

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-04884

vs.

Referee Decision No. 13-36426U

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 and charged the employer's account.

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 issues before the Commission are whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes, and whether the employer's record is eligible for relief of benefit charges in connection with this claim as provided in Section 443.131(3), Florida Statutes.

The referee made the following findings of fact:

The claimant worked as a certified nursing assistant for the employer a nursing home beginning May 18, 2010. The employer is governed by the Florida Agency for Health Care Administration for background screenings which requires all employees to have a level two background check. The employees must pass the level two screening in order to remain employed or actively working for the employer. On or about March 1, 2013, the claimant underwent a background screening. On March 12, 2013, the claimant was informed by [the human resources representative and

administrator] that she did not pass the level two screening. The claimant was not aware of anything in her background or the reason her background was found to be unsatisfactory. Subsequently, the claimant was discharged by the employer March 12, 2013, because she failed to meet the employer's criteria for a satisfactory background check.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work and that the employer's account was chargeable. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision concerning the issue of separation is supported by competent, substantial evidence and is a correct application of the law. Regarding the issue of charging, the Commission concludes the referee's decision is not supported by competent, substantial evidence and is not in accord with the law; accordingly, that portion of the decision is reversed.

The record reflects the employer is a skilled nursing facility. Pursuant to Section 400.512, Florida Statutes, skilled nursing facility personnel are subject to level two background screening by the Agency for Healthcare Administration (AHCA) as required under Chapter 435 and Section 408.809, Florida Statutes. Chapter 435, Florida Statutes, imposes strict screening requirements on nursing facilities and other similar agencies, such as home healthcare agencies, for the purpose of ensuring the safety and care of patients who are often elderly and Chapter 408 outlines the qualifications for licensing of certain Health Care Workers allowed by the state to work in certain facilities listed under Chapter 435. Thus, a skilled nursing home facility or other similar agencies may be required to terminate an employee who has been deemed ineligible by AHCA after conducting a background check. Although the employee who is discharged as the result of a background check may have been discharged for reasons other than misconduct connected with work as that term is defined by the reemployment assistance law, the employer is shielded from unemployment compensation (now reemployment assistance) liability pursuant to Section 408.809(9), Florida Statutes, as follows:

There is no reemployment assistance or other monetary liability on the part of, and no cause of action for damages arising against, an employer that, upon notice of a disqualifying offense listed under chapter 435 or this section, terminates the person against whom the report was issued, whether or not that person has filed for an exemption with the Department of Health or the agency.

The language of Section 435.06(4), Florida Statutes, is similar. The foregoing shield against liability for reemployment assistance benefits applies both to contributing and reimbursing employers. *See* U.A.C. Order No. 10-14657 (March 9, 2011).

The record reflects the employer was advised by AHCA that the claimant was ineligible to work at the facility as a result of her background check. Because the claimant was ineligible to continue working at the facility, the employer discharged the claimant for reasons other than misconduct connected with work. The referee concluded that because the AHCA notice did not contain specific information identifying the conviction or arrest that served as the basis for the disqualification, the evidence was insufficient to apply Sections 408.809(9) and 435.06(4), Florida Statutes. The Commission respectfully disagrees. We believe the Legislative purpose of these statutes will not be defeated merely because AHCA, on its own initiative, has chosen to report disqualifications in a summary fashion without a reference to the specific offense. Concluding otherwise, given the change in AHCA procedures, would effectively carve these provisions out of the Florida Statutes. This we will not do. Pursuant to Section 408.809(9), Florida Statutes, the employer is relieved of liability for any reemployment compensation benefits paid to the claimant notwithstanding the fact that the claimant was discharged under non-disqualifying circumstances and the referee's decision holding otherwise is reversed.

That portion of the decision of the appeals referee holding the claimant not disqualified is affirmed. If otherwise eligible, the claimant is entitled to benefits. That portion of the decision of the appeals referee holding the employer account is subject to charging is reversed. The employer is not subject to charging in connection with benefits paid to the claimant as a result of this separation.

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

8/07/2013 ,

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
Suite 240
215 Market Street
Jacksonville FL 32202-2850

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 asistè ou gratis, nou gendwa relé 1-800-204-2418. Sil vou plè pa pran àmpil tan, paské tan limité pou ou ranpli apèl la.

Docket No. 2013-36426U

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3620-0

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 as a certified nursing assistant for the employer a nursing home beginning May 18, 2010. The employer is governed by the Florida Agency for Health Care Administration for background screenings which requires all employees to have a level two background check. The employees must pass the level two screening in order to remain employed or actively working for the employer. On or about March 1, 2013, the claimant underwent a background screening. On March 12, 2013, the claimant was informed by the human resource representative and administrator that she did not pass the level two screening. The claimant was not aware of anything in her background or the reason her background was found to be unsatisfactory. Subsequently, the claimant was discharged by the employer March 12, 2013, because she failed to meet the employer's criteria for a satisfactory background check.

Conclusions of Law: As of June 27, 2011, the Unemployment Compensation 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 claimant was discharged for failure to satisfy the employer's criteria for a background check. However, the record is devoid of any detailed accounts or specific examples explaining why the claimant's background check was deemed unsatisfactory. The record holds insufficient evidence which is necessary to impose a

disqualification. Thus, it is determined that while the employer may have made a valid business decision in discharging the claimant, the claimant's behavior does not signal any conscious disregard of an employer's interests and was not found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of the claimant.

Consideration was given to the employer's argument that employees' employment is contingent upon a satisfactory level two background check which is dictated by their governing agent and that the employer should be relieved of charges. However, it was shown that the claimant was hired prior to the level two background requirement became effective and worked for the employer for over two years without incident. Further, no evidence was presented to show the employer received any notice specific to a conviction or arrest that would a disqualifying offense committed by the claimant in order to determine the employer's account be relieved of charges. Contrarily, the record demonstrates and by the employer's testimony, they are not given details of the claimant's background record only that the governing body, who was not present at the hearing, informed them the claimant was unemployable. In the absence of competent substantial and pertinent information in this case, the referee cannot disturb the original determination. For this reason the employer's argument is respectfully not accepted.

The appeals referee was presented with conflicting testimony regarding material events of the case and is charged with resolving these conflicts. The Unemployment Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering

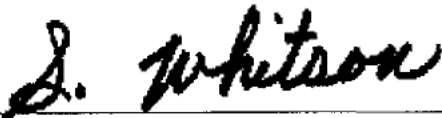
these factors, the appeals referee finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated April 22, 2013, qualifying the claimant and the employer's account record charged, is affirmed based on this separation.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on May 24, 2013.

S. JONES
Appeals Referee

By:



S. WHITSON, 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 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.