

DISTINGUISHING BETWEEN MISCONDUCT AND JOB PERFORMANCE

While we have addressed the issue of “job performance” in the past, it is wise to refresh this topic, as it is a frequent issue in the workplace. As many will recall, claimants are eligible to collect unemployment benefits if they are discharged for poor job performance, and are typically disqualified if they are discharged for work connected misconduct. Most clients recognize a “procedural violation” (not accompanied by an element of deliberate neglect or carelessness) does not meet the definition of work connected misconduct. However, it is typically more difficult to identify and document instances where an employee is deliberately not doing the job or intentionally disregarding selected job functions. Most experienced managers and supervisors can sense when this is happening but proving an employee has opted to act in such a manner is much more difficult. Yet, it is just this burden an employer must meet if they terminate an employee under such circumstances and wish to contest the award of unemployment benefits.



The difference can cost thousands!

To assist employers in their efforts to save some green... UTCA has put together a “litmus-test” to aid employers in identifying misconduct (where it exists) and proving their case, should a termination result. The following questions should be asked when assessing a potential case of misconduct:

1 Does this employee’s prior work history relate to the job for which they have been hired?

- 2 Has the employee successfully completed the introductory or probationary period of the job or position?
- 3 Have the employee’s job duties and/or work volume remained consistent?
- 4 Has the employee’s management or supervisory oversight remained the same?
- 5 Has the employee received the proper amount of training, supervision or support?
- 6 Has the employee previously demonstrated the ability to consistently perform the essential functions of their job?

If you answered “yes” to the majority or all of these questions, it is likely you have also identified an element of misconduct.

If you answered “no” to the majority or all of these questions, it is likely you have identified a “poor performance” situation, whereby the employee was never fully capable of doing the job for which he was hired. There is no deliberate withholding of skills or abilities and thus no “deliberate or job connected misconduct”.

If the test responses point to a potential misconduct situation, we recommend you establish a monitoring period, so the supervisor who identifies the offending conduct (directly) can later testify at the unemployment hearing from “first hand” knowledge. An employer who closely monitors the on-going activities of an employee suspected of misconduct should be able to recognize, observe and document certain behavioral patterns and conduct. Reminder

If the test responses lean toward no misconduct, employers should consider the following actions: review and improve hiring practices; allow employees sufficient time to adjust to the new position; provide enough training and support; and identify and address impediments to productivity in the workplace, such as work volume increases, new supervision, new procedures, etc. : Always document your findings and avoid “red flag” words such as “poor job performance” or “failure to meet”. These terms in the unemployment world signal payment of the unemployment claim! Logic: The term “poor job performance” reveals little or nothing as to why the employee has been separated. The outcome, whether someone is deliberately ignoring certain job duties or is simply unable to perform them, is essentially the same: the job is being “performed poorly”. In addition, if an employer asserts the employee “failed to do their job”, the state logic at work here considers a failure cannot take place, unless an effort was extended. Thus they

tried but could not do their job. Hence, there is no element of misconduct or withholding of effort, if they tried!

Obviously no test is foolproof and this test cannot guarantee any particular outcome. However, taking the test, before issuing corrective action, can assist management in drilling down on the issues presenting, which may reveal behaviors (if properly documented and addressed) that can place you in a much better position to contest the UI claim.

We hope this is helpful information. As always, if you have any questions about this Topic, please contact UTCA directly at 1-800-480-7725 or 1-888-395-7273. This article can be viewed on-line at www.utcainc.com by entering your client user name and password. Please contact UTCA if you do not have a client user name or password.