STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-01731

vs.

Referee Decision No. 0024960757-02U

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 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. 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's findings of fact state as follows:

> The claimant worked as full-time collector for a medical billing and collections company beginning on August 23, 2012, and earned $12 an hour at the time of separation. The claimant obtained certification in medical billing where he was taught all aspects of the federal Health Insurance Portability and Accountability Act of 1996. While working for the employer the claimant received ongoing training on the employer's policies and procedures as well [as] how to properly use the telephone scripts.
>
> In November of 2014, the claimant answered a call from a person who wanted to pay his account balance. The claimant did not verify the caller's account number in the employer's system. Had the claimant done so, and if he was unable to locate a caller in the

> system, the employer's policy provided that the claimant was to cease all work on the account. Any information obtained after that point was a violation of policy and could be used for reasons such as identity theft. The claimant took the caller's date of birth and last four digits of his Social Security Number. The claimant then contacted the caller's insurance company and further assisted the caller with the matter.
>
> The employer learned of the matter when a complaint came from a client of the employer on November 17, 2014. The client alleged the claimant had possibly violated HIPAA when he requested confidential information from the caller. An email exchange between the claimant and another employee of the instant [employer] occurred discussing a patient of the client company. The claimant contacted the other employee with questions about the caller's situation and the two wrote back and forth on the other patient's account.
>
> The employer investigated the claimant's actions and believed that the claimant performed work for another billing company and violated HIPAA while working for the instant employer. The claimant was terminated on December 2, 2014.

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 referee's decision is not supported by competent, substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

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.

When a claimant's separation results from an employer's decision to discharge the worker, the burden of proving misconduct rests with the employer. *See Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent, substantial evidence. *Tallahassee Housing Authority v. Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986); *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

In this case, the record reflects the claimant was discharged for allegedly violating the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its implementing regulations. At the hearing, the claimant's manager, testified that the claimant violated HIPAA when he requested a patient's name and date of birth, then shared the provided information with the patient's insurance company.

The manager, as well as two other witnesses for the employer, testified that the employer has a broad policy that requires employees to comply with HIPAA and maintain the confidentiality of patient health information. The record reflects employees are informed of this policy at the time of hire and at ongoing staff discussions. The claimant acknowledged he was aware of the need to comply with HIPAA's requirements, including limiting the sharing of patient information.

The manager also testified that the employer adopted a call procedure "policy" that requires employees to terminate any phone call where the employee is unable to verify a patient's account number. The manager did not produce the policy for the hearing, nor did he elaborate on the purpose of the policy other than it was adopted to ensure compliance with HIPAA. The manager testified that employees are instructed when receiving patient calls to first verify the patient's account number in the employer's system and, if the account number provided by the patient is not in the system, to terminate the call.

The claimant did not dispute that he was supposed to confirm a caller's patient account number, but added that he had also been instructed to handle every account to the best of his ability. The claimant testified that on a few occasions he had been unable to properly verify patients due to problems with the employer's computer system. The claimant testified that in an effort to circumvent another possible system malfunction, the claimant had asked for and was given the patient at issue's date of birth and the last four numbers of the patient's social security number in order to continue work on the patient's account.

Although the employer's witnesses testified that the claimant's asking the patient for identifying information and later providing such information to other individuals was unlawful, the employer produced no evidence at the hearing to show that such actions violated HIPAA or its implementing regulations. Indeed, covered entities, such as medical billing and collections companies like the employer, are required to ensure the confidentiality of all electronic protected health information the covered entity creates, receives, maintains, or transmits. *See* 45 C.F.R. §164.306(a)(1). However, covered entities are also permitted to disclose protected health information for purposes of payment, including activities undertaken by a health care provider or health plan to obtain reimbursement for the provision of health care such as billing, claims management, collection activities, obtaining payment under a contract for reinsurance, and related health care data processing.

See 45 C.F.R. §164.501, §164.502(a)(1)(ii). There is nothing in the record that reflects the claimant used or disclosed the patient's protected health information[1] for reasons other than the employer's own payment efforts as permitted under the applicable requirements. Accordingly, the claimant's actions do not violate HIPAA or its implementing regulations.[2]

Although the employer produced no evidence that the claimant violated HIPAA, the employer also alleged that the claimant's actions violated its call-handling policy. To establish a violation of an employer's policy, it is of course necessary to establish first what the policy is. The Commission has held in numerous decisions that "it is axiomatic that, in establishing a violation of an employer's policy, the employer should provide said policy and enter it into the record at the hearing." *See* R.A.A.C. Order Nos. 12-01590 (May 3, 2012), 12-07116 (August 3, 2012), and 12-07696 (August 21, 2012), among others. The employer's witnesses offered only oral testimony as to the employer's call-handling requirements, specifically that an employee must terminate any phone call in which the employee is unable to verify a patient's account number, and that failure to do so would result in a HIPAA violation. Although the employer's manager referred to this call-handling process as a "policy," there is nothing in the record that indicates such was anything more than an operational guideline or that failure to comply with the guideline was a dischargeable offense.

Even accepting that the employer had a policy requiring employees to end any call where the employee is unable to locate the patient's information in the computer system, we cannot conclude as a matter of law that the claimant's conduct was misconduct sufficient to disqualify him from benefits under subparagraph (e) of the above-stated statute. The Commission has held that subparagraph (e) generally requires that there be some notice to the employee of the potential consequences for the rule violation, or that the rule violation be sufficiently severe that the claimant would reasonably have understood that discipline including termination might result. Proper notice is not limited to the terms of the specific rule or policy at issue. An employee can be given notice of the potential consequences of violation of the rule in numerous ways: in a general disciplinary or other policy; by general oral or written notice to the workforce; by specific notice of the consequences to the employee at issue; or by prior warnings or counseling to the employee. Here, there is nothing in the record indicating the claimant was given notice or warning that his failure to comply, even inadvertently, with the rules/policies in question, would

---

[1] Indeed, only the broadest possible interpretation of HIPAA regulations would even include the personally identifiable information the claimant requested as "health information." 45 C.F.R. §160.103.

[2] The requests made by the claimant would not violate the minimum necessary standard. 45 C.F.R. §164.502(b).

result in termination, or whether the violation(s) was so serious that the claimant should have known of the consequences. In addition, there is no evidence in the record that suggests the claimant had any previous reprimands for this type of behavior. Furthermore, it should be noted that there is nothing in the record indicating that any actual harm or risk of harm occurred when the claimant failed to end the call and instead asked the patient for his date of birth and the last four digits of his social security number, nor when the claimant used such information at the patient's request to consult with the patient's insurance company.

Because the referee's findings are not properly supported by the employer's testimony, and the referee's legal conclusions are erroneous based on the findings, there is cause for overturning the referee's decision. Accordingly, the decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits.

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 7/21/2015, 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

*40721114 *

Docket No.0024 9607 57-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

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.

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: The claimant worked as full-time collector for a medical billing and collections company beginning on August 23, 2012, and earned $12 an hour at the time of separation. The claimant obtained certification in medical billing

where he was taught all aspects of the federal Health Insurance Portability and Accountability Act of 1996. While working for the employer the claimant received ongoing training on the employer's policies and procedures as well how to properly use the telephone scripts.

In November of 2014, the claimant answered a call from a person who wanted to pay his account balance. The claimant did not verify the callers account number in the employer's system. Had the claimant done so, and if he was unable to locate a caller in the system, the employer's policy provided that the claimant was to cease all work on the account. Any information obtained after that point was a violation of policy and could be used for reasons such as identity theft. The claimant took the caller's date of birth and last four digits of his Social Security Number. The claimant then contacted the caller's insurance company and further assisted the caller with the matter.

The employer learned of the matter when a complaint came from a client of the employer on November 17, 2014. The client alleged the claimant had possibly violated HIPAA when he requested confidential information from the caller. An email exchange between the claimant and another employee of the instant employee occurred discussing a patient of the client company. The claimant contacted the other employee with questions about the caller's situation and the two wrote back and forth on the other patient's account.

The employer investigated the claimant's actions and believed that the claimant performed work for another billing company and violated HIPAA while working for the instant employer. The claimant was terminated on December 2, 2014.

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

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

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

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

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

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

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

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

c. The rule is not fairly or consistently enforced.

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

The record reflects 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); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The record reflects that the claimant denied any wrongdoing in the matter. The claimant was aware of the employer's policy about privacy and the federal guidelines. Having worked in healthcare and receiving special certification the claimant was trained on confidentiality. The claimant should have contacted a supervisor when he was unable to locate the caller's information in the computer system. Additionally, the claimant should not have discussed a patient or provided any information about a patient that could be used to identify the patient over email. More important, the claimant should not have discussed one person's private information in messages containing information about another person. The claimant violated both patients' right to privacy.

When weighing the claimant's actions it is determined that he did not have the best interests of the employer or the caller in mind when he disregarded the employer's policy. His conduct violates subparagraph (a) of the misconduct statute. When applying subparagraph (b) the claimant's behavior shows an intentional disregard for his obligations to his employer. The claimant took personal information from a caller which violated the employer's policy. The caller was not a patient associate with the instant employer and the claimant had no reason to assist the caller. The claimant shared the caller's information with another employee in email exchanges that originated while talking about a patient's account for the instant employer. The record supports a finding of misconduct under subparagraphs (d) and (e). It is thus concluded that the claimant was terminated for misconduct connected with work. He is disqualified from receipt of benefits. is not subject to disqualification.

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

Decision: The determination dated January 29, 2014, is REVERSED. The claimant is disqualified for receipt of benefits from December 7, 2014, the immediate five weeks thereafter, and until he earns, $4,675.

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 April 3, 2015.

M. MURDOCK
Appeals Referee

By: 

LACHERYL SCURRY, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the distribution/mailed date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de envìo marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

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

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.
