

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order Nos. 13-06859
13-06860

vs.

Referee Decision Nos. 13-56111E
13-56110U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This consolidated matter comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a combined 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.

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 employed with the employer from November 29, 2010, through May 3, 2013. She worked full time as an underwriter. This employer has an attendance policy. The claimant had ongoing medical problems since 2004. The claimant had surgery in December 2004 and in March 2006. During her employment, she continued to have medical problems and was under a doctor's care. The claimant had another surgery in October 2011. She was covered by FMLA for the medical absences. Following the last surgery in 2011, the claimant

continued having medical problems and was absent from work. She did not apply for intermittent FMLA because she thought that the problems would dissipate. On July 31, 2012, the claimant was issued a written warning due to her excessive absenteeism. After the warning, the claimant continued missing work due to illness. She was absent from September 25, 2012 through September 27, 2012. The claimant was again absent from November 2, 2012 through November 9, 2012 and from February 11, 2013 through February 14, 2013. The claimant was under a doctor's care and had medical excuses for the absences. It was against the employer's policy to accept medical excuses. The claimant last missed work on April 30, 2013, again due to illness. The claimant was discharged May 3, 2013, due to excessive absenteeism.

Based on these findings, the referee held the claimant was discharged for reasons other than 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 in the record and is, therefore, 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 record reflects the claimant was discharged for exceeding the maximum number of unscheduled absences allowed under the employer's no-fault attendance guidelines. The referee held the claimant was discharged for reasons other than misconduct connected with work, concluding that the claimant did not consciously disregard the employer's interests or intentionally violate the claimant standards of behavior that the employer had the right to expect and that her absences did not deliberately violate the employer's known attendance policy because her absences were due to illness and beyond her control. While the Commission recognizes that the claimant's absences were due to illness, the Commission concludes the claimant's continued unapproved absences after written warning for unapproved absences constituted misconduct under subparagraph (c) of the above-noted statute.

The second prong of subparagraph (c) defines misconduct to include "one or more *unapproved* absences following a *written* reprimand or warning relating to more than one *unapproved* absence" (emphasis added). No requirement of fault exists under the second prong when the employer establishes that the final absence(s) followed a *written* warning for unapproved absences, and the final absence was "unapproved." The second prong of subparagraph (c), however, does presuppose an employee can request approval for absences and that, depending on the reason for the request, the employer can either approve or deny the request. The Commission observes that some employers have adopted "no fault" rules/policies regarding the issue of unscheduled absences. These policies provide that employees are entitled to a certain number of unscheduled absences during a specified time period. These policies normally also indicate that the reasons for unscheduled absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be discharged. Under such circumstances, the second prong of subparagraph (c) cannot be utilized to decide the issue of whether a claimant has been discharged for misconduct. This is so because an employee cannot

be faulted for failing to request approval of an absence when the employer has notified its employees that such requests will not be approved. Lastly, regardless of the employer's policies, an absence taken with proper notice and documentation by a claimant eligible for Family and Medical Leave Act ("FMLA") leave from an employer covered by FMLA would be an "approved" absence.

In this case, however, the record reflects the employer offered the claimant the opportunity to obtain approval for her unscheduled absences due to illness after the warning issued on July 31, 2012, by applying for intermittent FMLA. The referee found that the claimant did not apply for intermittent FMLA because "she thought that the problems would dissipate." Undisputed evidence in the record further reflects the claimant inquired about intermittent FMLA, but ultimately decided that she did not "want to do it." The claimant admitted that, after receiving the written warning on July 30, she continued to be absent due to complications caused by the same medical problem. The record reflects the claimant was absent 15 times from July 30 until the date of her discharge, April 30, 2013. Although she did not receive another written warning regarding her absences, the supervisor testified that he verbally counseled her during this period about her attendance. The claimant testified that she did not want to take intermittent FMLA because she "thought she had gotten a grip" on her illness because her doctor told her that she was getting better and "she knew she could beat it." She further asserted that she did not want to take intermittent leave because she did not want "an excuse to be sick." She testified, however, that she did have doctor's notes for all of her absences due to illness. She also admitted she was "fully aware" of the employer's attendance policy and knew she could be discharged if she continued to incur unapproved absences.

The Commission has previously held that despite the lack of an express intent standard in the second prong of (c), a claimant could not be disqualified from benefits where (1) all of the unapproved absences after a warning were for compelling reasons; (2) the claimant gave reasonable notice to the employer including compliance where possible with any specific notice provisions of the employer; and (3) the claimant provided any documentation or verification reasonably required by the employer. In such cases, the issue of misconduct cannot turn simply on the employer's willingness, or lack thereof, to approve the absence. However, that conclusion turns on the inability of the claimant to obtain, despite reasonable efforts, "approval" of her absences. In this case, the Commission concludes the claimant's failure to accept the employer's offer of intermittent FMLA, in light of her knowledge that her continued unapproved absences due to illness would ultimately result in her discharge, constituted misconduct under the plain language of the second prong of subparagraph (c). Because the record reflects the

choice of whether to apply for intermittent FMLA was within the claimant's control, the Commission holds that the claimant's failure to apply for intermittent FMLA leave resulted in her being culpable for the resulting unapproved absences. Accordingly, the claimant was discharged for misconduct connected with work within the meaning of the law.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending May 4, 2013, the five succeeding weeks, and until she becomes reemployed and earns \$4,675. The employer's account is relieved of charges in connection with this claim. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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
9/13/2013,
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: Natasha Green
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 limitè pou ou ranpli apèl la.

Docket No. **2013-56110U & 2013-56111E**

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3622-0

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 with the employer from November 29, 2010 through May 3, 2013. She worked full time as an underwriter. This employer has an attendance policy. The claimant had had ongoing medical problems since 2004. The claimant had surgery in December 2004 and in March 2006. During her employment, she continued to have medical problems and was under a doctor's care. The claimant had another surgery in October 2011. She was covered by FMLA for the medical absences. Following the last surgery in 2011, the claimant continued having medical problems and was absent from work. She did not apply for intermittent FMLA because she thought that the problems

would dissipate. On July 31, 2012, the claimant was issued a written warning due to her excessive absenteeism. After the warning, the claimant continued missing work due to illness. She was absent from September 25, 2012 through September 27, 2012. The claimant was again absent from November 2, 2012 through November 9, 2012 and from February 11, 2013 through February 14, 2013. The claimant was under a doctor's care and had medical excuses for the absences. It was against the employer's policy to accept medical excuses. The claimant last missed work on April 30, 2013, again due to illness. The claimant was discharged May 3, 2013, due to excessive absenteeism.

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. This occurred due to the claimant's excessive absenteeism. Whereas the employer had a know attendance policy, the claimant did not deliberately violate the policy. The claimant was dealing with chronic medical issues and was under a doctor's care throughout her employment. Her absences were due to illness and were beyond the claimant's control. The claimant did not consciously disregard the employer's interests or intentionally violate the standards of behavior that the employer had a right to expect. It is held that the claimant was not discharged due to misconduct connected with the work as defined by the statutes. The claimant remains entitled to benefits and the employer remains chargeable in connection with this claim.

Decision: The determination dated May 30, 2013, holding the claimant entitled to benefits is AFFIRMED. The determination dated May 31, 2013, charging the employer is AFFIRMED.

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on July 18, 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 definitiv sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yem} 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 lamèn, 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.
