STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02600

vs.

Referee Decision No. 0022071437-02U

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.

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.

The referee's finding that the claimant tested positive for amphetamines in a random drug test is unsupported by any competent evidence. The employer's witness provided hearsay testimony regarding what was reported to the employer by a non-testifying medical review officer, and the employer failed to provide any documentation to competently establish the positive drug test result. Consequently, this finding is rejected as unsupported by any competent evidence. Rejection of the finding, however, does not affect the ultimate outcome.

While there is no competent evidence to establish the claimant violated the provision of the employer's policy prohibiting use of *illegal* controlled substances, the claimant's own testimony supports a finding of a violation of a provision of the employer's policy relating to the use of *legal* drugs. This provision, which is set forth in the drug-free workplace policy the employer provided for the hearing, requires employees to immediately report to their supervisors any prescription medications so that the employer may evaluate whether the medication will have any impact on the employee's ability to safely perform their job duties. The policy further provides that failure to notify the supervisor in advance of the use of any legal drug may result in discipline up to and including discharge. At the hearing before the appeals referee, the claimant admitted he intentionally did not disclose the names of any of his medications to the employer because he did not want the employer to learn of his medical status. While he denied any awareness of the requirement to disclose his prescription medications, the claimant's admission that he was required to sign an acknowledgment every year at orientation is sufficient to establish that he reasonably should have known of the policy's requirements. Accordingly, the record supports disqualification.

We note that, if the employer's requirement that the claimant disclose medications was prohibited by federal or state law, the claimant could not be disqualified for refusing to comply with them. *See generally Madison v. Williams Island Country Club*, 606 So. 2d 687, 689 (Fla. 3d DCA 1992). Thus, we have

carefully reviewed the employer's requirements and find them in conformance with the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. This analysis is necessary because, as an individual with HIV or its related conditions, the claimant is considered to be "an individual with a disability" within the meaning of the ADA. *Bragdon v. Abbott*, 524 U.S. 624 (1998).

Under the ADA, an employer may require disclosure of medical conditions only in limited circumstances. 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.13(b). A requirement that an employee disclose medications is considered a "medical examination" within the meaning of that rule due to the possibility that disclosure of medications can reveal specific health conditions. *Roe v. Cheyenne Mountain Conference Resort*, 920 F. Supp. 1153 (D.C. Colo. 1996), reversed in part on other grounds, *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221 (10th Cir. 1997).

Under the facts of this case, the employer's requirement that the claimant disclose lawful prescription medications was permissible under the ADA because the requirement was job-related and consistent with a business necessity. 29 C.F.R. §1630.14(c). This case is similar to *Transport Workers Union of America v. N.Y. City Transit Auth.*, 341 F. Supp. 2d 432 (S.D.N.Y. 2004), where the court held that a requirement that bus drivers disclose their medical conditions resulting in the need for sick leave was permissible under the ADA because the employer's legitimate safety concerns regarding the fitness of its drivers satisfied the business necessity defense.

We also consider the fact that the employer's policy required the claimant to disclose use of drugs to his supervisor rather than to human resources or an occupational health professional employed by the employer. We note that the relevant regulation [29 C.F.R. §1630.14(c)(1)(i)] implies that such routine disclosures should be made to a person outside the direct supervisory chain, and this clearly appears to be the best practice in such cases. However, the EEOC's relevant guidance[1] does not include such a requirement, the EEOC itself does not follow such a policy,[2] and the only appellate decision we have found on point specifically rejects

[1] http://www.eeoc.gov/policy/docs/guidance-inquiries.html.
[2] *Policy Guidance on Executive Order 13164: Establishing Procedures To Facilitate The Provision of Reasonable Accommodation*, No. 915.002, 2000 WL 33407185, at *6 (Oct. 20, 2000) (emphasis omitted).

a contention that requiring disclosures of medical information to a supervisor rather than to a human resources department violates the prohibition on medical disclosures. *Lee v. City of Columbus*, 636 F.3d 245, 257-58 (6th Cir. 2011). Accordingly, we find no basis to conclude that the employer's policy was inconsistent with any ADA mandates.

While we sympathize with the claimant's desire to keep his medical condition private, the employer had compelling reasons for the policy at issue in this case. The ADA strikes a balance between the needs of the employee and the needs of the employer, and creates a mechanism in which legitimate medical inquiries can be made while protecting the privacy and, more fundamentally, the employment of the employee. In the absence of any evidence whatsoever that the claimant had a specific reason to fear for his job in this circumstance, his refusal to comply with a legitimate and important employer directive can only be deemed as a clear violation of an employer rule, which is not justified by any of the relevant defenses. Accordingly, the referee's decision must be affirmed.

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. The Commission concludes the record adequately supports the referee's material findings and the referee's conclusion is a correct application of the pertinent laws to the material facts of the case.

On appeal to the Commission, the representative for the claimant has neither set forth arguments to support the request for review nor requested approval of any representation fees charged to the claimant. Under the circumstances, the claimant's representative is not entitled to collect a fee from the claimant for representation of the claimant before the Commission.

The referee's decision is affirmed.

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

10/16/2014 ,

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

*26656014 *

Docket No.0022 0714 37-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Employer

Claimant

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.

Findingsof Fact: The claimant was employed as abus driver for the employer, beginning

onDecember 6, 2011. The employer had apolicy that employees who take prescription drugs are required to reveal thoseprescription drugs to their employer. Theclaimant took a random drug test, in which the claimant tested positive foramphetamines. The claimant was takingprescribed medication, but intentionally did not inform his employer that hewas taking certain prescribed medication, as he was afraid that information maycause the claimant to lose his job. As aresult of failing the random drug test and intentionally failing to inform theemployer that he was taking prescribed medication, the employer discharged theclaimant on February 15, 2014.

Conclusionsof Law: As of May 17, 2013, theReemployment Assistance Law of Florida defines misconduct connected with workas, but is not limited to, the following, which may not be construed in parimateria with each other:
(a) Conductdemonstrating conscious disregard of an employer's interests and found to be adeliberate violation or disregard of the reasonable standards of behavior whichthe employer expects of his or her employee. Such conduct may include, but isnot limited to, willful damage to an employer's property that results in damageof more than $50; theft of employer property or property of a customer orinvitee of the employer.
(b) Carelessnessor negligence to a degree or recurrence that manifests culpability, or wrongfulintent, or shows an intentional and substantial disregard of the employer'sinterest or of the employee's duties and obligations to his or her employer.
(c) Chronicabsenteeism or tardiness in deliberate violation of a known policy of theemployer or one or more unapproved absences following a written reprimand orwarning relating to more than one unapproved absence.
(d) Awillful and deliberate violation of a standard or regulation of this state byan employee of an employer licensed or certified by this state, which violationwould cause the employer to be sanctioned or have its license or certificationsuspended by this state.
(e) 1. Aviolation of an employer's rule, unless the claimant can demonstrate that:
a. He or she did not know, andcould not reasonably know, of the rule's requirements;
b The rule is not lawful ornot reasonably related to the job environment and performance; or
c. The rule is not fairly orconsistently 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 ofa patient, resident, disabled person, elderly person, or child in her or hisprofessional care.

The recordshows that the employer discharged the claimant. The burden of proving misconduct is on theemployer. Lewis v. UnemploymentAppeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance ofcompetent substantial evidence. DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee HousingAuthority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla.1986). The record shows that theclaimant was discharged for failing the random drug test and intentionallyfailing to inform the employer that he was taking prescribed medication, inviolation of the employer's policy.

Theclaimant knew, or should have known that failing the random drug test andintentionally failing to inform the employer that he was taking prescribedmedication, in violation of the employer's policy, couldlead to dismissal. The claimant'sactions demonstrate a violation of a standard of behavior the employer had aright to expect, and show an intentional disregard of the claimant's duties andobligations to the employer. Accordingly, since the claimant was discharged for misconduct connectedwith work, the claimant should be disqualified from the receipt of reemploymentbenefits.

Decision: The notice of approval, distributed on March24, 2014, is MODIFIED to hold that the claimant was discharged for misconductconnected with work, and REVERSED to hold that the claimant is disqualifiedfrom the receipt of reemployment benefits from February 16, 2014, plus fiveweeks, and until the claimant earns $4,114.

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 May 5, 2014

DON HYMAN
Appeals Referee

By: 

YVETTE HARVEY, 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.
