ALASKA DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT
DIVISION OF EMPLOYMENT AND TRAINING SERVICES
P.O. BOX 115509
JUNEAU, ALASKA 99811-5509

APPEAL TRIBUNAL DECISION

Docket number: 22 0113 **Hearing date:** June 14, 2022

CLAIMANT:	**EMPLOYER:**
SARAH THOMPSON	PERKUP ESPRESSO LLC
CLAIMANT APPEARANCES:	**EMPLOYER APPEARANCES:**
Sarah Thompson	None

DETS APPEARANCES:

None

CASE HISTORY

The claimant timely appealed a January 3, 2022 determination which denied benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant was discharged for misconduct connected with the work.

FINDINGS OF FACT

The claimant began work for the employer on December 20, 2014. She last worked on December 8, 2021. At that time, she worked full time as a barista.

On September 27, 2021, the employer consolidated their business operations and met with each of the remaining employees individually. The owner and manager met with the claimant, discussed with her their expectations as she moved to a new work site with new co-workers. The claimant was warned regarding ongoing tension and informed that if there were any problems, she would be terminated.

On December 7, 2021, an incident occurred in the workplace where the claimant observed a co-worker treating an elderly customer rudely. The claimant felt it was her responsibility as a senior staff member to hold her co-worker accountable for her actions. She confronted her co-worker, asking her why she was being rude to the long-time customer. Another co-worker intervened, shouting over both of the other employees, in an attempt to quiet things down. Throughout the course of the

shift, the claimant followed up with her co-worker, explaining why she had spoken up, and the two resolved the situation.

Another employee who was present later called the owner to complain about the claimant, alleging that the claimant demeaned and belittled her in front of customers and co-workers. The claimant denies engaging in this behavior and asserts that this co-worker was exaggerating the situation.

On December 8, 2021 at approximately 8:30 PM, the owner contacted the claimant by phone. The claimant had gone to bed early in anticipation of her next day's early shift, and was awakened by the call. The owner indicated that she did not know what to do about the situation that had occurred, and she terminated the claimant's employment during that phone conversation.

The claimant received later contact from her manager by text message, indicating that the owner and manager had planned to meet with the claimant on December 9, 2021 to discuss the incident that occurred on December 7, 2021. The manager stated that she was caught off guard by the termination, as that was not what had been discussed. The claimant felt that she was not given an opportunity to share her perspective on the incident, and that the owner took the side of the co-worker who complained.

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...

(2) was discharged for misconduct connected with the insured worker's last work.

8 AAC 85.095 provides in part:

(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....

CONCLUSION

"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 a sufficient quantity and quality to establish that misconduct was involved." Rednal, Comm'r Dec. 86H-UI-213, 8/25/86.

The employer did not participate in the hearing. The employer's documentary evidence is considered hearsay evidence, unsupported by sworn testimony of the claimant's supervisors or co-workers. Hearsay evidence is insufficient to overcome direct sworn testimony.

The Division's Benefit Policy Manual, Relations With Fellow Employees, MC 390.25-1 states, in part, that *"it is the responsibility of workers to get along with other employees to the best of their ability. However, because it is unlikely that anyone can have continually smooth working relationships with everyone, isolated instances of minor verbal disagreements among employees are not generally misconduct. The fact alone that a worker's fellow employees object to working with the worker does not make a discharge one for misconduct. If the employer fires the worker merely to keep peace, this is not misconduct on the part of the worker. The worker's actual conduct in violation of the employer's interest must be verified."*

The claimant in this case credibly testified that while she did verbally engage a co-worker, she did not raise her voice or yell, and her intent was to curtail the co-worker's rudeness toward a long-time customer. The employer's hearsay evidence did not establish that the claimant's actions rose to the level of misconduct as described in Regulation 8 AAC 85.095(d), above.

The Tribunal does not question an employer's right to discharge a claimant that does not meet its standards, but such a discharge is not always for misconduct. The Tribunal finds the claimant in this case was discharged for reasons other than misconduct and thus the penalties of AS 23.20.379 are not appropriate.

DECISION

The determination issued on January 3, 2022 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending December 11, 2021 through January 15, 2022, 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 June 15, 2022.

Solara Ames
Solara Ames, Appeals Officer