STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-07968

vs.

Referee Decision No. 13-73425U

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.

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 respiratory therapist for [the employer] from February 15, 2010, through June 24, 2013. The employer has an attendance policy that any employee will receive a warning if they accrue three absences within three months or six tardies within three months. If an employee received a verbal and two written warnings regarding their attendance within 12 months, they will be discharged for any additional absences or tardiness. The claimant received a verbal warning in August 2012 regarding her attendance. The claimant received a written warning on December 22, 2012, regarding tardiness. The claimant received a

> written warning on April 26, 2013, regarding absences. The claimant was tardy three times after the final warning and absent on June 19, 2013. The employer discharged the claimant on June 24, 2013, for violation of the employer's attendance policy.

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 did not properly consider all of the material evidence and the record was not sufficiently developed; consequently, the case must be remanded.

Effective May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
>
> (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)1. A violation of an employer's rule, unless the claimant can demonstrate that:
>
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.
>
> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects the claimant was discharged due to excessive attendance infractions in violation of the employer's attendance policy. The referee cited the language of Sections 443.036(30)(c), Florida Statutes, and concluded that the claimant's absenteeism constituted misconduct under the second prong of subparagraph (c) because the claimant had one or more unapproved absences after receiving a written warning for more than one unapproved absence. The record, however, does not support the referee's conclusion.

As noted above, Section 443.036(30)(c), Florida Statutes, defines misconduct as "[c]hronic 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" (emphasis added). Thus, two avenues are available for an employer to establish attendance-related misconduct under the provisions of Section 443.036(30)(c), Florida Statutes. For discharges based upon, in general, absenteeism and/or tardiness, the employer must establish both that the absenteeism and/or tardiness was "chronic" as well as a "deliberate violation of a known policy." Accordingly, under the first prong of subparagraph (c), absences or tardiness attributable to a compelling and/or involuntary reason would not constitute misconduct as they would not be a "deliberate violation." The Commission takes the position that, *generally*, an employee's absence from work based upon a "compelling" reason, when properly reported to the employer, does not rise to the level of being "a *deliberate* violation of a known policy of the employer." In reaching this position, the Commission references court cases under the earlier statute addressing attendance violations for "compelling reason(s)." *See Cargill, Inc. v. Unemployment Appeals Commission*, 503 So. 2d 1340 (Fla. 1st DCA 1987); *Howlett v. South Broward Hospital Tax District*, 451 So. 2d 976 (Fla. 4th DCA 1984); *Taylor v. State Department of Labor and*

Employment Security, 383 So. 2d 1126 (Fla. 3d DCA 1980). Accordingly, because the claimant's absences were due to her medical condition, they cannot be considered a "deliberate violation." For this reason, the referee correctly concluded the claimant's absenteeism did not constitute misconduct under the first prong of subparagraph (c).

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." No explicit requirement of fault exists under the second prong when the employer establishes a final "unapproved" absence(s) following a *written* warning for multiple prior unapproved absences. However, keeping in mind the language of the second prong, the common understanding of the word "misconduct," the prior case law regarding absences for compelling reasons, and the legislative intent, the Commission has concluded that the second prong of subparagraph (c) does not entirely remove the requirement of fault on the part of the claimant.

For example, the use of the term "unapproved" in the second prong of subparagraph (c) presupposes an employee can request approval for absences and that, depending on the reason for the request, and the information provided by the employee, the employer can either approve or deny the request. While this process is common among many employers, the Commission notes certain employers have adopted "no fault" rules/policies regarding absences. These policies provide that employees are entitled to a certain number of absences, or unscheduled absences, during a specified time period. These policies normally also indicate that the reasons for these 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 automatically be utilized to decide the issue of whether a claimant has been discharged for misconduct. 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. Further, regardless of the employer's policies, an absence taken with proper notice by a claimant eligible for Family and Medical Leave Act ("FMLA") leave from an employer covered by FMLA would be an "approved" absence. *See* 29 C.F.R. §825.220(c).

The Commission has concluded that if a claimant (1) requests that an absence for a compelling reason such as an illness be approved or excused (unless the employer has clearly indicated that no further absences will be excused, in which case this requirement is waived); (2) provides notice that is reasonable under the circumstances (either prior notice for a foreseeable absence or prompt notice for an unforeseeable one); and (3) provides whatever appropriate verification or other

information the employer may reasonably request; then the claimant cannot be considered to have engaged in "misconduct" within the meaning of the second prong of subparagraph (c). While an employer may choose whether or not to grant approval for such absences, a claimant will not be disqualified if such absences are not approved.

The record in this case reflects the employer has a "no fault" policy regarding the issue of unscheduled absences. The employer's witness testified that, under the initial version of the policy, the claimant was entitled to three unscheduled absences during a three-month period. When the employer's policy was revised in May 2013, the claimant, who had already received a second written warning under the prior version of the policy, was entitled to two additional occurrences before the policy called for termination. The employer's witness also testified that the employer's policy provided that the reasons for unscheduled absences are irrelevant and employees who exceed the specified number of absences stated in the rule/policy will be disciplined, up to and including discharge. The referee failed to recognize the claimant's unrebutted evidence that all of her absences were due to a medical condition and were properly reported to the employer in accordance with its policy. As indicated above, the Commission has concluded, that under the circumstances described in the claimant's case, the second prong of subparagraph (c) cannot be utilized to decide the issue of whether a claimant has been discharged for misconduct; therefore, the referee's conclusion that the employer established misconduct under this subparagraph is rejected by the Commission.

Even if the employer is unable to establish misconduct under Section 443.036(30)(c), Florida Statutes, the Commission has held that the employer may be able to do so under Section 443.036(30)(e), Florida Statutes, if the claimant's tardiness/absences amounted to a violation of an employer "rule." To prove the existence of a rule violation under this subparagraph, the employer must present evidence of its attendance policy/rules and evidence that the claimant violated it. The claimant would then have the burden of showing that he/she did not know, and could not reasonably know, of the rule's requirements; the rule is not lawful or not reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced. With respect to the issue of fair enforcement, the Commission applies the same rule as to the second prong of subparagraph (c).

The Commission also concludes that, while the employer established the claimant was aware of its attendance policy, the claimant presented evidence to show that the rule was not fairly applied to her circumstances. The referee ignored the record evidence which reflects that all of the claimant's absences were for compelling reasons not within the claimant's control and that the claimant provided notice to the employer of her intended absences. Moreover, the record reflects the

claimant did not fail to provide medical documentation as she was never instructed to provide any documentation to support her need to be absent. Finally, while the employer approved the claimant for FMLA leave from July 8 through August 19, 2013, so that she could undergo surgery for her medical condition, the employer discharged the claimant because of her absences, even though they were related to that same medical condition, before her leave began.

The Commission holds that the employer's rule cannot be seen as being fairly enforced with respect to the claimant's absences inasmuch as the absences were caused by the claimant's medical condition which constitutes a compelling reason over which the claimant had no control. The claimant's absenteeism cannot, therefore, be fairly considered a violation of the employer's rule such as would operate to disqualify her from receipt of benefits.

While the claimant's absences did not constitute misconduct, the referee did not adequately develop the record regarding the claimant's tardiness, and did not address whether the claimant's continued tardiness after warning constituted misconduct. The referee did not question the parties regarding the dates the claimant was late arriving to work, the reasons she was late, and the amount of time she was late on each occasion. We note that, when an employee is continually absent due to medical reasons, his or her absences disrupt the workplace, even though the absences are for compelling reasons and do not constitute misconduct. For this reason, it is critical that an employee who is repeatedly absent, albeit for compelling reasons, be mindful that his or her tardiness places an added burden on an employer that is already suffering from the disruption to its operation caused by the employee's absenteeism. Inasmuch as the record is unclear as to the reasons the claimant was late reporting to work, the referee must question the parties regarding the reasons the claimant was late arriving to work and determine, based on those reasons and the number of occurrences, whether the claimant's tardiness amounted to misconduct connected with work. Because the referee did not properly consider all of the relevant and material testimony and did not properly develop the record, the case must be remanded.

The referee's decision is vacated and the case is remanded for further proceedings. The referee is directed to convene a supplemental hearing, further develop the record in accordance with this order, consider all of the relevant and material evidence, and render a new decision featuring an appropriate credibility determination, if necessary, that is based upon the supplemented record.

The referee's decision 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 4/22/2014, 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: Kady Thomas
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
Suite 240
215 Market Street
Jacksonville FL 32202-2850

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. **2013-73425U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3619-0

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.

Findings of Fact: The claimant was a respiratory therapist for from February 15, 2010 through June 24, 2013. The employer has an attendance policy that any employee will receive a warning if they accrue three absences within three months or six tardies within three months. If an employee received a verbal and two written warnings regarding their attendance within 12 months, they will be discharged for any additional absences or tardiness. The claimant received a verbal warning in August 2012 regarding her attendance. The claimant received a written warning on December 22, 2012 regarding tardiness. The claimant received a written warning on April 26, 2013 regarding absences. The claimant was tardy three times after the final warning and absent on June 19, 2013. The employer discharged the claimant on June 24, 2013 for violation of the employer's attendance policy.

Conclusions of Law: As of May 17, 2013, the Reemployment Assistance Law, Florida Statute §443.036 (30), 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

(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) 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or

invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects that the claimant was discharged for violation of the employer's attendance policy. In cases of discharge the employer must establish by competent, substantial evidence that the claimant was discharged for misconduct connected with work. In order to do so under section (c) Florida Statute §443.036 (30), the employer must show that the claimant was absent or tardy in deliberate violation of the employer's policy, or that the claimant has an unexcused absence following a written warning for an unexcused absences. With respect to the first prong of Florida Statute §443.036 (30)(c); the RAAC takes the position that absences from work based on compelling reasons when properly reported to the employer do not rise to a level of being a "deliberate" violation of the employer policy. Cargill v. UAC, 503 So.2d 1340 (Fla.1st DCA 1987); Howlett v. South Broward Hospital Tax District, 451 So.2d 976 (Fla. 4th DCA 1984); Taylor v. State Department of Labor and Employment Security, 383 So.2d 1126 (Fla. 3d DCA 1980). In this case, the claimant was absent due to illness and called out of work properly. Since the claimant had a compelling reason for being absent, her absences cannot be considered a deliberate violation. With respect to the second prong of Florida Statute §443.036 (30)(c); the employer must establish that the final absence was followed by a written warning for unapproved absences. In this case, the claimant did receive a warning on April 26, 2013 regarding unexcused absences. After the warning, the claimant was tardy three times and absent on June 19, 2013. Since the claimant received a written warning about unexcused absences and then had another unexcused absences after warning, her attendance is considered misconduct within the meaning of the law. As such, the claimant is disqualified from receipt of benefits.

Decision: The determination dated July 23, 2013, qualifying the claimant is reversed. The claimant is disqualified for the week ended June 29, 2013 plus five weeks and until she earns wages of $4675.

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 September 6, 2013.

J. DATTOLI
Appeals Referee

By: K. Martin
K. M. MARTIN, 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.