

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-00881

vs.

Referee Decision No. 0024202693-02U

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 wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

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 made the following findings of fact:

The claimant worked as District Sales Manager for a beverage distributor from November 17, 2009, to August 29, 2014. The claimant was discharged on August 29, 2014, due to claiming personal travel costs and going outside of the normal process regarding customer interactions. The claimant was in violation of the employer's Code of Business Conduct for the submission of false receipts for processing and improper dealings with a customer. Additionally, the claimant was in violation of the employer's Travel and Expense Policy which requires that the employees only use the company credit card for business expenses; flights must be booked seven to fourteen days in advance; and all

travel must be booked through [a certain travel agency]. The claimant was aware of the policies and these rules. Additionally, the claimant failed to submit his travel and expense report on time. Employees are to submit these reports within seven business days of their return from a business trip.

During the period beginning March 31, 2014, through April 11, 2014, the claimant made a business trip to Atlanta, GA. The claimant used the company credit card to pay for his travel and expense costs during this period. The claimant failed to submit his travel and expense report within seven days upon returning from his trip. The claimant's supervisor received notice that the report was past due, and asked the claimant via email messages and phone calls to submit the report. The claimant was over sixty days late submitting the report causing the accrual of late fee charges to the credit account. Upon completion of an investigation by the employer, it was evident that the claimant had ten personal charges made to the company credit card during the period beginning April 4, 2014, through May 22, 2014, including unauthorized airline tickets. The total for these personal charges amounted to \$752.32.

In May 2014, the claimant attempted to return some beverages that he had bought [at] a Wal-Mart store. The claimant did not have the receipt, and asked for a cash refund. The claimant was advised that only store credit could be given without a receipt. The claimant asked to speak to a manager, and then informed the manager that he was employed by [the employer] and knew that they could provide a cash refund to him without a receipt. The manager later contacted the employer to complain about this incident.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the case must be remanded because the referee did not sufficiently develop the record regarding the applicability of Section 443.036(29), Florida Statutes, particularly subparagraphs (a) and (e).

Section 443.036(29), 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 referee concluded the claimant was discharged for claiming personal travel costs and going outside the normal process regarding customer interactions. However, the referee's finding that the claimant "informed the manager that he was employed by [the employer]" is not supported by competent evidence on the record. The employer failed to present any competent, non-hearsay evidence that the claimant identified himself as the employer's employee when interacting with the customer, and the record reflects the claimant denied this allegation. Accordingly, the employer's evidence presented on the claimant's customer interactions is insufficient to establish misconduct and is rejected by the Commission.

The referee's decision concludes that the claimant's actions constituted disqualifying work-related misconduct under subparagraphs (a) and (e) of the above-stated definition of misconduct. Because the claimant was discharged for allegedly violating an employer rule, we first examine whether the employer established that the claimant should be disqualified under subparagraph (e) of the definition of misconduct.

Subparagraph (e) "expresses the legislative intent that a claimant may be disqualified from benefits where it is established he or she committed a 'violation of an employer's rule.'" *Crespo v. Florida Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3d DCA 2012). Once the employer has shown a violation, the claimant bears the burden to establish one of the three defenses. *Crespo, supra*; *Critical Intervention Servs. v. Reemployment Assistance Appeals Commission*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013).

The record reflects the claimant was discharged for making personal, non-business purchases on his employer-issued credit card in violation of the employer's policy. The record reflects the claimant understood the employer's "Travel and Expense Policy" prohibited the claimant from making personal, non-business-related purchases with the business credit card issued to the claimant by the employer. Because this policy involves use of employer funds, it falls under the definition of a rule. The evidence in this case clearly established that the claimant violated this policy when he made at least ten personal purchases using the employer-issued business credit card. Thus, the issue in this case is whether the claimant can establish one of the three affirmative defenses. He must show that (1) he did not know, and could not reasonably know, of the rule's requirements; (2) the rule is not lawful or not reasonably related to the job environment and performance; or (3) the rule is not fairly or consistently enforced. While the policy at issue is clearly lawful and reasonably related to the job environment and the claimant admitted knowledge of the policy, the referee should analyze whether the policy was fairly and consistently enforced. The referee made no findings regarding the claimant's un rebutted explanation that he mistakenly used the employer-issued business credit

card to make some of the personal purchases because it looked similar to his own personal credit card. The referee should make a specific finding as to whether or not the claimant's use of the employer-issued credit card was intentionally deceptive or merely a matter of mistake. It is *not* necessary for the employer to specifically rebut the claimant's contention of accidental use with *direct* evidence of the claimant's intent, as the number of instances of use alone could give rise to a reasonable inference of intentional use; instead, the referee should evaluate the evidence offered by the claimant and the employer, direct or circumstantial, and determine, based on reasonable inferences that can be drawn from the evidence as well as logic and experience, whether it is more likely that the usage was accidental or intentional. Additionally, if the usage was accidental, the referee should develop the record and determine whether the evidence shows any prior such instances which would have put the claimant on notice of the need to use heightened care, or other circumstances that would show that even accidental use occurred in such circumstances so that the claimant was properly deemed culpable for negligence or lack of due care. In considering this issue, the referee should evaluate the claimant's contention that his mental health condition at the time contributed to the mistake, in determining the degree of culpability.

In determining whether the claimant's use of the employer-issued credit card constitutes misconduct under subparagraph (a), the employer is required to prove that the claimant's actions were in "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 (emphasis added)." This is a compound requirement, and while the record evidence in this case was sufficient to show that the claimant's conduct was in disregard of the reasonable standards of behavior established by the employer's rule, the employer must prove that the disregard was deliberate, and must also prove that the claimant acted in conscious disregard of its interests. This does not require intentional, purposeful conduct, but at least requires a degree of carelessness or indifference sufficient to show that the claimant's conduct reflected a lack of concern for the employer's interests. As noted above, the referee failed to address the claimant's un rebutted testimony that he mistakenly used the employer-issued credit card to make purchases because it looked like his personal credit card and that he made the purchases while experiencing anxiety and depression. Because the referee did not address the claimant's contentions on this point, the Commission is unable to determine whether the claimant acted in conscious disregard of the employer's interests or in deliberate violation or disregard of the reasonable standards of behavior which the employer could expect of its employees. Accordingly, on remand, the referee must address the un rebutted portions of the claimant's testimony.

In order to address the points raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to address the claimant's affirmative defense and then render a decision that contains specific findings of fact that reflect the believed, competent, material evidence regarding the events leading to the claimant's job separation. *See Hardy v. City of Tarpon Springs*, 81 So. 2d 503, 506 (Fla. 1955). The decision shall also include a proper analysis of those facts along with an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025. 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
5/11/2015,
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: Kimberley Pena
Deputy Clerk



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



*38630799 *

Docket No.0024 2026 93-02

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.

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.

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 District Sales Manager for a beverage distributor from November 17, 2009, to August 29, 2014. The claimant was discharged on August 29, 2014, due to claiming personal travel costs and going outside of the normal process regarding customer interactions. The claimant was in violation of the employer's Code of Business Conduct for the submission of false receipts for processing and improper dealings with a customer. Additionally, the claimant was in violation of the employer's Travel and Expense Policy which requires that the employees only use the company credit card for business expenses; flights must be booked seven to fourteen days in advance; and all travel must be booked through . The claimant was aware of the policies and these rules. Additionally, the claimant failed to submit his travel and expense report on time. Employees are to submit these reports within seven business days of their return from a business trip.

During the period beginning March 31, 2014, through April 11, 2014, the claimant made a business trip to Atlanta, GA. The claimant used the company credit card to pay for his travel and expense costs during this period. The claimant failed to submit his travel and expense report within seven days upon returning from his trip. The claimant's supervisor received notice that the report was past due, and asked the claimant via email messages and phone calls to submit the report. The claimant was over sixty days late submitting the report causing the accrual of late fee charges to the credit account. Upon completion of an investigation by the employer, it was evident that the claimant had ten personal charges made to the company credit card during the period beginning April 4, 2014, through May 22, 2014, including unauthorized airline tickets. The total for these personal charges amounted to \$752.32.

In May 2014, the claimant attempted to return some beverages that he had bought to a Wal Mart store. The claimant did not have the receipt, and asked for a cash refund. The claimant was advised that only store credit could be given without a receipt. The claimant asked to speak to a manager, and then informed the manager that he was employed by and knew that they could provide a cash refund to him without a receipt. The manager later contacted the employer to complain about this incident.

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 shows that the claimant was discharged. 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); TallahasseeHousing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). Testimony establishes that the claimant was discharged due to claiming personal travel costs and going outside of the normal process regarding customer interactions. The claimant's actions were in violation of known policies and procedures, and also demonstrate a conscious disregard of the employer's interests. Thus under Florida Statutes 443.036 (30)(a)(e) the claimant's actions amount to misconduct. Accordingly, the claimant is disqualified for the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003 10946 (December 9, 2003), the Commission 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 hearing officer finds the testimony of the employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

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 record shows that the claimant was discharged. Misconduct connected with work has been established. Therefore, the employer's account will not be charged.

Decision: The determination dated November 10, 2014, is **REVERSED**. The claimant is not qualified to receive benefits for the period beginning August 24, 2014, through September 27, 2014, and until he has earned \$4,675. The employer's account will not be charged.

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 5, 2015.

Susan Clifford
Appeals Referee

By: *Adrienne Kidder*

Adrienne Kidder, 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 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.