

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

In the Matter of)
)
SEAN W. NIEWOEHNER) OAH No. 22-0405-LUI
) Agency No. 22 0242 ER 10
_____)

APPEAL DECISION (SEPARATION)

Docket Number: 22 0242 ER 10

Hearing Date: May 23, 2022

CLAIMANT APPEARANCES:

EMPLOYER APPEARANCES:

Sean Niewoehner

Seena Poopathi

CASE HISTORY

Alaska Travel Adventures, Inc. (ATA) timely appealed a February 23, 2022 determination finding that its employee Sean Niewoehner had been discharged from employment for reasons other than misconduct. The determination declined to impose a disqualification and benefit limitation under AS 23.20.379. Notice of the decision was mailed on February 24, 2022.

The Department of Labor and Workforce Development referred the appeal to the Office of Administrative Hearings in April of 2022. 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 May 23, 2022. Mr. Niewoehner and ATA manager Seena Poopathi provided testimony under oath. The issue presented at hearing was whether Mr. Niewoehner separated from his employment with ATA under circumstances that should have triggered a benefit reduction.

FINDINGS OF FACT

ATA is a 500-employee company that provides services to cruise lines and passengers. It hired Mr. Niewoehner in late January of 2022 as a data entry clerk in its finance staff in Juneau.

Mr. Niewoehner was hired with the expectation that he would need to be trained. Training had to occur during normal business hours, meaning he would have to get to work by 9:30 or 10:00 each morning. After that, he could transition to flexible hours. Mr. Niewoehner found the mid-morning starts challenging because, in his words, "I am not a morning person."

Mr. Niewoehner was having other difficulties on the job in his first week. As he explained with some relish during the hearing, he had eaten a chipotle burrito which caused a condition that made it difficult for him to sit down. He was also finding the

work difficult, and felt he was under pressure to speed up and become more accurate. He did not want to continue working at ATA, but he felt he could not quit. He says this was because he believed he might not be paid if he quit of his own volition before his first paycheck. One may infer from the circumstances that he may also have been concerned about his eligibility for unemployment benefits if he resigned.

Mr. Niewoehner told his supervisor, "You should fire me." He told her, however, that he refused to quit and would wait until he was fired. On three successive days he pressured her to fire him, while performing poorly and displaying a "stubborn" attitude at work. On the third day, his supervisor granted his wish and let Mr. Niewoehner go.

Mr. Niewoehner then applied for UI benefits, reporting that he had been discharged because he could not keep up with the workload. Because the employer did not return any information to DETS about the circumstances of the separation, DETS had no practical choice but to accept this explanation.

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.

* * *
- (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).
- (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) - 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

DETS was not at fault in taking the employee's version of this separation at face value, since it had heard nothing from the employer. However, the appeal process gives a claimant or an employer a second opportunity to bring forward any evidence that may not have been submitted previously.

This case turns on whether Mr. Niewoehner's separation from ATA is viewed as a discharge of a voluntary separation on his part. If it is viewed as a discharge, Mr. Niewoehner could not be assessed an AS 23.20.379 disqualification and benefit limitation because the discharge was not for "misconduct" as that term is defined by regulation.

However, the only rational way to view a separation where the employee repeatedly asks and goads the employer to fire him is as a voluntary separation.¹ Mr. Niewoehner wanted to be discharged, he would not take "no" for an answer, and eventually he got what he wanted. To put it another way, he had the choice to remain employed, but he deliberately chose to press for an end to the employment relationship.

The Benefit Policy Manual does not directly address this situation, where an employee actively seeks to be fired. Its overall message, however, is that the "moving party [the party charged with bringing about the separation] is the party who, having a choice to continue the relationship, acts to end it."² Mr. Niewoehner is the party who made the real choice here.

As a voluntary separation, the decision to leave the job does not fit any of the criteria in 8 AAC 85.095(c), quoted above. Mr. Niewoehner "left the insured worker's last suitable work voluntarily without good cause." Therefore, his deliberate effort to bring his employment with ATA to an end must lead to the consequences that attend a voluntary quit.

1 This case is to be distinguished from the situation where a frustrated employee impulsively asks an employer, "Why don't you fire me?", or words to that effect. Mr. Niewoehner's goading was a deliberate campaign spanning several days.

2 BPM at VL 135.05-3.

DECISION

The employer's appeal is sustained. The Division's February 23, 2022, notice of determination is **REVERSED**. Mr. Niewoehner shall be assessed the disqualification and benefit limitation provided for in AS 23.20.379(a) and (c).

DATED June 2, 2022.

[REDACTED]

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 2, 2022, this document was sent to: Sean Niewoehner (by mail); Seena Poopathi (by email to [REDACTED]); Alaska Travel Adventures, Inc. (by mail and email); DETS UI Appeals Team (by email).

[REDACTED]
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