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**APPEAL TRIBUNAL DECISION**

**Docket number:** 19 0749 **Hearing date:** August

**CLAIMANT: EMPLOYER:**

BEAU BLANKENSHIP PROCARE HOME MEDICAL

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Beau Blankenship Lea Ann Allen

## CASE HISTORY

The claimant timely appealed a July 19, 2019 redetermination which denied benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant was discharged for misconduct connected with the work.

 **FINDINGS OF FACT**

The claimant began work for the employer on September 24, 2018. He last worked on May 1, 2019. At that time, he worked full-time as a distribution technician.

On April 18, 2019, the claimant delivered medical supplies to a patient at the hospital. A nurse questioned the claimant about the delivery, whether the items should have been delivered to the patient’s home instead and when a particular piece of equipment would be delivered. The claimant could not answer the nurse’s questions to her satisfaction, despite contacting the employer. The claimant felt the nurse was being unnecessarily rude to him and he believed she had given him rude looks in the past. The claimant asked the nurse why she was being so rude to him. The claimant recalled that he was not mean or aggressive when he asked the question.

A few days later, the nurse contacted the employer and reported that the claimant had been unhelpful and unresponsive to questions and then confronted her rudely. The nurse did not recall interacting with the claimant before that date.

The claimant had not been warned about any negative interactions with customers. The claimant had been verbally counselled after some co-workers were disturbed by the claimant questions about whether they were undercover investigators.

The employer gets much of its business from health care provider referrals, and considered that the claimant’s actions could result in referrals going to another medical supply business. The employer advised the claimant on May 1, 2019 that he was being discharged because of the customer complaint.

## 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.

**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....

 **CONCLUSION**

The claimant in this case was discharged because a customer complained about the claimant’s bahavior during a delivery.

*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 employer’s representative testified about what she had been told about the incident. The claimant provided credible sworn testimony that he had not been confrontational and that the customer was rude to him. The employer’s unsupported hearsay evidence did not establish that the claimant’s actions rose to the level of misconduct as described in Regulation 8 AAC 85.095(d), above.

The Tribunal does not question an employer’s right to discharge a claimant that does not meet its standards, but such a discharge is not always for misconduct. The Tribunal finds the claimant in this case was discharged for reasons other than misconduct and thus the penalties of AS 23.20.379 are not appropriate.

**DECISION**

The redetermination issued on July 19, 2019 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending May 4, 2019 through June 8, 2019, if otherwise eligible. The three weeks are restored to the claimant’s maximum benefits. The determination will not interfere with the claimant’s eligibility 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 22, 2019.

 Rhonda Buness, Appeals Officer