

### APPEAL TRIBUNAL DECISION

**Docket number:** 21 1964 **Hearing date:** May 3, 2022

**CLAIMANT: EMPLOYER:**

VALERIE BIASTOCH WRANGELL IGA INC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Valerie Biastoch None

#### CASE HISTORY

The claimant timely appealed a September 27, 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 in August or September 2019. She last worked on August 3, 2021. At that time, she worked full time as an office manager, and for a period of time was also the produce department manager.

On August 3, 2021, the claimant’s supervisor, one of the store owners, cursed at the claimant and berated her in front of a coworker for forgetting to put out the office trash for pickup. Immediately afterward, the claimant took a call from a customer ordering groceries. The claimant believed the customer was intoxicated and this made the call difficult as the customer wanted to order less than the minimum number of items and was joking around and considering what else to order. The claimant became abrupt with the customer, trying to get her to complete the order. The claimant was not rude, but kept asking, “what else?”

The customer complained to the claimant’s supervisor that the claimant had been rude. The claimant’s supervisor sent the claimant home to think about whether she wanted to continue working. The claimant left her keys and went home. She had observed two other managers be sent home for “decision making leave” and the employer had always requested the manager’s keys be left. The claimant later realized she was scheduled to open the store the next day, so she went back and asked her supervisor for her keys. The claimant’s supervisor told her to wait to return to work until she heard from the employer.

The claimant had been counseled on previous occasions. In October 2020 she had yelled at the owner and crumpled a piece of paper while experiencing mood swings related to a medication issue. She was advised that such behavior would not be tolerated. The next day, the claimant apologized and explained the medication issue. On December 7, 2020, the claimant was counseled because she asked another manager to bring concerns with the produce area to the claimant’s attention. The claimant was also the produce department manager during that period. On June 13, 2021, the claimant was removed from the produce manager position because the employer was not satisfied with the condition of the produce department while the claimant was on vacation. The claimant was not warned that her job was in jeopardy, except when she had yelled at her supervisor.

On August 5, 2021, the claimant sent the co-owner a text message asking if she would be returning to work that day. The owner told the claimant he believed she had quit. The claimant clarified that she did not quit. The employer told her it was better to just end the relationship because it was not working out.

#### 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 in this case was sent home to think about whether she wanted to continue working after a customer complained the claimant was short with them on the phone. The claimant left her keys because she believed the employer wanted her to leave them while she was on “decision making leave.” The claimant asked about returning and was told not to return because it wasn’t working out.

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 owner took the actions that ended he employment relationship when he told the claimant not to return. The separation is a discharge. Tribunal will consider if the claimant was discharged for work related misconduct.

The claimant was sent home after she was short with a customer on the phone. The claimant had not been counseled regarding her interactions with customers and she was not on notice that her job was in jeopardy. The claimant held that she was abrupt because the customer was difficult and she was frustrated by having recently been yelled at by her supervisor. The claimant held that she was not rude to the customer and did not curse, just tried to hurry her to complete her order.

*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. 86H-UI-213, August 25, 1986.*

The employer did not participate in the hearing. The claimant provided sworn testimony that while she was short with a difficult customer, she was not rude and she had not been previously counseled for such behavior. The employer has

not established that the claimant’s actions leading to her discharge rose to the level of misconduct as described in regulation 8 AAC 85.095(d).

The Tribunal does not dispute an employer’s right to discharge a worker who does not meet their standards, but not all such discharges are for misconduct. The Tribunal finds the claimant in this case was discharged for reasons other than misconduct and the penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on September 27, 2021 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending August 7, 2021 through September 11, 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 May 12, 2022.

Rhonda Buness, Appeals Officer