STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-05435

vs.

Referee Decision No. 13-39119U

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.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant was hired as an unloader by [the employer] on February 3, 2011. The claimant was aware the employer was a [drug-free] workplace and he may be selected for random drug tests. On March 25, 2013, the claimant was required to submit to a random drug test. The claimant remained at the facility for over five hours and was unable to produce a urine specimen for the test. The document provided to the employer regarding the results stated the claimant had a shy bladder and was unable to produce a specimen. On March 26, 2013, the human resource manager contacted the claimant and afforded him the opportunity to provide documentation to support any medical condition which would have caused the claimant to be unable to provide a

> specimen. The claimant faxed over a document from a walk-in clinic but the document had no explanation for the claimant's failure to produce the specimen. The human resource manager again contacted the claimant and obtained the fax number for the claimant location. He faxed a copy of a document for the doctor to sign and select the reason for the claimant's failure to provide a specimen. The document was faxed back with a doctor's signature on the document along with a selection of the claimant having a medical condition which may have resulted in the claimant being unable to produce a urine specimen. However, the human resource manager noticed the signatures on the documents were not the same. He contacted the facility and was told the claimant had not been to their location. On March 28, 2013, the human resource manager told the claimant he was discharged for failure to submit to a random drug test by failing to provide a specimen for the drug test.

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 referee's decision is not supported by competent and substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

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's separation results from an employer's decision to discharge the worker, the burden of proving misconduct rests with the employer. *See Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). Section 90.604, Florida Statutes, sets out the general requirement that a witness must have personal knowledge regarding the subject matter of his or her testimony. In this case, the employer's witness testified he discharged the claimant for failing to produce a urine specimen during a random drug test pursuant to company policy. The claimant failed to appear at the hearing. The only evidence supporting the shy bladder defense was documentation submitted by the employer, identifying the alleged *reason* for the claimant's failure to produce a sample, which was inadmissible hearsay.

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 under the residual exception if (1) the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and (2) 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. In this case, only three documents in the record discuss claimant's failure to provide a sample. First, the collection form, apparently filled out by a technician at the testing facility, contains a hearsay-within-hearsay statement by the claimant that he was unable to give a sample. The second document, a letter from the testing laboratory's medical review officer requesting a medical opinion substantiating claimant's "shy bladder" claim, merely recapitulated the claimant's hearsay-within-hearsay statement at the facility. The third and crucial document, a form letter ostensibly completed by a doctor claimant saw indicating that claimant had a medical reason

for his failure to give a sample, was questioned by the employer. This document was apparently sent by some third party to the laboratory, and from them to the employer. No one present at the hearing could vouch for the bona fide nature of the signature on the document; to the contrary, the employer *challenged* its validity. The referee held, incorrectly, that the employer's testimony that the medical provider denied claimant had visited them was hearsay; to the contrary, it was not hearsay to the extent it was offered for the limited purpose of questioning the validity of the execution of the form document, rather than for the purpose of proving claimant had not seen that physician.

Prior to being accepted as evidence in a hearing, any documentary or other tangible item must be authenticated. As stated in Section 90.901, Florida Statutes, authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is not onerous – it merely requires that someone with personal knowledge testify as to what the document is and how the document was prepared, received, or was retained as a record, etc. Authentication cannot be performed by a person who contests the validity of the document.

However, even if the testimony of the employer's witness that the document was received from the testing laboratory was sufficient to authenticate it, it was not sufficient to establish its admissibility. The completed form letter does not fall within any of the hearsay exceptions in the Florida Evidence Code. Furthermore, because its validity is in doubt, it is inadequate to be admitted under the residual exception as it lacks trustworthiness.

For these reasons, the completed form was not admissible to show the claimant had a legitimate medical reason not to give a sample. Because the laboratory's testing protocol required medical verification and no admissible verification was provided, the claimant's "shy bladder" justification was unsubstantiated. Without proper medical verification to establish that the claimant was unable to provide a urine sample, the record established only that he violated the employer's policy requiring employees to submit to random drug testing by failing, without good cause, to provide a sample.

Subparagraph (e) of the statutory definition of misconduct as set forth above provides that a violation of an employer's rule, by law, is misconduct unless the claimant can demonstrate at least one of three enumerated exceptions applies. When, as here, an employer establishes *prima facie* evidence of misconduct, the burden shifts to the employee to come forward with proof of the propriety of that

conduct. *Alterman Transport Lines, Inc. v. Unemployment Appeals Comm.*, 410 So. 2d 568 (Fla. 1st DCA 1982). *See also Sheriff of Monroe County v. Unemployment Appeals Comm.*, 490 So. 2d 961 (Fla. 3d DCA 1986). In this case, the claimant did not appear at the hearing and was, therefore, unable to justify his actions by demonstrating the existence of any of the exceptions to Section 443.036(30)(e), Florida Statutes. Additionally, he did not rebut the employer's *prima facie* case of misconduct under subparagraph (a). Under the circumstances, the referee's conclusion that the claimant was not guilty of misconduct must be reversed. The claimant is disqualified from receipt of benefits.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending March 30, 2013, the five succeeding weeks, and until he becomes reemployed and earns $4,216. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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
10/7/2013 ,
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: Kady Thomas
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 prán àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-39119U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: 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 was hired as an unloader by on February 3, 2011. The claimant was aware the employer was a drug free workplace and he may be selected for random drug tests. On March 25, 2013, the claimant was required to submit to a random drug test. The claimant remained at the facility for over five hours and was unable to produce a urine specimen for the test. The document provided to the employer regarding the results stated the claimant had a shy bladder and was unable to produce a specimen. On March 26, 2013, the human resource manager contacted the claimant and afforded him the opportunity to provide documentation to support any medical condition which would have caused the claimant to be unable to provide a specimen. The claimant faxed over a document from a walk-in clinic but the document had no explanation for the claimant's failure to produce the specimen. The human

resource manager again contacted the claimant and obtained the fax number for the claimant location. He faxed a copy of a document for the doctor to sign and select the reason for the claimant's failure to provide a specimen. The document was faxed back with a doctor's signature on the document along with a selection of the claimant having a medical condition which may have resulted in the claimant being unable to produce a urine specimen. However, the human resource manager noticed the signatures on the documents were not the same. He contacted the facility and was told the claimant had not been to their location. On March 28, 2013, the human resource manager told the claimant he was discharged for failure to submit to a random drug test by failing to provide a specimen for the drug test.

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 the claimant was 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, 483 So.2d 413 (Fla. 1986). The evidence presented shows the claimant had tried to supply a specimen within the available time, but was physically unable to do so. The employer contends the claimant had not been to the facility he claimed he was at seeking a medical reason of his inability to provide a urine specimen and that the signatures on the forms were different were different. This portion of the employer's testimony is hearsay. 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 s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
2. 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.

Since the employer failed to produce a witness to establish the claimant had not visited the facility to obtain a medical verification of a medical condition which would cause the claimant's inability to produce a urine specimen, the employer's testimony in this regards is not competent. The employer's decision to discharge the claimant may have been appropriate under the circumstances, since employees wishing to avoid a positive drug test could simply use the excuse that they were unable to urinate. The referee sympathizes with the employer's dilemma. However, it has not been shown that the claimant's inability to urinate during a five-hour period constitutes misconduct connected with the work of such degree as to warrant disqualification from the receipt of reemployment benefits. Misconduct was not established; therefore, the claimant is not disqualified from the receipt of benefits.

Decision: The determination dated April 22, 2013, 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.

CHARLES GUNTER
Appeals Referee

By: Demetria Rivers
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 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.