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### APPEAL TRIBUNAL DECISION

**Docket number:** 20 0115 **Hearing date:** February 20, 2020

**CLAIMANT: EMPLOYER:**

JOSETTE WILLCOX CHUGACH TRAINING &

 EDUCATIONAL SOLUTIONS

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Josette Willcox Kim Palmisano

#### CASE HISTORY

The claimant timely appealed a January 24, 2020 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 in June 2016. She last worked on December 20, 2019. At that time, she worked full time as an academic instructor.

In October 2019, the claimant provided the employer with advance notice that she would be leaving the work after December 31, 2020 to attend school and get a certification. The claimant offered to be flexible about her end date, and offered to help train her replacement if needed.

Near the end of her employment, the claimant’s supervisor advised the claimant that December 20, 2019 would be her last day, as her replacement was set to begin on December 30, 2019 and the employer saw no reason to keep the claimant working when students were not attending classes.

December 20, 2019 was the last day for student instruction before the employer’s holiday break. Although no students were in attendance, the claimant was often required to work during the holiday break on projects, cleaning and mandatory training. The claimant was paid a salary, and she would not be paid for the holiday break if she did not work. The claimant was working on a project for the employer that she did not have time to finish and she had planned to work on it during the holiday break.

#### 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

The first issue before the Tribunal is whether the claimant in this case voluntarily quit work or was discharged by the employer. 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.

In Flores, Com. Dec. No. 96 2183, December 16, 1996, the Commissioner set new policy regarding work separations earlier than the original intended date as follows:

*In Kennedy, Com. Dec. 9027951, October 10, 1990, we held that a claimant who was given one day's notice of a layoff and who then was given permission for leave the last day, remained laid off. The separation did not become a quit. We now extend that holding to cover workers who leave early after notice of discharge, but with less than two full shifts remaining in the notice period. These workers will be considered discharged. The discharge remains the primary and proximate reason for their unemployment. Inversely, if a claimant gives notice and the employer chooses to end the employment with less than two shifts remaining, the nature of the separation remains a voluntary leaving….*

The claimant resigned and provided December 31, 2019 as her last day of work. The employer decided the claimant’s services were no longer required after December 20, 2019. Although there were no classes between the claimant’s last day of work and her intended last day, the claimant had a history of working during the holiday break in past years, and she intended to work until her resignation date. In applying Flores, the Tribunal holds that the employer took the action that ended the claimant’s employment.

The employer did not establish that any actions of the claimant led to the decision to release her before her resignation date. Therefore the discharge was for reasons other than misconduct. The penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on January 24, 2020 is **MODIFIED** and **REVERSED.** Benefits are **ALLOWED** under AS 23.20.379(a)(2) for the weeks ending December 28, 2019 through February 1, 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 25, 2020.

 Rhonda Buness, Appeals Officer