

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-09115

vs.

Referee Decision No. 0006771907-03U

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.

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 as an activities certified nursing assistant for a nursing facility. The claimant worked for the employer from August 15, 2012, through July 30, 2013. One activities certified nursing assistant was assigned per floor. During the claimant's employment, she was trained to complete resident's chart [sic] by the end of the month, and to chart residents' activities even for the days she was absent. On July 28, 2013, the claimant charted residents' activities for July 30 and 31, 2013 due to her not returning to work until August 1, 2013. On July 30, 2013, the director of nursing discovered that the claimant completed charting for future dates. Later that day, the administrator discharged the claimant due to falsification of documents.

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 supported by competent, substantial evidence and is in accord with the law; accordingly, it is affirmed.

The employer contends, contrary to the claimant's testimony, that the charts showed the claimant charted two weeks in advance. The issue here is not hearsay, but the closely-related "best evidence rule." As a general matter, the best evidence of what a document shows is a copy of the document itself. *See generally* §§90.951-58, Fla. Stats. The employer did not provide any such chart for the hearing. This failure deprived the appeals referee of the opportunity to determine the admissibility of this evidence and to evaluate its weight. The Commission thus finds no error in the referee's determination as to the employer's lack of competent, substantial evidence of misconduct. The remaining question is whether the claimant's own testimony established she was discharged for acts of misconduct connected with work within the meaning of the law.

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 employer did not submit a copy of its rules or recite any explicit rule of the employer that the claimant was discharged for violating. Nor did the employer contend the claimant committed criminal assault or battery on another employee, or on a customer or invitee of the employer; or that she committed abuse or neglect of a patient, resident, disabled person, elderly person, or child in her professional care. The claimant is thus not disqualified pursuant to subparagraph (e) of this provision.

The record reflects both parties agreed that the standard ethical "rule" for nurses, or a component of any standard of ethics for nurses, is that a nurse does not document what she does not see. As noted in the referee's findings, the claimant testified that she violated this rule or ethical standard at the direction of the employer and that she was trained by the employer to, in effect, backdate activities that occurred during her days off. The employer's witness, who did not train the claimant, averred that no one would have given her such a directive or such training. The Commission takes seriously the import of the claimant's testimony and the employer's argument. However, the referee's finding the claimant was so trained is supported in the record. Moreover, the Commission makes note of the employer's request for review, which states in pertinent part ". . . we tell our employees that if they are absent they must chart in the [residents'] medications and activities *after* they get back." [Emphasis in original.] Thus, the employer has effectively refuted its own primary argument that the claimant would not have been given such training.

Given the fact that the claimant was directed to violate nursing standards, and moreover, was given a directive to complete each chart “at least by the end of the month,” the Commission finds that the claimant was caught between the proverbial rock and a hard place. As such, her choice of which rule to violate will not suffice to support a finding of misconduct under the provisions of either subparagraph (d) or (a) of the above-quoted section of the law. *See Bulkan v. Florida Unemployment Appeals Commission*, 648 So. 2d 846 (Fla. 4th DCA 1995), in which a worker violated a rule at the request of a manager and *Copp v. 4126, Inc.*, 616 So. 2d 87 (Fla. 4th DCA 1993), in which a worker obeyed a rule instead of a verbal directive. Both workers were held to have been discharged for reasons other than misconduct. *See also Daniels v. Florida Unemployment Appeals Commission*, 531 So. 2d 1047 (Fla. 2d DCA 1988), in which the court found no misconduct where a nurse's aide left a patient unattended, resulting in the patient's injury, in order to stop a second patient from leaving the facility.

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

The referee's decision is affirmed. The claimant is not disqualified from receipt of benefits as a result of 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
3/12/2014,
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
MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

IMPORTANT: For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE: Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN: Pou yon intèpret asistè ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pran àmpil tòn, paské tòn limité pou ou ranpli apèl la.

Docket No. **2013-84098**

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #:

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.

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 EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will 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 charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant worked as an activities certified nursing assistant for a nursing facility. The claimant worked for the employer from August 15, 2012, through July 30, 2013. One activities certified nursing assistant was assigned per floor. During the claimant's employment, she was trained to complete resident's chart by the end of the month, and to chart residents' activities even for the days she was absent. On July 28, 2013, the claimant charted residents' activities for July 30 and 31, 2013 due to her not returning to work until August 1, 2013. On July 30, 2013, the director of nursing discovered that the claimant completed charting for

future dates. Later that day, the administrator discharged the claimant due to falsification of documents.

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. The burden of proof is upon the employer to prove that the claimant was discharged for misconduct. It was shown that the claimant was discharged for falsification of documents.

The employer's witness and claimant presented testimony regarding the claimant completing resident charting for future dates. However, the claimant presented un rebutted testimony regarding her being trained to complete charting by the end of each month, and to also chart for days when she was absent from work. As such, the claimant's actions have not been shown to be a violation of the employer's rules. The employer has not presented competent and substantial evidence to disqualify the claimant under any of the subsections of the law outlined above. Therefore, the claimant is not subject to disqualification.

Decision: The determination dated August 28, 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 on October 17, 2013.

SHANTI NELSON
Appeals Referee

By: 
DEMETRIA RIVERS, 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 lamèn, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.

Any questions related to benefits or claim certifications should be referred to the Claims Information Center at 1-800-204-2418. An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.
