

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

vs.

R.A.A.C. Order No. 14-00018
Referee Decision No. 0010237263-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This cause comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision holding the claimant disqualified from receipt of benefits.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact recite as follows:

The claimant was employed [by] a government agency beginning on November 1, 1996, last working as a paramedic supervisor. On or about July 18, 2013, the claimant learned, after taking a random drug test that the test was positive and as a result the claimant was discharged per the employer's policy. The claimant challenged the results of the drug test and presented the testing facility with documentation showing the claimant was under a doctor's orders to take the medication that resulted in the positive drug test. The results were overturned, and the new result was forwarded to the employer. After forwarding the new results to its legal department, the employer received approval to reinstate the claimant effective July 31, 2013. On August 5, 2013, the claimant,

through his attorney, responded to the reinstatement, notifying the employer that the claimant would accept the reinstatement, but had other concerns that the claimant wanted addressed. Those concerns included paying the claimant's attorney's fees; granting the claimant's full pay including overtime and differentials; destroying the results of the drug tests; stating in writing that the employer violated the law by discharging the claimant based on the drug test results, and guaranteeing that the claimant would not be retaliated against by his superiors once he returned to work. The attorney also directed the employer not to communicate directly to the claimant, but through the attorney. The employer's attorney addressed each of the claimant's issues, granting the claimant's request for full back pay, stating that while it can't guarantee certain behaviors, the employer would behave in accordance to the employer's policy; that because of the Florida Sunshine Statute, the employer could not destroy any documents and did not possess the drug test results, but would follow [HIPAA] statutes in dealing with any requests for the tests; and finally that they would not pay the claimant's attorney's fees or state that it violated any laws in terminating the claimant, as the employer followed policy in both the initial termination and reinstatement. The claimant was dissatisfied with the employer's response and refused to return to work. The employer sent the claimant a final notice, notifying the claimant that he needed to report to work or be subject to termination. The claimant refused to return until the employer acquiesced to all of the claimant's demands. The claimant requested a hearing with the employer after receiving the employer's response. The hearing was scheduled in November. The claimant eventually canceled the hearing but again refused to return to work. The claimant was discharged on November 7, 2013, after he canceled the grievance hearing, for being on an unauthorized leave of absence.

Based upon the above findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision is not supported by competent, substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed in part.

Effective May 17, 2013, Section 443.036(30), 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.

The referee concluded that the claimant was discharged on November 7, 2013, for being on an unauthorized leave of absence. The referee, therefore, held the claimant was discharged for misconduct connected with work and that he was disqualified from receipt of benefits from the week ending November 9, 2013. Contrary to the referee's conclusions, the employer presented testimony that it discharged the claimant on July 18, 2013, with immediate effect due to a positive random drug test. While the employer also testified that the claimant's termination was not final because he filed a grievance, the undisputed evidence reflects the claimant performed no services for the employer and earned no wages after July 18, 2013. The employer's testimony, therefore, establishes that, as of July 18, the claimant was "unemployed" as that term is defined in Section 443.036(45), Florida Statutes. Since the claimant was discharged on July 18, 2013, he cannot be considered absent from work or on a leave of absence subsequent to that date. The first issue in this case then is whether the claimant's discharge on July 18, 2013, was for a disqualifying reason.

The employer discharged the claimant on July 18, 2013, for testing positive on a random drug test. Section 440.102(5)(i), Florida Statutes, states:

Within five working days after receiving notice of a positive confirmed test result, an employee or job applicant may submit information to the employer explaining or contesting the test result, and explaining why the result does not constitute a violation of the employer's policy.¹

The record reflects the employer did not provide the claimant with five working days to contest the test result but instead terminated his employment on the day it received notice that he had tested positive. Accordingly, the record reflects the employer discharged the claimant in violation of the above-cited statutory provision. The record reflects that, after the claimant provided the employer with documentation showing he was under a doctor's orders to take the medication which

¹ The record of this case did not indicate whether or not the employer's drug-testing policy was implemented pursuant to Section 440.102, Florida Statutes. However, the regulations of the Agency for Health Care Administration for drug-testing programs also contain this restriction. See Fla. Admin. Code R. 59A-24.008(2)(b)5. We conclude that any drug-testing program that results in a discharge of an employee due to a positive test without providing the opportunity, either before or after the test, to provide information to a medical review officer why the result should not be deemed positive, is inconsistent with the generally established standards under federal and Florida law and is inherently unreasonable.

resulted in the positive test result, the test results were overturned. The claimant, however, was already discharged. Under the facts of this case, we conclude the claimant was discharged on July 18, for reasons other than misconduct connected with work as defined under Florida law.

Although the claimant was discharged on July 18, 2013, the record reflects the employer subsequently offered to reinstate him to his former position. The second issue in this case then becomes whether the claimant refused an offer of suitable work without good cause which would be disqualifying under Section 443.101(2), Florida Statutes. The record reflects the claimant did not accept the employer's offer to reinstate him to his former position because the employer would not agree to all of his demands. While the employer did agree to give the claimant back pay including his overtime differential pay, it would not agree to pay the attorney fees the claimant incurred in contesting his unlawful discharge. While several of the demands the claimant made would not have been reasonable to expect the employer to comply with, due to legal constraints or otherwise, it was not unreasonable for the claimant to expect the employer to compensate him for his attorneys' fees incurred directly because of the employer's actions which either violated Florida drug-testing law, or were, at a minimum, inherently unreasonable. We hold that, as a matter of law, the lack of reimbursement to the claimant for his attorneys' fees would constitute good cause to refuse the offer of reinstatement.

The claimant did cancel his grievance hearing but it is unknown whether the hearing could have resulted in an award of attorneys' fees along with reinstatement. The case is, therefore, remanded for the referee to conduct an additional hearing to develop the record regarding these issues and determine whether the claimant refused an offer of suitable work with good cause. The employer or claimant should provide for the record copies of the relevant bargaining agreement or other grievance procedures for review. If the record shows that the claimant does not have a clear right to recover his attorneys' fees short of arbitration, the claimant shall have refused the offer of reinstatement with good cause. In the event that fees are available, the referee must determine the likelihood that the claimant would have succeeded in obtaining reinstatement and his attorneys' fees to determine whether the claimant abandoned his grievance, and his employment, with good cause.

The decision of the appeals referee is reversed 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

5/29/2014

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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: Kimberley Pena

Deputy Clerk



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



*19050512 *

Docket No.0010 2372 63-02

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES

Employer

Claimant

DECISION OF APPEALS REFEREE

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

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

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

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); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Issues Involved: **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.

times new roman;**Jurisdictional Issue:**A determination adverse to the employer was mailed to the employer's address of record on October 24, 2013. The employer never received the determination in the mail. The employer was notified of the adverse determination on November 15, 2013, after the employer was able to sign onto the CONNECT system.

Conclusions of Law: 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 record and evidence in this case show that the employer never received the original mailed determination. The employer filed an appeal within 20 days of signing onto CONNECT and learning of the adverse determination. The employer's request to appeal is deemed timely.

Finding of Fact: The claimant was employed for a government agency beginning on November 1, 1996, last working as a paramedic supervisor. On or about July 18, 2013, the claimant learned, after taking a random drug test that the test was positive and as a result the claimant was discharged per the employer's policy. The claimant challenged the results of the drug test and presented the testing facility with documentation showing the claimant was under a doctor's orders to take the medication that resulted in the positive drug test. The results were overturned, and the new result was forwarded to the employer. After forwarding the new results to its legal department, the employer received approval to reinstate the claimant effective July 31, 2013. On August 5, 2013, the claimant, through his attorney, responded to the reinstatement, notifying the employer that the claimant would accept the reinstatement, but had other concerns that the claimant wanted addressed. Those concerns included paying the claimant's attorney's fees; granting the claimant's full pay including overtime and differentials; destroying the results of the drug tests; stating in writing that the employer violated the law by discharging the claimant based on the drug test results, and guaranteeing that the claimant would not be retaliated against by his superiors once he returned to work. The attorney also directed the employer not to communicate directly to the claimant, but through the attorney. The employer's attorney addressed each of the claimant's issues, granting the claimant's request for full back pay, stating that while it can't guarantee certain behaviors, the employer would behave in accordance to the employer's policy; that because of the Florida Sunshine Statute, the employer could not destroy any documents and did not possess the drug test results, but would follow HIPAA statutes in dealing with any requests for the tests; and finally that they would not pay the claimant's attorney's fees or state that it violated any laws in terminating the claimant, as the employer followed policy in both the initial termination and reinstatement. The claimant was dissatisfied with the employer's response and refused to return to work. The employer sent the claimant a final notice, notifying the claimant that he needed to report to work or be subject to termination. The claimant refused to return until the employer acquiesced to all of the claimant's demands. The claimant requested a hearing with the employer after receiving the employer's response. The hearing was scheduled in November. The claimant eventually canceled the hearing but again refused to return to work. The claimant was discharged on November 7, 2013 after he canceled the grievance hearing, for being on an unauthorized leave of absence.

Conclusions of Law:As of May 17, 2013, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed

in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. 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:

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- b. The rule is not lawful or not reasonably related to the job environment and performance; or
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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 and evidence in this case show that the claimant was discharged for being on an unauthorized leave of absence after he refused to return to work after being reinstated.

The claimant contends that the termination should not have occurred in the first place, and he believed the employer should have agreed to all of his terms before he returned. While the claimant may have believed that he was wrongfully terminated, the evidence and record shows that as soon as the employer was made aware of the testing facility's reversal, the claimant was reinstated as soon as their legal department gave the employer the ability. And while the claimant did not get everything he wanted, his concerns were addressed. The claimant had no right to hold the position hostage in order to force the employer to get everything he believed he was entitled. The claimant was reinstated, given a restart day, was allowed to exercise all of his options in terms of addressing his grievances, and notified that failure to report to work would result in discharge. Under the circumstances, it is concluded that the claimant's actions demonstrated a conscious disregard of an employer's interests. The claimant is disqualified from the receipt of benefits.

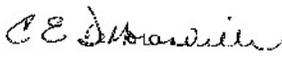
The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and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

Decision: The determination of the claims adjudicator dated October 24, 2013, is REVERSED. The claimant is disqualified from the receipt of benefits from the week ending November 9, 2013, plus the next five weeks, and until the claimant earns \$4675.00.

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 to the last known address of each interested party on December 10, 2013

BETTY GRAYSON
Appeals Referee

By: 

CONNIE DEMORANVILLE, 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 mailing date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org>. If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la fecha marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [*pago excesivo de beneficios*] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

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

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org>. Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitiv sòs si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} 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 diskalfye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

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

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

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