

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03786

vs.

Referee Decision No. 0022938790-02U

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, a child day care center, from January 7, 2013, until January 6, 2014. The claimant was employed full time as a toddler caregiver/teacher. At the time of hire, the claimant was informed by the employer that she was required by State regulations to complete 45 hours of training within a year and that failure to do so would result in her discharge. As of October 29, 2013, the claimant had not met this requirement and she signed a document acknowledging that the requirement had to be met by the first week of January 2014 or she would be discharged. The claimant a native Portuguese speaker, with limited knowledge of English, but with some fluency

in Spanish, had difficulty with the online English courses due to her lack of fluency in English. The claimant took the required tests at least five times in English and failed them. The claimant then found and paid \$360 for Spanish language certification courses. The claimant's studies were delayed by the Spanish language website being down for two months and by the intervening holidays. By January 6, 2014, the claimant had not completed all the certification requirements and was discharged on that date. The claimant finally passed all the requirements by February 3, 2014.

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 decision is supported by competent, substantial evidence, and, further, is in accord with the law; accordingly, it is affirmed.

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.

The employer discharged the claimant for failing to complete her certification requirements by the first week of January 2014. The record reflects the claimant took the required courses in English but, due to her lack of fluency in that language, failed to pass the test on five occasions. The claimant then obtained certification courses in Spanish but completion of the courses was delayed due to the website being down for two months and the holidays. The referee found the claimant's failure to timely obtain certification was not due to failing to take steps necessary to prepare and concluded her discharge was for reasons other than misconduct connected with work.

On appeal, the employer asserts the claimant was aware she had 365 days to obtain the necessary certification and that the employer was not responsible for the claimant's lack of fluency in the English language, delays caused by the Spanish language website or the fact of the intervening holidays. The employer contends that the claimant's failure to obtain certification demonstrated a conscious disregard of the employer's interests and a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of its employee because the claimant was solely responsible for not taking her classes in a timely manner.

The Commission notes that, under the law as it stood prior to the changes that took effect on June 27, 2011, and May 17, 2013, the claimant would not have been subject to disqualification because a person's inability to pass an exam, despite reasonable efforts to prepare, did not constitute misconduct within the meaning of

the reemployment assistance law. See *Gulf County School Board v. Washington*, 567 So. 2d 420 (Fla. 1990). While subparagraphs (a) and (b) of the statute have been amended, neither amendment eliminates the requirement that the employer show some degree of culpability for the claimant's failure to obtain the certification; therefore, as discussed further below, neither of those subparagraphs would serve to establish misconduct in this case. Because no form of absenteeism has been asserted, subparagraph (c) does not apply. Furthermore, since the employer has not alleged that it was to be sanctioned or to have its license or certification suspended by this state through a willful and deliberate violation of a state standard or regulation, subparagraph (d) does not apply in this case. Subparagraph (e) requires the violation of a policy or rule to establish misconduct; however, the record in this case contains no information with respect to the precise rule(s) considered by the employer in reaching its decision to discharge the claimant. Accordingly, misconduct has not been established under any of the subparagraphs of Section 443.036(30), Florida Statutes.

In *Colon v. Unemployment Appeals Commission*, 676 So. 2d 46 (Fla. 1st DCA 1996), a speech pathologist at a public school lost her job because she failed to obtain her certification. The Commission held that she voluntarily left her employment without good cause and was disqualified because she did not attempt to enter a program until her final year of certification and applied to only two universities. She did not apply to any of the other universities in the state, public or private, which offer similar programs. Citing *Washington*, the court reversed, reasoning that the claimant had made a good faith attempt to obtain her certification and, therefore, did not voluntarily leave her employment. Moreover, absent a showing of misconduct, she was qualified for benefits.

The school teacher in *Caro v. Florida Unemployment Appeals Commission*, 734 So. 2d 1077 (Fla. 1st DCA 1999), was working under a temporary certificate and waited until the last minute to register for the examination needed to obtain a regular certificate. When she failed the exam, her employment was terminated because it was too late to retake it. The agency held that the teacher's failure to take steps reasonably calculated to ensure her ability to continue working amounted to misconduct. The court reversed on the authority of *Washington*, reasoning that her inadequate efforts to obtain the certificate were the result of poor judgment, not misconduct.

The courts' rulings in *Colon* and *Caro* were based upon the pre-2011 definition of misconduct which defined misconduct as conduct demonstrating *willful or wanton* disregard of an employer's interests. The current definition of misconduct now states it is conduct demonstrating a *conscious* disregard of an employer's interests. Since the current definitions of (a) and (b) require a lesser degree of culpability, we

do not view these cases as controlling precedent. Nonetheless, the facts in this case demonstrate significant and ongoing efforts by the claimant to obtain her certification. The facts demonstrate she was far more diligent than the claimants in both *Colon* and *Caro*. There is no basis to hold her disqualified for misconduct for failure to make adequate efforts to obtain her certification.

In 2013, the reemployment assistance law was amended to add subparagraph (13) to Section 443.101, Florida Statutes. See §43, Chap. 2013-39, Laws of Florida. This new provision provides that an individual shall be disqualified for benefits:

For any week with respect to which the department finds that his or her unemployment is due to a discharge from employment for failure without good cause to *maintain* a license, registration, or certification required by applicable law necessary for the employee to perform her or his assigned job duties. For purposes of this subsection, the term “good cause” includes, but is not limited to, failure of the employer to submit information required for a license, registration, or certification; short-term physical injury which prevents the employee from completing or taking a required test; and inability to take or complete a required test that is outside the employee’s control (emphasis added).

While this section holds an employee responsible for failing to pass an exam even with good faith efforts, it only applies when the employee previously possessed the license, registration or certification and failed to maintain it. The rationale for the provision is that, when an employer hires someone for a position with a known job requirement of possession of a specific credential, and the employee possesses that credential at the time of hire, the employer may safely assume that the employee will continue to maintain the required credential. The facts of this case demonstrate that the claimant never held the required credential, and thus this provision is inapplicable.

Since the record does not establish grounds for disqualification under Section 443.101(1)(a)1. or Section 443.101(13), Florida Statutes, we must conclude the claimant’s discharge was for reasons other than misconduct connected with work or other proper grounds for disqualification and she is entitled to receive reemployment assistance benefits.

The referee's decision is affirmed. The claimant is not disqualified from receipt of benefits as a result of this claim. If otherwise eligible, the claimant is entitled to benefits. The employer's record shall be charged with its proportionate share of benefits paid in connection with this claim.

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

12/2/2014 ,

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



*29634999 *

Docket No.0022 9387 90-02

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

CLAIMANT/Appellant

EMPLOYER/Appellee

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.

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, a child day care center, from January 7, 2013 until January 6, 2014. The claimant was employed full time as a toddler caregiver/teacher. At the time of hire, the claimant was informed by the employer that she was required by State regulations to complete 45 hours of training within a year and that failure to do so would result in her discharge. As of October 29, 2013 the claimant had not met this requirement and she signed a document acknowledging that the requirement had to be met by the first week of January 2014 or she would be discharged. The claimant a native Portuguese speaker, with limited knowledge of English, but with some fluency in Spanish, had difficulty with the online English courses due to her lack of fluency in English. The claimant took the required tests at least five times in English and failed them. The claimant then found and paid \$360 for Spanish language certification courses. The claimant's studies were delayed by the Spanish language website being down for two months and by the intervening holidays. By January 6, 2014 the claimant had not completed all the certification requirements and was discharged on that date. The claimant finally passed all the requirements by February 3, 2014.

CONCLUSION OF LAW: The law provides that a claimant who was discharged for misconduct connected with work will be disqualified for benefits. "Misconduct", irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, conduct demonstrating conscious disregard of an employer's interest and found to be deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee, or carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.

In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. The employer has not shown by competent substantial evidence of disqualifying misconduct in that the claimant did not make reasonable efforts to meet the State certification requirements. Under the law, failure to obtain a certification necessary to continue in employment is not misconduct if the failure was due to inability, and not due to refusing to take the steps necessary to properly prepare. *Gulf County School Board v. Washington*, 567 So.2d 420 (Fla. 1990). Based on the totality of the record it is concluded that the claimant's delay in receiving the certification in a timely manner was due to inability related to lack of fluency in English and not due to failing to take steps necessary to properly prepare. The behavior of the claimant, as described by the claimant, did not meet the statutory definition of misconduct. The claimant is thus not subject to disqualification.

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 was discharged for misconduct connected with the work.

Since the claimant was discharged for reasons other than misconduct connected with the work, the employer's record is charged for benefits paid on this claim.

DECISION: The June 12, 2014 determination is REVERSED. The claimant was discharged for reasons other than misconduct connected with the work. The employer's record is charged for benefits paid on this claim.

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 11, 2014

CHARLES NEUFFER III
Appeals Referee

By: 

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

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

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); <https://raaciap.floridajobs.org>. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.

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.