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**APPEAL TRIBUNAL DECISION**

**Docket number:** 20 0042 **Hearing date:** February 4, 2020

**CLAIMANT: EMPLOYER:**

CAROLYN ENDFIELD BREAD & BREW LLC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Carolyn Endfield Craig McCarty

## CASE HISTORY

The claimant timely appealed a January 8, 2020 redetermination which denied benefits under Alaska Statute 23.20.379. 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 October 25, 2019. She last worked on November 29, 2019. At that time, she worked full time as a personal assistant and shopper.

The claimant was responsible for inventory and shopping for the employer’s restaurant. The claimant was given a credit card to use for purchasing items for the restaurant. The card was in the name of an owner of the business. The card was kept in a basket at the restaurant. The claimant asked the general manager if she could keep the card with her instead of leaving it at the restaurant. She was given permission to hold on to the card.

Early in her employment, the claimant mistakenly used the employer’s credit card instead of her own card to pay for a taxi to work. She immediately went to the general manager and admitted her error and repaid the taxi fare amount. The general manager told her this was okay, as the employer would not have to pay any interest or fees because the amount was paid by the end of the month.

The claimant called in sick on Monday, December 2, 2019. The employer noted the claimant had the employer’s credit card with her, and decided to check the statement of the credit card. The employer discovered a large amount of charges on the card that they did not believe were purchases for the employer’s business. The employer immediately cancelled the credit card and set about obtaining receipts for the purchases. The employer totaled the purchases that they believed the claimant did not have authorization to make at $9,618.05.

The claimant did not agree that she had made purchases in the amount calculated by the employer that were not for the employer’s use. The claimant recalled that she had been out shopping for the employer on November 6, 2019 and her phone was shut off due to non-payment. The claimant used the employer’s credit card to pay her $267.00 bill so that the employer could reach her by phone while she was out shopping. The claimant also used the employer’s credit card to pay for taxis to work several times, so that she would not be late for work. The employer had counseled the claimant about being late for work. Taxi use totaled $201.85.

The claimant recalled that she used the employer’s credit card to purchase clothes for her child. Purchases at Footlocker totaled $190.00. One Footlocker receipt obtained by the employer showed the claimant’s name and store loyalty program information and the employer’s credit card used to purchase clothing items. The claimant denied that she made purchases at some retail establishments that would not be likely to sell restaurant supplies, and held that other purchases made were for the employer’s use. The credit card was used to make purchases on days the claimant was not at work.

The claimant sent a text to the employer on December 3, 2019 stating that she knew the employer was aware of her personal purchases. She stated that she had all the receipts, had items she could return, and would be able to pay the employer back for the personal purchases.

The employer reported the matter to the police. The claimant believed her supervisor was coming to her house to get a doctor’s note for her illness and to retrieve the employer’s credit card. Instead, police arrived and arrested the claimant on suspicion of theft. The claimant was scheduled for a court appearance on February 6, 2020.

The claimant believed she had permission to use the employer’s credit card for personal purchases, because the general manager was not upset when the claimant mistakenly used the credit card for a taxi the first time. The claimant believed as long as she repaid the employer by the end of the month so no interest was accrued, she had permission to use the card for personal purchases.

The employer decided to discharge the claimant on December 3, 2019. This was not conveyed to the claimant, but she assumed she was discharged when she was arrested.

## 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.

**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 using the employer’s credit card to make personal purchases. The employer reported the claimant’s theft to the police.

The claimant argued that she believed she had permission to use the employer’s credit card because she was told it was okay that she had mistakenly used the card for a taxi, because she had repaid the employer before the end of the month so no interest or fees were incurred. However, the claimant admittedly used the employer’s credit card for personal purchases throughout the month of November and took no action and showed no intent to repay the employer for the $658.85 in personal purchases that she admitted to by the end of November.

*A Hearing Officer must base his decision on a "preponderance of evidence." See e.g. Patterson, Com. Dec. 86H-UI-233, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.28, 10/16/86. "Preponderance of evidence" has been defined as "that evidence which, when fairly considered, produces the stronger impression, and has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto." Adelman, Com. Dec. 86H-UI-041, 1C Unemp. Ins. Rptr. (CCH), AK ¶8121.25, 5/10/86, citing S. Yamamoto v. Puget Sound Lumber Co., 146 P. 861, 863 (WA).*

The preponderance of the evidence in this case indicates the claimant charged items to the employer’s credit card that were for her personal use in the amount of at least $658.85. The claimant’s belief that she had permission to make personal purchases on the employer’s card is not reasonable and she did not follow what she believed to be the conditions of using the card by repaying the employer by the end of the month. Not getting in trouble for mistakenly using the card does not imply permission to use the credit card at will. The Tribunal does not find the claimant’s use of the employer’s credit card to be justified under AS 11.81.300-11.81.450.

The Tribunal finds the claimant was discharged for felony theft connected to her work. The penalties of AS 23.20.379(e) are appropriate.

**DECISION**

The determination issued on January 8, 2020 is **AFFIRMED.** Benefits are **DENIED** for the weeks ending December 7, 2019 through November 28, 2020.

 **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 February 7, 2020.

 Rhonda Buness, Appeals Officer