STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03702

vs.

Referee Decision No. 0022365822-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits and charged the employer's account.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the claimant voluntarily left work without good cause attributable to the employing unit or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant worked for the employer, a credit card processing company, as a field sales executive from April 4, 2005, to April 17, 2014. The claimant was provided a copy of the employer's handbook in June 2013. ~~The employer has a policy~~ In February 2011, the claimant signed a Non-Disclosure and Non-Solicitation Agreement which states in paragraph six that during employment with the Company, the Employee will not associate with or engage in any capacity with, directly or indirectly, for compensation or otherwise, any person or entity who is in competition with the Company. The ~~policy~~ agreement also indicated in paragraph three that, in consideration of the Company providing Employee with

> the Confidential Information and Specialized Training described herein, Employee agrees to hold all Confidential Information and Specialized Training in the strictest confidence. For the duration of Employee's employment with the company and thereafter, Employee shall not directly or indirectly duplicate, sell, use, lease, commercialize, disclose or otherwise divulge to any person or entity any portion of the Confidential Information and Specialized Training or use any Confidential Information and Specialized Training for his own benefit or profit or the benefit or profit of another person or entity other than the Company, or allow any person or entity, other than the Company and authorized employees of the same, to use or otherwise gain access to any Confidential Information or Specialized Training. The claimant signed an offer letter in February 2013, which superseded all previous employment agreements which did not include a non-disclosure agreement. The claimant asked several managers and company officers about whether she could offer clients an equipment replacement program. The claimant was told that she could not and to refer those customers elsewhere. In April 2014, the claimant ~~was found to have~~ referred 3-5 clients to [another company] which provides an equipment <u>re</u>placement program. The claimant admitted to the vice president of operations that she referred these clients to [another company]. On April 17, 2014, the claimant was told that she was discharged for violating the employer's non-compete agreement.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee's findings, as modified above to conform to the evidence, are supported by competent, substantial evidence.[1] Accordingly, the factual findings are adopted as modified.

When the issue before the appeals referee relates to the claimant's separation from employment, the employer bears the initial burden of proving either the claimant was discharged for misconduct connected with the work or the claimant voluntarily quit, in which case the burden shifts to the claimant to show good cause

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[1] The referee apparently based the finding that the claimant was told to refer customers who were seeking an equipment replacement program elsewhere on the claimant's testimony at 1:22:37-49 of the hearing, when the claimant testified that her manager told her "that's not something that we offer, and (inaudible) offered it elsewhere." Whether this evidence is sufficient to support such a finding is not dispositive of the outcome of this case.

for the quitting. *See Lewis v. Lakeland Health Care Ctr., Inc.*, 685 So. 2d 876, 878 (Fla. 2d DCA 1996). The proof necessary to carry this burden must consist of competent, substantial evidence. *See Tallahassee Housing Authority v. Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986); *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

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

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.
>
> (c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.
>
> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.
>
> (e)1. A violation of an employer's rule, unless the claimant can demonstrate that:
>
> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or

> c. The rule is not fairly or consistently enforced.
>
> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

In the offer letter effective February 1, 2013, the employer offered the claimant the position of Outside Sales Representative. The letter outlined the economic terms of the offer and indicated:

> This compensation plan is not an employment contract but simply a method of establishing and calculating total earnings for the position you are being offered. The foregoing constitutes the entire compensation packet being offer[ed] to you and no additional compensation or benefits are to be received by you except as agreed . . . to by both of us in writing. [The employer] may amend or modify from time to time the existing Compensation Plan based on business needs, including modifying the performance requirements, target levels and participation terms. **Upon acceptance by you, such definitive agreement will supersede any existing employment agreement currently in place with [the employer].** You understand and agree that this position is a commissioned only Outside Sales Position, and it is not eligible for any hourly, overtime, or other wages not expressly disclosed above.

(Emphasis added.) The claimant contended, and the referee concluded, that the highlighted provision superseded the Non-Disclosure and Non-Solicitation Agreement the claimant signed in February 2011. While a review of the prior compensation agreements the claimant may have had with the employer could shed additional light on the issue, we reject the referee's interpretation of the compensation agreement as superseding the Non-Disclosure and Non-Solicitation Agreement. Read together, the intent is reasonably clear that the compensation agreement was not intended to affect the prior commitments in the Non-Disclosure and Non-Solicitation Agreement. The Non-Disclosure and Non-Solicitation Agreement contains a provision which specifically addresses other agreements and provides:

> *Other Agreements*. The obligations of the Employee under this Agreement shall be independent of, and unaffected by, and shall not affect, other agreements, if any, binding the Employee which apply to the Employee's business activities during and/or subsequent to the Employee's employment with Company.

The issue in this case, however, is not whether the claimant was bound by and violated the Non-Disclosure and Non-Solicitation Agreement. The issue is whether the claimant's actions constituted misconduct. We agree with the referee that the employer offered insufficient evidence to show that they did. The employer's choice of language in the 2013 compensation agreement needlessly injected ambiguity into the claimant's contractual obligations with the employer under the Non-Disclosure and Non-Solicitation Agreement. As the party drafting the agreements at issue, the employer had the ability to harmonize any documents to avoid such ambiguity, but did not do so. Even though we do not conclude that the compensation agreement released the claimant from her obligations under the Non-Disclosure and Non-Solicitation Agreement, the claimant could reasonably have believed so. Thus, the employer failed to show that the claimant had reason to know she was violating any contractual obligations.

On appeal to the Commission, the employer further contends that the claimant violated its policies in the employee handbook. The employer has provided several pages of the employee handbook that were not provided at the hearing below. The Commission may only consider evidence not provided for the appeals hearing if it is "newly discovered":

> (1) A party may request the Commission to consider newly discovered evidence which by due diligence could not have been discovered in time for presentation at the hearing before the appeals referee.
>
> (2) The request shall be in writing and shall include a clear and concise description of the evidence. The requesting party shall demonstrate that the evidence is material to the outcome of the case and that it could not have been discovered prior to the hearing by an exercise of due diligence.

Fla Admin. Code R. 73B-22.005. The Commission did not consider this evidence because it does not meet the requirements of the rule.

The only policy language in the hearing record are excerpts contained in the employer's May 19, 2014 appeal of the initial determination in this case. Based on the record, there is no evidence that the claimant "divert[ed] sales from [the employer]," or "provid[ed] products or services in competition with [the employer]." The only competent record evidence reflects that the claimant referred a limited number of customers to [another company] who wanted a free equipment replacement program, which the claimant was told her employer did not offer.

Finally, we note that even in the absence of a restrictive covenant agreement, an employee owes a common law duty of loyalty to her employer. In *New World Fashions v. Lieberman*, 429 So. 2d 1276, 1277 (Fla. 1st DCA 1983), the court stated the general rule that "[a]n agent may not, without the principal's knowledge and consent, enter into any business in competition with his principal and keep for himself any profit accruing from such transaction." Similarly, in *Fish v. Adams*, 401 So. 2d 843, 845 (Fla. 5th DCA 1981), the court stated, "[t]he general rule with regard to an [employee's] duty of loyalty to his employer is that an employee does not violate his duty of loyalty when he merely organizes a corporation during his employment to carry on a rival business after the expiration of his employment. However, that employee may not engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to the end of his employment." The record evidence in this case does not show that the claimant received any compensation for her referrals to [the other company], or that those referrals were of business that otherwise would have gone to the employer.

For the reasons above, the evidence does not establish that the claimant violated duties to the employer in circumstances which would constitute misconduct. Accordingly, the referee correctly held the claimant not disqualified from receipt of benefits.

The referee's decision is affirmed. If otherwise eligible, the claimant is entitled to benefits. The employer's record shall be charged with its proportionate share of benefits paid in connection with this claim.

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 1/27/2015, 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

*28879883 *

Docket No.0022 3658 22-02 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.

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.)

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 for the employer, a credit card processing company, as a field sales executive from April 4, 2005, to April 17, 2014. The claimant was provided a copy of the employer's handbook in June 2013. The employer has a policy which states during employment with the Company, the Employee will not associate with or engage in any capacity with, directly or indirectly, for compensation or otherwise, any person or entity who is in competition with the Company. The policy also indicates in consideration of the Company providing Employee with the Confidential Information and Specialized Training described herein, Employee agrees to hold all Confidential Information and Specialized Training in the strictest confidence. For the duration of Employee's employment with the Company and thereafter, Employee shall not directly or indirectly duplicate, sell, use, lease, commercialize, disclose or otherwise divulge to any person or entity any portion of the Confidential Information and Specialized Training or use any Confidential Information and Specialized Training for his own benefit or profit or the benefit or profit of another person or entity other than the Company, or allow any person or entity, other than the Company and authorized employees of the same, to use or otherwise gain access to any Confidential Information or Specialized Training. The claimant signed an offer letter in February 2013, which superseded all previous employment agreements which did not include a non-disclosure agreement. The claimant asked several managers and company officers about whether she could offer clients an equipment replacement program. The claimant was told that she could not and to refer those customers elsewhere. In April 2014, the claimant was found to have referred 3-5 clients to a company which provides an equipment placement program. The claimant admitted to the vice president of operations that she refered these clients to . On April 17, 2014, the claimant was told that she was discharged for violating the employer's non-compete agreement.

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, wilful 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 reflects that the determination holds that the employer discharged the claimant. In cases of discharge, the burden of proof is upon the employer to demonstrate that the discharge was for misconduct. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 468 So.2d 413 (Fla. 1986). It was shown that the claimant was accused of violating the employer's non-compete agreement. It was further shown that the claimant signed a document holding the non-compete agreement null and void. It was also shown that the claimant asked several managers and company officers about whether she could offer clients an equipment replacement program. The record reflects that the claimant was told that she could not offer clients an equipment replacement program and to refer those customers elsewhere for those services. The employer's witnesses were not present at the time the claimant was advised to refer the customers elsewhere, therefore, their testimony is considered hearsay. 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: I. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and II. 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. It has not been shown that the claimant made a conscious decision to disregard the employer's interest. While the employer may have made a valid business decision in discharging the claimant, it has not been shown that the claimant was discharged for misconduct connected with work. Accordingly, the claimant is not disqualified from the receipt of benefits.

Decision: The determination dated April 28, 2014, is **AFFIRMED**. The claimant is not disqualified from receipt of benefits. The employer's account shall be charged for benefits paid.

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 June 24, 2014

MICHAEL COLES
Appeals Referee

By: 

ALEXANDER RANKIN, 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.
