

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-05845

vs.

Referee Decision No. 13-39122U

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.

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

The referee's findings of fact state as follows:

The claimant was employed as an Inpatient Review Nurse for the instant employer from June 5, 2012, until March 1, 2013. At her time of hire, the claimant was told she would be able to work from home if she met the productivity level required by the employer within six months. The claimant would not have accepted the position otherwise, based on the distance from her home to work. The claimant met the productivity level required by the employer, but was told she could not work from home. The claimant quit.

Based on these findings, the referee held the claimant not disqualified from receipt of benefits because she quit with good cause attributable to the employer. Upon review of the record and the arguments on appeal, the Commission concludes the record was not sufficiently developed; consequently, the case must be remanded.

Section 443.151(4)(b)5.c., Florida Statutes, provides that 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 in a proceeding before an appeals referee if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee 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.

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

The hearing record shows the claimant quit her employment when the employer refused to allow her to work from home. The hearing record further shows the employer had advised the claimant she would be able to work from home within six months if she met the productivity level required. The claimant met the productivity level but was not allowed to work from home. The employer witness provided hearsay testimony to suggest otherwise. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions or it meets the statutory requirements set forth in s. 443.151(4)(b)5, Florida Statutes. The record is clear that the employer withdrew the offer to work from home causing the claimant financial hardship based on her commute to work. The employer's action was substantial and material enough to cause the average employee to quit their employment. Thus, the claimant's quitting was with good cause and attributable to the employer.

The referee determined that the employer's witness provided hearsay *testimony* regarding whether the claimant was informed at the time of hire she would be able to work from home after six months. Upon review of the actual testimony of the witness, it appears that the Human Resources Manager was testifying not as to information that she had been told by someone else, but as to the standard business practice of the employer. She testified that at the time of hire,

the employer would never have promised an inpatient nurse that she could work from home because the employer's contract requirements with the state did not allow inpatient nurses to work from home. She further testified that although the Agency later approved a staffing model allowing inpatient nurses to work from home on a trial period of six months, to be reevaluated to determine its effectiveness and impact on the program operations as a whole before adopting the model on a permanent basis, this program was not in effect at the time of the claimant's hire and ceased to exist several months prior to the claimant's resignation. Moreover, even if the claimant had met the requirements of the pilot program, the plan was not designed to allow nurses to work completely from home, and was only a six-month trial program that was never adopted.

Such evidence is not hearsay, but evidence of the routine practice of the employer's business. As such, it is admissible under Section 90.406, Florida Statutes, to create an inference that the party acted in accordance with that practice on any particular occasion. Although the witness did not testify specifically that this was the practice of the employer, the Commission does not expect that lay witnesses will know how to establish the specific foundation for admission of evidence in every situation. If a party offers testimony suggesting the normal practice of the organization is to act in a particular way in a particular situation, the referee should ask sufficient foundational questions to determine whether or not the organization has established a routine practice or procedure, and the specifics of that practice or procedure.

The testimony regarding the employer's routine business practices may not directly conflict with the testimony of the claimant that she was told by the employer's representatives during her interview that she may be able to work from home in 6 months. However, the employer's evidence could have affected the referee's assessment of the credibility of the claimant and the weight he gave to the claimant's testimony. The inference that can be drawn from the testimony regarding the employer's business practices regarding inpatient nursing working from home, may impact the referee's consideration of the claimant's veracity. In *Medithek Therapy, Inc. v. Vat-Tech, Inc.*, 658 So. 2d 644, 646 (Fla. 2d DCA 1995), the court points out that testimony that is not rebutted or contradicted in any manner,

. . . cannot be disregarded or rejected by the trial court unless it was illegal, inherently improbable or unreasonable, contrary to natural law, opposed to common knowledge or contradictory within itself. *Florida East Coast Ry. v. Michini*, 139 So. 2d 452

(Fla. 2d DCA 1962; accord *Roach v. CSX Transp., Inc.*, 598 So. 2d 246 (Fla. 1st DCA 1992); *Fletcher v. Metro Dade Police Dep't Law Enforcement Trust Fund*, 593 So. 2d 266 (Fla. 3d DCA 1992); *Duncanson v. Service First, Inc.* 157 So. 2d 696 (Fla. 3d DCA 1963).

Here, the inference that can be drawn from the testimony regarding the employer's business practices may have an impact on whether the referee finds the claimant's testimony "inherently improbable or unreasonable."

On remand, the referee must develop the record further and issue a new decision that clearly evaluates the employer's evidence and states what impact, if any, the evidence makes on the weight to be given to the claimant's testimony.

In order to address the issue raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to develop the record in greater detail and render a decision that contains accurate and specific findings of fact concerning the events that led to the claimant's separation from employment and a proper analysis of those facts. Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

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

11/5/2013,

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: Brandy Follmar

Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 350WD 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 asistè ou gratis, nou gen dwa rélé 1-800-204-2418. Sil vou plè pa pran àmpil tòn, paské tòn limité pou ou ranpli apèl la.

Docket No. **2013-39122U**

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

CLAIMANT/Appellant

EMPLOYER/Appellee

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.

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 was employed as an Inpatient Review Nurse for the instant employer from June 5, 2012, until March 1, 2013. At her time of hire the claimant was told she would be able to work from home if she met the productivity level required by the employer within six months. The claimant would not have accepted the position otherwise, based on the distance from her home to work. The claimant met the productivity level required by the employer, but was told she could not work from home. The claimant quit.

Conclusions of Law: The unemployment compensation statute provides for disqualification of a claimant who voluntarily left work without good

cause attributable to the employing unit. The cause must be one which would reasonably impel an average able-bodied qualified worker to leave employment. The applicable standards are the standards of reasonableness as applied to the average man or woman, and not to the supersensitive. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827, 829 (Fla. 4th DCA 1973).

The hearing record shows the claimant quit her employment when the employer refused to allow her to work from home. The hearing record further shows the employer had advised the claimant she would be able to work from home within six months if she met the productivity level required. The claimant met the productivity level but was not allowed to work from home. The employer witness provided hearsay testimony to suggest otherwise. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions or it meets the statutory requirements set forth in s. 443.151(4)(b)5, Florida Statutes. The record is clear that the employer withdrew the offer to work from home causing the claimant financial hardship based on her commute to work. The employer's action was substantial and material enough to cause the average employee to quit their employment. Thus, the claimant's quitting was with good cause and attributable to the employer.

Decision: The determination dated April 29, 2013, is REVERSED. If all other requirements are met, the claimant is qualified to receive benefits. The employment record of the employer shall be charged in connection with this claim.

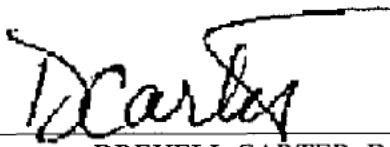
If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination,

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 12, 2013.

JAMES JOYNER
Appeals Referee

By: _____



DREXELL CARTER, 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 laman, 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.
