**STATE OF FLORIDA**
**REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-04612

vs.

Referee Decision No. 0023377274-02U

Employer/Appellant

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**ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

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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.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

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 worked for the employer, a cleaning service, as a full-time crew lead, from May 1, 2010, through May 22, 2014. The claimant's job duties included supervising workers performing on-site residential cleaning. On May 22, 2014, a ring went missing from a customer's home after it was cleaned by a crew lead by the claimant. Upon being contacted by the customer, the owner of the company asked her employees about the missing ring. The claimant told the owner that she did not take the ring. The claimant was subsequently arrested in connection with the theft. During the arrest, the claimant maintained she did not take the ring. The claimant was terminated on May 22, 2014.

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 decision fails to address competent, material, circumstantial evidence and, therefore, is not in accord with the law; accordingly, it is reversed.

Section 443.036(30), Florida Statutes (2013), 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.
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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:
>
> 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 holding the claimant not disqualified from receipt of benefits, the referee concluded the employer presented only hearsay evidence to establish the claimant had stolen from a customer and, therefore, failed to meet its burden of proving misconduct. In reaching this conclusion, however, the referee ignored unrebutted competent, material, circumstantial evidence that was sufficient to establish a prima facie case of misconduct.

*Direct evidence has no greater "automatic" or "inherent" value than circumstantial evidence.* Any element of proof in a reemployment assistance case may be made, or rebutted, by either direct or circumstantial evidence. "Direct evidence" is provided by witnesses who testify to their direct observation of a fact. *Mosley v. State*, 46 So. 3d 510, 526 n.14 (Fla. 2009). For example, a witness who testifies that he saw another employee take money out of a cash register has provided direct evidence to that fact. Circumstantial evidence, by contrast, is evidence of facts from which another material fact may be inferred. *Id.* *See also Lake County Sheriff's Department v. Unemployment Appeals Commission*, 478 So. 2d 880, 881 (Fla. 5th DCA 1985). For example, a store manager testifies that a store's safe contained $1000 when he counted it after closing one night, but contained only

$500 when he counted it before opening the next morning. He further testifies that he reviewed the store's security access log and found that an assistant manager was the only individual in the store during the interim. These facts are sufficient to prove by circumstantial inference that the assistant manager stole the money, and are sufficient to prove that fact over the assistant manager's denial, if the weight of the evidence favors that inference. There is no sound logical basis for automatically preferring or accepting direct evidence over circumstantial evidence. Indeed, such flawed reasoning can operate to deprive parties of their right to a fair hearing.

In concluding the employer did not present sufficient competent evidence to establish that the claimant was discharged for misconduct, the referee discredited hearsay testimony presented by the employer's witness without addressing any of the employer's competent circumstantial evidence. The employer's witness provided hearsay testimony, based on what was reported to her by the non-testifying police officer, that the claimant admitted to the police officer her involvement in the theft of a client's anniversary ring. The employer's witness did not personally hear the claimant's admission to the police officer, so the referee correctly concluded this testimony was hearsay. However, the record reflects that after being informed of the claimant's alleged admission and resulting arrest, the employer's witness went outside to notify the claimant of her discharge. The employer's witness testified she observed the claimant in handcuffs in the back of the police car. She further testified that when the claimant stated to her that she had not been involved in the theft of the client's ring, she heard the police officer say to the claimant, "You're in the back of a police car, you've just been arrested, you've admitted it to me, and you're still going to lie to her?" The employer's witness provided competent testimony, based on her personal observation, that the claimant started crying and stated she had a "pill problem" but that she had never stolen from the employer. The employer's competent evidence reflects the claimant never expressly refuted the police officer's statement "you admitted it to me," and that she amended her denial to say she had never stolen from *the employer* (as opposed to her earlier statement to the employer's witness that she had not stolen from *the client*). The employer's competent circumstantial evidence is sufficient to support a reasonable inference that the claimant was culpable and that she admitted her culpability to the police officer. Accordingly, the employer established a prima facie case of misconduct.

Once the employer establishes prima facie misconduct, the burden shifts to the employee to establish the propriety of that conduct. *Alterman Transport Lines, Inc. v. Unemployment Appeals Commission*, 410 So. 2d 568, 569 (Fla. 1st DCA 1982). The claimant did not appear or present any evidence at the hearing. Therefore, the claimant has failed to meet her burden of proof. Since the employer's prima facie evidence of misconduct is unrefuted, the claimant is disqualified from receipt of benefits.

The decision of the appeals referee is reversed. The claimant is disqualified from receipt of benefits for the week ending May 24, 2014, the 15 succeeding weeks, and until she becomes reemployed and earns $2,839. As a result of this decision of the Commission, benefits received by the claimant for which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of the overpayment to be calculated by the Department and set forth in a separate overpayment determination.

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 12/1/2014, 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

*31902102 *

**Docket No.0023 3772 74-02** 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:** 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 cleaning service, as a full-time crew lead, from May 1, 2010, through May 22, 2014. The claimant's job duties included supervising workers performing on-site residential cleaning. On May 22, 2014, a ring went missing from a customer's home after it was cleaned by a crew lead by the claimant. Upon being contacted by the customer, the owner of the company asked her employees about the missing ring. The claimant told the owner that she did not take the ring. The

claimant was subsequently arrested in connection with the theft. During the arrest, the claimant maintained she did not take the ring. The claimant was terminated on May 22, 2014.

**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 reflects the claimant was discharged. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De

Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); TallahasseeHousing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The record reflects the employer presented solely hearsay testimony to suggest the claimant stole from the customer. The record further reflects the claimant denied the theft of the ring when questioned by the supervisor. Ultimately, while the suspicion of theft alone may have provided the employer with adequate cause to terminate the claimant, the employer has not established by a preponderance of competent substantial evidence that the claimant's actions constituted misconduct. Accordingly, the claimant remains qualified for the receipt of benefits.

**Decision:** AFFIRMED. The claimant is not disqualified for the receipt of benefits.

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/mailed to the last known address of each interested party on August 29, 2014.

**STEELE SIMPSON**
Appeals Referee

By:

LACHERYL SCURRY, 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 distribution/mailed 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 distribución/fecha de envìo 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 distribisyon/postaj. 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.

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