



APPEAL TRIBUNAL DECISION

Docket number: 21 1672 **Hearing date:** January 14, 2022

CLAIMANT:

TERRY STEPANOFF

EMPLOYER:

MP2 ALASKA LLC

CLAIMANT APPEARANCES:

Terry Stepanoff

EMPLOYER APPEARANCES:

None

DETS APPEARANCES:

None

CASE HISTORY

The claimant timely appealed an August 3, 2021 determination which denied benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause or was discharged for misconduct connected with the work.

FINDINGS OF FACT

The claimant began work for the employer on December 7, 2020. He last worked on December 24, 2020. At that time, he worked part-time as a delivery driver.

The claimant was scheduled to work on Saturday, December 26, 2020. The prior day, he was charged with a DUI and his vehicle was impounded. The claimant contacted the manager to let her know he would be unable to work that day. The manager told the claimant not to worry about it.

The claimant borrowed money to get his car out of impound after two days. He immediately contacted the manager to let her know he had his car and was ready to return to work. The manager did not respond. The claimant called and sent several more text messages to the manager but never received a response. He assumed he was terminated.

PROVISIONS OF LAW

AS 23.20.379 provides in part:

- (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...
 - (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 provides in part:

- (c) To determine the existence of good cause under AS 23.20.379(a)(1) for voluntarily leaving work determined to be suitable under AS 23.20.385, the department will consider only the following factors:
 - (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 claimant 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 bonafide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reasons for the work not materializing must not be due to the fault of the worker;
 - (8) other factors listed in AS 23.20.385(b).
- (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....

AS 23.20.385(b) provides, in part:

- (b) In determining whether work is suitable for a claimant and in determining the existence of good cause for leaving or refusing work, the department shall, in addition to determining the existence of any of the conditions specified in (a) of this section, consider the degree of risk to the claimant's health, safety, and morals, the claimant's physical fitness for the work, the claimant's prior training, experience, and earnings, the length of the claimant's unemployment, the prospects for obtaining work at the claimant's highest skill, the distance of the available work from the claimant's residence, the prospects for obtaining local work, and other factors that influence a reasonably prudent person in the claimant's circumstances.

CONCLUSION

A discharge is "a separation from work in which the employer takes the action which results in the separation, and the worker does not have the choice of remaining in employment." 8 AAC 85.010(20). Voluntary leaving means a separation from work in which the worker takes the action which results in the separation, and the worker does have the choice of remaining in employment. Swarm, Com. Dec. 87H-UI-265, September 29, 1987. Alden, Com. Dec. 85H-UI-320, January 17, 1986.

The claimant notified the employer of his absence and then attempted to return to work two days later. The claimant had no intention of quitting the job. It was the employer's choice not to respond to the claimant and to discontinue the employment relationship. Therefore, the claimant was discharged for absence.

“Unexcused absence or tardiness is considered misconduct in connection with the work unless there is a compelling reason for the absence or tardiness and the worker makes a reasonable attempt to notify the employer.” Tolle, Comm. Dec. 9225438, June 18, 1992.

Work attendance is a commonly understood element to the employer/employee relationship. It need not be defined in company policy in order to require compliance. It is so important; a single breach can amount to misconduct connected with the work.

As we have held in previous cases, payment of unemployment insurance benefits is intended to assist those who are unemployed through no fault of their own. Labor, Comm'r Dec. 96 1303, August 5, 1996. Driving while intoxicated is a serious matter that not only impacts an employer, but the public as well. The claimant has not denied that she drove while intoxicated and therefore lost her driving privileges. Her employer was unable to use her services as a result. We hold that the claimant's actions in this case amounted to a willful disregard of the employer's interest that had an adverse impact on the employer. Conroy, Comm'r Dec. 03 0775, June 30, 2003.

The claimant's off-duty conduct adversely affected his ability to perform his job duties, which was detrimental to the employer interests. The claimant's own actions caused his car to be impounded, which directly affected his ability to perform his job duties as a delivery driver. Missing work because your car was impounded for driving under the influence is not compelling. Therefore, the claimant was discharged for an unexcused absence, which is misconduct in connection with the work.

DECISION

The determination issued on August 3, 2021 is **MODIFIED (from a quit to a discharge.)** Benefits remain **DENIED** for the weeks ending December 26, 2020 through January 30, 2021. The three weeks are reduced from the claimant's maximum benefits. The claimant may not be eligible for extended benefits under AS 23.20.406-409.

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.

Dated and mailed on January 18, 2022.

Kimberly Westover

Kimberly Westover, Appeals Officer