STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-04349

vs.

Referee Decision No. 13-32348U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. It is the referee's responsibility to develop the hearing record; weigh the evidence, resolve conflicts in the evidence; and render a decision supported by competent and substantial evidence. While hearsay evidence is admissible at a hearing, it can only be used to supplement or explain other evidence, and is not sufficient in itself to support a finding of fact unless admissible over objection in a civil action. Fla. Admin. Code R. 73B-20.024(3)(d). Such evidence, in fact, may not be considered as "competent evidence." The "Appeals Information" pamphlet provided to the parties prior to the hearing placed them on notice that "the best type of evidence is testimony from someone who was present when an event occurred and can answer specific questions about what happened" and that documents or affidavits standing alone are normally regarded as "hearsay" and may be insufficient to prove a case.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent and substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a

party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

This case involves the termination of an eight-year customer service representative for a single incident with a customer. On February 18, 2013, after a tense and unsettling conversation with a customer who had made unfavorable comments regarding the employer, the claimant sent an email to his supervisor with the word "scumbag" entered in the subject category, and in which he referred to the customer as an "asshole." The claimant also accidentally sent the email to the customer. After the customer complained, the employer terminated the claimant for unprofessional conduct, allegedly in violation of company policies. On appeal, the referee concluded that the employer had failed to prove the claimant was guilty of misconduct. The Commission agrees. Our review of the record confirms that there is competent, substantial evidence to support the referee's findings of fact. We write in this case to discuss the referee's treatment of the employer's policy evidence and the employer's contentions on appeal regarding it.

The Commission understands that a customer service representative is the face of the employer with respect to its clientele, and that an employer is entitled to expect the highest level of professionalism and courtesy from its representatives. Thus, the employer may have had good cause to terminate the claimant over a single incident after over eight years of work. However, as the courts have noted on many occasions, misconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant a denial of unemployment compensation benefits. *Borland v. Unemployment Appeals Commission*, 910 So.2d 320 (Fla. 2d DCA 2005). The employer must prove that the claimant's actions constitute misconduct under one of the five subparagraphs of Section 443.036(30), Florida Statutes. In this case the employer contended that the claimant's actions violated its "code of computing" policy and its general "rules of conduct" policy. The employer provided the latter policy as documentary evidence at the appeals hearing, but failed to provide the code of computing policy for the referee's review. Citing the best evidence rule in Section 90.952, Florida Statutes, the referee concluded that the employer failed to provide competent evidence showing that the claimant knowingly violated the computer policy. On appeal to the Commission, the employer contends that its computer usage policy was known to all within the company and that the evidence was sufficient to establish a violation.

Given the relaxed evidentiary standard contained in Section 443.151(4)(b)5.b., Florida Statutes, strict adherence in all situations to the best evidence rules of the Florida Evidence Code (Sections 90.951-958, Florida Statutes) is neither required nor appropriate. However, the Commission has held in numerous decisions that "it is axiomatic that, in establishing a violation of an employer's policy, the employer should provide said policy and enter it into the record at the hearing." *See* R.A.A.C. Orders No. 12-01590 (May 3, 2012), No. 12-07116 (August 3, 2012), and No. 12-07696 (August 21, 2012), among others. When an employer provides only oral testimony as to the contents of a detailed written policy, it is within the referee's sound discretion to determine what weight, if any, to give such testimony, and the more detailed the policy provisions are, the less likely oral testimony will suffice. This is a crucial issue because to establish a violation of an employer policy, it is of course necessary to establish first what the policy is. Accordingly, the Commission concludes that the referee did not err when she found the evidence insufficient to establish a violation of that policy.

The employer did introduce a general "rules of conduct" document which contained some broad rules of behavior. One such provision prohibited the "use of obscene, abusive or threatening language or involvement in malicious gossip or harassment of other employees or customers." The words used in the email sent by the claimant, although vulgar, were not "obscene" within the meaning of that word. Moreover, because of the referee's finding that the claimant's sending the email to the customer was accidental, it was not shown that the claimant engaged in "abusive or threatening language" or in the "harassment of other employees or customers." All of these terms would best be read to require some degree of intentional targeting of an individual. The Commission concludes that the referee correctly determined that the employer failed to establish misconduct under subparagraph (e).

The referee also concluded that employer failed to prove violation of subparagraph (a). The Commission concurs. The accidental nature of the email's transmission to the customer, and the fact that claimant's motive in sending the email was to inform his supervisor of a problematic client who the supervisor might have to talk to, preclude any determination that the employee was in "conscious disregard of the employer's interests."

Finally, although the referee does not consider whether the evidence established a violation of subparagraph (b), the Commission has reviewed the case with respect to that provision. We conclude that the findings were insufficient to establish "carelessness or negligence to a degree or recurrence that manifests culpability" in a single, simple accidental act. As a referee noted, neither poor judgment nor a single act of ordinary negligence are sufficient to establish misconduct under the law.

Based on the factual findings in this case, the Commission concludes that the referee correctly determined that the employer failed to prove misconduct. 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

8/29/2013 ,

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: Natasha Green
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

IMPORTANT:	For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE:	Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN:	Pou yon intèpret asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-32348U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3683-0

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

CHARGES TO EMPLOYMENT RECORD: Whether benefit payments made to the claimant shall 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 employer charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant worked full-time as a personal vocational planner for a cruise line corporation from December 7, 2004 until February 18, 2013. Company policy, of which the claimant was aware, stipulated that "use of obscene, abusive or threatening language or involvement in malicious gossip or harassment of other employees or customers" and that violation of the employer's "code of computing practice" could result in immediate termination. On February 13, 2013, the claimant had an unsettling conversation with a customer who had been a five year patron of the company. The customer made unfavorable comments regarding the company. The claimant was offended by the

customer's comments. Subsequently, the claimant sent an e-mail to his supervisor with "SCUMBAG" entered in the subject category, in which he referred to the customer as an "asshole." However, the claimant inadvertently sent the e-mail to the customer. The customer notified the employer of the mail. On February 18, 2013, the claimant was discharged for unprofessional conduct.

Conclusions of Law: As of June 27, 2011, 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.

(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) A violation of an employer's rule, unless the claimant can demonstrate that:

1. He or she did not know, and could not reasonably know, of the rules requirements;
2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

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 unprofessional conduct. The record reflects that the claimant had no written warnings related to the behavior for which he was discharged. The purpose of a written reprimand or warning is to place the claimant on notice of the seriousness of the charge and to warn the claimant that his job is in jeopardy. The record further reflects that the claimant had an unsettling conversation with a customer who made disparaging remarks regarding the company. The claimant was offended and subsequently sent an e-mail to his supervisor in which he referred to the customer as an "asshole" and "SCUMBAG." The claimant inadvertently sent the e-mail to the customer. Consideration was given to the employer's contention that the claimant violated the employer's "code of computing practice"; however, the employer did not present the actual "code of computing practice" at the hearing. Section 90.952, Florida Statutes, states: "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." No competent evidence was presented to show that the claimant knowingly violated any policy. The claimant's actions are best described as a momentary lapse in judgment resulting from a provocative interaction with a customer. As noted in the U.A.C. order No. 11-14941, "In construing an earlier version of the above-noted statutory

definition of misconduct, Florida courts have held that mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct connected with work. Hammett v. Florida Department of Commerce, 352 So.2d 948 (Fla. 2d DCA 1977); Fredericks v. Florida Department of Commerce, 323 So.2d 286 (Fla. 2d DCA 1975." The claimant's actions do not demonstrate wrongful intent and a conscious and intentional disregard of the employer's interests. The claimant's actions have not been shown to meet the statutory criteria for misconduct as outlined in the statute above. Accordingly, since the claimant was not discharged for misconduct, as that term is used in the reemployment assistance law, the claimant should not be disqualified from the receipt of reemployment assistance benefits.

Decision: The determination dated March 26, 2013, is REVERSED. The claimant is not disqualified from receiving reemployment assistance benefits. The employment record of the employer shall be charged for benefits paid on this claim.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on May 14, 2013.

KAREN GILBERT
Appeals Referee

By: Dorothy Sheffield
DOROTHY SHEFFIELD, 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 below 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 https://iap.floridajobs.org/ or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals 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 https://iap.floridajobs.org/ o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; 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 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 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, https://iap.floridajobs.org/ oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfimasyon an se va dat yo prezante demann nan pou reouvri kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sevis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.