

## SECTION 4: MISCONDUCT

One of the most common issues involved when unemployment benefits are denied is that the worker was terminated for “misconduct.” Many employers believe—or try to argue—that “misconduct” is an applicable term for any conduct that the employer did not like and which led to the worker being fired.

However, the legal definition of misconduct that is used for unemployment insurance claims is very specific. It requires “deliberate violations” of workplace standards or “carelessness or negligence of such degree or recurrence” that it shows **an intentional and substantial disregard of an employer’s interests.**

Many workers can make a better case for benefits if they understand that Michigan courts have long established that the following failings **do not** count as misconduct: **“inefficiency, ... failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion.”**

The employer has the **burden of proof** in misconduct cases and must prove (1) **that the termination was for misconduct;** and (2) that the misconduct was in **connection with the work.** The employer will have to identify the specific action(s) or omission(s) that are being claimed as misconduct. The employer will also have to specify whether the alleged behavior that resulted in termination was a **single instance or a pattern of behavior** over time. You will want to focus on the specific behavior identified, and try to show how it does not demonstrate deliberate intent to harm your employer’s interests.

During hearings where misconduct is an issue, your employer might claim that you “intentionally disregarded” their interests by pointing to a handbook or some other type of work policy. They will try and show that the existence of this policy, and your awareness of it, proves that you *purposefully* broke the rules. However, there are ways to counter this.

### Ask yourself:

- Had you ever seen the policy/handbook before? If so, **how long has it been?** If it was a long time ago, were you even aware of that policy when you acted?
- If you were aware of the policy, in what ways did you think the policy wouldn’t apply or that this **situation was different?**
- Did your employer have another **contradictory policy** that you were trying to follow when you allegedly broke the policy at issue?
- Was it **common practice** at your work to disregard this policy? Did the employer ever encourage or ignore the behavior they are now focusing on?
- Was the policy enforced the same for other employees? Was there **favoritism** that allowed some employees to ignore the policy?
- Was the policy **previously not enforced** or considered **minor** and now they are trying to say it was very important?
- Were you **warned** previously about this issue/policy? Were the warnings in writing? Did they warn you as to what discipline may follow?
- If they are pointing to past warnings/write-ups, did they give you **notice** of the write-up at the time of the alleged incident? Does it seem like they added it into your file after the fact?
- Did your supervisor have **discretion** to warn you, write you up, suspend you, or take other incremental action before termination and did they choose not to?
- Is the policy the employer is now citing the **real/initial reason you were terminated?** Can you introduce evidence that there was a different reason for your being fired?
- Were you written up or warned for refusing to do something that you believed was **unsafe or wrong?**
- Did the company offer **periodic evaluations/reviews** to help you improve?

Depending on your answers to these questions, you may be able to show that you didn't intentionally break the rules even though there may have been a policy of the employer.

The following are some common circumstances where employers have attempted to claim misconduct to disqualify a former employee from receiving UI benefits. Michigan law has consistently ruled that these are NOT misconduct for the purposes of denying a claim for unemployment compensation.

### Issues about how you did your job:

- It is not misconduct just because your employer said you were not doing your job correctly.
- It is not misconduct if you showed bad judgment or negligence in an isolated instance. In fact, negligence will generally not count as misconduct unless it happens often or that you committed negligence on a job with great responsibility over life and/or property.

When an auto-hauler truck driver headed his truck under an overpass, it hit the overpass and caused more than \$16,000 worth of damage—because the driver had forgotten to lower a ramp. Although this act of negligence caused so much damage, because it was a single act it was ruled not to be misconduct.

- It is not misconduct if you break the employer's rules in order to do something that you reasonably feel is in the employer's best interests if you used your judgment and made what is called a "good faith error".

A gas station manager left his desk to help the cashier when a group of threatening individuals came into the gas station. On returning to his office, the manager found that cash was missing. Although police investigating the theft exonerated the manager, he was fired. But he was not disqualified for UI benefits because responding to the cashier's request for help was in the employer's best interests.

- It is not misconduct if you caused harm to your employer without realizing your action would be against the employer's interests.

A fish market worker took home rotting fish to use as bear bait, figuring it was of no use to the employer. He was fired for taking inventory without authorization, but the UI ruling determined this was not misconduct, so he was entitled to unemployment benefits.

- It is not misconduct if an illness or injury inhibits full performance of your job.
- It is not misconduct if your action was taken to obey a supervisor's orders.

Nursing home workers obeyed instructions to alter their time cards so the employer would appear to be following government requirements regarding staff-to-patient ratios. The employer then fired the workers in order to cover up its own wrongdoing. Because the falsification clearly served the employer's interests and was ordered by an administrator, the workers were not disqualified from receiving UI.

- It is not misconduct if you refused to do something that could endanger your health or well-being without being

### Health Issues

When a worker loses a job because illness or injury interfered with his or her performance, there are a few issues to keep in mind in seeking unemployment benefits.

First, was the injury or illness caused by conditions at the workplace? If so, it may be appropriate for you to apply for workers' compensation.

Second, is the illness or injury a lasting disability or did it interfere with your work performance only for a limited time? If it is still affecting you and will prevent you from being available for full-time work, you may not be eligible for unemployment benefits. You should be prepared to address this point to the satisfaction of the UI representative considering your case.

On the other hand, if your doctor believes medical condition makes you unable to perform any job, and that this condition will last indefinitely/permanently, it may be appropriate to file to apply for disability benefits through the federal government.

properly informed of its safety—unless the assigned task is essential and in keeping with the nature of your job.

- It is not misconduct if the nature of your job includes discretionary decisions and you made an error in one of those decisions.

A service manager at a car dealership corrected discrepancies on employees' time cards rather than confronting them, because he wanted to maintain good rapport with his team. The employer considered this an error in judgment, so fired the manager—but because the judgment was within the discretionary character of his position as a manager, he was not disqualified for misconduct.

### Issues unrelated to your job performance:

- It is not misconduct if you miss work because you must take care of an individual in dire, immediate need. The person does not have to be a relative, but you must demonstrate that the situation was an emergency, and you should still do your best to give notice to your employer.

A worker was fired after he missed two days of work because the person he lived with was hospitalized in a psychiatric emergency, and the doctor requested the claimant's presence. While the employer had the right to deny use of company leave for this absence, it was ruled not to be misconduct and so the claimant received UI benefits.

- It is not misconduct if you were involved in a physical altercation at work when you can prove that you were the victim, rather than the aggressor.

A worker's car hit another worker's in the factory parking lot. The two workers got out of their cars, and the one who caused the accident apologized—but the other one attacked him with a penknife. While the reason for the assault was not related to the job, because it occurred on company property it did count as misconduct. The worker who became violent was disqualified from receiving unemployment benefits, but the one who was attacked was not.

- It is not necessarily misconduct if you were fired because you were arrested or accused of criminal activity, as long as the arrest and alleged crime are unrelated to your job.

However, if you were not fired for the arrest but rather were fired because you missed work while incarcerated, that can disqualify you from receiving benefits. Under such circumstances, you may qualify for benefits if:

- (1) the crime was a traffic violation that resulted in less than ten days of consecutive absence;
- (2) your sentence provided for day parole, so you didn't miss work;
- (3) your incarceration did not result from a full due process of law including conviction and sentencing.

### Allegations of Theft

Did you get fired because the employer claims you stole?

Being fired for theft can disqualify you on the basis of misconduct if the employer can prove four elements of the crime:

- (1) taking and carrying away
- (2) someone else's property
- (3) done with felonious intent and
- (4) without the owner's consent.

- It is not misconduct if you refuse to work days designated as Sabbath by your religion. The applicable rule refers to "conscientious observance of the Sabbath as a matter of religious conviction." Be prepared for potential difficulties if the employer can convince the UI decision-maker that your attachment to this religion or observance of the Sabbath is inconsistent or insincere.
- It is not misconduct if you get fired for giving notice that you planned to quit voluntarily. The benefits you can claim, however, will usually be limited to the time between when you were fired and the date you had named as your intended quit date.