
### APPEAL TRIBUNAL DECISION

**Docket number:** 21 0311 **Hearing date:** August 3, 2021

**CLAIMANT: EMPLOYER:**

ALLEN GINNETT HICKEL INVESTMENT CO

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Allen Ginnett None

#### CASE HISTORY

The claimant timely appealed a February 8, 2021 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.

The employer’s representative did provide a phone number and representative name after the start time of the hearing on August 3, 2021, but they did call before the hearing had ended. The hearing was concluded before the employer’s representative could be added to the call. The employer’s representative requested to be allowed to participate in the hearing. Since it was a clerical error beyond the employer’s control that prevented the employer from being added to the August 3, 2021 hearing before it was concluded, the appeals officer continued the hearing to August 23, 2021 at 10:00 am for the employer’s participation. Hearing notices were mailed to the parties on August 6, 2021. The employer’s representative did not appear at the scheduled time of the continued hearing time, so the hearing record was closed.

#### FINDINGS OF FACT

The claimant began work for the employer on May 28, 2019. He last worked on June 3, 2020. At that time, he worked full-time as a security guard. The claimant was working long hours monitoring guests that were quarantined due to the COVID-19 pandemic. On the claimant’s last day of work, his supervisor noted that the claimant looked tired and distraught. The claimant agreed that he was tired because he had been working seven days a week, twelve hours a day without a break. The claimant was also anxious about being exposed to the COVID-19 virus and bringing it home to his parents and all the unknown factors about the virus. The claimant’s supervisor told the claimant to go home early and to take time off for his mental health. The claimant did not recall that a return to work date was discussed, he believed he was to call the employer when he was ready to return. The claimant believed that his supervisor meant for him to take a few days off, and probably expected the claimant to call Monday, June 8, 2020.

While he was off work, the claimant went downtown on June 5, 2020 to get his hair cut. The claimant was caught up in a protest and was arrested and jailed. The claimant was held in jail and was not allowed to make calls for some time. The claimant was finally allowed to call his family right before he was released on June 14, 2020. The charges were later dropped.

The claimant contacted the employer on June 15, 2020 and requested to return to work. The claimant was advised he had been discharged because he did not call or return to work.

#### 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 was incarcerated while on a leave of absence. The first issue is whether the claimant voluntarily quit the work or whether he was discharged.

*[I]t is the holding and policy of this department that, when a person has been incarcerated and his employment is terminated for absenteeism as a result of incarceration, the termination is to be considered a discharge from employment. Traylor, Com. Dec. 88H‑UI‑140, March 6, 1989.*

As in Traylor, the claimant in this matter attempted to return to work, but was discharged due to his absences without contact. The separation is a discharge, so the Tribunal will consider if the claimant was discharged for work-related misconduct.

The Division’s Benefit Policy Manual, Misconduct MC15-5 holds:

*E. Overstaying leave Overstaying leave is considered an absence constituting misconduct in connection with the work unless:*

*• The reason for overstaying leave is compelling; and*

*• The worker made a reasonable attempt to give notice of not returning as expected.*

*Example: A claimant (05 0528 May 23, 2005) was incarcerated on January 11. The employer approved paid leave until January 17, when the worker thought he would be released. When he was still not released as of January 27, the employer discharged for absence. Citing a prior case, (88H-UI-140, March 6, 1988) the Commissioner found “the claimant’s inability to report to work was therefore a willful disregard of his employer’s interest.” The claimant was discharged for misconduct.*

Also in Traylor, Com. Dec. 88H‑UI‑140, March 6, 1989, the Commissioner held:

*Finally, it must be determined whether [the claimant's] absence was "intentional." The department holds that it was. While he may not have intended the act for which he was incarcerated to sever the employment, he knew or reasonably should have known it would have jeopardized his employment. Sherman-Bertram v. Ca. Dept. of Employment, 21 Cal. Rptr. 130 (Ca. App., 1962 (claimant's felonious act was willful and resultant unemployment was his fault.)*

*[I]t is the holding and policy of this department that, when a person has been incarcerated and his employment is terminated for absenteeism as a result of incarceration, the termination is to be considered a discharge from employment... [T]here are circumstances under which the resultant termination may not be disqualifying, however, I find none in this case. In accordance with this policy, it is the decision of this department that [the claimant] was discharged for misconduct in connection with his work.*

Unlike Traylor, it was not established in the record that the claimant’s actions were such that the claimant should have known he was jeopardizing his employment. The charges against the claimant were dropped. The claimant was not permitted to make any calls until right before he was released, so it was not within his control to notify the employer of his inability to return from his leave. For these reasons, the Tribunal does not find the claimant’s actions were a deliberate disregard of the employer’s interests and are not misconduct.

The Tribunal does not dispute an employer’s decision to discharge a claimant that does not meet its standards, but such a discharge is not always for misconduct. The Tribunal finds the claimant in this case was discharged for reasons other than misconduct. The penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on February 8, 2021 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending June 13, 2020 through July 18, 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 August 26, 2021.

 Rhonda Buness, Appeals Officer