

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-09442

vs.

Referee Decision No. 0008758062-03U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case 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 holding the claimant 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 voluntarily left work without good cause within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

The claimant began working for the employer on January 25, 2010. The claimant worked as an assistant city clerk II. On June 24, 2013, the city clerk asked the claimant why she failed to add minutes for ordinances from the meeting from May 7, 2013, in the document on a flash drive the claimant gave her. The claimant explained to the city clerk that she asked her previously if she needed to add the minutes from the ordinances in the document, and the city clerk said it was not necessary. However, the claimant took offense at the tone and manner the city clerk

asked the question. The claimant did not report to human resources or office of professional standard[s] the interaction she had with the city clerk that she considered offensive. On June 24, 2013, the claimant quit without notice because she believed the city clerk spoke to her in an offensive manner.

Based on these findings, the referee held the claimant voluntarily left work without good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes the record was not sufficiently developed; consequently, the case must be remanded.

Section 443.101(1), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973).

In concluding that the claimant voluntarily left work without good cause attributable to the employing unit, the referee resolved material conflicts in the evidence in favor of the employer. In her conclusions of law, the referee states in pertinent part:

The record and evidence in this case show that the claimant quit because she took offense at the tone and manner the City Clerk asked her a question. However, the claimant did not attempt to preserve her job by voicing her concerns to human resources or the office of professional standard[s]. An individual who leaves work voluntarily, as the claimant did, carries the burden to show that the leaving was with good cause attributable to the employer, in order to qualify for Reemployment Assistance benefits. That burden has not been met in this case. In addition, the claimant's quitting was not attributable to the employer. As such, the claimant is disqualified from the receipt of benefits

Consideration was given to the claimant's contention that the City Clerk took retaliatory actions against her because she and some co-workers filed a complaint against the City Clerk. Based on the evidence in the record, the City Clerk was not privy to the names of individuals that filed the complaint against her. The evidence in the record did not support the allegation that the City Clerk retaliated against the claimant. In addition, the claimant

submitted into evidence materials obtained from the internet; copies of emails and a CD of an audio complaint filed against the City Clerk in 2010 by an employee prior to the claimant being hired. After a careful review of the documents and the audio CD submitted by the claimant, the hearing officer reached the conclusion that the documents and CD are not relevant to the instant case. As such, consideration is respectfully denied.

A review of the record in this case reveals that material undisputed evidence was not properly addressed by the appeals referee. Additionally, the referee's conclusion that "the claimant did not attempt to preserve her job by voicing her concerns to human resources or the office of professional standards" is inconsistent with the referee's acknowledgment that the claimant attributed the City Clerk's behavior to retaliatory action because "she and some co-workers *filed a complaint* against the City Clerk." (emphasis added). The referee's decision indicates that, while the Clerk's behavior may not have been rooted in retaliatory animus, the claimant and her co-workers had previously apprised the employer that the City Clerk was engaging in inappropriate behaviors. The referee mistakenly concluded that the dispositive issues in this case are whether the Clerk's post-March 2013 behavior towards the claimant was in retaliation for the filing of a March 2013 complaint and whether the claimant made reasonable efforts to preserve her employment in June 2013. The dispositive issues in this case, however, are whether the claimant had good cause to quit because of the City Clerk's alleged ongoing behavior towards staff, and whether, given the prior complaint which the claimant had already made, she had any further duty to attempt to preserve her employment.

The record reflects that on March 1, 2013, the claimant and three of her co-workers filed a complaint with the employer regarding the City Clerk's behavior. The written complaint was entered as an exhibit for the appeals referee's consideration. The complaint alleges, in part, that the City Clerk yelled frequently, engaged in bullying behavior, and created a hostile work environment.¹ Due to the nature of the City Clerk's position, an investigation was conducted by the City Attorney's office, employees were interviewed and a report was generated. The report, which was entered as an exhibit, summarized the following statements from the investigator's employee interviews:

"Staff members' complaints are that she is difficult to work with because of her frequent yelling, unwarranted comments, overreaction to situations in the office, and inability to calmly discuss issues with staff members."

"There is a perception that she will take an adverse employment act against staff members for speaking out against her"

"Some of the staff members have brought their complaints to Office of Professional Standards (OPS) in the past and have not received any resolution of their grievances."

"All of the staff members believed that [the City Clerk] needs to be consistent with her treatment of her staff members and be more tactful in discussing work issues with her staff, i.e., cease all yelling at staff members."

"A majority of the staff members used the word 'bullying' to describe her behavior."

The City Clerk testified that she suffered no repercussions as a result of the investigation; she also testified she implemented an action plan to address the matters presented in the complaint. It is undisputed that the action plan required the City Clerk to, in essence, file a self-reported progress update with the City Commission after 60 days, and again after six months, of the implementation date of the plan.

¹ The claimant did not allege that the City Clerk targeted any individual for negative treatment based upon their membership in a protected class.

The claimant and two of her co-workers, an Assistant City Clerk IV and an Assistant City Clerk I, testified that no one instructed them on the procedures that were to be followed if the City Clerk retaliated against them or reverted to the type of behavior that caused them to file their complaint. It is undisputed that no input was solicited from employees working under the City Clerk at the time the 60-day report was completed. Accordingly, the record reflects that only the City Clerk reported on whether she had acted in compliance with the action plan. Both the claimant and the Assistant City Clerk IV testified that, after the 60-day mark had passed, the City Clerk reverted to the type of behavior that had caused them to file the March 2013 complaint.

In addition to the March 2013 complaint, the claimant presented evidence regarding a January 2010 complaint filed by another employee concerning the City Clerk's behavior. A copy of the audio recording containing the complaint, which was provided to the employer and the referee, was not provided to the Commission for review. The Commission notes that the employer's representative asserted she could not play the copy of the audio recording the claimant provided as evidence for the hearing. The referee did not offer to postpone the hearing so that the claimant could provide an additional copy of the recording, and the referee failed to consider the nature of the prior complaint when rendering her decision. The referee also failed to consider the manner in which the employer handled either the January 2010 or the March 2013 complaints in determining whether the claimant voluntarily left work without good cause attributable to the employer. Finally, in holding the claimant quit without good cause, the referee erroneously considered only the June 2013 interaction between the claimant and the City Clerk.

“An employer's failure to provide its employees with a tolerable work environment has been found to be good cause for leaving employment attributable to the employer.” *Yaeger v. Florida Unemployment Appeals Commission*, 786 So. 2d 48, 53 (Fla. 3d DCA 2001). *See also Eulo v. Florida Unemployment Appeals Commission*, 724 So. 2d 636 (Fla. 2d DCA 1999). In this case, the claimant testified that the City Clerk continually berated her. In the final incident, the City Clerk confronted the claimant about a work-related problem at a co-worker's desk, rather than speaking with the claimant in private. While the parties presented conflicting testimony regarding the City Clerk's demeanor, the claimant testified that this was the incident that prompted her to submit her resignation, an event that took place after she had complained regarding prior instances and, she contended, the Clerk's behavior had reverted to pre-complaint form. By focusing solely on the final incident, the referee failed to put this incident in proper context of an alleged pattern of behavior which resulted in the March 2013 complaint being filed.

Additionally, the referee focused on the issue of whether the City Clerk's behavior was motivated by retaliatory animus, without also recognizing that the behavior did not have to be retaliatory to be sufficiently hostile to give the claimant good cause to quit. On remand, the referee must consider the work environment as a whole during the claimant's employment under the City Clerk.

As to the issue of preservation of her employment, the claimant testified that she did not complain to the employer again after the final incident because prior complaints from the claimant and other workers had resulted in no meaningful change and she believed additional complaints would only lead to further negative treatment. As summarized within the employer's investigative report, the employer was aware prior complaints had been ineffectual for employees. The record indicates, however, that the employer established no mechanism to make sure the remedies were working on this occasion. Furthermore, the complaining employees were given no specific avenue to pursue should they receive further negative treatment.

In *Rivera v. Florida Unemployment Appeals Commission*, 99 So. 3d 505 (Fla. 3d DCA 2011), the claimant complained to both her general manager and district manager about an assistant general manager's harassment. After being told her allegations could not be corroborated, the claimant's request for a transfer was denied and, believing she would have to continue working with her harasser, the claimant voluntarily quit. *Id.* at 507. The court reversed the order disqualifying the claimant from receipt of benefits for failing to make reasonable efforts to preserve her employment after the transfer was denied, noting that the claimant had already expended reasonable efforts to preserve her employment. *Id.* at 508. While the employer did take some action in this case, the limitations on its actions could potentially have led a reasonable employee to conclude that another complaint was not only futile, but was counter-productive. On remand, the referee must weigh the facts as known to the claimant and determine whether she would reasonably have been expected to make any further attempts to complain to the employer.

Finally, the Commission notes that, during the course of the proceeding, the referee characterized a material portion of the City Clerk's testimony as "not truthful" because it conflicted with the testimony presented by the claimant and her witnesses.² The statement was inappropriate and, despite her ruling in favor of the employer, indicates potential bias against the employer's chief witness. In order to ensure full due process is provided to each party, the supplemental hearing must be held *de novo* before a new appeals referee.

In order to address the foregoing issues, the decision of the appeals referee is vacated and the cause is remanded for a hearing *de novo*. The parties are advised that any exhibits the parties wish to be considered, including higher quality copies of previously provided exhibits, must be sent to the referee as well as the opposing party in order to be received at least 24 hours in advance of the supplemental hearing in accordance with Florida Administrative Code Rule 73B-20.014(3). The referee must then render a decision that considers whether the claimant voluntarily left work with good cause attributable to the employer taken in context of the total employment history.

The claimant's Notice of Appeal was filed by a representative for the claimant. Section 443.041, Florida Statutes, provides that a representative for any individual claiming benefits in any proceeding before the Commission shall not receive a fee for such services unless the amount of the fee is approved by the Commission. The claimant's representative shall provide the amount, if any, the claimant has agreed to pay for services, the hourly rate charged or other method used to compute the proposed fee, and the nature and extent of the services rendered, not later than fifteen (15) days from the date of this Order.

² The Commission specifically refers to minute 20:00 of the second recording wherein the referee states, "You are testifying under oath that you were civil to the claimant on the interaction you had with her on June 24, 2013. I previously took testimony from city workers that allegedly saw some part of the events and according to their testimony the action was not civil. So, I am wondering why, under oath, you would provide me with a statement that was not truthful?"

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
4/25/2014 ,
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: Kimberley Pena
Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314-5250



*17897771 *

Docket No.0008 7580 62-02

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES Employer
 Employer Representative
 Claimant
 Other

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 began working for the employer on January 25, 2010. The claimant worked as an assistant city clerk II. On June 24, 2013, the city clerk asked the claimant why she failed to add minutes for ordinances from the meeting from May 7, 2013 in the document on a flash drive the claimant gave her. The claimant explained to the city clerk that she asked her previously if she needed to add the minutes for the ordinances in the document, and the city clerk said it was not necessary. However, the claimant took offense at the tone and manner the city clerk asked the question. The claimant did not report to human resources or office of professional standard the interaction she had with the city clerk that she considered offensive. On June 24, 2013, the claimant quit without notice because she believed the city clerk spoke to her in an offensive manner.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. "Good cause" includes only cause attributable to the employing unit or illness or disability of the claimant requiring separation from the work. However, a claimant who voluntarily left work to return immediately when called to work by a permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months, or to relocate due to a military-connected spouse's permanent change of station, activation, or unit deployment orders, is not subject to this disqualification.

The Reemployment Assistance Compensation statute provides for disqualification of a claimant who voluntarily left work without good cause attributable to the employing unit. The cause must be one which would reasonably impel an average able-bodied qualified worker to leave employment. The applicable standards are the standards of reasonableness as applied to the average man or woman, and not to the supersensitive. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827, 829 (Fla. 4th DCA 1973). The record and evidence in this case show that the claimant quit because she took offense at the tone and manner the city clerk asked her a question. However, the claimant did not attempt to preserve her job by voicing her concerns to human resources or the office of professional standard. An individual who leaves work voluntarily, as the claimant did, carries the burden to show that the leaving was with good cause attributable to the employer, in order to qualify for Reemployment Assistance benefits. That burden has not been met in this case. In addition, the claimant's quitting was not attributable to the employer. As such, the claimant is disqualified from the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These 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 hearing officer finds the testimony of the employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Consideration was given to the claimant's contention that the City Clerk took retaliatory actions against her because she and some co-workers filed a complaint against the City Clerk. Based on the evidence on the record, the City Clerk was not privy to the names of individuals that filed the complaint against her. The evidence on the record did not support the allegation that the City Clerk retaliated against the claimant. In addition, the claimant submitted into evidence materials obtained from the internet; copies of emails and a CD of an audio complaint filed against the City Clerk in 2010 by an employee prior to the claimant being hired. After a careful review of the documents and the audio CD submitted by the claimant, the hearing officer reached the conclusion that the documents and CD are not relevant to the instant case. As such, consideration is respectfully denied.

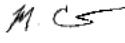
Decision: The determination dated July 19, 2013, is REVERSED. The claimant is disqualified from the receipt of benefits from June 23, 2013 and until earning \$4,675.

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 distributed to the last known address of each interested party on November 19, 2013

OLALONPE SOBANJO
Appeals Referee

By:


MONTY CROCKETT, 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 above 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 connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's 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 connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; 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, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); <https://raaciap.floridajobs.org>. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandé a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.

An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.