

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-02560

vs.

Referee Decision No. 0022147492-02U

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.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the claimant voluntarily left work without good cause within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

The claimant began working as an assistant nurse manager for the employer, a nursing facility, on July 15, 2002. On November 20, 2013, the claimant submitted a two weeks' notice of resignation to the employer citing discrimination as her reason for quitting.

Based on these findings, the referee held the claimant voluntarily left work with good cause attributable to the employing unit. Specifically, the referee concluded that:

The record reflects that the claimant made attempts to report discrimination in the workplace. The record also shows that these issues were not resolved. Discrimination constitutes good cause for quitting; thus, the claimant is eligible for benefits.

Upon review of the record and the arguments on appeal, the Commission concludes the referee's findings are inadequate, and the conclusions are not supported by appropriate findings. Furthermore, because our review of the record demonstrates that the claimant offered no competent, substantial evidence to support either that she had good cause to quit, or that she made appropriate efforts to preserve her employment, a remand is not appropriate in this case. Rather, we reverse the referee's decision for the reasons stated herein.

Facts

The claimant was employed as an assistant nurse manager for the employer at a medical center. She reported directly to the clinical manager. During her employment, she began to feel her next-level supervisor, the director, was treating her unprofessionally. According to the claimant, the director would speak to her in a rude manner or would "talk down" to her. The director texted her after hours about "silly things" that could have been brought up during regular business hours. The claimant also testified that she felt the black employees were being treated differently; however, she gave only three examples. She felt the director "found little ways to complain or talk about black employees." She also recounted an incident when the director told her she did not want a nurse, who happened to be black, sitting behind the nurses' station, but the director said nothing when a white nurse was sitting behind the nurses' station at some later point. Finally, she testified that, when she received her only write-up, one of the issues for which she was counseled was her failure to address an instance of nurses engaging in unprofessional conduct by dancing around in a patient care area. The claimant testified that the nurses involved in that incident were white, and that they were not written up, but she was. The record, however, is devoid of any foundation demonstrating whether the claimant was aware of any verbal counseling they may have received. She acknowledged that at no time were any racially demeaning or inappropriate comments made to her.

The record reflects the claimant was written up for the first and only time on November 15, 2013.¹ She received a final written counseling for three different issues. First, it had been reported to the employer that she had made insubordinate comments about her director. Second, she had reportedly left one day when the census was low without informing her supervisor. Third, she was reprimanded for not intervening on the day when the nurses were allegedly acting unprofessionally. Each of the incidents that formed the grounds for the write-up was based on the reports of other employees to the director. According to the claimant, she was told that if anyone else complained about her, she would be terminated. The claimant denied that she acted inappropriately during any of these instances, and further contended that she was not present on the day the nurses were acting unprofessionally.

Prior to the written warning, the claimant had expressed her complaints about her director on two occasions. First, she indicated that she spoke with the facility's chief nursing officer in May 2013 and advised her that the director talked to her in a rude manner and talked down to her. She also testified that she believed the director spoke that way with other black employees. She did not tell the chief nursing officer about the incident where the director said she did not want a particular nurse who was black sitting at the nurses' station. She did not indicate she believed that the director was discriminating against her on the basis of her race. The chief nursing officer told the claimant she would speak to the director about her tone of voice. The claimant also testified that she made an anonymous complaint to the company ethics hotline. She alleged she was being harassed by her supervisor, but did not mention any perception of race discrimination or harassment based on race.

The November 15, 2013 written warning was presented to the claimant in a meeting with her director and the facility's chief human resources officer. After that meeting, the claimant emailed the chief human resources officer on Saturday, November 16, asking to meet with her on November 20 when the claimant returned to work from a brief vacation. The chief human resources officer responded the next day advising that she would be available at 3 p.m. on November 20. Notwithstanding that appointment, the claimant emailed her resignation letter [Exh. A p. 1.] at noon on November 20. In her resignation, she complained that "it would be difficult to work in an environment where any invalidated statement can

¹ The claimant testified that she was written up on November 20, 2013. We accept the date provided by the employer's witness, because of the more detailed chronology in that largely unrebutted testimony, and because the employer's witness was reviewing the written warning and confirmed its date. The referee made no finding on this issue.

be used for my termination" She also complained that management was relying on statements of a "chosen few" staff members in disciplining her instead of interviewing all staff. The resignation did not explicitly mention any belief that racial discrimination was part of the reason for the discipline, or that the work environment was hostile or discriminatory due to race.

Analysis

Based on these facts, the referee apparently concluded that the claimant had shown she was discriminated against, and apparently on the basis of race, without making any findings in this regard. For the reasons discussed below, we reject this implied finding as not supported by competent, substantial evidence. The referee also concluded that the claimant "had made attempts to report discrimination in the workplace," again without making any specific underlying findings. We again reject this implied finding as not supported by competent, substantial evidence. By the claimant's own testimony, the only reference she ever made in any complaint even remotely suggestive of race discrimination was her conversation with the chief nursing officer, when she expressed her perception that the director also spoke in a rude or demeaning manner to other black employees. The record evidence demonstrates that the claimant did not mention race discrimination in her report to the ethics hotline, and that despite having an appointment set up with the chief human resources officer in which she could have expressed these concerns, she abruptly quit earlier that day.

Section 443.101(1), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973). Although we are aware of no Florida appellate cases addressing race discrimination in the unemployment context, courts have held that gender discrimination and harassment constitute good cause to quit. *See, e.g., Fowler v. Unemployment Appeals Commission*, 670 So. 2d 1202 (Fla. 4th DCA 2002); *see also* R.A.A.C. Order No. 13-05313 (February 18, 2014).

Both Title VII and the Florida Civil Rights Act make it unlawful to discriminate on the basis of race in the "terms, conditions or privileges of employment." 42 U.S.C. §2000e-2(a)(1); §760.10(1)(a), Fla. Stat. "This provision obviously prohibits discrimination with respect to employment decisions that have direct economic consequences, such as termination, demotion, and pay cuts." *Vance v. Ball State University*, 133 S. Ct. 2434, 2440 (2013).

Additionally, when an employer creates or permits a working environment that is so hostile that it interferes with the employee's ability to do his or her job, the employee has been deprived of a term, condition or privilege of employment." As the Supreme Court noted in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), to be actionable harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" Furthermore, under equal employment opportunity law, a constructive discharge claim typically requires a more significant deprivation of rights than a garden-variety discrimination or harassment claim. *See, e.g., Pa. State Police v. Suders*, 542 U.S. 129, 146-47 (2004). In a reemployment assistance proceeding involving a *voluntary separation*, we are guided by the standards that would be applied in a court proceeding regarding such prohibited conduct.

We review this case as both a general workplace environment case, and as a racial discrimination/harassment case. Our review of the evidence makes clear that, as a matter of law, the evidence is insufficient to establish either good cause in the abstract, or good cause due to racial discrimination or harassment. The specific behavior complained of, being spoken to in a rude or "talking down" tone or being texted about minor issues at work after hours, falls far below the type of facts necessary to establish good cause to quit. This is particularly true where the claimant provided no specific details beyond conclusory, subjective statements. Nor does receiving a final warning with which an employee disagrees constitute good cause, even if the warning were based on untrue statements from coworkers that management believed in good faith.

With respect to racial discrimination or harassment, the evidence again falls far below the threshold that is legally significant. The evidence does not reflect that the claimant was denied a term, condition or privilege of employment. Beyond not liking the way that the director spoke to her, the only significant consequence was a final written warning, which was insufficient to alter the terms, conditions or privileges of her employment. There was no indication that the claimant suffered any job consequence such as loss of pay or other opportunities as a result of the warning, and while the warning could impact her future employment if additional issues arose, that is too speculative a prospect to establish immediate injury. Likewise, the evidence failed to demonstrate that the claimant was exposed to any facially discriminatory harassment, or that the conduct allegedly based on race was sufficiently severe so as to create a hostile working environment. Finally, the claimant failed to demonstrate, beyond subjective, conclusory assertions, that race played a role in the director's conduct. Conclusory assertions are not sufficient to prove discrimination. *Harrison v. IBM Corp.*, 378 Fed. Appx. 950, 955 (11th Cir. 2010). With respect to the one instance provided by the claimant, the director

instructing the claimant that a particular black nurse should not be sitting at the nurses' station, but later not commenting on a white nurse sitting there, the record is far too incomplete regarding the comparability of the situations for any inference of discrimination to be drawn. *See, e.g., Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1186-87 (11th Cir. 1984).

We recognize that the claimant may have honestly and sincerely believed that she was the victim of race discrimination. However, even if the claimant did have good cause to quit, she would have to demonstrate that she took appropriate steps to address the issues of concern before she separated. It is well established that, "whenever feasible, an individual is expected to expend reasonable efforts to preserve his employment." *Glenn v. Unemployment Appeals Commission*, 516 So. 2d 88, 89 (Fla. 3d DCA 1987). The standard has been applied in numerous cases where an employee failed to utilize an internal grievance or other procedure to resolve the issues affecting his or her employment, or to attempt to resolve workplace concerns by further discussion with his employer. *Morales v. Unemployment Appeals Commission*, 43 So. 3d 157, 158 (Fla. 3d DCA 2010); *Lawnco Servs., Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586 (Fla. 4th DCA 2006); *Klesh v. Unemployment Appeals Commission*, 441 So. 2d 1126 (Fla. 1st DCA 1983). However, a claimant is not required to exhaust a procedure in circumstances where it would be futile to do so. *Schenk v. Unemployment Appeals Commission*, 868 So. 2d 1239, 1241 (Fla. 4th DCA 2004); *Grossman v. Jewish Community Center*, 704 So. 2d 714, 717 (Fla. 4th DCA 1998).

Both the Commission and the courts have applied that doctrine to harassment cases. *See* R.A.A.C. Order No. 13-05313, above. We also apply the doctrine in cases involving perceived discrimination. Indeed, the doctrine is even more important in discrimination cases that do not involve explicitly discriminatory statements. While harassment is generally objectively provable behavior, circumstantial discrimination cases require careful analysis of disparate treatment to determine whether the treatment was motivated by discriminatory bias, or other motives. The method of proof utilized by the courts, the burden-shifting mechanism established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), requires extensive comparison of the circumstances before discrimination can be proven. Because the claimant never clearly raised a claim of race discrimination with the employer, the employer was deprived of an opportunity to conduct a full investigation, interview other witnesses, and determine whether or not the director's decisions were based on a nondiscriminatory rationale. The employer was also deprived of the opportunity to make any adjustments to the job environment that were necessary. We emphasize that a generic complaint about a supervisor's treatment of the employee is *not* sufficient to put an employer on notice of potential race discrimination. Employers regularly receive complaints regarding the way

supervisors interact with employees, and those complaints are often resolved by mutual discussions. A complaint of race discrimination is far more serious, as it alleges categorical behavior, and addressing it usually requires far more fact-finding by the employer. The claimant's own testimony reflects that she only alluded to potential disparate treatment on one occasion, as a passing comment in a conversation with the chief nursing officer about the tone of voice the director used with her. She never presented the issue of race discrimination to human resources, and when she finally requested and received an opportunity to discuss her concerns with human resources, she abruptly quit earlier in the day of the meeting without any explanation. We hold that she was required to address the issue of race discrimination directly with the employer on at least one occasion prior to voluntarily quitting.

Finally, we note that the employer separated the claimant prior to the conclusion of the two-week notice that she provided on November 20, 2013. Pursuant to Section 443.101(1)(a)3., Florida Statutes, the claimant is qualified for benefits for the week ending December 7, 2013, and disqualified for the week ending December 14, 2013, and thereafter.

That portion of the decision of the appeals referee holding the claimant qualified for receipt of benefits for the week ending December 7, 2013, is affirmed. The remainder of the decision is reversed. The claimant is disqualified from receipt of benefits for the week ending December 14, 2013, and until she 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

Joseph D. Finnegan, Member

Thomas D. Epsky, Member, Not Participating

This is to certify that on

12/30/2014

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 Appeals
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

IMPORTANT: For free translation assistance, you may call 1 800 204 2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE: Para recibir ayuda gratuita con traducciones, puede llamar al 1 800 204 2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN: Pou yon intèpét asisté ou gratis, nou gendwa rélé 1 800 204 2418. Sil vou plè pa pràn àmpil tân, paské tân limité pou ou ranpli apèl la.

Docket No. **0022 1474 92-02**

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.

Findings of Facts: The claimant began working as an assistant nurse manager for the employer, a nursing facility, on July 15, 2002. On November 20, 2013, the claimant submitted a two weeks' notice of resignation to the employer citing discrimination as her reason for quitting.

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

The law provides that an individual will be disqualified for benefits who voluntarily leaves work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." The applicable standards are the standards of reasonableness as applied to the average man or woman, and not to the supersensitive Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Moreover, an employee with good cause to leave employment may be disqualified if reasonable effort to preserve the employment was not expended. See Glenn v. Florida Unemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987). See also Lawnco

Services, Inc. v. Unemployment Appeals Commission, 946 So.2d 586 (Fla. 4th DCA 2006); Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006).

The record reflects that the claimant made attempts to report discrimination in the workplace. The record also shows that these issues were not resolved. Discrimination constitutes good cause for quitting; thus, the claimant is eligible for benefits.

Decision: The determination dated March 31, 2014 is REVERSED. The claimant is qualified for the receipt of benefits beginning November 17, 2013.

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 mailed to the last known address of each interested party on April 30, 2014.

JOSHUA NICHOLS
Appeals Referee

By:



MONTY E CROCKETT, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown below 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 <http://www.floridajobs.org/CONNECT> or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals 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 sobre pago [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 <http://www.floridajobs.org/CONNECT> o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; 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, <http://www.floridajobs.org/CONNECT> oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfirmasyon an se va dat yo prezante demann nan pou reouvre kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org/>. Si ou voye 1 pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki

alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.

Any questions related to benefits or claim certifications should be referred to the Claims Information Center at 1 800 204 2418. An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.
