MISCONDUCT

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

VIOLATION OF EMPLOYER RULE. A discharge by an employer of an individual for violation of an employer rule is for misconduct connected with the work if the rule is reasonable, the individual knew or should have known the rule, and the violation is willful or wanton, material, and substantially injures or tends to injure the employer's interests. CCR Title 22, § 1256-42(b).

[4.10] **Elements**. A violation of an employer rule is not, by itself, misconduct. It would be misconduct *only* if all of the following conditions are met:

(1) The rule is **reasonable**.

(2) The claimant **knew or should have known** the rule.

(3) The violation is **wilful and wanton**.

(4) The violation is **material**.

(5) The violation **substantially injures or tends to injure** the employer's interests.

(6) The employer has previously **warned or reprimanded** the claimant. (Note: This last element is required only for violations of a *minor* employer rule or where the employee has committed violations of the same or similar employer rule in the past without being warned or disciplined - See Section 4.16, *infra.*) Otherwise, a previous warning or reprimand is ***not*** required. BDG MC 485.

EXAMPLE: The claimant, a medication nurse, was discharged for deliberately reducing by 50 percent the prescribed amount of medication administered to a patient in a hospital without the permission of a doctor. The claimant knew the hospital rule that medication could not be reduced without consulting the doctor, however she intentionally did not consult the doctor, and used the nurse in charge as an excuse for reducing the prescribed medication while knowing that the medication was the claimant's sole responsibility. The claimant was discharged by the hospital for violating the medication rule. The claimant's discharge is for misconduct since the rule was known, reasonable, deliberately disobeyed, material, and affected the employer's interest. CCR Title 22, § 1256-42(b).

EXAMPLE: In the example cited above, there would be no misconduct if the claimant had a bona fide belief that a full dosage would be detrimental to the patient, that the regular nurse in charge agreed with this opinion, and that the doctor for the patient had made known to the claimant that the doctor would not object to a reduced prescription dosage in the discretion of the medication nurse and that this practice was common in the hospital. Under those circumstances, there is no willful violation of a rule and the practice would have been condoned by the employer, with the result that no misconduct would have been present. CCR Title 22, § 1256-42(b).

[4.11] **(1) The Rule Must be Reasonable**. It is the employer's right generally to establish such rules for his or her employees as, in the employer's opinion, are necessary for the proper conduct of its business. In most cases, a rule will be judged reasonable solely because the employer considered it necessary for the proper conduct of the business. The right of the employer to control its operations should be kept in mind and the fact that the claimant cannot readily see the need for an employer rule, does not, of necessity, mean that the rule is unreasonable. BDG MC 485.

EXAMPLE: *Reasonable Employer Rule*. The claimant was employed as the manager of a rental unit. The rental office was occupied only by the claimant. However, she was required to deal with tenants and others who were prospective renters. In order to serve the public, the employer had established a no-smoking policy for the office. The claimant violated the policy, and was warned about it twice. She was finally terminated after she ignored the warnings. The discharge is for misconduct. The employer had a no-smoking policy while the claimant was in the office. This was established to serve the public. The claimant, despite warnings, violated this reasonable policy. BDG MC 485.

[4.11.1] An employer rule is *unreasonable* when:

- The rule is not designed to protect or preserve the employer's business interests.

- Compliance with the rule is impossible, unlawful, or would impose a new and unreasonable burden on the employee. See Labor Code section 2856.

If the employer rule is *unreasonable*, a claimant's discharge for violating that rule will *not* be for misconduct. In such a case, the motives or beliefs of the claimant in violating the rule need not be evaluated. The fact that the rule is unreasonable will give the claimant good cause for violating the rule. BDG MC 485.

[4.12] **(2) Claimant Knew or Should Have Known the Rule**. To be known, a rule must have been disseminated generally to all employees or made known to the claimant individually, either orally or in writing. If a claimant has been given a written copy of employer rules (as in an employee handbook), his or her failure to read the rules would not render the discharge for reasons other than misconduct. If the claimant was never informed of the existence of the employer rule, the discharge for violating the rule would generally not be for misconduct. BDG MC 485.

[4.12.1] Some employer rules do not need to be transmitted to the employee but are implied or are known rules in the occupation or industry. For example, there does not need to be a written employer rule against stealing of employer property or a formal employer rule that an employee does not drink on the job. BDG MC 485.

EXAMPLE: The claimant, a bellman, had drinks with two hotel guests during one evening. The claimant denied knowledge of an employer rule prohibiting drinking while on duty with guests of the hotel. The CUIAB held him ineligible and stated: "While there is a conflict in the evidence as to whether the claimant was specifically made aware of the existence of the rule against drinking, it is our opinion that his actions were such as to evince a disregard of the standards of behavior which the employer has a right to expect of him and were not simply good faith errors in judgment or discretion. Under the circumstances we hold that the claimant was discharged for misconduct . . ." P-B-221.

[4.13] **(3) Violation is Wilful and Wanton**. In order for there to be a violation of an employer rule amounting to misconduct, there must be a willful, deliberate or flagrant violation of the rule. If the violation is due to mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion, then there is no misconduct. Similarly, if a claimant has good cause for his or her violation of a rule there is no misconduct. BDG MC 485.

EXAMPLE: *Violation Not Wilful and Wanton*. The claimant was discharged after being off work for two days without notifying her employer. She did not report for work because her three-year old son was confined to a hospital with a fatal disease. She also did not communicate with her employer during her absence because she was during that period of time constantly at her child's bedside and her thoughts were completely preoccupied with her child. The CUIAB found the claimant eligible and stated: "[C]onsidering the circumstances which gave rise to her absence it cannot be said that her conduct evinced a wilful or wanton disregard of the employer's interests." P-B-213.

EXAMPLE: *Forgetting the Rule Is No Excuse*. Claimant used a cutting machine at work. The employer's rules specified the type of blade to use to prevent damage to the product. Despite repeated warnings, the claimant continued to use the wrong blade and was discharged. The claimant conceded that she hadn't always changed to the correct blade but contended that such failure had resulted from forgetfulness. The employer, however, maintained that the claimant's failure was willful as the use of the wrong blade enabled her to increase her total earnings. The CUIAB found her ineligible because her failure to use the proper blade was a willful disregard of the employer's interests. P-B-188.

[4.14] **(4) Violation is Material**. Misconduct also requires that there be a material violation of an employer rule. Violation of an employer rule is material when the employer's operations are interfered with. BDG MC 485.

EXAMPLE: *Violation Not Material*. No misconduct was found where the claimant, a janitor, was still 10 to 15 yards away from his work station when the whistle blew to begin work, even though he had been warned in the past. Noting that the employer's operations were not affected by his tardiness, the CUIAB found the claimant eligible, and stated: "Although the claimant . . . did not have any justification for his tardiness, we look beyond that element to determine whether the claimant's entire 'course of conduct which resulted in his discharge was so unreasonable as to be misconduct.' . . . From the evidence before us, we find that, if there was any dereliction of duty on the part of the claimant, it was of such minor consequence that it did not constitute misconduct." The claimant's infraction is not material because the claimant's actions had not in any way interfered with the employer's operations, and none of the claimant's prior infractions had been material. P-B-186.

[4.15] **(5) Substantial Injury to Employer's Interests**. Any violation of a reasonable rule will almost always, in some way, injure or tend to injure the employer's interests. However, there is no misconduct unless the injury or tendency to injure is *substantial*. BDG MC 485.

EXAMPLE: The claimant, a janitor at Mather Air Force Base, was arrested for drunken driving, and subsequently discharged for a violation of federal civil service regulations. In finding the claimant eligible, the CUIAB stated: "[A] discharge resulting from a violation of a company rule is not, in itself, a discharge for misconduct which results in the disqualification for benefits . . . . In the present case, the incident occurred while the claimant was off duty and did not tend substantially to injure the employer's interest. Accordingly, we find that the claimant was discharged for reasons other than misconduct connected with his work." P-B-191.

[4.16] **(6) Previous Warnings or Reprimands**. If the claimant violated only a minor employer rule, or if he or she had previously violated the same or a similar employer rule without consequences and with the knowledge of the employer, a discharge is for misconduct connected with the work if:

1) the violation substantially injures or tends to injure the employer's interests, and

2) has been preceded by prior warnings or reprimands for previous violations, or

3) the individual's course of conduct as a whole demonstrates a substantial disregard of the employer's interests following prior warnings or reprimands for violations of other employer rules.

(See Section ___, *infra*, for discussion on circumstances under which an employer's rule is reasonable or unreasonable.) CCR Title 22, § 1256-42(b).

There need be *no warning* for some employer rules, e.g. fighting or drinking on the job. However, if the claimant has broken an employer rule which, although reasonable, is of comparatively slight significance, the claimant should be entitled to a warning or reprimand so that he or she would have the opportunity of mending ways before he or she was discharged. For such rules the employer would need to show that the claimant persisted in violating the rule despite warnings and/or reprimands. BDG MC 485.

[4.16.1] **Warnings for Previous *Unrelated* Violations**. If the warnings or reprimands were not for the same type of violations as the one which occasioned the claimant's discharge, the discharge would nevertheless be for misconduct if the claimant's conduct, viewed in its entirety, evinced a deliberate disregard of the employer's interests. For example, a claimant may have been warned several times over a period of two or three months because of such violations as arguing with coworkers, wandering away from the work station to engage in conversations, and failure to follow instructions. If, shortly after the last warning, the claimant violated an employer rule relative to tardiness by appearing at work 20 minutes late without good cause and was thereupon discharged, the discharge would be for misconduct. BDG MC 485.

[4.17] **Safety Rules**. Employers may establish rules to protect the safety of employees or those who purchase or use the employer's product or service. Safety rules are almost always reasonable. An employee's willful or wanton violation of such safety rules is misconduct if the employer's interests are substantially jeopardized or injured, or if the violation is repeated after the employee has been given warnings or reprimands. CCR Title 22, § 1256-42(i).

EXAMPLE: The claimant, an assembler for an aircraft manufacturer, rode a bicycle without authorization across an airport runway. This act violated the employer's posted signs prohibiting unauthorized entry on the runway. A plane approaching the runway for landing pulled up and circled to avoid hitting the claimant. The employer discharged the claimant for violating the rule. The claimant's discharge is for misconduct involving violation of a reasonable rule for the protection and safety of the plane, passengers and crew as well as employees, with a substantial danger created by violations. CCR Title 22, § 1256-42(i).

EXAMPLE: *Repeated Violation After Warnings or Reprimands*. The employer had a rule which required all welders to wear safety glasses while in the performance of their duties as welders. The claimant knew of this rule and had violated the rule on occasions prior to that of his discharge. He had been warned to wear safety glasses while spot welding. On the day of his discharge the claimant did not wear safety glasses as required and was discharged. The discharge is for misconduct. The claimant knew about the rule and had been warned after prior violations.

NOTE: If the welder had argued there was no misconduct because he was the only one endangered by his conduct, he would have been found ineligible for benefits. If the claimant's eyes were injured, the employer would suffer damage as well, by having to incur additional expenses due to increases in insurance rates, personnel replacement expenses, and lost production time. BDG MC 485.

EXAMPLE: *Violation Not Conclusive*. The claimant, a bus driver, was traveling across the Oakland Bay Bridge with many passengers and following another bus with only fifteen to thirty feet between the two buses. The bus in front of the claimant's bus stopped suddenly, and the claimant applied brakes that failed to function properly and a collision occurred. The claimant testified that it was common practice for bus drivers to follow other buses closely in order to keep lighter vehicles from cutting in front of them. The claimant was discharged for failing to drive "defensively", and for failing to maintain proper distance between vehicles in accordance with State laws and company rules and regulations. However there is no evidence to show that the claimant did in fact violate any provision of the Vehicle Code or any specific rule or regulation of the employer. The evidence fails to show such conduct on the part of the claimant as to evince a willful or wanton disregard of the employer's interest. The claimant is eligible because the evidence is not conclusive that a specific employer rule had been broken - driving "defensively" is not specific. BDG MC 485.

[4.18] **Clothes and Appearance**. Some employers may establish reasonable rules which include standards of hygiene, mode of dress, or personal appearance. Individual employees, on the other hand, may choose to maintain a mode of dress or grooming or personal appearance in such matters as hair style or beard which does not comply with standards established by reasonable employer rules. Whether or not an employee's refusal to conform to the employer's rules is misconduct depends on whether the rule infringes on the consitutional rights of the employee. If it does, the three-part test set forth in Section 4.18.1, *infra*, would be applied to determine if there is misconduct. CCR Title 22, § 1256-42(c).

EXAMPLE: The claimant worked as a technician servicing and repairing his employer's business machines at the offices of its customers. When first hired, he had no beard. After two years on the job he grew a beard. The employer, who had no bearded service technicians at that time, considered that the claimant would not be a proper representative of the employer if he wore a beard calling upon its customers. The claimant was told that the beard would have to go or his services would be terminated. The Court found that the claimant had a constitutional right to wear a beard and only a "compelling state interest" could justify the substantial infringement of the claimant's First Amendment right. The Court stated: "Our decision goes no further than to acknowledge that the state is constitutionally inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected . . . [It is] part of the price which the employer must pay for participating in an unemployment compensation system which is administered by the state and is, therefore, subject to the state's constitutional obligations . . ." *King v. California Unemployment Ins. Appeals Bd.* (1972) 25 Cal.App.3d 199, 206-207.

EXAMPLE: The claimant worked with clients of his employer setting up sound equipment, repairing electrical equipment in clients' rooms, and other like maintenance work. When he was employed, he received a handbook for employees which contained a dress code requiring employees to look "well-kept" with "neatly groomed hair" and to be "fresh and professional looking on the job." During his employment, the claimant grew a beard and permitted his hair to grow slightly over his shirt collar. Thereafter, the employer issued a new policy that hair should not be longer than shirt collar length and there should be no beards. When the claimant refused to shave off his beard, he was terminated. The Court found that the claimant was not discharged for misconduct, but rather because of personal action which is constitutionally protected. The Court stated: "[W]e find that at the time this claimant was employed by the employer there were no specific rules relative to grooming. The claimant had been wearing a neatly trimmed beard for at least two years. Shortly before his employment terminated the employer established specific rules in regard to personal grooming of its employees. The claimant was ordered to shave off his beard or be discharged. While it is true that clients of the employer made some complaints about the claimant, it is not at all clear as to whether these complaints were related to the claimant's beard or whether the beard was merely used as a mark of identification. There was no indication that any of the employer's clients withdrew their business from employer's establishment because of the manner in which the claimant was groomed. Nor was there any indication that the employer offered the claimant any alternative other than employment termination." . . . "Our review of the evidence constrains us to conclude that the restraints placed upon the claimant with reference to shaving off his beard were not rationally related to the enhancement of the employer's business as there is no indication that the claimant's wearing of his neatly trimmed facial hair affected the employer's commerce. Also, the benefits to the employer did not outweigh the resulting impairment of the claimant's constitutional rights, as it is apparent in this factual matrix that the employer's sudden reversal of its long-standing rule allowing facial hair was not reasonable. It is equally evident that there were alternatives less subversive of the constitutional rights that were available to the employer, in that it could have easily moderated the severity of its edict completely disallowing beards by requiring a neatness that conformed with its other more rational grooming rules that tolerated mustaches and relatively long hair. Consequently, we must conclude that by requiring the claimant to adhere to the newly established arbitrary rule relating to beards the employer was infringing on the constitutionally protected rights of the claimant. In this posture it is evident that the claimant was discharged for reasons other than misconduct connected with his work." P-B-362.

[4.18.1] **The Test for Misconduct for Dress or Appearance**. When it comes to a discharge for dress or appearance, the employer's discharge of an employee is for misconduct if ***all*** of the following three conditions are met:

(1) the employer's rule rationally relates to the enhancement of the employer's business;

(2) the benefit to the employer outweighs the impairment of the employee's constitutional rights; and

(3) there is no available alternative which would be less restrictive of constitutional rights of mode of dress or grooming or personal appearance. CCR Title 22, § 1256-42(c).

[4.18.2] **Grooming or Appearance Rules for Health or Safety Reasons**. Some employers' standards are established to protect the health, safety or welfare of other employees or of the public, or to protect and preserve a particular business atmosphere or project a certain business image to patrons. Thus, an employer's order to an employee to shave his beard would be reasonable if the beard was unsanitary or a health hazard. The order would be unreasonable if it results from mere personal distaste of the employee or a mere ruse to discharge the employee. Also, an employer's rule that employees must confine long hair, if worn, by a hair net while at work for health or safety reasons is reasonable, and the employee's refusal to wear a hair net at work as required by the employer rule is misconduct. CCR Title 22, § 1256-42(c).

[4.19] **Time Clock**. Where an employer has a rule that each employee must personally punch in and out of the time clock, an employee's knowing violation of such a rule is misconduct, unless there is no falsification of time worked by the employee and the violation is an isolated instance. Intentional substantial falsification of time worked is misconduct. CCR Title 22, § 1256-42(k).

EXAMPLE: The claimant, a security guard, left her post early and had another guard punch her time card out at the regular quitting time. The employer discharged the claimant for violating the employer's rule that each employee must personally punch out the time card when leaving work. The claimant's discharge is for misconduct due to a deliberate violation of a substantial employer interest and involves falsification of time worked. CCR Title 22, § 1256-42(k).

[4.19.1] **Minor Violation Not Misconduct**. It is possible, of course, that the claimant might ask another person to clock out for him or her in order to save the trip across the plant to the time clock. Whether or not this is misconduct might depend on whether there are known rules regarding such a practice in the workplace. It would also be relevant to know the distances from the claimant's work station to the time clock, and to the exit. Under some circumstances, these facts may reveal that the claimant is guilty, at most, of a minor isolated rules infraction, and that the time records were not falsified. Even under these circumstances, however, repeated violations after warnings would constitute misconduct. BDG MC 485.

[4.20] **Money Matters**. Many employers establish rules governing the handling of, or accountability for, money by employees in their work. Some intentional violations of these rules can have a potential for substantial injury to the employer's interests and a single violation can be misconduct. Other violations can cause relatively minor injury to the employer's interests and not be misconduct in the absence of prior warnings or reprimands by the employer for similar prior violations. CCR Title 22, § 1256-42(f).

EXAMPLE: *Single Violation With Substantial Potential Injury*. The claimant, a cab driver, was required by the employer to keep a log of daily fares on a trip sheet. The cab meter also recorded the mileage and fare paid for each trip. The cab company operated under strict state and city regulations requiring detailed trip information for every driver. On one workday, a comparison of the claimant's trip sheet and the meter recording showed a discrepancy of 20 unpaid miles. The claimant blamed the discrepancy on faulty recording by the meter, but the meter was found to be accurate. The employer discharged the claimant for failure to explain the discrepancy, but did not allege theft or misappropriation of the fares by the claimant. The claimant's discharge is for misconduct because the claimant's conduct could have resulted in the employer losing its license to do business due to the strict regulations the employer was required to adhere to. CCR Title 22, § 1256-42(f).

EXAMPLE: *No Misconduct - Condonation by the Employer*. The claimant, a grocery checker, had been told of the employer's written rule requiring a written record of each individual sale. The claimant's work station as a grocery clerk was near the liquor department which did not have a separate checker. When a customer came to the claimant with a single liquor purchase, the claimant accepted the money and after the grocery transaction was completed would either record the single liquor purchase or combine the single liquor purchase with other single purchases and record one purchase. The claimant did this to avoid making the customer wait in line. The employer knew that the claimant and other grocery checkers followed these practices, despite the written rule to the contrary. The claimant's supervisor knew of the practices and participated in them. The employer discharged the claimant for violating the single purchase rule. The claimant's discharge is not for misconduct because the action was condoned by the employer and served the employer's interests by promoting efficient checking service. The error was at most ordinary negligence in isolated instances or good faith errors in judgment. CCR Title 22, § 1256-42(f).

EXAMPLE: *No Misconduct - Employer's Failure to Warn*. The claimant, a sales checker, while checking one customer, would accept money from another customer in the exact amount for a purchase and delay ringing up that sale until the current customer had been served. The employer's rule prohibited this practice. On some occasions, the claimant would defer ringing up the sale until several customers had been served, but also deposited any cash received in the cash drawer. The employer discharged the claimant for violating the purchase rule. The claimant's violations are not misconduct since she was never warned or reprimanded for a violation of procedure and at most the violations are isolated instances of negligence or good faith errors in judgment. CCR Title 22, § 1256-42(f).

[4.21] **Operation of Motor Vehicles at Work**. If an employee's willful or wanton violation of an employer rule regarding the use, maintenance, or operation of a motor vehicle involves potential substantial injury to the employer's interests, a discharge for violation of the rule is for misconduct. If a violation of an employer rule involves less serious consequences, a discharge for the violation is not for misconduct in the absence of prior warnings or reprimands for similar violations by the employee. CCR Title 22, § 1256-42(g).

EXAMPLE: *Improper Operation Violating Employer Rule - Misconduct*. The claimant was a commercial salesperson. The claimant drove a company truck in his work. The employer has a policy which required the claimant to operate the employer's vehicles in accordance with state law and in a safe and proper manner. About seven months before his discharge, a training specialist rode with the claimant in his vehicle, and reported that the claimant drove at speeds above the posted speed limit. The claimant was counseled after this report. Subsequently, the employer received two complaints from the public regarding the claimant. The claimant was then counseled and warned that he must abide by all legal regulations and company policy while operating a company vehicle. The claimant was specifically warned not to exceed the maximum limit of 65 miles per hour unless posted otherwise. Shortly before the claimant's discharge, the employer, in accordance with his usual practice, installed a tachograph on the claimant's truck without the claimant's knowledge. The instrument was left on the vehicle for seven days. It showed that the claimant was exceeding 70 miles per hour at times and this occurred on six out of the seven days involved. The claimant was then discharged. The discharge is for misconduct. The claimant had been counseled and warned not to violate safety rules and stated speed limits. The claimant continued to violate these rules. His actions were a willful disregard of the employer's interests. BDG MC 485.

[4.21.1] **Single Act of Negligence in Operation of Motor Vehicle Causing Substantial Damage**. It is the employee's responsibility to comply with the employer rules regarding the operation of the motor equipment if these rules are known to him or her. It is also the responsibility of the employee to comply with the law. The breaking of an employer rule, or the law, in operating a motor vehicle frequently constitutes a serious breach of duty which may cause substantial injury to the employer as well as to the life and limb of others. An automobile or truck is a deadly instrument if operated carelessly. Substantial cost may be incurred in repair if it is operated without sufficient safeguards pertaining to maintenance. Accordingly, improper operation of motor vehicles frequently results in a discharge for misconduct *if substantial damage results*, even though it may be a single act of negligence. BDG MC 485.

EXAMPLE: *Improper Operation Causing Substantial Injury - Misconduct*. The claimant, a cab driver, fell asleep while driving his cab and became involved in an accident. The claimant acknowledged that he had not had sufficient sleep, that the heater was on in his cab and all the windows were closed. Substantial damage was incurred to the vehicle and the passengers' safety was endangered. A motor vehicle is recognized as a potentially dangerous mechanism. The claimant had a high degree of responsibility and duty to the employer, to the drivers of other automobiles, and to the taxicab passengers who had to rely upon him for safe passage. It is well known that falling asleep is a common cause of automobile accidents, and this claimant, as the driver of a taxicab, had an added responsibility in taking proper precautions for his safe handling of the vehicle. His failure to take such precautions manifests a high degree of carelessness if not a deliberate disregard of the standards of behavior which the employer had the right to expect of this employee. CCR Title 22, § 1256-30(e).

EXAMPLE: *Improper Operation of Motor Vehicle Not Considered Misconduct - Isolated Instance of Negligence*. The claimant was hired to drive his employer's new cars from a freight depot to the company's storage warehouse. The cars had been shipped directly from the factory and were serviced (or supposed to be serviced) as they were unloaded. The employer stated that oral warnings had been given all employees to use care in checking oil and water levels before driving the cars, and that any driver who damaged a car because of failure to do this would be discharged. The claimant, while driving one of the automobiles, damaged a connecting rod because the car had no oil in it. The claimant denied that he had received prior warnings. Additionally, there was a dispute as to whether the oil gage, which would have informed the driver that no oil was in the crankcase, was operating correctly or not. The evidence in this case does not disclose more than a single negligent act as the result of which the claimant was immediately discharged. There is no evidence of repeated instances of negligence by the claimant, nor is there evidence that the claimant wilfully or intentionally disregarded the employer's interest. BDG MC 485.

[4.21.2] **Unauthorized Use of Employer's Vehicle**. The repeated unauthorized use of an employer's vehicles would generally constitute misconduct unless such acts had gained the employer's tacit approval. Such approval, for instance, may be given where a salesman, by custom, drives the employer's auto or truck to his own home at the end of the day. BDG MC 485.

[4.22] **Store Purchases**. Many employers in retail merchandising establish rules governing the purchase of merchandise by their own employees. For example, an employer might require that each purchase by an employee be accompanied by a sales slip, or entered into a ledger or record book. The purpose of employer rules of this type is often to prevent theft by employees. An employee's willful or wanton violation of an employer's rules relating to such purchases ordinarily involves substantial injury or tendency to injure the employer's interests and is misconduct. CCR Title 22, § 1256-42(j).

EXAMPLE: *No Misconduct*. The claimant was discharged by the employer because he left the employer's store with a 33-cent purchase not accompanied by a sales slip as required by an employer rule. However, the claimant had not been told of the employer's rule, and had previously purchased items without sales slips or any warning by the employer. The employer discharged the claimant for the violation. The claimant's discharge is not for misconduct because he had no knowledge of the employer's rule, had not been previously warned, and his violation was not deliberate. However, if he had been warned for any prior violations and then had violated the rule, a discharge would have been for deliberate acts and thus for misconduct. CCR Title 22, § 1256-42(j).

EXAMPLE: *Violation of Purchase Rule*. The claimant was the manager of the camera and jewelry department of a general merchandise store. In that capacity, she was responsible for supervising two or more employees. On the last day of work, after working about four hours, she was preparing to take her one-hour lunch break. Immediately prior to going on break, she went to the checkout stand area of the store and obtained a bag of potato chips from a display rack near the checkout stands. She did not pay for the potato chips at the time but instead took them to the lunch room and ate about half of them along with other lunch items she had brought. Half an hour later she put the remainder of the potato chips in her personal locker and then spent some time doing personal shopping in the store. She finished that shopping, including paying for those items, and returned to work. About two hours later, after a meeting with the management team, she was discharged for consuming part of the potato chips without having paid for them. The claimant was aware that the employer had a rule prohibiting "consumption of a product not paid for." The claimant explained that she did not pay for the potato chips when she initially got them because she did not want to wait in the checkout line and thus shorten her lunch break. Then she forgot to pay for the chips until it was time to return to work and there was then no time left for her to make payment at the check stand. She further testified that she intended to make payment at her next break which would occur about two hours later. The discharge is for misconduct. The claimant violated an employer rule which was reasonable and which she was aware of. The violation was a serious one considering the fact that the claimant had supervisory responsibilities and was required to set a good example for her subordinates and coworkers. Her explanation about intending to pay for the merchandise later did not justify the rule violation. BDG MC 485.

EXAMPLE: *Rule Violation Due to Poor Judgment.* The claimant was a salesperson and had worked for the employer for five years. He was discharged because he violated an employer rule which required that employees not ring up their own purchases. The claimant was aware of the rule. The claimant explained that on the day in question, it was near closing time and they were very busy. The only other employee in the area available to ring up the purchase was busy with a customer. In an attempt to save time, the claimant rang up the purchase of a mirror for $20. He made a proper ring of the sale, paid cash for the purchase, advised the coworker of what he had done and left the sales slip for the appropriate comparison. He did not feel that his action was a violation as the employer rule was intended to prevent theft and insure accuracy. He had not had any infractions of policy throughout his stay with the employer. The discharge is not for misconduct. There was no intent to defraud the employer. There were no prior rule violations. The claimant's failure to follow the reasonable rule is considered an isolated instance of poor judgment. BDG MC 485.

EXAMPLE: *Minor Infraction of Purchase Rule*. The claimant worked in a drugstore fountain. He was fired when he left the employer's store with a purchase (under $1) which was not accompanied by a sales slip. The employer stated that there were forty-three rules each employee was required to know and that the rule providing that all purchases must be entered in an employee's purchase book was one of them. This had not been done in this case. The claimant stated that he did not know of this rule, that he had only purchased cigarettes before, but did so without any such entry. He stated he had not waited for a receipt because the purchase was from the drug department and the pharmacist was busy. The claimant's unfamiliarity with the rule requiring the recording of employee purchases, the lack of a showing that the claimant had been previously warned or that the rule had been brought to his attention although the claimant had made small purchases without having them recorded, together with the fact that a showing was not made that the claimant deliberately violated the rule, indicate that the claimant is not guilty of misconduct. BDG MC 485.

[4.22.1] **Reselling Employer's Products**. It would be misconduct for an employee to resell a purchased item without required prior approval of the employer or in violation of written employer prohibitions known to the employee. CCR Title 22, § 1256-42(f).

[4.22.2] **Purchases by Customers**. Employers may also establish rules governing the wrapping, mailing, delivery, charging or exchange of purchases by customers. An employee's violation of employer rules relating to store purchases by customers usually will be relatively minor in consequences and is not misconduct, unless the violation occurs after prior warnings or reprimands for similar violations. CCR Title 22, § 1256-42(j).

[4.23] **Removal of Employer's Property by Employee**. An employee's willful or wanton removal of an employer's property from the employer's premises in violation of an employer rule known to the employee and without the express or implied permission of the employer is misconduct, unless the property is of little or no use to the employer. CCR Title 22, § 1256-42(h).

EXAMPLE: The claimant while in route at work to the restroom saw a damaged padlock on the ground near a trash can. The claimant took the padlock away from his work station and hammered it to see if it would open. The claimant was away from his work station for five minutes. The employer discharged him for destroying the employer's property in violation of the employer's rule against damaging the employer's property. The claimant's discharge is not for misconduct since the property had no value, and the claimant's violation of the employer's rule was trivial and casual and lacking in the willful or wanton disregard for the employer's interests required for misconduct. CCR Title 22, § 1256-42(h).

[4.23.1] "**Borrowing" Employer's Property**. If the employee contends that he or she just "borrowed" company property for his or her own personal use, and that he or she has every intention of returning the property, such a "borrowing" is misconduct if the removal of the property is without the employer's permission and in violation of a known employer rule. BDG MC 485.

[4.24] **Gambling or Game Playing**. Some employers have specific rules prohibiting gambling or other game playing on the job. Nearly all employers expect and require that employees perform the work for which the employees were hired during normal work hours. Thus, an employee's gambling or game playing on the job during normal work hours may be misconduct. CCR Title 22, § 1256-42(d).

[4.24.1] **Gambling On-Site During Off-Duty Hours**. Usually an employee's gambling or game playing on the employer's premises during off-duty hours would *not* be misconduct. It *would* be misconduct if the employee had been given prior warnings or reprimands for similar acts and the employee's ability to work is affected or there is a substantial injury to the employer's interests. CCR Title 22, § 1256-42(d).

[4.24.2] **Gambling Off-Site During Off-Duty Hours**. An employee's gambling or game playing off-site while off-the-job would not be misconduct unless this affected the employee's ability to work or caused a substantial injury to the employer's interests. This could occur if an employee who holds a position of financial, supervisory, or executive trust engaged in public gambling with adverse effect on the employer. The employer would be affected if customers or potential customers identified the employee with the employer and criticized the employee's public gambling, or withheld or withdrew business from the employer. CCR Title 22, § 1256-42(d).

EXAMPLE: *Gambling Off-the-Job - Not Misconduct*. The claimant had been warned and reprimanded for gambling while at work. A week prior to discharge the claimant had requested a week's leave of absence in order to take care of certain domestic and personal responsibilities and the employer granted the request. The claimant returned at the end of his leave and requested an additional week in order to assist a friend who was incapacitated. The employer refused the second week's leave and in effect discharged the claimant because the employer had learned that the claimant had engaged in gambling in the latter part of the previous week. The claimant acknowledged that he had gambled but stated that he had other things to attend to also and he saw no necessity in returning to work before the expiration of his leave. The company rules provided that the employee should not engage in other work for profit while on leave. The claimant testified that there was no "profit" from his gambling. The CUIAB found the claimant eligible, and stated: "The employer has not shown that the claimant's absence in any way affected the employer's interests, and any gambling activities the claimant may have engaged in during this period were not on the employer's premises or under circumstances connecting the claimant with the employer. . . [T]hough the claimant had been warned that one more violation of the rule would result in his discharge, this warning was given with respect to the claimant's activities during working hours and while on the company premises. The occasion for the claimant's discharge was not for violation of this rule for he was on leave of absence at the time and away from the employer's place of business." P-B-189.

[4.24.3] **Employer Condones or Participates in Gambling**. In no event would an employee's gambling or game playing be misconduct if the employer had ordered, participated in, or condoned the employee's activity. CCR Title 22, § 1256-42(d).

[4.25] **Burden of Proof**. If the employer has established that the employee has violated a reasonable rule, the burden shifts to the ***employee*** to show good cause for violating the rule. *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal.3d 671, 680-681.

Key to Abbreviations and Citations in Blue

CUIAB	California Unemployment Insurance Appeals Board
UI Code	California Unemployment Insurance Code
CCR Title 22, § 1956	California Code of Regulations, Title 22, Section 1956
P-B-001	CUIAB Precedent Benefit Decision No. 001
BDG	Benefit Determination Guide published by the EDD
- MC	- Misconduct

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