

## Defining Misconduct Fairly

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U.S. workers are virtually all “at will” employees. This means that they can be discharged by employers for any reason that is not otherwise prohibited by statute, contract, or public policy. In 2012, there were 2.7 million UI claims that included a determination involving a discharge. Payment of UI benefits to these discharged individuals is based upon the definition of “misconduct” applied in most states. In a minority of states, “just cause” or “willful misconduct” or similar words are employed in a state’s UI law applying to disqualifications for discharges.

### **Question: How do UI disqualification rules apply to discharged workers?**

**Answer:** At their core, the purpose of unemployment insurance involves compensating “involuntary unemployment,” and, for that reason, the focus in discharge cases is on voluntary unemployment defined as misconduct. When individuals are “at fault” for their unemployment—because their discharges arose from intentional or reckless conduct that was related to work—UI benefits are properly denied. In other words, most states recognize that while many discharged workers may have given employers a valid reason for firing them; they have not taken willful actions serious enough to justify treating them as voluntarily unemployed and denying them unemployment benefits.

The recognition of the importance of “willful” actions in establishing disqualifying misconduct was first articulated by the Wisconsin Supreme Court in the leading case of *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-260, 296 N.W. 636 (1941):

The term ‘misconduct’ \*\*\* is limited to conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, 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 are not to be deemed ‘misconduct’ within the meaning of the statute.

In summary, those individuals protected by the *Boynton Cab* standard are those who are properly fired, but who nonetheless should be treated as “involuntarily” unemployed and not disqualified from UI.

### **Question: Why do some employer associations support broader definitions of misconduct?**

**Answer:** Many employers (and legislators) wrongly believe that if employers fire someone, then that individual should not get unemployment benefits. The employer’s right to discharge an employee is not, and should not be, determinative as to payment

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of unemployment insurance benefits. Common areas of concern expressed by employer groups seeking broader definitions of misconduct involve payment of benefits following discharges for absenteeism, employer rule violations, and poor work performance. These are exactly the types of discharges that are not defined as misconduct under standards following *Boynton Cab*.

In 2013, there were a number of state legislative proposals seeking to expand the definition of misconduct in order to deny benefits to more individuals who have been fired. Indeed, Wyoming Governor Matthew Mead and Missouri Governor Jay Nixon both vetoed bills expanding the misconduct definition that passed legislatures in those states. Both vetoes were upheld. In addition, bills concerning discharges for conduct away from the worksite and denying benefits entirely in discharge cases have been considered in recent years. We expect further efforts to expand misconduct in future years.

**Question: What are the arguments against broader definitions of misconduct?**

**Answer:** In discharge cases, employers oppose payment of benefits in part because when discharged individuals later draw unemployment benefits, those benefits are charged to their former employers' experience rating accounts and result in higher UI payroll taxes. Despite higher employer costs, denying benefits to more of those among the ranks of the discharged would represent a significant departure from long-accepted practices in the administration of UI programs. Unemployment benefits are paid to accomplish many purposes that are broader than providing temporary income to jobless workers. More importantly, they are not paid as a penalty imposed upon employers. Unemployment benefits support continued purchasing of goods and services by jobless workers from other businesses. Denying benefits to those who do not commit misconduct as traditionally defined will only punish those workers while shifting the costs of their unemployment to their families, social service agencies, charities, and faith-based organizations.

Payment of unemployment benefits in discharge cases that involve involuntary unemployment complements—rather than undercuts—employers' power to discharge workers freely. As noted by law professors Michael Graetz and Jerry Mashaw in their 1999 book *True Security*, social insurance protections are “crucial to a society’s ability to structure economic risks in ways that are energizing rather than demoralizing,” and they “sustain and bolster a market economy.” In other words, employer power to discharge workers “at will” must be balanced by a reasonable safety net that pays unemployment benefits for those fired for reasons that fall short of intentional conduct that can be deemed equivalent to voluntary unemployment.

**Question: What limits exist upon states' ability to expand disqualifications for discharges beyond the Boynton Cab definition?**

**Answer:** While states have broad discretion in matters of eligibility and disqualification, there are some limits reflected in U.S. Department of Labor interpretations of UI law that can constrain states considering amending their misconduct definitions. First,

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the Labor Department has long stated that the structure and design of the federal-state UI programs evince a limit preventing states from considering factors unrelated to the “fact or cause” of an individual’s unemployment, since the intent of UI is to pay UI benefits to those unemployed “through no fault of their own.” This interpretation means that states cannot deny unemployment benefits based upon wealth, for example, since the fact that an involuntarily unemployed individual doesn’t financially need UI is unrelated to the fact or cause of his or her unemployment.

In the realm of misconduct, USDOL advised Oklahoma in unpublished letters that expanding misconduct to include poor work performance was improper because it might lead to benefit denials where there was no showing that poor performance was due to willful intent on the part of the individual. The Labor Department, in turn, cited the *Boynton Cab* definition of misconduct as flowing from the distinction between discharges based upon the fault of the individual and those where there was no such fault and benefits cannot be denied.

Similarly, the Labor Department cautioned Tennessee not to define the failure of employees to obtain a license or certification as disqualifying misconduct. There are some cases in which the failure to get a license is potentially misconduct; namely where the employee fails to take an examination or submit documentation to the employer. However, in other cases, as when the employee fails the examination despite doing his or her best, no misconduct can be established.

Second, the Labor Department notes that Section 3304(a)(10) of FUTA mandates that a state UI law cannot deny benefits due to a cancellation of wage credits or total reduction of benefit rights, except in cases involving “discharge for misconduct connected with his (sic) work, fraud in connection with a claim for compensation, or receipt of disqualifying income . . . .” Again, unpublished letters say this language means that states may fully cancel benefit rights for reasons of misconduct and that misconduct must be for reasons connected with work. As a result, a proposed Missouri amendment denying benefits for any violation of an employer work rule was questioned because it required a misconduct finding in the absence of any showing that the rule was related to job performance or that claimant’s behavior was connected with work.

Finally, USDOL has frequently told states that they cannot effectively delegate the decision to grant or deny benefits to either the employer or an outside entity, but have an obligation to take factual input from the parties in a claim involving a contested separation from work (as in a quit or discharge) and make a prompt determination. An example of problematic proposals running afoul of this requirement include requiring a misconduct finding when an individual is arrested or convicted of a crime. Instead of relying upon the fact of conviction, UI agencies must investigate the facts surrounding the discharge and make an independent assessment of whether misconduct applies.

### **Resources:**

Saul Blaustein, *Unemployment Insurance in the United States: The First Half Century* (Upjohn Institute, 1993), p. 283-285.

*Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941).