STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-06735

vs.

Referee Decision No. 13-58235U

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 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 was a receptionist for the employer, a medical practice, from May 14, 2008, to May 13, 2013. On May 13, 2013, the employer received evidence of a social media posting wherein the claimant referred to company as "fucken slave drivers". The claimant also made comments about the reason she believed employees quit shortly after being hired. The claimant posted the remarks because she was having personal issues and felt "ready to leave the company anyway." When confronted by the employer, the claimant acknowledged her actions and was subsequently dismissed for posting negative comments via social media regarding the company.

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 record was not sufficiently developed; consequently, the case must be remanded.

Section 443.036(30), Florida Statutes (2012), states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.
>
> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
>
> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
>
> (e) A violation of an employer's rule, unless the claimant can demonstrate that:
>
> 1. He or she did not know, and could not reasonably know, of the rule's requirements;
> 2. The rule is not lawful or not reasonably related to the job environment and performance; or
> 3. The rule is not fairly or consistently enforced.

When a claimant's separation results from an employer's decision to discharge the worker, the burden of proving misconduct rests with the employer. *See Lewis v. Lakeland Health Care Ctr., Inc*., 685 So. 2d 876, 878 (Fla. 2d DCA 1996). The proof must be by a preponderance of competent substantial evidence. *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957); *Tallahassee Housing Authority v. Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986).

The record reflects the claimant in this case was discharged for posting comments on her Facebook page in which she expressed discontent with her job and the employer. The employer did not have a social media policy or a similar policy governing statements made by employees. The claimant admitted posting the comments at issue after being told by a coworker that the employer was firing an employee. The claimant explained that she received the phone call and made the post on the day of her grandfather's funeral and that she admittedly was "not thinking" and had other things on her mind. The appeals referee reasoned that, because the claimant acknowledged her actions and asserted she was ready to leave the company anyway, her conduct demonstrated a conscious disregard of the employer's interests and, therefore, amounted to misconduct under Section 443.036(a), Florida Statutes.

This case requires the Commission to enter the complex, developing field of employment law regarding social media. Social media presents new challenges to the workplace. Historically, an employee upset after a day of work would go home and gripe to family or friends, or possibly coworkers. Now, thanks to social media, such private gripes can take the form of public rants. Where an employer has an appropriate policy, the primary analysis is under Section 443.036(30)(e), Florida Statutes. Because this employer did not have such a policy, the referee must make the required analysis under Section 443.036(30)(a), Florida Statutes.

We note that in a similar context, use of profanity in the workplace directed at supervisors, the courts have eschewed an absolute rule of misconduct under the predecessor version of Section 443.036(30)(a), Florida Statutes. *Compare Bivens v. Trugreen LP*, 845 So. 2d 347 (Fla. 2d DCA 2003) and *Benitez v. Girlfriday, Inc.*, 609 So. 2d 665 (Fla. 3d DCA 1992) with *Peaden v. Unemployment Appeals Commission*, 865 So. 2d 690 (Fla. 5th DCA 2004), *Wrightington v. Unemployment Appeals Commission*, 833 So. 2d 202, (Fla. 5th DCA 2002), *Suluki v. Unemployment Appeals Commission*, 644 So. 2d 552 (Fla. 5th DCA 1994), and *Stahl v. Unemployment Appeals Commission*, 502 So. 2d 78 (Fla. 3d DCA 1987). Although a number of

factors are relevant to distinguish these cases, the most important one was whether the profane comments directed at a supervisor were also made in the presence of coworkers or customers, so that the employee could be seen as defying the authority of management in front of others. In *Peaden*, such conduct was compared to "a mutiny on the high seas." 865 So. 2d at 691.

This case appears to have a slightly different context from the above-cited cases and is more similar to *Media General Operations, Inc. v. Unemployment Appeals Commission*, 947 So. 2d 632 (Fla. 2d DCA 2007). In *Media General*, the claimant read a letter the company vice president had sent to the employees and then commented to no one in particular, "stupid [expletive] moron." The vice president was not present, but the employee's comment was overheard by two coworkers, and was reported to management. The Commission affirmed the referee's decision holding claimant was entitled to benefits. The court affirmed, noting that in inappropriate language cases, Florida courts have typically considered factors such as "the frequency of the utterances, the presence of fellow employees or clients, the existence of provocation, and the object of the abusive language." 947 So. 2d at 634. In *Media General Operations*, the crucial fact was that the profane statement was not made *to* a member of management, although it was made *about* one. Thus, the employee did not directly challenge the authority of the employer in front of other persons.

In Chapter 2011-235, Laws of Florida, the Legislature amended the text of Section 443.036(30)(a), Florida Statutes, changing the phrase "[c]onduct demonstrating *willful or wanton disregard* of an employer's interests" to the current "[c]onduct demonstrating *conscious disregard* of an employer's interests" (emphasis added). This language requires a somewhat lessened degree of mental fault to establish misconduct, and thus case precedent regarding subparagraph (a) that predates the amendment must be carefully applied to the extent the case holds that misconduct was not established. However, the Legislature did not eliminate the requirement that the employer must establish that the claimant's conduct was adverse to the employer's interests. We note that currently subparagraph (a) has two elements. The employer must prove conduct (1) demonstrating a conscious disregard of an employer's interests; *and* (2) found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. While the limited record in this case could support a determination that the claimant's conduct was a violation of the reasonable standards of behavior the employer expected of her, even in the absence of a policy, the record contained no evidence of an impact, or potential impact, on the employer's interests. We have no doubt that the employer may have been offended by the postings, but offense alone will not always be sufficient. Accordingly, the case must be remanded for additional proceedings.

In reviewing a case involving an employee discharged for posting comments on a social media outlet, in the absence of a social media or other applicable policy, various factors must be considered and discussed in the analysis. A referee must first adduce specific evidence and make findings as to the circumstances behind the claimant's actions, which will enable the referee to assess the claimant's mental state, and to determine whether the employee deliberately engaged in behavior that violated or disregarded the reasonable standards of behavior an employer could expect of its employees. Such evidence includes but is not limited to the following:

- The date(s) and location(s) of the posting(s), including, in particular, whether the location was an employer-owned site, a public site, or a private site or page used by the claimant;
- The specific statements made and language used in the postings, with emphasis as to whether the statements were made about the employer generally, specific owner(s) or manager(s), coworkers or others, and whether they were vulgar, profane or offensive;
- Whether the statements were mere statements of opinions or "gripes," or whether they made specific allegations of a potentially defamatory nature;
- The claimant's purpose in making the posting(s);
- Whether there was any provocation;
- Whether the claimant engaged in any behavior to promote or further publicize the posting or related comments;
- Whether the claimant had previously been warned for any such actions, or was aware that others had (or had not) been disciplined for such actions.

The referee must also develop the record and make appropriate findings to determine whether the conduct was adverse to the employer's interests. The referee must determine what harm the employer experienced or reasonably could be expected to experience as a consequence of the posting(s). This includes determining, in addition to the issues above, the following:

- Whether the employer was identified by name in the posting or was otherwise identifiable on the location, such as by an "employed by" identifier;
- The potential audience for the postings, including such factors as where the posting was made and what individuals had access to it, and whether these individuals included managers or supervisors, coworkers, customers and clients, or potential customers and clients;

- How often the claimant posted negative or derogatory comments about the employer;
- How the employer became aware of the posting(s);
- Whether the posting disrupted, or might reasonably be expected to be disruptive, of the work environment;
- Whether there is proof that the posting did, or could reasonably be expected to, harm the employer's business activities;
- Whether the posting might be "protected concerted activity" under Section 7 of the National Labor Relations Act, and the primary factor on this issue is whether the posting was an attempt jointly to discuss concerns about the workplace with other employees, or was a mere personal gripe.

On remand, the referee must consider the factors listed above and any other similar factors the referee deems relevant and analyze whether the claimant's actions in posting the comments at issue on her Facebook page demonstrated a "conscious disregard" of the employer's interests and was a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee, as required by Section 443.036(30)(a), Florida Statutes.

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 5/2/2014, 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: Kimberley Pena
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
POST OFFICE BOX 8697
FORT LAUDERDALE FL 33310

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. **2013-58235U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3667-0

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 a receptionist for the employer, a medical practice, from May 14, 2008, to May 13, 2013. On May 13, 2013, the employer received evidence of a social media posting wherein the claimant referred to company as "fucken slave drivers". The claimant also made comments about the reason she believed employees quit shortly after being hired. The claimant posted the remarks because she was having personal issues and felt "ready to leave the company anyway." When confronted by the employer, the claimant acknowledged her actions and was subsequently dismissed for posting negative comments via social media regarding the company.

Conclusions of Law: As of June 27, 2011, Florida's Reemployment Assistance Law defines misconduct connected with the 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 that an employer expects of an 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 unlawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

The record reveals that the claimant was discharged on May 13, 2013, for dishonesty. In discharge cases, the employer bears the burden of proving

via competent, substantial evidence, that the claimant was discharged for misconduct connected with the work, see Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986); and the employer in this case has met its burden.

Here, both the employer's and claimant's testimony establishes that the claimant posted negative comments via social media about the company. Testimony also establishes that the claimant acknowledged her actions. Moreover, the claimant's assertion that she was ready to leave the company anyway supports a finding of conduct demonstrating conscious disregard of an employer's interests. Accordingly, it is held the claimant was discharged for misconduct connected with the work.

The appeals referee was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. Florida's Reemployment Appeals Commission has set forth factors to be considered in resolving credibility questions. These factors 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 appeals referee finds the employer's version of events to be more credible and therefore resolves all material conflicts in the evidence in the employer's favor.

Decision: The claims adjudicator's determination dated June 10, 2013, is REVERSED. The claimant was discharged for misconduct connected with the work and is disqualified from receiving reemployment benefits from May 18, 2013, plus five weeks and until the claimant earns **$4,675.** The employer's account will not be charged for any 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 July 25, 2013.

T. A. SMITH
Appeals Referee

By: Zamara Gonzalez
ZAMARA GONZALEZ, 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.