STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03041

vs.

Referee Decision No. 0022353187-02U

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 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 a gym offering lessons and classes until April 15, 2014. The claimant and a co-worker were considering opening a gym of their own about 45 minutes away. The claimant wanted the owner's blessing and to perhaps collaborate in business and scheduled a meeting to be conducted on April 15, 2014, to discuss the claimant's plans. The claimant was out of town at a meet on April 14, 2014, when her work email privileges appeared to have been revoked. The claimant concluded that she was discharged. The claimant later updated a social media membership which she held that was formerly dedicated to promoting the instant employer to update her followers about the

> new gym. The claimant kept her meeting with the owner the next day. The owner told the claimant that she thought the handling of the social media account was not acceptable and that she should go. A co-worker asked about giving notice and the owner told them that no notice would be accepted.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the record was not sufficiently developed; consequently, the case must be remanded.

The referee concluded the claimant was discharged from her employment; however, the decision is silent regarding the statutory basis by which the issue of misconduct was decided by the referee. In the absence of any citation to the applicable law and any indication as to whether the referee gave proper consideration to the statutory definition of misconduct, the case must be remanded for a more complete and proper analysis of the law to the facts of the case.

Effective May 17, 2013, Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
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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.
>
> (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 referee held the claimant not disqualified reasoning that, *inter alia*, since the employer took the position that the claimant voluntarily quit, it failed to present evidence of misconduct. The referee's characterization of the employer's position at the hearing and the evidence submitted in support of that position is not entirely accurate; consequently, the case must be remanded. The record reflects that the owner testified that on April 15, 2014, the claimant gave a two-week notice that she was resigning. The owner, however, chose to sever the employment relationship during the notice period immediately after learning of the claimant's plan to open a competing business venture. The record reflects the owner further testified, in essence, that she discharged the claimant for converting the employer's work time to the claimant's personal use while she was in the process of establishing a competing business venture and because she solicited the employer's employees during that process to join her in her venture. The employer, therefore, did not simply take the position that the claimant quit nor did it fail to present evidence to support its position that the claimant was discharged for misconduct, albeit during the notice period. It should also be noted that the fact that someone has given notice that they will quit on a certain date does not preclude a finding that a discharge during the notice period was for disqualifying misconduct.

The referee determined the claimant's testimony that she was discharged on the *previous evening* to be more credible. While the referee reasoned the employer did not present evidence to establish misconduct because it took the position that the claimant quit, the referee went on to essentially comment that, had he determined there had been a discharge, misconduct would not have been established. The referee's analysis, in part, states:

> The credible evidence shows that the claimant did not quit. The referee has to conclude that the claimant was discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The employer offered no evidence to show misconduct by virtue of the position held asserting the claimant quit. This position is not supported by the evidence.
>
> Considered as the basis for a finding of misconduct, the referee would conclude no wrong doing. The Instagram account was the claimant's at the time she began to use it to benefit the employer and it was closed after the employer voiced an objection to her continuing to hold that influence over customers of the employer's business. Also, the referee notes that no evidence was offered to show the claimant was subject to a non-compete agreement. The claimant was considering a business many miles away and not some operation to act in direct competition with the employer.

The claimant's testimony reflects she did not have any definite plans of leaving her employment. The claimant, however, admitted on the record that she:

- put in a bid on a lease for a facility for the new venture on or about April 3 or April 4, 2014;
- received notice on April 7, 2014 that the bid for the lease had been accepted;
- requested a few days prior to meet with the owner on April 15, 2014, to discuss the new venture;
- on April 14, 2014, posted on the Facebook page of the new venture that there would be a major announcement posted on the following day;

- posted (after the meeting) on April 15, 2014, on the Facebook page of the new venture the announcement of the grand opening of the new venture in May 2014;
- admitted a coworker helped her develop the Facebook page;
- deleted the Instagram account (after the meeting) that was also used for the employer's business;
- informed other employees who worked for the employer *while she was still employed by the employer* that she "would make it work" if they were interested in employment with the new venture, and that at least two former employees joined her at the new facility which opened in early May 2014.

It is unclear what consideration, if any, the referee gave to the claimant's admissions regarding her actions while she was still employed and to what degree, if any, they represented a conscious disregard of the employer's interests and a deliberate disregard of the reasonable standards expected by the employer of an employee, even in the absence of a non-compete agreement. The claimant owed a common law duty of loyalty to her employer. That rule is stated in *Fish v. Adams*, 401 So. 2d 843, 844 (Fla. 5th DCA 1981), in which the court explained, "The general rule with regard to an employee's duty of loyalty to his employer is that an employee does not violate his duty of loyalty when he merely organizes a corporation during his employment to carry on a rival business after the expiration of his employment. However, that employee may not engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to the end of his employment." Further, in *New World Fashions v. Lieberman*, 429 So. 2d 1276, 1277, (Fla. 1st DCA 1983), the court held, "An agent may not, without the principal's knowledge and consent, enter into any business in competition with his principal and keep for himself any profit accruing from such transaction." While the referee may have concluded the claimant's actions did not represent any "wrong doing," we cannot determine whether the referee gave consideration to all of the claimant's actions, to include the extent to which she acted in concert with other employees, and what steps she took to make her business "idea" an actual *plan* to develop the new venture in violation of a duty owed to the employer. For this reason, the claimant's actions in reportedly soliciting employees from the employer's staff for the purpose of opening a business which provides services similar to that of this employer are important to an analysis of whether the claimant was discharged for misconduct.

The Commission further notes that the decision of the appeals referee reflects that only the claimant appeared; however, the review of the record reflects the owner testified on behalf of the employer. On remand, the referee is directed to correct the decision to reflect the fact that both parties appeared. We also note that the original determination addressed employer chargeability as it relates to this claim. On remand, the referee shall address the issue of employer chargeability. Finally, any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

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 11/7/2014, 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

*27982113 *

Docket No.0022 3531 87-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES 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 a gym offering lessons and classes until April 15, 2014. The claimant and a co-worker were considering opening a gym of their own about forty five minutes away. The claimant wanted the owner's blessing and to perhaps collaborate in business and scheduled a meeting to be conducted on April 15, 2014, to discus the claimant's plans . The claimant was out of town at a meet on April 14, 2014, when her work email privileges appeared to have been revoked. The claimant concluded that

she was discharged. The claimant later updated a social media membership which she held that was formerly dedicated to promoting the instant employer to update her followers about the new gym. The claimant kept her meeting with the owner the next day. The owner told the claimant that she thought the handling of the social media account was not acceptable and that she should go. A co-worker asked about giving notice and the owner told them that no notice would be accepted.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause or was discharged for misconduct connected with the work will be disqualified for benefits.

The credible evidence shows that the claimant did not quit. The referee has to conclude that the claimant was discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); TallahasseeHousing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The employer offered no evidence to show misconduct by virtue of the position held asserting the claimant quit. This position is not supported by the evidence.

Considered as the basis for a finding of misconduct, the referee would conclude no wrong doing. The instagram account was the claimant's at the time she began to use it to benefit the employer and it was closed after the employer voiced an objection to her continuing to hold that influence over customer's of the employer's business. Also, the referee notes that no evidence was offered to show the claimant was subject to a non-compete agreement. The claimant was considering a business many miles away and not some operation to act in direct competition with the employer.

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 claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated April 25, 2014, is AFFIRMED.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed to the last known address of each interested party on June 3, 2014

BARTH BENNITT
Appeals Referee

Paulette A. Allison

By:

PAULETTE ALLISON, 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.
