

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02027

vs.

Referee Decision No. 0021333247-02U

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 which held the claimant disqualified from receipt of benefits and the employer's account noncharged.

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 server for the employer. The claimant was verbally counselled for failing to record drink orders. On January 11, 2014, the claimant approached the owner questioning him in a loud voice as to why he scheduled an extra server on a Saturday. The owner was then approached by a customer requesting service stating they had been waiting for ten minutes. The claimant brought the customer to their table but failed to notify another server that the customer was waiting for service. The owner told the claimant that she was suspended for two weeks. The claimant again questioned the owner then threatened to sue him. The owner discharged the claimant.

Based on these findings, the referee held the claimant was discharged for 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.

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.

In this case, the applicable portion of the definition of misconduct is subparagraph (a). That provision contains two separate requirements. The employer must prove that the claimant engaged in conduct (1) demonstrating a conscious disregard of an employer's interests *and* (2) found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

The believed evidence reflects the claimant, a server at a restaurant, was discharged for threatening to sue the owner after he suspended her for two weeks for yelling at him for scheduling too many servers on her shift. The record, however, was not sufficiently developed regarding many of the details surrounding the incidents that led to the discharge.

This case involves the claimant's insubordination by challenging the owner's judgment and threatening to sue, as well as the claimant's failure to perform a task properly. In addressing insubordination under the predecessor definition of misconduct, courts considered whether the employee's conduct occurred in private or could be heard or seen by anyone else, such as other employees or customers. *See, e.g., Peaden v. Unemployment Appeals Commission*, 865 So. 2d 690 (Fla. 5th DCA 2004) (vulgarity directed towards a supervisor in the presence of other employees is a willful and wanton disregard of the employer's interests). *Cf. Benitez v. Girlfriday, Inc.*, 609 So. 2d 665 (Fla.3d DCA 1992) (isolated use of obscene language directed to a supervisor during a private telephone conversation outside the presence of other persons did not constitute a willful and wanton disregard of the employer's interests).

The amended definition of misconduct contained in subparagraph (a) above covers more conduct than the predecessor definition of misconduct, as it replaces the prior high standard of "willful and wanton disregard" with a significantly lower "conscious disregard" standard. As a result, some cases decided prior to the 2011 amendment, such as *Benitez*, may have a different result under the new standard. However, analysis under the amended subparagraph (a) still involves consideration of the totality of the circumstances. Here the findings of fact lack sufficient detail regarding the circumstances surrounding the incidents that led to the claimant's discharge for the Commission to determine whether her actions constitute misconduct under the broader amended definition of misconduct.

In this case, it is unclear where in the restaurant the incident occurred and whether the claimant's conduct could be heard or seen by other co-workers or customers. In addition, the owner testified that, during both the incident that led to the suspension *and* the incident that led to the discharge, the claimant was "yelling." The findings of fact, however, reflect the claimant merely used a "loud voice" during the *first* of the two related incidents. Though the terms used are similar, there is at least some difference in the degree of disrespect they represent. Thus the findings of fact should adhere to the believed evidence as closely as possible. The findings of fact should also reflect whether the claimant was yelling in the second of the two incidents.

Furthermore, the findings reflect the claimant threatened to sue the owner. Indeed, the owner testified the claimant threatened to sue him for suspending her. The claimant testified that, upon being notified of the suspension, she merely told the owner that she "better contact a lawyer." While it is clear the parties agree the claimant's response was directed at the employer's action of suspending her, it is unclear from the record whether the parties disagree as to the actual words used by the claimant, or whether the owner simply concluded that her words meant she was going to sue him. The referee should clarify the owner's position as to the precise words used by the claimant and make findings of fact regarding what specifically the claimant said.

Finally, in cases involving the analysis of facts under subparagraph (a), a referee must consider both requirements under that subparagraph. The referee must determine what interests of the employer are thought to have been disregarded, and must also determine what are the reasonable standards of behavior the employer expects. In this case, we have no doubt that the reasonable standards of behavior expected by the employer would preclude unprovoked yelling at the manager as well as a threat to sue, *assuming these events occurred*. However, the employer's interests that were impacted by the claimant's behavior are not as clear. An employee who "makes a scene" in front of customers, or refuses in a fit of pique to properly ensure that a customer is served, clearly threatens a business' financial interests, as the impact on the clientele may be significant. However, a private conversation, depending upon the context, may or may not constitute the type of insubordination, or disruption of the management-employee relationship, that impairs the employer's interest in maintaining appropriate control of the workforce. By contrast, it was well-established even under prior case law that challenging the employer's authority in front of coworkers was disqualifying misconduct. *Peaden*, above. Additional development of the facts as set forth above may help reveal the nature of the employer's interests that were at stake during the incidents at issue, and what actions by the claimant may have injured, or at least "consciously disregarded," them.

In order to address the aforementioned points, the referee's decision is vacated and the case is remanded for the referee to schedule a supplemental hearing in order to adduce additional evidence on the matters noted above. Based upon the supplemental record, a new decision must then be issued with specific findings of fact and an appropriate conflict resolution.

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

10/29/2014,

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



*25160815 *

Docket No.0021 3332 47-02

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.

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 server for the employer. The claimant was verbally counselled for failing to record drink orders. On January 11, 2014, the claimant approached the owner questioning him in a loud voice as to why he scheduled an extra server on a Saturday. The owner was then approached by a customer requesting service stating they had been waiting for ten minutes. The claimant brought the customer to their table but failed to notify another server that the customer was waiting for service. The owner told the claimant that she was suspended for two weeks. The claimant again questioned the owner then threatened to sue him. The owner discharged the claimant.

Conclusion 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 claimant was discharged. 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 employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer. The facts in this case shows the claimant questioned the owner with a raised voice ultimately threatening to file a law suit. It is the employer's responsibility to assure adequate staffing in order to meet business needs. At a minimum, the claimant's actions violate a standard of behavior which the employer has a right to expect which rise to the level of misconduct connected with work. Accordingly, it is held that the claimant's discharge was for misconduct connected with work and she has been properly denied receipt of benefits. The employer shall remain noncharged.

Decision: The determination dated February 7, 2014, 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 March 28, 2014

CATHERINE MILLER
Appeals Referee

By: 

GAIL ALLEN, 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 sòs 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 diskalfye 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.