



APPEAL TRIBUNAL DECISION

Docket number: 24 0225 **Hearing date:** April 24, 2024

CLAIMANT:

XAVIER BIRD
[REDACTED]

EMPLOYER:

WASILLA LUBE EXPRESS INC
[REDACTED]

CLAIMANT APPEARANCES:

Xavier Bird

EMPLOYER APPEARANCES:

Peggy Dagostino
Tom Dagostino

CASE HISTORY

The claimant timely appealed a March 12, 2024 determination 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 March 26, 2018. He last worked on February 16, 2024. At that time, he worked part-time as a lube technician.

The claimant was verbally warned by his supervisor in September and again October 2023 that the employer was dissatisfied with his attendance. The claimant recalled that he most often missed work because his children were sick and his wife has greater difficulty calling out from her work, so it fell to the claimant to stay home with his children when they were sick. The claimant was told to improve his attendance or he would be replaced.

The employer provided documentation of the claimant's attendance for the last three weeks of his work. The claimant was scheduled to clock in for work at 7:45 am on days he was assigned to the front counter and 7:55 am on days he had other assignments. The claimant was late clocking in two times in the week ending February 2, 2024. He called out one day that week and requested to leave early another day. In the week ending February 10, 2024, the claimant was late clocking in one day, called out one day and requested another day off. In his final

week of work, the claimant clocked in late by 8 to 20 minutes each day he worked. On his last day, February 16, 2024, the claimant overslept and was late by 47 minutes. He notified the employer that he would be late as soon as he woke up.

On the claimant's last day, the employer learned that a customer had complained that the claimant was rude to her. The employer was not aware of what the claimant was alleged to have said or done that was rude. The claimant recalled the interaction and denied that he was rude to the customer and recalled that she was irritated because he told her she was required to wait in line behind customers waiting for oil changes to have her vehicle's fluids topped off. The claimant held that he was not aware of the employer's unwritten shop policy to provide topping off service as soon as possible.

The employer considered the complaint from the customer and the claimant's failure to improve his attendance after being warned that his job was in jeopardy due to his attendance. The employer advised the claimant at the end of his shift that he was discharged effective immediately.

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 after he was late for work and the employer learned a customer had complained that the claimant was rude. The employer could not say whether the complaint or the claimant's attendance held more weight in the decision to end the claimant's employment. The Tribunal will first consider the complaint from the customer.

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. 86-UI-213, August 25, 1986.

The employer did not provide evidence of what the claimant said or did that led the customer to complain. The claimant provided sworn testimony that he was not rude to the customer and he was not aware that he should have made sure the customer was helped ahead of other customers. The employer has not shown that the claimant's actions involving the customer who complained rose to the level of misconduct as it is described in regulation 8 AAC 85.095(d). The Tribunal will next consider the claimant's attendance.

In Tolle, Com. Dec. 9225438, June 18, 1992 the Commission of Labor states, in part:

Unexcused absence or tardiness is considered misconduct in connection with the work unless there is a compelling reason for the absence or tardiness and the worker makes a reasonable attempt to notify the employer.

In situations where a worker has been warned that further absence or tardiness could result in dismissal, it is necessary to examine the reason for the specific absence and the worker's ability to control it. The claimant in this case had been placed on notice that his job was in jeopardy due to his attendance. The claimant's last attendance issue, on the day he was discharged, was clocking in 47 minutes late for work because he overslept. Although the claimant notified the employer he would be late, oversleeping is not a compelling reason for tardiness, as getting to work on time was within the claimant's control.

The Tribunal finds the claimant was discharged for work-related misconduct. The penalties of AS 23.20.379 are appropriate.

DECISION

The determination issued on March 12, 2024 is **AFFIRMED**. Benefits remain **DENIED** for the weeks ending February 24, 2024 through March 30, 2024. The 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 April 30, 2024.



Rhonda Bunes, Appeals Officer