STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-09253

vs.

Referee Decision No. 0008781901-02U

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 was employed as a server from July 9, 2010, through August 2, 2013. The claimant worked on a full-time schedule at a rate of $4.91 an hour plus gratuity. On June 11[,] 2012, the claimant was issued a warning for being belligerent and abusive toward a supervisor. The claimant denied the allegations held against him. On September 28, 2012, the claimant was accused of violation of company policy; use of aggression and threatening a fellow co-worker. The claimant was issued a warning on September 29, 2012, and suspended pending an investigation and possible termination. The claimant denied the allegations held against him citing he asked the co-worker questions, "What's

> wrong with you? Why are you giving me this section?" The investigation concluded that there were no grounds for termination. On July 27, 2013, the claimant had a co-worker make egg shell milk for an espresso. When the milk was prepared, the claimant picked up the cup and put it down because the cup was too hot to hold. The cup was then picked up by a co-worker, resulting in the claimant informing her the cup she picked up was his, prepared for him by another co-worker. She disagreed, and the claimant asked for her to confirm it was his, referring her to the co-worker who prepared the cup. The claimant subsequently walked away and had another egg shell milk prepared. The claimant was accused of use of profanity directed at the co-worker; "Fuck you, fuck your ass". The claimant denied use of profanity in the workplace. The claimant admitted to having a strong voice but had not admitted to an act of aggression, having a short temper, or use of profanity directed toward another co-worker. On August 2, 2013, the claimant was discharged for violation of company policy; use of profanity directed at a co-worker in the workplace.

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 material conflicts in evidence were not resolved properly; consequently, the case must be remanded.

Effective May 17, 2013, Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
>
> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
>
> (e)1. A violation of an employer's rule, unless the claimant can demonstrate that:
>
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.
>
> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects the employer discharged the claimant for allegedly using profanity in the workplace in violation of company policy. The employer's evidence concerning the alleged violation consisted of written statements from co-workers as well as statements from employees contained in disciplinary action forms. The appeals referee considered the employer's evidence but held, "The statement's [sic] provided by the employer absent their authors for the hearing in the face of the claimant's denial, are untrustworthy and [hold] no probative value." In this case, the referee did not properly address the admissibility and competency of the documents. The referee's characterization of the employer's hearsay evidence is erroneous and is, therefore, rejected by the Commission.

Under Section 443.151(4)(b)5.a., Florida Statutes: "*Any part of the evidence may be received in written form . . . .*" As the statutory language implies, documentary evidence should be received and considered where properly admissible, and an absolute preference for oral testimony over probative documentary evidence is unjustified. However, documentary evidence often is, or contains, hearsay, and its admissibility must be properly determined. In making evidentiary rulings, the referee must be guided by the statutory standard in Section 443.151(4)(b)5., Florida Statutes, as well as, when applicable, the Florida Evidence Code.

"Hearsay" evidence is an oral or written assertion made outside the hearing, which is offered into evidence to prove the truth of the matter asserted. *See* §90.801, Fla. Stat. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, and can be used to support a finding of fact if the hearsay evidence falls within an exception to the hearsay rule and would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence that does not fall within one of the exceptions contained in Sections 90.803 and 90.804, Florida Statutes, may nevertheless support a finding of fact in a proceeding before an appeals referee under the new statutory "residual exception" if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the referee determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

In determining whether documentary evidence is hearsay that may be used to base a finding of fact pursuant to Section 443.151(4)(b)5.c., Florida Statutes, the referee is required to make and outline the following analysis in the decision:

- Confirm that the evidence was properly provided to the parties, either by the referee as an attachment to the notice of hearing or by proper advance transmittal by the offering party to the referee and other party;
- Determine whether the evidence can be authenticated, i.e., whether a witness can explain with personal knowledge what the document is and how it was created or obtained;
- Identify whether the evidence is in fact hearsay, or, alternatively, is tangible non-hearsay evidence that is admissible without any further showing;

- If the document is hearsay, determine whether one of the statutory exceptions in the Florida Evidence Code applies; if so, it should be admitted;[1]
- If the evidence does not fall within the exceptions in the Florida Evidence Code, then the referee should determine whether the residual exception applies, including whether the party against whom the documents are being offered had a reasonable opportunity to review such evidence prior to the hearing, and whether the hearsay evidence is trustworthy and probative and the interests of justice would best be served by its admission into evidence;
- If the evidence meets the statutory requirements for its admission into evidence, an analysis must then be made regarding such evidence in light of any conflicting evidence that may have been presented by the opposing party.

The employer's disciplinary action forms fall within a statutory exception to the hearsay rule as a business record. Section 90.803(6)(a), Florida Statutes, defines a business record as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

If the employer submits a written statement of a nontestifying witness, the referee must first decide whether the claimant has had a reasonable opportunity to review the statement/report prior to the hearing (as with all documentary or tangible evidence). Under Florida Administrative Code Rule 73B-20.014(3), 24 hours advance receipt is required for evidence to be admissible under the residual

[1] We note that witness statements that are properly authenticated may constitute business records if they were prepared in the course of business, as opposed to being prepared specifically as evidence for a hearing.

exception. The referee must then determine whether the evidence can be authenticated (again, as is required with any documentary or tangible evidence). As stated in Section 90.901, Florida Statutes, authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is not onerous – it merely requires that someone with personal knowledge testify as to what the document is and how the document was prepared, received, or was retained as a record, etc. Finally, the referee must determine whether to admit the statement/report into evidence for either general (admissible hearsay) or corroborative (otherwise inadmissible hearsay) purposes. This does not mean the referee denies admission of any hearsay evidence the referee deems to be less credible than the claimant's testimony. If the referee does admit the hearsay evidence into the record, the referee can nonetheless find the claimant's evidence/testimony that conflicts with, for example, the written statement, is more credible.

Since the appeal referee failed to give the employer's evidence its proper weight in judging the credibility of the evidence, the credibility determination is flawed and the decision cannot be affirmed. In order to ensure an impartial weighing of the evidence, the referee's decision is vacated and the case is remanded for a de novo hearing before a different appeals referee.

The decision of the appeals referee is vacated and the case is remanded for a hearing *de novo* and a decision upon the merits.

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
5/27/2014 ,
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 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 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. **2013-79740** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3640-0

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.)

Finding of Facts: The claimant was employed as a server from July 9, 2010, through August 2, 2013. The claimant worked on a full-time schedule at a rate of $4.91 an hour plus gratuity. On June 11 2012, the claimant was issued a warning for being belligerent and abusive toward a supervisor. The claimant denied the allegations held against him. On September 28, 2012, the claimant was accused of violation of company policy; use of aggression and threatening a fellow co-worker. The claimant was issued a warning on September 29, 2012, and suspended pending an investigation and possible termination. The claimant denied

the allegations held against him citing he asked the co-worker questions, "What's wrong with you? why are you giving me this section". The investigation concluded that there were no grounds for termination. On July 27, 2013, the claimant had a coworker make egg shell milk for an espresso. When the milk was prepared, the claimant picked up the cup and put it down because the cup was too hot to hold. The cup was then picked up by a co-worker, resulting in the claimant informing her the cup she picked up was his, prepared for him by another co-worker. She disagreed, and the claimant asked for her to confirm it was his, referring her to the co-worker who prepared the cup. The claimant subsequently walked away and had another egg shell milk prepared. The claimant was accused of use of profanity directed at the co-worker; "Fuck you, fuck your ass". The claimant denied use of profanity in the workplace. The claimant admitted to having a strong voice but had not admitted to an act of aggression, having a short temper, or use of profanity directed toward another co-worker. On August 2, 2013, the claimant was discharged for violation of company policy; use of profanity directed at a co-worker in the workplace.

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 employer was the moving party in the separation. Therefore, the claimant is considered to have been discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 468 So.2d 413 (Fla. 1986). It was shown that the claimant was discharged for violation of company policy; use of profanity directed at a co-worker in the workplace. The claimant denied this allegation and the employer failed to provide competent evidence to support their claim. Consideration has been given to the statements presented by the employer and the alleged acts of aggression, threats, having a short temper, or use of profanity directed toward co-workers. The claimant denied these allegations and the employer did not have firsthand knowledge which resulted in the hearsay evidence. Hearsay evidence may be used for the

purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
2. The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

The statement's provided by the employer absent of their authors for the hearing in the face of the claimant's denial, are untrustworthy and holds no probative value. While the employer may have made a valid business decision in discharging the claimant, it has not been shown that the claimant's actions constitute misconduct connected with work. Accordingly, the claimant should not be disqualified from the receipt of unemployment benefits.

The hearing officer was presented with conflicting testimony regarding whether the claimant used of profanity directed at a co-worker in the workplace and is charged with resolving these conflicts. The Unemployment 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 claimant to be more

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

Decision: The determination dated August 28, 2013, is REVERSED. The claimant is qualified for receipt of benefits in connection with this claim, and benefits paid will be charged to the employer's account.

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 31, 2013.

ABDULLAH MUHAMMAD
Appeals Referee

By: Robyn L Deak
ROBYN L DEAK, 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.