STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-05587

vs.

Referee Decision No. 0023566048-02U

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.

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 voluntarily left work without good cause attributable to the employing unit or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant worked for [the employer] part-time from February 21, 2014 through July 25, 2014, doing salad preparation. The claimant was scheduled to work on July 21, 2014 through July 25, 2014. The claimant's car broke down, and he was unable to go to work on July 21st through July 24th. He did not call the employer and let them know he would be absent. He got his car fixed late in the evening on July 24, 2014. He went to work on July 25, 2014. Right after he clocked in for work, he was told that

> he was no longer an employee of the employer. The claimant had been [discharged] for failing to show up for work three consecutive shifts in a row, and for failing to provide the employer with notice that he would be absent in violation of the employer's policy.

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 the referee's decision is not in accord with the law; accordingly, it is reversed.

As the referee's findings of fact indicate, the claimant was absent from work without calling in for four days due to lack of transportation when his car broke down. The employer's documentary evidence included its job abandonment policy:

> An employee may be deemed to have voluntarily resigned from employment . . . should he/she failed [sic] to report to work and failed [sic] to notify management of the absence (no call/no-show) for three consecutively scheduled work shifts.

The employer's testimony at the hearing was clear that the claimant was not discharged, but was deemed to have abandoned his job due to his absence for several days without contact with the employer, consistent with its policy. The claimant acknowledged that he was told by the employer that they considered him to have abandoned his job. While the claimant did not intend to quit, his subjective intent is not the only factor in determining whether a resignation has occurred. The doctrine of "job abandonment" is well-established in employment law and labor relations. When an employee fails to show up to work for several days without notice, the employer is left to guess what the employee's intention is, during which time its business operations are hindered by the employee's absence. In such cases, we conclude that the issue of whether an employee has quit must be examined under an objective standard, rather than relying solely on the subjective intent of a missing employee. Further, when an employee has been given notice of a reasonable job abandonment policy, and is absent without notice such that the provisions of the policy are triggered, the burden shifts to the employee to demonstrate that, on an objective basis, he should not be deemed to have resigned. Accordingly, as discussed below, we reject, as a matter of both fact and law, the referee's conclusion that the claimant was discharged.

In concluding that the claimant was discharged for reasons other than misconduct, the referee relied on several cases involving involuntary discharges for absences due to short-term transportation problems. However, in *Roberts v. Deihl*, 707 So. 2d 869 (Fla. 2d DCA 1998), *Vega v. Unemployment Appeals Commission*, 833

So. 2d 310 (Fla. 3d DCA 2003), and *Gallagher v. Unemployment Appeals Commission*, 29 So. 3d 345 (Fla. 4th DCA 2010), there is no evidence that the claimants therein went multiple days without advising the employer of the absences and the reasons therefore. Gallagher reported his absence immediately; Vega reported it the next morning. In *Roberts*, there is no indication that the claimant failed to report his transportation difficulties to the employer. While we agree that the mere inability to get to work due to unforeseeable short-term transportation issues is not misconduct, the issue in this case is the claimant's additional failure to give notice of his absences, an action that can be deemed disqualifying even when the absence itself would otherwise be excusable. *See Barragan v. Williams Island*, 568 So. 2d 106 (Fla. 3d DCA 1990) (holding the claimant discharged for misconduct for violation of the employer's work rule requiring the claimant to call in). Because of the employer's job abandonment policy and the lack of notice by the claimant, this case is closer to *Hernandez v. Unemployment Appeals Commission*, 23 So. 3d 824 (Fla. 3d DCA 2009), where the failure to report to work due to transportation was deemed a voluntary quit and thus disqualifying.

The referee's conclusions reflect the claimant's testimony that he did not call the employer because his telephone service was terminated for several days, acknowledging that, when he gained access to a telephone, he failed to call the employer. When asked by the employer in cross examination why he did not find a pay telephone to advise the employer or find another way to work, the claimant contended that it was five miles to the nearest pay telephone and four miles to a bus stop. The referee did not make any findings regarding that testimony nor include a credibility determination finding the claimant's testimony credible; consequently, we are not bound by any findings as to this testimony. Regardless, while it is the referee's responsibility to make findings and credibility determinations, we are not bound by a finding based on testimony that is disprovable by reference to known or readily obtainable information. The claimant testified that he lived in Carrollwood. Carrollwood, however, is not a rural area where one would expect access to pay telephones to be limited or difficult. There are few locations in Greater Carrollwood more than a couple of miles from Dale Mabry Highway, a major thoroughfare with numerous locations from where a call might be made. Carrollwood is bordered or dissected by Lynn Road, Ehrlich Road, Gunn Highway, Armenia Avenue, Linebaugh Avenue and numerous other roads heavily dotted with commercial establishments and pay telephones. The claimant's explanation of why he did not attempt to find a pay or commercial telephone to make a call to his employer, given that his telephone did not work, reflects that he failed to make a reasonable effort to notify the employer of his predicament. Accordingly, we conclude there is no basis to excuse the claimant from the operation of the employer's job abandonment policy.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending July 26, 2014, and until he becomes reemployed and earns $2,533. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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 3/24/2015, 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

*33310292 *

Docket No.0023 5660 48-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant ***EMPLOYER/Appellee***

APPEARANCES 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.

Findings of Fact: The claimant worked for the employer, , part-time from February 21, 2014 through July 25, 2014, doing salad preparation. The claimant was scheduled to work on July 21, 2014 through July 25, 2014. The claimant's car broke down, and he was unable to go to work on July 21st through July 24th. He did not call the employer and let them know he would be absent. He got his car fixed late in the evening on July 24, 2014. He went to work on July 25, 2014. Right after he clocked in for work,

he was told that he was no longer an employee of the employer. The claimant had been discharge for failing to show up for work three consecutive shifts in a row, and for failing to provide the employer with notice that he would be absent in violation of the employer's policy.

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, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

b. Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

c. Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

d. A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

e. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b. The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects that the claimant was discharged. When a claimant has been discharged from his or her employment, it is incumbent upon the employer to prove that they were discharged for misconduct connected with work before benefits can be denied. In order to do so, the employer must show by a preponderance of competent evidence that the claimant engaged in an act or course

of conduct that violated his duties and obligations to the employer. Department of Health and Rehabilitative Services v. Unemployment Appeals Commission, 503 So. 2d 403 (Fla. 1st DCA 1987).

In the instant case the employer did not present the necessary evidence to establish that the claimant was discharged for misconduct. If an employer wants to prove an employee committed misconduct under section 443.036(30) (e), the employer must prove the existence of its' policy/rules, and evidence that the claimant violated it. The claimant would then have the burden of showing that he/she did not know, and could not reasonably know, of the rules requirements; the rule was not lawful or reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced. The employer did prove the claimant violated the employer's policy by being absent for three consecutive shifts without giving the employer any notice he would be absent. However, the claimant testified that he was absent from July 21st through July 24th because his car broke down.

Gallagher v. Florida Unemployment Appeals Commission, involved a claimant who worked as a delivery driver. On March 18, 2008, the claimant was prepared to go to work when he discovered that his vehicle's transmission was broken. He called the employer around 11:00 am to notify the manager that he would not be able to work because of car trouble. The manager told the claimant that they were busy and hung the phone up. The claimant called back and was not able to speak with the manager. The employer discharged the claimant for not showing to work effective March 19, 2008. The referee held that the claimant was entitled to unemployment compensation since his failure to perform the job requirements was "through no fault of his own." The Commission reversed finding that appellant had a responsibility to report to work on time and his actions amounted to misconduct. The court reversed finding that, in general, courts have held that an employee's transportation problems do not constitute misconduct citing to Roberts v. Deihl, 707 So.2d 869 (Fla. 2d DCA 1998) and Vega v. Florida Unemployment Appeals Commission, 833 So.2d 310 (Fla. 3d DCA 2003).Gallagher v. Florida Unemployment Appeals Commission, 29 So.3d 345 (Fla. 4th DCA 2010).

In the instant case, the claimant was absent because he was having issues with his car, and had no transportation to work. In contrast to the case in Gallagher, the claimant did not try to contact the employer, because he did not have a phone. During the hearing, the claimant testified that he did not contact the employer, because his phone service was shut off. He later admitted he had access to a phone on Wednesday, July 23rd, but did not call the employer. He did however, call a friend who could help him fix his vehicle, and subsequently did fix his vehicle. The claimant made a bad judgment call when he decided not to call the employer, but his poor judgment did not amount to misconduct. Based on the reasoning found in Gallagher the claimant did not commit misconduct due to his transportation issues. Even though the claimant did violate the employer's policy, it would not be fair to disqualify him from receiving benefits for being absent, when he had no control over the situation. Therefore, the claimant did not commit misconduct connected with work under the applicable law, and is not disqualified from receiving benefits.

Decision: The determination dated August 25, 2014, is reversed. The claimant is not disqualified from receiving benefits from July 20, 2014.

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 October 2, 2014.

JAMEDRA MORGAN
Appeals Referee

By: K. Martin

KIMBERLY MARTIN, 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 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 distribución/fecha de envìo 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 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 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.
