

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

In the Matter of)	
)	
DWAYNE BERTHOLL)	OAH No. 21-2227-LUI
_____)	Agency No. 21 0982 03 10

APPEAL DECISION

Docket Number: 21 0982 03 10

Hearing Date: December 7, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Dwayne Bertholl

None

CASE HISTORY

The claimant, Dwayne Bertholl, appealed a December 28, 2020 determination which denied Unemployment Insurance (UI) benefits under AS 23.20.379. His appeal was not filed within 30 days of the decision date; it was not filed until May 18, 2021. 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 PUA appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing on December 7, 2022. Mr. Bertholl appeared by telephone as did Malorie Johnson, the human resources representative for Iyabak Construction, LLC (Iyabak), his employer.

The matter was referred to the ALJ to consider two issues, in sequence: 1) whether the lateness of Mr. Bertholl's appeal prevents him from challenging the denial, and 2) if not, what is the nature of the claimant's separation from work and does it disqualify him from immediate, full employment benefits.

TIMELINESS OF THE APPEAL

Under AS 23.20.340 and 8 AAC 85.151 the appeal of an agency determination or re-determination must be filed within 30 days after the determination or redetermination is made. However, the 30-day period may be extended for a reasonable time if the appellant shows that the failure to file within this period was the result of circumstances beyond the appellant's control. In addition, due process requires

claimants “be provided a meaningful opportunity to understand, review, and where appropriate, challenge the department’s actions.”¹

Mr. Bertholl testified that the delay in filing his appeal was the result of his hospitalization and treatment for cancer. It is unnecessary to determine whether the entire five-month delay can be excused by his ill health because this Tribunal concludes that even had his appeal been timely, the circumstances of his separation from employment do not establish legal good cause and the Division’s denial determination is affirmed.

FINDINGS OF FACT

Dwayne Bertholl established a claim for UI benefits effective October 24, 2020. The Division determined that the claimant was not eligible for UI benefits because he voluntarily quit his job without legal good cause making him disqualified from immediate benefits.

Mr. Bertholl owned a contracting business for twenty-five years. Market changes impacted the success of his business and his enjoyment of the work. Consequently, in December 2018 he took a job as a project manager and construction estimator for Iyabak. Iyabak is a subsidiary of Bering Straits Native Corporation. It regularly completes major renovation projects for municipalities, Native Corporations, and the military. Mr. Bertholl described it as “a good company.”

However, Iyabak was also a very busy company. Mr. Bertholl often felt his bosses were somewhat unresponsive to his requests for direction and assistance, but it was manageable from 2018 to 2020.

Mr. Bertholl testified that in 2020 he found himself bidding on and managing projects for the Air Force that were especially difficult, but his bosses did not have time to assist or provide guidance on how to deal with a recurring problem involving a specific procurement specialist. This was very frustrating. In hindsight, had Mr. Bertholl known the extent of the procurement officer’s personal disfunction and Air Force red-tape, he would have advised against bidding on the project or excused himself from it.

However, for six months he did the best he could to navigate the difficulties and further the project. During that six months, the situation on the “Vicky” project continued to worsen. The projected timeline for completion, materials lists, and labor issues “all went out of control.”

Mr. Bertholl testified that he was having serious health issues at the same time. He was diagnosed with cancer and started a drug treatment regimen. Unknown to him, a

¹ *Baker v. State, Dept. of Health & Social Services*, 191 P.3d 1005, 1007 (Alaska 2008); *see also Allen v. State, Dept. of Health & Social Services*, 203 P.3d 1155, 1168-70 (Alaska 2009)(discussing recoupment).

side effect from one of the medications was an increase in moodiness and irritability. Mr. Bertholl testified that for him, the side effects included memory loss, loss of muscle mass, and the existence of sudden, almost ungovernable rage. He “blew up” at his daughter and friends. He had “never been like that before.”

In early October 2020 Mr. Bertholl’s bosses at Iyabak had time to review the Vicky project and its problems. Mr. Bertholl interpreted their actions as preparation for making him the fall guy which he believed was inappropriate given how hard he tried to get their attention and advice early on.

Mr. Bertholl resigned on October 20, 2020. It was not a professional resignation. There were acrimonious words. Mr. Bertholl testified, “I blew up pretty hard and quit. I said some things you can’t take back.”

He did not give notice. “I left in such a hurry and I left a plateful of work for others to deal with.” Mr. Bertholl felt he was self-destructing and if he stayed, he would only become more bitter and caustic. He did not consider contacting HR to request leave or medical or mental health assistance from his employer.²

Iyabak had a two-week notice requirement for all employees from the CFO to the clean-up crew. Mr. Bertholl violated that policy.

After he left Iyabak, Mr. Bertholl got additional treatment for his cancer. It was during that treatment the relationship between his rage and medication was identified. Once his medication was changed, Mr. Bertholl had fewer problems, although he “had plenty of amends to make, especially with my daughter.”

Mr. Bertholl filed for unemployment effective October 22, 2020. The Division denied his claim on December 28, 2020.

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).³ 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

² Ms. Johnson testified that Iyabak had a human resources subdepartment that dealt with benefits, protected leave, medical leave, and mental health care.

³ 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.

worker. The first step in the analysis is the “non-monetary determination” of whether the claimant is eligible to for benefits.⁴ If the claimant is eligible, the division conducts the second step and issues a “monetary determination” calculating the benefit amount payable to the claimant.⁵

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.⁶ 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.”⁷ 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

⁴ 8 AAC 85.010(a)(14); 8 AAC 85.085.

⁵ 8 AAC 85.010(a)(12).

⁶ 8 AAC 85.010(a)(20).

⁷ 8 AAC 85.0895(d)(1).

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).⁸

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.”⁹ A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment.”¹⁰ Typically, to establish good cause under this standard, an

⁸ 8 AAC 85.095(c).

⁹ *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

¹⁰ *Calvert v. State, Dept. of Labor & Workforce Development, Employment Sec. Div.*, 251 P.3d 990, 1001 (Alaska 2011)(adopting BPD criteria).

employee must give the employer notice of the problem a chance to adjust or correct it before exhaustion of alternatives can be found.¹¹ However, the employee is “not expected to do something futile or useless in order to establish good cause for leaving employment.”¹² 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.”¹³

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.¹⁴ 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.¹⁵

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.

¹¹ *Id.* at 1002-06.

¹² *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).

¹³ *Id.* at 1002-06.

¹⁴ *Id.*

¹⁵ *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.

DECISION

Mr. Bertholl did not establish legal good cause for his voluntary resignation.

Mr. Bertholl voluntarily resigned from Iyabak. He did so out of rage and frustration which were undoubtedly exacerbated by fear associated with his cancer diagnosis and side effects of his medication. But those are the reasons he quit. He did not do so for any of the specific reasons listed in 8 AAC 85.095(c)(1)-(7). Whether legal good cause existed thus entitling Mr. Bertholl to immediate unemployment benefits must, therefore, be analyzed under 8 AAC 85.095(c)(8), the catchall provision.

Mr. Bertholl was required to prove that he had a compelling reason for leaving work *and* exhausted all reasonable alternatives to quitting.¹⁶ This is a high standard. A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment.”¹⁷ The combination of professional and personal difficulties Mr. Bertholl faced might have caused a reasonable person to leave employment.

However, there was little to no evidence that Mr. Bertholl exhausted or even explored reasonable alternatives to quitting. He did not request leave. He did not tell his employers that he was reaching the end of his rope. He did not identify specific assistance he requested from them that was denied, other than more regular and prompt communication.

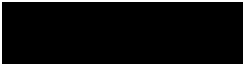
Mr. Bertholl’s testimony established that he was working on a problematic construction project with an incredibly difficult military point of contact. According to him, several other contractors refused to work with her. Mr. Bertholl appears to have generally asked for assistance, but he did not identify any particular request he made to his employers. It appears the situation simmered and stewed until it blew apart. Mr. Bertholl may have had legitimate personal reasons to leave employment. However, as executed his job quit does not make him eligible for immediate collection of unemployment benefits.

¹⁶ *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

¹⁷ *Calvert*, *supra*.

The Division's December 28, 2020 denial decision is **Affirmed**.

DATED January 11, 2022.

¹⁸
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: Dwayne Bertholl (by mail); Iyabak Construction LLC (by mail). A courtesy copy has been emailed to the DETS UI Appeals Team and DETS UI Technical Team.

_____
Office of Administrative Hearings

¹⁸ Signed electronically to accommodate remote work restrictions due to COVID-19.