

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Three Case Studies

What follows are three “case studies” that are actual cases, and actual documents associated with those documents, and the actual decisions issued by the UIA, the Administrative Law Judge, the Michigan Compensation Appellate Commission, and, where issued, the circuit court. Of course, any identifying information such as the name of the claimant or the name of the employer, have been deleted.

## How Employers Lose Unemployment Compensation “Discharge” Cases

- ❶ Discharge was for incompetence, but not misconduct.
- ❷ The final incident of a series was not misconduct.
- ❸ The employer did not respond to the request for information.
- ❹ No documents and/or first-hand witnesses were presented at the hearing.

As these cases will show, the four biggest reasons why an employer loses a case before an Administrative Law Judge are (1) that there was no showing of misconduct by the worker – the discharge was for incompetence but not for misconduct; (2) that the final incident showed no element of wrongdoing; (3) that the employer never provided the information that could have resulted in disqualification; and (4) that at the hearing the documents or witnesses, or both, that could have proven work-connected misconduct were not available.

## **How Employers Lose Unemployment Compensation “Discharge” Cases**

**In every case, the Administrative Law Judge is listening for one thing:  
Has the party with the burden of proof met that burden with credible testimony. In a discharge case, that means showing “misconduct” and “connection with the work”.**

It is critical that the party with the “burden of proof” carry all elements of that burden. In the case of a discharge, the burden of proof is on the employer, and the two elements that must be proven are “misconduct” and “connection with the work.”

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Case 1:

### **INCOMPETENCE**

The worker’s discharge was for declining store sales. No allegation of serious infractions. “Things were not working out.”

In the first of the three case studies, the claimant was discharged for declining store sales. There was never a successful allegation of misconduct, and at the hearing the employer’s testimony was that the claimant’s discharge was because “things were not working out.” This does not describe misconduct, even though it’s an ample reason to discharge an employee.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 1:

- **Fact-finding Review from Claimant:**  
I was being let go; not a good fit.
- **Response from Employer’s Rep:**  
Claimant quit due to dissatisfaction with job.
- **Non-Monetary Determination:**  
Claimant was discharged. No misconduct. No disqualification.

The first document in the file is the claimant’s response to fact-finding questions. He quotes the employer as saying he was being “let go” because he was “not a good fit” for the job.

The employer, on the other hand, asserts in their response to fact-finding questions from the Agency that the claimant quit due to dissatisfaction with the job.

The Agency resolved the conflict in this case by finding that the claimant was discharged, but that there was no showing of misconduct. Therefore, the Agency’s Determination found the claimant NOT disqualified.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 1:

#### ■ **Protest from Employer's Rep:**

Claimant was discharged due to misconduct and insubordination. No other details.

#### ■ **Non-Monetary Redetermination:**

Misconduct alleged, but no information to substantiate. No misconduct. No disqualification. Determination affirmed.

The employer protest the Determination, now acknowledging that the claimant was discharged, and asserting that the discharge was for “misconduct” and “insubordination.” However, the employer did not provide any factual basis for reaching their conclusion that the claimant’s actions were “misconduct” and “insubordination.” It would be useful for the employer to provide the facts which could then lead the Agency to conclude that those facts showed “misconduct” and/or “insubordination.”

In the absence of facts to substantiate the employer’s conclusion, the Agency found there was no information to substantiate the conclusions that there had been either misconduct or insubordination. The Agency therefore found in its Redetermination that the claimant not disqualified, thereby affirming the Determination.

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Case 1:

### ■ **Appeal from Employer’s Rep:**

“The claimant’s actions constituted misconduct.” No details provided.

### ■ **ALJ Hearing:**

Employer’s witness testified claimant was discharged because “things were not working out.” Previous discussions about store sales. Final event was failure to notify speaker of event cancellation. Claimant said he did same day. •

In appealing the Redetermination to an Administrative Law Judge (ALJ) for a hearing, the employer once again asserted its conclusion that the discharge was for “misconduct” but provided no factual basis for reaching this conclusion.

At the hearing, the employer’s witness testified that the claimant was discharged because “things were not working out.” The witness described previous discussions about store sales and about the claimant’s failure to cancel the speaker for a cancelled promotional seminar. The claimant countered, however, that he had indeed cancelled the speaker prior to the day of the planned seminar.

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Case 1:

### ■ **ALJ Decision:**

Nothing in the testimony established “misconduct”. Declining sales are a failure to meet employer’s standard of performance. Burden of proof to establish discharge for work-connected misconduct not met by employer. No disqualification. Redetermination affirmed.

The ALJ concluded that declining store sales showed a failure to meet the employer’s performance standards (presumably justifying discharge), but did not show a disregard of standards of behavior expected by the employer, and that the employer had failed to meet its burden of proof to show “misconduct” connected with the work. The ALJ affirmed the Redetermination.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

### SERIES OF INCIDENTS

Decline in work performance tracked  
personal problems

Final incident was excusable

Other incidents had been pre-approved  
or excused, according to claimant

No eyewitnesses testified for employer

In the second of the case studies, the sharp decline in the claimant’s work performance tracked personal problems the claimant was experiencing. He had to move his diabetic, blind Mother from out-of-state to Michigan. Then she became ill with the flu. Then the claimant became ill with the flu. The final incident was excusable. And the claimant asserted at the hearing that he had agreed with his supervisor that he could appear late for work each day in order to put his young child on the school bus. The supervisor was not present at the hearing to respond to that assertion.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

- **Fact-finding Review from Claimant:**

I had to care for my diabetic, blind Mother; got sick with flu and stayed home in accordance with directive of employer when sick.

- **Response from Employer:**

None

The claimant responded to the Agency’s request for information by stating that his attendance infractions were caused by his need to care for his Mother, and by the flu she and then he suffered from.

The employer did not respond to the Agency’s request for information about the discharge, and the Agency’s Determination was therefore based solely on the information from the claimant.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

- **Non-Monetary Determination:**

Claimant was discharged. There had been disciplinary action initiated, but last offense was for illness. No misconduct. No disqualification.

The Determination found the claimant was discharged and that it had been preceded by disciplinary actions by the employer, but that the last incident was not for any wrongdoing by the claimant, and that the claimant was therefore not disqualified.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

#### ■ **Protest from Employer’s Rep:**

Claimant was discharged for continued violations after prior warnings. Claimant knew further infractions could lead to termination.

#### ■ **Non-Monetary Redetermination:**

Prior discipline, but final event excusable due to illness. No misconduct. No disqualification.

In response to the Determination, the employer protested that the claimant was discharged only after repeated warnings about his attendance, and that he knew that further infractions could result in his termination.

The Redetermination acknowledged the prior disciplinary warnings, but found that the final incident showed no wrongdoing by the claimant and thus the claimant was not disqualified. The Determination was affirmed.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

- **Appeal from Employer’s Rep:**

Same wording as protest.

- **ALJ Hearing:**

Claimant had been high performer, then sales declined; started arriving late regularly until discharge; failed to punch in. Claimant had to move diabetic/blind Mother to Michigan; started punching in when policy required it; absences due to illnesses and always called in.

- Employer had no witness present to dispute. •

The employer’s appeal statement was the same as their protest statement.

In the findings of fact, the ALJ acknowledged that the claimant had been a high performer whose sales declined and whose tardiness and absences rose sharply when he moved his diabetic, blind Mother to Michigan. He was required to punch in according to the employer’s policy, and the ALJ found that when it became a formalized policy he started to do that. The ALJ found that the claimant always called in when ill, and also noted that the claimant’s supervisor was not present at the hearing to dispute the claimant’s assertion that the supervisor had agreed to the claimant’s late arrival each day to allow the claimant to place his young daughter on the school bus.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

#### ■ ALJ Decision:

Based on testimony, last incident was scheduled eye exam that lasted longer than expected; no testimony contradicting claimant’s assertions that he always called in and that he followed punch-in policy once it was put into place. Employer did not carry its burden of proof to show misconduct. No disqualification.

In the decision, the ALJ concluded that the employer had not carried its burden of showing misconduct connected with the work. The ALJ found that, based upon the testimony, the last incident showed no wrongdoing by the claimant, as a scheduled eye-doctor appointment for his Mother unexpectedly lasted the entire day; that there was not rebuttal by the employer of the claimant’s assertions that he began to punch in regularly when notified of that requirement; and that there was no rebuttal by the employer that the claimant had agreed with his supervisor that he could arrive late each day in order to place his young daughter on the school bus. The claimant’s supervisor was not present at the hearing. The ALJ therefore affirmed the Agency’s Redetermination finding no disqualification.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

#### ■ Board of Review (now, MCAC)

##### **Decision:**

Claimant had excessive tardinesses, and could only explain some of them. He therefore failed in his burden of proof. It appears he was going to work only when convenient for him, regardless of employer’s interests. ALJ reversed. Claimant disqualified.

The employer appealed the ALJ’s decision to the Michigan Employment Security Board of Review (now known as the Michigan Compensation Appellate Commission). The Board found that the claimant could only explain some of his many attendance infractions. The Board found that “it appears he was going to work only when convenient for him, regardless of the employer’s interests.” The Board reversed the decision of the ALJ and found the claimant disqualified.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 2:

- **Circuit Court Decision:**

Board of Review (MCAC) reversed. Claimant not disqualified. No explanation given by Court.

The claimant then appealed the Board’s decision to the circuit court in the county. The court issued an Order, without Opinion, that the Board’s decision was reversed and that the claimant was not disqualified. There was no appeal from the court’s Order.

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Case 3:

### **SINGLE INCIDENT**

Claimant denied wrongdoing.

No eyewitnesses testified for employer

In the third case study, the claimant denied wrongdoing and the employer presented no eyewitnesses who could rebut the claimant’s assertions.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 3:

- **Fact-finding Review from Claimant:**

Discharged, but reason unknown.

- **Response from Employer:**

Warning given on Oct. 8, 2008 (copy attached) relating to offensive remark to co-worker.

In response to the Agency’s request for information, the claimant said that he was discharged, but did not know why.

The employer’s response included a written warning given to the claimant about 8 months earlier for an incident involving profanity and an offensive remark to a co-worker, the same reason for the claimant’s ultimate discharge.

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Case 3:

### ■ **Non-Monetary Determination:**

Claimant was discharged. Claimant had been warned previously about profanity. It was not a common practice in the workplace. Discharge was for misconduct. Disqualification imposed.

In the Determination, the Agency held the claimant’s discharge was for misconduct connected with the work.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 3:

#### ■ **Protest from Claimant:**

I had good record, with top seniority and I suspect this was an excuse for a layoff for financial reasons. Profanity was common, and no signs prohibiting it.

#### ■ **Non-Monetary Redetermination:**

Determination finding disqualification affirmed.

The claimant protested the Determination, asserting that his discharge was due to the high rate of pay he received based on his seniority, and that his discharge was actually a way for the employer to save money. He also asserted the use of profanity was common in the workplace, and that there were no signs prohibiting it.

The Redetermination, however, affirmed the Determination, finding the claimant disqualified for misconduct connected with the work.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 3:

- **Appeal from Claimant**

I have no reprimands in my file. I never uttered profanity. The employer made that up. And there were no rules or signs against it.

In his appeal for a hearing before an ALJ, the claimant asserted there were no previous reprimands in his file (the employer had, though provided such a previous reprimand in its response to the Agency, along with a copy of its Handbook for workers prohibiting the use of profanity in the workplace). The claimant asserted that there was no incident of the use of profanity and that the employer had simply made up that story. Also, he asserted again that there were no rules or signs prohibiting the use of profanity at the workplace.

# How Employers Lose Unemployment Compensation “Discharge” Cases

## Case 3:

### ■ ALJ Hearing:

An incident occurred on June 4, 2009, and the claimant was verbally discharged the next day for being abusive and threatening to another employee. The claimant lacked veracity, but no witness to the event was presented by the employer.

At the hearing, the ALJ found that there was an incident that occurred on June 4, 2009, resulting in the claimant’s discharge the following day, and that the incident involved the claimant’s use of profanity in the workplace.

The ALJ specifically noted that the claimant “lacked veracity” but that no witness was present from the employer who could testify as to the previous warnings given to the claimant, or as to the events that led to his discharge.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 3:

- **ALJ Decision:**

Based on testimony, employer did not carry its burden of proof to show misconduct. No disqualification.

The ALJ concluded that, based on the testimony, the employer did not carry its burden of proof on misconduct. The ALJ reversed the Redetermination and found the claimant not disqualified.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### Case 3:

- **Employer’s Request for Rehearing:**

No explanation given for failing to present necessary witnesses at original hearing.

- **Order Denying Application for Rehearing:**

Denied, as parties had full opportunity to present witnesses at original hearing.

The employer requested a “Rehearing” before the ALJ to allow it to present the testimony of the eyewitnesses who were missing from the initial hearing. However, the ALJ noted that there was no explanation for not presenting those witnesses at the original hearing, and issued an Order denying the request for rehearing.

**How Employers Lose  
Unemployment Compensation  
“Discharge” Cases**

**“Take-Aways” from  
Case Studies**

So, to summarize the lessons learned from the case studies...

## How Employers Lose Unemployment Compensation “Discharge” Cases

### “Take-Aways” from Case Studies

- When responding to UIA, frame the issue: Who initiated the separation? Claimant (quit)? Employer (discharge)?

When responding to a request for information from the UIA, the employer should frame the case as the employer sees it – either as a discharge or a quit. If the employer frames the case as a quit (if the facts permit), then the burden of proof is on the claimant.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### “Take-Aways” from Case Studies

- When responding to UIA in a discharge case, use “sentence 1” language and tie it directly to specific facts in the case. Do not merely allege “misconduct”.

When responding to a request for information from the UIA, the employer should avoid merely stating the conclusion that the discharge was for “misconduct” but should, instead, recount the specific facts that led to the discharge and then, using language from “sentence 1” of the Supreme Court’s definition of “misconduct” show how that claimant’s behavior fell within that definition.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### “Take-Aways” from Case Studies

- Explain upfront to UIA how the claimant was made aware of unacceptable conduct, and how/when he/she disregarded employer’s interests by continuing the behavior?

To show that the claimant’s behavior disregarded the employer’s interest or reasonable expectations for the claimant, it is helpful for the employer, in responding to the UIA’s initial request for information, show that the claimant had been made aware of the employer’s expectations by means of progressive disciplinary warnings and that the claimant disregarded those warnings and persisted in the unacceptable behavior, therefore showing a “sentence 1” disregard of the employer’s interest.

## How Employers Lose Unemployment Compensation “Discharge” Cases

### “Take-Aways” from Case Studies

- At a hearing, have time-keeper and/or supervisor involved in discipline, and any witness to a specific incident, present or available to testify by phone (with prior ALJ approval).

At the hearing, it can be critical to have eyewitnesses present, and witnesses who can introduce the exhibits such as business records that will be useful to carrying the burden of proof. If a witness cannot be present in person, a request can be made in advance of the day of hearing to allow that person to testify by telephone at the hearing. That request, however, must be approved in advance of the hearing.