



APPEAL TRIBUNAL DECISION

Docket number: 23 0725 **Hearing date:** January 2, 2024

CLAIMANT:

BRITTNEY SIMS
[REDACTED]
[REDACTED]

EMPLOYER:

RED POINT CONSTRUCTION LLC
[REDACTED]
[REDACTED]

CLAIMANT APPEARANCES:

Brittney Sims

EMPLOYER APPEARANCES:

Kaela Lacosta
Chris Harsh

CASE HISTORY

The claimant timely appealed an October 6, 2023 determination which denied benefits under Alaska Statute 23.20.379. The issue before the Appeal Tribunal is whether the claimant voluntarily quit suitable work without good cause or was discharged for misconduct connected with the work.

FINDINGS OF FACT

The claimant began work for the employer on April 24, 2023. She last worked on August 30, 2023. At that time, she worked full time as a project manager.

On her last day of work, the claimant's supervisor, the vice president, came into the claimant's office and closed the door and sat down to talk to the claimant about her attendance and performance. The vice president had heard complaints from staff about the claimant's excessive absences and poor performance related to that. He told the claimant he understood she had some personal issues but that she needed to do better and improve her attendance.

The claimant had missed work and had worked from home on occasion because she was dealing with issues related to the process of prosecution of a former abuser. The claimant was stressed by what she perceived as being yelled at about her performance in the closed room, particularly because of her recent history of having been abused. The claimant became emotional. The vice president was frustrated and told the claimant. "this isn't working out" and left her office.

The claimant understood the supervisor's final statement to mean she was discharged. She did not think it could mean anything else following the complaints about her performance. She packed her personal belongings and left the office. She did not consider discussing the matter with anyone in the office before leaving, understanding that her supervisor had the authority to discharge her.

The vice president later noted the claimant was gone along with her personal belongings. A coworker contacted the claimant with the vice president's knowledge and then advised the vice president that the claimant said she was not returning. The vice president held in the hearing that he had not intended to discharge the claimant as he left her office and if he had, he would have made it clear that was the action he was taking and he would have taken immediate steps to limit the claimant's access to company records.

Upon learning that the claimant did not intend to return to work, the vice president had the claimant's final paycheck printed and the coworker brought it to the claimant and collected her keys and the employer's computer.

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...
 - (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.

8 AAC 85.095 provides in part:

- (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) provides, in part:

- (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.

CONCLUSION

The first issue before the Tribunal is whether the claimant voluntarily quit suitable work or whether she was discharged. A discharge is "a separation from work in which the employer takes the action which results in the separation, and the worker does not have the choice of remaining in employment."

8 AAC 85.010(20). Voluntary leaving means a separation from work in which the worker takes the action which results in the separation, and the worker does have the choice of remaining in employment. Swarm, Com. Dec. 87H-UI-265, September 29, 1987. Alden, Com. Dec. 85H-UI-320, January 17, 1986.

The employer established that he had no intention to discharge the claimant at that time, as the purpose of the counseling was to get the claimant to improve her attendance despite her personal issues. The employer's parting words, "this isn't working out" on their own are not reasonably understood to be a discharge. The claimant held that she understood the employer's vague phrase to mean he was discharging her, however he had just been telling her that he wanted her to improve her attendance, which makes no sense if he intended to discharge the claimant.

The Division's Benefit Policy Manual, VL 135.2, Discharge or Voluntary Leaving, Communication or Miscommunication of Discharge, holds:

Assumption of discharge not dispelled

If the worker assumes the worker has been discharged and communicates that assumption to the employer, and the employer makes no effort to correct the worker's assumption, the resulting separation is a discharge.

Example: A claimant took the afternoon off without permission from his employer. The employer called the claimant at home and expressed his dissatisfaction. The claimant asked whether he should go back into work that day, and the employer said it was not necessary. The claimant interpreted the employer's reply to mean he had been fired and told the employer that he would be in the next day to turn in his keys. The employer did nothing to dispel the claimant's assumption that he had been discharged. The separation was held to be a discharge. (75A-255)

On the other hand, if the worker does not attempt to clarify the matter, when it is reasonable for the worker to do this, the separation is a voluntary quit.

Example: An employer agreed to give a claimant three days off, and told the claimant to call when she was able to return to work. Later, the claimant called, and asked if she could come and pick up her check. When she went in, the employer was on the phone and told the claimant to take her check and leave. The claimant did so, assuming she was fired. Because the claimant did this, without verifying her status with the employer, the Tribunal held that she quit without good cause. (99 2087, September 13, 1999)

The Tribunal finds that the claimant in this case had a responsibility to verify the employer's intent following his vague parting statement. Since she did not take that step, the separation is a voluntary quit and the Tribunal will consider if the claimant had good cause to leave the work at the time she did.

Regulation 8 AAC 85.095(c) provides seven reasons that the Department will consider when determining good cause for voluntarily leaving work. The claimant in this matter did not leave work for one of the allowable reasons. The regulation also directs the Department to consider the suitability of the work as laid out in AS 23.20.385(b). The claimant did not establish that the work was a risk to her health, safety or morals, or that she was not physically fit for the work. This leaves the Tribunal to consider other factors that would influence a reasonably prudent person in the claimant's circumstances.

A worker has good cause for voluntarily leaving work because of a supervisor's actions only if the supervisor follows a course of conduct amounting to hostility, abuse, or unreasonable discrimination. In addition, the worker must make a reasonable attempt to resolve the matter prior to leaving work. Griffith, Com. Dec. 8822158, December 20, 1988, aff'd Griffith v. State Department of Labor, Alaska Superior Court, No. 4FA-89-0120 Civil, September 25, 1989.

An employer has the right to counsel a worker whose performance does not meet the employer's standards. While the employer may have been frustrated during the counseling, the claimant has not established that the employer's actions followed a course of conduct amounting to hostility, abuse, or unreasonable discrimination. The claimant has not established that she had good cause to leave work at the time she did.

The Tribunal finds the claimant voluntarily quit suitable work without good cause. The penalties of AS 23.20.379 are appropriate.

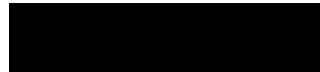
DECISION

The determination issued on October 6, 2023 is **AFFIRMED**. Benefits remain **DENIED** for the weeks ending September 9, 2023 through October 14, 2023. The three weeks remain reduced from the claimant's maximum benefits. The claimant may not be eligible 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 January 12, 2023.



Rhonda Bunes, Appeals Officer