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### APPEAL TRIBUNAL DECISION

**Docket number:** 20 0044 **Hearing date:** February 13, 2020

**CLAIMANT: EMPLOYER:**

CHERYL WARD ALASKA NATIVE TRIBAL

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Cheryl Ward Jason Whiteman

 Alicia Ambrosio

 Sadie Anderson

#### CASE HISTORY

The claimant timely appealed a December 20, 2019 determination which denied benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause or was discharged for misconduct connected with the work.

#### FINDINGS OF FACT

The claimant began work for the employer on December 23, 2010. She last worked on November 30, 2019. At that time, she worked part time as a registered nurse.

The claimant is opposed to receiving the flu vaccine for a variety of religious reasons and health concerns. In the past, the employer allowed the claimant to request an exemption from the requirement to get a flu vaccine. The claimant was instead allowed to wear a face mask when interacting with patients during the flu season.

In September 2019, the employer changed its policy and required all employees who interact with patients to receive a flu vaccine by December 1, 2019. The claimant was aware of the policy change. She requested a religious exemption, which was denied. The employer’s revised policy allows medical exemptions for situations such as allergies to the vaccination ingredients. The claimant did not apply for a medical exemption because she heard from other employees that most medical exemption requests were being denied.

The employer informed the claimant on November 20, 2019 that she would be placed on leave without pay if she did not receive the vaccine by December 1, 2019.

The claimant established a claim for unemployment insurance benefits effective December 1, 2019. The claimant’s supervisor told the claimant on December 13, 2019 that she was being discharged. The claimant’s supervisor told her to reapply with the employer after the flu season ended and she could possibly return to work. The employer sent the claimant a letter on December 18, 2019 informing her that she was discharged.

#### 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 employer took the action that ended the employment relationship when it notified the claimant that she was placed on leave if she did not get a flu vaccination by December 1, 2019. The separation is a discharge and the Tribunal will consider if the claimant’s actions were a willful disregard of the employer’s interests.

*The employer does have the right to set the parameters of the work. Furthermore, insubordination - that is, refusal to obey a reasonable request of the employer - does constitute misconduct. On the other hand, if just cause can be shown for refusing the request, then misconduct may be converted to a nondisqualifying separation. In Vaara, Com. Dec. 85H-UI-184, September 9, 1985.*

*In a question of whether insubordination constitutes misconduct in connection with a claimant's work, "it is only necessary to show that he [the claimant] acted willfully against the best interests of his employer in order to establish that." Risen, Com. Dec. 86H-UI-214, September 15, 1986. In Risen, the Commissioner also held that when a claimant refuses an employer's instructions, "Such refusal, absent a showing that the employer's request was unreasonable or detrimental to the individual, is misconduct in connection with the work."*

The claimant in this case had a religious objection as well as personal health concerns about receiving the flu vaccine. She had been allowed an exemption from the time of her hire and for several years until the employer’s policy changed.

The Tribunal finds the employer’s requirement that employees interacting with patients have a flu vaccination was reasonable, but the new, more stringent requirement changed the terms of the claimant’s employment. The claimant established that the vaccine was detrimental to her for religious reasons and because of possible health concerns. Her personal choice not to receive a vaccination was not a willful disregard of the employer’s interests.

The Tribunal does not dispute an employer’s right to discharge a worker that does not meet its requirements, but not all such discharges are for work related misconduct. The claimant in this case was discharged for reason other than misconduct. The penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on December 20, 2019 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending December 7, 2019 through January 11, 2020, 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 February 13, 2020.

 Rhonda Buness, Appeals Officer