****

**APPEAL TRIBUNAL DECISION**

**Docket number:** 19 0915 **Hearing date:** October 11, 2019

**CLAIMANT: EMPLOYER:**

MARLIS COLOME PROCARE HOME MEDICAL

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Marlis Colome Leann Allen

 Kate Kakela

## CASE HISTORY

The employer timely appealed a September 11, 2019 determination which allowed the claimant’s benefits without penalty 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 started working for the employer on January 24, 2019. She last worked on August 19, 2019. At that time, she worked full time as a qualifications specialist.

The claimant was absent from work for medical reasons. She returned, and provided a note from her doctor releasing her to return to work, but the doctor had indicated the claimant’s wrong side as having been injured. The employer required the claimant to get a corrected release before returning to work. The claimant said she would get a release at her doctor’s appointment at 1:00 pm. The employer expected the claimant to return to work after that appointment. The claimant did not know she was expected after her appointment and she did not contact the employer that day.

The claimant returned to work the next day with the corrected release. The claimant was given a written warning because the employer was unhappy with the claimant’s overall work attendance and had expected her to come to work the previous afternoon. The claimant was told if there were further problems with her attendance she would be placed on probation.

The claimant learned that morning that she had an opportunity at 2:45 pm to take her young child to meet his pre-school teacher before his first of school the next day. The claimant asked her supervisor if she could leave early or adjust her lunch to be at the school at 2:45 pm. The supervisor told the claimant no, she could only take her normal 30-minute break at 1:30 as scheduled, due to the employer’s staffing needs.

The claimant left for lunch at about 1:44 pm. She decided it was important that her son meet his teacher before he started school, so she went to the school at 2:45 pm. After the school meeting, the claimant heard from another employee that the claimant’s desk was being cleaned out. The claimant assumed she had been fired. She tried to call a manager, but did not get an answer. She did not return to the office or call again.

The employer had cleaned out the claimant’s desk because they were going to give her a final disciplinary warning and offer her part-time work in another position that they believed would be a better fit for 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...

1. left the insured worker's last suitable work voluntarily without good cause....

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

**8 AAC 85.095 provides in part:**

(c) To determine the existence of good cause under AS 23.20.379(a)(1) for voluntarily leaving work determined to be suitable under

AS 23.20.385, the department will consider only the following factors:

(1) leaving work due to a disability or illness of the claimant that makes it impossible for the claimant to perform the duties required by the work, if the claimant has no other reasonable alternative but to leave work;

(2) leaving work to care for an immediate family member who has a disability or illness;

(3) leaving work due to safety or other working conditions or an employment agreement related directly to the work, if the claimant has no other reasonable alternative but to leave work;

(4) leaving work to accompany or join a spouse at a change of location, if commuting from the new location to the claimant’s work is impractical; for purposes of this paragraph, the change of location must be as a result of the spouse’s

(A) discharge from military service; or

(B) employment;

(5) leaving unskilled work to attend a vocational training or retraining course approved by the director under AS 23.20.382, only if the claimant enters the course immediately upon separating from work;

(6) leaving work in order to protect the claimant or the claimant’s immediate family members from harassment or violence;

(7) leaving work to accept a bonafide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reasons for the work not materializing must not be due to the fault of the worker;

(8) other factors listed in AS 23.20.385(b).

 (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....

**AS 23.20.385(b) provides, in part:**

(b) In determining whether work is suitable for a claimant and in determining the existence of good cause for leaving or refusing work, the department shall, in addition to determining the existence of any of the conditions specified in (a) of this section, consider the degree of risk to the claimant's health, safety, and morals, the claimant's physical fitness for the work, the claimant's prior training, experience, and earnings, the length of the claimant's unemployment, the prospects for obtaining work at the claimant's highest skill, the distance of the available work from the claimant's residence, the prospects for obtaining local work, and

other factors that influence a reasonably prudent person in the claimant's circumstances.

#### **CONCLUSION**

A discharge is “a separation from work in which the employer takes the action which results in the separation, and the worker does not have the choice of remaining in employment." 8 AAC 85.010(20). Voluntary leaving means a separation from work in which the worker takes the action which results in the separation, and the worker does have the choice of remaining in employment. Swarm, Com. Dec. 87H-UI-265, September 29, 1987. Alden, Com. Dec. 85H-UI-320, January 17, 1986.

The claimant in this case did not return to work or contact the employer after her extended lunch break because she assumed she had been fired. The claimant’s actions ended the employment relationship, therefore she voluntarily quit work and the Tribunal will consider if she had good cause.

The Commissioner of Labor held in Spence, 9324931, February 9, 1994:

*Leaving in anticipation of a discharge is a voluntary leaving, not a discharge. This is true no matter how well founded the worker's belief was that the employer would discharge the worker if the worker did not leave. West, Comm. Dec 9321473, June 15, 1993; [W]e hold that quitting a job in anticipation of discharge is without good cause*

In applying Spence, the Tribunal must conclude the claimant did not have good cause for voluntarily leaving work. The penalties of AS 23.20.379 are appropriate.

**DECISION**

The determination issued on September 11, 2019 is **MODIFIED** and **REVERSED.** Benefits are **DENIED** under AS 23.20.379(a)(1) for the weeks ending August 24, 2019 through September 28, 2019. 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 October 22, 2019.

 Rhonda Buness, Appeals Officer