

### APPEAL TRIBUNAL DECISION

**Docket number:** 21 0027 **Hearing date:** May 20, 2021

**CLAIMANT: EMPLOYER:**

JULIA CISNEROS MV PUBLIC TRANSPORTATION INC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Julia Cisneros LuAnn Aitken

#### CASE HISTORY

The claimant timely appealed two determinations issued December 23, 2020, both of 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 June 1, 2000. She last worked on October 8, 2020. At that time, she worked full-time as a driver.

The claimant’s DOT fitness card, a requirement for the claimant’s position, was noted to be expired. The claimant failed initial tests to have her card renewed because she had not been complying with requirements to wear her CPAP machine four hours per night. The employer granted the claimant a leave of absence to get her card renewed because she could not be permitted to drive without a current fitness card. The claimant established her claim for unemployment benefits effective October 11, 2020.

The claimant was able to pass her tests, renew her DOT fitness card and was cleared to return to work. She was scheduled to return to work on November 10, 2020. The claimant was sick and coughing at that time and she did not work. The employer’s records show the claimant called out each day through October 16, 2020. The claimant did not recall that she had called the employer during that period. The employer deducted one point from the claimant’s attendance points for those absences, according to the employer’s policy. The claimant’s supervisor spoke with the claimant on November 16, 2020 to ask how the claimant was feeling, and she advised the claimant to get a COVID-19 test before returning to work.

The claimant did not report to work on November 17, 2020 and she did not call the employer. The employer deducted 4 points from the claimant’s available attendance points for the no call, no show. The employer sent the claimant a text message, asking if she needed information on applying for leave under the Family Medical Leave Act.

The employer had no further contact from the claimant until November 30, 2020, when the claimant’s supervisor sent the claimant a text message because the claimant did not answer her calls. The supervisor told the claimant that she could no longer be off the work schedule unless she provided a note from her doctor. The claimant responded that she thought she had already been discharged because she believed she had exceeded the allowed number of attendance points, according to the employer’s attendance policy. The supervisor asked the claimant to meet with her and the general manager to discuss a “last chance agreement” concerning the claimant’s attendance or a further a leave of absence under the Family Medical Leave Act. The claimant stated she was not ready to return to work because she was going through a lot at the time. The claimant was advised she could voluntarily resign and be considered for re-hire at a later date, or she could be terminated for violating the employer’s attendance policy. The supervisor sent the claimant contact information for a counselor and sent her forms to request early retirement. The claimant told the supervisor she just wanted to be terminated so she could receive her unemployment benefits. The claimant held she made that decision because she was depressed.

#### 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 claimant in this case was placed on a leave of absence after October 8, 2020 to renew her required DOT fitness card. The employer could not permit the claimant to work without current DOT authorization. On November 30, 2020, the claimant declined the employer’s offer to protect her job with a leave of absence for medical reason or to return to work with a last chance agreement regarding her attendance. The claimant requested the employer terminate her so she could collect unemployment benefits.

In Alcantra, Com. Dec. 83H-UI-087, June 6, 1983, the Commissioner held, in part:

"[A]n individual may have a 'first week' of unemployment when the individual ceases to perform services and again another 'first week' of unemployment when the employer-employee relationship is actually severed."

In Carlson, Com. Dec. 98 2336, November 19, 1998, the Commissioner held, in part:

A voluntary leaving does not occur until the worker has filed a claim for benefits in the week in which the worker left work or in a subsequent week.

As in Alcantra, the claimant in this case separated from work in the week ending November 17, 2020 when she began her leave of absence and established her claim for benefits. A second separation occurred on November 30, 2020 when the claimant told her supervisor to terminate her instead of taking actions recommended by the employer to preserve her employment.

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 led to the first separation when it placed the claimant on a leave of absence because the claimant did not have a current fitness card and the employer could not allow her to work without the card. The first separation is a discharge, so the Tribunal will consider if the claimant was discharged for work-related misconduct.

The claimant was placed on leave by the employer because she did not pass a medical test, related to the requirement to use her CPAP machine for at least four hours per night. The Tribunal cannot conclude that the claimant’s actions in this case were a willful disregard of the employer’s interests. While failure to comply with medical instructions may be a disregard of the claimant’s own interests, it has not been shown that the claimant deliberately failed to comply with the medical instructions with the knowledge that her job would be in jeopardy as a result of her actions. Because the claimant was discharged for reasons other than misconduct related to the work, the Tribunal finds the penalties of AS 23.20.379 are not appropriate for the first separation.

The claimant took the action that led to the second separation when she told her supervisor to terminate her rather than considering the employer’s options that could have preserved her employment. The Tribunal finds the second separation occurred on November 30, 2020 and was a voluntarily quit. The Tribunal will consider if the claimant had good cause to quit work.

Regulation 8 AAC 85.095(c) provides that a claimant may have good cause to voluntarily quit work when she does so because of a disability or illness that prevents the claimant from performing the duties required for the work.

In Missall, Com. Dec. 8924740, April 17, 1990, the Commissioner of Labor summarized Department policy regarding what constitutes good cause for voluntarily leaving work. The Commissioner held, in part:

*The basic definition of good cause is 'circumstances so compelling in nature as to leave the individual no reasonable alternative.' (Cite omitted.) A compelling circumstance is one 'such that the reasonable and prudent person would be justified in quitting his job under similar circumstances.' (Cite omitted). Therefore, the definition of good cause contains two elements; the reason for the quit must be compelling, and the worker must exhaust all reasonable alternatives before quitting.*

The employer offered the claimant the reasonable alternative to take a medical leave of absence to preserve her employment and the claimant refused. The Tribunal cannot find the claimant had good cause to voluntarily leave the work at the time she did. The penalties of AS 23.20.379 are appropriate in this instance.

#### DECISION

The determination issued on December 23, 2020 and holding the claimant voluntarily quit work on October 9, 2020 is **MODIFIED** and **REVERSED.** Benefits are **ALLOWED** under AS 23.20.379(a)(2) for the weeks ending October 17, 2020 through November 21, 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.

The determination issued on December 23, 2020 and holding the claimant voluntarily quit work on November 18, 2020 is **AFFIRMED** and **MODIFIED.** Benefits are **DENIED** for the weeks ending December 5, 2020 through January 9, 2021, reflecting that the claimant severed the working relationship on November 30, 2020. The three weeks remain 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 May 28, 2021.

Rhonda Buness, Appeals Officer