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: 23 0652 **Hearing date:** December 1, 2023

CLAIMANT:	**EMPLOYER:**
ALEXANDER MORROW	DRG EMPLOYER LLC

CLAIMANT APPEARANCES:	**EMPLOYER APPEARANCES:**
Alexander Morrow	Sara Dittrich

CASE HISTORY

The claimant timely appealed a September 1, 2023 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 April 17, 2021. He last worked on August 2, 2023. At that time, he worked full-time as a server.

On July 28, 2023, the employer was advised by a worker that was resigning to go to school that the worker was uncomfortable with the claimant because he physically touched her on multiple occasions after she told him to stop. The worker held that she had told managers about unwanted touching in the past and that she had tried to contact the employer's human resources office on one occasion. The claimant recalled that the coworker in question had told him to stop touching her, but he thought she was kidding because she tickled and touched the claimant as well and he believed they had a friendly relationship which included mutual physical contact.

After hearing the complaint, the employer suspended the claimant without pay while they looked into the matter. The employer spoke with other workers who also complained about the claimant. One worker described to the employer that they had observed the claimant approach a new worker and grab her arms to physically move the worker out of the way. The claimant recalled that the new

coworker had been standing and blocking customers who were trying to get past her. The claimant spoke to the coworker twice but she did not hear him so he moved her physically out of the way. The claimant was later told that the new coworker did not like being touched. The claimant avoided touching her after that and tried to maintain physical distance at all times. Another worker told the employer that the claimant had grabbed her forearms and would not let go. The claimant denied that he grabbed the coworker's arms. He recalled that the coworker had "flipped him off" and he placed his hand over hers and told her not to do that.

The employer's harassment policy holds that unwanted touches constitute sexual harassment. The employer had no record of previous harassment complaints about the claimant to the human resources office. The claimant had not been warned that his actions were placing his job in jeopardy. The employer decided that because of the number of complaints, the claimant should be discharged despite not having been warned.

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

The claimant in this case was discharged because coworkers reported that claimant physically touched them after they asked him not to.

> *Misconduct cannot be established on the basis of unproven allegations. Cole, Com. Dec. 85HUI006, January 22, 1985.*
>
> *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, Com. Dec. 86H-UI-213, August 25, 1986.*

The decision in this matter turns on the weight of the evidence. In Weaver, Com. Dec. 96 2687, February 13, 1997. The commissioner has held in part:

> *Uncorroborated hearsay evidence must normally be given less weight than that of the sworn testimony of eyewitnesses to an event. Only if first-hand testimony is clearly not credible, should hearsay statements be considered more reliable.*

In Douglas, Com. Dec. 85H-UI-069, April 26, 1985, paraphrasing AS 44.62.460(d), the commissioner held in part:

> *"Hearsay evidence may be used to supplement or explain direct evidence but is, by itself, insufficient to support a finding unless that evidence would be admissible over objection in a civil action".*

The employer's representative testified based upon information she received from other parties. The claimant provided credible sworn testimony that he did not physically touch coworkers after he was asked not to, and that he did not inappropriately touch coworkers at any time. 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 September 1, 2023 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending August 5, 2023 through September 9, 2023, 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 December 4, 2023.

Rhonda Buness, Appeals Officer