STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-04873

vs.

Referee Decision No. 0022234640-02U

Employer/Appellant
IRV MALVIN INC

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.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

Also on appeal to the Commission, the appellant requests another hearing to present additional evidence of disqualifying work-related misconduct from a witness who was unavailable for the hearing. The Commission's review of the hearing record reflects the appellant did not request a continuance to present the testimony of unavailable witnesses either before or during the hearing. Consequently, it has not been demonstrated the appellant is entitled to another hearing on the issue of misconduct. The request is, therefore, denied.

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 referee's decision incorrectly reflects the claimant was the only party to appear at the hearing. A review of the record reveals an employer witness also appeared and presented testimony at the hearing conducted in this matter.

The referee's finding, "[The employer's owner] stated the claimant displayed strange or bizarre behavior which made customers and co-workers uncomfortable and her personality was not a good fit for their business," is corrected to reflect the claimant allegedly displayed strange or bizarre behavior which allegedly made customers and co-workers uncomfortable and was discharged during her initial 90-day probationary period because she was not considered a good fit for the employer's business. Correction of the above finding, however, does not affect the legal correctness of the referee's ultimate decision on the issue of separation from employment because the employer failed to meet its burden of proving that the discharge was for disqualifying work-related misconduct.

Upon review of the record and the arguments on appeal, the Commission concludes that portion of the decision holding the claimant not disqualified from receipt of benefits because her discharge was for reasons other than misconduct is supported by competent, substantial evidence and is in accord with the law; accordingly, that portion of the referee's decision is affirmed. The case, however, must be remanded in part for further development of the record on the issue of employer chargeability.

Section 443.131(3)(a), Florida Statutes, provides in pertinent part:

> Further, as provided in s. 443.151(3), benefits may not be charged to the employment record of an employer who furnishes the Department of Economic Opportunity with notice, as prescribed in rules of the department, that any of the following apply:
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> * * *
>
> 2. If an individual is discharged by the employer for unsatisfactory performance during an initial employment probationary period, benefits subsequently paid to the individual based on wages paid during the probationary period by the employer before the separation may not be charged to the employer's employment record. As used in this subparagraph, the term "initial employment probationary period" means an established probationary plan that applies to all employees or a specific group of employees and that does not exceed 90 calendar days following the first day a new employee begins work. The employee must be informed of the probationary period within the

> first 7 days of work. The employer must demonstrate by conclusive evidence that the individual was separated because of unsatisfactory work performance and not because of lack of work due to temporary, seasonal, casual, or other similar employment that is not of a regular, permanent, and year-round nature.

Based on the above statutory provision, in order for the employer to establish relief from charging for a non-disqualifying discharge of a probationary employee, the employer must establish each of the following elements:

1. The claimant was employed during an *initial* probationary period. Under this provision, only the claimant's first period of employment with an employer may be subject to non-charging;

2. The probationary period did not exceed 90 days from the commencement of work;

3. The claimant was notified of the probationary period no later than the seventh day of work;

4. The probationary period was an established probationary plan applying to all employees, or to specific groups or classes of employees which included the claimant's position;

5. The employer establishes by conclusive evidence that the claimant was discharged for *unsatisfactory* performance, and *not* due to lack of work, such as because of temporary, seasonal, casual or other similar employment not of a regular, permanent and year-round nature.

The last requirement is the one most commonly misapprehended by referees, as it was in this case. The issue of whether the employer has shown that the claimant was discharged for unsatisfactory performance *is entirely separate from* the issue of whether the employer has shown that the claimant was discharged for misconduct. The phrase "unsatisfactory performance" is inherently subjective, and does not require explicit, direct proof of objectively poor performance. Thus, the employer does not need to prove to the referee's satisfaction that the claimant was not performing satisfactorily; it merely needs to establish that it sincerely believed the claimant's performance was unsatisfactory, and it is not required to do this with direct evidence of the claimant's performance. Instead, the employer must present evidence from individuals with knowledge of the *reason* for the discharge, rather than the performance. Thus, an owner who discharges an employee based on a

supervisor's oral statements to him that the employee was not performing adequately would not have competent evidence to prove misconduct, but would be able to provide competent evidence as to the reason for the separation decision he himself made. In short, the issue is not the employee's performance *per se*, but why the employee was separated.

This does not mean, however, that the referee must take the employer at its word that the claimant was discharged for unsatisfactory performance. The statute requires the employer to establish with *conclusive* evidence that the separation was not a layoff due to lack of work, particularly for a temporary, seasonal or casual employee, such as one called in for occasional as-needed assignments. This requirement is intended to ensure that employers do not exploit the probationary exemption to avoid proper charging when laying off employees. If an employer cannot provide any explanation, even second-hand evidence, as to why the claimant's performance was deemed unsatisfactory, the referee might reasonably infer that the discharge was for other reasons.

In any case in which the probationary exemption is being claimed by the employer, the referee should ask both the employer and the claimant specific questions such as: (1) the nature of the employer's business operations in which the claimant was employed; (2) the nature of the claimant's position and duties; (3) the claimant's expected length of employment at the time of hire; (4) the number of other employees filling similar positions to the claimant's; (5) whether other employees were separated around the same time as the claimant; and (6) whether the claimant was replaced, and if so, when. The referee should ensure that the claimant was hired in a permanent, regular position, or at least longer-term temporary position expected to run significantly longer than the probationary period. The referee must ultimately determine as a matter of fact whether the claimant's separation was for perceived performance deficiencies, rather than a lack of work, and do so from evidence leaving no realistic doubt. However, once the employer has established that it separated the claimant due to a good faith belief of unsatisfactory performance and not for lack of work, the employer has satisfied the last prong of the probationary exemption.

The record reflects the claimant was discharged during an initial 90-day probationary period because she was not considered a good fit for the employer's business. Department of Economic Opportunity records reflect the employer provided the Department notice that the claimant was discharged during a 90-day probationary period. While the hearing record includes an acknowledgment of the 90-day probationary period signed by the claimant on the date of hire and, thus, reflects that she was notified of the initial probationary period within the first seven days of work, the record is silent regarding whether the initial 90-day probationary

period is an established probationary plan that applies to all the employer's employees or to a specific group of employees. Moreover, the record as currently developed is inadequate to determine whether the decision to discharge was based on a perception or belief that the claimant's performance was unsatisfactory. The record reflects the employer's witness and his brother made the decision to discharge. Testimony from the employer's witness reflects there was no final incident that prompted the discharge but that they had decided ahead of time they would discharge the claimant prior to the end of her 90-day probationary period. He testified the claimant was not the type of individual they were looking for, she was "weird" and made customers and co-workers uncomfortable, so they "took it to the end" of the 90-day probationary period in hopes that it would "turn around," but it never did so they discharged her on the 89th day of her initial 90-day probationary period.

In considering whether the employer's reason for separation relates to unsatisfactory performance, we note that "unsatisfactory performance" is not narrowly interpreted to relate only to the specific performance of the claimant's job duties, but to the claimant's overall "performance" in the workplace. An employee whose work is often acceptable but whose attendance, attitude, compliance with employer rules, or other behaviors is not acceptable to the employer may be separated for unsatisfactory performance just as an employee with an exemplary attitude and attendance record who cannot master the job tasks assigned. Since the purpose of the exemption is to encourage employers to hire employees, there is no basis for limiting application of the exemption to a narrow band of employee behaviors.

In order to determine whether the employer is eligible for relief from charges pursuant to Section 443.131(3)(a)2., Florida Statutes, the case must be remanded for further development of the record as outlined above. In particular, the record must be developed regarding whether all employees or a specific group or class of employees are placed on an initial 90-day probationary period. Additionally, the employer's witness must be questioned in more detail regarding why the claimant was perceived as not being a good fit and how that impacted her perceived performance in the workplace.

The decision of the appeals referee is affirmed in part and remanded in part. That portion of the decision holding the claimant not disqualified from receipt of benefits because her discharge was for other than misconduct is affirmed. The issue of employer chargeability 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 3/12/2015, 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

*31901969 *

Docket No.0022 2346 40-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Claimant

DECISION OF APPEALS REFEREE

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

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

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

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 as sales person for a retailer beginning December 9, 2013. The claimant was notified through hiring paperwork that she was a within a 90 probationary period. The owner stated the claimant displayed strange or bizarre behavior which made customers and co-workers uncomfortable and her personality was not a good fit for their business. The claimant was very professional towards staff and customers; she was making sales and performed her job as best she could. She did not receive any reprimands for poor job performance or made aware of any performance issues during her time of employment. On March 8, 2014, the claimant called to report her absence due to a dental appointment and was instructed by she was no longer needed.

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 record reflects that the claimant was discharged for poor job performance within a 90 probationary period for alleged poor job performance. Although it was shown that the claimant was made aware that she was within a 90 day probationary period and the employer provided notice to the Department within a timely manner, the employer's argument of the claimant's lack of performance was ambiguous and devoid of detailed accounts, or specific examples explaining why the claimant's performance was deemed unsatisfactory. Thus, it is determined that while the employer may have made a valid business decision in discharging the claimant, the

record holds insufficient evidence which is necessary to impose a disqualification for poor job performance and cannot be regarded as a conscious disregard of an employer's interests and was not found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Accordingly, the claimant is not disqualified from receipt of benefits and the employer's account is charged.

The appeals referee was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors 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 appeals referee finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated July 30, 2014, qualifying the claimant and employer's account record charged, is affirmed based on this separation.

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/mailed to the last known address of each interested party on August 29, 2014.

SHANNA JONES
Appeals Referee

By: K. Martin

KIMBERLY MARTIN, 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 distribution/mailed 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 distribución/fecha de envìo 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 distribisyon/postaj. 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.
