

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-06035

vs.

Referee Decision No. 13-47134U

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 worked for the instant employer a temporary help firm, as a temporary employee from August 4, 2012, through January 17, 2013. It was reported that the claimant was advised at the time of hire of his requirement to contact the employer upon the conclusion of each job assignment and that failure to do so could result in a denial of his benefits. It was reported by the employer that the claimant did not contact the employer for reassignment upon the conclusion of his last assignment.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct. 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 443.101(10)(b), Florida Statutes, provides, in pertinent part:

A temporary or leased employee is deemed to have voluntarily quit employment and is disqualified for benefits . . . if, upon conclusion of his or her latest assignment, the temporary or leased employee, without good cause, failed to contact the temporary help or employee-leasing firm for reassignment, if the employer advised the temporary or leased employee at the time of hire and that the leased employee is notified also at the time of separation that he or she must report for reassignment upon conclusion of each assignment, regardless of the duration of the assignment, and that reemployment assistance benefits may be denied for failure to report.

The manager testified that the employer, a temporary staffing agency, reportedly provided the claimant upon hire with a "Welcome to Employment Form" which notified him of his duty to report back to the employer for reassignment at the conclusion of each assignment in accordance with Section 443.101(10)(b), Florida Statutes. The form was entered in evidence but was discounted by the appeals referee as hearsay. Before discounting evidence as hearsay, the referee must first consider whether one of the exceptions of the Florida Evidence Code applies. The Commission notes that, pursuant to Section 90.803(6), Florida Statutes, certain employer documents that are properly authenticated may constitute business records and thus be admissible as an exception to the hearsay rule if they were prepared in the course of business, as opposed to being prepared specifically as evidence for a hearing. The manager further testified that the claimant reportedly failed to contact the employer for reassignment at the end of his assignment as required by the above-referenced statute and asserted he never returned to work.

The claimant did not participate in the hearing, and the decision of the appeals referee is *silent* on the manager's testimony regarding the employer's record-keeping methods for documenting when employees report back for reassignment. Thus, in determining whether the manager provided sufficient evidence that the claimant failed to report back to work, the referee is required to make and outline the following analysis in the decision:

- Establish when the assignment ended or was scheduled to end;
- Identify the date the claimant last worked on the assignment;
- Identify what records the employer maintains for the purpose of documenting whether employees report back for reassignment;
- Determine how the information is captured and stored;
- *Review and discuss* the evidence specifically to identify what the manager saw *and* did not see in any record in determining whether the claimant reported back;
- Identify the chain of custody for record maintenance relevant in identifying whether the claimant reported back for reassignment.

The manager, as record custodian, asserted the *lack of documented evidence* of the claimant reporting back to the employer for reassignment was proof he did not report back. The Commission notes that, pursuant to Section 90.803(7), Florida Statutes, evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, of a regularly conducted activity to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances show lack of trustworthiness, is *admissible* evidence as an exception to the hearsay rule, and is sufficient upon which to base a finding of fact. The *absence* of information in this employer's records, therefore, may be sufficient to establish lack of contact. As the hearing officer, the referee must question witnesses as is necessary to properly develop the record. *See* Fla. Admin. Code R. 73B-20.024(3)(b). Accordingly, on remand, the referee must properly address the testimony of the employer's witness that she reviewed the employer's documentation and found no indication that the claimant had reported for reassignment.

In this case, the Commission is unable to adequately review the case without a clear account being established of the events that led to the claimant's separation. Accordingly, the case is remanded for the referee to determine when the assignment ended, when the claimant stopped reporting for work, and whether the employer's record maintenance is sufficiently reliable upon which to base a finding of fact as to whether the claimant reported back for reassignment pursuant to the requirement of the above-referenced statute.

In order to address the foregoing issues, the referee's decision is vacated and the case is remanded to the referee for further hearing and the rendition of a new decision. 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 sequence of 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 parties are *warned* that the testimony of the witnesses not subject to cross-examination at prior hearings due to the absence of the opposing party will most likely be rejected as incompetent and, as such, given no consideration if the witnesses are not available during subsequent hearings, if the opposing party appears. *See Altimeaux v. Ocean Construction, Inc.*, 782 So. 2d 922 (Fla. 2d DCA 2001). The referee shall specifically notice the parties of this fact when appropriate and record all attempts to telephone the parties.

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

Docket No. 2013-47134U

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES: EMPLOYER

LOCAL OFFICE #: 3644-0

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.)

Finding of Fact: The claimant worked for the instant employer a temporary help firm, as a temporary employee from August 4, 2012, through January 17, 2013. It was reported that the claimant was advised at the time of hire of his requirement to contact the employer upon the conclusion of each job assignment and that failure to do so could result in a denial of his benefits. It was reported by the employer that the claimant did not contact the employer for reassignment upon the conclusion of his last assignment.

Conclusions of Law: The law provides that a leased employee of an employee leasing company or a temporary employee of a temporary help firm voluntarily quit employment and is subject to disqualification if:

- a. the employer advised the temporary or leased employee at the time of hire and notified the leased employee at the time of separation to report for reassignment upon the conclusion of each assignment, and
- b. the temporary or leased employee was notified at the time of hire that failure to report for reassignment may result in denial of Reemployment Assistance benefits (leased employees must also receive this notification at the time of separation), and
- c. the employee failed, without good cause, to contact the employer for reassignment upon conclusion of the latest assignment.

In the instant case it was shown that the claimant worked for the instant employer, a temporary help firm, as a temporary employee. The record reflects that the claimant was notified at hire of his requirement to contact the temporary help firm upon the conclusion of each job assignment and that failure to do so could result in a denial of his benefits. The record further reflects that the employer's representative had no firsthand knowledge regarding whether the claimant contacted the employer for reassignment upon the conclusion of his last assignment. The testimony provided by the employer regarding the claimant's alleged failure to report for reassignment is considered 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. Upon review of all relevant facts and circumstances, it is determined that the hearsay evidence provided by the employer was not sufficient to support a finding. Accordingly, it cannot be concluded that the claimant voluntarily

quit. Furthermore misconduct connected with the work has not been shown or alleged. Accordingly, the claimant shall not be disqualified from the receipt of benefits.

The law provides that benefits will not be charged to the employment record of a contributory employer who furnishes required notice to the Department; when the claimant left the work without good cause attributable to the employer, was discharged for misconduct connected with the work, refused without good cause an offer of suitable work from the employer, was discharged from work for violating any criminal law punishable by imprisonment or for any dishonest act in connection with the work, refused an offer of suitable work because of the distance to the employment due to a change of residence by the claimant, became separated as a direct result of a natural disaster declared pursuant to the Disaster Relief Act of 1974 and the Disaster Relief and Emergency Assistance Amendments of 1988, or was discharged for unsatisfactory performance during an initial probationary period that did not exceed ninety calendar days and of which the claimant was informed during the first seven days of work. The employment record of the employer shall be charged for benefits paid to the claimant.

Decision: The determination dated May 6, 2013, is AFFIRMED. The claimant is not disqualified from the receipt of benefits. The employment record of the employer shall be charged for benefits paid to the claimant.

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.

SHERENE
THOMAS
Appeals Referee

By: 
ANTONIA L. SPIVEY, 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 diskalfye 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 abít 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.