STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

vs.

R.A.A.C. Order No. 14-00072
Referee Decision No. 0010195735-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has the responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. 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 Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and 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.

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

The claimant in this case was fired for poor work performance. The issue before the referee was whether the claimant's work performance was poor, and if so, whether her poor performance was the result of inability, or alternatively, lack of appropriate effort.

In *Rycraft v. United Technologies*, 449 So. 2d 382 (Fla. 4th DCA 1984), the court addressed a situation involving an engineer who not only made numerous mistakes in his work, but also was frequently late for work, devoted too much time to clerical tasks and read want ads on the job. This behavior continued despite repeated attempts by the employer to counsel the employee. The court pointed out that the worker in *Rycraft* demonstrated during certain times that he was a capable employee, but he simply did not apply himself consistently. The court concluded the worker's eventual discharge was for misconduct connected with work. Later cases that disqualified the claimant due to findings that he/she openly refused to perform, flouted employer authority and/or repeatedly failed to heed an employer's instructions include *Bozzo v. Safelite Glass Corp.*, 654 So. 2d 1042, 1043 (Fla. 3d DCA 1995), *Brownstein v. Hartwell Enterprises, Inc.*, 647 So. 2d 1004, 1005 (Fla. 3d DCA 1994), *Rubido v. Brinks, Inc.*, 601 So. 2d 1298, 1300 (Fla. 3d DCA 1992) and cases cited therein.

On the other hand, in *Doyle v. Florida Unemployment Appeals Commission*, 635 So. 2d 1028 (Fla. 2d DCA 1994), the claimant was a bank cashier who was unable to keep her cash drawer in balance. The court observed that employees who are discharged simply because they cannot perform the work adequately are entitled to unemployment benefits. The court found no evidence was presented to support a finding that the cashier willfully violated the employer's procedures. In *Pereira v. Unemployment Appeals Commission*, 745 So. 2d 573 (Fla. 5th DCA 1999), the court reaffirmed the principle that unsatisfactory performance as the result of inability or incapacity or incompetence is not misconduct as defined by the statute. Such performance may justify discharge of the employee, but does not disqualify the

worker from receiving unemployment benefits. Absent evidence that incompetent performance was the result of a lack of effort, wrongful intent, deliberate disregard of workplace rules, or an indifference to the interests of the employer, unsatisfactory job performance is not misconduct under the statute.

The employer in this case presented more than adequate evidence, if credited, to establish that the claimant's failure to perform was due to a lack of effort and indifference to the employer's interests. The employer's testimony indicated that the claimant had performed well for ten years, before a noticeable decline in her work performance in the last year of her employment. For example, during that time the claimant allegedly failed to return phone calls or properly process mail; she allegedly failed to complete required filings in probate cases so that the cases would be completed within the year prescribed by rule[1]; and she allegedly failed to follow a checklist that had been provided by the employer to ensure she completed files properly. Of particular significance are two instances described by the employer. In one, the claimant allegedly modified an accounting for a probate estate by $50,000 after it had been reviewed by the employer, requiring the employer to waive over $20,000 in attorney's fees. On another, the claimant took two files home only two weeks after she had been instructed not to remove confidential documents from the office. The claimant's failure to perform allegedly seriously jeopardized the employer's law practice.

The claimant denied most of the key portions of the employer's testimony relating to intentional failure to perform, and testified that she worked to the best of her ability. The claimant admitted, however, that she took files home after she had been advised by the employer that confidential material was not to be removed from the office. She explained that she was sick and was trying to keep up with her work. While we consider this perilously close to an admission of insubordination, because the claimant's motivation was an attempt to meet her job duties, we cannot conclude the referee erred in viewing this incident as an isolated instance of poor judgment.

Because the issue of whether poor job performance is the result of inability versus lack of effort is a complex and nuanced one, it is particularly within the province of the referee to make this ultimate finding. In this case, the referee made a credibility determination in favor of the claimant and found the claimant performed her job duties to the best of her ability. Because the referee's findings are properly supported by the claimant's testimony, and the legal conclusions are not erroneous based on the findings, there is no basis for overturning the referee's decision.

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[1] *See* Fla. R. Jud. Admin. 2.250(a)(1)(D).

The referee's decision is affirmed.

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

8/5/2014 ,

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: Ebony Porter
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*19954215 *

Docket No.0010 1957 35-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee ***EMPLOYER/Appellant***

APPEARANCES Employer

Claimant

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.

Findings of Fact: The claimant worked full time for the employer, a law office, from December 1997, until August 13, 2013, as a probate paralegal. The claimant's job duties included filing appropriate pleadings with the court, paying bills, making client contacts via the phone, and meeting with clients in the office. During the last year of her employment the owner was dissatisfied with the claimant's work

performance and believed she was failing to return client phone calls, removing files from the office without permission, and failed to do billing. The claimant was returning client calls as soon as she could. The claimant had permission to take files home at one point. The employer changed their rule so that the claimant was no longer allowed to take files home. Sometime in August 2013, the claimant was ill and took two files home to work on them. She did not ask for permission to take the files home. The claimant performed her job duties to the best of her ability. She was discharged for performance.

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 the claimant was 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); TallahasseeHousing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). It was shown the claimant was discharged for unsatisfactory work performance. The record shows the owner of the practice received reports from clients that the claimant was not returning their phone calls. The claimant categorically denies these allegations. The employer's witness relied on hearsay evidence to support this argument. 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.

A second hand statement is hearsay and does not meet an exception to the rule or support a finding of fact. Consideration has been given to the employer's argument that the claimant removed files from the office without permission. However, the claimant provided competent testimony that she had been given permission to remove files from the office and only removed files once after being instructed not to when she was sick. When viewed in its worst light the claimant removing the files when she was sick so that she could work on them at home was an isolated instance of poor judgment. The employer's witness has failed to provide any competent substantial evidence that the claimant showed a conscious disregard for the employer's interest or her job duties. As such, the claimant was discharged for reasons other than misconduct under subparagraph (a) or (b). Therefore, the claimant is not disqualified.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003 10946 (December 9, 2003), the Commission 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 November 15, 2013, is AFFIRMED. The claimant is not disqualified.

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 distributed to the last known address of each interested party on December 30, 2013

DEXTER PARKER
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 above 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 connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's 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 connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; 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 20yèm 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, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.
