

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02331

vs.

Referee Decision No. 0022098798-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a

finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings.

Our review of the record, and the referee's decision, reflects that the referee's findings of fact are supported by competent, substantial evidence, with two qualifications. First, the statement in the findings "the claimant was dissatisfied with what he believed his pay would be . . ." must be clarified to show that the claimant was dissatisfied with what he perceived as a lack of transparency as to how the employer calculated gross profits used to determine his commission payments. Second, we note that many of the referee's findings are based on testimony the claimant gave that was contradicted by the employer's witnesses' testimony regarding the claimant's statements to them as to why he was resigning. Given the referee's credibility determination in favor of the employer, not all of these findings are supported. Nonetheless, we conclude that remand for clarification of the findings is not necessary because the findings as written clearly support the referee's conclusion that the claimant's voluntary resignation from the employer was without good cause attributable to the employer.

On appeal to the Commission, the claimant raises issues relating to deductions from the check he received after he ended his employment. Additionally, the claimant contends that he was not paid as required by wage and hour law. While these issues were raised in the hearing, the claimant's own testimony reflects that no causal connection exists between the claimant's resignation and these complaints, as the claimant had not received his paycheck prior to his separation. Nor was there any credited evidence that the claimant raised these issues with the employer prior to his separation, as required to preserve his employment. *See Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586, 588 (Fla. 4th DCA 2006).

While the claimant contends that his total pay on an hourly basis was less than the Florida minimum wage, he failed to show any violation of the Fair Labor Standards Act ("FLSA") or the Florida Minimum Wage Act. He failed to demonstrate that the hours he worked were all scheduled, approved, and known to the employer. This is a significant omission since the employer based his guaranteed minimum compensation on a set number of hours that salespeople were required to work. Additionally, his calculations ostensibly showing that he was paid less than the applicable Florida minimum wage include 12.5 hours of work contested by the employer. Elimination of these hours, which is necessary given the credibility determination, would leave his effective hourly rate above the applicable Florida minimum wage.¹ Both the hearing and the claimant's request for review demonstrate that these issues are merely *post hoc* rationales offered by the claimant to justify his voluntary resignation. Regardless of whether the claimant has any economic claims against the employer, he failed to establish that any pay deductions or hourly rate issues were part of the reason for his resignation; thus, they are irrelevant in considering whether he had good cause to resign attributable to the employer. Therefore, we conclude that the referee properly applied the reemployment assistance law in determining the claimant was disqualified from receipt of benefits.

¹ As an automobile salesman, the claimant was not entitled to overtime compensation under the FLSA. 29 U.S.C. §213(b)(10)(A).

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits. The employer's account is relieved of charges in connection with this claim.

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

12/2/2014 ,

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



*26200573 *

Docket No.0022 0987 98-02

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES Employer Representative
 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.

Findings of Fact: The claimant was employed as a salesman for

a retail automobile sales company, from February 10, 2014 through March 3, 2014. The claimant was hired to work on a commission basis with a guaranteed minimum salary of \$1700/month gross - an amount equivalent with Florida minimum wage. Pursuant to the terms of hire, employees such as the claimant were to be paid a draw on the 15th of the month, which is an advance on their anticipated earnings, and the final pay, which reflects actual earnings, was to be made on or about the 7th of the following month. Earnings were to be calculated based on the greater between \$1700, the guaranteed monthly minimum, and 20% of gross profits earned by the employee based on sales made during the pay period. The claimant was dissatisfied with what he believed his pay would be, and he disputed the method used by the employer to calculate his pay - specifically the methods used to calculate gross profit. The terms agreed to by the claimant at the time of hire do not require detailed disclosure by the employer regarding its specific costs and methods used to calculate gross profits. The claimant addressed his issues regarding his concerns over the method used by the employer to calculate profits, and over the employer's transparency regarding its costs to be deducted in reaching the gross profits figure used in calculating the claimant's pay to the employer just prior to resigning; however, he had not yet received a pay check at that time, and he was advised that he would be paid in accordance with the terms of his hire. The claimant provided verbal notice of his intent to resign on February 28, 2014, and he last reported for work on March 3, 2014.

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. Good cause for voluntarily leaving a job is such cause as will reasonably impel the average, able-bodied, qualified worker to give up employment. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973).

The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. Uniweld Products, Inc., v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973).

Since the claimant left employment for reasons other than those listed above, Florida Reemployment Assistance law requires disqualification. Although the claimant's reasons for leaving the job may have been personally compelling, they do not meet the qualification requirements for Reemployment Assistance benefits.

The record herein shows the claimant voluntarily resigned from his employment due to dissatisfaction with his compensation and dissatisfaction with the manner of transparency offered by the employer with regards to its calculation of gross profit; however, the claimant resigned prior to receiving his first pay check. Accordingly, the claimant resigned prior to receiving his first pay check from the employer, and therefore the claimant resigned prior to confirming that his pay was not in accordance with the terms of hire. Additionally, the record reflects the employer's manner of payment was disclosed and agreed upon at the time of hire with no additional promises being made by the employer to provide detailed records of its internal accounting methods used to calculate gross profit. Accordingly, the claimant failed to meet his burden of establishing by a preponderance of the evidence that his resignation was with good cause attributable to the employer. As the claimant voluntarily resigned from his employment without good cause, he is disqualified from receiving reemployment assistance benefits effective March 2, 2014 and until he earns \$4675.

The appeals referee 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 Reemployment Assistance Appeals 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.

Decision: The determination of the claims adjudicator dated March 24, 2014 which held the claimant disqualified from receiving benefits due to quitting for reasons not attributable to the employer is **AFFIRMED**. It is held the claimant did not have good cause for voluntarily quitting his employment and is disqualified from receiving benefits effective March 2, 2014 and until he earns \$4675.

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 April 22, 2014

Pamela Chance
Appeals Referee

By: 
DANIEL SANCHEZ, 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 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 lèt 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.

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