

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Docket No. 20-00789

vs.

Referee Decision No. 0037182613-04U

Employer/Appellee

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.

This case was previously remanded for a *de novo* hearing, which excludes the prior hearing record as evidence in the case. Only evidence presented at the *de novo* hearing may be considered by the referee or the Commission in resolving the issues on appeal.

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. The referee also correctly applied the law in deciding the case.

The referee's reference to Florida Administrative Code Rule 60BB-5.009 is corrected to reflect Florida Administrative Code Rule 73B-20.008; this, however, does not affect the legal correctness of the referee's ultimate decision.

On appeal to the Commission, the claimant argues that her testimony regarding the altercation that occurred on September 12, 2019, was unrefuted and, therefore, her account of the incident should be reflected in the referee's findings. The reemployment assistance statute specifically allows for the consideration of documentary hearsay evidence as competent even when the declarant is not available for cross-examination. Under Section 443.151(4)(b)5.a., Florida Statutes: "Any part of the evidence may be received in written form . . ." As the statutory language implies, documentary evidence should be received and considered competent where properly admissible, and an absolute preference for oral testimony over probative documentary evidence is unjustified. Upon review, we find the referee's findings are consistent with the employer's competent, substantial evidence, including the written statement from a non-testifying witness that was entered into evidence as an exhibit.

The claimant further asserts on appeal that the employer's policies were not fairly or consistently enforced. The referee agreed, and her decision reflects that the claimant established the affirmative defense of inconsistent enforcement under Section 443.036(29)(e)1.a, Florida Statutes.¹ However, the referee concluded that the claimant's actions still constituted misconduct pursuant to Section 443.036(29)(a), Florida Statutes, which defines misconduct as:

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.

In this case, the claimant admitted engaging in an altercation with her coworker during which the claimant put her finger in the coworker's face, pushed the coworker, and kicked the coworker's glasses that had fallen to the ground as a result of their interaction. The claimant's testimony reflects that the claimant continued to approach the coworker even after a manager attempted to intervene by

¹ Given the referee's and our disposition of the case, it is not necessary for us to review the correctness of the referee's conclusion that the employer's rule was not consistently enforced.

inserting herself between the two participants and placing her hand on the claimant. Upon review, we find there is sufficient evidence in the record to support the referee's conclusion that the claimant's actions demonstrated a conscious disregard of the employer's interest and a deliberate disregard of the reasonable standards of employee behavior.

In her appeal to the Commission, the claimant denies initiating the altercation and argues that her conduct was in reaction to provocation by the coworker. The Commission, citing and expanding on court precedent, has previously held that reaction to provocation does not amount to misconduct in certain situations. *See, e.g.*, R.A.A.C. Order No. 13-08938 (August 25, 2014) (rule prohibiting abusive, threatening, and antagonistic language towards a coworker not fairly enforced due to provocation)²; R.A.A.C. Order No. 13-05983 (December 2, 2013) (employer's policy prohibiting swearing or use of other abusive language and disorderly conduct in workplace was not fairly enforced against the claimant in light of uninvited provocation).³

This case is distinguishable from the other cases where provocation was a viable defense. The provocation defense recognizes that individuals may spontaneously react to insulting or threatening conduct without deliberation, and as such may have limited culpability for that reaction. However, provocation is not an unlimited defense and does not justify all reaction to provoking behavior. Several circumstances may remove one from the protection of the defense. For example, the provocation defense assumes that the claimant was initially provoked and did not herself engage in provocative or escalating behavior triggering the incident. Further, the provocation defense only excuses proportionate reaction – it does not protect a claimant from the consequences of disproportionate reaction or further escalation after the start of the incident. Both of these circumstances are present here.

The claimant has not demonstrated the provocation was uninvited. The claimant's written statement demonstrates that she initiated her coworker's conduct by criticizing the coworker's driving habits, making the claimant the initial aggressor. In addition, the referee determined that while the coworker's conduct was both "vulgar" and "inappropriate," the claimant's response was not what the average reasonable person in like circumstances would have done. We agree. Moreover, the claimant was not solely acting in self-defense or in response to a coworker who had provoked her. The claimant admitted that she also forcibly

² Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-08938.pdf.

³ Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-05983.pdf.

“moved” the manager who had placed herself between the claimant and the coworker in an effort to deescalate the situation. While the coworker may have said something that caused the claimant to become upset, the manager whom the claimant disturbed was not the aggressor. For these reasons, the referee’s decision is affirmed.

The referee's decision is affirmed.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

This is to certify that on

7/31/2020 ,

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



*111262556 *

Docket No.0037 1826 13-04

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES:

Claimant Representative

Employer

Claimant

Employer Representative

DECISION OF APPEALS REFEREE

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

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

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

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 employed by the employer as a customer service representative from June 16, 2015, through September 23, 2019. Upon hire, employees participate in orientation where the policies and procedures are discussed. The employees at the claimant's location sign acknowledgment of the employer's safety promise which is posted in the workplace. On September 12, 2019, the claimant and a co-worker had a verbal exchange in the breakroom concerning a parking lot incident the day before. The claimant believed she was joking with the co-worker but acknowledged that the co-worker seemed angry by the claimant's actions. The claimant put in her earphones and started speaking with another employee. The co-worker walked away and said, "That's why I can't wait to leave the fucking store cause of those ignorant ass people." The claimant took off her headphones and asked the co-worker if she was calling her ignorant. The other employees told them both to calm down and the claimant replied "No." The claimant again asked the co-worker if she was calling her ignorant. The co-worker said, "you are fucking ignorant." The claimant walked up to the co-worker and pointed near her face. The claimant again asked the co-worker if she was calling her ignorant. The co-worker "then pushes" the claimant's hand and the claimant pushed the co-worker in the face exclaiming that she would not call her "ignorant." The co-worker shoved the claimant as a manager stepped between the two. The claimant moved the manager and returned the co-worker's push. The co-worker told the claimant to hit her in the face and the claimant replied, "If I did, I would break it." The claimant turned to walk away as the manager calls for another manager. The claimant informed the co-worker that if she called her ignorant again she would have "more problems than she thinks" then turned and kicked the co-worker's glasses which had fallen off during the altercation. The co-worker told the claimant not to "fucking" kick her "shit" again. The claimant replied, "make me." The store manager questioned both parties after reviewing the written statements. The claimant confirmed her written statement informing the store manager she "mushed" the co-worker's face. The store manager terminated the claimant.

Conclusion of Law: Under Florida's Reemployment Assistance law, 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 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, wilful 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 as a direct result of unacceptable conduct in violation of an employer rule. The employer established a reasonably related and known policy which the claimant and her co-worker violated during a verbal exchange resulting in a physical altercation. While the employer established a rule violation, based on the evidence presented, the claimant demonstrated inconsistent enforcement where she was the only party to the incident terminated, thus, satisfying prong (e) 1.c of the Florida statute defining disqualifying misconduct. Whether or not the co-worker's actions constitute a terminatable offense is not before the hearing officer in this case. Consideration was given to the claimant's contention that she was assaulted by the co-worker. The claimant's testimony on the record as to the co-worker "slapping" her hand is contrary to the claimant's written statement at the time of the incident, which states the co-worker "pushes" the claimant's hand. While it is accepted that the co-worker used vulgar language, the claimant's own account of the incident states she was sitting down speaking with another employee before getting up to approach the co-worker after the co-worker stated, "you're fucking ignorant." Where the claimant went to the co-worker pointing "near her face," again asking a question to which the co-worker had already responded, it is concluded the claimant's action do not demonstrate an act of self defense. Further consideration was given to the claimant's contention that she "slapped" her hand. It is concluded, however, that her earlier statement at the time of the incident is more creditable. The claimant's actions of getting up and approaching the co-worker with her finger pointing asking for clarification to a question which the co-worker had already answered does not constitute a normal reaction to a less than ideal situation. However, it is concluded that the co-worker's pushing of the claimant's pointing hand near her face is a natural reaction one would expect when pointing a hand near another's face. While it is accepted that the language and derogatory name calling from the co-worker was vulgar and inappropriate, it is concluded that such action would not lead a reasonable person to conduct themselves in such a manner as the claimant's own account of the incident in the workplace. Consideration was also given to the claimant's contention that the manager did not attempt to intervene prior to the incident becoming physical. However, the claimant's own written account of the incident is contrary to such where the written statement indicates she moved the manager when the manager tried to put herself between the two employees. Furthermore, the claimant told another co-worker "No," when told to calm down. As such, the claimant's testimony that she was merely acting in self -defense and that management condoned the co-worker's use of vulgar language causing the claimant to react in self defense is respectfully rejected. Accordingly, the claimant's behavior demonstrates an intentional disregard of a reasonable standard of behavior where the claimant confronted the co-worker. The claimant's action of pushing the co-worker in her face in response to her hand being pushed is not considered an action a reasonable person

would take. The claimant's actions more accurately reflect an act of violence including threats of "more problems" should the co-worker call the claimant ignorant. While the claimant established the co-worker's choice of words were meant to anger the claimant, it is concluded the claimant was the aggressor by her own written account of the incident where the claimant was sitting down conversing with another employee and chose to approach the co-worker and engage her with a pointed hand near her face, pushing her in the face in response to having the pointing hand pushed, refusing to calm down and moving the manager from between the two to continue engaging with the co-worker before kicking her glasses. The claimant's behavior demonstrates a conscious disregard of the employer's interest and a reasonable standard of behavior the employer has a right to expect. As such, it is concluded that the claimant was discharged for misconduct connected with the work as defined in prong a of the statute. The claimant, therefore, is subject to disqualification. The employer shall be noncharged.

Rule 60BB-5.009, Florida Administrative Code, requires any attorney or authorized representative of the claimant to disclose orally on the record, or by post hearing motion, the amount, if any, the claimant has agreed to pay for the services of the attorney or representative, the method used to compute the proposed fee and the nature and extent of the services rendered. The Rule further requires that the referee shall approve, reduce or deny the proposed fee by written order, which may be included in the decision upon the merits of the appeal. The record in this case reveals the claimant's representative agreed to represent the claimant pro bono. No fee agreement is approved.

Decision: The determination dated January 27, 2020, is REVERSED. The claimant is disqualified as of September 22, 2019, through October 26, 2019, and until earning \$3,927. The employment record of the employer will not be charged should benefits paid in connection to this claim.

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 15, 2020.

C. MILLER
Appeals Referee

By: 

GAIL ALLEN, 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-21.003(4), 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, 1211 Governors Square Boulevard, Suite 300, Tallahassee, FL 32301-2975; (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-21.003(4), 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, 1211 Governors Square Boulevard, Suite 300, Tallahassee, FL 32301-2975; (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-21.003(4), 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, Reemployment Assistance Appeals Commission, 1211 Governors Square Boulevard, Suite 300, Tallahassee, FL 32301-2975; (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 lèt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak 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.