

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Docket No. 18-01973

vs.

Referee Decision No. 0033972884-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

On appeal to the Commission, evidence was submitted that was not previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-21.011 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

The Commission's review is generally limited to the issues before the referee and the evidence and other pertinent information contained in the official record. The referee has the responsibility to develop the hearing record, weigh the evidence, judge the credibility of the witnesses, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. The Commission reviews the evidentiary and administrative record and the referee's decision to determine whether the referee followed the proper procedures, adequately developed the evidentiary record, made appropriate and properly supported findings, and properly applied the reemployment assistance law established by the Florida Legislature. The Commission cannot reweigh the evidence and the inferences to be drawn from it. Further, absent extraordinary circumstances, the Commission cannot give credit to testimony contrary to that accepted as true by the referee.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes that the referee sufficiently followed the proper procedures and the case does not require reopening or remanding for further proceedings. The referee's material findings are supported by competent, substantial evidence in the record. The referee also correctly applied the law in deciding the case.

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.

On appeal to the Commission, the employer argues it discharged the claimant after she was adjudicated guilty of four counts of criminal use of personal identification information because of the potential risk to its patients and because it was a violation of the claimant's code of conduct. The event that led to the claimant's conviction occurred prior to her employment with this employer. For an individual to be disqualified from benefits, s/he must be discharged for "misconduct connected with his or her work." §443.101(1)(a)1., Fla. Stat. This language requires that off-duty conduct impact the job or the employer in some way. Likewise, subparagraph (a) requires that a claimant exhibit a "conscious disregard of an employer's interests," again demonstrating that disqualifying misconduct must be materially adverse to the employer. See R.A.A.C. Order No. 14-01009 (August 4, 2014).¹ In this case, the employer presented no evidence that the claimant's off-duty conduct caused any detrimental effect to the employer's interests. Accordingly, the claimant's actions did not constitute misconduct under subparagraph (a).

The employer also argued that the conviction violated the employer's code of conduct. In order to demonstrate misconduct under subparagraph (e), the evidence must establish the claimant committed a "violation of an employer's rule." See R.A.A.C. Order No. 15-01177 at pg. 4 (August 3, 2017)²; *Crespo v. Reemployment Assistance Appeals Commission*, 128 So. 3d 49, 52 (Fla. 3d DCA 2012). Moreover, the employer must provide some notice to the employee that noncompliance with the rule could subject the employee to discipline. See, e.g., R.A.A.C. Order No. 16-01723 at pg. 2 (August 29, 2016).³ The policy that was entered into evidence gave no notice that a felony conviction unrelated to the employer would result in termination. Accordingly, the claimant's actions did not constitute misconduct under subparagraph (e).

We recognize that an employer might find these prior actions by the claimant indicative of behavior that could potentially negatively affect the workplace in the future; however, the mere speculative possibility that the claimant will repeat the behavior is not sufficient to establish misconduct as defined above. Accordingly, the employer failed to meet its burden of proving that the discharge was for misconduct, and the claimant is not disqualified from receipt of benefits.

¹ Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-01009.pdf.

² Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-01177.pdf.

³ Available at http://www.floridajobs.org/finalorders/raac_finalorders/16-01723.pdf.

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

9/28/2018 ,

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



*72816015 *

Docket No.0033 9728 84-02

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES:

Claimant

Employer

DECISION OF APPEALS REFEREE

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

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

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

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.

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 was arrested on November 18, 2017, on charges of criminal use of personal information. These charges stemmed from the presence of pictures taken by the claimant on a mobile phone she had sold in 2016. The claimant did not plead guilty at the time of arrest.

The claimant worked for the employer, a hospital, from November 25, 2017, until May 25, 2018, as a lab assistant. The claimant was asked on the employment application if she had ever been convicted of a crime, and accurately answered that she had not. The application did not ask about arrests.

The claimant was arrested again for the same charges on May 21, 2018. On that date, the claimant pled guilty to the charges. The employer was notified of the arrest, and discharged the claimant on May 25, 2018.

Conclusions of Law: The Reemployment Assistance Law of Florida defines "misconduct" 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 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. The employer was the moving party in the separation. Therefore, the claimant is considered to have been 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*, 468 So.2d 413 (Fla. 1986). It was shown that the claimant was discharged as a result of a guilty plea to criminal charges. It was shown that the charges related to an incident that occurred prior to the employment and was not connected to the employment in any way. It was shown that the claimant accurately stated on her employment application that she had never been convicted of a crime. It has not been shown that the claimant's actions demonstrated any conscious disregard of the employer's interests, or were a violation of any policy of the employer. The burden of proving misconduct has not been met. The claimant is not disqualified.

The law provides that benefits will not be charged to the employment record of a contributory employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer, was discharged for misconduct connected with the work, refused without good cause an offer of suitable work from the employer, was discharged from work for violating any criminal law punishable by imprisonment or for any dishonest act in connection with the work, refused an offer of suitable work because of the distance to the employment due to a change of residence by the claimant, became separated as a direct result of a natural disaster declared pursuant to the Disaster Relief Act of 1974 and the Disaster Relief and Emergency Assistance Amendments of 1988, or was discharged for unsatisfactory performance during an initial probationary period that did not exceed ninety calendar days and of which the claimant was informed during the first seven days of work.

As the claimant was discharged for reasons other than misconduct, the employer's account will be charged.

Decision: The determination dated July 11, 2018, is REVERSED. The claimant is not disqualified. The employer's account will 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 August 3, 2018.

J. THURSBY
Appeals Referee



By:

ANTONIA SPIVEY (WATSON), 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 the last five digits of the 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.

There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department's CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.

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 los últimos cinco dígitos del 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.

No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representado por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

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 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 mesajè 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 senk dènye chif nimewo sekirite sosyal demandè a 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.

Pa gen okenn kou pou Komisyon an revize yon ka, ni ke yon pati dwe reprezante pa yon avoka oubyen lòt reprezantan pou ke la li a revize. Komisyon Apèl Asistans Reyanbochaj pa te entegre antyèman nan sistèm CONNECT Depatman an. Byenke korespondans kapab fakse oubyen pòste bay Komisyon an, okenn korespondans pa kapab soumèt bay Komisyon an atravè sistèm CONNECT. Tout pati ki nan yon apèl devan Komisyon an dwe mentni yon adrès postal ki ajou avèk Komisyon an. Yon pati ki chanje adrès postal li nan sistèm CONNECT la dwe bay Komisyon an adrès ki mete ajou a tou. Tout korespondans ke Komisyon an voye, sa enkli manda final li, pral pòste voye bay pati yo nan adrès postal yo genyen nan achiv Komisyon an.

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.