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: 24 0716 **Hearing date:** December 10, 2024

CLAIMANT:

CHRISTINA ESPARZA
[redacted]

EMPLOYER:

TVI INC
[redacted]

CLAIMANT APPEARANCES:

Christina Esparza

EMPLOYER APPEARANCES:

Christy Fitzgerald

CASE HISTORY

The claimant timely appealed a December 10, 2024 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 July 10, 2024. She last worked on August 26, 2024. At that time, she worked full time as a site attendant.

The claimant worked at the employer's drop-off site for goods donations. The employer was advised by another employee that on August 18, 2024, the claimant was observed having her boyfriend and another friend help her at work while the friend's children were playing around the worksite. The claimant recalled that her friend had arrived to donate some items and, without asking the claimant, had started helping the claimant move begs that were outside on the ground over to the lifting tailgate of the employer's truck. The claimant held that her friend did not enter the employer's donation pod or the employer's truck. The claimant was aware that it was against the employer's rules for any non-employees to enter the pod or the truck. The claimant held that her friend's children were not doing anything unsafe at the worksite and that donors frequently brought children to the worksite when dropping off donations. The claimant recalled that her boyfriend had come by the site, which was on the way to the claimant's residence, and, also without asking, had moved a couch that someone had left at the site out of the claimant's way.

The employer's regional manager held that the claimant was advised that it was not permitted to have non-employees at the worksite in a safety video shown during the onboarding process. The claimant did not recall watching a safety video and she recalled that she was required to start work before the onboarding process was complete.

The manager recalled that the claimant's supervisor, who no longer works for the employer, told her he had warned the claimant verbally that it was not permitted to have her boyfriend help her at work. The manager recalled that she had observed one such conversation, when the claimant had stated that she would call her boyfriend to come pick up a dresser at the worksite. The manager recalled that the claimant's supervisor told the claimant she could not take donated items and that it was not appropriate to have her boyfriend come get the item. The claimant recalled that the supervisor had told her she could take the dresser because it was in a trash pile and had been for several days. The claimant recalled that the supervisor told her that her boyfriend could come pick up the item after the site was closed to the public. The claimant held that she was not counseled about having her boyfriend help her with her work at the site and she was not advised at any point that her job was in jeopardy.

The employer has a formal discipline process requiring verbal and written warnings leading up to discharge, but the process was not followed. The claimant was notified on August 26, 2024 that she was discharged for violating the employer's policy regarding having non-employees working at the worksite.

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 the employer received a report that the claimant had her boyfriend and another friend working at the worksite and the friend's children were playing at the site, after having been warned about such actions. The claimant denied that she was warned.

> *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 provided testimony mainly based on information from another person. The manager witnessed the claimant being warned about having her boyfriend come to the worksite, but not in the context of the boyfriend performing work at the worksite, but about picking up an item. The claimant held her boyfriend was then permitted to pick up the item after the site was closed. The claimant provided credible sworn testimony that she was not advised that non-employees could not carry bags for her or move a piece of heavy furniture or that a donor's children could not be at the worksite The

claimant was not put on notice that her job was in jeopardy. 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 14, 2024 is **REVERSED.** Benefits are **ALLOWED** for the weeks ending August 31, 2024 through October 5, 2024, 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 13, 2024.

Rhonda Buness, Appeals Officer