

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03648

vs.

Referee Decision No. 0022603507-02U

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.

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 was employed as a level 2 operator for [the employer], a pipe line transportation company, from January 11, 2010, through May 16, 2014. The claimant's duties were to receive fuel through pipelines. The claimant had ~~several~~ previous meetings with management while employed with the employer where he was accused of stealing, lying and wearing a recording device. The claimant was made to empty his pockets [and] lift [his] pants legs to see if he had anything hid[den] in his socks during meetings with management. The claimant also was made to lift his shirt to show management he was not wearing a recording device. On May 8, 2014, the claimant's immediate supervisor sent out a vast email to all employees advising that a recently hired operator 1, which had been with the company for one month, would be on a shift with one operator. On May 8, 2014, the claimant responded to the email stating the decision of his immediate supervisor would be a safety concern for the rest of the employees as the recently hired operator 1 was not ready to be placed on a shift alone with only one other operator. Everyone

who received the claimant's immediate supervisor's original email, also received the claimant's response to the email. The claimant's immediate supervisor was the terminal supervisor. The claimant's immediate supervisor's supervisor was the operation manager. Later that same day, the operation manager, upon receiving the claimant's response to his supervisor's original email, drove from Tampa, Florida to Orlando, Florida to meet with the claimant after his scheduled shift ended. Arriving at the Orlando terminal, the operation manager informed the terminal superintendent to ask the claimant to meet with him in the conference room. The claimant asked the employer, if the employee he was referring to in the email was attending the meeting as well to witness what was going to be said. The operation manager told the claimant no. The claimant responded he did not feel comfortable meeting with management without representation or a witness to attest to the conduct and/or actions displayed in the meeting. The operation manager told the claimant if he did not meet with him the claimant would be terminated for insubordination. The claimant told the operation manager he would meet with him, but only if he had a witness or representative to sit in on the meeting. The operation manager told the claimant he could not have a witness present. The claimant refused to meet with management alone. The operation manager took the claimant's company equipment, badge, and keys, and sent the claimant home. The claimant was instructed not to return to work until further notice. On May 16, 2014, the operation manager contacted the claimant and discharged him over the phone. On May 16, 2014, the claimant was discharged.

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 referee's findings, except as modified above, are supported by competent, substantial evidence. However, the referee's findings do not include all relevant testimony and his conclusions are not in accord with the law; accordingly, the decision 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.

(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.

In this case, the applicable portion of the definition of misconduct is subparagraph (a). That provision contains two separate requirements. The employer must prove that the claimant engaged in conduct (1) demonstrating a conscious disregard of an employer's interests *and* (2) found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. This portion of the definition of misconduct, Section 443.036(30)(a), Florida Statutes, was amended by the Legislature in 2011 as follows:

(a) Conduct demonstrating conscious ~~willful or wanton~~ 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 ~~has a right to expect~~ of his or her employee. ~~;~~ ~~or~~

2011 Fla. Laws ch. 235 (Words ~~stricken~~ are deletions; words underlined are additions). The plain language reflects the Legislature intended for amended subparagraph (a) to encompass a broader range of conduct than its predecessor. This interpretation is supported by legislative staff analysis. *See* House of Representatives Staff Analysis, Bill # CS/HB 7005, p.9. (Feb. 28, 2011).¹ The courts have not yet issued written opinions analyzing the Commission's interpretation of amended subparagraph (a). While the case law analyzing the predecessor version remains instructive for the purpose of establishing what acts remain included in the amended subparagraph (a), that case law has limited precedential value to show what conduct is excluded from the expanded definition.

Even prior to the 2011 amendment, however, it was well established that "an outright refusal to perform an employer's valid and reasonable work order amounts to misconduct." *Gongaware v. Unemployment Appeals Commission*, 882 So. 2d 453, 455 (Fla. 4th DCA 2004), *citing* *Torres v. Unemployment Appeals Commission*, 862 So. 2d 26, 27 (Fla. 2d DCA 2003). *See also* *Givens v. Unemployment Appeals Commission*, 888 So. 2d 169, (Fla. 3d DCA 2004); *Boyd v. Ikon Office Solutions, Inc.*, 743 So. 2d 1152 (Fla. 3d DCA 1999); *Clay County Sheriff's Office v. Loos*, 570 So. 2d 394 (Fla. 1st DCA 1990); *Kraft, Inc. v. Unemployment Appeals Commission*, 478 So. 2d 1183 (Fla. 2d DCA 1985); *Hines v. Department of Labor and Employment Sec.*,

¹ *Florida House of Representatives Staff Analysis CS/HB 7005*:
<http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=h7005c.EAC.DOCX&DocumentType=Analysis&BillNumber=7005&Session=2011> (last accessed March 20, 2014).

455 So. 2d 1104 (Fla. 3d DCA 1984). In determining whether such refusal was misconduct, courts also considered mitigating factors, such as whether the employee had a legitimate reason for believing that he was not lawfully able to comply with the order. *See, e.g., Pascarelli v. Unemployment Appeals Commission*, 664 So. 2d 1089 (Fla. 5th DCA 1989).

One of the few cases to excuse a direct failure to obey a supervisor's instruction without explanatory factors is *Vilar v. Unemployment Appeals Commission*, 889 So. 2d 933 (Fla. 2d DCA 2005). In *Vilar*, the claimant refused an order to return to her workplace, which the court excused as "an isolated instance of poor judgment." The Commission concludes that this precedent does not survive the 2011 amendment. While *Vilar's* conduct might not have reached the level of "willful or wanton disregard" of her employer's interests, it assuredly constituted a "conscious disregard" without any justification for it.

In this case, the claimant refused multiple instructions, including one after being warned of the consequences, to meet with his supervisor individually. The individual he selected to be his witness was the least appropriate individual in the worksite – the very individual he had identified in his email as not being ready to handle the responsibilities of working as an operator. Because the claimant raised an issue about the individual's readiness, the employer had every reason to want to discuss the individual's qualifications and preparation outside the individual's presence. Furthermore, while the referee found the claimant had previously been accused of lying or wearing a recording device, and made to demonstrate that he was not, the claimant admitted that these incidents occurred prior to the operations manager's employment in his position, and were unknown to him. The claimant did not advise the operations manager of his alleged reasons for refusing to meet with him. In short, the claimant took what was a facially unreasonable position and offered no explanation for it.

In concluding that the claimant's behavior did not constitute misconduct, the referee offered three reasons, none of which was legally correct. An employer need not have a rule that requires employees to meet with a supervisor for a legitimate work-related reason. Nor is the employer required to schedule such meetings at the employee's convenience. The referee concluded that the employer "did not inquire why the claimant was adamant about having a witness present." In doing so, the referee erroneously placed the burden on the employer to attempt to obtain an explanation for the claimant's facially insubordinate conduct. It is the claimant's, not the employer's, obligation to attempt to preserve his employment. *Glenn v. Unemployment Appeals Commission*, 516 So. 2d 88, 89 (Fla. 3d DCA 1987).

Finally, we note that there was nothing unlawful about the employer requiring the claimant to meet without a witness or representative. The claimant was not shown to be a member of a bargaining group and, since he was not, had no right to a representative under current law. *IBM Corp. v. Schult*, 341 N.L.R.B. 1288 (2004). Even if the claimant had been employed in a bargaining unit position, however, his request would not have been appropriate under the standards announced in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). Under *Weingarten*, union members have the right to have a union representative appear with them, but not a coworker who has no union position.

An employee who declares that he will not obey a reasonable order has threatened the employer's legitimate interest in maintaining appropriate control of the workforce. The claimant's behavior thus reflects a conscious disregard of the employer's interests. His behavior in refusing a routine instruction without explanation also reflects a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his employee. Under these circumstances, the claimant's refusal to comply with the employer's instruction constituted misconduct under Section 443.036(30)(a), Florida Statutes (2013).

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending May 17, 2014, the five succeeding weeks, and until he becomes reemployed and earns \$4,675. The employer's account is relieved of charges in connection with this claim. 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
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on

3/17/2015 ,

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: Juanita Williams
Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250



*29062307 *

Docket No.0022 6035 07-02

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

CLAIMANT/Appellant

EMPLOYER/Appellee

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 Facts:The claimant was employed as a level 2 operator for a pipe line transportation company, from January 11, 2010, through May 16, 2014. The claimant's duties were to receive fuel through pipelines. The claimant had several meetings with management while

employed with the employer where he was accused of stealing, lying and wearing a recording device. The claimant was made to empty his pockets, lift pants legs to see if he had anything hid in his socks during meetings with management. The claimant also was made to lift his shirt to show management he was not wearing a recording device. On May 8, 2014, the claimant's immediate supervisor sent out a vast email to all employees advising that a recently hired operator 1, which had been with the company for one month, would be on a shift with one operator. On May 8, 2014, the claimant responded to the email stating the decision of his immediate supervisor would be a safety concern for the rest of the employees as the recently hired operator 1 was not ready to be placed on a shift alone with only one other operator. Everyone who received the claimant's immediate supervisor's original email, also received the claimant's response to the email. The claimant's immediate supervisor was the terminal supervisor. The claimant's immediate supervisor's supervisor was the operation manager. Later that same day, the operation manager, upon receiving the claimant's response to his supervisor's original email, drove from Tampa, Florida to Orlando, Florida to meet with the claimant after his scheduled shift ended. Arriving at the Orlando terminal, the operation manager informed the terminal superintendent to ask the claimant to meet with him in the conference room. The claimant asked the employer, if the employee he was referring to in the email was attending the meeting as well to witness what was going to be said. The operation manager told the claimant no. The claimant responded he did not feel comfortable meeting with management without representation or a witness to attest to the conduct and/or actions displayed in the meeting. The operation manager told the claimant if he did not meet with him the claimant would be terminated for insubordination. The claimant told the operation manager he would meet with him, but only if he had a witness or representative to sit in on the meeting. The operation manager told the claimant he could not have a witness present. The claimant refused to meet with management alone. The operation manager took the claimant's company equipment, badge, and keys, and sent the claimant home. The claimant was instructed not to return to work until further notice. On May 16, 2014, the operation manager contacted the claimant and discharged him over the phone. On May 16, 2014, the claimant was discharged.

Conclusion 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 record shows 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 evidence shows the operation manager called a meeting with the claimant after receiving an email regarding safety concerns. The claimant did not feel comfortable meeting with management in a meeting which was not previously scheduled. The claimant asked for a witness to be present and the employer refused to conduct the meeting with the claimant's witness present. There was no rule established by the employer indicating employees could not have a witness present when meeting with management. The employer did not inquire why the claimant was adamant about having a witness present. The claimant testified he did not have a problem with the meeting, he just refused to meet with management alone due to past experience with meeting with management alone. The employer did not make any reasonable efforts to make the unscheduled meeting he wanted to have with the claimant conducive for all parties involved. The claimant's refusal to meet with management without a witness does not demonstrate misconduct. The employer did not establish the claimant was insubordinate. Therefore the record does not contain competent and substantial evidence to show the claimant's actions constitute misconduct connected with the work. Accordingly, the claimant is not disqualified from the receipt of benefits.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer.

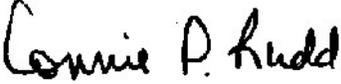
Benefits paid will be charged to the employer's account.

Decision: The determination of the claims adjudicator dated June 27, 2014, is REVERSED. The claimant is qualified for receiving benefits from June 4, 2014, through June 14, 2014. Benefits paid will be charged to the employer's account.

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 27, 2014

HOWARD BETHEL
Appeals Referee

By: 
CONNIE RUDD, 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 definitiv sòs si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalfye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); <https://raaciap.floridajobs.org>. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje 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.

An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.