STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-08424

vs.

Referee Decision No. 13-76613U

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 which held the claimant 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 referee's findings of fact state as follows:

> The claimant began working for the employer on June 18, 2012. The claimant last worked for the employer as a shift manager. During the [latter] course of the employment, the employer's regional manager received complaints from its store manager that the claimant [was] often confrontational, exhibited poor communication, and demonstrated a poor attitude in the work place. The regional manager discussed the complaints with the claimant and encouraged the claimant to improve in his attitude. Thereafter, the regional manager received another complaint from its store manager that the claimant was insubordinate when determined not to give the store manager his 100% effort in performing his job duties. The regional manager warned the claimant to either improve in his attitude or he would be discharged. On or about May 14, 2013, the regional manger received a complaint from the store manager that the claimant had referred to her as being "emotionally immature" for the job.

> The claimant admitted to making the statement, but attributed his attitude and disposition to personal medical issues. The employer, however, determined that the claimant's actions were intolerable and decided to discharge the claimant on May 20, 2013, for creating a hostile atmosphere in the workplace.

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's decision is not supported by competent, substantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

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.
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> (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:
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> 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.

In a discharge case, the employer bears the burden of proof to establish misconduct by a preponderance of the evidence. *See generally*, *Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). In this case, the employer's regional manager testified he discharged the claimant for "creating an unharmonious work environment" due to his interaction with the store manager on various occasions. The appeals referee concluded the claimant's actions amounted to misconduct under subparagraph (a) of Section 443.036(30), Florida Statutes, and therefore, held the claimant disqualified from receipt of benefits. The Commission notes a disqualification from benefits under subparagraph (a) is appropriate only if a claimant's actions are found to be a deliberate violation or disregard of the reasonable standards of behavior the employer expects of his or her employee.

In determining whether the use of vulgar or inappropriate language comes within the purview of the statute's definition of misconduct, courts have considered several factors, including the frequency of the vulgar utterance, the presence of any fellow employees or clients, the existence of any provocation, and the object of the abusive language. *See*, *e.g.*, *Benitez v. Girlfriday, Inc.*, 609 So. 2d 665 (Fla. 3rd DCA 1992). In *Bivens v. Trugreen LP*, 845 So. 2d 347 (Fla. 2d DCA 2003), the court held an isolated instance of an employee's use of vulgar language in a message left on the supervisor's voicemail was not disqualifying misconduct. Likewise, in *Wrightington v. Unemployment Appeals Commission*, 833 So. 2d 202 (Fla. 5th DCA 2002), the court held the claimant's vulgar and abusive language toward the employer's Chief Executive Officer in a private office did not amount to misconduct because the incident was isolated and took place within the confines of a private office. While Section 443.036(30)(a), Florida Statutes, was amended in Chapter 2011-235, Laws of Florida, to lower the degree of mental culpability necessary, case precedent under the predecessor version of the statute remains instructive in appropriate situations.

The record reflects the claimant in this case did not use vulgar language during the incidents at issue. The regional manager testified he warned the claimant in March 2013 for making inappropriate comments to the store manager after the store manager stated the claimant was not working 100 percent of the time. The claimant's testimony reflects he merely commented that no one can give one hundred percent, one hundred percent of the time, and his words were not intended to be derogatory. Regarding the final incident, the regional manager testified the claimant told the store manager via text that she was "emotionally immature." The claimant admitted he made that comment after his hours were cut, but indicated he did so because he was "flustered" and that he did not intend the remark to be insubordinate. In *Davis v. Unemployment Appeals Commission*, 472 So. 2d 800 (Fla. 3d DCA 1985), the court recognized that a worker may overreact due to an emotional situation and exercise bad judgment as opposed to committing misconduct. *See also General Asphalt Co., Inc. v. Harris*, 563 So. 2d 803 (Fla. 3d DCA 1990). In both *Davis* and *General Asphalt*, the court found an assault on a co-worker to be isolated poor judgment due to provocation. In the case before us, the claimant's actions were less egregious than that of the two workers in *Davis* and *General Asphalt*. Although the claimant in this case was not physically provoked, the record reflects his hours were cut, which caused him to overreact. Moreover, there is nothing in his comments which were so clearly beyond the limits of appropriate dialogue that he could be said to have consciously disregarded his employer's interests. The record, therefore, does not establish the claimant displayed the deliberateness required to establish misconduct under subparagraph (a) of Section 443.036(30), Florida Statutes.

Although the employer referenced a policy that prohibits employees from engaging in behavior that creates "discord" and "lack of harmony," the terms of that policy are vague and do not specify the types of behavior the policy prohibits. Accordingly, the employer did not show the claimant's actions in calling his store manager "emotionally immature" violated the policy at issue nor did the employer indicate it had any other policy in effect that applied in that situation. The Commission notes the referee did not find that the claimant violated an employer's rule. The record, therefore, does not establish the claimant was discharged for misconduct under subparagraph (e) of Section 443.036(30), Florida Statutes.

Based on the evidence presented at the hearing, we find the record is insufficient to demonstrate the claimant acted in conscious disregard of the employer's interests, in deliberate violation or disregard of the reasonable standards of behavior which the employer could expect of its employees, or in violation of any applicable rule. Accordingly, we conclude the employer has failed to establish the claimant was discharged for "misconduct connected with work" as that term is defined in the reemployment assistance statute. Thus, he is not disqualified from the receipt of benefits.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits. The employer's account shall be charged with benefits paid 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
5/5/2014 ,
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. **2013-76613U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3659-0

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.

NONAPPEARANCE: Whether there is good cause for proceeding with an additional hearing pursuant to Rules 73B-20.016; 20.017, Florida Administrative Code.

Jurisdictional Issue (Nonappearance): A hearing was held on July 24, 2013. The employer/appellant failed to attend that hearing because the employer witness was unavailable during the date and time of the hearing. The employer requested the hearing be postponed for a later date; yet, that request was denied. A dismissal decision was mailed to the parties' address of record on July 24, 2013. The employer requested the hearing be reopened on August 13, 2013. A case will be re-opened for a hearing on the merits when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated. The record and evidence in this case show that the employer could not attend the prior hearing after notifying the Agency of its request for continuance. The employer has shown good cause to proceed with a hearing on the merits of the case.

Findings of Fact: The claimant began working for the employer on June 18, 2012. The claimant last worked for the employer as a shift manager. During the later course of the employment, the employer's regional manager received complaints from its store manager that the claimant often confrontational, exhibited poor communication, and demonstrated a

poor attitude in the work place. The regional manager discussed the complaints with the claimant and encouraged the claimant to improve in his attitude.

Thereafter, the regional manager received another complaint from its store manager that the claimant was insubordinate when determined not to give the store manager his 100% effort in performing his job duties. The regional manager warned the claimant to either improve in his attitude or he would be discharged.
On or about May 14, 2013, the regional manger received a complaint from the store manager that the claimant had referred to her as being "emotionally immature" for the job. The claimant admitted to making the statement, but attributed his attitude and disposition to personal medical issues. The employer, however, determined that the claimant's actions were intolerable and decided to discharge the claimant on May 20, 2013, for creating a hostile atmosphere in the workplace.

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 creating a hostile atmosphere in the workplace.

In the hearing, the claimant admitted that at times exhibited poor behavior toward the store manager and had referred to her as being "emotionally immature" for the job. The claimant was warned to improve in his behavior and the claimant's unsatisfactory behavior continued after warning. The claimant's continued actions amount to conduct demonstrating a conscious disregard of the employer's interests and found to be a deliberate disregard of the reasonable standards of behavior which the employer expected of the claimant, which is misconduct under the law.

Consideration was given to the claimant's contention that his attitude and disposition were the result of personal medical issues. The claimant's contention is rejected. The claimant's medical issues may have had some affect on his attitude, but the employer provided unrebutted testimony that the claimant did not put the employer on notice that his medical issues were or may be affecting his attitude or that his attitude was the direct

result of his medical issues. Therefore, 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 June 14, 2013, is **REVERSED**. The claimant is disqualified from the receipt of benefits from the week ending May 25, 2013, plus the six subsequent weeks, and until the claimant earns $3,298.

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 19, 2013.

ALIN LOUIS
Appeals Referee

By: M. Duran
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 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.