

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

In the Matter of )  
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HIDEE MENESES ) OAH No. 21-2228-LUI  
 ) Agency No. 21 1003 ER 10  
\_\_\_\_\_ )

**APPEAL DECISION**

**Docket Number:** 21 1003 ER 10

**Hearing Date:** December 7, 2021

**CLAIMANT APPEARANCES:**

**DETS APPEARANCES:**

Hidee Meneses

None

**CASE HISTORY**

Hidee Meneses filed a claim for Unemployment Insurance (UI) benefits under AS 23.20.379. The Department of Labor approved her claim on April 16, 2021. The employer, Lowe's Home Centers, LLC, filed an appeal to contest the determination. 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 7, 2021. Ms. Meneses appeared by telephone. Attempts to contact her employer, Lowe's Home Centers (Lowe's) were unsuccessful.

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**

Hidee Meneses established a claim for UI benefits effective December 6, 2020. The Division determined that the claimant was eligible for UI benefits and approved her claim. The employer, Lowe's, contested the determination, claiming Ms. Meneses voluntarily quit her job when she failed to comply with company policies on how to request return to work following sick leave.

Hidee Meneses started work at Lowe's on September 22, 2020. At the time Lowe's had certain policies in place related to the COVID-19 pandemic. Specifically, employees who were diagnosed with the virus or in close contact with a person diagnosed with the virus were not to come to work until a two-week quarantine had passed or they

had a negative COVID-19 test result. Lowe's did not provide sick or disaster pay to employees who complied with this policy.<sup>1</sup>

On December 14, 2020, Ms. Meneses informed her supervisor that her father and sister, with whom she lived, had tested positive for COVID-19. She was told to quarantine and not come to work until after January 3, 2021. Ms. Meneses complied with that directive.

On January 4, 2021, Ms. Meneses texted her supervisor, Jennifer Ate, to be placed back on the schedule. Ms. Ate asked if Ms. Meneses had confirmed her return with the manager, Sedgwick. Ms. Meneses confirmed that she had. Ms. Ate then responded that Ms. Meneses would be given work hours the following week. Ms. Meneses testified that she continued to contact Lowe's but was never placed back on the schedule.

After repeated attempts to get an explanation from Ms. Ate or the manager, Ms. Meneses concluded she had been terminated, likely because there was less work in her department.

She applied for unemployment benefits. Lowe's did not fully respond to requests for information from the Department of Labor. Based on the information from Ms. Meneses, including copies of the email correspondence with her supervisor, and the limited information from Lowe's, the Division approved her claim, concluding she had been laid off by her employer.

Lowe's appealed. The Lowe's appeal documents claim that Ms. Meneses failed to appear or call in for work for three shifts within a twelve-month period which is considered a "voluntary quit" for its purposes. Lowe's did not provide the dates or times for which Ms. Meneses failed to appear or address the emails demonstrating Ms. Meneses had been in regular contact from January to March attempting get work. Lowe's then failed to appear for the hearing.

### **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

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<sup>1</sup> This is true despite the fact that Lowe's store sales increased by 30% in the first twelve months of the pandemic according to its own reports and press releases, and profits rose accordingly.

<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

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.<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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Misconduct, Suitable Work, Total and Partial Unemployment, and Voluntary Leaving with individual subsections addressing specific issues and incorporating recent updates.

<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

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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.

and prudent person of normal sensitivity, exercising ordinary common sense, to 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. Meneses was discharged by Lowe's: the evidence demonstrated that- regardless of Lowe's preferred terminology- the company discharged Ms. Meneses for perceived non-compliance with corporate policy on returning to work from sick leave. The evidence did not demonstrate Ms. Meneses was discharged for misconduct connected with work as defined by law. The Division did not err.**

There is no legitimate dispute that Lowe's discharged Ms. Meneses. The only issue is whether the discharge was for misconduct connected with the work as defined above. Lowe's terminated Ms. Meneses because it believed she had not complied with corporate policy on how to return to work and had, thus, failed to call in as required. Lowe's was factually wrong as demonstrated by the contemporaneous communication by Ms. Meneses.

In addition, even had Ms. Meneses failed to comply with a Lowe's policy, whether a person is disqualified for unemployment benefits is a different question from whether the employer had legitimate reasons for discharge. Unless the employee was discharged for misconduct connected with the work, the employee remains eligible for unemployment even if the employer acted appropriately under its policies.

In this case there is no indication Ms. Meneses engaged in conduct that showed a willful and wanton disregard of the employer's interest as required to establish misconduct connected with work. Importantly, it appears Ms. Meneses complied with Lowe's policy regarding unpaid leave from work while sick and she attempted to comply with protocols for return. Even if she were unsuccessful, there was no indication that Ms. Meneses intentionally, knowingly, or recklessly violated a reasonable work rule or deliberately violated or disregarded standards of behavior that the employer has the right to expect.

On the evidence presented, Lowe's did not demonstrate that the Division erred.

**ORDER**

The Division's April 16, 2021 approval determination is **Affirmed**.

DATED January 14, 2022.

[REDACTED] 15  
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 14, 2022, this document was sent to: Hidee Meneses (by mail and email to [REDACTED]); Lowe's Home Centers LLC (by mail). A courtesy copy has been emailed to the DETS UI Appeals Team.

[REDACTED] \_\_\_\_\_  
Office of Administrative Hearings

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<sup>15</sup> Signed electronically to accommodate remote work restrictions due to COVID-19.