

# MISCONDUCT

By: Brian E. Hawes, Esq.

*(See End of Article for Key to Abbreviations and Citations in Blue)*

## RELATIONS WITH THE EMPLOYER'S CUSTOMERS AND THE PUBLIC.

[4.65] **Injures or Tends to Injure the Employer's Interest.**

[4.66] **Isolated Instance of Discourtesy.**

[4.67] **Multiple Acts of Discourtesy.**

[4.68] **Friction with Customers.**

[4.69] **Substantiation of the Discourtesy.**

**RELATIONS WITH THE EMPLOYER'S CUSTOMERS AND THE PUBLIC.** An employee's discourtesy to the public is misconduct if the acts of discourtesy continued after prior warning or reprimand and the employee has the ability to control the performance. Usually a single or isolated instance of discourteous behavior is not misconduct, but the degree of discourtesy to a patron may be so serious that a single instance alone is misconduct. [CCR Title 22, § 1256-38\(b\)\(3\)](#).

[4.65] **Injures or Tends to Injure the Employer's Interest.** It is of unusual importance to employers who rely on public acceptance of their product or services to have their employees serve the public in such a manner that the customer is satisfied and pleased with that service and will patronize the firm again. For business establishments relying on repeat contacts by their customers, this is of singular importance to the employer. Restaurants, markets, department stores, auto shops and dozens of other retail outlets rely to a large degree on "repeat" customers. If the customer is dissatisfied with the service of the employees of that firm, or if the customer has been shown discourtesy, the employer is virtually certain to suffer financially and no further investigation relative to the "tendency to injure" needs to be made. [BDG MC 390](#).

[4.66] **Isolated Instance of Discourtesy.** As noted above, a single or isolated instance of discourteous behavior is usually not misconduct, but the degree of discourtesy to a patron may be so serious that a single instance alone is misconduct. [BDG MC 390](#).

EXAMPLE: The claimant worked for an automobile dealership for about three years as a sales manager. He was negotiating a sale with a particular customer. The discussion became heated when the customer demanded the claimant make a sale below invoice. When the claimant refused, the customer became obnoxious and criticized the employer's sales force as well as the claimant. In the heat of the argument, the claimant lost his temper and used a four-letter word at the customer who retorted in kind. They both laughed at that point, and the claimant told the customer to come in to complete the deal. The customer went instead to the vice-president and complained in the presence of all in sight. The claimant was discharged for the incident. The claimant had no previous similar incidents with customers. The discharge is not for misconduct. Although losing one's temper when dealing with any customer is never condoned, in this instance, the offensive words were uttered under a circumstance of provocation and the incident was isolated. There were no other incidents of using profane language to customers. [BDG MC 390](#); See also *Silva v. Nelson (1973) 31 Cal.App.3d 136, 142* for the general principle that a single instance of an offensive remark, attributable to hot headedness rather than deliberation, is not misconduct.

[4.67] **Multiple Acts of Discourtesy.** If acts of discourtesy continue after warnings, and if the claimant has the ability to control his or her performance, the discharge would be for misconduct. [CCR Title 22, § 1256-38\(b\)\(3\)](#).

EXAMPLE: The claimant, a truck driver's helper for a brewery, was discharged because he was inclined to argue both with customers and fellow workers. On the day of discharge the claimant became engaged in an argument with a customer and then with the truck driver. The claimant was discharged because of his inability to work without causing trouble. The claimant had been warned a number of times and the records showed that the claimant had previously been demoted from truck driver to helper because of his quarrelsome nature. Even though the incident which led to his discharge might have been minor and inconsequential, it was but the last in a line of such occurrences. The discharge is for misconduct. While an employer must take his workers as they come, and must accept their abilities and temperaments as they exist, if the temperament of a particular worker is such as to endanger the employer's interests and if the worker, after warnings, persists in his improper behavior, the discharge is for misconduct. [BDG MC 390](#).

EXAMPLE: The claimant worked as a nurse's aide for a health care center for about seven months. The employer had warned him several times about his poor work performance regarding patient care. One counseling resulted from a patient complaint that he placed a pillow over the patient's face. On the last day of work, the employer received another complaint. The employer conducted an investigation and found the claimant had handled a patient roughly. He fed a female patient very hot food and when she spit it out the claimant took away her tray. When a family member of the patient complained, the claimant told him to feed the patient himself. The discharge is for misconduct. The claimant had been warned regarding his care of patients, yet he continued to treat patients roughly. [BDG MC 390](#).

EXAMPLE: *No Prior Warnings - No Misconduct*. The claimant, an automobile parts salesman, was discharged for being "short tempered and argumentative." The employer provided the following substantiated facts:

- The claimant engaged in an argument with a customer about a paper gasket about three months prior to his separation.
- About two months before the claimant was discharged, a customer complained that the claimant refused to special order a small part which was not in stock.
- The claimant's supervisor stated that there was one customer who did not wish to be waited on by the claimant.
- An operative of an investigative agency serving the employer contacted the claimant about three weeks before his discharge and reported that the claimant greeted him with, "Hey, Mack, don't play with those elements unless you're going to buy one." The operative reported the claimant was "the rudest man he had ever bought parts from" and that his greeting had been insulting.
- The same operative contacted the claimant five days later and reported that the claimant's appearance was unsatisfactory, and that although he was prompt in serving him, his attitude was poor and indifferent and that his sales ability was poor.
- Two other operatives reported substantially the same as the first and, in addition, reported that the claimant "did not have the personality that is required by a parts man or any one serving the public."

After the last operative report, the claimant was discharged. The claimant's supervisor, however, had not discussed the claimant's attitude or performance with him or indicated any need for correction or improvement. A careful review of the evidence does not disclose more than inefficiency or unsatisfactory performance on the part of the claimant. The evidence, with the exception to one instance where the employer alleges the claimant refused to order a part for a customer, tends to support a finding of inefficiency and unsatisfactory attitude which is not of a degree to constitute misconduct. In view of the fact that the employer had not reprimanded or otherwise instructed the claimant regarding his conduct, it could not be shown that the claimant intentionally and deliberately disregarded the employer's interests. The discharge is not for misconduct. [BDG MC 390](#).

[4.68] **Friction with Customers.** In situations where an employee is constantly dealing with the public, some friction or difficulties between the employee and customers or the public will occur. The friction or difficulties may be caused by the customers or the public. However, even if "goaded" or "baited," the employee owes an obligation to the employer to remain courteous. Failing to do so may result in a discharge for misconduct. [BDG MC 390](#).

EXAMPLE: The claimant, a security guard, was assigned to a post in an office building (the employer's client) and worked from twelve midnight until 8 a.m. For about four months, the claimant had difficulties with a tenant of the office building. The office employee regularly complained to the claimant that he (the claimant) should deliver a newspaper to his floor. The claimant consistently refused because his immediate supervisor, the sergeant, had instructed him not to deliver the newspaper. On the last day of work, at about 7:10 a.m. the claimant became involved in a verbal altercation with the tenant with whom he had difficulties in the past. Both sides used vulgar or obscene language. The altercation occurred in the presence of another tenant. Later that morning, at around 10:30 a.m. the supervisor telephoned the claimant and informed him not to return to that assignment as the result of the confrontation. The claimant became angered, returned to the office building to confront the tenant and directed vulgarities and obscenities to the tenant. As a result of the second confrontation, the claimant was discharged. The discharge is for misconduct. Even though the claimant might have been angered or frustrated at the tenant's demand or confrontation, he was obligated to exercise temperance and direct the tenant's complaint to his supervisor. Instead, the claimant engaged in a verbal dispute highlighted by obscenities and vulgarities in the presence of another tenant. Furthermore, he returned, against the supervisor's order, to the building to confront the tenant a second time. [BDG MC 390](#).

[4.69] **Substantiation of the Discourtesy.** An employer may learn about the claimant's discourtesy through complaints filed by customers. However, a discharge resulting from customer complaints may not necessarily be misconduct because further fact finding is required to determine whether the claimant is really discourteous to customers. If the facts do not establish that the claimant is discourteous, the discharge is not for misconduct. [BDG MC 390](#).

EXAMPLE: The claimant, a cab driver, had been discharged for allegedly making improper and suggestive remarks to a group of women whom he was driving from their place of work to their homes. It was undisputed that the customers filed a complaint to the employer, but the employer failed to submit any evidence concerning the truth of the allegations. The claimant, whose behavior on the job had never previously been called into question, denied the charges unequivocally. He stated that the passengers were noisy and boisterous and it was they who made insulting remarks. Clearly, discourtesy to passengers by a taxicab driver would constitute misconduct, however, the fact of discourtesy has to be established. Although it is undisputed that a complaint was filed in this case, this circumstance is wholly insufficient to establish the truth of the allegations contained therein. The employer was given an opportunity to present evidence as to the truth of such allegations, but failed to do so. The discharge is not for misconduct. [CCR Title 22, § 1256-38\(b\)\(3\)](#); [BDG MC 390](#).

NOTE: Since a claim of discourtesy often depends on the statement of a complaining customer, the claimant will have a difficult time disproving the alleged discourtesy if the complaining customer cannot be personally questioned regarding the incident. Therefore, in such cases, the reliability and credibility of the complaint itself must be determined. Factors to consider in such an analysis include: (1) is it an anonymous complaint; (2) has anyone else complained of a similar discourtesy; (3) how serious was the offense. In order to discredit the complaint, the claimant may need to impress upon the trier of fact the hearsay nature of the complaint which makes it inherently susceptible of being untrustworthy.

---

*Key to Abbreviations and Citations in Blue*

CUIAB	California Unemployment Insurance Appeals Board
UI Code	California Unemployment Insurance Code
CCR Title 22, § ____	California Code of Regulations, Title 22, Section ____
P-B-____	CUIAB Precedent Benefit Decision No. ____
BDG	Benefit Determination Guide published by the EDD
- MC	- Misconduct

*Monday, April 07, 2014*