

### APPEAL TRIBUNAL DECISION

**Docket number:** 21 0070 **Hearing date:** June 3, 2021

**CLAIMANT: EMPLOYER:**

SHAELYNN URWILLER BREWSTER'S

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Shaelynn Urwiller None

#### CASE HISTORY

The claimant timely appealed a December 4, 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 December 26, 2019. She last worked on September 10, 2020. At that time, she worked full time as a server.

At the end of the claimant’s last day, the employer spoke to the claimant about a situation where the claimant had received two large tips from customers on the same credit card. The employer was concerned about the circumstances of the claimant’s tips being charged. The employer held the claimant’s tips from the card that evening. Documents in the record indicate the employer told the Division it never received any report of improper credit card charges from that date.

The claimant was unable to work on September 11, 2020 because she did not have childcare. The claimant notified the employer before her scheduled shift. The next day, the claimant was told that she had been taken off the work schedule. The claimant sent a text message to the general manager asking if she could get her tips from the card, since she had been taken off the schedule. The general manager gave the claimant her tips from her last shift without further questions.

The claimant had been warned about a week earlier that her job was in jeopardy because she had missed work when the work schedule was changed and the claimant did not check the schedule and missed a shift. She believed she was discharged when she was told she was taken of the work schedule on September 12, 2020.

#### 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 matter before the Tribunal is whether the claimant voluntarily quit suitable work or if the claimant was discharged. 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 claimant provided sworn testimony that she was taken off the schedule. Documents in the record include second-hand statements from the employer that indicate the claimant abandon her job. The decision in this matter turns on the weight of the evidence. In Weaver, Com. Dec. 96 2687, February 13, 1997. The commissioner has held in part:

*Uncorroborated hearsay evidence must normally be given less weight than that of the sworn testimony of eyewitnesses to an event. Only if first-hand testimony is clearly not credible, should hearsay statements be considered more reliable.*

In Douglas, Com. Dec. 85H-UI-069, April 26, 1985, paraphrasing AS 44.62.460(d), the commissioner held in part:

*“Hearsay evidence may be used to supplement or explain direct evidence but is, by itself, insufficient to support a finding unless that evidence would be admissible over objection in a civil action”.*

Considering the claimant’s credible sworn testimony, the Tribunal must conclude the employer in this case took the action that ended the employment relationship when the claimant was removed from the work schedule. The separation is a discharge so the Tribunal will consider if the discharge was for misconduct related to the work.

The statements of the employer in the Division’s documents in the record do not establish that the claimant took any action that was against the interests of the employer. The claimant’s absence on September 11, 2020 was with good cause and she properly notified the employer in advance.

The Tribunal concludes the claimant was discharged for reasons other than misconduct. The penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on December 4, 2020 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending September 19, 2020 through October 24, 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 June 15, 2021.

Rhonda Buness, Appeals Officer