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

In the Matter of	)	
	)	
KRISTEN E. FALKE	)	OAH No. 22-0485-LUI
	)	Agency No. 22 0392 ER 16

APPEAL DECISION

Docket Number: 22 0392 ER 16

Hearing Date: July 5, 2022
July 7, 2022

CLAIMANT APPEARANCES:

Kristen Falke (earlier session)

EMPLOYER APPEARANCES:

Brendan McCann

CASE HISTORY

Home on Mulchatna (Mulchatna) timely appealed an April 4, 2022 determination by the Division of Employment and Training Services (Division) that its employee Kristin Falke was "discharged for reasons other than misconduct." Based on that determination, DETS declined to impose a disqualification under AS 23.20.379(a)(2) and a benefit limitation under AS 23.20.379(c). Notice of the decision was mailed on April 5, 2022, and Home appealed on April 8, 2022.

The Department of Labor referred the appeal to the Office of Administrative Hearings on May 16, 2022. Under the agreed terms of referral, an administrative law judge (ALJ) 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 July 5, 2022 and July 7, 2022. Brendan McCann and Ms. Falke testified under oath. The issue presented at hearing was whether Ms. Falke was separated from her employment with Mulchatna under circumstances that triggered a disqualification and benefit reduction.

FINDINGS OF FACT

Brendan McCann is the owner, operator, and manager of Multchatna, an assisted living facility for adult men with special needs. Kristin Falke worked

for Mulchatna as a direct care provider for a little more than a year until February 28, 2022. During that time, Mulchatna had three clients, two of whom lived at the facility. It also had 3 employees: Mr. McCann, Ms. Falke, and a man named Jon.

Although the details of Ms. Falke's separation from employment with Mulchatna are somewhat murky, the following generally appears to be true: Ms. Falke was scheduled to work on February 25, 2022, but she texted Mr. McCann to let him know her vehicle was stuck in her ex-husband's driveway so she could not come to work. Mr. McCann drove to the ex-husband's residence to try to help pull out the vehicle, but he claimed the vehicle "wasn't really stuck, not really anyway" when he got there.

Ms. Falke was eventually able to go to work that day but later called Mr. McCann in tears. She told him she was having personal issues and would be taking the weekend off. She claimed she needed time before she could provide the support the clients needed and hoped the other employee would be able to help, as she had covered for him previously.

Mr. McCann became very frustrated, as Mulchatna was already short-staffed. The other employee had Covid, so with Ms. Falke unavailable, Mr. McCann had to work over the weekend. Mr. McCann expressed frustration that Ms. Falke had been hired "to give [him] respite," which she was provide while absent.

On February 28, 2022, Ms. Falke was scheduled to work all day. She called Mr. McCann in the morning and asked whether she could use the company car because the roads were bad. He declined, which he believed made her mad, so she used her own vehicle that day. She came home in the middle of her shift between client appointments to get something to eat, and then called Mr. McCann to tell him she was stuck in her driveway again. She called right before she was scheduled to take a client to the gym, which upset Mr. McCann. They got into a heated discussion, during which he told her he needed her time sheets and they needed to talk, and she told him she was in no condition to handle his arrogance. According to Mr. McCann, she also told him to bring her last paycheck, which he said he interpreted to mean that she was quitting, although he later testified that he did not accept her resignation and fired her.

When asked to clarify the main reasons for the discharge, Mr. McCann said the "unexcused absences" on February 25, 2022 and February 28, 2022 were the "last straw." But he claimed there were multiple contributory factors that made her "too much trouble" and unreliable to keep on staff. He claimed she had threatened to resign multiple times, which he found unnerving; she contacted

another agency to complain about scheduling issues he believes she should have discussed with him, which he considered "insubordinate;" she tried to "make work" for him by asking for a performance appraisal; and she had problematic personal issues. He also said he had warned Ms. Falke verbally about unexcused absences and last minute cancellations previously, although he had no documentation of that or the dates when any such absences or cancellations occurred. He said Mulchatna does not have a human resources department and acknowledged that Mulchatna does not have a policy specifying the amount of advance notice employees are required to give if they are unable to come to work.

Ms. Falke told a version of events. She said she was stuck in her driveway on February 25 and February 28, 2022 and believes Mr. McCann was just irritated that he had to work when she could not. She claims she never failed to show for work without calling first, had no unexcused absences, and had no prior warnings. She said she loved her clients and considered quitting before but never told Mr. McCann she was going to resign. She said Mr. McCann was derogatory towards her and claimed he treated her unfairly.

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.379 states 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; or

(2) was discharged for misconduct in connection with the insured's last work.

(b) 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

(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;

APPLICATION

Although there is some question from the evidence whether Ms. Falke was discharged or quit her employment with Mulchatna, the preponderance of the evidence shows that she was discharged. In general, whether an employee's separation is a discharge or a voluntary leaving depends on whether the employer or the worker was the moving party in causing the separation. The Benefits Policy Manual describes the moving party as "the party who, having a choice to continue the relationship, acts to end it." Here, even if Ms. Falke did ask Mr. McCann to bring her "last paycheck," and Mr. McCann construed this as a resignation, he testified that he did not accept her resignation and fired her. On these facts, Mr. McCann was the moving party who acted to end the employment relationship.

As for whether Ms. Falke was discharged for misconduct, the department has taken the following approaching approach, beginning with the Commissioner Decision in *In re Rednal*, 86H-UI-213 (1986), and continuing with subsequent decisions[1]:

> 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

[1] *E.g., In re Ecker*, 07 0530 (DLWD Appeal Tribunal 2007); *In re Mendonsa,* Comm'r Dec. 04 0577 (2004).

> forth evidence of sufficient quantity and quality to establish that misconduct was involved.

The burden is a heavy one, because "misconduct" in the context of the unemployment program is not ordinary malfeasance or breach of protocol. It is instead defined as "a willful and wanton disregard of the employer's interest." Lesser conduct--"inefficiency, unsatisfactory performance as the result of incapacity, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment"—is expressly excluded from the definition of "misconduct" in 8 AAC 85.095(d), as set forth in the regulation.

There is an additional concept in unemployment cases that is also important here. It is the principle that the conduct that must rise to the "willful and wanton" threshold is the final conduct that precipitated the dismissal.[2] An explained in *In the Matter of Tanya* Lange, 21 1088 16 (DLWD Appeal Tribunal 2022), "[a]n employee may commit a number of acts in the course of employment that would fit the definition of 'misconduct' used in unemployment cases, but if the employer chose to discipline those actions with something other than discharge, they may be largely irrelevant to characterizing the final separation. Thus, if an employee running a restaurant has been warned repeatedly about illegal hiring of minors—a deliberate act, and a firing offense—but the real reason for a later discharge is poor financial performance, the fact that the illegal hiring had occurred does not transform the firing into a discharge for "misconduct."[3]

In this case, although Mr. McCann testified that there were multiple factors contributing to Ms. Falke's misconduct, he eventually fired her based on the last minute cancellations on February 25 and February 28, 2022. Because these actions triggered the discharge, they must fit the definition of misconduct to support a disqualification and benefit limitation under the unemployment program. The evidence Mr. McCann presented is insufficient to meet his burden of showing that Ms. Falke's actions were misconduct. Although Mr. McCann claimed Ms. Falke had been warned about last minute cancellations before and suggested she was lying about being stuck in the driveway on February 25 and 28, Ms. Falke told an equally plausible version of events: that she was actually stuck and needed help to pull out her vehicle so she could go to work, which she eventually did, at least on February 25, 2022. Because the

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[2] *See, e.g., In re Gibson,* 99 0280 (DLWD Appeal Tribunal 1999) ("If the act causing the discharge cannot be construed as misconduct . . ., then a discharge for that reason is not misconduct, even if the worker has committed other acts of misconduct.").

[3] *Cf.* Benefit Policy Manual at MC 385-1.

evidence is insufficient to show that Ms. Falke's actions showed a willful or wanton disregard of her employer's interest, the discharge here was not for misconduct, and the disqualification and benefit limitation in AS 23.20.379(a) and (c) may not be imposed.

In reaching this conclusion, I make no determination regarding the legitimacy of Mr. McCann's decision to terminate Ms. Falke's employment. The question addressed in this case is not whether Mr. McCann was justified in ending the employment relationship – which indeed appears to have deteriorated – but whether Ms. Falke's final actions resulting in the discharge were of a kind that should disqualify her from collecting unemployment. They were not.

DECISION

The Division's determination issued on April 4, 2022 is **AFFIRMED**. No disqualification under AS 23.20.379(a)(2), nor any benefit limitation under AS 23.20.379(c), may be imposed for the claimant's separation from Multchatna.

DATED July 29, 2022.

[redacted]
Lisa M. Toussaint
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 July 29, 2022, this document was sent to: Kristen Falke (by mail and email); Home on Mulchatna (by email and email). A courtesy copy has been emailed to the DETS UI Appeals Team.

[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
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