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

In the Matter of	)	
	)	
MIGUEL GOMEZ	)	OAH No. 21-2238-LUI
	)	Agency No. 21 0980 10

APPEAL DECISION

Docket Number: 21 0980 10 **Hearing Date:** December 17, 2021

CLAIMANT APPEARANCES: **DETS APPEARANCES:**

Miguel Gomez None

CASE HISTORY

The claimant, Miguel Gomez, timely appealed a May 18, 2021 determination which denied Unemployment Insurance (UI) benefits under AS 23.20.379. 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 17, 2021. Mr. Gomez appeared by telephone . His employer, Opulent LLC (Opulent), an assisted living facility in Seward, did not respond to a telephone call to its telephone number of record.

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

Miguel Gomez established a claim for UI benefits effective February 6, 2021. The Division determined that the claimant was not eligible for UI benefits because he voluntarily quit employment without legal good cause.

Prior to moving to Alaska, Miguel Gomez worked as a home health care aid in California. His primary client was Jaime Atherton's brother. She was impressed with his abilities, and when her brother no longer needed Mr. Gomez's assistance, she offered him a job working at an assisted living facility she manages in Seward, Alaska. Mr. Gomez accepted the position and moved to Alaska.

For several years, Mr. Gomez lived at the residence four days a week and worked those days and nights. He had the other three days of the week free and did not live at the residence. Ms. Atherton had other employees, but he was aware she relied on him

more than the others. Mr. Gomez did not mind because he testified, "we were sort of like family after many years working together."

In early 2021, additional work demands were placed on Mr. Gomez. First, of course, were the additional precautions necessary to properly respond to COVID-19. Increased sanitation, social isolating, and restrictions on residents all increased his workload. Second, there was staff turnover which meant he had to cover extra shifts. Third, Ms. Atherton became sick and unable to work herself. In addition, her significant other, Jeff, who was supposed to do exterior maintenance was not coming to the residence because he was providing care to her. Those duties, too, fell on Mr. Gomez.

Mr. Gomez testified that he understood the extra demands would be temporary and tried to adjust. However, the last weekend in January he was supposed to have Friday, Saturday, and Sunday off. Jeff called him on Friday and told him to go to the residence and clear the driveways and walkways because there had been extra snow. Mr. Gomez reminded Jeff that it was his day off, and stated he was not going to go shovel snow: there were other staff members present who could perform that task if Jeff was unable or unwilling to do so. Jeff then demanded Mr. Gomez return to the residence and remove the snow on Saturday. Mr. Gomez said no to coming in on Saturday or Sunday when Jeff asked him to do so.

Ms. Atherton called Mr. Gomez later that day and chastised him for his bad attitude.

After the weekend, Mr. Gomez went to visit her at home during the week of February 1, 2021. He told her he was "getting burned out." He could manage a while longer to give her time to get well and find more good staff, but in April 2021, he wanted to take time off. He thought she agreed.

Mr. Gomez went to work on February 5, 2021 per his posted schedule. When he arrived, another worker was at his station. She told him that Ms. Atherton assigned her that shift and that Ms. Atherton had removed him from the work schedule. The co-worker had an updated schedule that had not been emailed to Mr. Gomez showing that he was not scheduled to work for the next two weeks.

Mr. Gomez emailed Ms. Atherton immediately and asked if his removal from the schedule was some sort of "power play" to punish him for not coming on his days off. He could not afford to go without pay for two weeks.

Within the hour Ms. Atherton responded that she was giving him "at least a week off if not more." She was clearly angry he would not come in on his day off and shovel the snow because "the fire code required the door to be clear." She mentioned that she had seen him posting on Facebook and if he had time to post on Facebook, he had time to go in and shovel snow. She closed by stating I was "clear I ask you to give me your notice in writing via email," but you still have not done that. "So the schedule is a stand for right now." If you want, I can send you a copy. "If you choose you don't

wanna come back to work after being in this email." I suggest you respond within 24 hours that way I know.

Mr. Gomez's last day of work at Opulent was February 5, 2021. He did not formally resign, but Ms. Atherton did not put him back on the schedule and she never spoke to him again- not even in response to the condolence he sent to her when he found out the brother he had cared for until he needed institutionalization had died.

Mr. Gomez filed for unemployment effective February 6, 2021. The Division denied his claim concluding he voluntarily quit employment without good cause in reliance on information from Ms. Atherton. That information did not include copies of the email correspondence submitted to the OAH.

THE UNEMPLOYMENT INSURANCE BENEFITS ELIGIBILIYT 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).[1] Under those rules the employment and training services division of the Department of Labor and Workforce 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.[2] If the claimant is eligible, the division conducts the second step and issues a "monetary determination" calculating the benefit amount payable to the claimant.[3]

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.[4] 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:

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1 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.

2 8 AAC 85.010(a)(14); 8 AAC 85.085.

3 8 AAC 85.010(a)(12).

4 8 AAC 85.010(a)(20).

(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."[5] Claimants discharged for those reasons remain eligible for full unemployment benefits.

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

[5] 8 AAC 85.0895(d)(1).

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).[6]

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."[7] A compelling reason is "one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment."[8] 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.[9] However, the employee is "not expected to do something futile or useless in order to establish good cause for leaving employment."[10] 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."[11]

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

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6 8 AAC 85.095(c).

7 *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

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

9 *Id.* at 1002-06.

10 *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).

11 *Id.* at 1002-06.

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.[12] 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.[13]

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

DECISION

Mr. Gomez did not voluntarily quit employment without good cause: he demonstrated that he was discharged from employment for reasons other than misconduct connected with his work and is entitled to immediate full unemployment benefits.

Constructive discharge occurs "where an employer makes working conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign.[14] The employee must show that he was "forced into involuntary

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12 *Id.*

13 *Id.*

14 *Mills v. Hankla*, 297 P.3d 158, 166-67; (Alaska 2013); *Beard v. Baum*, 796 P.2d 1344, 1350 (Alaska1990)

resignation."[15] Constructive discharge may result from retaliation, hostility, a sustained campaign of harassment or other actions by the employer.[16]

Evidence at the appeal hearing included the email correspondence over several days preceding his "job quit" between Ms. Atherton and Mr. Gomez that was not submitted to the Division. Other documentation from Ms. Atherton acknowledged that she "put him on leave without notice." The ALJ also had access to full and detailed testimony from Mr. Gomez, who was a sincere and credible witness.

It is more likely than not from that evidence that Ms. Atherton removed Mr. Gomez from the schedule in retaliation for declining to provide free labor on his scheduled days off. Her email on February 6, 2021 states she demanded his resignation. She removed him from the schedule which effectively eliminated his income without notice to him using a secret schedule that she distributed to other employees but not to him. This denied him wages and was coercive. She told the Division she put him "on leave without notice." The clear motive for those actions was to coerce the written resignation she demanded. Then she simply never put him on the schedule again thus eliminating his job.

The evidence did not support a finding that Mr. Gomez voluntarily quit his job: he was constructively discharged for reasons other than misconduct related to his work.

The Division's May 18, 2021 denial decision is **Reversed.**

DATED January 11, 2022.

[redacted][17]
Carmen E. Clark
Administrative Law Judge

[15] *Mills*, 297 P3d at 166 (internal citation omitted).
[16] *Id.* at 166-69.
[17] Signed electronically to accommodate remote work restrictions due to COVID-19.

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 13, 2022, this document was sent to: Miguel Gomez (by mail and email); Opulent LLC (by mail). A courtesy copy has been emailed to the DETS UI Appeals Team.

[redacted]

Office of Administrative Hearings

Alaska Department of Labor and Workforce Development
Appeals to the Commissioner

Please read carefully the enclosed Appeal Tribunal decision. Any interested party (claimant or the Division of Employment and Training Services [DETS]) may request that the Commissioner accept an *appeal* against the decision (AS 23.20.430-435 and 8 AAC 85.154-155).

A Commissioner appeal must be filed within 30 days after the Appeal Tribunal decision is mailed to a party's last address of record. The 30-day period may be extended for a reasonable time if the appealing party shows that the appeal was late due to circumstances beyond the party's control.

A Commissioner appeal must be in writing and must fully explain your reason for the appeal. You or your authorized representative must sign the appeal. All other parties will be sent a copy of your appeal. Send Commissioner appeals *to the Commissioner's Hearing Officer* at the address below.

A Commissioner appeal is a matter of right if the Appeal Tribunal decision reversed or modified a DETS determination. If the Appeal Tribunal decision did not modify the DETS determination, the Commissioner is not required to accept the appeal. If the appeal is accepted, the Commissioner may affirm, modify, or reverse the Appeal Tribunal decision. The Commissioner may also refer the matter back to the Appeal Tribunal for another hearing and/or a new decision. The Commissioner will issue a written decision to all interested parties. The Commissioner decision will include a statement about the right to appeal to Superior Court.

Any party may present *written argument* to the Commissioner stating why the Appeal Tribunal decision should or should not be changed. Any party may also request to make an *oral argument*. Written argument and/or a request for oral argument should be made when you file an appeal or immediately after you receive notice that another party filed an appeal. You must supply a written argument or a request for oral argument promptly, because neither will likely be considered after the Commissioner issues a decision.

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