

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-08300

vs.

Referee Decision No. 13-67597U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings.

The referee's findings of fact state as follows:

The employer operates an optical center and the claimant began working for the employer on June 21, 2004, as a retail supervisor. The employer has a hostile work environment policy that prohibits employees from engaging in offensive conduct such as the use of epithets, slurs or negative stereotyping.

On June 20, 2013, the claimant submitted a re-do order to correct an order for optical lenses. In the order, the claimant entered the comment, "nigga"[sic] did wrong" in the comment section of the form. The claimant admitted to entering the comments, but attributed her use of the phrase "nigga"[sic] as language that is common in the workplace and in her social life. The employer, however, determined that the claimant's use of the phrase was offensive and in violation of the employer's policy. As a result, the employer discharged the claimant on June 24, 2013.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work.¹

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.

¹ Although the referee cited to the 2012 statutory definition of misconduct, the statutory changes made effective on May 17, 2013, are irrelevant to the case currently under review. *See* §443.036(30), Fla. Stat. (2013). *Compare* §443.036(30), Fla. Stat. (2012). Consequently, the error was harmless.

(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 referee concluded, in pertinent part:

The record and evidence in this case show that the claimant was discharged for a violation of the employer's hostile work environment policy. The [claimant] was aware of the employer's policy and was aware that the term can be offensive. The claimant's excuse of common work-place usage is little evidence to show the claimant's action was exempt from the employer's hostile work environment policy.

The claimant's actions cannot be excused as poor judgment. Poor judgment can only be considered where one has the discretion to exercise more than one option and simply chooses the wrong option. The employer's policy is unambiguous and leaves no room for judgment or discretion. The claimant's failure to adhere to the policy was a deliberate disregard of the claimant's duties and obligations to the employer, amounting to misconduct connected with work within the meaning of the law. The claimant is disqualified from the receipt of benefits.

Upon review of the record and the arguments on appeal, the Commission concludes the record adequately supports the referee's material findings and the referee's conclusion is a correct application of the pertinent laws to the material facts of the case.

The record reflects the claimant was discharged from employment when the employer concluded she violated its policy against harassment and unwelcome conduct. During the appeals hearing, the claimant acknowledged receiving the employer's policy.

The policy, which was entered as an exhibit, sets forth the following:

The Company does not permit discrimination or harassment because of a person's sex, race, color, age, religion, creed, ethnicity, national origin, disability, veteran status, marital status, sexual orientation, or any other category protected by Federal, State or local law. We do not tolerate harassment of Associates . . . by Management personnel, co-workers, customers, outside business invitees or visitors.

The policy goes on to provide "Examples of Hostile Work Environment Harassment" including an explanation that "[i]t can arise from offensive conduct (such as epithets, slurs or negative stereotyping) or written or graphic material which disparages an individual's sex, race, color, age, religion, creed, ethnicity, national origin, disability or other legally protected characteristics."

The claimant admits to writing the phrase "nigga did wrong" on one of the employer's official documents, a re-order request. The employer's general manager testified the claimant was discharged because the comment she placed on the re-order request violated the employer's harassment policy. On appeal to the Commission, the claimant contends that she did not intend to use the word "nigga" in an offensive manner. While that may be true, she admitted writing the word on a

re-order request that was being submitted and which might pass to any number of people. Although the record does not identify which individual notified the employer's human resources department of the incident, it is evident that someone believed the claimant's conduct necessitated referral to the employer's human resources department.

The law is clear that harassment is not measured primarily by the intent of the actor, but by the individuals exposed to the conduct and actions will be considered harassing if they are both subjectively perceived by the recipient as such, and would also be deemed as such by a reasonable person. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).² Furthermore, courts have held that the precise term utilized by the claimant in this case could reasonably be deemed harassing by other individuals. *See Lyons v. Huntsville Wholesale Furniture, Inc.*, 545 F. Supp. 2d 1214, 1217 (N.D. Ala. 2008) (holding that the playing of a song which contained the word "nigga" "is precisely the kind of extremely serious 'isolated incident' which constitutes a racially hostile work environment").

With these principles in mind, we next consider whether the referee correctly concluded that the claimant's actions were misconduct under the reemployment assistance law. Because a violation of an employer policy is at issue, we consider whether the employer established misconduct under subparagraphs (a) and (e).

The referee correctly held that the claimant's actions were a violation of the employer's harassment policy, and thus the claimant was held disqualified under Section 443.036(30)(e), Florida Statutes, for violating an employer's rule. The claimant's actions cannot be excused as "poor judgment" within the meaning of the reemployment assistance law. The Commission has previously held that the "poor judgment" analysis does not apply to subparagraph (e), because that provision contains its own defenses. R.A.A.C. Order No. 13-06848 (November 7, 2013). Although the claimant contends that the employer's harassment policy was ambiguous, the language of the policy, set forth above, is sufficiently clear to give the claimant fair notice that the use of such a term would be a violation. Therefore, the claimant cannot establish that she did not know and should not have known that her actions were a violation of the policy. Additionally, the claimant has not established under the facts of this case that the policy was not fairly enforced. As noted above, the claimant's lack of malicious intent does not prevent her conduct from reasonably being viewed as offensive or demeaning when it was written on a document that she knew would be circulated to other employees. Finally, she failed

² We note that it is not necessary for behavior to reach the threshold of creating a "hostile or abusive environment" implicating Title VII or Florida Civil Rights Act liability to constitute harassing conduct.

to prove that the policy was not consistently enforced by the employer. While the claimant asserts that she demonstrated that the term “nigga” was commonly used in the workplace as a reference to a close friend, the employer’s general manager, whose testimony was credited by the referee, denied hearing the term used in the workplace. The Commission has previously held that to establish a lack of consistent enforcement, the employee must demonstrate the employer was aware of other instances of violation of the rule and failed to enforce it. R.A.A.C. Order No. 13-06381 (October 30, 2013).

Similarly, the claimant’s argument that her behavior did not constitute disqualifying misconduct because it was an isolated incident is contrary to the law. In *Alvarez v. Florida Reemployment Assistance Appeals Commission*, 121 So. 3d 69 (Fla. 3d DCA 2013), the court upheld a referee’s ruling that an employee who was discharged for a single policy violation was discharged for disqualifying misconduct. The court noted that the present statutory scheme expanded the definition of misconduct to include the deliberate violation of an employer’s rule which has not been shown to be unfairly or inconsistently enforced. *Id.* at 71. Thus, we conclude that the claimant’s actions constitute disqualifying misconduct under subparagraph (e).

The Commission also concludes that the claimant is subject to disqualification under subparagraph (a). We agree with the referee that the claimant’s actions cannot be excused as “poor judgment” under subparagraph (a), as the employer’s policy provides sufficient guidance as to what is expected of the employees. In *Lockheed Martin Corp. v. Unemployment Appeals Commission*, 876 So. 2d 31 (5th DCA 2004), the court held that violating a clear harassment policy amounts to disqualifying misconduct even when the behavior is consensual amongst the participants. In *Lockheed Martin Corp.*, the employees engaged in consensual sexual horseplay and none of the participants complained to the employer about the behavior. *Id.* at 32-33. The employer became aware of the behavior two years after the final incident when a non-participant relayed the events to one of the employer’s human resources officials. Applying the more liberal definition of misconduct in effect prior to June 27, 2011, the court noted the facts that the on-site supervisors “chose to disregard [the behavior],” the victim failed to complain, and other witnesses failed to complain, *did not* eliminate the misconduct. *Id.* The court explained that “[t]his is essential because such conduct adversely affects others in the workplace, not just the victim or participant.” *Id.* Evidence of the controversial, and potentially damaging, nature of the term used by the claimant in this case was provided by the employer’s general manager and the claimant’s own witness, a former co-worker, who both acknowledged that, while some may not take offense to

the term “nigga,” they personally refuse to use it. We note that employers can be held liable under federal and state law for failing to maintain a workplace free of illegal harassment, and employers thus have a moral and legal duty to do so. Accordingly, the Commission concludes that the referee's decision must be affirmed in all respects.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits. The employer's account is relieved of charges in connection with this claim.

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

2/6/2014 ,

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
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 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. 2013-67597U

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3678-0

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 employer operates an optical center and the claimant began working for the employer on June 21, 2004, as a retail supervisor. The employer has a hostile work environment policy that prohibits employees from engaging in offensive conduct such as the use of epithets, slurs or negative stereotyping.

On June 20, 2013, the claimant submitted a re-do order to correct an order for optical lenses. In the order, the claimant entered the comment, “nigga”[sic] did wrong” in the comment section of the form. The claimant admitted to entering the comments, but attributed her use of the phrase “nigga”[sic] as language that is common in the workplace and in her social life. The employer, however, determined that the claimant’s use of the phrase was offensive and in violation of the employer’s policy. As a result, the employer discharged the claimant on June 24, 2013.

Conclusion 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 record and evidence in this case show that the claimant was discharged for a violation of the employer's hostile work environment policy. The claimant's was aware of the employer's policy and was aware that the term can be offensive. The claimant's excuse of common workplace usage is little evidence to show the claimant's action was exempt from the employer's hostile work environment policy.

The claimant's actions cannot be excused as poor judgment. Poor judgment can only be considered where one has the discretion to exercise more than one option and simply chooses the wrong option. The employer's policy is unambiguous and leaves no room for judgment or discretion. The claimant's failure to adhere to the policy was a deliberate disregard of the claimant's duties and obligations to the employer, amounting to misconduct connected with work within the meaning of the law. The claimant is disqualified from the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission 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 hearing officer finds the testimony of the employer to be

more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination of the claims adjudicator dated July 19, 2013, is **AFFIRMED**. The employer's account shall not be charged in connection to this claim.

The claimant had a representative at the hearing who is not charging the claimant a fee. Therefore, no fee is approved.

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.

ALIN LOUIS
Appeals Referee

By: 
M. DURAN, 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 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 laman, 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.
