

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-07961

vs.

Referee Decision No. 13-55724U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits and charged the employer's account.

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 referee's findings of fact state as follows:

The claimant worked as an administrative assistant for the employer, a repair service company, beginning on September 17, 2012. On April 10, 2013, the claimant had a discussion with one of her supervisors regarding her work product. The claimant felt her supervisor began yelling at her during the discussion so she excused herself from the room to avoid further confrontation. The employer believed the claimant's behavior represented insubordination and decided to separate her employment from the organization. The claimant was discharged on April 11, 2013, for alleged insubordination.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee did not adequately develop the record or address the employer's evidence; consequently, the case must be remanded.

Section 443.036(30), Florida Statutes (2012), 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 referee held the claimant was discharged for reasons other than misconduct, reasoning that her actions of excusing herself from the room to avoid further confrontation with her supervisor amounted to, at most, an isolated incident of poor judgment. In so holding, the referee did not properly develop the record or consider the employer's evidence.

As a finder of fact, the referee has a duty to examine or cross-examine any witness as is necessary to properly develop the record. Fla. Admin. Code R. 73B-20.024(3)(b). It is incumbent upon the referee to develop the record and accurately reflect the material testimony in the decision so that a reviewing body can evaluate the case. Without the above-referenced information, the Commission is unable to determine whether the referee correctly held the claimant disqualified from the receipt of benefits.

A review of the hearing record reflects that the claimant was not discharged *solely* because of the final incident. The employer's president testified that the claimant had previously been insubordinate, was disruptive during other incidents, and did not follow the chain of command. The record further reflects that the office manager had also given the claimant verbal warnings prior to the final incident. However, when the employer attempted to present additional testimony regarding previous incidents and complaints from other employees, the referee erroneously advised the employer that they were there to "discuss the final incident that resulted in the claimant's separation" and that the complaints that the manager had received from other employees were hearsay, unless the employer wanted to present those employees as witnesses. The referee allowed the employer to present testimony concerning an incident that involved the claimant hiring a temporary worker to help her complete a marketing assignment that resulted in the claimant being disciplined, but the referee did not properly consider the previous incidents in the body of her decision. These actions indicate that the referee misapprehended the extent to which the record needed to be developed.

While the employer's evidence may have been hearsay regarding the substance of the complaints received by the manager, such evidence is still admissible and can be considered by the referee, provided it is accorded the weight it deserves. If it is admissible hearsay, it must be considered as to whether it supports a finding that the claimant had previously engaged in acts which, collectively with the final incident, constituted misconduct within the meaning of the reemployment assistance law. Even if it is not hearsay admissible for a material finding, it should still be considered as to issues such as the credibility of the parties and the light in which the final incident should be viewed. If the prior incidents tend to suggest the claimant habitually acted in a certain way, such evidence is admissible under the relaxed evidentiary standard of Section 443.151(5)b., Florida Statutes, as to the

issue of the claimant's behavior in the final incident. Finally, we note that claimants and employers interact with each other based on their history of working together. A claimant or employer will, and often is entitled to, interpret current events based on past experiences, and the referee should consider this background when interpreting the evidence before him or her.

For these reasons, the Commission concludes the decision must be vacated and the case remanded for the referee to consider the totality of the claimant's employment record and determine whether the discharge was for misconduct. The referee is to convene a supplemental hearing to allow the employer the opportunity to present all of its evidence regarding the various reasons it took into consideration when making its decision to discharge the claimant. If the employer's evidence is credited, the referee cannot conclude that the claimant was discharged for an "isolated instance" of poor judgment, but must address whether the claimant's actions, when considered in the aggregate, amount to disqualifying misconduct. The referee shall then render a new decision, resolving all material conflicts in the evidence and addressing the claimant's entitlement to benefits.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

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

3/17/2014,

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: Kady Thomas

Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
POST OFFICE BOX 8697
FORT LAUDERDALE FL 33310

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 asistè ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pran àmpil tòn, paské tòn limité pou ou ranpli apèl la.

Docket No. **2013-55724U**

Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3675-0

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.

CHARGES TO EMPLOYMENT RECORD: Whether benefit payments made to the claimant shall be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026, 11.018, Florida Administrative Code. (If employer charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant worked as an administrative assistant for the employer, a repair service company, beginning on September 17, 2012. On April 10, 2013, the claimant had a discussion with one of her supervisors regarding her work product. The claimant felt her supervisor began yelling at her during the discussion so she excused herself from the room to avoid further confrontation. The employer believed the claimant's behavior represented insubordination and decided to separate

her employment from the organization. The claimant was discharged on April 11, 2013, for alleged insubordination.

Conclusions of Law: As of June 27, 2011, Florida's Reemployment Assistance Law 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 than an employer expects of an 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;
 - 2. The rule is unlawful or not reasonably related to the job environment and performance; or
 - 3. The rule is not fairly or consistently enforced.

The record indicates that the claimant was discharged on April 11, 2013, for alleged insubordination. In discharge cases, the employer bears the burden of proving via competent, substantial evidence, that the claimant was discharged for misconduct connected with the work, see Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986); and the employer in this case has not met its burden.

The record, at most, illustrates an isolated incident of poor judgment on the claimant's part. While such incidents may give an employer a good business reason for dismissing an employee, such events are generally not misconduct under Florida's reemployment assistance statute. Bivens v. Trugreen LP, 845 So. 2d 347, 348 (Fla. 2d DCA 2003); see also Lewis v. Wal-mart Associates, Inc., U.A.C. Order No. 11-13645 (Nov. 4, 2011). Having reviewed the claimant's work history, disciplinary record, and the incident at issue, the appeals referee concludes that the claimant's actions were not sufficiently egregious enough to rise to the level of misconduct necessary to prohibit the receipt of reemployment benefits. See Pierce v. Ward Toulmin Berg PA, R.A.A.C. Order No. 13-01855 (Apr. 3, 2013) ("An employee's attempt to address their grievances with a supervisor does not constitute misconduct as defined by the statute"). Accordingly, it is held the claimant was discharged for reasons other than misconduct connected with the work and thus eligible for benefits.

The appeals referee was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Florida's Reemployment Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the appeals referee finds the claimant's version of events to

be more credible and therefore resolves all material conflicts in the evidence in the claimant's favor.

There are no attorney's fees associated with the claimant's representation at the hearing.

Decision: The claims adjudicator's determination dated June 12, 2013, holding that the claimant was discharged for reasons other than misconduct connected with the work and charging the employer's account for any benefits paid on this claim; 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.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on August 22, 2013.

T. A. SMITH
Appeals Referee



By: _____
ZAMARA GONZALEZ, 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.

IMPORTANT - 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 reembolsar 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 definitiv 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 lamèn, 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.
