STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-04522

vs.

Referee Decision No. 13-31827U

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.

Procedural error requires this case to be remanded for further proceedings; accordingly, the Commission does not now address the issue of whether the claimant is qualified for benefits.

The referee made the following findings of fact:

> The claimant began working for the listed employer, a healthcare center, on January 24, 2011, as an environmental service aide. The claimant accrued seven absences from October 28, 2011, through November 15, 2012; two occurrences of tardiness on November 8, 2011, and November 28, 2012, and an early departure on March 1, 2013. The claimant's absences and early departures were due to her being ill or not feeling well. The claimant called and reported all of her absences. The claimant received four warnings from April 26, 2012, through March 1, 2013, for the attendance infractions. The claimant called out sick on March 6, 2013. The claimant was discharged on March 7, 2013, for attendance.

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; consequently, the case must be remanded.

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.
>
> (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) 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 rule's 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.

When a claimant is discharged from employment, 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*, 468 So. 2d 413 (Fla. 1986). Although the referee is not required to set out in detail every fact brought out in the evidence, his statement of facts should be clear and unambiguous and should be sufficiently definite to enable the reviewing authority to test the validity under the law of the decision resting upon those facts. *Hardy v. City of Tarpon Springs*, 81 So. 2d 503, 506 (Fla. 1955). In this case, it was shown that the claimant was discharged for absenteeism. The Commission, however, is unable to determine from the facts presented whether the claimant's attendance violations constitute disqualifying misconduct pursuant to Section 443.036(30)(a),(c), or (e), Florida Statutes. Since the issue is whether the claimant's attendance violations constitute disqualifying misconduct, subparagraphs (b) (carelessness or negligence) and (d) (violation of a state regulation) do not apply.

Subparagraph (a) and the first prong of subparagraph (c) both require "deliberate" action. Subparagraph (a) requires a conscious disregard of the employer's interests and a *deliberate* disregard or violation of the reasonable standards of behavior which the employer expects of employees while the first prong of (c) requires chronic absenteeism or tardiness in *deliberate* violation of a known policy. Under these provisions, absences or tardiness attributable to a compelling and/or involuntary reason would not constitute misconduct as they would not be a "deliberate violation." The Commission takes the position that, *generally*, an employee's absence from work based upon a "compelling" reason, when properly reported to the employer, does not rise to the level of being "a *deliberate* violation of a known policy of the employer." In reaching this position, the Commission references court cases under the earlier statute addressing attendance violations for "compelling reason(s)." *See Cargill, Inc. v. Unemployment Appeals Commission*, 503 So. 2d 1340 (Fla. 1st DCA 1987); *Howlett v. South Broward Hospital Tax District*, 451 So. 2d 976 (Fla. 4th DCA 1984); *Taylor v. State Department of Labor and Employment Security*, 383 So. 2d 1126 (Fla. 3d DCA 1980). In this case, the claimant testified her absences were all due to illness and thus were not deliberate; therefore, subparagraph (a) and the first prong of subparagraph (c) would not apply.

The second prong of subparagraph (c) defines misconduct to include "one or more *unapproved* absences following a *written* reprimand or warning relating to more than one *unapproved* absence" (emphasis added). No explicit requirement of fault exists under the second prong when the employer establishes a final "unapproved" absence(s) following a *written* warning for multiple prior unapproved

absences. However, keeping in mind the language of the second prong, the common understanding of the word "misconduct," the prior case law regarding absences for compelling reasons, and the legislative intent, the Commission has concluded that the second prong of subparagraph (c) does not entirely remove the requirement of fault on the part of the claimant.

For example, the use of the term "unapproved" in the second prong of subparagraph (c) presupposes an employee can request approval for absences and that, depending on the reason for the request, and the information provided by the employee, the employer can either approve or deny the request. While this process is common among many employers, the Commission notes certain employers have adopted "no fault" rules/policies regarding absences. These policies provide that employees are entitled to a certain number of absences, or unscheduled absences, during a specified time period. These policies normally also indicate that the reasons for these absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be discharged. Under such circumstances, the second prong of subparagraph (c) cannot automatically be utilized to decide the issue of whether a claimant has been discharged for misconduct. An employee cannot be faulted for failing to request approval of an absence when the employer has notified its employees that such requests will not be approved. Further, regardless of the employer's policies, an absence taken with proper notice by a claimant eligible for Family and Medical Leave Act ("FMLA") leave from an employer covered by FMLA would be an "approved" absence. See 29 C.F.R. §825.220(c).

The Commission has concluded that if a claimant (1) requests that an absence for a compelling reason such as an illness be approved or excused (unless the employer has clearly indicated that no further absences will be excused, in which case this requirement is waived); (2) provides notice that is reasonable under the circumstances (either prior notice for a foreseeable absence or prompt notice for an unforeseeable one); and (3) provides whatever appropriate verification or other information the employer may reasonably request; then the claimant cannot be considered to have engaged in "misconduct" within the meaning of the second prong of subparagraph (c). While an employer may choose whether or not to grant approval for such absences, a claimant will not be disqualified if such absences are not approved.

Even if the employer is unable to establish misconduct under Section 443.036(30)(c), Florida Statutes, the Commission has held that the employer may be able to do so under Section 443.036(30)(e), Florida Statutes, if the claimant's tardiness/absences amounted to a violation of an employer "rule." To prove the existence of a rule violation under this subparagraph, the employer must present

evidence of its attendance 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 rule's requirements; the rule is not lawful or not reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced. With respect to the issue of fair enforcement, the Commission applies the same rule as to the second prong of subparagraph (c).

In this case, the employer's attendance policy does not appear to be strictly a no-fault policy because it states that:

> Unsatisfactory attendance must be determined by the relevant circumstances of each case. Management discretion should be exercised equitably and fairly considering:
>
> a. Type, frequency and pattern of absences from work
> b. Extenuating circumstances, ie, hospitalization, catastrophic event, bereavement, etc.
> c. Precedent
> d. Flagrant violation.

The policy also states that any time planned by the employee to be away from their regularly scheduled hours of work must be approved in advance by the department manager or designee and must be done in compliance with any departmental policies regarding scheduled time off. It also states that for purposes of taking disciplinary action, an unscheduled and/or unapproved absence from work is considered an occurrence and that absences of two or more consecutive days for the same reason (e.g., illness) will be considered one occurrence. The policy further provides:

> Absences due to illness or injury which qualify under the FMLA will not be counted against an employee's attendance record. Medical documentation within the guidelines of FMLA may be required in these instances. It is the employee's responsibility to assure all documentation is accurate and up to date. If medical documentation, i.e., doctor's note, is presented by the employee and it is unrelated to an approved FMLA, the time away from work will be considered an attendance occurrence.

Although the policy uses the terms approved and unapproved absences and indicates that management can consider extenuating circumstances, the record also states that absences for medical reasons not covered under FMLA will be considered an occurrence for disciplinary purposes. It is not clear from the existing record

whether the employer's policy is, in effect, a no-fault policy and, therefore, the second prong of (c) would not apply, or whether the employer has a policy by which unscheduled absences can be approved. In the absence of specific findings and conclusions regarding these points, the Commission is unable to determine whether the claimant should be disqualified from the receipt of benefits under the second prong of subparagraph (c). On remand, the referee is directed to further develop the record as to what circumstances, if any, would result in "approved" absences under the employer's attendance policy; whether the employer would (and has) granted FMLA leave in circumstances where the employee's illness did not meet the specific requirements of 29 C.F.R. §825.113 (serious health conditions); and what the nature of the claimant's illness(es) was which caused *each* of her absences that resulted in termination under the employer's attendance policy. It is not clear from the record whether the claimant would have qualified for intermittent leave under FMLA and whether her failure to apply for FMLA leave resulted in her being culpable for the resulting unapproved absences. It is also not clear whether the claimant reported to the employer that her absences were due to illness or whether the claimant failed to take action which would otherwise have resulted in her absences being approved by the employer. We note that the Commission has held that an employee's failure to request leave when it might have been granted may result in an absence being properly considered "unapproved" even when due to compelling circumstances. (R.A.A.C. Order No. 13-06859). The decision must contain specific findings of fact regarding the details of the employer's attendance policy and the specific infractions.

The decision of the appeals referee is vacated and the case is remanded for further proceedings for the referee to further develop the record and make specific findings as outlined above. The referee must evaluate the evidence and render a new decision addressing whether the employer met the burden of proving misconduct connected with work pursuant to the second prong of Section 443.036(30)(c), Florida Statutes.

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 10/18/2013, 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: Kimberley Pena
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 prân âmpil tân, paské tân limité pou ou ranpli apèl la.

Docket No. **2013-31827U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3648-0

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.

Findings of Fact: The claimant began working for the listed employer, a healthcare center, on January 24, 2011, as an environmental service aide. The claimant accrued seven absences from October 28, 2011, through November 15, 2012; two occurrences of tardiness on November 8, 2011, and November 28, 2012, and an early departure on March 1, 2013. The claimant's absences and early departures were due to her being ill or not feeling well. The claimant called and reported all of her absences. The claimant received four warnings from April 26, 2012, through March 1, 2013, for the attendance infractions. The claimant called out sick on March 6, 2013. The claimant was discharged on March 7, 2013, for attendance.

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 hearing record reflects that the employer was the initiating party in the separation. Therefore, the claimant is considered to have been discharged. 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, 468 So.2d 413 (Fla. 1986). It was shown that the claimant was discharged for absenteeism. Excessive unauthorized absenteeism presumptively hampers

the operation of a business and is inherently detrimental to an employer. A finding of misconduct is justified when an employer presents substantial competent evidence of an employee's excessive unauthorized absenteeism. Once excessive unauthorized absenteeism is established, the burden is on the employee to rebut the presumption that the absenteeism can be characterized as misconduct. Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986); Mason v. Load King Mfg. Co., 758 So.2d 649 (Fla. 2000). In this instance case, it was not shown that the claimant accrued an excessive amount of absences or attendances issues. Excessive tardiness has been held to constitute misconduct under the statute. Consistent failure either to report to work on time or to remain at work during the times scheduled has the effect of hampering the operation of a business and is inherently detrimental to an employer. Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986); Mason v. Load King Mfg. Co., 758 So.2d 649 (Fla. 2000). It was not shown that the claimant accrued an excessive amount of tardiness infractions as the testimonies of the representative and witness show that the claimant accrued infractions of tardiness in two separate years. The hearing record demonstrates that the claimant's attendance infractions were properly reported to the employer and caused by mitigating circumstances or health reasons. While the employer may have made a valid business decision in discharging the claimant, it has not been shown that the claimant's actions justify a disqualification of benefits for the purposes of Reemployment Assistant compensation. Accordingly, the claimant is not disqualified from the receipt of benefits.

Decision: The determination dated April 8, 2013, is REVERSED. The claimant is not disqualified from the receipt of Reemployment Assistance 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 mailed to the last known address of each interested party on May 10, 2013.

DARCY ETIENNE
Appeals Referee

By: _____
DEMETRIA RIVERS, 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 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, 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 sèvis 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.