STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-01033

vs.

Referee Decision No. 0024149907-04U

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.

The issue before the Commission is whether the claimant voluntarily left work without good cause within the meaning of Section 443.101(1), Florida Statutes.

The referee made the following findings of fact:

> The claimant began working for [the employer] on July 29, 2013, as a painter. In or around October 2013, the claimant dressed as [the Pope] for Halloween. A co-worker, a plumber's helper, told the claimant "You're a queer . . . You're a homosexual . . . You're a faggot." The co-worker continued to call the claimant names such as "queer" and "dick licker" for the next approximate eight months. The co-worker called the claimant names in front of other co-workers, including the claimant's direct supervisor.

The employer had a policy prohibiting harassment and bullying. The employer's policy held that all incidents of sexual harassment must be reported to human resources (HR). The policy held that for other types of harassment, incidents should be reported to HR or a supervisor. On September 23, 2014, the co-worker wrote "faggot" on the claimant's locker. The claimant became upset and went to the superintendent's office. The claimant used profanity and raised his voice when speaking to the superintendent. The claimant told the superintendent that the co-worker had no right to do "that" and should be fired. The claimant did not tell the superintendent that the co-worker wrote "faggot" on his locker. The superintendent turned to the co-worker and told him "if you did something to upset [the claimant], go undo it." The superintendent asked the claimant what he wanted him to do about the situation. The claimant responded that he wanted an apology from the co-worker. The co-worker apologized to the claimant and they reconciled.

The claimant did not report to work the following day because he was upset. The superintendent called the claimant's house to speak to him. The claimant's friend answered the phone and wanted to know what the superintendent was doing about the situation. The superintendent did not discuss the incident with the friend because he did not know who he was.

After returning to work, the claimant received a report from his supervisor that the co-worker was laughing about what he did to the claimant. The claimant believed that the co-worker looked at him like he "wanted to kill [him]." On October 2, 2014, the claimant advised the superintendent he was quitting immediately in order to take his friend to Chicago. The claimant wrote a note to his supervisor advising that he quit to take his friend to Chicago. The claimant performed no further services for the employer.

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 the referee's decision is not in accord with the law; accordingly, it is reversed.

Section 443.101(1)(a), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Under the statute, "the term 'good cause' includes only that cause attributable to the employing unit which would compel a reasonable employee to cease working." §443.101(1)(a)1., Fla. Stat. *See also Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827, 829 (Fla. 4th DCA 1973) (holding good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment").

The record in this case reflects the claimant established good cause attributable to the employer for quitting his employment. The claimant's unrefuted testimony reflects he was subjected to eight months of bullying and harassing conduct by a co-worker who called the claimant disparaging names in front of other employees and the claimant's immediate supervisor. Moreover, the claimant's unrefuted testimony reflects that, although his immediate supervisor heard the co-worker's disparaging comments and was therefore aware for months that the claimant was being harassed and bullied, his supervisor did nothing to address the situation. The parties agreed the employer has a policy prohibiting harassment or bullying and requiring that sexual harassment be reported directly to human resources and that other types of harassment be reported to a supervisor or to human resources. According to the employer's human resources director, a supervisor who receives a report of harassment is required to report it to human resources. The record, however, reflects the employer's human resources department had no knowledge of the co-worker's conduct toward the claimant. While the claimant acknowledged he never reported the co-worker's conduct to human resources, the record reflects the claimant's supervisor was aware of the co-worker's conduct and failed to report it to human resources. The record, therefore, reflects the claimant's supervisor failed to comply with or enforce the employer's anti-harassment policy.

Whenever feasible, an individual is expected to expend reasonable effort to preserve his employment. *Glenn v. Florida Unemployment Appeals Commission*, 516 So. 2d 88 (Fla. 3d DCA 1987). However, a claimant cannot be disqualified for failing to make a sufficient effort to preserve his or her employment when the employer is aware of the harassing and bullying conduct that constitutes good cause for quitting and fails to comply with and enforce its own policy. An employer is accountable for the failure of a supervisor to take action after the supervisor observes the misconduct of employees on a daily basis. The claimant is, therefore, not disqualified from receipt of benefits.

The decision of the appeals referee is reversed. 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 6/8/2015, 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: Ebony Porter
Deputy Clerk

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

*39011172 *

Docket No.0024 1499 07-04 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

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.

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.

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 began working for the employer, , on July 29, 2013, as a painter. In or around October 2013, the claimant dressed as a pop for Halloween. A co worker, a plumber's helper, told the claimant "You're a queer... You're a homosexual... You're a faggot." The co worker continued to call the claimant names such as "queer" and "dick licker" for the next approximate eight months. The co worker called the claimant names in front of other co workers, including the claimant's direct supervisor.

The employer had a policy prohibiting harassment and bullying. The employer's policy held that all incidents of sexual harassment must be reported to human resources (HR). The policy held that for other types of harassment, incidents should be reported to HR or a supervisor. On September 23, 2014, the co worker wrote "faggot" on the claimant's locker. The claimant became upset and went to the superintendent's office. The claimant used profanity and raised his voice when speaking to the superintendent. The claimant told the superintendent that the co worker had no right to do "that" and should be fired. The claimant did not tell the superintendent that the co worker wrote "faggot" on his locker. The superintendent turned to the co worker and told him "if you did something to upset [the claimant], go undo it." The superintendent asked the claimant what he wanted him to do about the situation. The claimant responded that he wanted an apology from the co worker. The co worker apologized to the claimant and they reconciled.

The claimant did not report to work the following day because he was upset. The superintendent called the claimant's house to speak to him. The claimant's friend answered the phone and wanted to know what the superintendent was doing about the situation. The superintendent did not discuss the incident with the friend because he did not know who he was.

After returning to work, the claimant received a report from his supervisor that the co worker was laughing about what he did to the claimant. The claimant believed that the co worker looked at him like he "wanted to kill [him]". On October 2, 2014, the claimant advised the superintendent he was quitting immediately in order to take his friend to Chicago. The claimant wrote a note to his supervisor advising that he quit to take his friend to Chicago. The claimant performed no further services for the employer.

Conclusions of Law: The law provides that an individual will be disqualified for benefits who voluntarily leaves work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able bodied qualified worker to give up his or her employment." Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Moreover, an employee with good cause to leave employment may be disqualified if reasonable effort to preserve the employment was not expended. SeeGlenn v. FloridaUnemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987). SeealsoLawnco Services, Inc. v.

Unemployment Appeals Commission, 946 So.2d 586 (Fla. 4th DCA 2006); Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006).

The record shows 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). The record reflects the claimant advised his supervisor and the superintendent he was quitting in order to take his friend to Chicago. At the hearing, the claimant contended he quit due to being bullied and harassed by a co worker. The record reflects the claimant notified the superintendent of something that upset him on one occasion, September 23, 2014. The record shows the superintendent took steps to address the issue and asked the co worker to "un do" whatever he did to upset the claimant and that he asked the claimant what action he should take. The record reflects the claimant told the superintendent he wanted an apology and received an apology from the co worker. The record reflects the superintendent believed the issue was resolved.

The record shows the claimant became upset again because he received a report from his supervisor that the co worker laughed about what he did to the claimant and because he believed the co worker gave him mean looks like he wanted to kill the claimant. The record shows the claimant did not advise the superintendent of any further issues prior to quitting. The record reflects the claimant did not report any of the issues he had with the co worker to HR prior to quitting. Although the referee accepts that the co worker's language and actions could be construed as bullying and/or harassment, the claimant did not show he made sufficient efforts to have the problems resolved prior to quitting. The claimant did not notify the employer of the severity of the issue and did not give the employer the opportunity to correct the issue prior to quitting.

In this case, the claimant did not make a reasonable effort to preserve the employment relationship prior to leaving. Thus, it is concluded that the claimant voluntarily left work without good cause attributable to the employing unit within the meaning of Florida reemployment assistance law.

The referee notes the claimant's friend testified the claimant entered a psychiatric ward for six days after quitting, as a result of the co worker's actions. The record does not reflect the claimant had an illness that required his separation from the job. If the claimant needed time off to seek counseling or bring his friend to another state, he had the opportunity to request time off rather than quit immediately.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These 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 witnesses to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

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.

Good cause for quitting, attributable to the employer, was not shown. The employer's account is thus relieved of charges.

Decision: The determination dated December 15, 2014, is AFFIRMED. The claimant is disqualified from August 31, 2014, and until he earns $4,386.00. The employer's account will not be charged.

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 16, 2015.

A. HORLICK
Appeals Referee

Lisa Rell

By:

LISA RELL, 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.
