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

In the Matter of	)	
	)	
TANYA LANGE	)	OAH No. 21-2259-LUI
	)	Agency No. 21 1088 16

APPEAL DECISION (SEPARATION)

Docket Number: 21 1088 16

Hearing Dates: Jan. 13, 2022
Mar. 9, 2022
Mar. 29, 2022

CLAIMANT APPEARANCES:

Tanya Lange
Avraham Zorea (later sessions)

EMPLOYER APPEARANCES:

Mariah Leavitt
Stephanie Lodinoff
Rebecca Patterson (later sessions)

CASE HISTORY

Tanya Lange appealed a May 21, 2021 determination by the Division of Employment and Training Services (DETS) finding that she had been discharged from her employment with the Kenaitze Indian Tribe (the Tribe) for willful and wanton misconduct. Based on that finding, the determination imposed a disqualification under AS 23.20.379(a)(2). Notice of the decision was mailed on May 24, 2021. Ms. Lange appealed promptly.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in October of 2021.[1] Under the agreed terms of referral, an administrative law judge 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 series of recorded hearing sessions, the first of which was on January 13, 2022.[2] In that session, Ms. Lange stated near the end of her testimony that she was suing the tribe for wrongful termination. This led to delays while both sides brought in counsel, who then represented them in subsequent hearing sessions in March 2022. Ms. Lange was permitted to supplement her testimony through counsel in the later sessions. The Tribe presented testimony from Stephanie Lodinoff (HR Director), Kathy King (former Director of Behavioral Health), Carrie Brown (Financial Controller), Kelli Ping (Behavioral Case Manager), and Joseph Cannava (Supervisor of Youth Services).

1 Delay in processing the appeal, and the decision to refer it to another tribunal, were connected with the department's extensive backlog related to the pandemic.

2 An earlier session, in December 2021, had to be terminated because the parties could not hear each other.

FINDINGS OF FACT

Tanya Lange has worked off and on for the Tribe for a number of years. In 2017, she was discharged for a reason that is not in the record. She filed a complaint with the EEOC, but the agency declined to pursue it on her behalf.[3]

The Tribe rehired her in September of 2020. Her work involved substance abuse clients, and included some appearances before a therapeutic Tribal court. Ms. Lange cared about her job, and particularly enjoyed the court work. With respect to the job as a whole, she relates that her reviews were positive up until the time of the incidents discussed below, and there is no evidence to the contrary.

Beginning in approximately January of 2021, Ms. Lange began to have a conflict with a coworker, related in large part to political disagreements. The conflict spilled over into social media. Some communications by each party to the conflict are in the record. Insofar as it has been explored through the evidence, the manner in which this conflict was carried on reflects poorly on both participants.

On approximately March 4, 2021, Ms. Lange made a Facebook post that violated client confidentiality to some degree and contravened employer policies of which she was aware. The post was probably about the coworker with whom she was feuding,[4] and it certainly seems to have been motivated in part by the feud.[5] Ms. Lange received a formal written warning for the violation, and she apologized for it.[6]

After the warning—which referenced confidentiality rules, not the feud—Ms. Lange's conflict with the co-worker continued. On March 12, 2021, both participants were put on unpaid administrative leave for a week.[7] This was a disciplinary suspension and a cooling off period imposed in direct response to their unprofessional interactions. The misconduct of both participants was expressly determined not to be "intentional."[8]

On the morning of March 31, 2021, Ms. Lange received an email from management informing her that a "Decision was made to have you step out of [Tribal Court] related activities."[9] This decision was apparently supposed to have been discussed with her orally by a manager, but the counseling process had not occurred and she instead learned of the decision through a rather blunt

---

3 Lange testimony. The discharge also appears to have been the subject of a finding adverse to Ms. Lange by DETS. Ms. Lange appealed it but then failed to pursue the appeal. *See* DLWD Appeal Tribunal Docket No. 17 1057 (Aug. 8, 2017).

4 There is conflicting evidence on this point. *Compare, e.g.,* King testimony *with* Ex. J.

5 Ex. B ("I let a co-worker get too far under my skin").

6 *Id.*; Ex. A.

7 King testimony; Ex. E, F.

8 Ex. F, p. 1.

9 Ex. G, p. 1.

email containing no overall explanation.[10] This method of disclosing the decision was sufficiently unfortunate that the manager apologized for it.[11] The decision eliminated a substantial portion of Ms. Lange's duties.[12]

Ms. Lange's reaction is accurately summarized in the following paragraph from a personnel memo:

> Tanya disagreed with the changes, and was visibly upset and raised her voice at several staff in the building as well as slammed an office door. Tanya's yelling could be heard by un'ina and staff out front in the lobby. Tanya was then approached by the Interim Director of Behavioral Health as Tanya was leaving and asked if she would meet with her to discuss her concerns. Tanya refused to meet and left the building and was yelling such things as "why don't you just fire me?"[13]

Ms. Lange threatened to resign, but did not do so. The following day, Ms. Lange was discharged for the "unprofessional" emotional outburst, effective immediately.[14]

The day after her firing, Ms. Lange contacted the Tribal Council and reported what she viewed as Medicaid fraud.[15] The communication to the Council does not allude to prior efforts to report these allegations. There is no persuasive evidence in this proceeding that she raised these issues in any meaningful way prior to that. The communications by Ms. Lange leading up to her discharge do not support the implication that she was acting, or thought she was acting, as a whistleblower who was being retaliated against for reporting misconduct.[16]

The evidence presented in this proceeding does not demonstrate billing irregularities relating to Medicaid. The issue is collateral, however, and it neither could be nor was explored fully at the hearing. Under no circumstances should this decision be deemed to provide findings usable in a Medicaid audit.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.379(a) - 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

10 *Id.*
11 *Id.*
12 Lange testimony.
13 The paragraph, which is substantially corroborated by testimony of several witnesses including Ms. Lange, is found in Ex I. Un'ina are clients.
14 *Id.*
15 Ex. J.
16 In addition to the pre-discharge communications, *see also, e.g.,* Ex. 1 pp. 11, 13-14.

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 - Voluntary Quit, Discharge for Misconduct, and Refusal to Work

(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….

APPLICATION

Beginning with the Commissioner Decision in *In re Rednal*, 86H-UI-213 (1986), and continuing with subsequent decisions,[17] the department has taken the following approach regarding whether there is grounds for disqualification under AS 23.20.379(a):

> 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.

The "misconduct" the employer must prove, moreover, is not ordinary misconduct nor even misconduct serious enough to justify peremptory discharge. The term has as special meaning in the unemployment context. It requires, as the regulation quoted in the preceding section indicates, a "willful and wanton disregard of the employer's interest." This is because the issue in an unemployment case is not whether the employee ought to have been fired, but whether the employee triggered the firing by deliberate conduct such that it would be inappropriate for the employee to have immediate access to unemployment benefits.

17 *E.g., In re Ecker*, 07 0530 (DLWD Appeal Tribunal 2007); *In re Mendonsa,* Comm'r Dec. 04 0577 (2004).

There is an additional concept in unemployment cases that is especially central to resolving this one. It is the principle that the conduct that must rise to the "willful and wanton" threshold is the final conduct that precipitated the dismissal.[18] An employee may commit a number of acts in the course of employment that would fit the special definition of "misconduct" used in unemployment cases, but if the employer chose to discipline those actions with something other than discharge, they may be largely irrelevant to characterizing the final separation. Thus, if an employee running a restaurant has been warned repeatedly about illegal hiring of minors—a deliberate act, and a firing offense—but the real reason for a later discharge is poor financial performance, the fact that the illegal hiring had occurred does not transform the firing into a discharge for "misconduct."[19]

This is not to say that all prior conduct must be disregarded. A common example is repetitive tardiness: if an employee has been warned over and over about being late, and ultimately is fired for being late yet again, the prior warnings help to establish that final conduct was "willful and wanton," because the employee did exactly what he or she had been warned not to do.[20] But "[t]he direct triggering cause of the discharge must be, standing alone or in conjunction with previous actions which harm the employer's interest, misconduct."[21]

Here, Ms. Lange had received pointed warnings about compromising client confidences in social media and about feuding with her co-worker. Much of the conduct that led to those warnings might plausibly be characterized as "willful and wanton disregard of the employer's interest." But it was not that conduct, nor a repetition of anything similar to that conduct, that precipitated her discharge. She was discharged for an emotional outburst at the workplace in response to an unexplained cutback in her responsibilities. There is no evidence that she had had such an outburst before, nor that she had been warned to keep such outbursts in check.

Ms. Lange should not have yelled in the workplace as she did. The outburst was unprofessional and improper. It was not, however, in any way premeditated. It was a spontaneous reaction to a management decision that would distress any employee—a decision that had been communicated to her in such a poorly-considered way that management felt the need to apologize for the way she found out about it. In these circumstances, the Tribe has not met its burden of showing that the actual conduct for which Ms. Lange was discharged was behavior in "willful and wanton disregard of the employer's interest."

---

18 *See, e.g., In re Gibson,* 99 0280 (DLWD Appeal Tribunal 1999) ("If the act causing the discharge cannot be construed as misconduct . . ., then a discharge for that reason is not misconduct, even if the worker has committed other acts of misconduct.").

19 *Cf.* Benefit Policy Manual at MC 385-1.

20 *E.g., In re Bray*, 00 1842 (DLWD Appeal Tribunal 2000).

21 Benefit Policy Manual at MC 385-2.

In reaching this conclusion, I do not suggest that the discharge was wrongful. There was ample reason for the Tribe to reach the conclusion that Ms. Lange was a problematic employee, not well-suited to the unit in which she was working. The question we address here, however, is not whether the Tribe was justified in ending the employment, but rather whether the employee's final precipitating act was of a kind that should disqualify her from collecting unemployment. It was not.

Since the discharge was not due to "misconduct" as that term is defined by regulation, no disqualification can be imposed.

DECISION

The employee's appeal is sustained. The Division's May 21, 2021 decision is **REVERSED**. A disqualification under AS 23.20.379(a) may not be imposed for the separation from Kenaitze Indian Tribe.

DATED May 9, 2022.

[redacted]
Christopher Kennedy
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 May 9, 2022, a true and correct copy of this order was distributed as follows: Isaac Zorea (by mail and email); Avraham Zorea, counsel for Ms. Lange (by email); Rebecca Patterson, counsel for the Tribe (by email); DETS UI Appeals Team (by email); DETS UI Technical Team (by email).

By: [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.

ALASKA DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT
COMMISSIONER'S HEARING OFFICER
P.O. BOX 115509 JUNEAU ALASKA 99811-5509
Phone: (800) 232-4762 E-mail: appeals@alaska.gov Fax: (907)465-3374