STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02971

vs.

Referee Decision No. 0022100941-02U

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 holding the claimant 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 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 for the employer from March 20, 2012, until March 7, 2014, as a store clerk. The employer is a drug-free workplace and has a drug and alcohol policy. The claimant was aware of the policy. The claimant was injured on the job and the employer sent the claimant for a drug test. The claimant's drug test came back positive for opiates and morphine. The claimant contested the results and provided a list of medications she was taking. However, there were no medications on the list that would have given a positive result for opiates and morphine. The employer discharged the claimant for a positive drug test, in violation of company policy.

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 that one of the referee's findings is not supported by competent evidence, and further concludes that the decision is not in accord with the law; accordingly, it is reversed.

Section 443.036(30), Florida Statutes (2013), 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.
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> (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.
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> (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.
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> (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.

The record evidence in this case is largely reflected in the referee's findings. However, contrary to the referee's finding that "the employer sent the claimant for a drug test," the competent record evidence reflects that the claimant was not sent to a lab to give a urine sample, but was instead required to provide an oral fluids sample at her workplace. A cotton swab was placed in her mouth for five to ten minutes, packaged, and then sent to the testing lab. The record does not identify the individual who took the sample.

The issue before us is whether the drug test results in this case, which were reported as positive, are sufficient under the reemployment assistance law to constitute a "positive, confirmed test" pursuant to Sections 443.101(1)(d) and (11), Florida Statutes. For two reasons, we conclude they do not, and thus we reject the referee's findings and conclusions to the extent they rely on the positive result provided by the employer to disqualify the claimant.

First, with respect to the matter of testing in this case, oral fluids testing has yet to be approved by either the federal or Florida governments as an authorized form of drug testing for Drug-Free Workplace Programs. The Substance Abuse and Mental Health Services Administration ("SAMHSA") of the U.S. Department of Health and Human Services ("HHS") is the federal agency charged with, among other tasks, evaluating drug testing methodologies and establishing protocols for federal drug testing programs. Although more recently developed forms of sample testing, such as those for hair, oral fluids and sweat samples, have been available for several years, SAMHSA has not yet issued standards for the use of such tests under the *Mandatory Guidelines for Federal Workplace Drug Testing Programs* (the "Mandatory Guidelines"). In 2004, SAMHSA issued a notice of proposed updates to the Mandatory Guidelines, which included consideration of alternative sample methodologies such as those for hair, oral fluids and sweat. *See* 69 Fed. Reg. 19673,

19674-7 (April 13, 2004).[1] However, when the revised Mandatory Guidelines were issued in 2008, SAMHSA did not add procedures for these alternative samples, indicating the need for more study. *See* 73 Fed. Reg. 71858 (November 25, 2008).[2] In response to the SAMHSA Mandatory Guidelines, the U.S. Department of Transportation ("DOT") followed SAMHSA's lead in rejecting the use of alternative sample methodologies when it adopted revised procedures for workplace drug and alcohol testing programs in 2010. *See* 75 Fed. Reg. 49850, 49852-53 (August 16, 2010).[3] In 2011, SAMHSA issued a request for information indicating that it was accepting comments on the use of oral fluids sampling. *See* 76 Fed. Reg. 34086 (June 10, 2011).[4] In 2012, SAMHSA's administrator approved the Drug Testing Advisory Board's recommendation that testing standards be adopted for oral fluids[5]; however, SAMHSA has yet to release any notice of proposed revisions. Currently, oral fluids sample testing is not included as an approved methodology in the federal Mandatory Guidelines.

Likewise, the Florida Agency for Health Care Administration ("AHCA"), designated by Florida law to adopt the procedures for drug-free workplace programs for state employees (Section 112.0455(12), Florida Statutes) and workers' compensation programs (Section 440.102(10), Florida Statutes), has not yet adopted standards for oral fluids testing. *See* Fla. Admin. Code R. 59A-24.004(2),[6] providing for urine testing for all drugs other than alcohol; Fla. Admin. Code R. 59A-24.006(4)(e)2.,[7] also allowing limited use of hair specimens. In 2009, the workers' compensation drug-free workplace program was amended to eliminate the requirement that *initial* testing be conducted by a licensed laboratory, and thus any test may be used for initial testing. *See* Ch. 2009-127, §1, Laws of Fla.[8] However, confirmation testing must be conducted by a licensed laboratory. §440.102(5), Fla. Stat.

We recognize that oral fluids testing potentially has several advantages over traditional urine testing. It may be less expensive; it reduces the privacy concerns of supervised urine testing; and it may be more difficult to cheat the test than some other methods. However, there are also accuracy concerns, and sampling procedures are still being perfected.

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[1] Available at http://www.gpo.gov/fdsys/pkg/FR-2004-04-13/pdf/04-7984.pdf.
[2] Available at http://www.gpo.gov/fdsys/pkg/FR-2008-11-25/pdf/E8-26726.pdf.
[3] Available at http://www.gpo.gov/fdsys/pkg/FR-2010-08-16/pdf/2010-20095.pdf.
[4] Available at http://www.gpo.gov/fdsys/pkg/FR-2011-06-10/pdf/2011-14092.pdf.
[5] Available at http://datia.org/resources/DTAB+recommendation+memo+signed.pdf.
[6] Available at https://www.flrules.org/gateway/RuleNo.asp?title=DRUG-FREE%20WORKPLACE%20STANDARDS&ID=59A-24.004.
[7] Available at https://www.flrules.org/gateway/RuleNo.asp?title=DRUG-FREE%20WORKPLACE%20STANDARDS&ID=59A-24.006.
[8] Available at http://laws.flrules.org/2009/127.

Section 443.101(11), Florida Statutes, of the reemployment assistance law applies to testing implemented pursuant to the drug-free workplace provisions of the workers' compensation statute, and under that law, drug testing is limited to tests conducted by laboratories licensed by AHCA. *See* §440.102(9), Fla. Stat. While subsection (1)(d) of Section 443.101, Florida Statutes, disqualifies individuals discharged for misconduct as a result of a "positive, confirmed test," we conclude that any testing pursuant to that provision must be conducted pursuant to either AHCA or SAMHSA standards. As neither AHCA nor SAMHSA has yet adopted procedures for oral fluids testing for drug-free workplace programs, we conclude such tests are not yet sufficient under the reemployment assistance law.

The second issue arising in this case is that the employer did not provide chain of custody documentation. This is particularly problematic where the test sample was not obtained at a certified or licensed laboratory, but in the workplace by an unidentified individual. The record provides no evidence of what controls were utilized to ensure proper identification, sampling, preservation, transmittal, and initial and confirmation testing of the oral fluids sample in this case. Chain of custody documentation is required by all Florida drug-free workplace programs. *See* §112.0455(8)(b)&(c), & (12)(b)2., Fla. Stat.; §440.102(5)(b)&(c), 9(b)2., & 10(e), Fla. Stat. Under the reemployment assistance law, test results and chain of custody documentation are self-authenticating when provided together. *See* §443.101(11), Fla. Stat.[9] We conclude that, in the absence of sufficient evidence regarding chain of custody, a report of drug test results is not sufficiently reliable to be probative evidence in a reemployment assistance case.

For these two reasons, we conclude, as a matter of law, that the test results in this case were not sufficient to bear the employer's burden of proving that the claimant failed her drug test, and accordingly reverse the referee's decision in this 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.

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[9] The statutory language states that "test results and chain of custody documentation provided to the employer . . . *is* self-authenticating and admissible in reemployment assistance hearings, . . . (emphasis added)" meaning that the test results and chain of custody documents are to be supplied *collectively*.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits.

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 1/27/2015, 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

*27549618 *

Docket No.0022 1009 41-02 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.

Findings of Fact: The claimant worked for the employer from March 20, 2012, until March 7, 2014, as a store clerk. The employer is a drug-free workplace and has a drug and alcohol

policy. The claimant was aware of the policy. The claimant was injured on the job and the employer sent the claimant for a drug test. The claimant's drug test came back positive for opiates and morphine. The claimant contested the results and provided a list of medications she was taking. However, there were no medications on the list that would have given a positive result for opiates and morphine. The employer discharged the claimant for a positive drug test, in violation of company policy.

Conclusions of Law: As of May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; 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 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) 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.

The claimant's action was a conscious disregard of the employer's interests and a deliberate violation of the reasonable standards of behavior which the employer expected of her. The claimant's action was also careless and negligent to a degree that manifested culpability and wrongful intent and showed an intentional and substantial disregard of the employer's interest. In Vilar v. Unemployment Appeals Commission, 889 So.2d 933 (Fla. 2d DCA 2004), the court held that although the employee was wrong to disobey her supervisor's instructions to return to her work area, this was an isolated instance of poor judgment and does not constitute misconduct. On the other hand, only one week before the issuance of the Vilar decision, a panel of the Third DCA affirmed the disqualification of a claimant, noting that the claimant was discharged for misconduct "because he obdurately refused contrary to the direct orders of his supervisor, to operate a forklift." Givens v. Unemployment Appeals Commission, 888 So.2d 169 (Fla. 3d DCA 2004). Thus, there is clearly a narrow line between disqualifying insubordination and nondisqualifying "poor judgment." The claimant's actions in this isolated incident weresufficiently egregious to rise to the level of misconduct within the meaning of the reemployment assistance law. Further, the claimant failed to show she was not aware of the employer's rule; the claimant testified she was aware of the rule. The claimant also failed to show the rule was unlawful or unreasonably related to the job environment and performance or that the rule was unfairly or inconsistently enforced. It is concluded the employer discharged the claimant for misconduct connected with work. Therefore, the claimant has improperly been held qualified.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These 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 claimant contended the drug test was inaccurate. However, the claimant provided no competent evidence to substantiate her claim. The claimant also contended the drug test was not conducted in a certified laboratory. However, the test was sent to a certified laboratory. The drug sample was taken at the jobsite, but the drug test was conducted at a laboratory and reviewed by a medical review officer. The claimant further contended the employer told the claimant the medical review officer told the employer the claimant did not cooperate with them and submit her list of drugs she was taking. However, the employer's witness never said the claimant did not cooperate. The employer's witness testified the claimant sent her documents to the medical review officer when the employer notified the claimant the medical review officer did not receive the claimant's documents the first time the claimant sent them. The claimant's testimony that she was not using opiates or morphine does not fly in the face of reason based on the testimony and evidence presented.

Therefore, the claimant's contentions are respectfully rejected.

Decision: The determination dated March 26, 2014, is reversed. The claimant is disqualified for the week ended March 8, 2014, plus five weeks and until she earns income of $2,839.

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 22, 2014

DEBBIE JONES
Appeals Referee

By: C E Demoranville

CONNIE DEMORANVILLE, 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 20yèm 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.
