

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-01579

vs.

Referee Decision No. 0024310228-03U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings.

The referee held the claimant was discharged for reasons other than misconduct connected with work and, therefore, not disqualified from receipt of benefits. 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 record reflects the employer discharged the claimant for sleeping on the job. It is clear that, prior to the passage of Chapter 2011-235, the claimant's actions would not have amounted to misconduct. Under case law construing a prior version of subparagraph (a), a single sleeping episode, absent evidence to show the employee acted intentionally, was not considered misconduct. In *Paul v. Jabil Circuit Company*, 627 So. 2d 545 (Fla. 2d DCA 1993), the claimant, a security guard, was discharged when he was found asleep while on duty. The court held that one incident of nodding off is an isolated instance of negligence and is not misconduct. The court noted, however, that had the claimant intentionally taken a nap or repeatedly fallen asleep on the job, a different result might have been reached. See also *Lusby v. Unemployment Appeals Commission*, 697 So. 2d 567 (Fla. 1st DCA 1997). Cf. *Jennings v. Unemployment Appeals Commission*, 689 So. 2d 1193 (Fla. 4th DCA 1997).

However, subparagraph (a) was amended by the Legislature in 2011, as follows:

Conduct demonstrating conscious ~~willful or wanton~~ 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 ~~has a right to expect~~ of his or her employee, ~~or~~

Ch. 2011-235, §3, at 3, Laws of Fla. (Words stricken are deletions; words underlined are additions). The Commission has concluded that the revised provision contains a standard with two separate and independently analyzed requirements: whether the claimant's behavior reflects a conscious disregard of the employer's interests *and* whether the behavior was a deliberate breach of the reasonable standards of behavior the employer has established or otherwise expects. See R.A.A.C. Order No. 14-02027 (October 29, 2014).¹ We have further concluded that the revised language significantly lowers the degree of mental culpability required in the "conscious disregard" clause of subparagraph (a). See R.A.A.C. Order No. 14-00676 at pg. 3 (September 25, 2014) ("Whereas the employer previously was required to establish that an employee intentionally or maliciously disregarded its interests, which is an extremely high mental state, under the amended provision it need show only that an employee had an *awareness* that such conduct disregarded the employer's interest").²

Thus, conduct that may not have been deemed disqualifying prior to 2011 may rise to that level today.³ Nevertheless, despite the lower mental state required under amended subparagraph (a), falling asleep on the job is not misconduct per se and each case should be decided on its own merits, in consideration of all the facts and circumstances including the particular nature of the employer's interest.

In determining whether the employer has proven that the claimant's sleeping on the job is misconduct under subparagraph (a), we consider a variety of factors that tend to show whether or not the claimant consciously disregarded the employer's interests, and whether the sleeping was a deliberate breach of the employer's reasonable standards of behavior. These factors include, but are not limited to, the following:

- the nature of the employee's job responsibilities;
- whether the employer had a rule prohibiting sleeping on the job;
- whether the employer previously warned the employee for sleeping on the job;
- the location where the employee was found sleeping;
- whether or not the employee made any "preparations" for sleeping, as opposed to dozing off while on duty; and
- the existence of any mitigating factors, e.g., sleepiness caused by illness or medication.

¹ Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-02027.pdf.

² Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-00676.pdf.

³ Courts have not yet issued written opinions addressing the Commission's interpretation of amended subparagraph (a).

In examining the nature of the claimant's job responsibilities, we focus on what the claimant was supposed to be doing at the time of the incident, and the harm or potential harm to the employer's interests of the claimant's unauthorized sleeping. *See, e.g.*, R.A.A.C. Order No. 13-08813 (May 20, 2014)⁴; R.A.A.C. Order. No. 13-08134 (May 22, 2014).⁵

Of particular importance is evidence of "preparation," that is, that the claimant took actions consistent with preparing to sleep, such as removing himself or herself to a non-duty or non-visible area, lying down, assuming a reclining position, or other actions which demonstrate a conscious decision either to sleep or place oneself in a position where it was likely. By contrast, evidence that an employee dozed off while in a normal work position may be indicative of inadvertent sleeping. While inadvertent sleeping may be in conscious disregard of an employer's interests where the claimant was performing job duties at the time where heightened awareness was needed, a lack of intent to sleep is relevant in determining whether the claimant was sufficiently culpable to have engaged in misconduct.

In a sleeping case, the referee must develop the record and make specific findings bearing on the factors above and any other factors that are relevant to the particular case. While we accept the referee's findings were supported by competent, substantial evidence, and give deference to the referee's ultimate conclusion as to whether or not the credited evidence shows misconduct, the ultimate conclusion is a mixed issue of law and fact which the Commission reviews for consistency with established case precedent.

In this case, the record is devoid of factors which tend to show a "conscious disregard" of the employer's interests. The record reflects a co-worker found the claimant sleeping in his office while sitting at his desk. The record does not reflect the claimant placed himself in a position particularly conducive for sleeping. The claimant testified that he accidentally dozed off after his lunch break. The record reflects the claimant suffers from sleep apnea which can cause symptoms such as sleepiness or lack of energy. The record further reflects the claimant had not been previously warned by the employer for sleeping on the job. While indeed the employer is entitled to reasonably expect an employee not to fall asleep while on duty, the Commission concludes the claimant's isolated sleeping episode, in light of the claimant's medical condition and all the surrounding circumstances, is not

⁴ Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-08813.pdf.

⁵ Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-08134.pdf.

misconduct in “conscious disregard” of the employer’s interests as required under subparagraph (a). The Commission likewise concludes subparagraph (b) is not applicable because there was no showing of carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent or that shows an intentional disregard of the employer’s interest or the employee’s duties.

The employer may alternatively establish a prima facie case of misconduct as defined by subparagraph (e) of the statute if it can establish that the claimant’s single episode of sleeping on the job violated a known policy.⁶ While the employer argues on appeal that the claimant’s behavior was in violation of its policy, the employer failed to provide any documentary or testimonial evidence at the hearing regarding the terms of its policy which the claimant allegedly violated. Accordingly, the Commission concludes that the referee did not err when she found the evidence insufficient to establish misconduct as defined in subparagraph (e).

⁶ The Commission notes that, in cases involving *unintentional* or *negligent* violations of an employer rule, we have applied a weighing process which measures the culpability of the claimant, on the one hand, with the nature and purpose of the rule on the other when considering whether the “fair enforcement” defense under subparagraph (e)1.c. is applicable. See R.A.A.C. Order No. 13-07369 (November 6, 2013), available at http://www.floridajobs.org/finalorders/raac_finalorders/13-07369.pdf; R.A.A.C. Order No. 13-04567 (August 7, 2013), available at http://www.floridajobs.org/finalorders/raac_finalorders/13-04567.pdf. Since the employer failed to establish a rule violation, the issue of whether the claimant met any of the affirmative defenses under subparagraph (e) is immaterial.

The referee's decision is affirmed.

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

7/30/2015 ,

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: Mary Griffin
Deputy Clerk



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



*40256576 *

Docket No.0024 3102 28-03

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES

Claimant

Claimant Representative

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 for a hospitality as a help desk manager from December 4, 2013, through September 15, 2014. The human resources saw the claimant sleeping at his desk and he stood in front of his door to see if he was just resting but the claimant did not wake up. The claimant applications manager was informed that the claimant was sleeping in his office. The claimant went to the claimant's office and witnessed him sleeping. The applications manager went to the claimant's office and knocked on the claimant's door and woke him up. The claimant was sleeping due to having a medical condition. The claimant was discharged due to sleeping on the job.

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 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 due to sleeping on the job. The evidence shows that the claimant fell asleep in his office and was witnessed sleeping by managers. The evidence also shows that the claimant has a medical condition which causes him to sleep. It was shown that the claimant demonstrated an isolated instance when he slept in his office. As noted in the U.A.C. order No. 11-14941, "In construing an earlier version of the above-noted statutory definition of misconduct, Florida courts have held that mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct connected with work. Hammett v. Florida Department of Commerce, 352 So.2d 948 (Fla. 2d DCA 1977); Fredericks v. Florida Department of Commerce, 323 So.2d 286 (Fla. 2d DCA 1975." It was also shown that the claimant did not demonstrate either of the subsections above (a through e) and his actions were not misconduct under the law. Therefore, the claimant is not disqualified from receiving reemployment assistance.

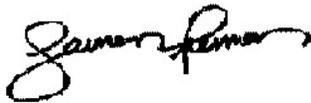
Decision:The determination dated January 2, 2015, is AFFIRMED.

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 March 19, 2015.

W. GOLDEN SMITH
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 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 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 departman.

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.