

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

In the Matter of)
)
RODNEY GRANT) OAH No. 22-0365-LUI
) Agency No. 22 0018 ER 10
_____)

APPEAL DECISION

Docket Number: 22 0018 ER 10

Hearing Date: May 11, 2022

CLAIMANT APPEARANCES:

None

EMPLOYER APPEARANCES:

Fred Meyer Stores, Inc., through its representative, Hope Summers, with Equifax, TALX UCM Services

CASE HISTORY

The employer in this case, Fred Meyer Stores, Inc., appealed a December 3, 2021, notice of non-monetary determination by the Department of Labor, Unemployment Insurance Claim Center (Division). The determination concluded that the claimant, Rodney Grant, voluntarily took a leave of absence from his employer Fred Meyer, with good cause. As such, it held he was eligible for UI benefits per AS 23.20.379. Fred Meyer appealed that determination, and the Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings. 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 telephonic hearing on May 11, 2022. Fred Meyer appeared and offered testimony under oath through its representative Hope Summers, with Equifax TALX UCM Services, and Sara Green, Assistant Store Manager, at the East Fairbanks, Alaska, Fred Meyer. Jarrod Zerbe, also from the East Fairbanks Fred Meyer, participated in the hearing as an observer.

The issue on appeal is whether the claimant, Mr. Grant voluntarily took a leave of absence from his employment with Fred Meyer for good cause due to health reasons thereby entitling him to UI benefits.

FINDINGS OF FACT

Mr. Grant was employed fulltime as a liquor store clerk at the East Fairbanks Fred Meyer. On October 25, 2021, he was scheduled to open the liquor store. When he did not show up for work, he was contacted by his supervisor. He reported that he and his wife were extremely sick and that they were going to go get tested for COVID.¹

Under Company policy applicable at the time, if an employee was either exposed to COVID or symptomatic with COVID, they were required to get tested. If they tested

¹ Sara Green Testimony; Ex. 1, pp. 18-19.

positive, or if a member of their household tests positive, they were required to quarantine at home for 14 days and avoid coming into work.²

Initially, Mr. Grant did not test positive for COVID, but his wife did. Consequently, he was prevented from coming into work for approximately two-weeks based on Fred Meyer policy. At the end of that two-week period, and prior to coming back into work, Fred Meyer had Mr. Grant again test for COVID. At that point, he tested positive. Ms. Green testified that Mr. Grant was originally prevented from coming into work for two-weeks based on his wife having tested positive for COVID and then at the end of that period, he was prevented from coming into work because he himself tested positive. Ms. Green further testified that Mr. Grant's first day back into work was November 17, 2021.³

When Mr. Grant returned on that date, however, he was disciplined and suspended for three additional days, without pay. This was because of his having not initially called in or attempted to notify his supervisor in advance of missing the beginning of his shift on October 25, 2021. Ultimately, his first full day back on the job after being out on October 25, 2021, was November 20, 2021.⁴

During this period, Fred Meyer paid workers emergency pay for up to 14-days based on having tested positive for COVID. In Mr. Grant's case, receipt of this emergency pay was delayed due to issues related to his untimely submission of paperwork and test results.⁵

Ms. Green further confirmed that Mr. Grant received emergency pay for October 25, 2021, through November 7, 2021. Both Ms. Green and Ms. Summers testified that Fred Meyer was only challenging the payment of UI benefits to Mr. Green for the period during which he received unemployment benefits and no emergency pay, from November 8 through November 20, 2021. Further, this is on the basis that he was not "able and available" to work as required by Alaska law.⁶

On December 3, 2021, the Division's UI claim center issued a notice of non-monetary determination. It concluded that Mr. Grant's voluntarily leave of absence from Fred Meyer was based on health reasons and good cause. Consequently, it held that he was eligible for UI benefits.⁷ Fred Meyer timely appealed that determination.⁸

² Sara Green Testimony.

³ Sara Green Testimony. It is noted, however, that there are, at-most, 24 days between October 25, 2021, and November 17, 2021. As such, even if all testing occurred immediately, and assuming there was no overlap in the consecutive 14-day quarantine periods applicable to Mr. Grant and his wife, he should have arguably been excused from work for a period of 28-days from October 25 – November 24, 2021. As will be addressed below, due to the analysis applicable here, this apparent time discrepancy is a non-issue.

⁴ Sara Green Testimony.

⁵ Sara Green Testimony.

⁶ Sara Green Testimony; Hope Summers Testimony; Ex. 1, p. 3.

⁷ Ex. 1, pp. 8-10.

⁸ Ex. 1, pp. 2-3.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.378 - Able to Work and Available For Suitable Work

- (a) An insured worker is entitled to receive waiting-week credit or benefits for a week of unemployment if for that week the insured worker is able to work and available for suitable work. An insured worker is not considered available for work unless registered for work in accordance with regulations adopted by the department. An insured worker may not be disqualified for failure to comply with this subsection if
 - (1) the insured worker is not available for work because the insured worker
 - (A) is ill or disabled;

AS 23.20.379 - 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....
- (c) The department shall reduce the maximum potential benefits to which an insured worker disqualified under this section would have been entitled by three times the insured worker's weekly benefit amount, excluding the allowance for dependents, or by the amount of unpaid benefits to which the insured worker is entitled, whichever is less.

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).

AS 23.20.385 - Suitable Work

- (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.

APPLICATION

The issue in this case is whether Mr. grant had good cause for taking a temporary leave of absence from his employer due to health reasons, from October 25 – November 20, 2021. Or alternatively, whether, because he was not 'able and available' to work under AS 23.20.378(a)(1), he is barred from receiving UI benefits.

AS 23.20.378(a)(1) requires that to be eligible for benefits, a claimant must be able and available to work. However, that provision is not read in isolation. AS 23.20.379(a)(1) effectively allows a claimant to still receive benefits if they left suitable employment 'for good cause.' In determining good cause, the Division is entitled to consider whether the claimant left work due to a disability or illness making it impossible to perform their work duties and if the claimant has no other reasonable alternative but to leave work.⁹ Another factor the Division is entitled to consider is whether the claimant

⁹ 8 AAC 85.095(c)(1).

voluntarily left work due to an illness of, or to take care of, an immediate family member.¹⁰

On March 26, 2020, Alaska also enacted a Temporary and Special Act relating to COVID and UI benefits. It provided that an insured worker, who is otherwise qualified to receive a benefit, may not be disqualified for failure to comply with AS 23.20.378(a) because of conduct by the worker related to COVID, including 1) providing care, including medical care, to one or more persons; or 2) preventing or limiting the spread of COVID.¹¹


Here, Fred Meyer's own policy and procedures kept Mr. Grant from coming into work for most of the period in question from October 25 through November 17, 2021. This was because both he and/or his wife had tested positive for COVID. This is also precisely the circumstance that the above-referenced code and regulatory provisions address and prevent a claimant from being disqualified to receive UI benefits.

It is understood that Fred Meyer may take issue with Mr. Grant's receipt of benefits from November 17-20, 2021, since during this period he was suspended from work as opposed to being absent from work because of COVID. However, that said, even based on the testimony offered by Fred Meyer, the reason for Mr. Grant's three-day suspension was because he did not call into work and because he and his wife on that date were extremely ill. While Fred Meyer may have suspended Mr. Grant for three days for not having first called in to work, it cannot be concluded under the circumstances, that there was a lack of good cause for his having failed to do so.

DECISION

The Division's December 3, 2021, notice of non-monetary determination is **AFFIRMED**.

DATED May 20, 2022.

A black rectangular redaction box covers the signature area of the Administrative Law Judge.

Z. Kent Sullivan
Administrative Law Judge

¹⁰ 8 AAC 85.095(c)(3).

¹¹ Chapter 4, Section 1, Alaska Temporary and Special Acts (March 25, 2020) (effective until repealed on April 1, 2021).

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 20, 2022, this document was sent to: Rodney Grant (by mail); Equifax TALX UCM Services, Inc. (by mail and email); and a courtesy copy to the DETS UI Appeals Team and DETS UI Technical 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.

**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