STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Docket No. 18-00030

vs.

Referee Decision No. 0031756285-02U

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.

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

The referee made the following findings of fact:

> The claimant began working for the employer in October 2016. The claimant was employed as a helper for the employer. The claimant was off work on June 26, 2017 through June 28, 2017 because the claimant's girlfriend was sick and he was watching their child while she was sick. The claimant came into work four hours on June 29, 2017 but had to leave work early due to a toothache. The claimant was also out June 30, 2017 due to a toothache. The [employer] was made aware of the reasons the claimant was absent June 26, 2017 through June 30, 2017. The claimant requested to take off July 03, 2017 for work and his supervisor approved his request. The employer's supervisor text[ed] the claimant on July 02, 2017 to, "please be at work tomorrow I don't want to hire someone. We work well together." The claimant did not show up to work on Monday because he requested that day off to go to a doctor's appointment with his

> child's mother. The employer needed someone at their job to work the claimant's position. The claimant did not go back into work for the employer because of the text he receive[d] from the employer. The claimant's last day of working for the employer was in June 2017.

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 record was not sufficiently developed and the decision lacks critical findings of fact. The additional record development and findings are essential to determining the legal rules applicable to this case. Consequently, the case must be remanded.

The Legal Issues

The referee concluded that the claimant reasonably believed he was discharged for reasons other than misconduct "when he was told that if he did not show up to work on Monday he would be replaced," citing *LeDew v. Unemployment Appeals Commission*, 456 So. 2d 1219 (Fla. 1st DCA 1984).[1] The referee reasoned that "The employer's words and actions would lead a reasonably prudent person to believe that the claimant had been replaced when he did not show up on Monday." This is an expansion of the *LeDew* analysis beyond the holdings of our courts, but we do not reject it. We agree with the referee that under some circumstances, an ultimatum with which a party cannot comply reasonably could be viewed as becoming a discharge when the condition in the ultimatum is not met. Under these circumstances, however, the referee must apply an additional analysis: preservation.

Typically when a *LeDew* constructive discharge occurs, the issue of preservation is irrelevant because the claimant subjectively and reasonably believes that termination *has already occurred*. However, in the *LeDew* case itself, the discharge was only proposed, and not yet final. The bulk of the discussion in *LeDew* was essentially a preservation analysis. The court noted that "the claimant testified the reason he did not go before the board [to challenge his proposed dismissal] was because he sincerely believed it would have been an act of futility." The referee made a finding to that effect, and the court held that finding was supported by the evidence, which it discussed in detail. We conclude that in any *LeDew* constructive

[1] To the extent that this language suggests that a constructive discharge occurred immediately, we disagree as a matter of law. Taken in context with the rest of the decision, however, we believe the referee's conclusion is that the discharge became effective on Monday when the claimant did not show up for work.

discharge case where the key acts or communications do not show an immediate, final, and apparently non-negotiable discharge, the referee must determine whether the claimant took reasonable steps to preserve his or her employment as required by *Glenn v. Unemployment Appeals Commission*, 516 So. 2d 88 (Fla. 3d DCA 1987), and subsequent cases.

Finally, our review of the evidentiary record shows a significant flaw in the referee's *LeDew* conclusion. The text message the claimant's supervisor sent that was alleged to have triggered his discharge was in evidence and states as follows:

> I don't think I'm going to make it to the party. I'm going to hide in the AC all day. Please be at work tomorrow I don't want to have to hire someone. We work well together.

This text was sent on July 2, the day before the claimant was intending to be absent to accompany his child's mother to a doctor's appointment, having previously requested to be off. Upon receipt, the claimant did not respond in any way. He did not go to work the next day. He did not have any further contact with the employer. *However, contrary to the referee's conclusion, the evidence does not establish that the claimant believed he was discharged either at the time the email was received or on Monday, July 3.* The claimant testified that after he did not appear for work on Monday, July 3, and after a day off for the July 4th holiday, the claimant thought he might get a text saying to come in Wednesday or asking, "what's going on, is everything ok." This testimony precludes a finding of constructive discharge on Sunday or Monday, because an individual cannot be constructively discharged under the *LeDew* standard when he believes his employment may be still intact. While *LeDew* contains an *objective* standard, that standard is applied only as a test of the reasonableness of a claimant's *subjective* belief: that is, for *LeDew* to apply, the claimant must first actually believe he has been terminated. Accordingly, we reject the referee's *LeDew* analysis, and remand for a reconsideration of that issue after further record development as discussed below.

Additional Record Development and Findings Needed

The decision lacks critical facts establishing the timeline of events leading up to the claimant's separation. For example, additional material facts include when the claimant requested time off for July 3, and when his request was approved by the employer. According to the claimant's testimony, his supervisor approved the day off "weeks" in advance. Logically, the next critical fact is when, if ever, did the claimant remind the supervisor of his approved day off. While the claimant testified he had spoken to the supervisor the previous Thursday, June 29, about his being stressed out about his girlfriend's forthcoming test results, the record is silent

regarding whether he specifically reminded his supervisor that the appointment was on the coming Monday, July 3, and that he would not be at work. The record in this case is inadequately developed to support a finding either way as to whether the supervisor's text was sent in knowing derogation of a prior agreement for the claimant to be off on Monday, or whether the supervisor merely forgot.

In addition, the supervisor testified that on Sunday, July 2, the claimant had texted that he would be at work the following day. Such a statement would have suggested that the claimant no longer wanted or needed the following day off. The claimant was not questioned about that testimony. On remand, either party may submit additional text messages to establish the context of the events leading to the separation; however, at a minimum, the claimant should be questioned about the supervisor's testimony.

Next, given the claimant's testimony that for the Wednesday, July 5, workday, he awaited a communication from his supervisor in accordance with the supervisor's normal pattern of texting the claimant either the night before or the morning of a workday, the referee must further develop the record as to when the claimant thought he was finally discharged and why.

Finally, the referee must develop the record as to why the claimant did not engage in further communication with his supervisor about his employment. The claimant must be questioned as to why he did not respond to the Sunday text with a reminder to his supervisor that he had been preapproved for leave that day, and why, after not hearing from the supervisor on Wednesday morning, he did not make the effort of initiating contact himself. As we have held in prior cases, just as an employer's actions can lead an employee to reasonably believe he has been discharged, an employee's actions can reasonably lead an employer to believe he has resigned. *See* R.A.A.C. Order No. 16-02602 (November 1, 2016).[2] For a variety of reasons, employees simply stop attending work all the time, as the cases before us reveal. This case shows an unfortunate failure to communicate, perhaps by both sides. On remand, the referee must further develop the record and determine, under the constructive discharge, constructive resignation, and preservation doctrines, who bears the primary responsibility for this job separation.

[2] Available at http://www.floridajobs.org/finalorders/raac_finalorders/16-02602.pdf.

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

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

This is to certify that on 5/4/18, 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

*67578952 *

Docket No.0031 7562 85-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

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.

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 began working for the employer in October 2016. The claimant was employed as a helper for the employer. The claimant was off work on June 26, 2017 through June 28, 2017 because the claimant's girlfriend was sick and he was watching their child while she was sick. The claimant came into work four hours on June 29, 2017 but had to leave work early due to a toothache. The claimant was also out June 30, 2017 due to a toothache. The claimant was made aware of the reasons the claimant was absent June 26, 2017 through June 30, 2017.The claimant requested to take off July 03, 2017 for work and his supervisor approved his request. The employer's supervisor text the claimant on July 02, 2017 to, "please be at work tomorrow I don't want to hire someone. We work well together." The claimant did not show up

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to work on Monday because he requested that day off to go to a doctor's appointment with his child's mother. The employer needed someone at their job to work the claimant's position. The claimant did not go back into work for the employer because of the text he receives from the employer. The claimant's last day of working for the employer was in June 2017.

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 evidence shows the claimant was constructively discharged from his employee when he was told that if he did not show up to work on Monday he would be replaced. An employee is considered discharged if the words and actions of the employer would logically lead a prudent person to believe he or she has been terminated from the job. LeDew v. Unemployment Appeals Commission, 456 So.2d 1219 (Fla. 1st DCA 1984). The employer's words and actions would led a reasonably prudent person to believe that the claimant had been replaced when he did not show up on Monday. The reason the employer discharged the claimant was because of his attendance. In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. The employer did not provide an attendance policy. The employer did not indicate the claimant was written up for his attendance infractions. The evidence shows that the claimant's absences were due to circumstances beyond his control to which he informed the employer about and the claimant's final absence was a pre-approved day off. The employer has not shown that the claimant acted with

conscious disregard, intentionally, or with the requisite intent to demonstrate, the claimant was acted with misconduct when he was absent these days. Accordingly, the claimant is entitled to receive benefits.

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

Decision: The determination dated November 09, 2017 is REVERSED. The claimant is entitled to receive benefits.

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 December 26, 2017.

E. THOMAS HILL
Appeals Referee

By: Antonia L Spivey

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

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

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

There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department's CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de 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 los últimos cinco dígitos del número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representado por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

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

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

Pa gen okenn kou pou Komisyon an revize yon ka, ni ke yon pati dwe reprezante pa yon avoka oubyen lòt reprezantan pou ke la li a revize. Komisyon Apèl Asistans Reyanbochaj pa te entegre antyèman nan sistèm CONNECT Depatman an. Byenke korespondans kapab fakse oubyen pòste bay Komisyon an, okenn korespondans pa kapab soumèt bay Komisyon an atravè sistèm CONNECT. Tout pati ki nan yon apèl devan Komisyon an dwe mentni yon adrès postal ki ajou avèk Komisyon an. Yon pati ki chanje adrès postal li nan sistèm CONNECT la dwe bay Komisyon an adrès ki mete ajou a tou. Tout korespondans ke Komisyon an voye, sa enkli manda final li, pral pòste voye bay pati yo nan adrès postal yo genyen nan achiv Komisyon an.
