

### APPEAL TRIBUNAL DECISION

**Docket number:** 21 1505 **Hearing date:** December 14, 2021

**CLAIMANT: EMPLOYER:**

DAVID GONZALES AMER LANDSCAPING CO INC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

David Gonzales Glen Ball

#### CASE HISTORY

The claimant timely appealed a July 21, 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.

#### FINDINGS OF FACT

The claimant began work for the employer on in May 2020. He last worked on Monday, May 31, 2021. At that time, he worked full-time as a welder and fabricator.

The claimant was sick on Tuesday, June 1, 2021. He could not get out of bed so he contacted his foreman around his usual start time and let him know he would not be in that day. The claimant was still sick on Wednesday, June 2, 2021. He did not contact the employer because he was very sick and he assumed they would know he was still sick when he didn’t show up.

On June 3, 2021, the claimant contacted his foreman to see which worksite he should report to. The foreman told him to contact the owner, which the claimant did. The owner sent the claimant a text message advising him that he was discharged.

The claimant had worked for the employer in the past. When the owner agreed to hire the claimant in May 2020, he told the claimant that among the conditions of hire would be no tardiness, no no-shows, no leaving early, and no visitors at the worksite, all of which had been issues during the claimant’s previous periods of employment. The claimant agreed to the employer’s terms. The owner decided to discharge the claimant because of the claimant’s absence without notification on June 2, 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 first issue before the Tribunal is whether the claimant voluntarily quit work or whether he 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 did not intend to quit the work. The employer took the action that ended the employment relationship when the owner advised the claimant by text that he was no longer employer. The separation is a discharged. The Tribunal will then consider if the discharge was for work-related misconduct.

In Tolle, Com. Dec. 9225438, June 18, 1992 the Commission of Labor states, in part:

*Unexcused absence or tardiness is considered misconduct in connection with the work unless there is a compelling reason for the absence or tardiness and the worker makes a reasonable attempt to notify the employer.*

In situations where a worker has been warned that absence or tardiness could result in dismissal, it is necessary to examine the reason for the specific absence and the worker’s ability to control it.

The claimant in this case had been placed on notice that the employer would not tolerate no-shows. The claimant did not establish that he made a reasonable effort to notify the employer of his absence on June 2, 2021. The Tribunal finds the claimant was discharged for misconduct connected to her work.

#### DECISION

The determination issued on July 21, 2021 is **AFFIRMED** and **MODIFIED.** Benefits remain **DENIED** under AS 23.20.379(a)(2) for the weeks ending June 5, 2021 through July 10, 2021. 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 December 20, 2021.

Rhonda Buness, Appeals Officer