

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

vs.

R.A.A.C. Order No. 15-02840
Referee Decision No. 0020960329-05U

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.

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.

This case has had a lengthy history, consisting of four separate hearings occurring over a period of fifteen months. Unfortunately, due to a fundamental error at the third hearing, we must remand for additional consideration and a supplemental hearing.

The record reflects the appeal was originally dismissed when the employer did not appear to prosecute the appeal at a hearing scheduled for March 7, 2014. After requesting reopening, the employer established good cause for its prior nonappearance and presented its witnesses at the second hearing conducted on June 19, 2014. The claimant, however, did not appear for the second hearing because she had not received the notice of hearing. Based on the testimony presented at the second hearing, the referee issued a decision disqualifying the claimant. The claimant appealed the referee's decision to the Commission. We remanded the case for a hearing to determine whether the claimant had good cause for her non-appearance at the second hearing and, if so, to conduct additional proceedings on the merits. The third hearing was conducted on April 22, 2015, and for the first time both parties appeared, each represented by an attorney.

At the beginning of the third hearing, the claimant's attorney requested that witnesses be sequestered. The referee then proceeded to require *all* of the employer's witnesses, including the employer's primary corporate representative, to leave the proceeding except when they were testifying. The employer's attorney questioned this procedure, but the referee ruled that only one representative was permitted per side, implying that the attorney was filling that role, and that since the individual the employer wished to designate as a corporate representative had testified, the witness had to be sequestered. The employer's attorney then requested that, since its witnesses were all being sequestered, the claimant be excluded from the hearing as well. The referee agreed, and the claimant was excluded from the hearing while the employer's witnesses testified and until it was the claimant's turn to testify.

Before the employer completed its cross-examination of the claimant, the hearing was postponed because the referee had another hearing to conduct. Both parties appeared at the fourth scheduled hearing, but the claimant appeared without representation. It is unclear from the record whether the claimant was provided the recordings from the third hearing.

The referee's ruling at the third hearing excluding all witnesses from the employer as well as the claimant except when they were testifying was based on a misunderstanding of the role of the representative at an appeals hearing. Section 443.151(7), Florida Statutes, provides as follows:

REPRESENTATION IN ADMINISTRATIVE PROCEEDINGS. —
In any administrative proceeding conducted under this chapter, an employer or a claimant has the right, at his or her own expense, to be represented by counsel or by an authorized representative. Notwithstanding s. 120.62(2), the authorized representative need not be a qualified representative.

An authorized representative within the meaning of this provision is an individual who conducts the hearing on behalf of a party but is not the party proper. An authorized representative is not the same as a corporate representative. An employer organized as a corporation, partnership, limited liability company, and the like has the right to one testifying owner, manager, or other employee to attend all aspects of a hearing as a "corporate" or other entity representative *separate and apart from its counsel or non-testifying authorized representative*. Employers may, and commonly do, choose to have as their authorized representative an individual employed by employer who also testifies at the proceeding, thus serving as both

authorized representative and *corporate* representative, but this is a matter of their choice. If the employer's authorized representative will not testify, the employer is entitled to a testifying corporate representative as well. The referee thus erred in excluding the employer's actual corporate representative over the objection of the employer's attorney.

The referee's error was then compounded when the employer's attorney asked for the same rule to be applied to the claimant, who was then excluded from the proceeding. The result was that while both parties' attorneys were present for the hearing, *both parties were excluded*. This is clear and *fundamental* error. The right of a party to attend its own hearing is fundamental and cannot be limited except in extreme circumstances, such as a sanction when a party's obstreperous behavior after warning imperils the ability of the referee to conduct a proper hearing. While both parties suffered equally under this error, we cannot affirm a ruling of a referee based on such a fundamental violation of the parties' due process rights. When the fairness of the proceedings has been substantially impaired by material errors in procedure or a failure to follow prescribed procedure, the requirements of due process entitle a party to an additional hearing. *See Revell v. Florida Department of Labor and Employment Security*, 371 So. 2d 227, 231 (Fla. 1st DCA 1979). Accordingly, the only adequate remedy is to remand the case for a supplemental hearing before a different referee on the issue of separation.¹

We remand this case to the Department with the following instructions:

- (1) This case should be assigned to a supervisor or other experienced referee for further proceedings;
- (2) The new referee shall review all of the current record from four hearings and shall conduct a supplemental hearing to allow both parties to offer any additional evidence relating to the issue of misconduct. This evidence shall not be cumulative of evidence already provided;
- (3) The referee shall provide both parties with a copy of the recording of the third hearing and shall attach to the notice of hearing a copy of all exhibits heretofore marked into evidence.
- (4) After conducting the supplemental hearing, the referee shall render a new decision on the issue of separation, which any adversely affected party may appeal to the Commission.

¹ The referee's rulings regarding the issues of non-appearance are approved and may be incorporated into the revised decision.

The decision of the appeals referee is vacated and the case is remanded for a supplemental hearing before a different referee as ordered herein.

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

11/30/2015,

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: Ebony Porter

Deputy Clerk



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



*43004443 *

Docket No.0020 9603 29-05

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES Employer
 Claimant

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

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

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

Jurisdictional Issue (Nonappearance): A hearing was held on March 7, 2014. The employer/appellant failed to attend that hearing because of an inadvertent oversight by the employer's personnel in recognizing the appeals referee's contact attempts.

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 and evidence in this case shows that as a result of the inadvertent error, the employer did not appear in the prior hearing. The employer has shown good cause to proceed with a hearing on the merits of the case.

Jurisdictional Issue (Nonappearance): A hearing was held on June 19, 2014. The claimant/appellee did not appear in the hearing because she did not receive the notice of hearing. The claimant later learned of the adverse decision and requested the hearing be re-opened within 20 days of the decision mail date.

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 and evidence in this case shows that the claimant was not aware of the prior hearing and thus has shown good cause to proceed with a hearing on the merits of the case.

Findings of Fact: The claimant began working for the employer on August 27, 2012, as a legal secretary. The employer workplace is a high-stress environment and during the course of employment, the claimant became confrontational with co-workers on several occasions.

In June of 2013, the claimant became hostile toward her co-worker while in the workplace. The claimant yelled at the co-worker by screaming and calling her "Bitch!" then approaching her closely calling her a "Fucking Bitch!" "I [the co-worker] don't know who I think I am!" The co-worker was fearful and reported the incident to her superior. The employer, managing attorney, believed the claimant's actions were harmful and her conduct unacceptable.

The employer warned the claimant to improve in her behavior in demeanor after the employer learned that the claimant had personally confronted another employee and the claimant's poor demeanor toward the employer.

Sometime in November of 2013, the claimant, as a part of her job duties was required to perform a discovery request on a particular case file. The employer and another paralegal reviewed the file and confronted the claimant. The claimant had no knowledge of the file and was combative and defensive over the issue. The employer determined that the claimant had the file in her possession but failed to take responsibility over the file. Moreover, during the same month, the employer conducted a meeting with employees and during the meeting the claimant became highly upset with the employer about issues in the workplace. The employer warned the claimant that her actions were unacceptable and intolerable. The employer issued the claimant a final warning to improve her conduct. In consideration of these issues, the employer did not provide the claimant with additional training, but instead, placed the claimant on an action plan which included the claimant attending a paralegal course.

A few days later, the employer and paralegal found another case file where the claimant had it in her possession but had failed to perform the job duties related to the case file. The employer found several other

files that belonged to the claimant that were incomplete and the deadline dates for the files were missed. As a result of the inactions, the employer incurred monetary expense on getting deadline extensions on some of the files.

The employer confronted the claimant about the files and the claimant had no knowledge of the file and did not understand the process that the files required. The responded to the employer when confronted by saying, "I'm outta [sic] here!" The claimant then left the job to retrieve a prescription refill. The employer found the claimant's demeanor to be combative and defensive.

The employer determined that the claimant's attitude was not conducive to the workplace and created conflict. In consideration of being previously warned, the employer decided to discharge the claimant on December 3, 2013, for insubordination.

Conclusion of Law: 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.

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

1. He or she did not know, and could not reasonably know, of the rules 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.

The record and evidence in this case show that the claimant was discharged for insubordination.

In the hearings, the employer presented competent substantial testimony that the claimant was confrontational in the workplace, was unaware of her job responsibilities as it related to her assigned case files, and often displayed conduct that is a disregard to the employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which an employer expects of his or her employee. Therefore, it is concluded that the claimant is disqualified from the receipt of benefits.

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 has 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.

Decision: The determination dated January 29, 2014, is **REVERSED** and **MODIFIED** to show the claimant was discharged for misconduct connected to the work. The claimant is disqualified from the receipt of benefits from December 1, 2013, plus the next five weeks, and until the claimant 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 June 19, 2015.

A. LOUIS
Appeals Referee

By: 

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

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

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

An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.