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### APPEAL TRIBUNAL DECISION

**Docket number:** 20 0883 **Hearing date:** August 17, 2020

**CLAIMANT: EMPLOYER:**

NICOLE BUSH ARMY APPROP FUNDS 422

 ARMY BENEFITS CENTER - CIVILIAN

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Nicole Bush Olivia Fenderson

 Nicole Battenburg

 Kimberly Derouenslaven

#### CASE HISTORY

The claimant timely appealed a June 23, 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 on April 29, 2019. She last worked on April 23, 2020. At that time, she worked full time as a human resources assistant.

On April 1, 2020, the claimant received a letter of counseling from her direct supervisor. A conversation between the claimant and a co-worker had come to the supervisor’s attention and the claimant was warned that the employer considered the claimant had been discourteous and that further such behavior would not be tolerated. The claimant denied that she was discourteous to the other employee, and she felt the other employee often treated her poorly, but the claimant was told to tolerate that treatment.

On April 23, 2020, the claimant was speaking with her second-line supervisor. The supervisor wanted to know the status of background checks for employees in Texas who were waiting to start work. The claimant had not been able to plan to have the employee’s fingerprints taken because many offices were closed due to local government mandates related to the COVID-19 pandemic and the employees were hesitant to go out to get their fingerprints taken. The claimant told the supervisor that she could not be made to force the employees to get their fingerprints taken. The supervisor found the claimant’s response discourteous.

Because the employer had other concerns with the claimant’s performance, such as her attendance and some customer service complaints, the employer decided the claimant would not be retained past her probation period. The claimant was advised on April 23, 2020 that she could resign or she would be terminated. The claimant resigned.

#### 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 the claimant was advised she could resign or be terminated. The claimant did not have the option to continue working. The Tribunal finds the separation is a discharge, and will consider if the discharge was for work-related misconduct.

*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. 86H‑UI-213, August 25, 1986.*

*We have previously held in similar cases that although profane abuse is certainly misconduct, not every intemperate remark to a supervisor is. Some sensible line must be drawn. In Albrecht, Com. Dec. 87H-UI-302, IC Unemp. Ins. Rptr. (CCH), AK 8146.15, December 21, 1988. In Smith, Com. Dec. No. 9321739, June 30, 1993*

The claimant was discharged because she told a supervisor she could not force employees to go get their fingerprints taken. While the supervisor found the remark discourteous, it was not established that the claimant’s remark was so disrespectful as to rise to the level of a willful disregard for the employer’s interests.

The employer may have been justified in discharging the claimant because her performance did not meet the standards of the employer; but for unemployment insurance purposes she was not terminated for misconduct and as such, there is no disqualification.

#### DECISION

The determination issued on June 23, 2020 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending May 2, 2020 through June 6, 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 September 1, 2020.

 Rhonda Buness, Appeals Officer