

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

In the Matter of)	
)	
JASON JACOBY)	OAH No. 22-0451-LUI
_____)	Agency No. 22 0370 ER 16

APPEAL DECISION

Docket Number: 22 0370 ER 16

Hearing Date: June 3, 2022

CLAIMANT APPEARANCES:

Jason Jacoby

EMPLOYER APPEARANCES:

Rick Westover, general manager and
Jeremy Campbell, assistant manager,
Goldrush Pancakes No. 3, Inc.

CASE HISTORY

The employer in this case, Goldrush Pancakes No. 3, Inc., timely appealed a March 24, 2022, determination issued by the Unemployment Insurance Claim Center within the Alaska Department of Labor and Workforce Development. The determination concluded that the claimant, Jason Jacoby, was discharged by Goldrush under circumstances that did not show a willful disregard for the employer's interest. Consequently, UI benefits were allowed per AS 23.20.379. Goldrush 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 June 3, 2022. Goldrush participated and provided testimony under oath through its general manager, Rick Westover, and its assistant manager, Jeremy Campbell. The claimant, Jason Jacoby, also testified under oath. The issue on appeal is whether Mr. Jacoby was discharged by Goldrush under circumstances amounting to willful misconduct, thereby disqualifying him from UI benefits.

FINDINGS OF FACT

The claimant, Jason Jacoby, was employed by Goldrush as a combination table busser and dishwasher, beginning May 26, 2021, and ending February 9, 2022.¹

¹ Ex. 1, p. 8; Jeremy Campbell Testimony. The record and testimony were unclear on the last day Mr. Jacoby may have physically worked. His completed claimant discharge questionnaire identifies February 9, 2022, as his last day of work. Ex. 1, p. 8. However, as Mr. Campbell and Mr. Westover testified, February 9, 2022, was likely the date Mr. Jacoby's discharge documentation was completed. But they indicated that his last physical day of work may have been earlier. However, they were unclear on precisely when it was. Jeremy Campbell Testimony; Rick Westover Testimony. In any event, both parties appear to agree that Mr. Jacoby was discharged as of February 9, 2022. Ex. 1, p. 8; Jeremy Campbell Testimony; Rick Westover Testimony.

Prior to being discharged, Goldrush had some issues and concerns with Mr. Jacoby arriving to work late. He would sometimes arrive a ½ hour to an hour after his shift began. Mr. Campbell testified that Mr. Jacoby may have been written up for this, however, Mr. Jacoby had refused to sign any such documentation and it was not submitted as evidence at time of the hearing. Prior to Mr. Jacoby's termination, he had never previously completely failed to appear for a shift altogether. He had, however, been warned that if he continued to show-up for his shifts late, Goldrush was going to have to terminate him.²

On the date giving rise to his discharge, Mr. Jacoby was scheduled to work a shift, but failed to timely appear. Throughout the day, Mr. Campbell attempted to contact him telephonically, but could never get in touch with him. Mr. Jacoby also never appeared at work on that date, and never provided any explanation for his absence. He was ultimately discharged by Goldrush based on his failure to appear for his shift and provide an explanation for his absence.³

At the hearing, Mr. Jacoby did not dispute any of the testimony Goldrush provided through either Mr. Westover or Mr. Campbell. To the contrary, he testified that their recitation of the facts and circumstances surrounding his discharge was accurate.⁴

Mr. Jacoby filed for UI benefits on March 6, 2022.⁵ In his claimant discharge questionnaire, he indicated that he was “let go in the middle of a shift” and identified the reason for his discharge as “other.”⁶ No additional explanation was provided.

Although the UI Claim Center attempted to contact both Goldrush and Mr. Jacoby in advance of its determination to glean more details concerning Mr. Jacoby's discharge, it was unsuccessful in doing so.⁷ On March 24, 2022, it issued a determination concluding that Mr. Jacoby was discharged for reasons other than misconduct in connection with his work. As such, UI benefits were allowed.⁸ Goldrush timely appealed that determination, contending in its appeal request that it had never received any paperwork from the Division concerning Mr. Jacoby's discharge and that he had been a no call, no show.⁹

EXCERPTS OF RELEVANT PROVISIONS OF LAW

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...

² Jeremy Campbell Testimony.

³ Jeremy Campbell Testimony.

⁴ Jason Jacoby Testimony.

⁵ Ex. 1, p. 16.

⁶ Ex. 1, p. 8.

⁷ Ex. 1, pp. 10-15.

⁸ Ex. 1, pp. 2-5.

⁹ Ex. 1, pp. 1-2.

- (1) left the insured worker's last suitable work voluntarily without good cause; or
- (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; or
- (2) a claimant's conduct off the job, if the conduct
 - (A) shows a willful and wanton disregard of the employer's interest; or
 - (B) either
 - (i) has a direct and adverse impact on the employer's interest; or
 - (ii) makes the claimant unfit to perform an essential task of the job.

...

APPLICATION

As noted, the issue on appeal is whether Mr. Jacoby was discharged by Goldrush under circumstances amounting to willful misconduct, thereby disqualifying him from UI benefits. Per AS 23.20.379(a)(2), an employee is disqualified for benefits if they were discharged for misconduct connected with their last work. "Misconduct" in this context, is defined as:

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; or a claimant's conduct off the job, if the conduct shows a willful and wanton disregard of the employer's interest; or either has a direct and adverse impact on the employer's interest; or makes the claimant unfit to perform an essential task of the job.¹⁰

Based on the undisputed facts of this case, Mr. Jacoby had previously been tardy in arriving to work and had been warned that if he continued to do so, he would be terminated. On the date in question, he failed to arrive to work at all, failed to call his employer providing an explanation for his absence, and failed to make any effort to reestablish contact with his employer or continue his position. He is properly

¹⁰ 8 AAC 85.095(d).

characterized as a no call, no show, and his actions demonstrated willful misconduct and a disregard for his employer's interests.

DECISION

The Division's March 24, 2022, determination is **REVERSED**.

DATED June 9, 2022.



Z. Kent Sullivan
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 9, 2022, this document was sent to: Jason Jacoby (by email); Goldrush Pancakes No. 3, Inc. (by email); DETS UI Appeals Team (by email); 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**

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