconduct. (A.B. 55-38; A.B. 505-38)

Intoxication in circumstances detrimental to employer's interests constituted misconduct although claimant was not in company property. (Traveling salesman.) (A.B. 626-39)

Drinking during working hours, if a violation of company rules, constituted misconduct. (A.B. 184-38)

A discharge for failure to remain alcohol free as agreed to by a stipulation to an arbitration award is not misconduct if claimant's failure to do so is the direct result of claimant's alcoholism. (A.B. 384,707; [A-750-2041](#))

Offering liquor to fellow employees during working hours, if a violation of company rules, was sufficient to constitute misconduct. (A.B. 1151-39)

A claimant's repeated absences from work, despite previous warnings, because of a frequently recurring state of intoxication, constituted misconduct. (A.B. 781-39)

A discharge for repeated absence from work is not misconduct if claimant's absences are attributable to claimant's disease of alcoholism. (A.B. 382,990; [A-750-2042](#))

Unsatisfactory attendance is not excused by claimant's addictions to both a controlled substance and alcohol. Because the controlled substance is illegal, the claimant's alcoholism should not be considered in determining the reason for separation. (A.B. 445,500; [A-750-2071](#))

Alcoholism does not excuse claimant's reporting to work in a safety sensitive position while impaired by alcohol, because of the potential for harm to the welfare or safety of the claimant himself, or his coworkers, or his employer's customers. (A.B. 471,802; [A-750-2099](#))

#### 1127. Appearance

Refusal to comply with the employer's rule limiting hair length is misconduct, if, at time of hire the rule was made a condition of employment (Uniformed guard). (A.B. 224,165; [A-750-1833](#))

Refusal to be clean shaven in accordance with the employer's policy is not misconduct if the employer fails to offer a compelling reason for having such an intrusive policy. (A.B. 460,731A; [A-750-2077](#))

#### 1130. Behavior off job

(See [Index 1195](#), and Special Bulletin [A-710-50](#))

When a claimant had been warned about absences, discharge for absence due to arrest or incarceration for an offense committed outside the course of employment, is a loss of employment due to misconduct, since the absence was caused by claimant's own actions and violated a reasonable condition of employment -- regular and prompt attendance. (A.B. 199,344; [A-750-1782](#))

A misconduct disqualification applies to a brokerage clerk who is discharged for accepting bookmaking bets in the building in which employed since, in view of the employer's business, such action was detrimental to the employer's interest because the public impression of his employees' high integrity is of the essence of their employment. (A.B. 95,799; [A-750-1586](#))

A loss of employment because the Waterfront Commission rescinded the claimant's longshoreman's work registration for bookmaking at the hiring hall is misconduct (A.B. 131,959)

Commission of a crime, even outside of working hours, may be misconduct, if claimant's occupation (such as parcel delivery to private homes) requires that he be of good character. (Claimant was convicted of sexual abuse and unlawful imprisonment) (A.B. 214,704; [A-750-1807](#))

A nurse's aide employed by a nursing home who is discharged because of conviction for attempted arson (set fire in own home) is subject to disqualification for misconduct since such action demonstrated that she was unfit to care for persons unable to care for themselves. (A.B. 236,230)

An airline ramp agent who is discharged because of conviction for armed robbery (truck hijack) is subject to disqualification for misconduct since in view of his duties supervising transfer of valuable cargo, his actions imposed an unreasonable risk to property in his employer's custody and to the safety of persons with whom he came into contact. (A.B. 245,487)

A supermarket stock clerk who is discharged because of conviction for shoplifting in another store is subject to disqualification for misconduct since such action demonstrated that he could no longer be entrusted with company merchandise. (A.B. 267,998)

A county corrections officer, discharged after a disciplinary hearing under Civil Service Law on the findings of the hearing officer that he unlawfully coerced and restrained an individual, attempted to force her to perform a sexual act, falsely represented himself as a vice officer and threatened to arrest her, was subject to disqualification for misconduct in connection with his employment, even though the offenses were committed while off duty. A correction officer had the status of a peace officer, and is held to a high standard of conduct on or off the job. (A.B. 269,695; [A-750-1872](#))

Stealing electricity by tampering with the equipment installed in claimant's home by his employer, a public utility, is misconduct in connection with employment. (A.B. 222,514; [A-750-1818](#))

When a claimant is employed in a sensitive position dealing with the public, violation of a work rule prohibiting criminal, dishonest or immoral behavior which tends to discredit him or his employer, is misconduct in connection with employment, even if occurring off the job. (A.B. 280,277; [A-750-1876](#))

A claimant's off duty act, in disregard of standards of behavior which an employer has a right to expect of its employees, is "in connection with" employment within the meaning of Section 593.3 (misconduct) and Section 593.4 (criminal acts) of the Labor Law. (Claimant, a fiscal analyst for a municipality, was convicted of engaging in felonious corruption of a public official, reflecting unfavorably on the integrity of the employer). (Matter of Markowitz, 94 A.D. 2d 155; [A-750-1946](#))

A claimant discharged for failing to maintain a valid driver's license, a necessary condition of employment, is not subject to disqualification when the loss of the license is not caused by the claimant's act. There is no misconduct or voluntary separation ("provoked discharge") unless the loss of employment results from the claimant's volitional act or omission. (A.B. 343,898; [A-750-1948](#))

#### 1135. Carelessness

A single act of carelessness or poor judgement which was not a wilful attempt to injure the employer's interests did not constitute misconduct. (Ref. M-63-1-38R; similarly A.B. 316,055)

Carelessly leaving the contents of a cash register unprotected, resulting in theft by a customer, is gross negligence constituting misconduct, when claimant had recently been warned about such behavior after a similar incident. (A.B. 212,906; [A-750-1805](#); see comments)

1137. Civil rights

Refusal to comply with an employer's order to remove a political button from the uniform worn by claimant bearing the company name, is not misconduct in the absence of evidence of detriment to the employer's interest or of violation of an established company rule. (Matter of DeGrego, 39 N.Y. 2d 180; [A-750-1809](#))

Refusal to take a polygraph test is not misconduct. (A.B. 226,217; [A-750-1823](#))

Refusal to answer questions during an employer's formal interrogation regarding alleged improprieties, when the testimony may ultimately be used in a criminal proceeding against the employee, is an exercise of constitutional rights against self-incrimination and therefore is not misconduct. (Matter of Kubus, 62 A.D. 2d 534; [A-750-1858](#))

A public employee discharged for refusing to answer the employer's questions during a disciplinary investigation has violated a condition of employment and is subject to a misconduct disqualification, provided the responses may not be used against the employee in subsequent criminal proceedings. (Matter of Altieri 92 A.D. 2d 1028; [A-750-1936](#))

Refusal to work an evening shift while serving jury duty is not misconduct because such work would be contrary to public policy and would infringe upon and inhibit the claimant's physical ability to properly serve as a juror the following day. (A.B. 432,522; [A-750-2072](#))

Refusal to attend work or to perform tasks which would violate one's religious beliefs is not disqualifying. (A.B. 452,775; [A-750-2086](#))

1140. Competing business

Violation of a reasonable company rule which prohibited its salesmen from carrying a competing line of merchandise constituted misconduct. (A.B. 468-38)

Attempt by employee to take business away from his employer constituted misconduct. (A.B. 4663-41; [A-750-261](#); similarly, A.B. 318,386)

Acceptance of work from employer's customers to employer's detriment constituted misconduct. (A.B. 7946-42; [A-750-406](#))

1145. Disciplinary suspension

Failure to file a grievance. in response to proposed disciplinary action, is not tantamount to voluntary leaving of employment without good cause unless there is some accompanying affirmative act by the claimant signifying voluntary separation. (A.B. 359,061; [A-750-1963](#))

A claimant who voluntarily leaves his or her position in the face of pending disciplinary charges may qualify for Unemployment Insurance Benefits if the claimant's actions do not constitute misconduct. (A-750-2143)

1150. Dishonesty

Falsification of employment application

(See Special Bulletin A-710-50)

A deliberate falsification of an application for employment constitutes misconduct within the meaning of the Unemployment Insurance Law if there is present injury or prejudice to the employer's interest. (A.B. 39,840-53; A-750-1244)

A false statement on an employment application made to conceal an illness or disability (epilepsy) constitutes misconduct. (A.B. 162,012; A-750-1735)

Falsifying the date of birth on an application for employment does not constitute a misconduct in connection with such employment, when the employer's pecuniary interests, actual or potential, have not been prejudiced. (A.B. 61,271-57; A-750-1466)

Disqualification for misconduct was proper when claimant, 17 years of age, certified that she was 19, since her employment was in violation of Labor Law, Section 132. (A.B. 95,069)

"Puffing" the length of previous employment on an application in order to obtain a job does not constitute misconduct. (A.B. 67,034-58; A-750-1496) (But see Comments in A-750-1759)

Falsely denying in an employment application of having worked for the employer before, with the knowledge that such concealment would be cause for discharge, constitutes misconduct. (Ref. Dec. 7-127-53R; A-750-1250)

Deliberate omission of a prior employer from an employment application may be misconduct. (A.B. 204,070; A-750-1795)

Falsely claiming on the employment application of a municipality to be a high school graduate is misconduct. (Matter of Starich, 52 A.D. 2d 965; A-750-1821)

Falsely denying a prior conviction on an employment application because the disposition of the conviction was a conditional discharge, constitutes misconduct. (A.B. 386,289; A-750-1990)

False time and work reports

Falsification of his time card by an employee constituted misconduct. (A.B. 18-38)

Submitting false time records and work reports is misconduct. (A.B. 197,556)

A breach of trust resulting in termination of employment constitutes misconduct, even though the impropriety (falsifying records to signify usual closing time of a store rather than an actual earlier closing) is sanctioned by claimant's immediate supervisor, who also disregards the employer's interest. (A.B. 53,843-55; A-750-1408. See Index 1105C-1 for general rule on condonation by supervisor.)

### Theft and mishandling of funds

A claimant who deliberately committed an act which was prejudicial to employer's interest and connected with his employment is guilty of misconduct. (Truck driver appropriated property of customer while making a delivery on his premises.) (A.B. 1613-39; [A-750-8](#))

Although restitution of the shortage was made, repeated violations of reasonable company rule, familiar to claimant, that insurance premiums collected must be turned in immediately constituted misconduct. (A.B. 1084-39)

Withholding money collected on behalf of employer constituted misconduct. (A.B. 603-39)

Dishonesty in connection with claimant's work constituted sufficient ground for a finding of misconduct, although the full extent of defalcations did not become known until investigation subsequent to discharge. (A.B. 1360-39)

Claimant's unexplained failure to report for work when entrusted with the responsibility of collecting funds, coupled with his failure to properly account for funds belonging to his employer constituted misconduct. (A.B. 7-38)

(a) Discharge for pilfering is not disqualifying when such conduct stems from a psychiatric disorder manifested by a compulsion to steal.

(b) A claimant discharged under such circumstances is incapable of employment in the absence of medical evidence that he is no longer suffering from the psychiatric disorder. (A.B. 191,103; [A-750-1773](#))

Stealing electricity by tampering with the equipment installed in claimant's home by his employer, a public utility, is misconduct in connection with employment. (A.B. 222,514; [A-750-1818](#))

A corporate officer and stockholder who loses his employment when the corporation is closed by the Internal Revenue Service in an attempt to collect unpaid social security and income taxes withheld from the wages paid to its employees, is not subject to disqualification for misconduct when the money was appropriated not for his personal use but for operating expenses to forestall bankruptcy. (A.B. 235,415; [A-750-1827](#))

It is misconduct when a corporate officer and stockholder loses employment because the corporate business is closed by the Internal Revenue Service in its attempt to collect unpaid taxes withheld from employees' wages, provided the corporation was not in financial difficulty. (A.B. 209,388)

### 1152. Drugs

Claimant's misconduct in connection with his employment may not be excused by dependence on a controlled substance because, unlike alcoholism, the use of such substance is subject to strict legal prohibitions against possession and sale, and

the negative consequences of its use can or should be reasonably foreseen. (A.B. 398,533A; [A-750-2030](#))

Possession or use of an illegal drug in violation of an employer's reasonable rule, known to the claimant, is not excused by claimant's addiction to that drug, since such possession or use is an illegal act. (A.B. 384,850; [A-750-1993](#))

Claimant's refusal to submit to a urinalysis intended to determine drug use, when there is no reasonable suspicion of such use or specific advance notice that such testing would be a condition of employment, does not constitute misconduct. (A.B. 383,643; [A-750-1992](#))

Failure to attend a drug abuse treatment and counselling program, in violation of a condition of probation imposed after a formal disciplinary hearing for drug related absenteeism, is misconduct. (Matter of Restifo, 88 A.D. 2d 1045; [A-750-1950](#))

Storing a large quantity of marijuana in one's desk is misconduct. (A.B. 243,072)

Smoking marijuana during working hours is misconduct. (A.B. 219,239; [A-750-1810](#))

Claimant was discharged when he notified his employer of his admittance to a hospital for drug rehabilitation sometime after being admitted. Claimant's absenteeism is not excused because it was caused by his admittance to a drug abuse rehabilitation program inasmuch as his drug abuse problem was a foreseeable result of his use of an illegal substance. After reemployment, it was not good cause for claimant to voluntarily leave his job in order to avoid the location near the worksite where alleged drug. were available for purchase. (A.B. 409,188; [A-750-2058](#))

Unsatisfactory attendance is not excused by claimant's addiction, to both a controlled substance and alcohol. Because the controlled substance is illegal, the claimant's alcoholism should not be considered in determining the reason for separation. (A.B. 445,500; [A-750-2071](#))

When reliable procedures are used, testing of hair samples for evidence of use of illegal drugs provides adequate proof. When this evidence indicates that claimant ingested an illegal drug during his probationary period, in violation of the employer's rule, claimant's discharge from employment is due to misconduct. (A.B. 479,408; [A-750-2109](#))

#### 1155. Hours (Including overtime, weekend)

Refusal to work overtime is not misconduct if it was agreed at time of hire that claimant would not be required to work overtime. (A.B. 206,335; [A-750-1794](#)).

In the absence of an agreement that no overtime would be required, refusal without compelling reason to work overtime is misconduct. (Matter of Flores, 50 A.D. 2d 1006)

Refusal without compelling reason to work on one weekend, for which claimant would be compensated, is insubordination constituting misconduct, even though claimant did

not normally work weekends. (A.B. 199,010; [A-750-1788](#))

Refusal to attend employer's training classes after working hours unless compensated therefor, is not misconduct, when such attendance is not a part of the contract of hire and overtime pay is required by law in the occupation. (A.B. 250,698; [A-750-1846](#))

Refusal to occasionally work a shift on a Saturday and/or Sunday solely because it interfered with claimant's social life constitutes misconduct. (A.B. 394,349; [A-750-2025](#))

Refusal to work an evening shift while serving jury duty is not misconduct because such work would be contrary to public policy and would infringe upon and inhibit the claimant's physical ability to properly serve as a juror the following day. (A.B. 432,522; [A-750-2072](#))

#### 1160. Insubordination

An insolent and impertinent attitude on the part of an employee, on probation because of a previous offense, constituted misconduct. (A.B. 80-38)

Repeated minor infractions of company rules accompanied by insolence when reprimanded constituted misconduct. (A.B. 450-38; similarly, A.B. 278,879)

Refusal, without good reason, to comply with a direct order from the employer which adversely affects the employer's interests constitutes misconduct. (A.B. 43,195-54; [A-750-1284](#); similarly, A.B. 43,737-54; 44,108-54; 48,793-45; Matter of Hock, No. 77-98 App. Div., 3rd Dept., Apr. 21, 1977, not reported, Affg. A.B. 232,112)

Profanity addressed to a supervisor in the presence of co-workers may constitute misconduct within the meaning of the Unemployment Insurance Law. (Ref. 515-44-54R; [A-750-1265](#); similarly, App. Div., Matter of Bruh, No.76-465 (App. Div., 3rd Dept., Dec. 16, 1976) not reported, Affg. A.B. 215,561)

When a claimant responds to a reprimand by inviting the employer to discharge him, such response is insubordination constituting misconduct. (A.B. 196,420; [A-750-1789](#); similarly, A.B. 243,919)

A first incident of profanity directed toward management in general, none of whom is present, does not constitute misconduct. (A.B. 365,511; [A-750-1968](#))

Claimant's refusal to submit to a urinalysis intended to determine drug use, when there is no reasonable suspicion of such use or specific advance notice that such testing would be a condition of employment, does not constitute misconduct. (A.B. 383,643; [A-750-1992](#))

Vulgarity directed towards a supervisor to express defiance, as opposed to an uncalculated remark made under stress, is misconduct. (A.B. 427,946; [A-750-2062](#))

Refusal to work an evening shift while serving jury duty is not misconduct because such work would be contrary to public policy and would infringe upon and inhibit the claimant's physical ability to properly serve as a juror the following day. (A.B. 432,522; [A-750-2072](#))

An employee's use of profanity when informed by her employer that she was to be discharged is not misconduct since the employer had already decided to discharge her for a different reason. (A.B. 547893; [A-750-2136](#))

1165. Safety and Security

The claimant, a ground security coordinator for an airline, neglect of duty by failing to investigate a potential security breach at an airport, thereby jeopardizing the safety and security of the airline's crew and passengers has committed an act of disqualifying misconduct. (A.B. 563,487; [A-750-2148](#))

The claimant, a transportation security officer, who in violation of the employer's security procedure did not properly secure a weapon taken from a passenger has committed an act of disqualifying misconduct. (A.B. 564,048; [A-750-2149](#))

1170. Neglect of duty

Falling asleep by a hospital attendant while attending a patient afflicted with suicidal tendencies constituted misconduct. (A.B. 4655-41; [A-750-258](#))

Claimant's failure to notify his employer of theft of merchandise by co-workers of which he had knowledge showed such a deliberate disregard of the employer's interests and of his duties and obligations as an employee as to constitute misconduct. (A.B. 21,431-51; [A-750-1087](#); similarly, A.B. 245,675)

A security guard saw a burglary in progress at the site he was assigned to guard, did nothing about it, and did not report the burglary immediately to the police. He reported the burglary to the employer more than five hours after the burglary took place. Held: "Failure to report the burglary was a gross dereliction of duty and as such was misconduct." (A.B. 320,358)

The claimant failed to disclose pertinent information to his employer during the course of an investigation the employer was conducting in claimant's department. "Claimant as a member of management was duty bound to cooperate with the investigation to the full extent of his knowledge. His failure to do so by not disclosing pertinent information when there was a clear duty to speak constitutes misconduct in connection with his employment." (A.B. 310,712)

Claimant, having given two weeks notice, is subject to a misconduct determination when discharged earlier if, by her actions, she demonstrates she does not intend to perform her job duties. (A.B. 394,334; [A-750-2022](#))

A claimant discharged for falling asleep on the job is not subject to disqualification when his sleeping is caused by a medication prescribed for his chronic medical condition, and when the employer who has knowledge of claimant's medical condition, condoned claimant's behavior in the past. (A.B. 545303; [A-750-2135](#))

The claimant, a ground security coordinator for an airline, neglect of duty by failing to investigate a potential security breach at an airport, thereby

jeopardizing the safety and security of the airline's crew and passengers has committed an act of disqualifying misconduct. (A.B. 563,487; [A-750-2148](#))

The claimant, a transportation security officer, who in violation of the employer's security procedure did not properly secure a weapon taken from a passenger has committed an act of disqualifying misconduct. (A.B. 564,048; [A-750-2149](#))

A nurse's failure to carefully monitor a patient's medications, and to renew the prescription in an expeditious manner, causing a lapse in administration of the medication and thereby jeopardizing the claimant's health, is disqualifying misconduct. (A.B. 569,264; [A-750-2150](#))

A claimant, who falsifies medical records indicating she had administered medicine to three patients when she had not done so, has committed an act of disqualifying misconduct. (A.B. 571,264 A; [A-750-2151](#))

#### 1172. Healthcare Workers

A nurse's failure to carefully monitor a patient's medications, and to renew the prescription in an expeditious manner, causing a lapse in administration of the medication and thereby jeopardizing the claimant's health, is disqualifying misconduct. (A.B. 569,264; [A-750-2150](#))

A claimant, who falsifies medical records indicating she had administered medicine to three patients when she had not done so, has committed an act of disqualifying misconduct. (A.B. 571,264 A; [A-750-2151](#))

#### 1175. Relations with Fellow Employees

An unjustified assault upon a fellow employee while on company premises constituted misconduct. (A.B. 328,128)

A fight with fellow employee in which claimant acted in self-defense did not constitute misconduct. (Ref. Dec. M11-7-38R; B-6-38; similarly A.B. 33,250-52)

An unprovoked insulting remark to a fellow employee causing argument and disturbance during working hours constituted misconduct. (Ref. Dec. M11-3-38R; similarly, in case of fighting, A.B. 43,010-54) (Also, A.B. 89,038 notwithstanding claimant was due to be discharged at end of shift because of no work.)

Objectionable behavior toward fellow employees, detrimental to employer's interest and repeated despite warnings, constituted misconduct in connection with employment. (Loud argument with co-worker in presence of customers) (A.B. 2038-40; [A-750-57](#))

Fighting on the job in violation of an employer rule is misconduct regardless of who initiates the fight, if the claimant has an opportunity to withdraw from the dispute but does not do so. (A.B. 339,308; A.B. 334,700; [A-750-1947](#))

A first incident of profanity directed toward management in general, none of whom is present, does not constitute misconduct. (A.B. 365,511; [A-750-1968](#))

An employee's comments made in a general manner expressing concern over the volume of work, are not equivalent to direct criticism of an employee's work habits and don

not constitute misconduct. (A.B. 541385; !-750-2133)

1180. Union relations

Refusal to follow employer's instructions to violate union rules did not constitute misconduct. (A.B. 3253-40; [A-750-204](#))

Participation by a claimant in an industrial controversy regardless of its merits is insufficient grounds for disqualification for misconduct when the claimant is discharged because of his actions in connection therewith, provided such actions do not overstep the bounds of peaceful picketing and are not actions evincing a wilful and wanton disregard of the employer's interests or a deliberate violation and disregard of standards of behavior which an employer has a right to expect of his employees. (Matter of Heitzenrater, 19 N.Y. 2d 1; aff'g. A.B. 87,617; [A-750-1594](#))

A claimant who in the course of an industrial controversy oversteps the bounds of legal and peaceful picketing (blocking of plant entrance; intimidating and threatening other workers; damaging other workers' property; etc.) and is discharged for this reason is subject to misconduct disqualification beginning with the actual date of discharge since the employer-employee relationship is not terminated by the controversy. (Matter of Davis, 24 A.D. 2d 904; aff'g. A.B. 80,096-61, et. al.; [A-750-1554](#))

Discharge for participating in a work stoppage expressly prohibited by statute is ground for disqualification for misconduct. (Matter of Rodriguez, 32 N.Y. 2d 577; [A-750-1764](#))

Claimant's refusal to continue to work as assistant foreman because the new union contract made such employees ineligible for union membership, was not misconduct, since continuance would have interfered with his retaining membership in a labor organization. (Unemployment Insurance Law, Sec. 593.2(a)) (A.B. 240,026; [A-750-1835](#))

When a strike is not prohibited by law, the failure of a claimant's union to comply with a statutory requirement to give advance notice before calling a strike does not subject the claimant to disqualification for misconduct. (A.B. 332,827-332,831; [A-750-1928](#))

1185. Violation of company rule

Failure of store salesman to register single sale on cash register contrary to company rule did not constitute misconduct in the absence of proof of dishonesty. (Ref. Dec. 516-123-38R; (similarly, Matter of Figueroa, 50 A.D. 2d 998)

In circumstances where violations of a company rule have been with knowledge and "tacit consent of an employee's immediate superior, such infractions did not amount to misconduct. (Hotel handyman performed work for tenant without prior notification to management.) (A.B. 664-39)

A breach of trust resulting in termination of employment constitutes misconduct, even though the impropriety (falsifying records to signify usual closing time of a

store rather than an actual earlier closing) is sanctioned by claimant's immediate supervisor, who also disregards the employer's interest. (A.B. 53,843-55; [A-750-1408](#))

Wilful and persistent failure and neglect to enforce employer's rule designed to protect its property from theft is such a wanton disregard of the employer's interest as to constitute misconduct within the meaning of the Law. (A.B. 41,112-53; [A-750-1241](#))

Violation of a safety rule, despite prior warnings, constituted misconduct. (A.B. 1778-39; [A-750-58](#))

Discharge of department store salesman for violating employer's rule prohibiting smoking in restricted part of premises constituted misconduct as the rule was not unreasonable in a business of that nature. (A.B. 19,028-49; [A-750-872](#))

Violation of a reasonable company rule which prohibited its salesmen from carrying a competing line of merchandise, constituted misconduct. (A.B. 468-38)

The failure of a store manager to keep his store open until the known official closing time, such act being a deliberate violation of an important company rule and resulting in prejudice "to the employer's interests, constitutes misconduct. (A.B. 42,830-54; [A-750-1258](#))

Although restitution of the shortage was made, repeated violations of reasonable company rule, familiar to claimant, that insurance premiums must be turned in immediately constituted misconduct. (A.B. 1084-39;)

Claimant who deliberately violated company rules in a manner highly prejudicial to employer's interests was guilty of misconduct. (Insurance agent concealed information regarding an applicant) (A.B. 1088-39)

Violation of an established company rule for safeguarding employer's interests (insurance agents falsely certifying to having witnessed applicant's signature), constitutes misconduct, even though no appreciable monetary loss resulted. (A.B. 52,637- 55; [A-750-1396](#))

Deliberate failure to follow employer's reasonable procedures, set up to maximize efficiency and minimize accidents, waste or defective product, is misconduct. (A.B. 195,280; 195,383; 195,514; [A-750-1787](#))

Possession or use of an illegal drug in violation of an employer's reasonable rule, known to the claimant, is not excused by claimant's addiction to that drug, since such possession or use is an illegal act. (A.B. 384,850; [A-750-1993](#))

Failure to follow the employer's procedures to establish the age of a customer attempting to buy an alcoholic beverage *is* misconduct. (A.B. 454,907; [A-750-2088](#))

When a company policy permits occasional personal use of employer's computers and an employee receives no formal warning regarding such use, alleged excessive internet use may not be the basis for a misconduct determination since the employee would have no way of knowing his or her job was in jeopardy. (A.B. 543342; [A-750-2134](#))

There is no absolute requirement that a warning is required in all instances before conduct can be found to be misconduct when it can be established that the claimant was aware or should have been aware that his/her actions violate employer's policy or procedure. (A.B. 589,136; [A-750-2162](#))

1190. Other Offenses

A deliberate act of indiscretion harmful to employer's interests on the part of an employee in a position of trust and confidence constituted misconduct. (Private investigator divulged confidential information) (A.B. 539-39)

Use of profanity by a supervisor in reprimanding a subordinate, in direct violation of a warning by management to desist from such practice, is misconduct. (Claimant was an assistant food service director in medical center.) (A.B. 195,159; [A-750-1790](#))

Accepting illegal policy number bets from coworkers on the employer's premises, is misconduct. (A.B. 222,419; [A-750-1822](#))

A claimant who deliberately engages in conduct known to be detrimental to the employer's interests is subject to disqualification for misconduct even though discharged without prior warning. (A.B. 334,205; [A-750-1927](#))

A claimant discharged for failing to maintain a valid driver's license, a necessary condition of employment, is not subject to disqualification when the loss of the license is not caused by the claimant's act. There is no misconduct or voluntary separation ("provoked discharge") unless the loss of employment results from the claimant's volitional act or omission. (A.B. 343,898; [A-750-1948](#))

A first incident of profanity directed toward management in general, none of whom is present, does not constitute misconduct. (A.B. 365,511; [A-750-1968](#))

Claimant who is held to be an unacceptable risk by the employer's insurance carrier is not subject to a voluntary quit disqualification for provoked discharge, because the employer is not without any option to seek coverage elsewhere. Instead, claimant's behavior that led to the negative evaluation of his insurance risk should be examined to determine whether misconduct in connection with employment has arisen. (A.B. 473,758; [A-750-2103](#))

1195. Criminal acts (Section 593.4)

Claimant was properly disqualified for loss of employment because of a criminal act when he had signed a statement admitting the commission of an act which constitutes a felony even though he subsequently pleaded guilty to a reduced charge of a misdemeanor. (A.B. 108,554A; [A-750-1607](#); similarly. A.B. 298,970)

A statement signed by claimant that he wrongfully took monies from the employer is not a statement admitting a felony within the meaning of Section 593.4 if it does not show the amount involved and therefore, does not show that the monies taken reached that sum which renders the act to be a felony. (A.B. 85,225A; [A-750-1577](#))

A document prepared by a claims examiner and signed by a claimant in connection with his claim for benefits does not represent a signed "statement admitting that he (claimant) has committed" a felony within the requirement of Subdivision four of Section 593 of the law, and a disqualification as provided in that subdivision can, therefore, not be imposed on the basis of such document. (A.B. 76,294-60; [A-750-1539](#))

Obsolete

A postal employee commits a criminal act in connection with his employment (Section 593.4) when convicted for a felony (grand larceny) committed off the job because it is a condition of hire that postal workers subscribe to a code of ethics requiring that no employee shall engage in criminal conduct. (A.B. 281,278F)

A claimant's off duty act, in disregard of standards of behavior which an employer has a right to expect of its employees, is "in connection with" employment within the meaning of Section 593.3 (misconduct) and Section 593.4 (criminal acts) of the Labor Law. (Claimant, a fiscal analyst for a municipality, was convicted of engaging in felonious corruption of a public official, reflecting unfavorably on the integrity of the employer.) (Matter of Markowitz, 94 A.D. 2d 155; [A-750-1946](#))

A claimant is subject to the twelve month disqualification for criminal misconduct when subsequently convicted of related acts constituting a felony if such actions occurred while engaged in the employment in question and there is a sufficient link between these acts and the reasons for the loss of employment, even if the original reason for discharge was only based on suspicion. (Matter of Powers 177 AD 2d 833; [A-750-2043](#))

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