

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-06326

vs.

Referee Decision No. 0024079953-02U

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.

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 voluntarily left work without good cause attributable to the employing unit or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

On November 14, 2011, the claimant was hired to work for [the employer] as a full-time security officer. The claimant was aware that the employer's policy required termination of an employee for failure to report absences for three days. On July 3, 2014, the claimant was arrested while he was at work for [a] domestic issue. The manager of security operations was aware that the claimant was arrested at work. On July 8, 2014, the claimant's sister visited him in jail and the claimant asked his sister to contact the manager of security operations for him. The manager of security operations received a text message from the claimant's sister regarding the claimant being incarcerated. As soon as the

claimant was given a free phone call, he called the manager of security operations and left a voice mail message. On August 20, 2014, the claimant was released from jail at 1:00 a.m. Two days later when the claimant got a phone, he called the manager of security operations. On July 6, 2014, the claimant was discharged for violating the employer's policy, because he did not call in to report his absence for three days.

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 not supported by competent, substantial evidence, and, further, is not in accord with the law; accordingly, it is reversed.

The record reflects the claimant was employed as a security officer supervisor at the time of the separation. Sometime between June 30, 2014, and July 2, 2014, the claimant was arrested. The employer was aware of the arrest, but did not know the nature of the charges. The claimant was released from custody and returned to work without violating the employer's attendance policy. On July 3, 2014, the claimant was at work when he was arrested a second time. The supervisor testified he was aware that the claimant had been arrested, but again, was not aware of the nature of the charges or how long the claimant would be incarcerated. The claimant was subsequently a no-call/no-show for his scheduled shifts on July 5, 6, and 7. The claimant's sister sent the supervisor a text on or shortly after July 8 informing the employer that the claimant was still in jail. At the hearing, the claimant testified that he entered a plea of no contest to criminal charges and was released from jail on August 20, 2014, and as of the date of the hearing, November 11, 2014, the claimant remained on probation as a result of the plea he entered.

The supervisor testified that the employer considered the claimant to have abandoned his job after being [a] no-call/no-show for three days in violation of the employer's policy. He also testified that, had the claimant contacted the employer prior to being removed from the employer's system on July 7, 2014, the claimant would not have been considered to have abandoned his job at that time. It was noted, however, that the claimant would have subsequently violated other portions of the employer's attendance policy because he was unable to report to work for seven weeks due to being incarcerated.

The referee held that the claimant was discharged for reasons other than misconduct reasoning that, since the employer knew the claimant had been arrested and he made an effort to contact the employer through his sister and made a call from jail as soon as he was able to, his actions did not demonstrate a "conscious

disregard” of the employer’s interests. In so concluding, the referee likely relied on the precedent of *Parker v. Unemployment Appeals Commission*, 440 So. 2d 438 (Fla. 1st DCA 1983), which held that an employee’s absence from work due to an incarceration cannot automatically be deemed disqualifying, because an arrest and incarceration prior to an adjudication of guilt do not establish culpability under the reemployment assistance law by themselves. Were these the only operative facts, we would be compelled to affirm the referee’s decision.

However, the record also reflects that the claimant entered a plea of no contest and accepted responsibility for his actions. The claimant’s argument that he entered the plea out of convenience in order to get out of jail does not negate the fact that he is deemed lawfully responsible. In addition, the claimant’s argument that he committed the acts for which he was arrested away from work is not grounds for relief pursuant to Florida’s reemployment law because his actions resulted in his inability to report for work as scheduled. The claimant missed seven weeks of work due to his incarceration. His absence of that duration combined with his acceptance of responsibility through his no contest plea constitutes misconduct under Section 443.036(29)(a) & (e), Florida Statutes. See *Hillsborough County v. Unemployment Appeals Commission*, 433 So. 2d 24 (Fla. 2d DCA 1983). We distinguish *Livingston v. Tucker Construction & Engineering, Inc.*, 656 So. 2d 499 (Fla. 2d DCA 1995), which held the claimant not disqualified for an absence due to incarceration, on the grounds that it no longer appears to be good law subsequent to the 2011 amendments to the definition of misconduct, other statutory amendments regarding the impact of a no contest plea, and the fact that the short-term incarceration in that case is not comparable to the seven-week absence of the claimant herein.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending July 5, 2014, the five succeeding weeks, and until he becomes reemployed and earns \$4,675. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination. Department records reflect the employer filed on October 14, 2014, a timely response to the Notice of Claim Filed. The employer's account is relieved of charges 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

3/31/2015,

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



*35247218 *

Docket No.0024 0799 53-02

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

CLAIMANT/Appellee

EMPLOYER/Appellant

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.

Issues Involved: SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

FINDINGS OF FACT: On November 14, 2011, the claimant was hired to work for _____ as a full time security officer. The claimant was aware that the employer's policy required termination of an employee for failure to report absences for three days. On July 3, 2014, the claimant was arrested while he was at work for domestic issue. The manager of security operations was aware that the claimant

was arrested at work. On July 8, 2014, the claimant's sister visited him in jail and the claimant asked his sister to contact the manager of security operations for him. The manager of security operations received a text message from the claimant's sister regarding the claimant being incarcerated. As soon as the claimant was given a free phone call, he called the manager of security operations and left a voice mail message. On August 20, 2014, the claimant was released from jail at 1:00 a.m. Two days later when the claimant got a phone, he called the manager of security operations. On July 6, 2014, the claimant was discharged for violating the employer's policy, because he did not call in to report his absence for three days.

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

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

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employees duties and obligations to his or her employer.

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

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

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

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

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

c. The rule is not fairly or consistently enforced.

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

The record shows that the claimant was discharged for violating the employer's policy, because he did not call to report his absence for three days. However, the claimant was arrested while he was at work and the manager of security operations was aware of the arrest. The claimant did try to contact the employer by asking his sister to contact the employer and then by using his free phone call while in jail. The claimant's actions did not demonstrate a conscious disregard of the employer's interests and is not found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of their employees. The burden of proving misconduct is on the employer. *Lewis v Unemployment Appeals Commission*, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. *De Groot v. Sheffield*, 95 So.2d 912 (Fla. 1957); *Tallahassee Housing Authority v. Unemployment Appeals Commission*, 483 So.2d 413 (Fla. 1986). The employer has not met that burden. Since the claimant was not discharged for misconduct under Florida Statutes 443.036(30)(a)(b)(c)(d)or(e), the claimant is qualified for receipt of benefits.

DECISION: The determination dated October 16, 2014, is AFFIRMED. The claimant is qualified for receipt of benefits.

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 November 21, 2014.

ROSEMARY WILD (RIGGINS)
Appeals Referee

By: 

DREXELL CARTER, 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 envío 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 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.

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.