STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-08931

vs.

Referee Decision No. 0008772548-03U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a 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 worked for an online retail company as a production employee technician from May 8, 2012, through July 24, 2013. It was reported from two other witnesses that the claimant was involved with a competing online company. The claimant was questioned on July 24, 2013 and the claimant denied being involved with the competing company. The claimant was presented an addendum to the employee handbook which stated that employees were not allowed to be involved with or participate in competing companies and he refused to sign the document. The

> claimant was informed that he was being terminated due to alleged insubordination because he refused to sign the acknowledgement and due to alleged misconduct regarding being involved with an online competing company.

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, 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.
>
> (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 after he refused to sign a document acknowledging that participating in a competing business during his employment would result in termination. The evidence shows the employer, which sells light-activated hula hoops, suspected the claimant of being involved in a competing business. Because of this suspicion, the employer required each of its employees to sign an addendum to its work rules which stated that participating in a competing business during one's employment or withholding information about other employees competing with the employer would result in termination. The document the employer asked its employees to sign specifically provides:

> I hereby acknowledge that participating in a competing hoop and/or party novelty business at any time during my employment with [the employer] will be considered serious misconduct against the interests of the company, and will result in termination of employment.
>
> I also acknowledge that any information I have about [the employer's] employees participating in a competing business will be relayed to management as soon as possible, otherwise my withholding of the information will be considered as participation in the competing business and therefore as grounds for termination of employment.

Although each of the employer's other employees signed the addendum, the claimant refused. The manager advised the claimant that, if he did not sign the document, he would be discharged. The claimant insisted he would not sign it and was promptly discharged. The referee concluded the claimant's refusal to sign the document did not amount to misconduct connected with work. The referee, however, did not provide an analysis as to why she concluded the claimant's refusal did not amount to insubordination. To the extent that the referee considered the addendum a material alteration of the agreement of employment, however, the referee erred.

The document the employer directed the claimant to sign does not impose a new, material obligation on the claimant. The document does not generally restrict where the claimant may work while employed with the employer, and places no limitations on the claimant's ability to seek employment or pursue competitive opportunities *after* his employment with the employer has ended. The employer's policy simply advises its employees of the common law duty of loyalty an employee owes to his employer. That rule is stated in *New World Fashions v. Lieberman*, 429 So. 2d 1276, 1277, (Fla. 1st DCA 1983), where the court held, "[a]n agent may not, without the principal's knowledge and consent, enter into any business in competition with his principal and keep for himself any profit accruing from such transaction." Similarly, in *Fish v. Adams*, 401 So. 2d 843, 844 (Fla. 5th DCA 1981), the court stated, "[t]he general rule with regard to an employee's duty of loyalty to his employer is that an employee does not violate his duty of loyalty when he merely organizes a corporation during his employment to carry on a rival business after the expiration of his employment. However, that employee may not engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to the end of his employment." Since there is no evidence that the employer had previously expressly allowed the claimant to engage in competitive business activities, the claimant was already under a duty not to compete with the employer while employed.[1] We recognize that the addendum also required the

[1] We have found no court decisions addressing this issue in reemployment assistance law. We note that on two prior occasions, Florida appellate courts have considered whether the imposition of a new non-competition agreement that applied post-employment provided good cause to quit. On both occasions, the courts held that it did not. *See Benson v. Unemployment Appeals Commission*, 927 So. 2d 49 (Fla. 5th DCA 2006); *Nelson v. Unemployment Appeals Commission*, 927 So. 2d 190 (Fla. 2d DCA 2006). In *Nelson*, the court noted that while the agreement did not provide good cause to quit, had the claimant therein refused to sign the agreement and been discharged, he would not have been disqualified. Crucial to that decision was the fact that the claimant was being asked to enter into an agreement that modified the terms of his engagement. An employee's refusal to comply with a newly implemented policy at the employer's request does not constitute misconduct within the meaning of the reemployment assistance statute. *See Swope v. Florida Industrial Commission*, 159 So. 2d 653 (Fla. 3d DCA 1963); *Thomas v. United Parcel Service, Inc.*, 864 So. 2d 567 (Fla. 2d DCA 2004).

claimant to report any information he was aware of regarding other employees competing with the employer, but we do not view that directive as inconsistent with the claimant's fiduciary duty. Instead, it is a reasonable application of the duty of loyalty, particularly where the employer had reason to believe that duty had been violated. We conclude, in any event, that it was not a material modification of the agreement of hire, once the claimant's common law obligations to the employer are considered.

Our courts have held that an employee's obdurate or belligerent refusal to comply with a valid work order amounts to misconduct sufficient to deny benefits. *See*, *e.g.*, *Hinson Electrical v. Unemployment Appeals Commission*, 914 So. 2d 1033 (Fla. 1st DCA 2005); *Givens v. Florida Unemployment Appeals Commission*, 888 So. 2d 169 (Fla. 3d DCA 2004); *Boyd v. Ikon Office Solutions, Inc.*, 743 So. 2d 1152 (Fla. 3d DCA 1999); *Clay County Sheriff's Office v. Loos*, 570 So. 2d 394 (Fla. 1st DCA 1990); *National Insurance Services, Inc. v. Unemployment Appeals Commission*, 495 So. 2d 244 (Fla. 2d DCA 1986); *Hines v. Department of Labor and Employment Security*, 455 So. 2d 1104 (Fla. 3d DCA 1984); *Citrus Central v. Detwiler*, 368 So. 2d 81 (Fla. 4th DCA 1979). In this case, the claimant's refusal to sign a document in which he agreed to comply with his common law duty not to compete with the employer demonstrated a conscious disregard of an employer's interests and was a deliberate disregard of the reasonable standards of behavior which the employer expects of its employees. The claimant's actions, therefore, amounted to misconduct connected with work as defined under Section 443.036(30)(a), Florida Statutes.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending July 27, 2013, the five succeeding weeks, and until he becomes reemployed and earns $3689. 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
5/9/2014 ,
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
MSC 344 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 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. **2013-83533U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3642-0

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 worked for an online retail company as a production employee technician from May 8, 2012, through July 24, 2013. It was reported from two other witnesses that the claimant was involved with a competing online company. The claimant was questioned on July 24, 2013 and the claimant denied being involved with the competing company. The claimant was presented an addendum to the employee handbook which stated that employees were not allowed to be involved with or participate in competing companies and he refused to sign the

document. The claimant was informed that he was being terminated due to alleged insubordination because he refused to sign the acknowledgement and due to alleged misconduct regarding being involved with an online competing company.

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 record reflects that the claimant was discharged due to alleged insubordination because he refused to sign the acknowledgement and due to alleged misconduct regarding being involved with an online competing company. The evidence shows that the claimant was not working for or involved with a competing company The evidence also shows that the claimant did refuse to sign the acknowledgment. It was shown that the claimant did not demonstrate either of the subsections above (A through E). While the employer may have made a valid business decision by discharging the claimant, it has not been shown by substantial, competent evidence that the discharge was for misconduct connected with work. Therefore, the claimant is not disqualified from receiving reemployment assistance.

Decision: The determination dated August 22, 2013, is AFFIRMED.

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

WHITNEY
GOLDEN-SMITH
Appeals Referee

on October 4, 2013.

By: DESYREE JONES, 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.