

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-01385

vs.

Referee Decision No. 0025141525-02U

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.

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. For the reasons discussed below, we conclude that the evidence should be received, because the claimant's actions impaired the effectiveness of the notice to the employer.

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's findings of fact state as follows:

The claimant was employed from October 1, 2013, through February 05, 2015, [as] a Manager/Floor Server. The claimant was paid \$6.50 per hour, plus her tip money. The employer advised all employees that they would not authorize pay for more

than 40 hours per week. The claimant worked between 50-55 hours per week. The claimant resigned because she was not receiving overtime compensation for the additional 10-15 hours per week that she worked.¹

Based on these findings, the referee held the claimant voluntarily left work with good cause attributable to the employing unit, reasoning in pertinent part:

In this case, the record reflects that the claimant had a compelling reason for leaving her employment. The claimant resigned because she was not receiving overtime compensation for the additional 10-15 hours per week that she worked. Accordingly, the claimant established a compelling reason for leaving her employment. Therefore, the claimant is eligible based on her separation from the employer.

Upon review of the record and the arguments on appeal, the Commission concludes that the employer was misled as to whether the hearing would occur, that the record was not sufficiently developed, and that the referee misapprehended the relevant law; consequently, the case must be remanded.

I. *Procedural Issue*

During the appeal hearing, the employer's representative stated that she was advised by the claimant that she did not need to appear for the appeal hearing and that the claimant was going to withdraw her claim for benefits. The record confirms that the claimant had in fact filed a withdrawal request, but subsequently "withdrew" the withdrawal request before it was acted on. While the claimant had the right to do this, her contacting the employer appears to have led the employer to assume it did not need to submit information for the hearing, and potentially impaired the employer's preparation for and defense of its case. When the employer's representative advised that she was told by the claimant that she did not need to appear and that the hearing would be canceled, the referee should have

¹ Although not made clear by the findings, the claimant's testimony at the hearing indicates that she received no compensation whatsoever for the extra hours, not merely that she did not receive overtime rates. For purposes of our analysis herein, it does not matter which is the case.

inquired as to whether that information impacted the employer's preparation. Because the referee did not, we remand this case for a supplemental proceeding to provide the employer with the opportunity to submit documentary and other evidence. The employer is advised that the documents submitted to the Commission must be resubmitted to the Office of Appeals for the hearing.

II.

Good Cause Issue

In considering the case, the referee concluded that the claimant had good cause to quit because she worked overtime for which she was not paid. While in some cases the failure of an employer to pay overtime can constitute good cause to quit, the record in this case is incomplete on a number of issues necessary for the referee to reach that decision.

A. *Was There an Obligation to Pay Overtime Rates?*

First, the failure to pay overtime constitutes good cause only if the failure to pay overtime violates wage and hour law, or breaches the agreement of hire the employer reached with the employee. *See* R.A.A.C. Order No. 14-01650 (November 26, 2014) at 2.² In this case, it is not clear whether the employer was covered by the Fair Labor Standards Act (FLSA). The employer is covered if it has \$500,000 or more in revenue per annum. The claimant may also be covered if she routinely processed credit card transactions herself. *See generally* R.A.A.C. Order No. 13-04651 (September 25, 2013) at pgs. 2-3.³

On remand, the referee must determine whether coverage existed under either of these circumstances. The referee must also determine what the compensation agreement between the employer and the claimant was with respect to overtime: whether the claimant was permitted or expected to work overtime, and if so, whether the claimant was to be compensated for overtime hours at either her regular rate, or at a time and a half premium rate.

² Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-01650.pdf.

³ Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-04651.pdf.

B. *Did the Claimant Work Overtime Hours the Employer Was Obligated to Pay?*

1. *Did the Claimant Work Overtime Hours for Which She Was Not Paid?*

While the claimant testified that she regularly worked 50 or more hours per week, the employer disputed that the claimant worked any overtime hours. On appeal to the Commission, the employer submitted payroll records reflecting that the claimant worked substantially less than 40 hours most weeks, and that she worked and was paid overtime in a few weeks. These documents were not available at the first hearing potentially due to the claimant's suggestion to the employer that she would be withdrawing her appeal. These documents and any others provided by the parties relating to the claimant's timekeeping and payroll records should be considered by the referee when determining whether the claimant worked more than 40 hours in any particular week. While timekeeping and payroll records are typically the best evidence of hours worked and compensated, the Commission recognizes that they are not conclusive with respect to these issues and do not preclude the claimant from establishing that she worked hours different from those reflected on the records. After review of such records and taking supplemental testimony regarding hours worked, the referee should make findings regarding whether the claimant worked overtime hours for which she was not compensated or was not compensated at an overtime rate, and if so, how often.

2. *Did the Employer "Suffer or Permit" the Claimant to Work Overtime Hours for Which She Was Not Compensated?*

The issue of whether the claimant worked overtime hours for which she was not fully compensated *does not resolve the issue of whether she was entitled to compensation for those hours*. An employer is entitled to determine how many hours its employees work. It is only required to compensate employees for time that its "suffers or permits" an employee to work. 29 C.F.R. §785.11. Under this standard, work is compensable if it is expressly required or authorized; it is also compensable even if not explicitly authorized, if the employer is aware of the employee's work, gains a benefit from it, and does not stop it. 29 C.F.R. §785.13. This latter regulation states:

[I]t is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

If management knows or has reason to know that overtime work that is not authorized is being performed, it must take action to prevent the employee from working unauthorized hours. Otherwise, the time will be compensable. Courts look at a number of different factors in applying this doctrine, but the principal one is whether the employer had direct knowledge, or indirect indication, that overtime was repeatedly being worked. *See, e.g., Reich v. Dept. of Conservation & Natural Resources*, 28 F.3d 1076, 1081-82 (11th Cir. 1994).

Another significant factor is whether the claimant reported hours she claimed to have worked overtime, and if not, why not. An employee who purposely withholds working time from the employer or falsifies timesheets without prompting or direction by the employer has deprived the employer of knowledge necessary to properly compensate her. *See Forrester v. Roth's IGA Foodliner*, 646 F.2d 413, 414 (9th Cir. 1981). Under such circumstances, the work is not compensable. The evidence in this case reflects that one of the claimant's job responsibilities was to review and maintain the employer's timecard records, including her own. The claimant testified that she noted her actual hours worked on the timecards in a different location. On remand, the referee should review any records provided to determine whether this was the case, and to determine whether the employer reviewed such records or relied upon the claimant to summarize and submit them.

The claimant testified at the hearing that she did not report overtime hours because the employer said it would not pay overtime. However, the referee did not clarify this testimony from the claimant, or adequately inquire of the employer, whether the employer established a policy that it would not pay overtime, and if so, what that policy meant. Did it mean the employer would not pay overtime whether or not it was worked, or did it mean that it would not pay overtime because such hours would not be authorized?⁴

On remand, if the referee finds that the claimant worked overtime hours for which she was not compensated fully, the referee must determine whether the employer "suffered or permitted" such overtime, either by authorization, or by implicitly permitting with knowledge that it was being worked without efforts to curtail it.

⁴ We note that the exhibits submitted by the employer to the Commission reflected that the claimant reported *and was compensated for* overtime hours on occasion.

C. *Did the Claimant Quit Because of Unpaid Overtime?*

Finally, the referee must determine whether the claimant voluntarily quit because of any unpaid overtime. While the referee made such a finding below based on the claimant's testimony, the employer's submitted documents to the Commission may support an alternative finding. On remand, the referee must further develop the record and revisit the issue.

D. *Did the Claimant Make a Reasonable Effort to Preserve Her Employment?*

Finally, the referee must determine whether the claimant made a reasonable effort to preserve her employment. In *Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586, 588 (Fla. 4th DCA 2006), a case involving alleged unpaid overtime, the court approved a referee's decision holding that the claimant had a duty to raise the issue with the employer prior to quitting. The claimant, however, is not required to make efforts that would be futile. *Ogle v. Unemployment Appeals Commission*, 87 So. 3d 1264, 1269 (Fla. 1st DCA 2012). In this case, the claimant contended that she did not raise the issue because the employer had advised that it would not pay overtime. As noted above, the meaning and context of that statement is unclear. If the referee concludes that the claimant worked unpaid overtime hours "suffered or permitted" by the employer that were a reason for her voluntary separation, the referee must determine whether the claimant made reasonable efforts to preserve her employment, or whether such efforts would have been futile.

In conclusion, the referee shall conduct a supplemental hearing, further develop the record, and make specific findings and reach conclusions on the issues discussed above. The parties are cautioned that any documents previously submitted to adjudication or to the Commission are not part of the record before the Office of Appeals, and must be resubmitted to the Office of Appeals unless attached to the notice of hearing.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

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
8/28/2015,
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



*40310027 *

Docket No.0025 1415 25-02

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES

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.

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.

Finding of Fact: The claimant was employed from October 1, 2013, through February 05, 2015, and a Manager/Floor Server. The claimant was paid \$6.50 per hour, plus her tip money. The employer advised all employees that they would not authorize pay for more than

40 hours per week. The claimant worked between 50-55 hours per week. The claimant resigned because she was not receiving overtime compensation for the additional 10-15 hours per week that she worked.

Conclusion 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. Florida Statute 443.101(1)(a). See *Mueller v. Harry Lee Motors*, 334 So.2d 67 (Fla. 3d DCA 1976), where the court held that a worker who is not paid for overtime work in accord with the law has good cause attributable to the employer to quit within the meaning of the unemployment compensation law.

In this case, the record reflects that the claimant had a compelling reason for leaving her employment. The claimant resigned because she was not receiving overtime compensation for the additional 10-15 hours per week that she worked. Accordingly, the claimant established a compelling reason for leaving her employment. Therefore, the claimant is eligible based on her separation from the employer.

Decision: The determination dated February 17, 2015, disqualifying the claimant and non-charging the employer's account, is reversed.

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 March 20, 2015.

J. WALKER
Appeals Referee

By: *Kristi Snyder*

Kristi Snyder, 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 envío marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); <https://raaciap.floridajobs.org>. Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitiv 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.

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