

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

vs.

R.A.A.C. Order No. 13-09628
Referee Decision No. 0010251921-03U

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.

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 recite as follows:

The claimant began working for the employer, a retail store, in 2012. The claimant worked as a membership coordinator. During the time the claimant worked for the employer he had a conversation with a co-worker. During the conversation, the claimant touched the co-worker on the shoulder. The co-worker never advised the claimant that she felt uncomfortable with the conversation or that she was uncomfortable about him touching her on the shoulder. The co-worker complained to the employer about the incident and the claimant received a warning from the employer advising him that he was not to touch co-workers and that the only appropriate touching at work would be a handshake. Subsequently, the co-worker resigned from her job with the employer. After the claimant clocked out of work for the day, he went to the co-worker to bid her goodbye, embracing her and giving her a "peck" on the neck. On October 1, 2013, the employer discharged the claimant for inappropriate conduct.

The referee concluded, in pertinent part:

The record reflects the employer discharged the claimant. In this matter, the employer previously warned the claimant that the only appropriate touching at work was a hand shake. However, at the time of the final incident, the claimant was not on the clock and thus not at work. Moreover, the co-worker had resigned and thus no longer an employee of the company. As such, the employer has failed to demonstrate that the claimant violated a known company rule or acted in a manner demonstrating a conscious disregard of the employer's interests. Accordingly, it is held the claimant was discharged for reasons other than misconduct connected with work.

Based upon the above 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 record was not sufficiently developed; consequently, the case must be remanded.

It is noted that the referee has relied on a prior version of the reemployment assistance law that is not controlling in this case. Effective May 17, 2013, Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in *pari materia* with each other":

(a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than \$50; or theft of employer property or property of a customer or invitee of the employer.

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

- a. He or she did not know, and could not reasonably know, of the rule's requirements;
- b. The rule is not lawful or not reasonably related to the job environment and performance; or
- c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

At the hearing before the appeals referee, the employer's representative, the club manager, testified that the assistant manager and the personnel training coordinator discharged the claimant. Neither the assistant manager nor the personnel training coordinator attended the hearing. If the person who discharged a claimant does not attend an appeals hearing, the referee is expected to ascertain whether those employer witness(es) who do attend the hearing either participated in the decision to discharge the claimant or were physically present when the claimant was discharged. At present, while the record is clear that the club manager was not present at the time of the separation, the record is silent concerning whether the evidence the employer's witness provided was competent concerning the reason for the claimant's discharge because it is unknown if the club manager participated in the decision to discharge the claimant.

The record, presently unsupported by competent evidence, reflects that the claimant was discharged for violating the employer's sexual harassment policy. The claimant testified that he was told that he was being discharged for "inappropriate behavior and misconduct." The referee entered into evidence (but failed to label) documents identified as the employer's sexual harassment policy and two written

statements of the claimant regarding allegations of inappropriate behavior made against him by co-workers. However, the employer did not submit any acknowledgement of the employee handbook or policies signed by the claimant and the referee never asked the claimant if he was aware of the employer's sexual harassment policy. The claimant admitted to receiving a write-up on July 30, 2013, concerning allegations that he touched a co-worker's shoulder, had a conversation with a second co-worker about religion, and asked a third co-worker whether she had any children. However, the employer did not submit a copy of the write-up and the referee never asked the claimant whether the employer's sexual harassment policy was discussed at the time the write-up was issued to him. The referee also failed to ask the claimant if he was told the write-up was for violating the sexual harassment policy or any other policy. Additionally, regarding the final incident on September 1, 2013, the claimant admitted to hugging and placing a kiss on the neck of a co-worker, who had notified the employer of her intended resignation a week before, because he said that the co-worker permitted him to do so.

The referee, in her decision, found that the claimant was previously warned that the only appropriate form of touching at work was a handshake, but that at the time of the final incident "the claimant was not on the clock and thus not at work" and "the co-worker had resigned and thus no longer an employee of the company." However, these findings are not supported because, although it is undisputed that the incident occurred at the worksite, the record is not clear regarding whether the co-worker was still working on the clock and was employed by the employer at the time of the incident. Moreover, the reemployment assistance statute does not require that for an employee's action to be considered misconduct, it must have occurred while an employee is on the clock working. In fact, Section 443.036(30), Florida Statutes, states that misconduct connected with work can occur "irrespective of whether the misconduct occurs at the workplace or during working hours" It is also not determinative that the co-worker the claimant kissed had finished her last day of work, as she was still at the work premises, and thus legitimately within the protection of the employer's policies.

With respect to the issue of whether the claimant violated an employer rule, the statute provides that a violation of an employer's rule is misconduct, unless the claimant can show that he did not know or could not reasonably know of the rule's requirements; that the rule is not lawful or reasonably related to the job environment and performance; or, the rule is not fairly or consistently enforced. The statute does not provide for a lack of memory concerning the contents of a properly received policy.

The referee is advised that there are several controlling court cases that have addressed the issue of sexual harassment in regards to separations of employment. In *Sears, Roebuck & Company v. Unemployment Appeals Commission*, 463 So. 2d 465 (Fla. 2d DCA 1985), a male supervisor was discharged for kissing a minor female employee on the cheek. Although the supervisor's act may have been completely innocuous, it violated the employer's policy against such activities and might have led to the filing of a charge of sexual harassment. The court held the violation amounted to misconduct connected with work.

In *Lockheed Martin Corporation v. Unemployment Appeals Commission*, 876 So. 2d 31 (Fla. 5th DCA 2004), the court held that violating a clear harassment policy amounts to disqualifying misconduct even when the behavior is consensual amongst the participants. In *Lockheed Martin Corp.*, company employees engaged in consensual sexual horseplay and none of the participants complained to the employer about the matter. *Id.* at 32-33. The employer became aware of the behavior two years after the final incident when a non-participant related the events to one of the employer's human resources officials. Applying the more liberal definition of misconduct in effect prior to June 27, 2011, the court noted the facts that the on-site supervisors "chose to disregard [the behavior]," the victim failed to complain, and other witnesses failed to complain, *did not* eliminate the misconduct. *Id.* The court explained that "[t]his is essential because such conduct adversely affects others in the workplace, not just the victim or participant." *Id.*

On remand, the referee is directed to convene a supplemental hearing, develop the record as outlined above and issue a new decision that features specific findings of fact along with proper conclusions of law as well as an appropriate conflict resolution with respect to any disputed material facts.

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
7/14/2014 ,
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: Juanita Williams
Deputy Clerk



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



*19050561 *

Docket No.0010 2519 21-03

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES Claimant
 Employer

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.

times new roman;Findings of Fact: The claimant began working for the employer, a retail store, in 2012. The claimant worked as a membership coordinator. During the time the

claimant worked for the employer he had a conversation with a co-worker. During the conversation, the claimant touched the co-worker on the shoulder. The co-worker never advised the claimant that she felt uncomfortable with the conversation or that she was uncomfortable about him touching her on the shoulder. The co-worker complained to the employer about the incident and the claimant received a warning from the employer advising him that he was not to touch co-workers and that the only appropriate touching at work would be a handshake. Subsequently, the co-worker resigned from her job with the employer. After the claimant clocked out of work for the day, he went to the co-worker to bid her goodbye, embracing her and giving her a "peck" on the neck. On October 1, 2013, the employer discharged the claimant for inappropriate conduct.

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in *pari materia* with each other:

- (a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
- (b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.
- (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
- (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
- (e) A violation of an employer's rule, unless the claimant can demonstrate that:
 - 1. He or she did not know, and could not reasonably know, of the rules requirements;
 - 2. The rule is not lawful or not reasonably related to the job environment and performance; or
 - 3. The rule is not fairly or consistently enforced.

The record reflects the employer discharged the claimant. In this matter, the employer previously warned the claimant that the only appropriate touching at work was a hand shake. However, at the time of the final incident, the claimant was not on the clock and thus not at work. Moreover, the co-worker had resigned and thus no longer an employee of the company. As such, the employer has failed to demonstrate that the claimant violated a known company rule or acted in a manner demonstrating a conscience disregard of the employer's interests. Accordingly, it is held the claimant was discharged for reasons other than misconduct connected with work.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission 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 hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated November 4, 2013, holding the claimant disqualified, is **REVERSED**. It is held the claimant was discharged for reasons other than misconduct connected with work.

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 December 10, 2013

SAMANTHA STEEN
Appeals Referee

By: 

MARISOL DURAN, 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 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 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 demandè 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.