

### APPEAL TRIBUNAL DECISION

**Docket number:** 21 0504 **Hearing date:** September 7, 2021

**CLAIMANT: EMPLOYER:**

PATRICK RADNER LIGHTHOUSE CAFE AND BAKERY

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

None Erik Ronneberg

#### CASE HISTORY

The employer timely appealed a March 3, 2021 determination which allowed the claimant’s benefits with no 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 2018. He last worked on August 2, 2020. At that time, he worked full time as a night baker.

The claimant had began his work for the employer on the day shift and was given a share of the pooled tips each day. When the claimant started working the night shift in 2019, the employer continued to give the claimant a share of each day’s tips. In 2020, the employer noted that the claimant was taking advantage of the employer’s policy of providing a free meal each shift for employees by taking food home. One night, the owner’s wife walked in on the claimant and his family cooking and eating food in the kitchen. The owner warned the claimant that it was not permissible to feed his family for free or take food home, but noted the claimant continued to feed his family after hours on the store’s security video. The owner decided to stop sharing the day’s tips with the claimant because the claimant was costing money in the food he and his family consumed.

After his last day of work, the claimant confronted the owner and told him he had noted he was no longer receiving a share of the tips, and that he should continue to receive a share the tips or get a raise. The owner told the claimant he refused to share the tips or give the claimant a raise because of cost of the food the claimant took home or fed to his family. The claimant left his keys and told the owner to call if he was needed.

#### 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

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 in this case took the action that ended the employment relationship when he gave the employer the keys and told him to call him if needed. The Tribunal finds the claimant voluntarily quit the work and will consider if the claimant had good cause to leave the work.

The claimant left because he was no longer receiving a share of the day shift’s tips. The claimant had received a share of the tips since he started the work in 2018. Even if there was not a written agreement that the claimant would get tips, the practice had gone on long enough to be considered an agreement of the claimant’s hire. Tips are wages under AS 23.20.530. The employer reduced the claimant’s wage when he withheld the tips.

The Division’s Benefit Policy Manual, VL 500.8-100.3-3 through 4 holds:

*Deductions - General*

*Deductions from an employee's pay may seldom be used by the employer to recover losses. Under AAC 08.015.160 an employer may not legally deduct from a worker's pay for breakage, shortages, or lost or stolen property, unless the worker in writing acknowledges responsibility for the breakage, shortage, or loss. If the deduction is lawful, --- that is, the worker has acknowledged responsibility for the breakage, shortage, or loss --- it is not good cause for leaving. Employers also may not deduct for any other reason, other than the standard deductions of taxes and insurance, and those authorized by legal processes, without the written consent of the employee.*

*Illegal deductions*

*If the employer has made an illegal deduction from the worker's wages and the worker brings the matter to the employer for correction before leaving, the worker has good cause to quit.*

*Example: The claimant’s employer deducted money from the claimant's pay in order to recover money which the employer claimed the claimant owed him. The claimant disputed the amount and filed a complaint with Labor Standards and Safety for the balance. The deductions were not according to a written agreement, and brought the pay below the minimum wage. He had good cause for quitting. (97 0299, March 7, 1997)*

The employer in this case deducted the tips from the claimant’s wages to cover food consumed by the claimant. While this may seem like a reasonable solution, the claimant did not agree to the deduction, therefor the deduction from his wages was illegal. The claimant brought the issue to the employer’s attention before he left the work.

The Tribunal must conclude the claimant in this case voluntarily quit with good cause and the penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on March 3, 2021 is **AFFIRMED** and **MODIFIED.** Benefits are **ALLOWED** under AS 23.20.379(a)(1) for the weeks ending August 8, 2020 through September 12, 2020. 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.

#### 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 September 23, 2021.

Rhonda Buness, Appeals Officer