STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-04660

vs.

Referee Decision No. 0023089053-03U

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 filed an initial claim for reemployment assistance benefits effective May 11, 2014. The claimant was employed as a phone decoder for the employer from November 25, 2005, until May 9, 2014. The claimant was absent one day in January 2014 for personal reasons. The claimant was three minutes tardy in February 2014 because she had an asthma attack and needed to take medicine prior to coming to work. The claimant was tardy by one minute in March 2014 because the claimant stopped to pick up a co-worker who had broken down and needed a ride to work. The claimant stated a [manager] was informed of the tardiness and it was approved.

> On May 9, 2014, the claimant was issued a second written warning. The second written warning concerned the claimant's absences and tardies. The claimant was told the employer had a policy that required all employees to sign written warnings, or the employee would face immediate termination. The employer had a second policy that required immediate termination for a second written warning. The claimant was aware of the two written warnings policy, so the claimant refused to sign the second written warning, as she disagreed with the basis of the warning. The claimant stated she did not know, prior to the issuance of the second written warning, that all written warnings must be signed or the employee would face immediate termination. The claimant was discharged from her employment on May 9, 2014, for refusing to sign the second written warning.

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 failed to develop the record sufficiently; consequently, the case must be remanded.

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.
>
> (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 record reflects the claimant was discharged when she refused to sign a warning. Under case law construing subparagraph (a) of a prior version of the above-referenced statute, a claimant's refusal to sign was required to be sufficiently egregious to rise to the level of misconduct and not simply be an isolated instance of poor judgment. In *Del Pino v. Arrow Air Inc.*, 920 So. 2d 772 (Fla. 3d DCA 2006), the court found a claimant's refusal to sign a warning because he wanted to appeal the warning was not misconduct under the unemployment compensation law. In *Mompoint v. Ward Stone College, Inc.*, 701 So. 2d 1267 (Fla. 3d DCA 1997), the court held a worker's actions in merely refusing to sign a warning notice was not sufficiently egregious to fall within the definition of misconduct. Similarly, in *Nelson v. Burdines, Inc.*, 611 So. 2d 1329 (Fla. 3d DCA 1993), the claimant's actions in tearing up a warning notice was found by the court to be an isolated instance of poor judgment, not misconduct under the statute. Although the courts have not addressed the impact of the 2011 amendment as to the requirements of subparagraph (a), the Commission has considered the effect of the changes. While it is clear that egregiousness is no longer a requirement under subparagraph (a), the employer must still establish a "conscious disregard" of its interests and "a deliberate violation or disregard of the *reasonable* standards of behavior which the

employer expects of his or her employee" (emphasis added). Thus, in order to find misconduct under subparagraph (a), the employer would have to establish that the claimant was given the opportunity to read the document, was informed her signature would acknowledge she had received the document without signifying agreement, was advised there was space on the document for her to write her explanation or express her disagreement, and was notified that her refusal to sign would result in her discharge.[1] The record as currently developed lacks sufficient clarity with respect to these issues.

Alternatively, the employer may establish the discharge was for misconduct as defined by subparagraph (e) of the statute if it establishes the claimant's refusal to sign violated a known policy. In this case, the record reflects the employer submitted a copy of its policy and the written warning prior to the hearing. Although the employer's witness referenced the documents during his testimony, he did not formally request to enter the documents into evidence. In order for documents to be considered, they must be properly introduced as evidence and properly labeled by the referee. Fla. Admin. Code R. 73B-20.024(3)(e). Generally, parties are laypersons unfamiliar with the technical requirements of administrative law. When a document is submitted by a party pursuant to Florida Administrative Code Rule 73B-20.014(3) and references are made to that document at the hearing, the referee should ask the party whether the party intends for the document to be a part of the record. On remand, the referee is directed to include copies of the employer's documents, which should be numbered appropriately, with the next hearing notice to ensure each party has a copy of the documents prior to the next hearing. After convening the next hearing, the referee is directed to authenticate the documents and properly label and enter them into evidence as exhibits. If the employer establishes, based upon the supplemented record, that the claimant's refusal to sign the warning violated a known policy, the burden would then shift to the claimant to establish one of the affirmative defenses listed in Section 443.036(30)(e)1.a.–c., Florida Statutes, to avoid disqualification. With respect to the defense of fair enforcement in subparagraph (e)1.c., the Commission's analysis as to subparagraph (a) above (especially footnote 1) would provide guidance. Additionally, in this case, the referee should develop the record as to whether the employer's policies would also have resulted in the claimant's automatically being terminated

[1] It is inherently unreasonable for an employer to require an employee to "agree" to a disciplinary action that the employee believes is unwarranted or based on a false or mistaken understanding of events, effectively admitting to behavior the employee disputes; however, an employer can reasonably expect the employee to acknowledge receipt of a warning designed to place the claimant on notice that the employer deems her conduct unsatisfactory.

for signing the second warning, or whether the claimant reasonably believed this was so. If the claimant was placed in a "Catch 22" where she would be fired whether or not she signed the warning, the purpose of requiring the claimant to sign the warning is not achieved in such a case, and the rule would not be fairly enforced.

In order to address the foregoing issues, the referee's decision is vacated and the cause is remanded for further proceedings. On remand, the referee is directed to conduct a supplemental hearing to develop the record as outlined above and to properly enter the employer's documents into evidence. The referee must then render a new decision based upon the supplemented record that contains accurate and specific findings of fact regarding the circumstances surrounding the claimant's job separation and a proper analysis of those facts, along with an appropriate credibility determination, if necessary. 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 11/26/2014, 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

*31608774 *

Docket No.0023 0890 53-03 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 filed an initial claim for reemployment assistance benefits effective May 11, 2014. The claimant was employed as a phone decoder for the employer from November 25, 2005 until May 9, 2014. The claimant was absent one day in January 2014 for personal reasons. The claimant was three minutes tardy in February 2014 because she had an asthma attack and needed to take medicine prior to coming to work. The claimant was tardy by one minute in March 2014 because the claimant stopped to pick up a co-worker who had broken down and needed a ride to work. The claimant stated a manger was informed of the tardiness and it was approved.

On May 9, 2014, the claimant was issued a second written warning. The second written warning concerned the claimant's absences and tardies. The claimant was told the employer had a policy that required all employees to sign written warnings, or the employee would face immediate termination. The employer had a second policy that required immediate termination for a second written warning. The claimant was aware of the two written warnings policy, so the claimant refused to sign the second written warning, as she disagreed with the basis of the warning. The claimant stated she did not know, prior to the issuance of the second written warning, that all written warnings must be signed or the employee would face immediate termination. The claimant was discharged from her employment on May 9, 2014 for refusing to sign the second written warning.

Conclusions of Law: As of May 17, 2013, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

a. Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

b. Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's

interest or of the employee's duties and obligations to his or her employer.

c. Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

d. A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

e. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The hearing record shows that the employer discharged the claimant. In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. The employer failed to establish the claimant was discharged for misconduct connected with work. The claimant refused to sign a written warning that would have resulted in her immediate termination. Additionally, the claimant had no way of contesting the written warning that would have resulted in her immediate termination, had she signed the warning. The claimant had good cause for being late and absent, as she had health issues to address.

Consideration was given to the employer's contention that the claimant was discharged for not signing the written warning. However, the claimant would have been immediately terminated, has she signed the second warning, and the claimant had no

option to oppose the written warning, other than refusing to sign the document. The employer may terminate the claimant's employment for refusing to sign the written warning that she did not agree with but that does not establish disqualifying misconduct under the law. Accordingly, it is concluded that the claimant was discharged for reasons other than misconduct connected with work; therefore, the claimant is not disqualified from receiving 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 was discharged for misconduct connected with the work.

The hearing record reveals the claimant was discharged by the employer. The employer did not establish any type of misconduct committed by the claimant. Therefore, it is concluded that the claimant was discharged, but not for misconduct connected with work within the meaning of the law. The employer's account is properly chargeable with benefits paid on this claim.

Decision: The determination of the claims adjudicator dated July 7, 2014 holding the claimant was discharged for chronic absenteeism and the reason for discharge was for misconduct; therefore, the claimant is disqualified from receipt of benefits from May 4, 2014 through November 15, 2014 and until she earns $3,128.00, is **REVERSED**, to hold the claimant was discharged for reasons other than misconduct and the claimant is not disqualified from receipt of benefits. The portion of the determination which held benefits shall not be charged to the employer is **REVERSED**to hold the employer's account shall be charged should any benefits be 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 Agosto 22, 2014.

Nathaniel Flinchbaugh
Appeals Referee

By:

KENER NOEL, 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.
