

**APPEAL TRIBUNAL DECISION**

**Docket number:** 20 1270 **Hearing date:** September 15, 2020

**CLAIMANT:**

DANELLE BUSH

**CLAIMANT APPEARANCES: DETS APPEARANCES:**

Danelle Bush None

#### CASE HISTORY - TIMELINESS

The claimant filed an appeal against two determinations. First is an August 1, 2019 determination that denied benefits under AS 23.20.379 on the ground that the claimant voluntarily left suitable work without good cause. The Division mailed the determination to the claimant’s address of record on August 2, 2019. The claimant’s appeal was filed on August 4, 2020, giving rise to the issue of the timeliness of the claimant’s appeal.

The second determination was issued on May 28, 2020, and denied the claimant’s benefits under AS 23.20.406(h), on the ground that the claimant was not eligible for extended benefits. That determination was mailed on May 29, 2020 and appealed on August 4, 2020, and that appeal is also untimely.

**FINDINGS OF FACT - TIMELINESS**

The claimant did not receive the determination mailed on August 2, 2019. The claimant had relocated and changed had her address of record with the Division to that of a family member in New York on the same date the determination was mailed. The determination was mailed to the claimant’s Alaska address and it was not received there by the claimant or forwarded to her new address. The claimant was aware that her claim was penalized and her benefits delayed because of conversations she had with a Division representative, but she was not aware of the full penalty or of her right to appeal the determination. She was advised of her appeal rights on August 4, 2020.

The claimant had been trying the reach the Division by phone since she received the determination mailed on May 29, 2020. That determination denied the claimant’s extended benefits as a penalty imposed by the separation determination issued August 1, 2019. The claimant received the determination denying extended benefits shortly after it was mailed, and began trying to contact the Division by phone. She called many times and she left multiple voice messages for a Division representative who had given her a direct number. Her calls were not returned and the claimant did not get through to the Division by phone until August 4, 2020, when her appeals were taken.

#### PROVISIONS OF LAW - TIMELINESS

**AS 23.20.340 provides in part;**

(e) The claimant may file an appeal from an initial determination or a redetermination under (b) of this section not later than 30 days after the claimant is notified in person of the determination or redetermination or not later than 30 days after the date the determination or redetermination is mailed to the claimant's last address of record. The period for filing an appeal may be extended for a reasonable period if the claimant shows that the application was delayed as a result of circumstances beyond the claimant's control.

(f) If a determination of disqualification under AS 23.20.360, 23.20.362, 23.20.375, 23.20.378 ‑ 23.20.387, or 23.20.505 is made, the claimant shall be promptly notified of the determination and the reasons for it. The claimant and other interested parties as defined by regulations of the department may appeal the determination in the same manner prescribed in this chapter for appeals of initial determinations and redeterminations. Benefits may not be paid while a determination is being appealed for any week for which the determination of disqualification was made. However, if a decision on the appeal allows benefits to the claimant, those benefits must be paid promptly.

**8 AAC 85.151 provides in part:**

1. An appeal may be filed with a referee, at any employment center, or at the central office of the division and, if filed in person, must be made on forms provided by the division. An appeal must be filed within 30 days after the determination or redetermination is personally delivered to the claimant or not later than 30 days after the date the determination or redetermination is mailed to the claimant’s last address of record. The 30-day time period will be computed under Rule 6 of the Rules of Civil Procedure. However, the 30-day period may be extended for a reasonable time if the claimant shows that the failure to file within this period was the result of circumstances beyond his or her control.

#### CONCLUSION - TIMELINESS

An appellant has the burden to establish some circumstance beyond the appellant’s control prevented the timely filing of the appeal. The claimant in this case did not receive the determination mailed August 2, 2019, despite changing her address with the Division on the date the determination was mailed. The claimant was not aware of her right to appeal the penalties of that determination, including the denial of extended benefits, until August 4, 2020. The claimant began trying to appeal the determination issued May 28, 2020 within the appeal period. The claimant attempts to call were unsuccessful and her messages were not returned because Division staff fielding large numbers of calls.

The Tribunal finds the claimant’s appeal of the determination issued August 1, 2019 and the determination issued May 28, 2020 was delayed by circumstances beyond her control.

#### DECISION - TIMELINESS

The claimant’s appeal of the determinations issued on August 1, 2019 and May 28, 2020 is **ACCEPTED** as timely filed.

#### CASE HISTORY – SEPARATION

The determination issued August 1, 2019 denied the claimant’s benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause.

#### FINDINGS OF FACT – SEPARATION

The claimant began work for the employer in February 2018. She last worked on June 28, 2019. At that time, she worked full time as a supply technician. The claimant took maternity leave beginning September 4 2019 and her baby was born on September 7, 2019. The claimant planned to take twelve weeks of maternity leave and she believed she would be paid a portion of her wages under a short-term disability program. After 6-7 weeks, the claimant learned she did not qualify for the short-term disability program and her leave would be unpaid. Because she could not afford to remain off work without an income, the claimant ended her leave and returned to work early. She was placed in a new temporary position on her return.

In mid-May 2020, the claimant requested to take the rest of her maternity leave. The claimant’s original maternity leave agreement held that she could use the balance of the leave any time in 12 months. The claimant was being treated by a doctor for postpartum depression. The claimant’s doctor did not specifically advise that the claimant take time off work, but he told the claimant to do what she felt she needed to do for her mental health. The claimant was pumping milk at work for her baby and she was concerned about the baby’s nutrition. She was distracted from her duties and felt her productivity at work was decreased. The claimant believed that additional time off bonding with her baby would help and she would be prepared to return to work.

The employer refused to grant the claimant’s leave request, holding that a policy had changed and the claimant no longer qualified for leave under the Family Medical Leave Act, nor under the employer’s emergency leave program. The claimant told the employer she needed the time off, and she was advised doing so would end the employment relationship. She was told she could reapply for work after the time off. The claimant was required to complete an exit interview and turn in her badge before beginning her leave. The claimant relocated to stay with family for financial assistance shortly after the work ended.

#### PROVISIONS OF LAW - SEPARATION

**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.

1. **AAC 85.095 provides in part:**
2. A disqualification under AS 23.20.379 (a) and (b) remains in effect for six consecutive weeks or until terminated under the conditions of AS 23.20.379 (d), whichever is less. The disqualification will be terminated immediately following the end of the week in which a claimant has earned, for all employment during the disqualification period, at least eight times his weekly benefit amount, excluding any allowance for dependents. The termination of the disqualification period will not restore benefits denied for weeks ending before the termination. The termination does not restore a reduction in maximum potential benefits made under AS 23.20.379 (c).

(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).

**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 - SEPARATION

The claimant in this case requested a leave of absence to continue a maternity leave previously granted by the employer. The claimant argued that she did not intend to quit the work, and held that she was discharged for taking leave.

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 Division’s Benefit Policy Manual, VL 135.1-2 holds:

*Taking leave for which the employer has denied permission*

*Taking leave of absence for which the employer has denied permission is a voluntary leaving. Whether the worker has left work for good cause depends on if the reason is compelling.*

The claimant in this case voluntary quit work when she took leave understanding that it would end the employment relationship. The Tribunal will consider if the claimant had good cause for leaving the work.

Regulation 8 AAC 85.095(c) holds that a claimant may have good cause to leave work when she does so 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. The claimant in this case believed her medical condition interfered with her ability to work. She was being treated by a physician who advised her to decide if a break would help her mental health. The claimant decided additional time with her baby would help. She asked to use the balance of her maternity leave and was denied. She was told she was not eligible for job protection. She was not asked to submit documentation of her medical need to be off work. She was advised she could resign and reapply again.

The Tribunal finds the claimant had good cause to voluntarily leave her work for health reasons, and she tried to protect her job by requesting a leave of absence. The penalties of AS 23.20.379 are not appropriate.

#### DECISION - SEPARATION

The determination issued on August 1, 2019 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending July 6, 2019 through August 10, 2019, 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.

#### CASE HISTORY – EXTENDED BENEFITS

The determination issued on May 28, 2020 denied the claimant’s benefits under AS 23.20.406(h), on the ground that the claimant was not eligible for extended benefits.

**FINDINGS OF FACT – EXTENDED BENFITS**

Because the penalties of AS 23.20.379 no longer apply to the claimant’s separation from employment, the claimant’s eligibility for extended benefits is not in question and no further review of that determination is required.

#### PROVISIONS OF LAW – EXTENDED BENEFITS

#### AS 23.20.406 provides in part:

#### (h) An individual is not eligible to receive extended benefits for any week of unemployment in the individual's eligibility period if the individual has been disqualified for benefits because the individual voluntarily left work, was discharged for misconduct, or refused an offer of suitable work, unless the disqualification imposed for those reasons has been terminated in accordance with AS 23.20.379(d).

#### CONCLUSION – EXTENDED BENEFITS

As the claimant is no longer subject to a penalty under AS 23.20.379(a), the claimant is eligible for extended benefits under AS 23.20.406.

#### DECISION

The claimant’s appeal from the notice of determination issued on May 28, 2020 is **REVERSED**. The claimant is eligible for extended benefits.

#### APPEAL RIGHTS

This decision is final unless an appeal is filed 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 appeal rights and procedures is enclosed.

Dated and mailed on September 21, 2020.

 Rhonda Buness, Appeals Officer