

### APPEAL TRIBUNAL DECISION

**\*\*CORRECTED\*\***

**Docket number:** 21 0035 **Hearing date:** May 4, 2021

**CLAIMANT: EMPLOYER:**

NATASHA FAGASAU FEDERAL EXPRESS CORP

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Natasha Fagasau Kathleen Travers

David Risi

#### CASE HISTORY

The employer timely appealed a November 18, 2020 determination which allowed the claimant’s benefits without penalty 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 February 2020. She last worked on April 24, 2020. At that time, she worked full-time as a material handler.

After her last day of work, the claimant was seen by her doctor for cramps. Afterwards, the claimant provided the employer with a note from her doctor. The claimant was pregnant and her doctor recommended the claimant not lift more than 36 pounds and not lift more than 18 pounds repetitively. He recommended the claimant avoid loud noises and toxic fumes and substances. The employer could not accommodate the claimant’s restrictions at the noisy airport worksite, and required employees in the claimant’s position to be able to lift 50 pounds. The employer did not have other work that met the claimant’s restrictions. The employer placed the claimant on a leave of absence beginning May 6, 2020 with an understanding that the claimant would return to work six weeks after her baby was born.

On November 23, 2020, the claimant sent the employer a letter of resignation. The claimant had been unable to get anyone to commit to providing childcare for her baby that would allow her to return to work six weeks after the baby’s birth. She asked friends and family and looked into professional childcare agencies. She was placed on a waitlist for one agency. The claimant’s baby was born on January 3, 2021.

#### 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 established a claim for unemployment benefits effective July 5, 2020, when she was placed on a leave of absence. The claimant then informed the employer on November 23, 2020 that she would not return from the leave of absence.

*An 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. (Alcantara, 83H-UI-087, June 6, 1983)*

The claimant’s first week of unemployment was the week ending May 2, 2020 when she was placed on leave. The claimant was placed on a leave of absence until six weeks after her baby’s birth because the employer did not have work that met the claimant’s medical requirements.

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 Tribunal finds the employer took the action that ended the work when it placed the claimant on a leave of absence because there was no work available within the claimant’s medical requirements. The claimant was laid off due to a lack of work, which is a non-disqualifying discharge. The penalties of AS 23.20.379 are not appropriate in this case.

The claimant had a second “first week” of unemployment when she notified the employer on November 23, 2020 that she would not return to work after her leave of absence. The record does not indicate that the Division has addressed the separation from work that occurred in the week ending November 28, 2020. That matter will be remanded for the Division to investigate and adjudicate is necessary.

#### DECISION

The determination issued on November 18, 2020 is **AFFIRMED.** Benefits remain **ALLOWED** under AS 23.20.379(a)(2) for the weeks ending May 2, 2020 through June 6, 2020, if otherwise eligible. The three weeks are not reduced from 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 matter of the claimant’s separation from work in the week ending May 28, 2020 is **REMANDED** to the Division for investigation and adjudication, if necessary.

#### 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 7, 2021.

Rhonda Buness, Appeals Officer