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### APPEAL TRIBUNAL DECISION

**Docket number:** 21 2276 **Hearing date:** July 18, 2022

**CLAIMANT: EMPLOYER:**

SANDIN KIDDER WAL-MART ASSOCIATES INC

**CLAIMANT APPEARANCES: EMPLOYER APPEARANCES:**

Sandin Kidder None

#### CASE HISTORY

The claimant timely appealed a November 2, 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 in March 2020. She last worked on April 15, 2020. At that time, she worked full time as a meat department clerk.

The employer advised workers in April 2020 that they could take two weeks of leave if needed because of the effects of the COVID-19 pandemic. The claimant was particularly concerned about the pandemic because she lives with three family members with medical conditions that make them particular susceptible to complications of the COVID-19 virus. The claimant kept hearing of people at work getting sick, but the employer did not notify workers of exposure to the virus. Masks and other personal safety gear was not widely in use at that time. Community spread was high, so the claimant decided to take leave and see if the situation became safer for her to work in.

The claimant completed an application for a two week leave of absence and it was approved. The claimant expected to return to work at the end of April, but when she checked the employer’s electronic schedule, she was not listed as working. The claimant called several times and could not reach her manager by phone. The claimant went to the store, where she talked to a lead worker who asked if the claimant had called in daily during her leave. The claimant had not been advised that she was required to call while she was on leave, so she had not. She did not understand why she would have to call the employer, as she had been approved to be off work for two weeks. The claimant contacted the employer’s human resources office and she was advised she had been let go because she did not call daily.

#### 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

The claimant in this case initially took two weeks leave from work because of concerns regarding the COVID-19 pandemic and her medically fragile family members. The claimant was then discharged by the employer when she attempted to return to work because she had not called in daily during her leave of absence.

In Alcantra, Com. Dec. 83H-UI-087, June 6, 1983, the Commissioner held, in part:

"[A]n individual may have a 'first week' of unemployment when the individual ceases to perform services and again another 'first week' of unemployment when the employer-employee relationship is actually severed."

In Carlson, Com. Dec. 98 2336, November 19, 1998, the Commissioner held, in part:

A voluntary leaving does not occur until the worker has filed a claim for benefits in the week in which the worker left work or in a subsequent week.

As in Alcantra, the claimant in this case initially separated from work in the week ending April 18, 2020 when she began her leave of absence and claimed unemployment benefits. A second separation occurred in the week ending May 1, 2020 when the claimant was advised she was being let go for failing to call in during her leave.

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 took the action that first ended the employment relationship when she requested a leave of absence. The first separation is a voluntary leaving, so the Tribunal will consider if the claimant had good cause to leave the work at that time. The claimant left work because she lives with three people who have medical risk factors for severe illness or death from the COVID-19 virus. The risk of the virus spreading was high in the claimant’s community. The claimant sought and was granted a leave of absence to preserve her employment.

The Division’s Benefit Policy Manual, at VL 5-2 holds:

*C. Suitable Work*

*There is no disqualification if a worker leaves unsuitable work. A worker needs good cause only to quit suitable work.*

*Suitable work is defined as work in the worker's usual occupation or an occupation for which the worker is reasonably fitted by training, experience, and physical condition.*

*If the worker has accepted the conditions of employment, by remaining on the job a significant period of time, and not attempting to change the objectionable circumstance, the work is suitable. However, in cases where the work is detrimental to the claimant’s health, even though the claimant is capable of performing a particular job, the work may be deemed unsuitable.*

The claimant in this case left work not because of a possible detriment to her own health, but that of persons in her home. The claimant’s decision to limit her exposure was reasonable in light of the COVID-19 pandemic guidelines. The Tribunal concludes the work was not suitable for the claimant at the time she left. The penalties of AS 23.20.379 are not appropriate.

The claimant intended to return to work at the end of April after her leave, however she learned she had been discharged because she had not called the employer daily during her leave. The claimant did not recall being advised that she was required to call in daily and she had been told she was approved to be off work for two weeks. No documents in the records indicate the claimant was so advised. The Tribunal cannot find that the claimant’s actions in not calling the employer daily during her approved leave of absence to rise to the level of misconduct.

The Tribunal does not dispute an employer’s right to discharge a worker that does not meet their standards, however not all such discharges are for misconduct. The Tribunal finds the claimant was discharged for reasons other than misconduct and the penalties of AS 23.20.379 are not appropriate.

#### DECISION

The determination issued on November 2, 2021 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending April 18, 2020 through May 23, 2020, if otherwise eligible. The three weeks are restored to the claimant’s maximum benefits. The determination will not interfere with the claimant’s eligibility 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 July 22, 2022.

 Rhonda Buness, Appeals Officer