STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-05527

vs.

Referee Decision No. 13-46668U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision holding the claimant 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 voluntarily left work without good cause attributable to the employing unit or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant worked for a hospital as a registered nurse from February 13, 2003, through April 24, 2013. The claimant was given information from a labor and delivery nurse about a mother who was not aware that she was pregnant and was possibly thinking about placing her baby for adoption. The mother had just had a cesarean, was on medication and was not in a state to make sound decisions. The claimant's daughter and [son-in-law] were looking to adopt a baby and had adopted a baby before. The claimant was informed by the labor and delivery nurse that the mother allegedly wanted to speak with her regarding the adoption process. The claimant, claimant's daughter and [son-in-law]

> arrived to the labor and delivery unit to visit the baby and the mother while the claimant was off of her shift. The claimant spoke with the mother about the adoption process and referred her to different adoption agencies including the adoption agency that her daughter and [son-in-law] use. The mother was spoken to by the director of women and children services and the mother informed her that she is not sure of whether she requested the claimant to come and visit her or not due to being on medication. The claimant was discharged due to violating the [HIPAA] Policy.

Based on these findings, the referee held the claimant was discharged for 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 is not in accord with the law; accordingly, it is reversed.

At the hearing before the appeals referee, the employer's witnesses primarily provided speculative and hearsay testimony regarding the claimant's conversation with the patient at issue. For example, the director of women's and children's services provided pure hearsay testimony regarding her conversation with the birth mother the day after the mother met with the claimant. Additionally, the record contains insufficient competent evidence to support the referee's finding that the patient had "just" undergone surgery and was on medication that rendered her unable to make sound decisions; consequently, those findings are rejected. It was not clear whether the birth mother had had general or local anesthesia for the procedure. The director provided no indication that she had reviewed the patient's charts. While she testified that the claimant should not have spoken with the birth mother so soon after the delivery, her testimony to that effect – "it's a nursing protocol that anybody coming off medication, there's a how-many-hour window" – was hardly definitive. By contrast, the claimant's testimony provided no indication that the birth mother was unable to carry on an intelligent conversation. The Commission also notes that the birth mother's labor and delivery nurse must have considered the patient competent to talk to the claimant or else she would not have called for her.

The claimant provided unrebutted testimony that she met with the patient in question because the patient informed her labor and delivery nurse that she would like to speak with the claimant. The claimant also provided unrebutted testimony that, upon arriving at the hospital, she confirmed with the patient that the patient wanted to speak with her. The claimant testified her only intention in speaking with the patient was to share her family's positive adoption experience, provide information regarding the adoption process, and help calm the patient. She provided

further unrebutted testimony that the patient then requested to speak with her daughter and son-in-law. The claimant also testified that she was aware of other circumstances in which nurses who had experienced a loss came in to talk with grieving patients to provide comfort. The referee gave no account to these undisputed facts, apparently considering them irrelevant. To the contrary, they are relevant to the issues of misconduct in this case.

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.
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> (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.
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> (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:
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> 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.

The referee's conclusions of law state, in pertinent part:

> The record reflects that the claimant was discharged due to violating the HIPPA [sic] Policy. The evidence shows that the claimant was given confidential information by another nurse regarding a mother who was possibly considering placing her newborn baby for adoption. The evidence also shows that [she] used the information to her advantage and family's advantage by taking her daughter and son-in-law to the hospital to visit the mother and speak with her. It was shown that the claimant should not have visited the mother in the hospital especially since the mother had no knowledge of being pregnant and had just undergone major surgery. Although the claimant did not personally look in the mother's file or [retrieve] the mother's information, the claimant should not have visited the mother whether the mother requested her or not. The mother would have been seen by an employee who specializes in this specific situation. It was shown that the claimant knew or should have known that her actions were unacceptable. Furthermore, the claimant demonstrated [subparagraphs (a) and (e)] and her actions were misconduct under the law. Therefore, the claimant is disqualified from receiving reemployment assistance.

The record reflects the claimant was discharged for purportedly violating the employer's policies regarding patients' rights and information and, also, for allegedly violating either the employer's policies implementing the Privacy or Security Rules of Title II of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), or the act or regulations themselves.[1] The record does not support the referee's conclusion that the claimant's actions amounted to misconduct under subparagraphs (a) and/or (e) of Section 443.036(30), Florida Statutes (2012). With respect to subparagraph (e), it is axiomatic that, in establishing the violation of a policy, the employer should provide a copy of the policy and enter it into the record at the hearing. This is particularly true where the policies are complex, which they would necessarily be in this instance if they were intended to comply with relevant laws. However, the employer did not submit a copy of the applicable policies for the hearing. Although the employer's witnesses testified that, because the claimant was a 10-year employee, she should have been aware of the policies, the employer did not present competent evidence to establish the claimant was, in fact, informed of the

[1] The employer's witness seemed to refer to the employer's HIPAA policies on some occasions and to the statutory and regulatory scheme on others. For purposes of this order, we will review whether the employer provided sufficient evidence as to either a violation of policy, or a violation of the relevant statutory or regulatory provisions.

specific provisions of the policies she purportedly violated. Indeed, the claimant's testimony reflects she did not believe her actions violated the employer's policies and/or HIPAA. Because the employer failed to submit the policies at issue in this case, and the claimant did not admit to their terms or a violation of them, the Commission finds the employer presented insufficient evidence to establish the terms of the policies, much less that the claimant violated them. The record, therefore, does not establish the claimant committed misconduct connected with work within the meaning of Section 443.036(30)(e), Florida Statutes.

With regard to subparagraph (a), the record does not establish that the claimant consciously disregarded the employer's interests or deliberately violated or disregarded the reasonable standards of behavior which the employer expects of its employees. Under the undisputed testimony the claimant gave, there is no basis to find a statutory or regulatory violation of the HIPAA privacy standard, as opposed to the employer's policy.[2] Furthermore, although the employer may have shown that the claimant had an inherent conflict of interest in providing this information even at the patient's request, the circumstances in this case demonstrate that, at most, the claimant exercised poor judgment. The courts have held on numerous occasions that an isolated case of poor judgment by a long-time employee will not typically establish misconduct. *Bagenstos v. Unemployment Appeals Commission*, 927 So. 2d 153, 157 (Fla. 4th DCA 2006); *Forte v. Unemployment Appeals Commission*, 899 So. 2d 1159, 1160 (Fla. 3d DCA 2005); *Smith v. Unemployment Appeals Commission*,

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[2] The Commission notes that "HIPAA" has become almost a mantra in the medical community. When the term is used by laypeople, and most medical staff, it is typically meant to refer to policies or practices medical providers and others have adopted to implement the Privacy and Security Rules, 45 C.F.R. §164.300 *et seq*. and §164.500 *et seq*., despite the fact that the privacy rules are merely one component of one section (§264) of a law with five substantive titles. Regardless, privacy policies typically incorporate provisions designed to comply with many federal and state laws as well as to implement best practices in the profession. Thus, even if the claimant had violated the employer's HIPAA policy, there is no guarantee that she violated the privacy regulations themselves. Given the facts that the claimant testified to, which were unrebutted, she had every reason to believe she was in compliance with the HIPAA privacy rules, because she had the patient's consent. *See* 45 C.F.R. §164.502(a)(1); §164.506(b)(1) & (c)(1). The employer's argument regarding a violation appears to be that she talked to the patient while she knew or should have known the patient was still under the effects of anesthesia and thus could not have given proper consent. As noted above, there is insufficient evidence to establish that this occurred. It is also unclear whether the information she received *about* the patient, or *from* the patient, constituted "individually identifiable health information" or "protected health information," which are required for the HIPAA privacy rules to be applicable. *See* 42 U.S.C. §§1320(6) & 1320d-6(a)(2)-(3); 45 C.F.R. §164.500(a).

891 So. 2d 650, 652 (Fla. 2d DCA 2005); *McKnight v. Unemployment Appeals Commission*, 713 So. 3d 1080, 1081 (Fla. 1st DCA 1998). The Commission concludes that, as a matter of law, the admissible evidence, even viewed in the light most favorable to the employer, does not establish misconduct under subparagraphs (a) or (b).

The employer has not carried its burden of demonstrating the claimant's discharge was for misconduct connected with work. Accordingly, the claimant is not disqualified from the receipt of benefits.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to 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
11/22/2013 ,
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 pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-46668U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3642-0

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 worked for a hospital as a registered nurse from February 13, 2003, through April 24, 2013. The claimant was given information from a labor and delivery nurse about a mother who was not aware that she was pregnant and was possibly thinking about placing her baby for adoption. The mother had just had a cesarean, was on medication and was not in a state to make sound decisions. The claimant's daughter and son in law were looking to adopt a baby and had adopted a baby before. The claimant was informed by the labor and delivery nurse that the mother allegedly wanted to speak with her regarding the adoption process. The claimant, claimant's daughter and son in law arrived to the labor and delivery unit to visit the baby and the mother while the claimant was off of her shift. The claimant spoke with the mother about the adoption process and referred her to different adoption agencies including

the adoption agency that her daughter and son in law use. The mother was spoken to by the director of women and children services and the mother informed her that she is not sure of whether she requested the claimant to come and visit her or not due to being on medication. The claimant was discharged due to violating the HIPPA Policy.

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

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

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

The record reflects that the claimant was discharged due to violating the HIPPA Policy. The evidence shows that the claimant was given confidential information by another nurse regarding a mother who was possibly considering placing her new born baby for adoption. The evidence also shows that the used the information to her advantage and family's advantage by taking her daughter and son in law to the hospital to visit the mother and speak with her. It was shown that the claimant should not have visited the mother in the hospital especially since the mother had no knowledge of being pregnant and had just undergone major surgery. Although the claimant did not personally look in the mother's file or retrieved the mother's information, the claimant should not have visited the mother whether the mother requested her or not. The mother would have been seen by an employee who specializes in this specific situation. It was shown that the claimant knew or should have known that her actions were unacceptable. Furthermore, the claimant demonstrated subsections (A & E) and her actions were misconduct under the law. Therefore, the claimant is disqualified from receiving reemployment assistance.

Decision: The determination dated May 3, 2013, is REVERSED. The claimant is disqualified from receiving reemployment assistance from the week ending April 24, 2013, plus five weeks and until she earns $4,675.

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 June 20, 2013.

WHITNEY GOLDEN-SMITH
Appeals Referee

By: LAUREN FREEMAN, 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.