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FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

STATE OF FLORIDA REEMPLOYMENT ASSISTANCE APPEALS COMMISSION
RAAC

APPEALS QUARTERLY

The Family and Medical Leave Act in RA Law

Under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654, eligible employees of covered employers are permitted to take job-protected leave (unpaid or paid depending on employer policies) for specified family and medical reasons. Eligible employees are entitled to 12 workweeks of leave in a 12-month period for: (1) the birth of a child and to care for the newborn child within one year of birth; (2) the placement with the employee of a child for adoption or foster care, and to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, child, or parent who has a serious health condition; (4) a serious health condition that makes the employee unable to perform the essential functions of his or her job; and (5) any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member or "covered active duty." Eligible employees are entitled 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness, if the employee is the servicemember's spouse, son, daughter, parent, or next of kin. Generally speaking, when an eligible employee returns from FMLA leave, he or she must be offered an "equivalent" position in terms of pay, responsibilities, and work schedule.

The FMLA contains specific obligations on the part of both the employer and the employee that arise at various points in the process. Often, one party's duty under the statute is triggered only when the other party complies with an obligation, and vice versa. For example, there are four different types of notice an employer must give to employees, but most of them either require a prior action by the claimant, or are interwoven with the claimant's responsibilities. In reemployment assistance proceedings, issues involving the FMLA usually arise in one of two situations involving potential disqualification: first, where an employer discharges the claimant for absenteeism allegedly due either to his or her own medical issues, or a family member's health; and second, where a claimant voluntarily separates due to a personal or family health issue that requires him or her to miss work for some time. In these cases, analysis of these issues often requires careful record development and consideration of whether the parties met their obligations under the FMLA.

In this Issue:

CONSIDERATION OF FMLA IN DISCHARGE CASES

***Blodgett v. Unemployment Appeals Commission*, 880 So. 2d 814 (Fla. 1st DCA 2004)**: The claimant went on FMLA due to complications with her pregnancy. Because she was not expected to give birth until several months later, she planned on taking three months of personal leave after her FMLA leave expired. She was instructed to submit a written request for each 30-day period of personal leave. Her employer advised her that failure to return the leave forms could jeopardize her leave. Because she was not medically released to drive until several weeks later, she did not return her forms for several weeks. As a result, she was discharged for failure to request personal leave.

The referee found this to be misconduct, and the Commission affirmed. The First DCA reversed, holding that the claimant's actions did not amount to misconduct. Although it found that the claimant had excessive absenteeism, the court determined that she had successfully rebutted the presumption of misconduct. Her attempts to comply with the requirements of her employer demonstrated that her conduct did not rise to the level of willful or deliberate disregard of her employer's interests.

***Logalbo v. Unemployment Commission*, 79 So. 3d 936 (Fla. 1st DCA 2012)**: The issue was "whether claimant committed misconduct because of 'excessive unauthorized absenteeism,' and whether claimant attempted to comply with the employer's directive to supply documentation in accordance with the [FMLA]." The referee and Commission denied the claimant benefits. The First DCA reversed, however, "because the referee and [Commission] failed specifically to address the reasonableness of claimant's attempts to comply," and remanded the case with directions to address the reasonableness issue. The court cited *Blodgett*, and instructed the referee on remand to "make a specific factual determination concerning the reasonableness of a claimant's effort to comply." The referee had instead focused only on whether the claimant was instructed on "how to comply with the FMLA and whether he actually complied." As such, "where a claimant presents evidence concerning an attempt to comply, such a specific finding is required."

R.A.A.C. Order No. 13-07223 (May 30, 2014)

The Commission vacated a hearing officer's decision that concluded the claimant had been discharged for misconduct, and remanded the case for further proceedings. The employer discharged the claimant for taking an unauthorized leave of absence because she failed to submit her FMLA paperwork within the 15-day requirement and failed to comply with the employer's request for a second medical opinion.

The Commission noted that with respect to the late paperwork, the claimant submitted evidence that the paperwork was only one day late, and the delay was caused by an oversight at the physician's office. The Commission also explained that while the FMLA imposes the 15-day requirement, it provides an exception if it is not practicable under the particular circumstances to do so despite the employee's diligent, good-faith efforts, and noted that the Department of Labor advised, "employers should be mindful that employees must rely on the cooperation of their healthcare providers and other third parties in submitting the certification and that employees should not be penalized for delays over which they have no control."

With respect to the allegation that the claimant did not cooperate with the employer's demand that she obtain a second medical opinion, the Commission noted the evidence established the employer gave the claimant only one day's notice to attend a medical appointment in Florida at a time when the employer knew she was in Texas for the emotional support of her family and, therefore, the demand was not reasonable.

R.A.A.C. Order No. 13-06859 (September 13, 2013)

The claimant worked full-time as an underwriter for the employer. The claimant had surgery. After the surgery, the claimant continued having medical problems and was absent from work. She did not apply for intermittent FMLA leave because she thought her medical issues would dissipate. Nine months later, the claimant was issued a written warning due to her excessive absenteeism. After the warning, the claimant continued missing work due to illness. The claimant was under a doctor's care and had medical excuses for the absences. The claimant was discharged for excessive absenteeism. The referee held the claimant was discharged for reasons other than misconduct.

The Commission's order reversed the referee's decision. Although the

claimant's absences were due to illness, her continued unapproved absences after a written warning for unapproved absences constituted misconduct under subparagraph (c) of the statutory definition of misconduct. After the warning the employer offered the claimant the opportunity to obtain approval for her unscheduled absences by applying for intermittent FMLA. The claimant, however, did not apply for intermittent leave, and she continued to be absent due to complications caused by the same medical problem. The claimant's failure to apply for intermittent FMLA leave resulted in her being culpable for the resulting unapproved absences.

R.A.A.C. No 13-04522 (October 18, 2013)

The referee found that the claimant accrued seven absences and two occurrences of tardiness, that the absences were due to her being ill or not feeling well, that the claimant called to report all her absences, and that she received four warnings for the attendance infractions before eventually being discharged. The referee held the claimant was discharged for reasons other than misconduct connected with work.

The Commission remanded the case because the factual findings were not specific enough to enable it to conclude whether the claimant's attendance infractions constituted misconduct under subparagraphs (e), (c), or (a) of the definition of misconduct. In particular, the record was not clear whether the employer provided a means by which unscheduled absences could be approved or whether the policy was a no fault policy, in which case the second prong of (c) would not apply. The record was also not clear regarding whether the claimant would have qualified for intermittent FMLA leave and whether her failure to apply for FMLA leave resulted in her being culpable for her absences being unapproved.

R.A.A.C. Order No 14-00590 (August 27, 2014)

The employer discharged the claimant after attempting to verify her FMLA paperwork but being advised by the physician's office that the documents submitted by the claimant were forged since they had not been prepared by the only individual it authorized to issue medical certifications. At the hearing, the claimant denied she falsified the forms or had any knowledge of someone else falsifying them. She testified that, after the employer confronted her about the alleged forgery, she attempted to reach the person who provided her the documents but was unable to do so. She further testified she did not call her employer back because, without the help of the person who provided her the documents, she could not clear up the issue and she knew she was going to be fired as a result. The referee found the employer failed to establish that the claimant falsified the documents or was aware that they had been falsified and, therefore, did not establish she was discharged for misconduct.

On review, the Commission held that the employer established a prima facie case of misconduct by showing by direct evidence that the claimant presented the employer with forged medical notes. The burden then shifted to the claimant to establish the propriety of her actions. Though the claimant denied being complicit in the falsification of the documents, the referee failed to properly evaluate the employer's documents and testimony for circumstantial evidence and reasonable inferences that could be drawn from that evidence that the claimant either falsified the documentation or knew that it had been falsified. The Commission remanded the case for the referee to properly evaluate the employer's circumstantial evidence and to determine, in light of that evidence, whether the claimant's explanation was sufficiently credible to rebut the employer's prima facie case of misconduct.

CONSIDERATION OF FMLA IN QUIT CASES

***Large v. Unemployment Appeals Commission*, 927 So. 2d 1066 (Fla. 4th DCA 2006):** The claimant had health problems and experienced escalated stress and anxiety levels with the intensified demands of an increasing workload, which adversely impacted his health. The claimant asked his supervisor for reassignment on several occasions, which the supervisor declined. As a result, the claimant quit. The referee and the Commission denied the claimant benefits on the basis that the claimant voluntarily left his employment without good cause by failing to make an additional effort to retain employment by asking for family leave before resigning.

The Fourth DCA reversed, holding that the Commission's order was clearly erroneous because the referee misapplied the law. The court explained: "The failure to apply for family leave did not preclude the claimant from eligibility." The court focused on the language of 443.101(1)(a)(1), which states that a claimant will be entitled to benefits if he left his employment due to illness or disability requiring separation from work. As such, the proper inquiry was whether the claimant was unable to perform the job duties, not whether the claimant first applied for family leave, as "the statute does not impose a requirement on sick employees to needlessly exhaust family leave options." As such, the court concluded that the record reflected that the claimant, without reassignment, was medically unable to continue employment with the employer. Thus, he was entitled to benefits.

Large is narrowly applicable only to situations where the existence of a chronic condition suggests that a short leave will not ultimately resolve the issue. Outside of such circumstances, employees are generally expected to

make reasonable efforts to preserve their employment prior to quitting for health reasons. See, e.g. Borakove v. Unemployment Appeals Commission, 14 So. 3d 249 (Fla. 1st DCA 2009).

***Ramirez v. Reemployment Appeals Commission*, 135 So. 3d 408 (Fla. 1st DCA 2014):** The claimant asked her manager for time off to be with her father in the Dominican Republic after learning that he had a stroke. She was unable to say when she would return. The manager told her that she could not give her a leave of absence, but stated that she "offered [the claimant] FMLA." Shortly thereafter the claimant departed for the Dominican Republic when her brother paid for her plane ticket, but without notifying the employer. Her father died about a week after she got there. When she went to pick up her paycheck the following week, the manager informed her that she had abandoned her position. The appeals referee concluded that the claimant had quit for personal reasons not attributable to her employer. The referee explained that the claimant "had essentially asked for an indefinite amount of time off for a family emergency, and the employer's denial of such a request could not be considered unreasonable such that it would cause the average able-bodied qualified worker to quit." The referee also focused on the fact that the claimant had not sought leave under the FMLA, after being advised to do so. The Commission affirmed the referee's conclusions, but added that "even if [the claimant] had been constructively discharged, the evidence showed that the discharge would have been for excessive absences without permission, which would amount to misconduct connected with work."

The First DCA reversed, holding that the claimant had good cause to voluntarily quit, under the family emergency exception. "When there is evidence of a genuine family emergency, a claimant cannot be denied benefits because he or she either voluntarily quit or committed misconduct, because leaving work for such emergency constitutes good cause . . . rather than a disregard of the employer's interests." As such, under the litany of family emergency cases, the claimant had good cause to leave work early and go see her father. The court explained that "leaving for [her] family emergency was encompassed by the statutory exception for good cause attributable to illness or disability, or, in the alternative, leaving because of the family emergency after the employer had refused permission constituted good cause attributable to the employer." The court rejected the referee's rationale that the claimant quit without good cause when she did not seek leave under the FMLA because the employer did not develop the record regarding the requirements of and compliance with the FMLA. The court explained that, consequently, "the facts that touched on the Act do not have any bearing on our decision."

The court also rejected the employer's argument that the claimant's trip constituted "excessive absenteeism," justifying the denial of benefits for misconduct. The court explained that to show "excessive absenteeism" an employer must prove "a serious and identifiable pattern of excessive absenteeism or late arrivals," which must be proved by more than one act. The court explained there was no evidence the claimant was absent for any days other than for those associated with the family emergency just prior to her discharge.

R.A.A.C. Order No. 15-00331 (July 24, 2015)

The claimant, a teacher for a childcare facility, quit her job in order to relocate to provide care for a seriously ill family member. She did not request leave or other accommodation prior to quitting. The referee found that, since the employer did not notify her that she was eligible to take leave, her quitting was for good cause attributable to the employer.

On review, the Commission noted that the employer's initial obligation under the FMLA is to provide general notice of FMLA rights to its employees by posting in a conspicuous place a notice approved by the US Department of Labor, and to provide a copy of the notice to employees in a handbook. If this obligation is met, the next obligation falls on the employee, not the employer. The employee must advise the employer of a need for leave; merely discussing a family situation without indicating a need for time off will not suffice. Once the employee requests leave, the employer's next obligation is to notify the employee of his/her eligibility.

In this case, the claimant never requested leave and thus never triggered the employer's obligation to notify her whether she was eligible for leave under the FMLA. However, because the record was not clear whether the employer met its initial obligation to provide general notice of FMLA rights,

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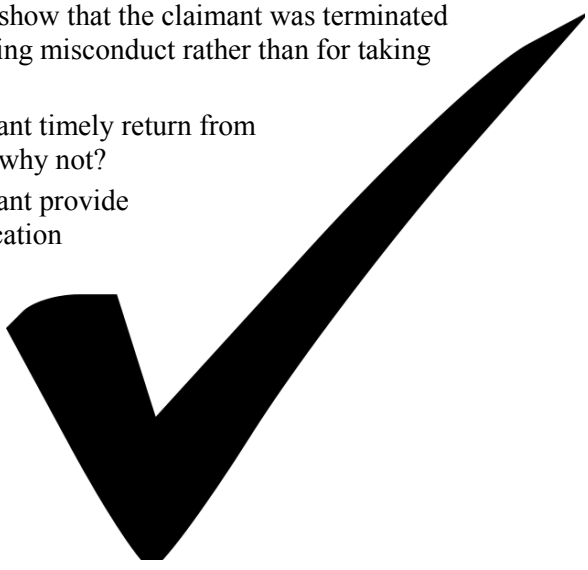
the Commission remanded the case for additional fact-finding. If the claimant's failure to request leave was caused by the employer's failure to provide general notice of FMLA rights to its employees, then the claimant's quitting was for good cause attributable to the employer.

R.A.A.C. Order No. 14-00132 (May 27, 2014)

The Commission reversed a referee's conclusion that the claimant was disqualified because he voluntarily quit without good cause attributable to the employer. The claimant's wife had a serious illness requiring surgery and his son had a permanent disability. The record reflected the claimant made reasonable attempts to obtain leave under the FMLA, but his wife's doctor would not provide the claimant with a timeline required for the completion of the required paperwork. As a result, the claimant was unable to obtain FMLA leave. The Commission declined to hold the claimant responsible for delays caused by his wife's doctor. Given the absence of responsibility on the part of the claimant for not meeting the requirements of FMLA, the Commission concluded it was constrained by case law to consider the claimant's circumstances a family emergency encompassed by the statutory exception for good cause attributable to illness or disability. The claimant was not disqualified and, since the quitting was not attributable to the employer, it was not subject to charging.

Areas of Inquiry for FMLA Cases

- Relevant regulations are found in 29 C.F.R. Part 825.
- Is the employer covered by FMLA?
  - Is the employer engaged in commerce and does it have 50 or more employees on payroll for each workday for 20 or more weeks for the current and prior calendar year?
  - Is the employer a governmental agency?
- Is the claimant an "eligible" employee?
  - Has the claimant worked (1) at least one year in aggregate and (2) at least 1250 hours during the previous 12 months?
  - Does the claimant work at a worksite with 50 or more employees, or with at least 50 employees within a 75 mile radius?
- Has the employer given proper notice of FMLA rights?
  - By posting the statutorily required notice?
  - By providing a copy of the notice in its employee handbook or otherwise?
- Has the claimant advised the employer of his/her need for leave or time off, and if so, has the claimant advised the employer that the leave is needed for circumstances that may be FMLA-qualifying?
- Is the leave needed for one of the following:
  - The claimant's own "serious health condition"?
  - To care for a spouse, son, daughter, or parent who has a serious health condition?
  - For birth of a child?
  - For adoption or foster placement of a child?
  - For a military service-related "exigency" of a spouse, son, daughter, or parent?
- Did the employer notify the claimant that the leave requested is FMLA-qualifying leave?
- Did the claimant fail to take advantage of leave without good reason?
- Did the employer request medical certification?
- Did the claimant timely provide proper medical certification? If not, did the claimant make diligent efforts to do so?
- Did the employer grant leave, and if so, for what period of time? If not, was the denial of leave improper under the FMLA?
- Did the claimant comply with any proper requests for recertification or other conditions during leave?
- Was the claimant terminated during leave? If so, did the employer show that the claimant was terminated for disqualifying misconduct rather than for taking leave?
- Did the claimant timely return from leave? If not, why not?
- Did the claimant provide proper certification to return? If not, why not?
- How/why did the separation occur and how did it relate to leave rights?



Miscellaneous Orders

R.A.A.C. Order No. 14-05679 (March 24, 2015)

The claimant voluntarily quit his position, telling his employer he was retiring to care for his mother during her final stage of cancer. The claimant did not request a leave of absence or other accommodation from the employer prior to quitting. The referee held the claimant's quitting was not disqualifying under the family emergency exception. The Commission reversed, declining to extend the doctrine to a scenario where an employee voluntarily quit without having first requested and been denied leave or other accommodation by the employer, at least in the absence of any showing that such a request would have been futile.

R.A.A.C. Order No. 14-02027 (October 29, 2014)

The claimant, a server at a restaurant, was discharged for insubordination after threatening to sue the owner for suspending her for two weeks for yelling at him about scheduling. In addressing insubordination under the predecessor definition of misconduct, courts considered whether the employee's conduct occurred in private or could be heard or seen by anyone else, such as other employees or customers. See Benitez v. Girlfriday, Inc., 609 So. 2d 665 (Fla.3d DCA 1992)(isolated use of obscene language directed to a supervisor during a private telephone conversation outside the presence of other persons did not constitute a willful and wanton disregard of the employer's interests).

Section 443.036(30)(a) was amended and the new provision contains two separate requirements. The employer must prove that the claimant engaged in conduct (1) demonstrating a conscious disregard of an employer's interests and (2) found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. This amended definition of misconduct covers more conduct than the predecessor definition of misconduct, as it replaces the prior high standard of "willful and wanton disregard" with a significantly lower "conscious disregard" standard. As a result, some cases decided prior to the 2011 amendment, such as Benitez, may have a different result under the new standard. However, analysis under the amended definition still involves consideration of the totality of the circumstances.

Here, the findings of fact lacked sufficient detail regarding the circumstances surrounding the incidents that led to the claimant's discharge for the Commission to determine whether her actions constituted misconduct under the broader amended definition of misconduct. The referee's decision was vacated and the case was remanded for the referee to adduce additional evidence.

R.A.A.C. Order No. 14-02355 (November 11, 2014)

The claimant was working as a special education teacher for a school board that received information from law enforcement that the claimant had been arrested for sexual contact with minors. The school board recommended termination and offered the claimant an opportunity to be heard which, according to the employer, the claimant declined.

At the time of the RA hearing, criminal charges remained pending. The referee held the claimant was discharged for reasons other than misconduct, apparently on the basis that the criminal charges had not yet been resolved.

The Commission vacated the decision and remanded the case, noting that the basis for denying benefits is not limited to Section 443.101(9), Florida Statutes, but that the referee should also analyze whether the employer proved misconduct as defined in Section 443.036(29), Florida Statutes. The Commission also stated the referee must address whether the claimant, in allowing his dismissal to be implemented because he would not respond to the school board's recommendation to terminate him, chose not to avail himself of an accessible avenue by which he might have retained his employment and, therefore, effectively voluntarily quit.

The referee in this case also apparently believed the claimant could refuse to testify without consequence. However, the fact that a claimant has a criminal charge pending does not preclude the referee from analyzing whether the claimant voluntarily quit based on his failure to pursue available procedures to challenge the allegations against him, or from finding misconduct based on the claimant's actions if the employer presents a prima facie case against the claimant and the claimant fails to overcome the evidence against him. The Fifth Amendment does not forbid adverse inferences to be drawn against parties to civil actions when they refuse to testify in response to probative evidence offered against them. Baxter v. Palmigiano, 422. U.S. 308, 318 (1976).

R.A.A.C. Order No. 14-02600 (October 16, 2014)

The claimant was discharged for failing to disclose to the employer his use of prescription medication as required by the employer's rule. At the hearing before the appeals referee, the claimant admitted he intentionally did not disclose the names of any of his medications to the employer because he did not want the employer to learn of his medical status. While he denied any awareness of the requirement to disclose his prescription medications, the claimant's admission that he was required to sign an acknowledgment every year at orientation is sufficient to establish that he reasonably should have known of the policy's requirements.

Given the condition for which the claimant was being treated, he was considered to be "an individual with a disability" within the meaning of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act; therefore, the Commission carefully reviewed the employer's requirements and found them in

conformance with the ADA. The employer's requirement was permissible under the ADA because the requirement was job-related and consistent with a business necessity. 29 C.F.R. §1630.14 (c). The Commission also considered that the employer's policy required the claimant to disclose use of drugs to his supervisor rather than to human resources or an occupational health professional employed by the employer. While the relevant regulation, 29 C.F.R. §1630.14(c)(1)(i), implies that such routine disclosures should be made to a person outside the direct supervisory chain, the EEOC's relevant guidance and case law do not include such a requirement.

The Commission noted the ADA strikes a balance between the needs of the employee and the needs of the employer, and creates a mechanism in which legitimate medical inquiries can be made while protecting the privacy and, more fundamentally, the employment of the employee. The Commission affirmed the claimant's disqualification from benefits for violating the employer's rule.

R.A.A.C. Order No. 14-03648 (March 17, 2015)

The claimant was discharged for refusing to meet with his supervisor unless a co-worker was present as a witness. The supervisor told the claimant he could not have a witness present and that, if he did not meet with him, the claimant would be terminated for insubordination. The claimant continued to refuse to meet alone with the supervisor and was discharged.

The Commission noted that one of the few cases to excuse a direct failure to obey a supervisor's instruction without explanatory factors is Vilar v. Unemployment Appeals Commission, 889 So. 2d 933 (Fla. 2d DCA 2005). In Vilar, the claimant refused an order to return to her workplace, which the court excused as "an isolated instance of poor judgment." The Commission concluded this precedent does not survive the 2011 amendment. While Vilar's conduct might not have reached the level of "willful or wanton disregard" of her employer's interests, it assuredly constitutes a "conscious disregard" in the absence of any justification for it.

In this case, the claimant refused multiple instructions to meet with the operations manager individually, including after being warned of the consequences. The individual he proposed as his witness was the least appropriate individual in the worksite, as the claimant's discussion of the individual's recent employment and lack of experience is what led to the directive to meet with management. Although the claimant had previously been accused by management of lying or wearing a recording device, and had been required to demonstrate that he was not, the claimant admitted that these incidents occurred prior to the operations manager's employment in his position, and were unknown to him. In short, the claimant took what was a facially unreasonable position and offered no explanation for it.

An employer need not have a rule that requires employees to meet with a supervisor for a legitimate work-related reason. Nor is the employer required to schedule such meetings at the employee's convenience. Also, there is nothing unlawful about the employer requiring the claimant to meet without a witness or representative. The claimant was not shown to be a member of a bargaining group and, since he was not, had no right to a representative under current law. IBM Corp. v. Schult, 341 N.L.R.B. 1288 (2004). In any case, under NLRB v. J. Weingarten, 420 U.S. 251 (1975), union members have the right to have a union representative appear with them, but not a co-worker who has no union position.

An employee who declares that he will not obey a reasonable order has threatened the employer's legitimate interest in maintaining appropriate control of the workforce. The claimant's behavior thus reflects a conscious disregard of the employer's interests. His behavior in refusing a routine instruction without explanation also reflects a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of its employee and thus constitutes misconduct under subparagraph (a).

R.A.A.C. Order No. 14-04873 (March 12, 2015)

The claimant was discharged during an initial 90-day probation period because she was considered not a good fit for the employer's business.

Under Section 443.131(3)(a), Florida Statutes, in order for the employer to establish relief from charging for a non-disqualifying discharge of a probationary employee, the employer must establish each of the following elements:

- The claimant was employed during an initial probationary period. Under this provision, only the claimant's first period of employment with an employer may be subject to non-charging;
- The probationary period did not exceed 90 days from the commencement of work;
- The claimant was notified of the probationary period no later than the seventh day of work;
- The probationary period was an established probationary plan applying to all employees, or to specific groups or classes of employees which included the claimant's position; and
- The employer establishes by conclu-

sive evidence that the claimant was discharged for unsatisfactory performance, and not due to lack of work, as would occur with temporary, seasonal, casual, or other similar employment not of a regular, permanent, and year-round nature.

The issue of whether the employer has shown that the claimant was discharged for unsatisfactory performance is entirely separate from the issue of whether the employer has shown that the claimant was discharged for misconduct. The phrase "unsatisfactory performance" is inherently subjective, and does not require explicit, direct proof of objectively poor performance. Instead, the employer must present evidence from individuals with knowledge of the reason for the discharge rather than the performance of the employee. In short, the issue is not the employee's performance per se, but why the employee was separated. "Unsatisfactory performance" is not narrowly interpreted to relate only to the specific performance of the claimant's job duties, but to the claimant's overall "performance" in the workplace. An employee whose work is often acceptable but whose attendance, attitude, compliance with employer rules, or other behaviors is not acceptable to the employer may be separated for unsatisfactory performance. Since the purpose of the exemption is to encourage employers to hire employees, there is no basis for limiting application of the exemption to a narrow band of employee behaviors.

The statute requires the employer to establish with conclusive evidence that the separation was not a layoff due to lack of work, particularly for a temporary, seasonal or casual employee, such as one who is called in for occasional as-needed assignments. However, if an employer cannot provide any explanation, even second-hand evidence, as to why the claimant's performance was deemed unsatisfactory, the referee might reasonably infer that the discharge was for other reasons.

R.A.A.C. Order No. 14-05587 (March 24, 2015)

The claimant was absent from work without calling in for four days due to lack of transportation when his car broke down. The employer's documentary evidence included its job abandonment policy, which provided that an employee would be deemed to have voluntarily resigned from employment if he failed to report to work and failed to notify management of the absence for 3 consecutive shifts.

The employer's testimony at the hearing was clear that the claimant was not discharged, but was deemed to have abandoned his job due to his absence for several days without contact with the employer, consistent with its policy. While the claimant did not intend to quit, his subjective intent is not the only factor in determining whether a resignation has occurred. When an employee fails to show up to work for several days without notice, the employer is left to guess what the employee's intention is, during which time its business operations are hindered by the employee's absence. In such cases, the issue of whether an employee has quit must be examined under an objective standard, rather than relying solely on the subjective intent of a missing employee. Further, when an employee has been given notice of a reasonable job abandonment policy, and is absent without notice such that the provisions of the policy are triggered, the burden shifts to the employee to demonstrate that, on an objective basis, he should not be deemed to have resigned.

While the mere inability to get to work due to unforeseeable short-term transportation issues is not misconduct, the issue in this case was the claimant's additional failure to give notice of his absences, an action that can be deemed disqualifying even when the absence itself would otherwise be excusable. The claimant's explanation of why he did not attempt to find a pay or commercial telephone to make a call to his employer, given that his telephone did not work, reflects that he failed to make a reasonable effort to notify the employer of his predicament. Accordingly, the Commission concluded no basis existed to excuse the claimant from the operation of the employer's job abandonment policy.

R.A.A.C. Order No. 14-05924 (April 24, 2015)

The claimant, a restaurant assistant general manager, was discharged for violating the sexual harassment policy in his conduct towards a female subordinate. The employer offered extensive direct, circumstantial, and hearsay evidence (both competent and corroborative) supporting its contention that the claimant engaged in sexual harassment, including testimony regarding the contents of a security video, and testimony regarding statements made to the employer by both the claimant and the subordinate he was accused of harassing. Since the referee apparently did not consider this evidence, the case was remanded.

The employer's HR manager offered extensive testimony regarding the contents of a surveillance video she observed. The referee, however, did not specifically comment on this evidence in the decision, even though the manager's evidence was corroborated by testimony from other witnesses, including the claimant himself. Since the video evidence offered was probative, the referee's failure to specifically address and weigh it was error.

The employer also introduced hearsay evidence, some of which was admissible to support a finding of fact and other that was only supporting. Hearsay that falls within a hearsay exception in the Florida Evidence Code or the statutory "residual" exception set forth in Section 443.151(4)(b)5.c., Florida Statutes, may

directly support a factual finding. Such evidence is referred to as "competent" hearsay because it is competent to support a finding. Hearsay that does not fall within an exception may still be introduced, but it may only be used to "supplement" or "explain" other evidence, and thus is corroborating evidence.

The statements the claimant allegedly made to either manager were competent evidence because they constitute admissions and were a sufficient basis to establish misconduct, particularly when supplemented by additional evidence. See §90.803(18), Fla. Stat.; Arbor Tree Mgmt. v. Unemployment Appeals Commission, 69 So. 3d 376, 381-82 (Fla. 1st DCA 2011). The HR manager's testimony regarding the claimant's admission, combined with the subordinate's subsequent complaint, is sufficient to establish a prima facie case of misconduct. Thus, the referee needed to determine whether the employer's testimony as to these alleged statements was credible and determine the weight to be given them.

The subordinate's statements to the general manager should have been considered under the "excited utterance" hearsay exception. Section 90.803(2), Florida Statutes, defines an "excited utterance" as "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

The issue on remand was whether, after considering all relevant evidence, weighing it appropriately, and drawing reasonable inferences, the referee concludes it was more likely than not that the claimant committed the acts of which he was accused. If the employer's testimony is believed, then certain inferences would reasonably be drawn from it that are contrary to the claimant's version of events. Circumstantial evidence is not inherently inferior to direct evidence. Likewise, circumstantial evidence is sufficient to prove facts under the preponderance of the evidence standard used in reemployment assistance appeals proceedings.

The Commission further noted that, while the claimant's actions must be viewed through the eyes of the recipient to determine whether harassment occurred, the employer's policy appears to prohibit more than that which would be deemed harassment: "Each associate must exercise his or her own good judgment to avoid engaging in conduct that may be perceived by others as harassment." The Commission directed the referee to develop the evidence regarding the employer's policy and then determine if the claimant's actions violated the policy even if they did not constitute harassment.

R.A.A.C. Order No. 14-06326 (March 31, 2015)

The claimant, a security officer supervisor, was discharged for violating the employer's policy that provided for discharge if an employee was a no-call/no-show for three days. The claimant had been arrested at work. The supervisor testified he was aware that the claimant had been arrested, but was not aware of the nature of the charges or how long the claimant would be incarcerated. The claimant was subsequently a no-call/no-show for his three consecutive shifts. The supervisor testified that the employer considered the claimant to have abandoned his job after being no-call/no-show for three days in violation of the employer's policy. The claimant's sister sent the supervisor a text at the time of or shortly after the third missed shift, informing the employer that the claimant was still in jail. As soon as the claimant was given a free phone call, he called the manager of security operations and left a voicemail message. At the hearing, the claimant testified that he entered a plea of no contest to criminal charges and was released from jail seven weeks after his arrest.

The claimant was unable to attend work for seven weeks due to his incarceration. His absence of that duration, combined with his acceptance of responsibility through his no contest plea, constitutes misconduct under subparagraphs (a) and (e). See Hillsborough County v. Unemployment Appeals Commission, 433 So. 2d 24 (Fla. 2d DCA 1983). The Commission distinguished Livingston v. Tucker Construction & Engineering, Inc., 656 So. 2d 499 (Fla. 2d DCA 1995), which held the claimant not disqualified for an absence due to incarceration on the grounds that it no longer appears to be good law subsequent to the 2011 amendments to the definition of misconduct, other statutory amendments regarding the impact of a no contest plea, and the fact that the short-term incarceration in that case is not comparable to the seven-week absence of the claimant herein.

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