

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-02818

vs.

Referee Decision No. 0021336730-02E

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 wherein the employer's record was held chargeable with a proportionate share of benefit payments made to the claimant.

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 employer's record is eligible for relief of benefit charges in connection with this claim as provided in Section 443.131(3), Florida Statutes.

The referee's findings of fact state as follows:

The claimant worked for the employer from January 22, 2013, through April 12, 2013, as a phone operator. The employer has an established 90-day probationary period [to which] every employee is subject upon hire. It does not exceed 90 days, and the claimant was notified about the probationary period at hire. On March 18, 2013, the claimant allegedly sent a fax to a regular number instead of a fax number on two different medication refill requests. On March 21, 2013, the claimant allegedly scheduled a patient for an annual physical instead of a new patient appointment. On March 22, 2013, the claimant allegedly put the incorrect telephone number on a form. The employer counseled the claimant about

these incidents of poor work performance, and asked the claimant if there was a problem or if she needed additional training. The employer was not notified of any problem. The employer terminated the claimant on April 12, 2013, for poor work performance.

Based on these findings, the referee held the employer's account chargeable with its proportionate share of benefits paid to the claimant. Upon review of the record and the arguments on appeal, the Commission concludes the referee's decision is not in accord with the law; accordingly, it is reversed.

Section 443.131(3)(a)2., Florida Statutes, provides:

If an individual is discharged by the employer for unsatisfactory performance during an initial employment probationary period, benefits subsequently paid to the individual based on wages paid during the probationary period by the employer before the separation may not be charged to the employer's employment record. As used in this subparagraph, the term "initial employment probationary period" means an established probationary plan that applies to all employees or a specific group of employees and that does not exceed 90 calendar days following the first day a new employee begins work. The employee must be informed of the probationary period within the first seven days of work. The employer must demonstrate by conclusive evidence that the individual was separated because of unsatisfactory work performance *and not because of lack of work due to temporary, seasonal, casual, or other similar employment that is not of a regular, permanent, and year-round nature* [emphasis added].

The referee held the employer did not establish that its account should be relieved of benefit charges under the provisions of the above-noted statute because it did not present competent evidence of the underlying events leading to the claimant's separation. Upon review of the evidence in the record and the arguments on appeal, the Commission concludes the referee misunderstood the intent of the statutory requirement and thus incorrectly held that the employer was required to prove by conclusive and competent evidence the specific acts which lead to the claimant's separation. The above-noted statute provides that ". . . the employer must demonstrate by conclusive evidence that the claimant was separated *because of unsatisfactory performance.*" The critical issue, therefore, is whether the *reason* for discharge was the claimant's unsatisfactory performance, not whether the employer can, in fact, prove the claimant's performance was deficient and that the

employer's conclusion her performance was unsatisfactory, which is a rather subjective standard, can be independently substantiated. This is because the purpose of the statutory language is to ensure that the employer's motivation for discharge was a belief that the claimant was performing poorly, rather than an intent to circumvent charging by mischaracterizing the layoff or separation of a temporary, seasonal or other short-term employee as a separation for poor performance. Thus, it is the employer's *belief* that an employee is performing poorly, rather than objective proof of that fact, that is at issue. Accordingly, the referee must develop the record to determine the nature of the employer's business, the terms of the claimant's hire and expectations for continued employment, the circumstances behind the separation of the claimant, and other relevant facts such as whether other individuals were separated around that time, to ensure that the separation is a bona fide separation for poor performance. We acknowledge that direct, probative evidence regarding the specific performance issues the claimant was perceived to have is highly relevant to prove the veracity of the employer's explanation, but it is not essential in every case.

The employer's witness, the practice administrator, testified that, as one of the claimant's supervisors, she discussed the claimant's performance with her at least twice during her employment and that she made the decision to discharge the claimant for unsatisfactory performance based on information presented to her by the claimant's lead supervisor and documentation in the claimant's employment file. Furthermore, the practice administrator testified that she personally discharged the claimant and advised the claimant she was being discharged for poor performance within the initial 90-day probationary period. There was no evidence in the record from which an inference could be drawn that the claimant was actually laid off due to being a short-term employee. The Commission concludes that the practice administrator's testimony established by conclusive evidence that the claimant was in fact discharged for poor performance within the initial 90-day probationary period. Accordingly, the employer's account is relieved of charges in connection with this claim.

The decision of the appeals referee is reversed. The employer's account is relieved of charges in connection with this claim. This order does not affect the claimant's entitlement to benefits.

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

9/15/2014,

the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kady Thomas

Deputy Clerk



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



*27264283 *

Docket No.0021 3367 30-02

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES

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.

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 for the employer from January 22, 2013 through April 12, 2013 as a phone operator. The employer has an established 90-day probationary period that every employee is subject upon hire. It does not exceed 90 days, and the claimant was notified about the probationary period at hire. On March 18, 2013, the claimant allegedly sent a fax to a regular

number instead of a fax number on two different medication refill requests. On March 21, 2013, the claimant allegedly scheduled a patient for an annual physical instead of a new patient appointment. On March 22, 2013, the claimant allegedly put the incorrect telephone number on a form. The employer counseled the claimant about these incidents of poor work performance, and asked the claimant if there was a problem or if she needed additional training. The employer was not notified of any problem. The employer terminated the claimant on April 12, 2013 for poor work performance.

CONCLUSION OF LAW: 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, was discharged for misconduct connected with the work, refused without good cause an offer of suitable work from the employer, was discharged from work for violating any criminal law punishable by imprisonment or for any dishonest act in connection with the work, refused an offer of suitable work because of the distance to the employment due to a change of residence by the claimant, became separated as a direct result of a natural disaster declared pursuant to the Disaster Relief Act of 1974 and the Disaster Relief and Emergency Assistance Amendments of 1988, or was discharged for unsatisfactory performance during an initial probationary period that did not exceed ninety calendar days and of which the claimant was informed during the first seven days of work.

The record reflects that the employer has an established ninety-day probationary period. The employer's probationary period is set for 90 days, extends to all employees, and they are notified on the date of hire. The employer personally hired the claimant and reviewed the 90-day probationary provision in the handbook with the claimant.

The record reflects the claimant was discharged. When a claimant has been discharged from his employment during the 90 day probationary period, "the employer must demonstrate by conclusive evidence that the individual was separated because of unsatisfactory work performance and not because of lack of work due to temporary, seasonal, casual, or other similar employment that is not of a regular, permanent, and year-round nature." Fla. Stat. § 441.131(3)(a)2. In this case, the employer identified four specific incidents of poor performance but did not provide first-hand testimony to the incidents. They were relayed to the employer's witness by the claimant's supervisor. The claimant's supervisor was not present at the hearing. The employer did counsel the claimant about general issues of poor performance, but not regarding these specific dates. No other instances of poor performance was provided. As such, the testimony of the employer's witness is hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions or it meets the statutory requirements set forth in § 443.151(4)(b)5, Florida Statutes. Because there is no first-hand testimony about specific acts of misconduct, the record is void as to disqualifying conduct. Therefore, the employer's account is not relieved of charges.

DECISION: The determination dated March 24, 2014, charging the employer's account, is **AFFIRMED**. The employer's account (3124474) is not relieved of charges.

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 19, 2014

CATHERINE ARPEN
Appeals Referee

By: 

CONNIE DEMORANVILLE, 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 definitiv sòs 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.

An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. All voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.