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

In the Matter of	)	
	)	
CHRISTI SWANSON	)	OAH No. 22-0449-LUI
	)	Agency No. 21 2262 03 10

APPEAL DECISION (SEPARATION)

Docket Number: 21 2262 03 10 **Hearing Date:** June 15, 2022

CLAIMANT APPEARANCES: Christi Swanson

EMPLOYER APPEARANCES: None

CASE HISTORY

Christi Swanson appealed an October 13, 2021 determination by the Division of Employment and Training Services (DETS) finding that she had quit her employment at Alaska Regional Hospital without good cause. Based on that finding, the determination imposed a disqualification and benefit limitation under AS 23.20.379(a) and (c). Notice of the decision was mailed on October 14, 2021. Ms. Swanson appealed six weeks later.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in May of 2021. 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 recorded hearing on June 15, 2022. Ms. Swanson testified under oath. The employer, through its representative, expressly declined to participate. The issues presented at hearing were, first, whether Ms. Swanson's appeal should be treated as timely and, second, whether her employment ended under circumstances that should trigger a disqualification and benefit limitation under AS 23.20.379.

TIMELINESS

Under a department regulation, 8 AAC 85.151, appeals of unemployment determinations must be initiated within 30 days. The regulation provides that "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." For her appeal to be considered on its merits, Ms. Swanson has to show that circumstances beyond her control caused her delay in starting her appeal.

DETS recorded that it mailed its adverse determination to Ms. Swanson on October 14, 2021. Applying the day-counting rules in the regulations (which slightly prolong the 30-day window), Ms. Swanson's request to appeal would ordinarily have been due November 16, 2021. DETS recorded that she initiated her appeal on December 2, 2021, 16 calendar days beyond that time. However, materials in the DETS file make it clear that she actually mailed her first appeal request no later than November 27, 2021,[1] which is five days less tardy. The December 2 date may correspond to a follow-up phone call from Ms. Swanson.

In the days before her denial was issued, Ms. Swanson was in active correspondence with a DETS employee about the details of her separation, sending voluminous information and offering to send more. This seems to have influenced her to think the matter had not been fully resolved. To confuse matters further, she received a second adverse decision in early November (issued November 8, 2021, mailed November 9, 2021; not included in the case record but reflected in other documents). This second decision, which arrived before the time had run on the first decision, would have also carried a 30-day appeal deadline, expiring later than the one in the first decision.

It is hard to be certain of what happened, given the passage of time before this appeal was referred, the incompleteness of the file supplied by the agency, and the erroneous recording of at least one key date. However, it is slightly more likely than not that Ms. Swanson did not appreciate that DETS had made a final decision on her separation issue until she received the November 8, 2021 decision, and she then relied on the appeal date given in that document, appealing well within the time it set. The confusion was understandable, the delay was small, and there is every indication that Ms. Swanson was trying her best at every stage to assert her position promptly and forcefully. I find that circumstances beyond Ms. Swanson's control led to the slight delay in filing her appeal.

FINDINGS OF FACT -- MERITS

Prior to the separation at issue in this case, Ms. Swanson was working as a nurse at Alaska Regional Hospital. She felt the hospital was mistreating her in various ways, and was suspicious that hospital management was trying to

1 Ex. 1, p. 5. The record does not contain the appeal instruction that were sent to Ms. Swanson. In the past, some UI documents have contained appeal instructions that have stated that the date of an appeal will be the date it is postmarked. *See, e.g., In re Rawlston*, No. 00 1634 (DLWD Appeal Tribunal 2000). This language may have been discontinued. The underlying regulatory language is ambiguous as to whether an appeal "filed . . . by mail" is effective when postmarked or received.

get rid of her. She did not want to lose her job and had involved her union in her dispute with management.

On February 25, 2021, Ms. Swanson was sent a letter from an insurance company indicating that one of her employee benefits was being terminated effective February 28, 2021.[2] Ms. Swanson interpreted this as an indication that a plan was afoot (and had been for some time previously) to terminate her employment. In fact, the letter resulted from a routine bureaucratic error, but this would not become apparent until much later.[3]

Ms. Swanson has impaired hearing. The hospital had tried to accommodate this disability for several years.[4] On February 26, 2021, the hospital took Ms. Swanson off the schedule, apparently in relation to concerns that she was not able to hear important communications relating to her patient care. There was an informal invitation to meet, followed on March 4, 2021 by a formal letter offering her accommodations such as a job transfer. The hospital sought to meet with Ms. Swanson over a period of about two weeks; while she was not wholly unresponsive to the requests, she failed to appear at a meeting that was reasonably but unilaterally scheduled by management on March 12, 2021. The hospital ended the employment relationship that day, saying that she had "voluntarily resigned" by failing to attend. The hospital notified Ms. Swanson of its decision by mail.[5]

Ms. Swanson did not attend the March 12 meeting because she did not believe the HR person conducting it was acting in good faith. There is no persuasive evidence that she was correct in this assessment, but it is a belief she genuinely held. Instead of attending the meeting, she contacted the hospital's chief nursing officer on the same date the meeting was set to occur (that is, before she had received the hospital's letter telling her she had "resigned") and attempted to engage with him regarding her claims of mistreatment.[6] Her letter to the chief nursing officer made it very clear she wished to keep her job.

Ms. Swanson's relationship with the hospital did not wholly end on March 12; indeed, hospital management met with her on March 29, 2021. She did not work any more shifts, however. The hospital's reported severance date of March 12, 2021 is probably the correct date of the end of Ms. Swanson's employment, with subsequent interactions being best seen as efforts to be reinstated.

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2 Ex. 1, p. 18.
3 *See* Ex. 1, p. 96.
4 *See, e.g.,* Ex. 2, p. 11 (July 2017 email).
5 Ex. 1, p. 122.
6 Ex. 1, pp. 47-48.

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 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

(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....

APPLICATION

The starting point for analyzing this separation is whether Ms. Swanson quit her employment with Alaska Regional Hospital, or whether she was discharged. The Division's Benefit Policy Manual states:

> Whether a separation is considered a discharge or a voluntary leaving depends on whether the employer or the worker was the moving party in causing the separation. The moving party in this sense is not necessarily the party who initiated the chain of events leading to the separation. Rather it is the party which, having a choice to continue the relationship, acts to end it, thus withdrawing any choice from the other party. . . . A party who has no choice in continuing the employment relationship cannot be the moving party.[7]

7 BPM at VL 135.05-3.

The Alaska Superior Court confirmed the above policy in *Tyrell v. Dept. of Labor*.[8] The court found that job abandonment does not automatically mandate a conclusion that a claimant intended to quit his job, observing:

> In every case [of constructive quits]... the real, underlying inquiry remains whether the employee intended to quit, which is the same thing as asking whether the employee voluntarily terminated the employment....

In this case, it is perfectly clear that Ms. Swanson had no intention of quitting. On the contrary, she was fighting for her job, albeit in a manner that may have seemed misguided at times. The hospital is the party that chose to end this employment relationship. Accordingly, the consequences of this separation will be analyzed on the basis that the separation was a discharge.

Beginning with the Commissioner Decision in *In re Rednal*, 86H-UI-213 (1986), and continuing with subsequent decisions,[9] 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. In order to bear out that burden, it is necessary that the employer bring forth evidence of sufficient quantity and quality to establish that misconduct was involved.

In this case, the employer chose not to participate in the hearing, and thus it must meet its burden based on the paper file. The burden is a heavy one, moreover, because "misconduct" in this context is not ordinary malfeasance or breach of protocol. It is instead defined as "a willful and wanton disregard of the employer's interest." Lesser conduct--"incapacity, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment"—is expressly excluded from the definition of "misconduct" in 8 AAC 85.095(d), quoted in the previous section.

Ms. Swanson almost certainly made an error in judgment when she decided to essentially boycott the March 12 accommodation meeting and take her concerns directly to a different manager. But there was nothing "wanton" about this conduct, and if it was committed in disregard of anyone's interest,

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8 No. 1KE-92-1364 CI (Nov. 4, 1993).

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

it was in disregard of Ms. Swanson's own interest, not her employer's. It was the act of an employee who erroneously believed she was the victim of a pre-ordained plan to terminate her, based in large part on a conclusion she leapt to from the benefit termination letter she had been sent on February 25. Ms. Swanson's interactions with management at times seem so sadly misguided as to raise concerns about her ability to exercise good judgment in other areas. But they are not "misconduct" as that term is defined in the regulation.

In reaching this conclusion, I do not suggest that the discharge was wrongful. The question we address here, however, is not whether the hospital 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.

DECISION

The appeal is timely. The employee's appeal is sustained. The Division's October 13, 2021 decision is **REVERSED**. No disqualification under AS 23.20.379(a), nor any benefit limitation under AS 23.20.379(c), may be imposed for the claimant's separation from Galen Hospital Alaska, Inc. (Alaska Regional Hospital).

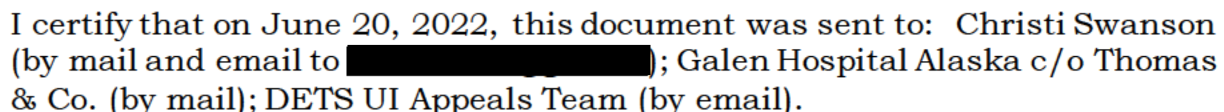
DATED June 20, 2022.

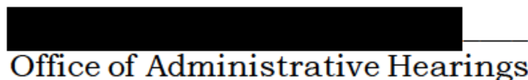
Christopher Kennedy
Administrative Law Judge

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 June 20, 2022, this document was sent to: Christi Swanson (by mail and email to ); Galen Hospital Alaska c/o Thomas & Co. (by mail); DETS UI Appeals Team (by email).



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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