

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON  
REFERRAL FROM THE DEPARTMENT OF LABOR AND WORKFORCE  
DEVELOPMENT**

In the Matter of	)	
	)	
PASHA ISADORE	)	OAH No. 21-2205-LUI
_____	)	Agency No. 21 0959 ER 16

**APPEAL DECISION**

**Docket Number:** 21 0959 ER 16

**Hearing Date:** December 1, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Pasha Isadore

None

**CASE HISTORY**

Pasha Isadore filed a claim for Unemployment Insurance (UI) benefits under AS 23.20.379. Her claim was approved. Ms. Isadore's employer, Kodiak Island Real Estate, Inc. contested the claim. The Department of Labor referred the appeal to the Office of Administrative Hearings. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing on December 1, 2021.

The issue before the ALJ is the nature of the claimant's separation from work and whether the claimant is disqualified from full unemployment benefits as a result.

**FINDINGS OF FACT**

Pasha Isadore established a claim for UI benefits effective September 2020. The Division determined that the claimant was eligible for UI benefits. However, Ms. Isadore's employer, Kodiak Island Real Estate, contested the award.

Ms. Isadore and her employer, Paula Laird, testified at a telephonic hearing on December 1, 2021. According to their testimony, Ms. Laird is the licensed agent and broker for Kodiak Island. She has owned and operated the real estate office since 2012, although under different names. She hired Ms. Isadore as a part-time receptionist and office worker in 2017. Ms. Isadore later became a licensed real estate assistant.

Ms. Laird testified that Ms. Isadore was a competent and reliable employee from 2017 through August 2020. In August 2020 Ms. Isadore gave her notice effective September 25, 2020 because she and her husband were relocating off-island.

Ms. Isadore and Ms. Laird agreed that Kodiak Island would assist Ms. Isadore with paperwork related to the sale of her home. Ms. Isadore and her husband had already located a buyer, so a complete listing relationship was unnecessary. Ms. Isadore and her husband became Kodiak Island clients. The purchase and sales agreement were executed August 27, 2020.

The next step for sale were inspections related to the house and property. Those inspections would include a septic and Kodiak Island Borough water quality test. The Kodiak Island Borough water quality test is quite basic according to Ms. Laird and Ms. Isadore. It does not test for lead, arsenic, heavy metals, or other pollutants. It tests only for coliform and e. coli. Testing is done by the City of Kodiak Wastewater Treatment plant and, typically, the results are obtained within 24 to 48 hours of the time the sample is submitted. That time includes weekends because the samples must be tested promptly after collection or the results are not reliable.

The wastewater facility gives the homeowner written directions on how to collect a sanitary sample and the proper sources for collection along with a sterilized container containing the chemical base. The homeowner is to follow directions, add water to the chemical base, seal the container, and return it for analysis. Ms. Isadore's husband collected the sample on Friday, September 11, 2020. The sample was tested over the weekend.

On Monday Ms. Laird and Ms. Isadore had a conversation about the water test results. The two women remember the initial conversation and its follow-up communications very differently.

Ms. Laird remembers asking Ms. Isadore for the water quality test results and being told explicitly that "the treatment plant didn't get *any* test results." Ms. Laird testified that she directly asked Ms. Isadore if "they got the test results, and she said 'no.'"

Ms. Isadore remembers the conversation as her telling Ms. Laird that "they didn't get *reliable* results." According to her, the conversation was rushed because she was packing to move but she intended to communicate that "we didn't do it (the collection) right, so we had to do it over again." She and her husband did receive an email from the water treatment facility over the weekend telling them that the sample did not pass. She testified there would have been no reason to tell Ms. Laird that the water treatment facility didn't get any results because the email would have been available to her and there was no consequence for a "failed" test, as a homeowner Ms. Isadore would merely need to test again or, worst case scenario, add a filter to the faucet.

On Monday afternoon, September 14, 2020, Ms. Laird called the wastewater treatment plant to find out why the results weren't ready—as she thought they were not completed over the weekend. She was told by a representative that the test results were complete but unsatisfactory: the coliform result was negative, but the e. coli result was positive.

Ms. Laird then called Ms. Isadore. She testified, “ I called her to get what happened...She said we didn’t take it right... We have to do it correctly.” “I told her she told me earlier that there were no results and that was a lie.” I knew she got results and the water didn’t pass, so I told her,” “you’ve been dishonest. You told me there were no results, but there were, and I needed to know so we could get retested.”

Ms. Isadore testified she tried to explain to Ms. Laird that there had been a miscommunication. She had not intended Ms. Laird to think that the city did not test the water over the weekend, she had only intended Ms. Laird to know that they were going to have to collect another sample because they had not collected it properly on September 11, 2020.<sup>1</sup>

However, communication between the two women devolved over the remainder of the afternoon and evening. Ms. Laird remained adamant that Ms. Isadore lied to her and Ms. Isadore felt intentionally misunderstood. After additional texts messages, Ms. Laird fired Ms. Isadore at approximately 9:00 p.m. She told Ms. Isadore that she “no longer trusted her” and “let’s just end it.”

Ms. Laird submitted required paperwork to the Alaska Real Estate Commission documenting Ms. Isadore’s separation.

Ms. Isadore left Kodiak on the October 12, 2020 ferry. She arrived in Oregon where she and her husband had planned to relocate on October 19, 2020. She looked for work but did not immediately find employment so she filed for Alaska UI on December 5, 2020, effective September 15, 2020.

The Division approved her claim because it found Ms. Isadore had been discharged for reasons unrelated to misconduct at work, i.e., “not disclosing full water treatment test results to your employer/realtor prior to the sale of your personal property.”

### **THE UNEMPLOYMENT INSURANCE BENEFITS ELIGIBILITY FRAMEWORK.**

An individual is eligible for unemployment compensation under Alaska labor law if the individual’s employment is covered by the Alaska Employment Security Act EASA, AS 23.20.005-535 as implemented in 8 AAC 85.010-842 and detailed in the Department’s Benefit Policy Manual (BPM).<sup>2</sup> Under those rules the employment and training services division of the Department of Labor and Workforce

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<sup>1</sup> Ms. Isadore testified that she and her husband concluded he contaminated the sample because he took it from the kitchen faucet which had a screen on it, he collected the wrong temperature; he did not wash his hands, and he did other “no-nos.”

<sup>2</sup> The BPM fulfills the mandate in 8 AAC 85.360 that the Department “maintain a policy manual interpreting the provisions of AS 23.20 and this chapter.” The Alaska supreme court has referred to the BPM as the “Precedent Manual” and looks to the BPM to interpret labor issues. *See, Calvert, supra; Westcott v. State, Dep’t of Labor*, 996 P.2d 723 (Alaska 2000). The BPM is divided into eight sections: Able and Available, Evidence, Labor Dispute, Miscellaneous Misconduct, Suitable Work, Total and Partial Unemployment, and Voluntary Leaving with individual subsections addressing specific issues and incorporating recent updates.

Development conducts a two-part analysis of each claim filed by an unemployed worker. The first step in the analysis is the “non-monetary determination” of whether the claimant is eligible to for benefits.<sup>3</sup> If the claimant is eligible, the division conducts the second step and issues a “monetary determination” calculating the benefit amount payable to the claimant.<sup>4</sup>

Eligibility turns on the acts and circumstances surrounding the claimant’s separation from employment. The separation may be due to “discharge” where the employer takes action which results in the separation and the worker does not have a choice in remaining in employment.<sup>5</sup> A claimant who has been involuntarily discharged by their employer is eligible for full unemployment benefits unless the discharge was for misconduct connected with work as defined in AS 23.20.379(a)(2) and 8 AAC 85.095(d).

“Misconduct connected with work” means discharge for:

- (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; or
- (2) a claimant's conduct off the job, if the conduct shows a willful and wanton disregard of the employer's interest; and either (i) has a direct and adverse impact on the employer's interest; or(ii) makes the claimant unfit to perform an essential task of the job; or
- (3) discharge for an act that constitutes commission of a felony or theft under circumstances defined in 8 AAC 85.095(f).

If the claimant was discharged for misconduct connected with work, the claimant is not eligible for full employment benefits. Instead, the claimant is disqualified under AS 23. 20.379(a) and (b)-- meaning the claimant is disqualified from benefits the first and following five weeks of unemployment and the maximum potential benefit is reduced by three times the weekly benefit amount. However, “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.”<sup>6</sup> Claimants discharged for those reasons remain eligible for full unemployment benefits.

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<sup>3</sup> 8 AAC 85.010(a)(14); 8 AAC 85.085.

<sup>4</sup> 8 AAC 85.010(a)(12).

<sup>5</sup> 8 AAC 85.010(a)(20).

<sup>6</sup> 8 AAC 85.0895(d)(1).

The work separation may also be due to voluntary decisions or “job quits” by the employee. When the separation is due to a voluntary job quit by the employee, the employee will be disqualified per AS 23. 20.379(a) and (b) unless the employee can demonstrate that the job quit was for “good cause.”

To determine whether good cause existed for voluntarily leaving suitable work, the factors set out in 8 AAC 85.095(c) are considered:

- (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 individual 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 bona fide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reason for the work not materializing must not be due to the fault of the worker; and
- (8) other factors listed in AS 23.20.385(b).<sup>7</sup>

AS 23.20.385(b) establishes a catchall provision under which an employee can demonstrate good cause and retain unemployment eligibility by proving the employee had “a compelling reason for leaving work” and “exhausted all reasonable alternatives to quitting.”<sup>8</sup> A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to

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<sup>7</sup> 8 AAC 85.095(c).

<sup>8</sup> *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

leave employment.”<sup>9</sup> Typically, to establish good cause under this standard, an employee must give the employer notice of the problem a chance to adjust or correct it before exhaustion of alternatives can be found.<sup>10</sup> However, the employee is “not expected to do something futile or useless in order to establish good cause for leaving employment.”<sup>11</sup> There is “no requirement that a worker’s reasons for leaving work be connected with the work. Either work connected or personal factors may present sufficiently compelling reasons.”<sup>12</sup>

AS 23.20.385 provides that suitability of work depends on a wide range of factors, including whether wages, hours, or other conditions of work are substantially less favorable than prevailing conditions in the locality; the degree of risk to the claimant’s health, safety, and morals; the claimant’s physical fitness for the work; the distance of the work from the claimant’s residence and any “other factor that would influence a reasonably prudent person in the claimant’s circumstances.” Although suitability of work may not be presumed it need not be examined in all cases.<sup>13</sup> Suitability of work must be examined if the worker objects to the appropriateness of wages or other “conditions of work, the worker specifically raises the issue of suitability of work; or facts appear during the investigation that put the Department on notice that wages or other conditions of work maybe substantially less favorable than prevailing conditions for similar work in the locality.<sup>14</sup>

#### **EXCERPTS OF RELEVANT PROVISIONS OF LAW**

##### **AS 23.20.379. Voluntary quit, discharge for misconduct, and refusal of work.**

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

(2) was discharged for misconduct connected with the insured worker’s last work.

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<sup>9</sup> *Calvert v. State, Dept. of Labor & Workforce Development, Employment Sec. Div.*, 251 P.3d 990, 1001 (Alaska 2011)(adopting BPD criteria).

<sup>10</sup> *Id.* at 1002-06.

<sup>11</sup> *Id.* at 1004. (“An employer’s limited authority or expressed refusal to accommodate an employee can establish that requesting an adjustment to work conditions would be futile: ‘[i]f the employer has already made it known that the matter will not be adjusted to the worker’s satisfaction, or if the matter is beyond the power of the employer to adjust, then the worker is not expected to perform a futile act.’ ”)(internal citation omitted).

<sup>12</sup> *Id.* at 1002-06.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

(b) An insured worker is disqualified for waiting-week credit or benefits for a week and the next five weeks of unemployment following that week if, for that week, the insured worker fails without good cause

(2) to accept suitable work when offered to the insured worker.

### **APPLICATION**

**Ms. Laird did not establish that Ms. Isadore was discharged for misconduct related to work: Ms. Isadore was discharged for conduct off the job and that conduct did not show a willful and wanton disregard of the employer's interest; have a direct and adverse impact on the employer's interest; or makes her unfit to perform an essential task of the job.**

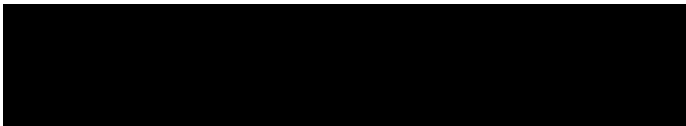
There is no dispute that Ms. Laird lost confidence in Ms. Isadore's candor. That loss of trust formed a legitimate basis for her discharge. However, the "dishonest" conversation took place regarding a personal not employment matter. There does not appear to have been a willful or wanton disregard of Kodiak Island's interests. Nor was there a direct and adverse impact on the employer's interest: Ms. Isadore made arrangements to have a subsequent test which both women testified was a common practice and the sale went through as planned.

Whether the incident made Ms. Isadore unfit to perform an essential task of the job is a closer question. As stated above, there is no doubt that Ms. Laird believed that Ms. Isadore lied to her. Dishonesty during real estate sales can have serious consequences. However, the testimony was that Ms. Isadore had worked for Kodiak Island for several years before this event with no concerns regarding her honesty. Ms. Isadore's explanation reasonably indicated a misunderstanding could have occurred during the hectic circumstances surrounding her move. Given this record, Ms. Laird did not meet her burden of proof to establish the Division was wrong.

### **DECISION**

The April 15, 2021 employment determination by the Division is **AFFIRMED**.

DATED January 10, 2022.



Carmen E. Clark  
Administrative Law Judge

## **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.

## **CERTIFICATE OF SERVICE**

I certify that on January 12, 2022, this document was sent to: Pasha Isadore (by mail and email); Kodiak Island Real Estate Inc (by email). A courtesy copy has been emailed to the DETS UI Appeals Team.

  
Office of Administrative Hearings