STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-00993

vs.

Referee Decision No. 0000313547-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

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 voluntarily left work without good cause within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant worked as a delivery driver for the employer, a pizza restaurant, from March 6, 2013, until June 1, 2013. The claimant was hired as a part-time employee *with variable hours and shifts which included nights and weekends*. Sometime after being hired, the claimant requested to work only during daylight hours as possible because the claimant is color blind *and to have paid breaks*. The employer accommodated the daylight hours request for the claimant's work schedule. *However, the employer did not have enough work for the claimant to obtain additional scheduled hours during daylight. The employer's policy was to have unneeded part-time employees clock out when business was slow. The employees were advised that they could stay nearby should*

> *pizza orders increase if the employees wanted to be brought back on the clock that day. The employer did not guarantee that an employee would be brought back on the clock for that day*. The claimant did not request a leave of absence. The claimant did not provide any notice of his resignation. The claimant stated to the employer that he was resigning because he was putting too many miles on his car. *The claimant resigned because of concerns about hours, the lack of work, and not having mandatory paid breaks when business was slow* (emphasis added).

Based on these findings, the referee held the claimant voluntarily left work without good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes a procedural error occurred during the hearing process and the record was not sufficiently developed; consequently, the case must be remanded. As a result of the procedural error, certain of the findings of the referee italicized above were not based on competent evidence; consequently, those findings are rejected.

Section 443.101(1), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973).

The record reflects the claimant, who worked as a pizza delivery driver, notified the employer he was quitting because he was putting too many miles on his vehicle. At the hearing before the appeals referee, however, the claimant testified that the primary reason he quit was because he was required to clock out but remain on the premises when business was slow and was not permitted to clock back in until the food was ready for delivery. The claimant's testimony was not developed adequately to determine whether, when, why, and how often these unpaid periods occurred, i.e., daily, multiple times per shift, occasionally, etc. The referee also failed to clarify the claimant's testimony or question the employer regarding the employer's alleged requirement that the claimant clock out but remain on the premises when business was slow. As the trier of fact, the appeals referee has a duty to question witnesses as is necessary to develop the record. *See* Fla. Admin. Code R. 73B-20.024(3)(b).

A review of the record reveals the employer's representative, who was not placed under oath to provide testimony at the hearing, provided unsworn assertions regarding the issue of unpaid time during the employer's closing statement. According to the representative's unsworn statement, when business is slow, the employer asks employees to clock out but to wait 30 to 45 minutes before going home so that, if business picks up, they can be brought back on the clock to work. He also stated that, if business does not pick back up, employees are sent home at the end of the waiting period. Florida Administrative Code Rule 73B-20.024(3)(a) states: "Oral evidence shall only be taken upon oath or affirmation." Since the unsworn assertion of a non-witness representative during closing statements does not constitute record evidence, it cannot support any findings of fact. On remand, the referee must obtain *admissible* testimony from both parties as to the nature and purpose of these periods, and the employer's procedures in determining how and when they would occur. The referee must make a number of specific findings as further discussed below.

The testimony of the claimant in this case raises two potential grounds of voluntary separation attributable to the employer. First, the referee must determine, based on the developed record, whether the employer unilaterally and materially altered the agreed terms of the claimant's engagement. In such circumstances, the claimant may have good cause attributable to the employer for voluntary separation. *Wilson v. Unemployment Appeals Commission*, 604 So. 2d 1274, 1275 (Fla. 4th DCA 1992).

Secondly, the facts of this case raise multiple questions as to whether the claimant's resignation was based on employer policies that violated the Fair Labor Standards Act ("FLSA") or the Florida Minimum Wage Act.[1] "The FLSA provides that 'every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, [minimum] wages' during each applicable pay period." *Martinez v. Ford Midway Mall Inc.*, 59 So. 3d 168, 172 (Fla. 3d DCA 2011) (quoting 29 U.S.C. §206 (2009)). "It is unlawful for an employer to not pay an employee at least a minimum wage for every hour worked during the applicable pay period." *Id.* (citing 29 U.S.C. §215(2) (2009)). As such, an employer is statutorily on notice that it must pay an employee at least the minimum wage for each hour of service performed, unless the employee or employer is exempt.

[1] The Florida Minimum Wage Act adopts the coverage provisions and certain definitions from the FLSA. *See* §448.110(3), Fla. Stat.

The issue of whether the claimant and his co-workers were required to remain at the jobsite for 30 minutes or more off the clock to determine whether business would pick up raises a question as to whether the claimant was properly compensated for his work time under the FLSA and Minimum Wage Act. Generally, under the continuous workday rule, if an employee is required to wait at a facility for additional work after starting the work day, the employee is entitled to be compensated for that time. 29 C.F.R. §790.6. *See Brock v. DeWitt*, 633 F.Supp. 892, 895-96 (W.D. Mo. 1986).[2] However, employers may provide unpaid meal or rest breaks. A *bona fide* break may be properly treated as non-compensable time, 29 C.F.R. §785.19, but if the employee did not need rest or meal breaks due to the hours of work, the break may have been primarily for the benefit of the employer. The claimant must have been completely relieved of duty. *Kohlheim v. Glynn County*, 915 F.2d 1473, 1477 (11th Cir. 1990). Additionally, the claimant notified the employer that his decision to resign was also based on the mileage he was putting on his car. The evidence did not address whether the employer compensated the claimant for his mileage, and, if not, whether the claimant's employer-paid compensation (not including tips) was high enough to cover the cost of mileage without dropping the claimant below the FLSA's so-called "subminimum" wage for tipped employees. *See*, *e.g.*, *Garcia v. Koning Restaurants Int'l, LLC*, 2013 U.S. Dist. LEXIS 186533 (S.D. Fla. May 10, 2013) (a case apparently involving this employer).

On remand, the referee should develop the record on a number of issues. The referee must first determine whether the employer unilaterally and materially altered the terms of the claimant's employment. The findings reflect that the claimant requested and received a change in schedule to daylight hours from his original engagement to work varied shifts. To the extent the claimant's having to remain at work for any unpaid time was a function of the employer's granting of this requested change in hours, the record may not support that the change was unilateral.

The referee must also develop the record regarding FLSA and Minimum Wage Act issues. The referee must first determine whether the claimant's employment was "covered" by the FLSA. *Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586, 589 (Fla. 4th DCA 2006). FLSA coverage can be established by one of two methods. First, "enterprise" coverage applies to all employees of a business engaged in commerce that has annual revenue of $500,000 or more. 29 U.S.C. §203(s)(1)(A). Second, even if the employer is not covered as an enterprise, employees who are engaged in "commerce or the production of goods for commerce" are covered. 29 U.S.C. §§206(a)(l) & 207(a). As to the issue of individual coverage, the referee should determine whether the claimant used the "channels of

[2] The differences between compensable and non-compensable waiting time are addressed in 29 C.F.R. §§785.15-16.

interstate commerce." This would include determining whether the claimant routinely took orders over the telephone or processed credit card transactions. Additionally, if the employer contends that any of the exemptions to the FLSA applies to the claimant, the employer must be given the opportunity to present such evidence.

Next, the referee should determine the claimant's compensation structure. What was the claimant's employer-paid hourly rate, not including tips, during his employment? Was the claimant reimbursed for mileage for driving his personal car and, if so, how?

As noted above, the referee must then determine whether the claimant was required to clock out when business was slow and yet remain at the facility in case business increased. If the referee finds that the employer did not require the claimant to remain, but offered him the possibility of more work if he voluntarily stayed, the findings should so reflect. Whether the employee is free to decide whether to wait for additional work is a significant factor in determining whether the time is compensable. *Compare Felker v. Southwestern Emergency Med. Servs.*, 581 F.Supp.2d 1006 (S.D. Ind. 2008) to *Bernal v. Trueblue, Inc.*, 730 F.Supp.2d 736 (W.D. Mich. 2010).

If the employer did routinely require the claimant to clock out while remaining at the location for a period of time, the referee must then determine whether the time was characterized as a rest or meal break and, if so, whether those breaks were primarily for the benefit of the employer or employees. The referee should determine, among other things, how long the claimant typically worked prior to such breaks, and whether they were "regular" in nature.

Finally, in order to determine whether the claimant separated from employment under disqualifying circumstances, the referee must develop the record and make findings as to the claimant's reason(s) for quitting and his efforts to preserve his employment prior to quitting. The claimant's testimony regarding the involuntary unpaid breaks must be clarified to ascertain how many hours of each scheduled shift he typically remained at work and for how many of those hours was he actually paid. Even if it is established on remand that the employer's requirement that the claimant clock out but remain on the premises when business was slow altered an agreement of hire and constituted good cause for quitting, the claimant may nonetheless be disqualified from receipt of benefits if he did not make a sufficient effort to preserve his employment prior to quitting. *See Glenn v. Florida Unemployment Appeals Commission*, 516 So. 2d 88 (Fla. 3d DCA 1987). *See also Lawnco*, at 588; *Tittsworth v. Unemployment Appeals Commission*, 920 So. 2d 139 (Fla. 4th DCA 2006) (claimant quit her job without good cause attributable to her

employer as there was no evidence that she asked the employer for time off to go to Colombia to care for a sick member of her family or otherwise sought to take the leave and retain her job). The claimant is only required to make reasonable efforts, however, when there is "a realistic possibility they will not be futile." *Ogle v. Florida Unemployment Appeals Comm'n*, 87 So. 3d 1264 (Fla. 1st DCA 2012).

The record, therefore, must be developed to determine whether the claimant expressed any concerns to the employer regarding the requirement that he clock out for unpaid breaks when business was slow. At the hearing, the referee merely questioned the claimant regarding whether he requested a leave of absence or accommodation prior to quitting, which are questions of no relevance to the facts in this case. The referee must also develop the record to determine whether the employer has a clearly established procedure for resolving such concerns.

Finally, our review of the record reveals the employer provided a packet of documentary evidence to the referee and to the claimant for the hearing, and requested that one document from the packet, the claimant's separation/discharge form, be entered into the record. The claimant indicated he objected to the document being considered, but never specified any basis for his objection, and the referee made no inquiry. Moreover, the referee neglected to rule on the claimant's unspecified objection or the employer's motion that its document be considered as evidence. The referee stated the claimant's objection was "noted;" however, the referee never indicated whether the unspecified objection was sustained or overruled, and never gave any indication whether or not the employer's document would actually be marked as an exhibit, entered into the record, and considered in his decision. On remand, the referee must inquire regarding the specific basis for the claimant's objection, make a ruling on the record regarding the issue, and then make a ruling on the record regarding the employer's request that the document be entered into the record. If the document is entered into the record, it must be properly authenticated, marked, and labeled as an exhibit.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

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 5/1/2014, 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 PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*24646546 *

Docket No.0000 3135 47-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Claimant

Employer

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.

Issues Involved: 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 a delivery driver for the employer, a pizza restaurant, from March 6, 2013, until June 1, 2013. The claimant was hired as a part-time employee with variable hours and shifts which included nights and weekends. Sometime after being hired, the claimant requested to work only during daylight hours as possible because the claimant is color blind and to have paid breaks. The employer accommodated the daylight hours request for the claimant's work schedule. However, the employer did not have enough work for the claimant to obtain additional scheduled hours during daylight. The employer's policy was to have unneeded part-time employee's clock out when business was slow. The employees were advised that they could stay nearby should pizza orders increase if the employee's wanted to be brought back on the clock that day. The employer did not guarantee that an employee would be brought back on the clock for that day. The claimant did not request a leave of absence. The claimant did not provide any notice of his resignation. The claimant stated to the employer that he was resigning because he was putting too many miles on his car. The claimant resigned because of concerns about hours, the lack of work, and not having mandatory paid breaks when business was slow.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. "Good cause" includes only cause attributable to the employing unit or illness or disability of the claimant requiring separation from the work. However, a claimant who voluntarily left work to return immediately when called to work by a permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months, or to relocate due to a military-connected spouse's permanent change of station, activation, or unit deployment orders, is not subject to this disqualification.

The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment," and the burden rests with the claimant to show, by a preponderance of the evidence, that s/he quit with good cause. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827, 829 (Fla. 4th DCA 1973). In addition, whenever feasible, an individual is expected to expend reasonable effort to preserve his/her employment. Glenn v. Florida Unemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987).

Here, the record shows the claimant voluntarily quit during the claim week ending June 1, 2013, for personal reasons, and while the claimant's reasons for leaving may have been personally compelling, the claimant has not established that the employer violated the terms of hire. Accordingly, it is held that the claimant voluntarily quit without good cause attributable to the employer.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer.

The record reveals the claimant left work without good cause attributable to the employer. Accordingly, the employer's account shall be non-charged should any benefits be paid.

Decision: The claims adjudicator's determination dated September 30, 2013, holding that the claimant voluntarily quit without good cause attributable to the employer and disqualifying the claimant from receiving reemployment benefits from May 26, 2013, and until the claimant earns $2,329, and holding that the employer's account will not be chargedshould any benefits be paid 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 distributed to the last known address of each interested party on March 14, 2014

DEREK GORDON
Appeals Referee

By: 

HECTOR BERMUDEZ, 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.
