STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-00645

vs.

Referee Decision No. 0008816950-02U

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

The referee's findings of fact state as follows:

> The claimant worked as a patient care monitor technician for a hospital from September 12, 2011, until September 3, 2013. On May 31, 2013, a female employee reported an allegation to the director that the claimant had made a comment to her over an intercom system saying "I love watching a woman doing manual labor. I bet you're breaking a sweat." The claimant received a written counseling from his director and was questioned about the incident. The claimant admitted he made the comment, but it was not meant to be offensive and that he and the female employee joke around on a daily basis. Other employees were interviewed regarding the incident and noted that they have seen and

> overheard the claimant and the female employee joke around on many occasions. On August 23, 2013, the claimant and a female employee were overheard sharing a joke. The female employe[e] made an off color joke about President Obama and in response to the joke the claimant responded with, "You're not right! You should have been a blow job and put everyone out of their misery." Both the claimant and the female employee laughed and went back to work. The female employee was repeating the joke to another employee and was advised to report his response because it was vulgar. The claimant was questioned by his director regarding the incident and explained that the joke was not said to offend the employee and was the normal type of jokes and comments he and the female employee made to each other often. The claimant explained that he had spoken to the female employee after the incident and she told him she was not offended. On September 3, 2013, the claimant was discharged.

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's decision is not in accord with the law; accordingly, it is reversed.

Two incidents preceded the claimant's discharge from employment. The claimant admitted to making a comment to a co-worker in May 2013, via the employer's intercom system, which he characterized as inappropriate. The claimant acknowledged that a patient was present but seemingly devalued the patient's presence because he was on a ventilator.

As a result of that incident the claimant was issued a warning in June, which states: "Action Plan for Improvement: 1. [The claimant] will conduct himself in a professional and respectful manner in the workplace and while performing his job duties." The warning cautions that "[F]ailure to adhere to this Action Plan or a reoccurrence of this or any misconduct will result in disciplinary action, up to and including termination of employment." The claimant acknowledged that, in conjunction with the warning, he was required to read the employer's policies regarding behavior in the workplace.

Two months later, in response to a political joke, he told a co-worker she "should have been a blow job." The record, however, does not support the referee's finding that the two employees were overheard. Rather, the co-worker relayed the comment to another individual, which led to the employer's investigation. In the statement the claimant provided to his employer, he wrote of the incident, "She

shared a joke and I responded I admit jokingly but inappropriately for the workplace." He further explained that "[She] and I share these kinds of jokes frequently with each other. Sometimes they are off color in nature." At least twice during the appeals hearing, the claimant categorized his own statement as inappropriate. The employer's director testified that the female co-worker was counseled for the incident, but the claimant was terminated because it was his second violation.

Effective May 17, 2013, Section 443.036(30)(a), Florida Statutes, states, in part, 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 . . . ."

> (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.

When a worker has been discharged from employment, the employer bears the burden of proving the discharge was for misconduct, as the term is defined by law. *See Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). A review of the record reflects the employer's burden was met in this case. As noted above, the claimant acknowledged during the hearing that his May actions were inappropriate, testified that he received a warning in June, and acknowledged his August comment was inappropriate. It is clear that the employer deemed the final interchange between the two employees unprofessional.

The courts have held that continuing a behavior or activity after being expressly warned by the employer to cease doing so constitutes a willful and wanton disregard of the employer's interests and a deliberate violation or disregard of the reasonable standards of behavior which the employer expects. "It is well established that repeated instances of misbehavior, contrary to the interest of the employer, constitutes 'misconduct.'" *Silver Springs v. Fla. Dep't of Commerce*, 366 So. 2d 876 (Fla. 1st DCA 1979) (disqualifying claimant for being involved in a disruptive incident with a female employee after he was warned that another incident would result in his termination). *See also Orange Bank v. Unemployment Appeals Commission*, 611 So. 2d 107 (Fla. 5th DCA 1992) (disqualifying claimant for continuing to complain about work distribution after she was warned to cease

complaining); *Caputo v. Fla. Unemployment Appeals Commission*, 493 So. 2d 1121 (Fla. 3d DCA 1986) (disqualifying a principal from benefits when he failed to heed his superintendent's directive to "cease and desist certain religious activities"). These cases were decided under the prior version of subparagraph (a), which was amended in 2011 to lower the mental state requirement from "willful or wanton disregard" to "conscious disregard" of the employer's interests.

Because this employer presented a prima facie case of misconduct, the burden shifted to the claimant to provide an exculpatory explanation for his actions. *See Alterman Transport Lines, Inc. v. Unemployment Appeals Commission*, 410 So. 2d 568 (Fla. 1st DCA 1982). The claimant did not meet his burden. The claimant cited his history of frequent similar exchanges with the co-worker and testified that his co-worker was not offended by his comments. The co-worker, however, is not the sole individual that must be considered in determining whether the claimant's comment to her rises to the level of disqualifying misconduct.

The claimant worked in a hospital with patients. A requirement that employees behave professionally is not put in place for the benefit of one or two employees, but for all employees and customers of a business who might potentially witness and be offended by unprofessional behavior. Considering the environment where the claimant worked, his August comment was objectively unprofessional. Contrary to the referee's conclusion, the fact that the claimant's co-worker engaged in unprofessional conversations while at work does not ameliorate the claimant's own misconduct, particularly since the co-worker was also disciplined. Additionally, rather than mitigating the claimant's action, the frequency of similar interactions with the female co-worker further strengthens the legal conclusion that the claimant was repeatedly committing acts of misconduct by behaving unprofessionally.

In *Lockheed Martin Corp. v. Unemployment Appeals Commission*, 876 So. 2d 31, 33 (Fla. 5th DCA 2004), the court noted that the fact that conduct is not complained of by other participants is not determinative, if it is violative of the employer's policies or expectations. The court noted that such policies are also designed to protect others in the workplace, who may be exposed to such behavior even if they do not participate in it. *Id*.

While the claimant's actions in this case may or may not have violated the specific terms of any employer policies, he had previously been warned regarding unprofessional conduct of a similar nature, and acknowledged that he knew that his statements were inappropriate. The claimant's failure to heed his employer's warning to behave professionally, lest he be terminated, was a conscious disregard of the employer's interests and reasonable standards of behavior the employer expected of its employees.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending September 7, 2013, the five succeeding weeks, and until he becomes reemployed and earns $4675. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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 9/9/2014, 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: Ebony Porter
Deputy Clerk

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

*22796500 *

Docket No.0008 8169 50-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee ***EMPLOYER/Appellant***

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.

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.

Issues Involved: CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will 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 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 a patient care monitor technician for a hospital from September 12, 2011, until September 3, 2013. On May 31, 2013, a female employee reported an allegation to the director that the claimant had made a comment to her over an intercom system saying, "I love watching a woman doing manual labor. I bet you're breaking a sweat." The claimant received a written counselling from his director and was questioned about the incident . The claimant admitted he made the comment, but it was not meant to be offensive and that he and the female employee joke around on a daily basis. Other employees were interviewed regarding the incident and noted that they have seen and overheard the claimant and the female employee joke around on many occasions. On August 23, 2013, the claimant and a female employee were overheard sharing a joke. The female employer made an off color political joke about President Obama and in response to the joke the claimant responded with, "You're not right! You should have been a blow job and put everyone out of their misery." Both the claimant and the female employee laughed and went back to work. The female employee was repeating the joke to another employee and mentioned the claimant's response and was advised to report his response because it was vulgar. The claimant was questioned by his director regarding the incident and explained that the joke was not said to offend the employee and was the normal type of jokes and comments he and the female employee made to each other often. The claimant explained that he had spoken to the female employee after the incident and she told him she was not offended. On September 3, 2013, the claimant was discharged.

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 shows the claimant was discharged. The burden of proving misconduct is on the employer.

Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The employer provided documentations of the incidents that led to the claimant's discharge. The information in the documents show the claimant's incidents with the female employee were not isolated incidents and from statements from other employees, were normal interactions between the claimant and the female employee. The claimant provided unrebutted testimony that he and the female employee share jokes and make off handed comments to each other often. The claimant testified that he had spoken to the female employee and was told she was not offended by his comments. The employer was unable to show the claimant's actions were intentional in nature and meant to offend or hurt the female employee. The employer was unable to show the claimant's actions were 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. Accordingly, the claimant's actions do not rise to the level of misconduct. Therefore, the claimant is qualified for benefits.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The record shows the claimant's actions did not rise to the level of misconduct. Accordingly, the employer's tax account will be charged.

Decision: The determination dated October 10, 2013, is AFFIRMED.

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

This is to certify that a copy of the above decision was distributed to the last known address of each interested party on February 4, 2014

GERREN MARDIS
Appeals Referee

Sherene M. Price

By:

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

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, 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.
