



IN THE DISTRICT COURT OF DOUG

BUCKS, INC.,  
Petitioner,  
v.

#13 FILED  
IN DISTRICT COURT  
DOUGLAS COUNTY NEBRASKA  
SEP 02 2016  
JOHN M. FRIEND  
CLERK DISTRICT COURT

Cl. Doc. 16 No. 7532

PETITION FOR REVIEW

SHAUN D. FLETCHER and JOHN H. ALBIN, COMMISSIONER OF LABOR, STATE OF NEBRASKA,  
Respondents.

ASSIGNED TO Ashford

COMES NOW the Petitioner, Bucks, Inc., and petitions the Court, pursuant to Neb. Rev. Stat. §§ 48-638, et seq. of the Nebraska Employment Security Law (hereinafter "Act") and 84-917, et seq. of the Administrative Procedure Act, to review, reverse, and vacate, without payment of fees, costs, and security, the Decision of the Nebraska Appeal Tribunal, Nebraska Department of Labor, dated August 10, 2016, in the matter of the claim of Respondent Shaun D. Fletcher, SSN ~~###-##-4768~~ (Docket No. 16 2773) awarding Fletcher unemployment compensation benefits, a copy of which is attached hereto as Exhibit A. In support of its Petition for Review, Petitioner states as follows:

1. Petitioner, Bucks, Inc., is a corporation duly organized under the laws of the State of Nebraska. The mailing address for Petitioner is 7315 Mercy Road, Omaha, NE 68124. Petitioner's principal place of business is located in Douglas County, Nebraska.

2. Respondent Shaun D. Fletcher is a natural person residing in Omaha, Douglas County, Nebraska, and a claimant for unemployment benefits charged to the Petitioner's account maintained by the State of Nebraska. Respondent Fletcher's mailing address is 2122 Ohio Street, Omaha, NE 68110.

3. Respondent John H. Albin is the duly appointed, qualified Commissioner of Labor for the State of Nebraska, and is joined as a party to this action pursuant to Neb. Rev. Stat. §§ 48-638 and 48-642 of the Act. The mailing address for the Commissioner of Labor is 550 South 17<sup>th</sup> Street, Box 94600, Lincoln, NE 68509.

4. Petitioner employed Respondent Fletcher from June 15, 2014 through June 17, 2016, at which time Fletcher's employment was terminated.

5. Respondent Fletcher filed a claim for unemployment benefits with the Nebraska Department of Labor, Division of Employment. The Claims Deputy's Notice of Determination found that Respondent Fletcher was disqualified from receiving benefits for 14 weeks. Respondent Fletcher appealed the Claims Deputy's Notice of Determination to the Nebraska Appeal Tribunal.

6. On August 10, 2016, a telephonic hearing was held before the Nebraska Appeal Tribunal regarding Respondent Fletcher's appeal of the Notice of Determination.

7. On August 10, 2016, a Decision was entered by the Tribunal, the Honorable W. Russell Barger, reversing the Claims Deputy's Determination. That Decision was mailed to the parties on August 10, 2016. A copy of said Decision is attached hereto as Exhibit A.

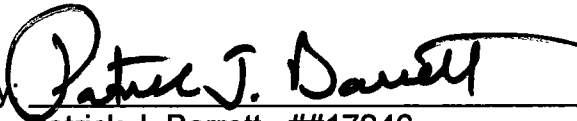
8. Respondent Fletcher engaged in misconduct connected with his work and should be disqualified from receiving unemployment benefits for a period of 14 weeks.

9. The Nebraska Appeal Tribunal's decision of August 10, 2016, is unsupported by competent, material, sufficient, or substantial evidence. In view of the entire record, moreover, said decision is contrary to law, arbitrary, and capricious and affected by errors appearing on the record.

WHEREFORE, Petitioner, Bucks, Inc., prays that the decision of the Nebraska Appeal Tribunal, dated August 10, 2016, be reversed and vacated, that Respondent Fletcher be disqualified from receiving unemployment benefits due to his misconduct connected with his work, and that Petitioner be granted such other relief as the Court may deem just and proper.

DATED September 2<sup>nd</sup>, 2016.

BUCKS, INC., Petitioner.

By: 

Patrick J. Barrett. ##17246

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ATTORNEYS FOR PETITIONER

# NEBRASKA APPEAL TRIBUNAL

Nebraska Department of Labor

In the Matter of The Claim of:

Docket No. 16 2773

SHAUN D. FLETCHER  
SSN: XXX-XX-4768  
Claimant – Appellant

## DECISION

BUCKS INC.  
Employer – Respondent

COMMISSIONER OF LABOR  
Respondent

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The claimant has appealed a Notice of Determination dated June 28, 2016, which assessed a 14-week benefit disqualification upon a finding that the claimant was discharged under disqualifying conditions. A hearing was held before the Nebraska Appeal Tribunal by telephone conference call on August 10, 2016. The claimant appeared and testified. Appearing on behalf of the employer was Dave Dunn, Operations Director; Steve Kalhorn, General Counsel and Shari Leinbaugh, Human Resources Director. The employer was represented by Rhianna Kitrell, Attorney at Law. There were no appearances on behalf of the Commissioner of Labor. Employer's Exhibits 1 and 2 were offered and received.

### HEARING ISSUE:

Whether the claimant voluntarily left his employment without good cause or was discharged for misconduct connected with his work. Neb. Rev. Stat. § 48-628(1), (2).

### FINDINGS OF FACT:

The claimant worked for this employer from June 15, 2014, through June 17, 2016. Upon separation the claimant was employed as a sales associate earning \$11.00 per hour. The claimant worked under the immediate supervision of Mark Pitchan, Store Manager.

The claimant provided services at the employer's convenience store in Omaha, Nebraska. On June 17, 2016, the claimant came into the store prior to his shift starting. The claimant began helping his peer cashier with numerous customers. The claimant's manager came in later, and told him to tuck in his shirt, and to take out the trash. The claimant said he would do those things once he got done helping the waiting customers. The manager then complained to the operations director, who later arrived at the store. The claimant had the trash taken out and his shirt tucked in, prior to the operations director arriving. After a conversation with the claimant, the operations director told the claimant he was discharged for not timely tucking in his shirt, and taking out the trash. The claimant was told this was insubordination.

### OPINION:

The Nebraska Employment Security Law provides for a disqualification from benefits, if an individual is discharged as a result of misconduct connected with his or her work. Neb. Rev. Stat. § 48-628(2). The Nebraska Supreme Court has defined misconduct as "behavior evidencing (1) wanton and willful disregard of the employer's interests, (2) deliberate violations of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations."

**EXHIBIT A**

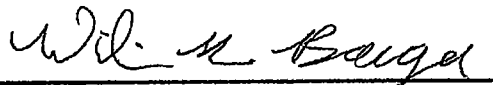
NEBCO Inc. v. Murphy, 280 Neb. 145, 153 (2010). As a general rule, "[p]oor judgment, inability to cope with situations, and occasional incidents of non-deliberate failure to precisely follow established rules and procedures do not constitute the kind of willful and deliberate misconduct that will disqualify an employee from receiving unemployment benefits as provided by law." Meyers v. Nebraska State Penitentiary, 280 Neb. 958, 966 (2010).

The employer has the burden of persuasion in proving the claimant was discharged for misconduct. The claimant was discharged for not quickly taking out the trash, and tucking in his uniform shirt. The evidence is divergent on this matter. The employer described comments from the claimant to a director that could be insubordinate. However, on cross exam, the director did not mention these comments, or a refusal to do "duties as assigned", as reasons for the discharge. The claimant was not cross-examined on these comments. The only credible evidence that can be relied upon for discharge are whether the claimant was insubordinate by continuing to check out customers, rather than immediately leaving the register, taking out the trash, and getting his shirt fully tucked in. The employer did not prove the claimant's tardiness to perform these two minor acts rises to a refusal to perform a reasonable directive. The claimant may have worked at several stores. It is difficult to believe that he was removed from those stores, yet not a single manager gave the claimant a written warning. The employer did not prove the claimant's acts on June 17, 2016 rose to insubordination. The employer failed to meet its burden of proving misconduct. The claimant's separation was under for non-disqualifying conditions.

DECISION:

The Notice of Determination is hereby REVERSED. It is held the claimant was discharged under non-disqualifying conditions, and is entitled to benefits for weeks claimed, if otherwise eligible.

Dated: August 10, 2016



W. RUSSELL BARGER  
Administrative Law Judge

**NEBRASKA  
APPEAL TRIBUNAL**

August 10, 2016

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 NDOL Legal

**APPEAL RIGHTS:** If you disagree with this decision or order by the Nebraska Appeal Tribunal, you may complete and return a Request to Reconsider form or file a Petition for Review. A Request to Reconsider form is available at [dol.nebraska.gov/appeals](http://dol.nebraska.gov/appeals) and must be returned to the Tribunal within **10 days** of the mail date stamped on this decision or order. A Petition for Review must be filed in the appropriate District Court within **30 days** of the mail date stamped on this decision or order. For information on a Petition for Review, see Neb. Rev. Stat. §§25-510.02 and 84-917 or contact the District Court. If you need further assistance, please contact an attorney.