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**APPEAL TRIBUNAL DECISION**

**Docket number:** 19 0683 **Hearing date:** August

**CLAIMANT: EMPLOYER:**

ANTHONY HOLMES ARMY AIRFORCE EXCHANGE 429

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Anthony Holmes Jessica Frankmann

 Christopher Woods

## CASE HISTORY

The claimant timely appealed a July 11, 2019 determination which denied benefits under Alaska Statute 23.20.379(e). The issue before the Appeal Tribunal is whether the claimant was discharged for felony misconduct connected with the work.

 **FINDINGS OF FACT**

The claimant began work for the employer on March 10, 2009. He last worked on April 10, 2019. At that time, he worked full time as an auto worker.

The employer’s loss prevention team performed random checks by viewing security camera video of the employer’s work bays. The loss prevention team notified the employer that they had observed the claimant perform work on his own car during work hours. The employer’s policy prohibits such work. The claimant was aware that working on his own car during work hours was not permitted. The employer determined that the claimant had balanced his tires and topped off his windshield wiper fluid and oil, services worth $50.43. The claimant had earlier paid for an oil change at the employer’s shop, which meant he was eligible to receive free oil top-off, which the employer had considered was worth $3.49 of the total owed.

An ex-employee was seen on the security video working on his own car in the employer’s shop. The claimant’s supervisor watched the security video and observed the claimant helping the ex-employee with his tires. The claimant recalled that the ex-employee had come into the shop on his own and the claimant did not know if he had permission to work in the shop or not. The claimant recalled that he helped move the ex-employees tires just to get them out of his way because he was trying to work on a customer’s car at the time. The employer calculated that the ex-employee’s work should have been billed at $219.00.

The claimant was placed on administrative leave with pay on April 10, 2019. The matter was referred to the military police. The claimant paid the employer the full amount for the work on his car and the ex-employee’s car. The claimant was barred from entering the base. On April 19, 2019, the employer notified the claimant he was being discharged effective May 2, 2019. The military police later dropped the charges against the claimant.

## PROVISIONS OF LAW

**AS 23.20.379 provides in part:**

(a) An insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment following that week if the insured worker...

 (2) was discharged for misconduct connected with the insured worker's last work.

1. The department shall reduce the maximum potential benefits to which an insured worker disqualified under this section would have been entitled by three times the insured worker’s weekly benefit amount, excluding the allowance for dependents, or by the amount of unpaid benefits to which the insured work is entitled, whichever is less.
2. The disqualification required in (a) and (b) of this section is terminated if the insured worker returns to employment and earns at least eight times the insured worker’s weekly benefit amount.
3. An insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next 51 weeks of unemployment following that week or until the individual has worked subsequent to the discharge from work and earned 20 times the insured worker's weekly benefit amount in employment covered under this chapter if the insured worker was discharged for commission of a felony or theft in connection with the work.  In addition, the insured worker is not eligible for extended benefits under this chapter until the worker has requalified for benefits by meeting the earnings requirement in this subsection.

## AS 11.81.330 Justification, provides in part:

1. A person may use non-deadly force upon another when and to the extent the person reasonably believes it is necessary for self defense against what the person reasonably believes to be the use of unlawful force by the other…

 **(b)** …the person claiming the defense of justification may use non-deadly force if that person has withdrawn from the encounter and effectively communicated the withdrawal to the other person, but the other person persists in continuing the incident by the use of unlawful force.

**8 AAC 85.095 provides in part:**

 (d) "Misconduct connected with the insured worker's work" as used in

 AS 23.20.379(a)(2) means

 (1) a claimant's conduct on the job, if the conduct shows a willful and wanton disregard of the employer's interest, as a claimant might show, for example, through gross or repeated negligence, willful violation of reasonable work rules, or deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee; willful and wanton disregard of the employer's interest does not arise solely from inefficiency, unsatisfactory performance as the result of inability or incapacity, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment or discretion....

(e) A discharge for an act that constitutes commission of a felony or theft will result in a disqualification for benefits under AS 23.20.379(e) if

(1) charges are filed against the claimant or the employer has reported the act to the appropriate law enforcement authority;

(2) the felony or theft is "misconduct connected with the insured worker's work" under (d) of this section; and

1. a preponderance of the evidence establishes that
2. the claimant committed the act; and

(B) the act was not justified under AS 11.81.300 –

AS 11.81.450.

(f) An acquittal, plea to a lesser charge, or dismissal of charges does not prevent a disqualification for benefits under (e) of this section, if a preponderance of evidence supports that disqualification.

(g) For purposes of this section

1. "felony" means an act classified as a felony in AS 11; and
2. "theft" means an act described in AS 11.46.100, if the value of the property or service is $50 or more.

 **CONCLUSION**

The claimant in this case was discharged for violating the employer’s policy by working on his own car and that of an ex-employee.

Regulation 8 AAC 85.095(e)-(g) holds that an act of the claimant may constitute felony misconduct if charges are filed and the value of property or services was $50 or more. The claimant argued that he was not in any way responsible for the $219 in charges for the ex-employee’s services. The claimant further argued that he was not responsible for the $3.49 charge for oil top-off, as he was eligible to receive that service for free. Thus the claimant believes the services involved were worth $46.94, which does not reach the threshold for felony misconduct.

*Misconduct cannot be established on the basis of unproven allegations. Cole, Com. Dec. 85HUI006, January 22, 1985.*

*When a worker has been discharged, the burden of persuasion rests upon the employer to establish that the worker was discharged for misconduct in connection with the work. In order to bear out that burden, it is necessary that the employer bring forth evidence of a sufficient quantity and quality to establish that misconduct was involved. Rednal, Com. Dec. 86H‑UI-213, August 25, 1986.*

The decision in this matter turns on the weight of the evidence. In Weaver, Com. Dec. 96 2687, February 13, 1997. The commissioner has held in part:

*Uncorroborated hearsay evidence must normally be given less weight than that of the sworn testimony of eyewitnesses to an event. Only if first-hand testimony is clearly not credible, should hearsay statements be considered more reliable.*

In Douglas, Com. Dec. 85H-UI-069, April 26, 1985, paraphrasing AS 44.62.460(d), the commissioner held in part:

*“Hearsay evidence may be used to supplement or explain direct evidence but is, by itself, insufficient to support a finding unless that evidence would be admissible over objection in a civil action”.*

The claimant provided credible sworn testimony that he did not give the ex-employee permission to work in the employer’s shop and he did not assist the ex-employee except to move the ex-employees tires out of his way, and that he was eligible for a free oil top-off, which made the services obtained by the claimant worth less than $50. The employer’s hearsay evidence did not establish that the claimant’s actions rose to the level of felony misconduct as described in Regulation 8 AAC 85.095(e)-(g), above, and the penalty provided in AS 23.20.379(e) is not appropriate.

However, the claimant in this case was aware that the employer did not approve of employees working on their own cars during working hours and it has been established that the claimant did work on his own car and perform services worth $46.94, which he did not pay for until he was asked about them. Theft of services is a willful disregard of the employer’s interest as described in regulation 8 AAC 85.095(d)(1).

The Tribunal finds the claimant was discharged for misconduct connected to the work and the penalties of AS 23.20.379(a)(2) are appropriate.

**DECISION**

The determination issued on July 11, 2019 is **MODIFIED.** Benefits are **DENIED** under AS 23.20.379(a)(2) for the weeks ending May 11, 2019 through June 15, 2019. Three weeks are reduced from the claimant’s maximum benefits. The claimant may not be eligible for extended benefits under AS 23.20.406-409.

 **APPEAL RIGHTS**

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party’s control. A statement of rights and procedures is enclosed.

Dated and mailed on August 15, 2019.

 Rhonda Buness, Appeals Officer