

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Docket No. 19-01314

vs.

Referee Decision No. 0035320382-04U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits and charged the employer's account.

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. The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record.

The issue before the Commission is whether the claimant voluntarily left work without good cause or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee made the following findings of fact:

The claimant worked full time for the employer, from September 1, 2016, to January 17, 2019. The claimant had no prior warnings or write ups before the separation. The employer is an LLC that operates in Florida under [U.S.P.], and in Georgia under [U.S.A.] Since the time of hire, the claimant received checks under [U.S.A.] Around December 2018, the owner changed the name to [U.S.P.], to reflect its operation under the Florida LLC name.

On January 17, 2019, the claimant inquired about the name change, as he discovered on his check stub that the name changed from [U.S.A. to U.S.P.] The owner told the claimant that the [U.S.A.] name is the Georgia company and the [U.S.P.] name is Florida company. The claimant asked whether his boss was going

to be the person listed as the manager/registered agent for the Florida company; the owner told the claimant that the only thing that changed was the *name* of the company, and that he (the owner), was still the claimant's boss. The claimant continued to push the owner for more information about the company change(s), and told the owner that he was going to quit, if the owner did not come clean and give him the information he wanted. The owner told the claimant that he accepted his resignation and grabbed the claimant's clipboard; the claimant grabbed his belongings and left for the day.

The next day, the claimant returned to work. The owner asked the claimant why he was on the premises. The claimant responded that he was there to work; the owner informed the claimant that he quit the previous day, and demanded that the claimant leave the premises or he would call the police. Subsequently, the owner called the police, but the claimant had already left.

The claimant filed a Florida reemployment assistance claim on February 5, 2019, with a weekly benefit amount of \$275. The claimant received \$275 for each week, from week ending February 16, 2019, through April 27, 2019.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes that material findings of fact are inconsistent with the credibility determination, thereby rendering the decision internally inconsistent, and the referee's legal analysis is erroneous; consequently, the case must be remanded.

Florida Administrative Code Rule 73B-20.025(3)(d) requires the referee, if confronted with conflicting evidence with respect to a disputed issue of fact, the finding of which is determinative of the outcome of the appeal, to acknowledge such conflict and set forth the rationale by which that conflict is resolved. While the referee made a credibility determination in favor of the *claimant*, her findings are based almost entirely on the *employer's* evidence and ignores that of the claimant, specifically regarding what occurred at time of separation on January 17, 2019. The employer's sole witness, the owner/manager, testified that the claimant quit his job with the employer on January 17, 2019, after telling the owner/manager that if he did not "come clean" or give him the information he wanted he would quit, and the owner/manager told the claimant he was accepting the claimant's resignation at that time. The claimant, however, testified that he never made any statement to the owner/manager about resigning or quitting. The claimant testified that after he

inquired about a company name change on his paycheck stub, the owner discharged him by grabbing his clipboard from him and telling him to leave. On remand, the referee must conform the conflict resolution to the findings, either revising the findings or the credibility determination, even if this means the referee must make a split credibility determination. The statement of facts must also be clear and unambiguous. *Hardy v. City of Tarpon Springs*, 81 So. 2d 503, 506 (Fla. 1955). See also R.A.A.C. Order No. 15-03751 (February 16, 2016).¹

Additionally, the referee's conclusion that the employer was the moving party in the separation is erroneous under the current factual findings of this case. In cases where the separation does not result from the claimant clearly conveying a present intent to resign or the employer clearly conveying that the claimant is discharged, the referee must apply a moving party or constructive resignation/discharge analysis. R.A.A.C. Docket No. 18-01513 (August 28, 2018). In the moving party analysis, primary consideration is given to which party's actions proximately caused the separation. Based on the current findings, the referee concluded that the claimant's separation was due to the *employer* discharging the claimant when the owner accepted his threat to quit as a resignation notice. However, based on the current findings, the proximate or primary cause of the separation was the *claimant's* statement he was going to quit if the employer did not "come clean" or give him the information he wanted. The record reflects that the owner/manager already explained the reason for the name change on the claimant's paystub and told the claimant multiple times that nothing had changed with his employment; consequently, the claimant's statement that he would quit was not simply a "threat" as reasoned by the referee. Moreover, the claimant's statement was incendiary – given the employer's prior statements regarding the name change, the claimant implied that the employer was lying.

Due to the inconsistency between the credibility determination and the referee's material findings, the Commission cannot determine who the moving party was in this case. To address the foregoing, the referee shall render a new decision with specific findings of fact that are based on competent evidence and consistent with an appropriate conflict resolution with respect to all disputed material facts in accordance with Florida Administrative Code Rule 73B-20.025. Should the referee credit the employer's testimony and make findings consistent with the current findings of fact, the referee must hold that the claimant was the moving party in the separation and determine whether the claimant established "good cause" to leave his employment. If deemed necessary by the referee to develop the record further, the hearing or hearings convened in compliance with this order are supplemental, and all evidence currently in the record shall remain in the record.

¹ Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-03751.pdf.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on

9/5/2019,

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: Benjamin Bonnell

Deputy Clerk



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



*80059929 *

Docket No.0035 3203 82-04

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES:

Employer

Claimant Representative

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.

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.)

OVERPAYMENT: Whether the claimant received benefits to which the claimant was not entitled, and if so, whether those benefits are subject to being recovered or recouped by the Department, pursuant to Sections 443.151(6); 443.071(7); 443.1115, Florida Statutes and 20 CFR 615.8.

Findings of Fact: The claimant worked full time for the employer, from September 1, 2016, to January 17, 2019. The claimant had no prior warnings or write ups before the separation. The employer is an LLC that operates in Florida under _____, and in Georgia under _____. Since the time of hire, the claimant received checks under _____. Around December 2018, the owner changed the name to _____, to reflect its operation under the Florida LLC name.

On January 17, 2019, the claimant inquired about the name change, as he discovered on his check stub that the name changed from _____ to _____. The owner told the claimant that the _____ name is the Georgia company and the _____ name is Florida company. The claimant asked whether his boss was going to be the person listed as the manager/registered agent for the Florida company; the owner told the claimant that the only thing that changed was the *name* of the company, and that he (the owner), was still the claimant's boss. The claimant continued to push the owner for more information about the company change(s), and told the owner that he was going to quit, if the owner did not come clean and give him the information he wanted. The owner told the claimant that he accepted his resignation and grabbed the claimant's clipboard; the claimant grabbed his belongings and left for the day.

The next day, the claimant returned to work. The owner asked the claimant why he was on the premises. The claimant responded that he was there to work; the owner informed the claimant that he quit the previous day, and demanded that the claimant leave the premises or he would call the police. Subsequently, the owner called the police, but the claimant had already left.

The claimant filed a Florida reemployment assistance claim on February 5, 2019, with a weekly benefit amount of \$275. The claimant received \$275 for each week, from week ending February 16, 2019, through April 27, 2019.

Conclusions of Law: As of May 17, 2013, the Reemployment Assistance Law of Florida defines misconduct 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 of 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 and 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, or the rule's requirements;
- b. The rule is not lawful or 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 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 profession.

The law requires benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The law provides that a claimant who was not entitled to benefits received must repay the overpaid benefits to the Department. The law does not permit waiver of recovery of overpayments.

The entry into evidence of a transaction history generated by a personal identification number establishing that a certification or claim for one or more weeks of benefits was made against the benefit account of the individual, together with documentation that payment was paid by a state warrant made to the order of the person or by direct deposit via electronic means, constitutes prima facie evidence that the person claimed and received reemployment assistance benefits from the state.

The record shows the claimant was employer was the moving party in the claimant's separation from employment, when the owner accepted the claimant's threat to quit as a resignation notice, and told him to leave the premises. The claimant is considered to have been discharged. 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 claimant was discharged on January 17, 2019, based on his assumption that the claimant was resigning. The record shows that on January 17, 2019, the claimant and the owner had a disagreement regarding whether the claimant worked for or . The claimant threatened to quit if the owner did not provide him with more details regarding who he was working for, etc. Although the claimant *threatened* to quit, nothing in the record shows that the claimant had any present intention to quit, as the claimant reported back to work on January 21, 2019, his next- scheduled work day. The employer contended that he sufficiently answered the claimant's questions by telling him that the companies were the same but operated under different names for different states, and that other than the name change, there were no changes to the claimant's pay, supervisor, job duties etc., which has been substantiated. However, the employer failed to establish that the claimant's inquiry as to the reason for the company name change or his threat to quit, rose to the level of misconduct connected to the work. Therefore, the claimant is considered to have been discharged for reasons other than

misconduct; accordingly, the claimant is not subject to disqualification.

The record shows the claimant was discharged for reasons other than misconduct connected with the work. Benefits paid in connection with this claim will be charged to the employer.

The record shows that the claimant is qualified to receive benefits. The claimant was not overpaid.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

The claimant was represented by an attorney. The claimant's attorney requested a flat rate fee of \$500 for representation at the hearing. This amount, to be paid by the claimant, is approved.

Decision: The determination dated May 6, 2019, holding the claimant disqualified and the employer non-charged, is reversed. The claimant was not overpaid.

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 14, 2019.

S. Neal
Appeals Referee



By:

Valarie L. Washington, 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 reembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

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

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org>. Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y 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 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 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.