

### APPEAL TRIBUNAL DECISION

**Docket number:** 21 1707 **Hearing date:** February 7, 2022

**CLAIMANT: EMPLOYER:**

YUVONE FOWLER MARLOWE MANOR ASSISTED

LIVING FACILITY

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Yuvone Flower Theresa Brisky

Carol Wolfe

#### CASE HISTORY

The claimant timely appealed an August 17, 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 April 19, 2021. She last worked on June 6, 2021. At that time, she worked full-time as a residential living assistant.

The employer was not satisfied with the claimant’s performance from the beginning of her employment. The employer received complaints that the claimant did not get along with staff and did not accept constructive criticism. The claimant believed that communication issues with coworkers who had strong accents she did not understand may have contributed to the idea that she did not get along with staff. The claimant was counseled about an instance where a resident under the claimant’s care did not use the toilet during the claimant’s entire shift. The claimant told the employer she had asked, and the resident had refused. The employer told the claimant she should use a different approach to encourage the resident. The employer noted that the claimant documented asking the claimant to use the toilet at 2:00, when she was seen initially entering the floor at 2:08 on the employer’s security camera.

On June 7, 2021, the employer received a complaint from a resident’s family member that the claimant had been rude to them on the phone. The employer’s representatives in the hearing had not talked to the family member and did not know what the claimant had said or done that was believed to be rude. The claimant recalled that a resident’s family member had called during her last shift to report that they saw a naked person enter their resident’s room on a video camera. The claimant was not working on that floor and she had to go to that floor twice and speak to the family member twice to try to determine which room their resident was in. The claimant did not recall being rude to the family member.

After receiving the complaint, the employer decided to discharge the claimant because she was not a good fit and she was still in her 90-day probation period. The claimant was advised on June 9, 2021 that she was being discharged. The claimant left and refused to discuss the reason or to sign any documents regarding her discharge.

#### 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

Alaska Statute 23.20.379 holds that the Division must examine the reason a claimant is unemployed and determine if penalties apply. The Division held that the claimant voluntarily quit work when she refused to sign a discharge document. The Tribunal does not agree.

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.

Both parties agree that the claimant was discharged on June 9,2021. The claimant’s refusal to sign a discharge document does not change that she had no choice to remain employed, with or without signing the document. The separation is a discharge, so the Tribunal will consider if the discharge was for work related misconduct.

*When a worker has been discharged, the burden of persuasion rests upon the employer to establish that the worker was discharged for misconduct in connection with the work. In order to bear out that burden, it is necessary that the employer bring forth evidence of a sufficient quantity and quality to establish that misconduct was involved.* Rednal, Com. Dec. 86-UI-213, August 25, 1986.

*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.* Weaver, Com. Dec. 96 2687, February 13, 1997.

This case turns on the sufficiency of the evidence. The employer’s representatives did not witness the claimant being rude to a resident’s family member or even talk to that family member themselves. The employer did not present business records showing what the claimant may have done. The claimant provided sworn testimony that she was not rude to the family member. As stated in Rednal above, the employer had the burden to bring forth evidence of sufficient quality to establish that the claimant’s actions rose the level of misconduct. The employer has not met that burden.

The Tribunal does not dispute an employer’s right to discharge a claimant that does not meet its standards, however not all such discharges are for misconduct. The Tribunal finds the claimant in this case was discharged for reason other than misconduct. The penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on August 17, 2021 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending June 12, 2021 through July 17, 2021, 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 February 24, 2022.

Rhonda Buness, Appeals Officer