STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

vs.

R.A.A.C. Order No. 13-04867
Referee Decision No. 13-33373U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This cause comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact recite as follows:

> The claimant was employed as a monitor tech with [the employer] from November 12, 2007 through March 15, 2013. The claimant was made aware of the employer's attendance policy at her time of hire. The claimant was given a final warning and two day suspension on December 6, 2012, for the accumulation of seven unscheduled calls out within a 12-month rolling period. The claimant was told that if she called out again before April 4, 2013, she would be discharged under the employer's attendance policy. The claimant reported to work for her scheduled shift on February 22, 2013. The claimant complained of chest pains and was overheard by a nurse. The claimant was sent by the nurse to be seen. The claimant was admitted to the hospital and did not

> return to work her shift. The claimant was released from the hospital on February 23, 2013. The claimant was told by her doctor that she could not return to work until she had a stress test. The claimant notified her immediate supervisor on February 25, 2013, that she could not return to work until she had a stress test. The claimant called out of work, speaking to her immediate supervisor most days between February 25, 2013 and March 15, 2013. The claimant notified her supervisor on March 15, 2013, that she could return to work on March 17, 2013, but the employer had already made the decision to discharge the claimant under their attendance policy. The claimant was told on March 15, 2013, that she had been discharged.

Based upon the above findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision is not supported by competent and substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.
>
> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
>
> (e) A violation of an employer's rule, unless the claimant can demonstrate that:
> 1. He or she did not know, and could not reasonably know, of the rule's requirements;
> 2. The rule is not lawful or not reasonably related to the job environment and performance; or
> 3. The rule is not fairly or consistently enforced.

The record reflects the nurse manager testified that the claimant was discharged due to excessive attendance infractions in violation of the employer's attendance policy. The referee cited the language of Sections 443.036(30)(c) and (e), Florida Statutes, and concluded that the claimant's absenteeism constituted misconduct as the claimant had one or more unapproved absences after receiving a written warning for one or more unapproved absences, and that the employer established that the claimant knowingly violated its attendance policy after warning when she was absent between February 25, 2013 and March 15, 2013. The record, however, does not support the referee's conclusion.

As noted above, Section 443.036(30)(c), Florida Statutes, defines misconduct as "[c]hronic absenteeism or tardiness in *deliberate* violation of a known policy of the employer *or* one or more *unapproved* absences following a *written* reprimand or warning relating to more than one *unapproved* absence" (emphasis added). Thus, two avenues are available for an employer to establish attendance-related misconduct under the provisions of Section 443.036(30)(c), Florida Statutes. For discharges based upon, in general, absenteeism and/or tardiness, the employer must establish both that the absenteeism and/or tardiness was "chronic" as well as a "deliberate violation of a known policy." Under the first "prong" of subparagraph (c), absences or tardiness attributable to a compelling and/or involuntary reason would not constitute misconduct as they would not be a "deliberate violation." The Commission takes the position that, *generally*, an employee's absence from work based upon a "compelling" reason, when properly reported to the employer, does not rise to the level of being "a *deliberate* violation of a known policy of the employer." In reaching this position, the Commission references court cases under the earlier statute addressing attendance violations for "compelling reason(s)." *See Cargill, Inc.*

v. Unemployment Appeals Commission, 503 So. 2d 1340 (Fla. 1st DCA 1987); *Howlett v. South Broward Hospital Tax District*, 451 So. 2d 976 (Fla. 4th DCA 1984); *Taylor v. State Department of Labor and Employment Security*, 383 So. 2d 1126 (Fla. 3d DCA 1980).

The second prong of subparagraph (c) defines misconduct to include "one or more *unapproved* absences following a *written* reprimand or warning relating to more than one *unapproved* absence" (emphasis added). No explicit requirement of fault exists under the second prong when the employer establishes a final "unapproved" absence(s) following a *written* warning for multiple prior unapproved absences. However, keeping in mind the language of the second prong, the common understanding of the word "misconduct," the prior case law regarding absences for compelling reasons, and the legislative intent, the Commission has concluded that the second prong of subparagraph (c) does not entirely remove the requirement of fault on the part of the claimant.

For example, the use of the term "unapproved" in the second prong of subparagraph (c) presupposes an employee can request approval for absences and that, depending on the reason for the request, and the information provided by the employee, the employer can either approve or deny the request. While this process is common among many employers, the Commission notes certain employers have adopted "no fault" rules/policies regarding absences. These policies provide that employees are entitled to a certain number of absences, or unscheduled absences, during a specified time period. These policies normally also indicate that the reasons for these absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be discharged. Under such circumstances, the second prong of subparagraph (c) cannot automatically be utilized to decide the issue of whether a claimant has been discharged for misconduct. An employee cannot be faulted for failing to request approval of an absence when the employer has notified its employees that such requests will not be approved. Further, regardless of the employer's policies, an absence taken with proper notice by a claimant eligible for Family and Medical Leave Act ("FMLA") leave from an employer covered by FMLA would be an "approved" absence. *See* 29 C.F.R. §825.220(c).

The Commission has concluded that if a claimant (1) requests that an absence for a compelling reason such as an illness be approved or excused (unless the employer has clearly indicated that no further absences will be excused, in which case this requirement is waived); (2) provides notice that is reasonable under the circumstances (either prior notice for a foreseeable absence or prompt notice for an unforeseeable one); and (3) provides whatever appropriate verification or other information the employer may reasonably request; then the claimant cannot be

considered to have engaged in "misconduct" within the meaning of the second prong of subparagraph (c). While an employer may choose whether or not to grant approval for such absences, a claimant will not be disqualified if such absences are not approved.

The record in this case reflects the employer has a "no fault" policy regarding the issue of unscheduled absences. The employer's witness testified that the claimant was entitled to seven unscheduled absences during a 12-month period. The employer's witness also testified that the employer's policy provided that the reasons for unscheduled absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be disciplined, up to an including discharge. The referee failed to recognize the claimant's unrebutted evidence that all of her absences, both before and after the December 6, 2012 warning, were due to illness and were properly reported to the employer in accordance with its policy. As indicated above, the Commission has concluded, that under the circumstances described in the claimant's case, the second prong of subparagraph (c) cannot be utilized to decide the issue of whether a claimant has been discharged for misconduct; therefore, the referee's conclusion that the employer established misconduct under this subparagraph is rejected by the Commission.

Even if the employer is unable to establish misconduct under Section 443.036(30)(c), Florida Statutes, the Commission has held that the employer may be able to do so under Section 443.036(30)(e), Florida Statutes, if the claimant's tardiness/absences amounted to a violation of an employer "rule." To prove the existence of a rule violation under this subparagraph, the employer must present evidence of its attendance policy/rules and evidence that the claimant violated it. The claimant would then have the burden of showing that he/she did not know, and could not reasonably know, of the rule's requirements; the rule is not lawful or not reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced. With respect to the issue of fair enforcement, the Commission applies the same rule as to the second prong of subparagraph (c).

The Commission also concludes that, while the employer established the claimant was aware of its attendance policy, the claimant presented evidence to show that the rule was not fairly applied to her circumstances. The referee ignored the record evidence which reflects that all of the claimant's final absences were for compelling reasons not within the claimant's control and that the claimant provided notice to the employer of her intended absences. The claimant denied that she was ever advised that any of these final absences would lead to her discharge or that she did not have approval for all of her final absences. The claimant presented unrebutted evidence that she received approval from the house supervisor to leave work early due to chest pains and her subsequent hospitalization on February 22.

The record further reflects that the claimant notified the employer upon her release from the hospital on February 23 that her physician ordered her not to return to work until she received the results of a stress test. The claimant testified that, at that time, the house supervisor said, "Okay, it's fine." The nurse manager testified that the claimant also advised her of her condition and doctor's restrictions regarding returning to work. The record is devoid of evidence that the claimant was ever advised that her continued absence would lead to her discharge. The claimant testified that she kept the nurse manager apprised of her condition during her absence and that on March 12 she advised the nurse manager that she was cleared by her physician to return to work on March 17. The record reflects that the nurse manager told the claimant to report back to work on March 17, but that when the claimant reported back as instructed on that day she was discharged.

The Commission holds that the employer's rule cannot be seen as being fairly enforced with respect to the claimant's absences from February 22 through March 17 inasmuch as the absences were caused by the claimant's illness and the employer's statements to the claimant gave her cause to believe that her absences were approved and would not lead to her discharge. The claimant's final absences cannot, therefore, be fairly considered a violation of the employer's rule such as would operate to disqualify her from receipt of benefits.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on
10/9/2013 ,
the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.
By: Natasha Green
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
Suite 240
215 Market Street
Jacksonville FL 32202-2850

IMPORTANT:	For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE:	Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN:	Pou yon intèpret asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-33373U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3620-0

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.
Derechos de apelación importantes son explicados al final de esta decisión.
Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

Issues Involved:
SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Findings of Fact: The claimant was employed as a monitor tech with from November 12, 2007 through March 15, 2013. The claimant was made aware of the employer's attendance policy at her time of hire. The claimant was given a final warning and two day suspension on December 6, 2012, for the accumulation of seven unscheduled calls out within a 12 month rolling period. The claimant was told that if she called out again before April 4, 2013, she would be discharged under the employer's attendance policy. The claimant reported to work for her scheduled shift on February 22, 2013. The claimant complained of chest pains and was overheard by a nurse. The claimant was sent by the nurse to be seen. The claimant was admitted to the hospital and did not return to work her shift. The claimant was released from the hospital on February 23, 2013. The claimant was told by her doctor that she could not return to work until she had a stress test. The claimant notified her immediate supervisor on February 25,

2013, that she could not return to work until she had a stress test. The claimant called out of work, speaking to her immediate supervisor most days between February 25, 2013 and March 15, 2013. The claimant notified her supervisor on March 15, 2013, that she could return to work on March 17, 2013, but the employer had already made the decision to discharge the claimant under their attendance policy. The claimant was told on March 15, 2013, that she had been discharged.

Conclusions of Law: The Unemployment Compensation Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rules requirements;

employer must present evidence of its attendance policy and evidence that the claimant violated the policy or rule. The claimant would then need to present evidence to show they did not know of the rule. The evidence presented by the employer regarding their attendance policy was hearsay in nature only. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if: The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

In this case the employer presented no documentary evidence of the attendance policy however the claimant testified that she knew the policy and had been warned that further callouts would be a violation of the attendance policy. The employer met the burden of proof to show that the claimant knew additional callouts would violate the employer's policy. The claimant's absences between February 25, 2013 and March 15, 2013 are disqualifying under Section 443.036(30)(c) and Section 443.036(30)(e). The claimant is thus subject to disqualification.

Decision: The determination dated April 12, 2013, is affirmed.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

Section 443.036(30)(c), Florida Statutes, defines misconduct as chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand. The Commission has analyzed the new law through a two-prong approach. The first prong requiring the employer show the claimant's attendance-related misconduct was both "chronic" and "deliberate." The second that the employer must establish the final absences followed a written warning for unapproved absences and the final absence be unapproved.

The employer's witnesses provided testimony that the claimant was given a final warning on December 6, 2012, and warned that further callouts would result in her separation. The claimant testified that after her final warning on December 6, 2012, she called out of work between February 25, 2013 and March 15, 2013. The claimant testified that she called out because she was unable to work under doctor's orders. Under the first prong analysis the claimant's absences would not be considered deliberate as they were due to her illness, but certainly considered chronic as she called out for all her scheduled shifts between February 25, 2013 and March 15, 2013. Under the second prong analysis, the claimant's absences were unapproved, and would rise to the level necessary under the attendance-related misconduct to disqualify her from receipt of benefits. The RAAC has held that there is no intent requirement under Section 443.036(30)(c), so while the claimant may have had no intention to be absent, her absences alone are enough to disqualify her from benefits.

The Commission has held that an employer can also establish misconduct under Section 443.036(30)(e) if the claimant's tardiness/absences were a violation of the employer's "rule." To disqualify under this section the

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on May 17, 2013.

D. DUNCAN
Appeals Referee

By: C E De Moranville
C. E. DE MORANVILLE, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown below and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at https://iap.floridajobs.org/ or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/**. If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la fecha marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [*pago excesivo de beneficios*] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en https://iap.floridajobs.org/ o escribiendo a la dirección en la parte

superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN – DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, https://iap.floridajobs.org/ oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfimasyon an se va dat yo prezante demann nan pou reouvri kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.

Any questions related to benefits or claim certifications should be referred to the Claims Information Center at 1-800-204-2418. An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.