STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-00605

vs.

Referee Decision No. 0024645569-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

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

On appeal to the Commission, the claimant offered assertions of fact 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.

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 full-time for the employer, a paint manufacturing company, from January 3, 2006, until May 15, 2014, as a lab technician. He last physically worked on May 15, 2014. The claimant began a medical leave of absence on May 15, 2014, to have elective surgery on his knees. The claimant had double knee replacement on July 9, 2014. On September 8, 2014, the claimant's physician cleared him to return to work with restrictions on September 15, 2014. The claimant was restricted from climbing ladders, a requirement in the lab technician position. The claimant was offered the position of batch maker with the same pay, hours and same benefits. The position of batch maker did not require the claimant to climb ladders. The claimant refused the position offer advising the employer it was a demotion. The claimant was given until November 17, 2014, to accept the position of batch maker. The claimant believed the position of batch maker would be more strenuous on him than the position of lab technician. The employer no longer had a need for a lab technician once the claimant went on medical leave but needed someone to fill the position of batch maker. On October 14, 2014, the claimant's physician provided the employer with a note advising the claimant could return to work without restrictions on December 1, 2014. The employer agreed to accommodate the claimant's restrictions until December 1, 2014, if he worked in the position of a batch maker. The claimant refused to accept the position. The claimant quit by failing to return to work after a medical leave of absence.

Based on these findings, the referee held the claimant voluntarily left work without good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes that, while the referee correctly concluded that the claimant did not leave work with good cause attributable to the employer, the referee failed to properly analyze the issue of whether the claimant voluntarily left work due to illness or disability requiring separation. Thus, the referee's decision is not in accord with the law and is reversed.

Section 443.101(1)(a), Florida Statutes, denies payment of benefits to persons who voluntarily leave a job, unless the leaving was for good cause attributable to the employer which would compel a reasonable employee to cease working; due to the claimant's personal illness or disability that required separation; or to relocate as a result of his or her military-connected spouse's permanent change of station orders, activation orders, or unit deployment orders. In considering whether the claimant left work due to illness or disability requiring separation, the focus should be "whether the individual is physically unable to perform the job duties." *Krulla v. Barnett Bank*, 629 So. 2d 1005, 1007 (Fla. 4th DCA 1993).

The referee found the claimant voluntarily quit without good cause on November 17, 2014, based on his refusal to accept the position offered by the employer once he was to be released to return to work after his medical leave of absence. The record, however, reflects the claimant did not perform any services for the employer after May 15, 2014. The evidence presented at the hearing reflects the claimant became separated from his employment when he effectively quit because he was not reinstated to his prior position because he was unable to perform all the duties of his pre-injury quality control position subsequent to May 15, 2014, due to an illness or disability. *See* U.A.C. Order No. 07-08542 (December 10, 2007) (bus driver held not disqualified from last day of work despite being placed on a leave of absence where he was unable to return to work due to injury).

In this case, the claimant was placed on a leave of absence as an accommodation under the Americans with Disabilities Act ("ADA") because he could no longer physically perform all of the essential functions of his job, which included (per the job description admitted into evidence) the physical requirement of being able to stand for long periods, climb catwalks/ladders, and lift up to 50 pounds. The record reflects the claimant's physician, in a medical questionnaire which was also admitted into evidence, stated the claimant could no longer perform those physical requirements. The record also reflects that although the claimant could perform other job functions prior to his surgery, the employer could not accommodate him and placed him on a medical leave of absence. At the time of the claimant's resignation, he had still not been released to work without restrictions that precluded him from being able to perform the prior work. Moreover, the record reflects that during his absence on leave, the employer's business needs changed and the prior position was no longer necessary. Because the record reflects the claimant was separated from his work (the quality control position) due to a disabling injury which precluded him from performing the duties of his pre-injury position, he is not disqualified from receipt of benefits.

The determination under appeal did not address the issue of charging. However, under the facts of this case, the employer cannot be charged. The charging issue is controlled in this case by whether or not the claimant's separation was due to the employer's failure to make appropriate accommodations to the claimant's condition. In other words, while the claimant was medically unable to return to work, we consider whether the employer failed to comply with any statutory duties that would have permitted the claimant to do so. Our review of the record reflects that was not the case.

The claimant contends that the employer violated the ADA by not reinstating him to his previous position after his leave of absence. The record reflects two flaws with this contention. First, the record demonstrates that the claimant's medical limitations precluded the claimant from performing some of the essential functions of his position. While the claimant argues that the employer should have removed the duties that he was unable to perform, it is well established that an employer is not required, as a reasonable accommodation, to remove essential functions. 42 U.S.C. §12111(8); *Woodruff v. Sch. Bd. of Seminole County*, 304 Fed. Appx. 795, 799 (11th Cir. 2008) (citing *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1305 (11th Cir. 2000)). The claimant's contention that climbing and other duties were not essential fails to recognize that substantial deference is given to the employer's designation of essential functions. Under the Americans with Disabilities Act,

> (3) Evidence of whether a particular function is essential includes, but is not limited to:
> *(i) The employer's judgment as to which functions are essential;*
> *(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;*
> (iii) The amount of time spent on the job performing the function;
> (iv) The consequences of not requiring the incumbent to perform the function;
> (v) The terms of a collective bargaining agreement;
> (vi) The work experience of past incumbents in the job; and/or
> (vii) The current work experience of incumbents in similar jobs.

29 C.F.R. §1630.2(n)(3) (emphasis added). *See also* 42 U.S.C. §12111(8) ("For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential and, if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job"); *D'Angelo v.*

ConAgra Foods, Inc., 422 F.3d 1220, 1233 (11th Cir. 2005). Although the claimant makes additional factual assertions on appeal to the Commission which we do not consider, the claimant's evidence at the hearing was not sufficient to call into reasonable question the employer's designation of these duties as "essential functions."

Moreover, an employer is not always required to reinstate an employee to a prior position as an ADA accommodation. Unlike the Family and Medical Leave Act which generally guarantees the right of the employee to return to the same or similar position, or to an equivalent one, the ADA requires that the employer hold open the position while the employee is on leave unless it can show that doing so causes *undue hardship*. 29 C.F.R. §1630.2(p)(2); EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act (October 17, 2002), at Q&A 18.[1] Here, the employer made a showing of undue hardship because the claimant's position was eliminated during his extensive leave due to changing business needs, and it would be an undue hardship to require an employer to create a new position it no longer needs. If it is an undue hardship under the ADA to hold open an employee's position during a period of leave, or an employee is no longer qualified to return to his original position, then the employer must reassign the employee (absent undue hardship) to a vacant position for which he/she is qualified. *Id.* at Q&A 21. This is what the employer attempted to do. Because the record evidence demonstrates that the employer complied with the ADA, and when it eliminated the claimant's position made another one available to him, the claimant's resignation cannot be deemed due to good cause attributable to the employer. As a result, the employer's account may not be charged.

That portion of the decision of the appeals referee holding the claimant was separated under disqualifying circumstances is reversed. If otherwise eligible, the claimant is entitled to receive benefits. That portion of the decision noncharging the employer's account is affirmed. The employer's account is relieved of charges in connection with this claim.

[1] Available at http://www.eeoc.gov/policy/docs/accommodation.html (last accessed July 19, 2015).

Although the employer contends the claimant was subsequently offered suitable work and refused the offer, the issue of the refusal of suitable work was not addressed by the determination or noticed for the hearing, and the referee never inquired if the parties were willing to waive notice concerning that issue. Thus, the issue could not properly be ruled on by the referee. Accordingly, the Department is directed to investigate the issue and, if not already addressed, issue a determination regarding the issue of refusal of suitable work.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Franfk E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on 7/20/2015, 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: Mary Griffin
Deputy Clerk

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

*38473384 *

Docket No.0024 6455 69-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Claimant

Employer

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

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), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Findings of Fact: The claimant worked full time for the employer, a paint manufacturing company, from January 3, 2006, until May 15, 2014, as a lab technician. He last physically worked on May 15, 2014. The claimant began a medical leave of absence on May 15, 2014, to have elective surgery on his knees. The claimant had double knee replacement on July 9, 2014. On September 8, 2014, the claimant's

physician cleared him to return to work with restrictions on September 15, 2014. The claimant was restricted from climbing ladders, a requirement in the lab technician position. The claimant was offered the position of batch maker with the same pay, hours, and same benefits. The position of batch maker did not require the claimant to climb ladders. The claimant refused the position offered advising the employer it was a demotion. The claimant was given until November 17, 2014, to accept the position of batch maker. The claimant believed the position of batch maker would be more strenuous on him than the position of lab technician. The employer no longer had a need for a lab technician once the claimant went on medical leave but needed someone to fill the position of batch maker. On October 14, 2014, the claimant's physician provided the employer with a note advising the claimant could return to work without restrictions on December 1, 2014. The employer agreed to accommodate the claimant's restrictions until December 1, 2014, if he worked in the position of a batch maker. The claimant refused to accept the position. The claimant quit by failing to return to work after a medical leave of absence.

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

The record reflects the claimant quit. The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. Uniweld Products, Inc., v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). It was shows the claimant took a leave of absence for medical reasons and failed to return to work when offered a position of work. Thus, the claimant constructively quit. The record reveals the claimant was placed on medical restrictions and could not perform a primary function of his job duties, climbing ladders. The evidence demonstrates the employer attempted to accommodate the claimant's medical restrictions by offering him a latter move in positions that would not require him to climb ladders. When the claimant refused the offer of suitable work he effective quit his job. The claimant has not shown that his quitting was with good cause attributable to the employer as the job offer was considered suitable. Thus, the claimant is disqualified.

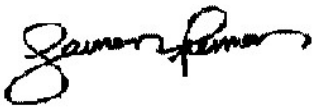
The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003 10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the employer's witness to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination dated December 17, 2014, is REVERSED. The claimant is disqualified from May 11, 2014, and until he earns $4675.

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 February 2, 2015.

DEXTER PARKER
Appeals Referee

By: 

LAUREN FREEMAN, 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.
