STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-05983

vs.

Referee Decision No. 13-49283U

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 consolidated decision wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

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 began employment with the employer on June 17, 2008. She worked full time as a dietary aide. This employer has a code of conduct that prohibits swearing or use of abusive language. Disorderly conduct during work hours or on company property is also prohibited. The claimant was issued a handbook at the time of hire. She was aware of these rules. During the latter part of her employment, a woman came to the job site while the claimant

> was outside on break. The woman knew the claimant's son's father. She confronted the claimant about the claimant's son's father. The claimant considered it harassment and reported the incident to the lead cook. The claimant did not go to human resources or to the director about the incident.
>
> On March 26, 2013, the claimant was working in the dining room. The same woman came into the dining room and confronted the claimant. She was loud and called the claimant names. The claimant walked away. The woman continued carrying on in the dining room. She called the claimant a "bitch." The claimant walked over and called the woman a "bitch" and told her to leave or she would call security. The director of food and nutrition heard the commotion in the hall outside the dining room. There were other employees and customers in the dining room at that time. The director walked in behind the line and called the claimant's name. The director told the claimant to step away three times. After the third time, the claimant walked away. The claimant was discharged March 27, 2013, due to improper conduct in violation of company rules.

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, 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.

The claimant was discharged for violation of a known rule or policy of the employer as a result of her conduct during a confrontation with a visitor to the worksite, a hospital cafeteria. In light of the rule violation, the referee held the claimant disqualified under subparagraph (e) of the above statute. The referee, however, did not give proper consideration to whether the employer's rule was, in context, fairly enforced against the claimant.

The record reflects the claimant's conduct during the confrontation was in reaction to uninvited provocation. According to the claimant's testimony, the other individual is a woman who had been harassing the claimant outside of work for approximately three years and the final incident was the second time in two weeks that the individual came to the worksite to harass her. The claimant's testimony reflects the worksite confrontation occurred when the individual approached her in the cafeteria while she was performing her job duties, "got in [the claimant's] face," and said to the claimant "Hey, you ugly 'blank.'" (The claimant was not asked to specify the word or phrase for which she substituted the word "blank" in her testimony.) She testified, however, "When she cursed me, I cursed her back," and that she called the woman "bitch" after "she called me one first." The employer's witness, who heard the commotion from the hallway and entered the cafeteria to observe part of the confrontation, testified the other woman was "using very abusive language" and that the claimant "just lost it." The record, therefore, reflects that the claimant was reacting to uninvited provocation.

Case law and prior orders of the Commission consistently hold that reaction to provocation does not constitute disqualifying misconduct under subparagraphs (a) or (b) of the above cited statute. In *Davis v. Unemployment Appeals Commission*, 472 So. 2d 800 (Fla. 3d DCA 1985), the claimant, a grocery store cashier, was found to have been discharged for reasons other than misconduct after an altercation with a co-worker. In that case, the co-worker precipitated the incident by physically assaulting and verbally abusing the claimant without just cause. The court found the claimant reacted "in hot blood" by lunging at the co-worker and issuing a conditional threat of violence. The court reasoned the claimant's bad judgment and inability to control herself may have justified her dismissal, but her actions were insufficient to deny benefits. *See also Bagenstos v. Unemployment Appeals Commission*, 927 So. 2d 153 (Fla. 4th DCA 2006) (citing other cases and applying the provocation analysis to actions of a customer); U.A.C. Order No. 12-05219 (June 29, 2012) (holding it was not misconduct for claimant to engage in a heated discussion and, after being pushed, to push back because the claimant was provoked and acted in self-defense); and U.A.C. Order No. 12-00755 (March 28, 2012) (holding there was no violation of the employer's rule prohibiting fighting on company property because the fight occurred off the property but noting that, even if it had occurred on the property, the rule would not be fairly enforced because the claimant fought only in self-defense after he was attacked by a co-worker).

Because this precedent arose under the pre-2011 definition of misconduct and relates to subparagraphs (a) and (b), the question remains whether provocation should be considered in rule violations under subparagraph (e). The Commission concludes that, in appropriate cases, provocation can be considered in determining whether a rule was fairly enforced in a particular case. We further conclude that in light of the uninvited provocation here, the claimant should not be disqualified from receiving benefits. Under these facts, the employer's policy prohibiting swearing or use of other abusive language and disorderly conduct in the workplace was not fairly enforced against the claimant. To be clear, the Commission is not holding that the employer acted unfairly by *discharging* the claimant, which it may have felt was necessary in this situation. Instead, we conclude that *disqualification* from receipt of benefits constitutes unfair enforcement of the employer's policy under subparagraph (e) of the above-cited statute. Under the facts of this case, based on the unfair enforcement affirmative defense, the claimant should not be disqualified from receipt of benefits for her conduct in reacting to uninvited provocation in the heat of the moment.

We further note the record would not support a conclusion that the claimant was insubordinate during the confrontation. Although the record reflects the employer's witness called the claimant's name and asked her to step away from the confrontation three times before the claimant actually did so, the record is devoid of

any evidence that the claimant heard the employer's witness ask her to step away. The employer's witness provided no testimony indicating that the claimant acknowledged hearing the instruction, or reacted in any way to the witness calling her name. To the contrary, she testified that she thought the claimant had gotten so involved in the confrontation that she just "lost it." The claimant's testimony reflects she was not even aware that the employer's witness was present during the incident. In the absence of any evidence establishing that the claimant heard and ignored the instruction to step away from the confrontation, the record is not sufficient to establish a subparagraph (a) disqualification for insubordination.

Finally, we note that although the record includes a copy of a prior written warning issued in 2010 for "swearing or use of other abusive language," the warning reflects on its face the claimant's written comment, "I didn't say this." The employer's sole witness did not issue the warning and provided no testimony regarding the underlying incident. Accordingly, the record is devoid of any competent evidence to establish a pattern of inappropriate workplace conduct by the claimant.

Although the referee issued a consolidated decision that addresses both the claimant's separation from employment and employer chargeability, the issues were docketed separately at the initial appeals level. Accordingly, the Commission addresses only the separation issue in this case and leaves the referee's charging decision in the separately docketed employer case, Referee Decision No. 13-48294E, undisturbed.

On appeal to the Commission, the representative for the claimant has neither set forth arguments to support the request for review nor requested approval of any representation fees charged to the claimant. Under the circumstances, the claimant's representative is not entitled to collect a fee from the claimant for representation of the claimant before the Commission.

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 12/02/2013, 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 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 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. **2013-49283U & 2013-49284E** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3631-0

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 began employment with the employer on June 17, 2008. She worked full time as a dietary aide. This employer has a code of conduct that prohibits swearing or use of abusive language. Disorderly conduct during work hours or on company property is also

prohibited. The claimant was issued a handbook at the time of hire. She was aware of these rules. During the latter part of her employment, a woman came to the job site while the claimant was outside on break. The woman knew the claimant's son's father. She confronted the claimant about the claimant's son's father. The claimant considered it harassment and reported the incident to the lead cook. The claimant did not go to human resources or to the director about the incident.

On March 26, 2013, the claimant was working in the dining room. The same woman came into the dining room and confronted the claimant. She was loud and called the claimant names. The claimant walked away. The woman continued carrying on in the dining room. She called the claimant a "bitch." The claimant walked over and called the woman a "bitch" and told her to leave or she would call security. The director of food and nutrition heard the commotion in the hall outside the dining room. There were other employees and customers in the dining room at that time. The director walked in behind the line and called the claimant's name. The director told the claimant to step away three times. After the third time, the claimant walked away. The claimant was discharged March 27, 2013, due to improper conduct in violation of company rules.

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 benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The record in this case shows that the claimant was discharged for improper conduct and violating company policies. The employer has known company rules that prohibit disorderly conduct and also prohibit use of profanity and abusive language in the workplace. The claimant was aware of these rules. However, the claimant engaged in a verbal altercation with a woman in the cafeteria. The claimant used profanity and acted inappropriately. The claimant violated the employer's rules and was

discharged for misconduct connected with the work as defined by the statutes. The claimant is disqualified and the employer is noncharged in connection with this claim

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

Decision: The determination dated May 16, 2013, is REVERSED. The claimant is disqualified from March 24, 2013 and until earning $2,839. The employer is noncharged 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 25, 2013.

TERRY SHINE
Appeals Referee

By: _____
MONTY E. CROCKETT, 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.