

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-05326

vs.

Referee Decision No. 13-38493U

Employer/Appellee

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. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent and substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

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.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings.

The Commission concludes the record adequately supports the referee's material findings, and in particular, the referee's finding that claimant failed to secure adequately her login credentials. Indeed, the record evidence in this case was more than sufficient to support a finding that the claimant herself was the person who accessed, without proper reason or authorization, confidential medical information relating to the wife and daughter of her boyfriend. The facts are clear that her unique login credentials were used, and despite claimant's suggestion that her boyfriend may have been responsible for the breach, medical record and database software such as that used in this case typically requires some familiarity to search effectively. Nonetheless, it was within the province of the referee not to find the claimant herself to be the person who accessed the information.

Regardless of whether the claimant was directly or only indirectly responsible for the unauthorized access, the Commission notes that this case involves a serious breach of regulatory and ethical standards by the claimant. Title II of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), was intended, in

part, to effectuate the electronic storage and exchange of medical information in order to facilitate medical practice, billing and payment for medical services, and appropriate governmental collection of medical data. Because electronic storage also creates greater risk for intentional or inadvertent disclosure of confidential medical data, Congress also required the Department of Health and Human Services to adopt rules protecting the privacy of medical information and establishing permitted uses (the Privacy Rule, codified in 45 C.F.R. §164.500 et seq.), and establishing appropriate security standards to prevent unauthorized access (the Security Rule, codified in 45 C.F.R. §164.300 et seq.).

The claimant acknowledged being aware of these rules and the employer's policies requiring compliance with the same. The unlawful accessing of the medical records that occurred in this case is precisely the type of event these rules were written to prevent.¹ The facts also demonstrate the serious consequences the employer faced due to claimant's actions – being subjected to litigation, and the suspension of access to the insurance database by virtue of claimant's violation of the business associate agreement. For these reasons, the Commission concludes the referee correctly held that claimant's actions were misconduct under subparagraphs (a), (b) and (e). The Commission concludes the record was insufficient to establish that claimant's actions violated a state standard or regulation, as required by subparagraph (d).

¹ We note that a knowing violation of the HIPAA privacy standards to access wrongfully the confidential medical records of another individual is a federal crime. 42 U.S.C. §1320d-6.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits. The employer's account is relieved of charges in connection with this claim. The claimant has been overpaid \$1925 in benefits.

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

8/6/2013 ,

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 rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tòn, paské tòn limité pou ou ranpli apèl la.

Docket No. **2013-38493U**

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3624-0

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.

OVERPAYMENT: Whether the claimant received benefits to which the claimant was not entitled, and if so, whether those benefits are subject to being recovered or recouped by the Department, pursuant to Section 443.151(6); 443.071(7); 443.1115; 443.1117, Florida Statutes and 20 CFR 615.8.

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 for the employer from June 29, 2009, until February 22, 2013, as an office manager. The employer has a policy requiring employees to *maintain the confidentiality of information and patient records, including but not limited to, documents, reports, records, files, correspondence and communications and to abide by the security and privacy guidelines established by HIPPA.* The employer also has a policy prohibiting employees from *breaching*

proprietary information standards and taking or client files off owned or operated premises without permission. The claimant was aware of the policies and signed for a copy of the policies on June 27, 2009. The claimant was also aware of the HIPPA laws and regulations. The claimant had access to the employer's insurance site which contains patients' health information. The employer's policy and the HIPPA laws prohibited the claimant from accessing the site for reasons other than business reasons. The employer's policy also required the claimant to keep her passwords and access codes to the site secure and not to provide them to anyone. The employer received notification of a lawsuit being filed against the employer. The allegations against the employer were that the claimant accessed patient information, using the employer's insurance site, from her home, on June 16, 2011. The patient information the claimant accessed was not for a patient of the employer. The patient was the wife of the claimant's boyfriend. The employer questioned the claimant and the claimant said she did not access the patient's information. The employer asked the claimant how anyone could have accessed the information using her password and access code. The claimant said that her boyfriend could have accessed the information using her computer because the claimant had her password and access code on her desktop at home. The employer then asked the claimant why she had her password and access code at home. The claimant told the employer that she would sometimes take work home with her to work on when she was sick and her password and access code were on her desktop. The employer told the claimant she did not give the claimant permission to take home any work. The employer's access to the site was suspended due to the claimant's illegal access of the site. The employer requested the IP address of the computer where the access took place. The IT professional of the insurance site provided the employer with an IP address, and the coordinates of where the IP address was located. The IP address was not the IP address of the employer or an IP address of the employer's internet provider. The IP address was an address of the claimant's internet provider and the coordinates showed the IP address was from a computer

located in the vicinity of the claimant's residence. The employer discharged the claimant for failing to keep her password and access code secure and for accessing patient information for personal reasons, in violation of company policy and HIPPA laws and regulations.

The claimant received benefits in the amount of \$1,925, for the weeks ended March 9, 2013, through April 20, 2013.

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 law provides that a claimant who was not entitled to benefits received must repay the overpaid benefits to the Department. The law does not permit waiver of recovery of overpayments.

The entry into evidence of a transaction history generated by a personal identification number establishing that a certification or claim for one or more weeks of benefits was made against the benefit account of the individual, together with documentation that payment was paid by a state warrant made to the order of the person or by direct deposit via electronic means, constitutes prima facie evidence that the person claimed and received reemployment assistance benefits from the state.

In cases of discharge, the burden is on the employer to establish the discharge was for misconduct connected with work. With respect to the claimant accessing the patient information from her home, the employer did not meet the burden of proof. The employer did not show the claimant was the person who accessed the information. The claimant testified she did not access the information and the IP address sent to the employer was not her IP address. The employer's evidence did not show the IP was the IP address of the claimant's computer and the address of the IP address was actually the claimant's residence. However, with respect to the claimant failing to secure her password and access code and taking home work without permission, the employer did meet its burden of proof. The claimant's failure to secure her password and her access code was a conscious disregard of the employer's interests and a deliberate disregard of the reasonable standards of behavior which the employer expected of her. The claimant was aware she was required to keep her password and access code secure in accordance with the employer's policy and the HIPAA laws. The claimant did not do so. The claimant's failure to secure

her password and her access code was also careless and negligent to a degree that manifested culpability and wrongful intent and showed an intentional and substantial disregard of the employer's interest. The claimant was reckless in failing to secure her password and access code. The claimant's failure to secure her password and her access code was a wilful and deliberate violation of a regulation of the State of Florida and Federal laws that caused the employer to be sanctioned; the employer's access to the insurance site was revoked. Further, the claimant failed to show she was not aware of the employer's rule regarding securing passwords and access codes; the claimant testified she was aware of the rule. The claimant also failed to show the rule was unlawful or unreasonably related to the job environment and performance or that the rule was unfairly or inconsistently enforced. The claimant's taking home work without permission was also a conscious disregard of the employer's interests and a deliberate disregard of the reasonable standards of behavior which the employer expected of her. The claimant did not ask permission and knew that failure to obtain permission was a violation of the employer's policy. The claimant's taking home work without permission was also careless and negligent to a degree that manifested culpability and wrongful intent and showed an intentional and substantial disregard of the employer's interest. Again, the claimant was reckless in the performance of her job. Again, the claimant failed to show she was not aware of the employer's rule regarding taking work home without permission; the claimant testified she was aware of the rule. The claimant also failed to show the rule was unlawful or unreasonably related to the job environment and performance or that the rule was unfairly or inconsistently enforced. It is concluded the employer discharged the claimant for misconduct connected with work. Therefore, the claimant has properly been held disqualified.

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 employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

The claimant contended she did not take her password and access code home; she had her personal passwords at home. However, when the employer asked the claimant how anyone could have accessed the site from her home, she told the employer her passwords were on her desktop. The claimant also contended other employees had access to her password and access code; both were in a folder, in a drawer, in her office. However, the claimant did not provide any evidence to prove her allegation. Also, the employer did not find the claimant's password or access code when the employer cleaned out the claimant's office after the claimant's termination. The employer had to reset the entire system. Based on the testimony presented, the employer's testimony was more credible. Therefore, the claimant's contentions are respectfully rejected.

Decision: The determination dated April 29, 2013, disqualifying the claimant, determining she was overpaid, and relieving the employer's account is affirmed.

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 31, 2013.

D. JONES
Appeals Referee

By: _____
K. M. MARTIN, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the 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 definitiv 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.

Any questions related to benefits or claim certifications should be referred to the Claims Information Center at 1-800-204-2418. An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.
