

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03754

vs.

Referee Decision No. 0022536579-02U

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 and charged the employer's account.

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 April 2013 to May 2, 2014. The claimant began employment as an assistant and was transitioning to a hairstylist. On May 1, 2014, the claimant was presented with a non-compete agreement by the owner of the business. The non-compete agreement defined the time period the agreement covered and the area where the claimant could not work as a hairstylist if she left employment. The claimant was required to sign the contract if she wanted to continue her

employment. The claimant was informed of this by the employer. The claimant did not agree with the terms of the contract and the employer would not negotiate. On May 2, 2014, the claimant's employment ended when she refused to sign the non-compete agreement.

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 did not properly consider the employer's documentary evidence; consequently, the case must be remanded.

Florida Administrative Code Rule 73B-20.014(3), provides in pertinent part:

If any party wishes to submit evidence to be considered, pursuant to Section 443.151(4)(b)5.c., F.S., as the basis for a finding of fact, notwithstanding Section 120.57(1)(c), F.S., the party must arrange for delivery of the evidence to all parties and the appeals referee at least 24 hours prior to the scheduled hearing time.

The record reflects the claimant was separated from the employer when she refused to sign a non-compete agreement the employer presented to her. The claimant testified that she was discharged because she refused to sign the employer's non-compete agreement. The employer's witness/representative testified that the employer's non-compete agreement was reasonable and that the claimant quit rather than sign it. In support of its assertions, the employer presented the testimony of one of its owners who is also the office manager. The record reflects that the employer also submitted documents that the employer's witness/representative referred to as the non-compete agreement at issue, a map representing the restricted area covered by the non-compete agreement, excerpts from the employer's employee handbook, and a print-out titled "Florida Recording Law." While the referee received the documents and the employer's witness/representative asserted the documents were also timely mailed to the claimant, the claimant denied receiving them. The referee stated he would address the employer's submitted documents if either party referred to them or asked the referee to admit them during the hearing. The employer's witness/representative referred to the submitted documents during the hearing, but the referee did not address them on the record or in his decision.

As the hearing officer, the referee has a duty to preserve the right of each party to present evidence relevant to the issues. Fla. Admin. Code R. 73B-20.024(3)(b). At the hearing, the employer's witness/representative notified the referee that documents it wished to be considered as evidence had been timely mailed to the claimant, but the claimant did not receive them. The referee, however, did not offer to postpone the hearing in order to give the employer an opportunity to provide its documentary evidence to the claimant at least 24 hours prior to a scheduled hearing in accordance with the above-stated rule. Further, the referee did not question the claimant regarding whether she would be willing to waive her right to review the evidence. Fla. Admin. Code R. 73B-20.014(4). The Commission concludes that, because the employer was not offered the opportunity to postpone the hearing, the fairness of the proceedings was substantially impaired. Due process requires that the employer be afforded a supplemental hearing. *See Revell v. Florida Dep't of Labor and Employment Security*, 371 So. 2d 227, 231 (Fla. 1st DCA 1979). At the next hearing, the referee is directed to review the employer's documents, authenticate them and, if deemed relevant, properly enter them into evidence as an exhibit in accordance with Florida Administrative Code Rule 73B-20.024(3)(e). Additionally, the referee is directed to question the claimant as to the contents of the documents, and properly analyze the evidentiary quality of the documents in reaching her decision.

We note that the specific requirements of the employer's "non-compete" agreement, and whether the claimant quit or was discharged, are determinative to the outcome of this case. In *Benson v. Unemployment Appeals Commission*, 927 So. 2d 49 (Fla. 5th DCA 2006) and *Nelson v. Unemployment Appeals Commission*, 927 So. 2d 190 (Fla. 2d DCA 2006), the courts held that an employee who resigns in lieu of signing a non-compete agreement that was not an initial condition of employment has not resigned with good cause attributable to the employer. By contrast, an employee who is discharged for refusal to sign a non-compete agreement has been discharged for reasons other than misconduct. *Nelson*, 927 So. 2d at 192. However, the terms "non-compete" or "noncompetition agreement" are often used loosely, and sometimes incorrectly, in the business community. For the purposes of reemployment assistance law, a written agreement which merely confirms in writing the common law duty of an employee not to compete with its employer while employed (absent specific agreement to the contrary at the time of hire), or the statutory duty of an employee not to use trade secrets or confidential information other than as permitted by the employer during or after employment, does not constitute a material change in the terms of employment, and the failure to sign such agreements may be disqualifying, whether the employee resigns or is discharged. R.A.A.C. Order No. 13-08931 (May 9, 2014). For the purposes of *Benson*

and *Nelson*, a non-compete agreement is one which limits the rights of an employee to work with a competing business, or to engage in competition with the employer, *after* employment has ended. For this reason, the referee must receive and analyze the specific agreement the claimant was asked to sign in order to determine whether the claimant is subject to disqualification.

In order to address the foregoing issues, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to hold a supplemental hearing to consider documentary evidence submitted by the parties, authenticate and enter relevant evidence, and render a decision that contains accurate and specific findings of fact regarding the events leading to the claimant's job separation and a proper analysis of those facts, along with an appropriate conflict resolution with respect to all disputed material facts. 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
11/3/2014,
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



*29822508 *

Docket No.0022 5365 79-02

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES

Claimant

Employer

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Issues Involved: CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant worked for the employer from April 2013 to May 2, 2014. The claimant began employment as an assistant and was transitioning to a hairstylist. On May 1, 2014 the claimant was presented with a non-compete agreement by the owner of the business. The non-compete agreement defined the time period the agreement covered and the area where the claimant could not work as a hairstylist if she left employment. The claimant was required to sign the contract if she wanted to continue her employment. The claimant was informed of this by the employer. The claimant did not agree with the terms of the contract and the employer would not negotiate. On May 2, 2014 the claimant's employment ended when she refused to sign the non-compete agreement.

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 record reflects that the claimant was separated by refusing to sign a mandatory contract. In determining whether a separation is voluntary, examining the intent of the worker is necessary. The word "voluntary" connotes something freely given and proceeding from one's own choice or full consent. St. Joe Paper Company v. Gautreaux, 180 So.2d 668 (Fla. 1st DCA 1968). In this case the employer's actions in making the non-compete contract mandatory to continue employment denied the claimant the right to freely given consent. The claimant could not continue employment without signing the contract and was informed of such by the employer. The claimant's only options were to sign an agreement she did not agree with or face discharge for refusal. As the claimant's employment was not voluntarily ended and no misconduct was proven, there are no disqualifying circumstances. Therefore, the claimant is qualified for benefits beginning April 27, 2014.

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.

The law provides that benefits will not be charged to the employment record of an employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer. In this case the reason for the separation was attributable to the employer. Therefore, the employer's account will be charged.

Decision: The determination dated June 6, 2014 is REVERSED. The claimant is qualified for benefits beginning April 27, 2014 if otherwise eligible. The employer's account is charged.

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 July 16, 2014.

Kelci Kemmerer
Appeals Referee



By:

LACHERYL SCURRY, 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 reembolsar 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.