

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-00631

vs.

Referee Decision No. 0024279159-03U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision holding the claimant 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. The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record.

The issue before the Commission is whether the claimant voluntarily left work without good cause within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

The claimant was primary owner/officer of the business, an office café, from July 2000 until April 6, 2014. The claimant sold the company on March 31, 2014. The business was not operating in a deficit. She continued to assist the new owners until April 6, 2014, when she quit. The claimant sold the company as she could not pay herself and another employee.

Based on these findings, the referee held the claimant disqualified for receipt of benefits. He concluded that, while the claimant may have quit for good personal reasons, the law requires disqualification under the circumstances of this case. In his conclusion, the referee stated:

The record reflects the claimant owned a controlling interest in the business. It was revealed the claimant sold her interests in the company due to lack of profits. However, the testimony of the claimant reveals the company was not operating at a loss. Thus, while the claimant may have quit for good personal reasons, the law requires disqualification under these circumstances. Thus, the claimant is disqualified for benefits.

The issue in this case is whether the claimant must be disqualified from receipt of benefits due to her sale of the business: specifically, whether that action constitutes a voluntary separation not attributable to the employing unit within the meaning of the reemployment assistance law. The referee's decision indicates that the referee analyzed the claimant's loss of her position as a voluntary quit due to her sale of the business. To determine the correctness of the referee's conclusion, we must determine how a loss of employment due to a sale of an individual's business must be analyzed under the reemployment assistance law.

An individual who is "unemployed" within the meaning of Section 443.036(44), Florida Statutes, and who otherwise meets the eligibility requirements of Section 443.091 and 443.111, Florida Statutes, is presumed to be entitled to benefits unless she is subject to disqualification pursuant to Section 443.101, Florida Statutes. When a separation is a result of a quit, Section 443.101, Florida Statutes, provides:

An individual shall be disqualified for benefits:

(1)(a) For the week in which he or she has voluntarily left work without good cause attributable to his or her employing unit or has been discharged by the employing unit for misconduct connected with his or her work, based on a finding by the Department of Economic Opportunity. As used in this paragraph, the term "work" means any work, whether full-time, part-time, or temporary.

1. . . . As used in this subsection, the term "good cause" includes only that cause attributable to the employing unit which would compel a reasonable employee to cease working or attributable to the individual's illness or disability requiring separation from his or her work. Any other disqualification may not be imposed. An individual is not disqualified under this subsection for voluntarily leaving temporary work to return immediately when called to work by the permanent employing unit that temporarily

terminated his or her work within the previous 6 calendar months, or for voluntarily leaving work to relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders.

Because the statute does not specifically address the issue of disqualification when an individual loses employment due to a sale of his or her business, it is necessary to analogize such a separation to other separations. First, the referee must examine the record to determine whether the separation was voluntary or involuntary in order to determine whether it was effectively a discharge or resignation. Second, if the separation was effectively a resignation, the referee must determine whether it met one of the statutory exceptions from disqualification.

In determining whether the loss of employment was voluntary, the first question is whether the claimant voluntarily sold the business. If the claimant had the sole or a controlling stake in the business, and was not legally compelled to sell the business, then the sale will generally be considered voluntary. If the claimant had only a minority interest in the business, the referee must determine whether the claimant agreed to the sale.

Both the courts and the Commission have held that an employee who resigns from or loses employment as a consequence of a voluntary agreement providing separate consideration has voluntarily resigned without good cause. *See Lake v. Unemployment Appeals Commission*, 931 So. 2d 1065 (Fla. 4th DCA 2006) (holding disqualified employee who resigned as part of workers' compensation settlement); *Calle v. Unemployment Appeals Commission*, 692 So. 2d 961 (Fla. 4th DCA 1997) (holding disqualified employee who retired pursuant to early retirement package in face of future department layoff); and *In re Astrom*, 362 So. 2d 312 (Fla. 3d DCA 1978) (holding disqualified employee who retired pursuant to early retirement package in face of future plant closure). We apply a similar analysis to determine whether a claimant voluntarily left employment as a consequence of a sale of the business.¹

¹ We recognize that in an asset sale, the actual employing entity may cease business, resulting in the claimant effectively being laid off. Likewise, even where the buyer purchases the business organization as well as its assets, the acquiring employer may transfer employees to a separate employing entity. Regardless of the form of the acquisition, we examine the economic realities of the transaction to determine whether the separation was a known and direct consequence of the voluntary agreement, regardless of whether it is deemed a resignation or layoff.

In such cases, the referee must develop the record and make findings regarding the specific agreement and anticipated consequences of the agreement. While the sale of a business by an owner will commonly result in loss of employment by the owner either immediately at the time of the sale, or in the near future after a short transition period, occasionally the acquiring entity will retain the services of the seller indefinitely. In those circumstances, the seller has not relinquished employment as a result of the sale.²

Our approach is consistent with the holdings in other states that a sole or majority owner who loses employment due to a voluntary sale of his or her business has voluntarily caused his or her unemployment. *See Davis v. Scherer*, 381 So. 2d 643 (Ala. Civ. App. 1980); *Jahn v. Div. of Employment Sec.*, 489 N.E.2d 998 (Mass. 1986); *Nelson v. Wheel Estates Mobile Home Park Inc.*, 2000 Minn. App. LEXIS 281 (Minn. Ct. App. 2000); *Erb v. Comm. of Economic Security*, 601 N.W.2d 716 (Minn. Ct. App. 1999); *Neubauer v. Bec-Jon Corp.*, 1984 Ohio App. LEXIS 10525 (Ohio Ct. App. 1984); *Manuel v. Toner Plus, Inc.*, 815 N.W.2d 668 (S.D. 2012) (acknowledging that some states have considered economic reasons to be good cause, but holding that limited grounds under South Dakota law did not permit such interpretation); *Allen v. Dept. of Employment Security*, 781 P.2d 888 (Utah Ct. App. 1989) (holding record lacked sufficient evidence of compelling financial circumstances to constitute good cause); *Saunders v. Virginia Employment Commission*, 43 Va. Cir. 200, 1997 Va. Cir. LEXIS 352 (Va. Cir. Ct. 1997); *Fish v. White Equipment Sales & Service, Inc.*, 221 N.W.2d 864 (Wisc. 1974).

The voluntary nature of the separation, however, does not automatically disqualify the claimant. The claimant may still show that she had good cause within the meaning of the statute, including “good cause attributable to the employing unit.” The Commission has held, albeit in dicta, that a claimant may have good cause to terminate her employment by virtue of a sale of the business when it is financially failing. *See U.A.C. Order No. 03-09732* (October 17, 2003).

In this case, the referee concluded that the claimant sold her business voluntarily while not operating at a loss. While this finding is supported and significant, the referee also acknowledged that the claimant could not pay herself and another employee at the time of the sale. This second finding is consistent with the claimant’s testimony. The claimant also testified that despite being an operating owner – that is, that she regularly worked at the location – she had not been able to regularly draw compensation from the business for some time. She testified that she

² Again, while the sale may result in the claimant being transferred to a new reporting employer, resulting in a technical discharge and new hire, we examine the economic reality of the transaction to determine whether continued employment was expected.

had only drawn \$1000 as compensation for her work during the calendar year through the date of sale, testimony that is supported by the claimant's wage transcript and determination. Florida law, under both the decisions of the courts and Commission, recognize that a regular employee may have good cause to quit due to inadequate pay. *See, e.g.*, R.A.A.C. Order No. 13-04651 (September 25, 2013). If the owner of a business can keep it running on a break-even basis at best solely by working for little or no pay for an extended period of time, it would be difficult to argue that she is gainfully employed.

However, we also recognize that an employee who owns a business assumes more risk and accepts more reward than a rank and file employee, including investment gain as well as salary or wages. Furthermore, because such an employee is the alter ego of the employer, the employee cannot completely escape the consequences of his or her decisions as employer. For these reasons, most courts have, while recognizing under various state "good cause" standards³ that an employee owner may have good cause to quit, established high standards of financial necessity to support a conclusion of good cause.⁴ Courts have also developed factors to consider in determining whether a sale was financially compelled.

In *Neubauer, supra*, the record established that the claimant sold her business while it was operating at a loss, but despite her contention that she sold it to avoid bankruptcy, the record did not establish that it was insolvent and could not have been operated as a going concern. Significantly, the court held that the record lacked any evidence of whether the claimant netted any profit or loss from the sale. Likewise, in *Allen*, the claimants were held to have been erroneously granted benefits where the record reflected "only a mere suggestion that [the claimants] were delinquent in payments on an obligation owed a bank, but no other evidence of external pressures so compelling as to enable us to conclude that they had 'good cause for leaving work voluntarily.'" 781 P.2d at 891. In *Davis, supra*, the court held that "antiquated machinery" did not constitute "good cause" for deciding to sell a business.

³ Under many states' laws, "good cause" is not limited to the criteria provided under Florida statutory law. For our purposes, good cause necessitated by financial difficulties for which the claimant is not culpable under misconduct standards could be considered "good cause attributable to the employing unit."

⁴ *Fish, supra*, by contrast, appears to establish a rule that an employee who effectively is the alter ego of the business cannot establish "good cause attributable to the employer," holding that the claimant "as an employee could not disassociate the fault or *misfortune* of [the claimant] as an employer so as to become eligible for unemployment benefits under the statute." 221 N.W.2d at 869 (emphasis added). The majority of states addressing the issue do not appear to have followed such an absolute rule.

By contrast, in *Saunders*, the court held that the claimant had good cause where she and her sister sold their business because it was losing money, neither wanted to take it into bankruptcy, and significantly, neither had drawn a regular salary for months prior to the sale.

In *Jahn*, the court identified a number of relevant factors which should be considered in determining whether compelling financial circumstances existed. In particular, the court noted that the business had made a slight profit of a few thousand dollars in two of the past three years before the sale, and a similar-sized loss in the other; that the officers (primarily the claimant) had drawn between \$22,000 and \$40,000 in annual salary during that time; and that the sale of the business netted its owners \$40,000. Examination of these facts presented a more accurate picture of the overall financial circumstances of the owner. On those facts, the court affirmed the agency's conclusion that the owner did not have good cause to relinquish his employment.

In this case, the referee's finding that the business was not running at a deficit, while a significant finding, does not address the entirety of the claimant's financial situation. As noted above, the claimant testified that she only drew \$1000 in compensation the year the sale occurred. According to Department of Revenue records, the following amounts were shown as compensation paid to the claimant by *quarter* and *year*:

1/2014 - \$1000
4/2013 - \$3900
3/2013 - \$3400
2/2013 - \$3000
1/2013 - \$2800
4/2012 - \$2700
3/2012 - \$3300
2/2012 - \$5300
1/2012 - \$3700
4/2011 - \$4000
3/2011 - \$3300
2/2011 - \$2800
1/2011 - \$3700
4/2010 - \$3550
3/2010 - \$4446
2/2010 - \$2800
1/2010 - \$1000

These records show the claimant's compensation dropped significantly in the 1st quarter of 2014. Whether this loss of income was sufficiently compelling to constitute good cause to quit by selling the business depends on the extent to which it was foreseeable as a long-term trend, or a short-term downturn. On remand, the referee should conduct a brief supplemental hearing and develop the record as to why the claimant's income declined during that period. Additionally, the referee should inquire as to the amount of net proceeds (if any) from the sale, the amount of debt and why it was incurred, and any other factors that provide a broader picture of whether the claimant's situation was such that it would compel a reasonable person to end her employment by selling the business. Finally, the referee must reach a conclusion as to whether the facts in this situation provide the compelling justification necessary for the claimant to have good cause to quit by selling the business.

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

8/26/2015,

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: Kady Ross

Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250



*38473440 *

Docket No.0024 2791 59-03

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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rules 73B-20.016; 20.017.

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.)

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.

Jurisdictional Issue: A hearing was held on January 12, 2015, which the claimant/appellant did not office attend. The claimant received the notice of hearing timely. The claimant's phone was not working properly at the time of the hearing.

A case will be re opened for a hearing on the merits when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated.

The record shows the claimant was awaiting the phone call for the previous hearing but was unable to receive it due to an unsuspected phone issue. Thus, good cause has been shown to proceed with an additional hearing.

Findings of Fact: The claimant was primary owner/officer of the business, an office café, from July 2000, until April 6, 2014. The claimant sold the company on March 31, 2014. The business was not operating in a deficit. She continued to assist the new owners until April 6, 2014, when she quit. The claimant sold the company as she could not pay herself and another employee.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. "Good cause" includes only cause attributable to the employing unit or illness or disability of the claimant requiring separation from the work. However, a claimant who voluntarily left work to return immediately when called to work by a permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months, or to relocate due to a military connected spouse's permanent change of station, activation, or unit deployment orders, is not subject to this disqualification.

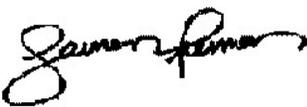
The record reflects the claimant owned a controlling interest in the business. It was revealed the claimant sold her interests in the company due to lack of profits. However, the testimony of the claimant reveals the company was not operating at a loss. Thus, while the claimant may have quit for good personal reasons the law requires disqualification under these circumstances. Thus, the claimant is disqualified for benefits.

Decision: The determination dated November 21, 2014, is AFFIRMED. The claimant is disqualified from April 6, 2014, and until she earns \$2550. The employer's account is charged in connection with the 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/mailed to the last known address of each interested party on February 2, 2015.

DEXTER PARKER
Appeals Referee

By: 

LAUREN FREEMAN, 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 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 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 diskalfye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

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

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); <https://raaciap.floridajobs.org>. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lèt 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.