

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Docket No. 20-00915

vs.

Referee Decision No. 0037353372-02U

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.

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.

While ordinary mistakes and simple negligence in the performance of one's duties are not misconduct, where the mistakes are of such character as to be reflective of indifference, a lack of attention to duties, disregard of one's job responsibilities, or failure to follow work procedures, the poor performance may properly be deemed misconduct under subparagraph (a) or (b) of Section 443.036(29), Florida Statutes. See R.A.A.C. Order No. 14-02817 (December 2, 2014).¹ In this case, the credited evidence reflects that in the final incident the claimant mislabeled two separate patients' specimens as belonging to only one of the patients. The specimens were cancer biopsies, and the claimant's error resulted in one patient being erroneously told of a positive test while the second patient, whose biopsy was actually the one that was positive, was not timely advised of the actual test result for some time and thus had treatment delayed.

In considering whether negligence is sufficiently severe to be disqualifying, we examine among other things the known or foreseeable potential consequences of negligence in performing the work duty at issue. A restaurant server who accidentally switches an order may have been negligent, but the consequences of the act are likely to be no more than a few disgruntled diners. By contrast, negligence in labelling cancer biopsies has potential adverse health consequences. For this reason, we have recognized that whether negligence arising from lack of attention to the requirements of one's duties (including compliance with required work procedures) is sufficient to constitute misconduct depends, as suggested in the statutory language, on the seriousness of the negligence in terms of its actual or potential adverse consequences. See, e.g., R.A.A.C. Order No. 13-08134 at pg. 5 (May 22, 2014) (recognizing sleeping on the job was egregious because the claimant was in an armored truck waiting for his colleague to return).² Thus, we look at the record to determine whether the claimant was giving attention appropriate to her duties in the circumstances. Clearly, given the nature of the error here, she was not.

This was also a case of recurring negligence. Previously, the claimant neglected to call in antibiotics for another patient for three days that led to a documented verbal warning. While this prior incident could have been a case of forgetfulness, it also had the direct consequence of delaying treatment and creating a potential risk to the health of the patient at issue. The claimant's actions on these two separate occasions when considered collectively amounted to a serious neglect of her duties and were sufficiently egregious as to constitute misconduct under Section 443.036(29)(a) and (b), Florida Statutes.³ Accordingly, we conclude the evidence was sufficient to support the referee's decision that the claimant was discharged for misconduct and, therefore, is disqualified from receiving benefits.

Credibility is a matter that falls within the province of the referee as the finder of fact. *Glover v. Sanford Child Care, Inc.*, 429 So. 2d 91, 92 (Fla. 5th DCA 1983); *Andrus v. Department of Labor & Employment Security*, 379 So. 2d 468, 470 (Fla. 4th DCA 1980). The Commission is bound by the referee's credibility determination except in

¹ Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-02817.pdf.

² Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-08134.pdf.

³ We focus primarily on subparagraph (b), but the referee's decision concluding misconduct occurred under subparagraph (a) is not clearly erroneous on this record.

extremely limited circumstances, which do not exist here. Moreover, the Commission may not reweigh evidence in a case, and must accept the referee's findings if supported by competent, substantial evidence. *Contreras v. Reemployment Assistance Appeals Commission*, 178 So. 3d 953, 955-56 (Fla. 4th DCA 2015). Our careful review and consideration of the record reveals record support in the credited evidence for the referee's findings.

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

8/21/2020,

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



*113207998 *

Docket No.0037 3533 72-02

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES:

Employer

TPA

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.

TIMELINESS: Whether an appeal, request for reconsideration, or request to reopen an appeal was filed within twenty days after mailing of the determination or decision to the adversely affected party's address of record or, in the absence of mailing, within twenty days after delivery, pursuant to Sections 443.151(3); 443.151(4)(b)1., Florida Statutes; Rules 73B-10.022(1); 10.022(5); 10.023(1); 11.017(2); 20.002-007, 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.)

Jurisdictional Issue: A determination was mailed on April 23, 2020 , which was adverse to the employer. The employer did receive the determination around the date of mailing. The employer filed an appeal on May 13, 2020. The law provides that a determination is final unless an adversely affected party files an appeal or request for reconsideration within twenty days after the mailing date of the determination notice to the party's last-known address or, in lieu of mailing, within twenty days after delivery of the notice. The employer did receive the determination in time to file a timely appeal. The employer's appeal is accepted as timely and the hearing shall proceed. A decision will be rendered based upon the merits of the case.

Findings of Facts: The claimant worked for the employer as a medical assistant, beginning on April 30, 2012. On April 30, 2012, the claimant received the employer's national patient safety policy which requires employees label specimens in front of patients to avoid mislabeling. In 2018 and 2019, the claimant received the annual risk training they discussed serious safety events where they discuss the process of not deviating from policy. On January 31, 2020, the claimant received a verbal warning in reference to an antibiotic for a patient not being called into the pharmacist for patient for three days which delayed patients therapy. The claimant was placed under notice that her job was in jeopardy due to the issue.

On January 27, 2020, the claimant assisted a doctor performing a biopsy on two separate patients. On January 27, 2020, the claimant labeled both specimens and entered them into the system under one patient instead of the patients separately. On February 2020, the biopsy report came back which indicated cancer of the scalp for a patient that did not have cancer due to the claimant's mislabeling. On February 12, 2020, the supervisor discovered the claimant had mislabeled the specimens. On February 13, 2020, the human resources director and the chief nursing officer confronted the claimant regarding the incident. The claimant denied having caused the issue. The human resources director confronted the claimant regarding having logged the results and labeled the specimens. The claimant did not have a response to having logged the specimens. The claimant was not able to give specifics about what occurred. On February 13, 2020, the claimant was discharged due to neglect of duty.

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 that the employer was the moving party in the separation. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986).It was shown that the claimant was discharged for neglect of duties. The record reflects the claimant received the employer's national patient safety policy which requires you label specimens in front of patients to avoid mislabeling. Consideration was given to the claimant's contention that the claimant did not receive the employer's national patient safety policy, that the claimant did not log the specimens into the system someone else did, and that the claimant did not receive a reason for the discharge. However, the employer's witnesses categorically deny the allegations of the claimant. Furthermore, the claimant's self- admitted testimony during the hearing was that she was the person that collected and labeled the specimens. In addition, if the claimant had labeled the specimens correctly that would have been entered correctly based on the label. Also, the claimant did not mention any information at the time of discharge that would have shown that the claimant allegedly was not the person who entered the specimens into the system. Additionally the claimant had received a verbal reprimand for failing to send in patient information which caused a delay in treatment and was under notice that her job was in jeopardy for this behavior. It is unreasonable to believe that an employee would not notify an employer when the employee was not responsible for an action that violated an employer policy and which could cost the employee their job or be detrimental to a patients health. Thus, the employer has met the burden to show that the claimant's actions in the final incident rose to the level of misconduct to warrant disqualification. Hence, the claimant's actions in the final incident in accordance with reemployment assistance law prong (A) does show conduct showing a conscious disregard for the employer's interest, and is found to be a deliberate act or course of conduct which would violate the reasonable standards the employer would expect of an employee, and under prong (B) of reemployment assistance law the claimants actions does show conduct that was careless and negligence to a degree or recurrence that it manifest culpability, and shows a violation of the duties and obligations the employer a right to expect of his or her employees. As a result, employer has shown that the discharge was for misconduct in connection with work. Accordingly, the claimant is disqualified from the receipt of reemployment assistance benefits.

The law provides that 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.

Because the claimant acted with misconduct the employer's account will not be charged for benefits.

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 employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision:The determination dated April 23, 2020, is REVERSED. The claimant is disqualified from receipt of reemployment benefits beginning February 9, 2020, plus five weeks, and until she earns \$4,675. the employment record of the employer shall not be charged for benefits paid to the claimant in connection with this claim.

PUA

The claimant may be eligible for Pandemic Unemployment Assistance in accordance with Section 2102 of the CARES Act of 2020, Public Law (Pub. L.) 116-136. For questions regarding this eligibility or instructions on how to apply for these benefits, the claimant can call the Department at 1-833 FL APPLY (1-833-352-7759) or visit <http://floridajobs.org/cares-act>

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 17, 2020.

G. WRIGHT
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-21.003(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 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, 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 pèman 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.