STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02817

vs.

Referee Decision No. 0022245506-02U

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 holding the claimant disqualified from receipt of benefits.

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 began working as bank teller for the employer, a bank, on June 20, 2012. The claimant's job duties included doing transactions, deposits, withdrawals, and being custodian of the cash machine. The employer has a policy which requires termination for any cash difference for the calendar month for more than $1,000.00 on any day. On February 13, 2014, the claimant's teller drawer had a cash difference of $2,340.00. The claimant was discharged on April 1, 2014 for violation of policy.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the record was not developed sufficiently and the evidentiary quality of significant portions of the testimony provided by the employer's witness is unknown. 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.
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> (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.
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> (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.
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> (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:
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> 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.

In the conclusions of law, the referee referenced the above statute and stated, in part:

> The record shows that 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); *Tallahassee Housing Authority v. Unemployment Appeals Commission*, 468 So. 2d 413 (Fla. 1986). The employer provided testimony to substantiate the misconduct of the claimant. *The claimant displayed misconduct by violating the employer's policy of having a cash difference of $2340.00 missing from her bank teller's drawer at the end of a single day*. The claimant was aware of this policy. Therefore the claimant was discharged for misconduct due to violation of policy and is disqualified from the receipt of benefits. (Emphasis added.)

The employer's policy defines cash differences as net differences that are not recovered after research and exceed the acceptable threshold in any given month. The policy's corrective action guidelines provide, in pertinent part, that a net cash difference exceeding $1,000 on any day is cause for corrective action up to and including discharge. The policy also notes that the employer may discharge an employee for cash differences outside the corrective action guidelines, especially where a consistent trend of differences or losses occurs. At the hearing, the branch

manager testified that she performed an audit which revealed a net difference of $2,340 at the claimant's teller window. The branch manager further testified that the employer then performed an investigation, which did not recover the net difference. Based on this investigation, the employer determined that the claimant was responsible for a cash difference and discharged the claimant pursuant to the above policy.

As the record now stands, we cannot determine the evidentiary quality of the testimony presented by the branch manager. At the hearing, the branch manager testified that another division of the employer conducted the investigation, which ultimately resulted in the determination that the claimant was responsible for a cash difference. This determination was material to whether the claimant violated the employer's policy. The referee accepted the employer's evidence as competent without establishing the evidentiary quality of that testimony. For instance, the referee failed to ask crucial questions, such as "How do you know?" The resulting record is therefore insufficient to determine whether the employer's evidence was competent. As the hearing officer, the referee must ask basic foundational questions of a witness so a reviewing body can determine whether the witness' testimony is based upon direct knowledge as opposed to hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it is not sufficient, in and of itself, to support a finding unless it would be admissible over objection in civil actions or under the residual hearsay exception set forth in Section 443.151(4)(b)5.c., Florida Statutes. *Yost v. Unemployment Appeals Commission*, 848 So. 2d 1235 (Fla. 2d DCA 2003). On remand, the referee is instructed to develop the record as needed to ascertain the proper weight to be accorded to the employer's evidence.

Furthermore, the record as currently developed is silent on how the employer performed its investigation and reached the conclusion that the claimant was responsible for a cash difference. We note that the employer may not be able to provide direct evidence to prove the claimant was responsible for a cash difference as defined under the employer's policy. However, circumstantial evidence based on firsthand testimony is competent evidence upon which to base a finding of fact. Circumstantial evidence is defined as proof of certain facts and circumstances from which the trier of fact may infer that the ultimate facts in dispute existed or did not exist. *See Lake County Sheriff's Department v. Unemployment Appeals Commission*, 478 So. 2d 880 (Fla. 5th DCA 1985). Thus, if the employer cannot provide direct evidence, circumstantial evidence would be competent to establish the claimant was responsible for a cash difference.

In addition to the foregoing, the record is unclear whether or not the net difference stemmed from significant or serious negligence or incompetent performance resulting from a lack of effort, wrongful intent, disregard of workplace rules, or an indifference to the interests of the employer, as opposed to simple negligence or inability to perform. As such, the referee must deduce evidence to determine how the net difference occurred and then evaluate the claimant's culpability under the relevant provisions of the aforementioned statute. If the employer is able to establish that the claimant was in violation of its rule, the referee must address whether the claimant under the facts of this case established the affirmative defense under Section 443.036(30)(e)3., Florida Statutes, that the rule was not fairly enforced. Particularly, if the referee finds the claimant committed an inadvertent or negligent violation of the employer's rule, the referee must balance the culpability of the claimant versus the nature and purpose of the rule and the impact of the violation on the employer or others when determining whether the employer's rule was fairly and consistently enforced. *See* R.A.A.C. Order No. 13-07369 (November 6, 2013); R.A.A.C. Order No. 13-04567 (August 7, 2013). We stress that in making this analysis, the referee must keep in mind that the 2011 amendment of the definition of misconduct adding subparagraph (e) *does not abrogate* the fundamental, long-standing doctrine that an employee may not be disqualified for inability to perform despite good faith efforts. *See generally Pereira v. Unemployment Appeals Commission*, 745 So. 2d 573 (Fla. 5th DCA 1999).

In *Doyle v. Unemployment Appeals Commission*, 635 So. 2d 1028 (Fla. 2d DCA 1994), the court addressed a scenario similar to this one under the predecessor version of the statute. In *Doyle*, the claimant was a bank teller who had a $400 overage on one day, and a $200 overage two days later. In addition to having her drawer out of balance, the employer found that Doyle had not completely complied with an employer policy requiring tellers to maintain a separate adding machine tape tracking their transactions in order to help the employer discover the source of any errors. The record did reflect, however, that Doyle had substantially complied with the policy, and attempted to do so consistently, but due to tape breaks or other issues had failed to do so in every circumstance.

Reversing a decision that Doyle should be disqualified for gross negligence, the court found insufficient evidence of disqualifying misconduct under either the predecessor version of (a) or (b). In doing so, the court noted the Florida Supreme Court's holding in *Gulf County School Board v. Washington*, 567 So. 2d 420, 423 (Fla. 1990), that "it is well settled that an employee who is discharged because he cannot adequately perform the work is entitled to unemployment compensation in spite of the fact that the employer had good reason to fire him." 635 So. 2d at 1031.

We caution that much of the legal analysis in *Doyle* has been superseded by statutory amendments.[1] However, our review of the legislative history regarding the 2011 amendment, as well as the plain language of the statute, provides no reason to believe that the Florida Legislature intended to eliminate the long-standing doctrine regarding unsatisfactory performance, including good-faith errors, merely by allowing employers to write a rule prohibiting them. Thus, in determining whether negligent or inadvertent failure to comply with the employer's rule is disqualifying, the referee must apply the test developed in R.A.A.C. Order Nos. 13-07369 and 13-04567, giving consideration to the underlying doctrine of cases like *Pereira* and *Doyle*.

Although not specifically addressed in the referee's decision, the documentary evidence provided by the employer reflected that the claimant had multiple drawer differences as well as a loss of $2,102 on December 4, 2013, in addition to the final loss for which she was terminated. On remand, the referee should also give consideration as to whether the claimant's ongoing performance demonstrated "carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or show[ed] an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer." §443.036(30), Fla. Stat. (2013). Again, however, the mere fact of the loss may not be sufficient by itself, without further evidence, to show the degree of negligence necessary to disqualify the claimant. The referee must develop the record as to the nature of the claimant's ongoing performance, any remedial training or counseling she had received, and the employer's and the claimant's explanations of why these errors occurred.

In order to address the foregoing issues, the referee's decision is vacated and the cause is remanded for further proceedings. On remand, the referee is directed to conduct a supplemental hearing to develop the record in greater detail and render a new decision that contains accurate and specific findings of fact regarding the circumstances surrounding the claimant's job separation and a proper analysis of those facts, along with an appropriate credibility determination, if necessary. Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

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[1] The *Doyle* court cited superseded versions of the definition of misconduct, the rule of construction, and the evidence rules regarding hearsay. We also conclude that statutory amendments have superseded *Doyle* to the extent it quotes *Spalding v. Florida Industrial Commission*, 154 So. 2d 334, 339 (Fla. 3d DCA 1963), for the proposition that "inattention" does not constitute misconduct. While mere inattention may not constitute "willful or wanton disregard" under the prior version of the definition of misconduct, it may very well constitute "conscious disregard" and thus constitute disqualifying misconduct under the current statute.

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 12/2/2014, 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

*27649008 *

Docket No.0022 2455 06-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES 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.

Finding of Facts: The claimant began working as Bank Teller for the employer, a bank, on June 20, 2012. The claimant's job duties included doing transactions, deposits, withdrawals, and being custodian of the cash machine. The employer has a policy which requires termination for any cash difference for the calendar month for more than $1,000.00 on any day. On February 13, 2014, the claimant's teller drawer had a cash difference of $2,340.00. The claimant was discharged on April 1, 2014 for violation of policy.

Conclusions of Law: As of May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; 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 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. 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 shows that the claimant was discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2nd 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2nd 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 468 So.2nd 413 (Fla. 1986). The employer provided testimony to substantiate the misconduct of the claimant. The claimant displayed misconduct by violating the employer's policy of having a cash difference of $2340.00 missing from her bank teller's drawer at the end of a single day. The claimant was aware of this policy. Therefore the claimant was discharged for misconduct due to violation of policy and is disqualified from the receipt of benefits.

Decision: The Determination distributed on April 14, 2014 is REVERSED. The claimant is disqualified from the receipt of benefits from March 30, 2014, the five following weeks, and until the claimant has earned $3383.00.

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 May 27, 2014

Crystal Turner
Appeals Referee

By: 

ANTONIA SPIVEY (WATSON), 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 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, 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.
