

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-01848

vs.

Referee Decision No. 0024636085-04U

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. The Commission's review is generally limited to the evidence and issues before the referee and 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 was hired December 3, 2001, as a loader operator, with the employer. The claimant was hired full-time. The claimant was responsible for moving around damaged cars and loading buyers' transport trucks. The claimant used heavy equipment to move the vehicles around. The loader picks up vehicles and moves them using forks approximately 14 feet long. The claimant was trained on the operation of the loader and recertified every three years. The claimant began using a new style loader with a joy stick and was trained to operate the equipment. On November 11, 2014, the claimant was driving the loader on the roadway within the employer's property. The

claimant dropped a clipboard in the loader. The claimant did not stop the vehicle to retrieve the clipboard. The claimant took his eyes off the road and continued driving while trying to retrieve the clipboard. The claimant drove off the roadway and over the hoods of two cars parked in regular inventory. The damage was approximately \$5,855.00. On November 14, 2014, the claimant was discharged for negligence in operating procedures.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work, reasoning as follows in pertinent part:

The claimant was experienced in operating a loader. The claimant contended that he was using a new style loader with a joystick and implied that this may have played a role in the final incident. However, the claimant was trained to operate this style loader and was using the loader for at least 30 days prior to the accident. Additionally, the accident was a preventable accident as the claimant failed to operate the loader safely by taking his eyes off the road and not stopping the vehicle prior to doing so. The claimant's contention is rejected. The claimant was aware of the proper operating procedures for the loader and failed to use due care resulting in damage to a portion of the employer's inventory. The claimant was negligent in his duties. The claimant is found to have committed misconduct under Florida Statutes 443.036(29)(b) for negligence to a degree that manifests culpability. The employer met their burden of proof. The claimant is thus subject to disqualification.

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 443.036(29), Florida Statutes, states that misconduct connected with work, “irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other”:

(a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than \$50; or theft of employer property or property of a customer or invitee of the employer.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:

- a. He or she did not know, and could not reasonably know, of the rule's requirements;
- b. The rule is not lawful or not reasonably related to the job environment and performance; or
- c. The rule is not fairly or consistently enforced.

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

While the findings of the referee are correct with one modification, they do not completely capture the testimony of the claimant as to the cause of the accident and his actions, which are crucial to the application of the law in this case. To conform to the claimant's testimony, which was the only firsthand evidence as to how the incident occurred, we modify the finding that "The claimant dropped a clipboard in the loader" to "The claimant hit a pothole while driving the loader which caused a clipboard to fall against the 'joystick' that controlled the vehicle." Additionally, the claimant testified that he panicked, took his eyes off the road for a moment to try to retrieve the clipboard, and did not realize that he had left the roadway until he hit the first vehicle, at which point he tried to stop but could not do so before he hit the second car. When asked why he didn't stop immediately, he testified that he thought he could retrieve the clipboard quickly, but wasn't able to. The claimant described the incident as like "texting while driving" when you just take your eyes off the road for a moment. However, unlike a conscious decision to send a text, the record reflects in this case that the claimant was reacting spontaneously to an unexpected event.

This explanation of the evidence is required because the application of subparagraph (b) by the courts mandates a fact-specific analysis of the degree of negligence involved in the case. There is no question that the referee correctly held that the claimant was negligent; however, the issue is whether he was "careless[] or negligen[t] to a degree or recurrence that manifests culpability or wrongful intent, or show[ed] an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer."

Our review of the existing court precedent reflects a lack of consensus among the courts on the proper application of the law to these facts. For example, in *Girgis v. Unemployment Appeals Commission*, 897 So. 2d 513 (Fla. 4th DCA 2005), a claimant who had previously been warned for poor driving hit a post he did not see while turning because he was focusing on a car that he had to maneuver around. The court concluded that "driving without looking where you are going" was willful, and constituted misconduct under the circumstances present in the case. Although the facts of *Girgis* vary somewhat from this case, they are sufficiently close that, if the employer was located in the territory of the Fourth District Court of Appeal, we would have affirmed.

However, the majority of cases, including two decided by the Fifth District Court of Appeal, within whose jurisdiction the claimant resides, lead to a different result. In *Williams v. Unemployment Appeals Commission*, 484 So. 2d 89 (Fla. 5th DCA 1986), the court reversed an order disqualifying a claimant who had been involved in *five* accidents, one of which involved her violating a traffic signal. Recognizing that "the claimant was not worth keeping as a driver," the court held

that neither the test of subparagraph (a) nor (b) had been satisfied and that misconduct had not been established.¹ In *Maxfield v. Unemployment Appeals Commission*, 716 So. 2d 859 (Fla. 5th DCA 1998), the court reversed an order disqualifying the claimant, a long distance truck driver, who had been at fault in three motor vehicle accidents in a year and was fired as a result of an employer's policy, again concluding that the evidence was insufficient to establish negligence of the degree necessary to constitute misconduct. Most recently, in *Lyster v. Unemployment Appeals Commission*, 826 So. 2d 482 (Fla. 1st DCA 2002), the court held that a truck driver who had experienced five accidents in a ten-month period of time was not disqualified from benefits. The court recognized that the claimant was justifiably discharged due to inability or incompetence, but that none of the incidents reflected the high degree of negligence required to establish misconduct.

Viewed in light of these cases, the evidence in the case before us does not meet the standard required under subparagraph (b).² The evidence shows merely an incident of poor judgment under a moment of panic in unanticipated circumstances. There is no doubt that the consequences were financially significant for the employer, but a single error of this nature in the record of a 13-year employee does not demonstrate the degree of indifference for the employer's interests, or the lack of concern regarding the consequences of his behavior, that subparagraph (b) requires. We are thus compelled to conclude that misconduct has not been proven.

¹ Subparagraph (a) has been significantly revised since *Williams* was decided, while subparagraph (b) has had a minor revision that does not affect its application in this case.

² The employer also contended that the claimant violated its work rule prohibiting "carelessness or negligence in doing your job." Even if we concluded that such a general standard constituted a "rule" within the meaning of subparagraph (e), a conclusion we find questionable here, we would be compelled to apply a similar analysis to the fair enforcement defense, and would reach the same result.

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

9/29/2015,

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



*40451710 *

Docket No.0024 6360 85-04

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES

Employer

Claimant

DECISION OF APPEALS REFEREE

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

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

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

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 was hired December 3, 2001, as a loader operator, with the employer. The claimant was hired full time. The claimant was responsible for moving around damaged cars and loading buyer's transport trucks. The claimant used heavy equipment to move the vehicles around. The loader picks up vehicles and moves them using forks approximately 14 feet long. The claimant was trained on the operation of the loader and recertified every 3 years. The claimant began using a new style loader with a joy stick and was trained to operate the equipment. On November 11, 2014, the claimant was driving the loader on the roadway within the employer's property. The claimant dropped a clipboard in the loader. The claimant did not stop the vehicle to retrieve the clipboard. The claimant took his eyes off the road and continued driving while trying to retrieve the clipboard. The claimant drove off the roadway and over the hoods of two cars parked in regular inventory. The damage was approximately \$5,855.00. On November 14, 2014, the claimant was discharged for negligence in operating procedures.

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 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 was discharged for misconduct connected with the work.

The record shows the claimant was discharged. The claimant was experienced in operating a loader. The claimant contended that he was using a new style loader with a joystick and implied that this may have played a role in the final incident. However, the claimant was trained to operate this style loader and was using the loader for at least 30 days prior to the accident. Additionally, the accident was a preventable accident as the claimant failed to operate the loader safely by taking his eyes off the road and not stopping the vehicle prior to doing so. The claimant's contention is rejected. The claimant was aware of the proper operating procedures for the loader and failed to use due care resulting in damage to a portion of the employer's inventory. The claimant was negligent in his duties. The claimant is found to have committed misconduct under Florida Statutes 443.036(30)(b) for negligence to a degree that manifests culpability. The employer met their burden of proof. The claimant is thus subject to disqualification. The claimant is disqualified from benefits beginning from November 9, 2014, through December 13, 2014, and until they earn \$4,675.00. The employer's tax account will not be charged.

Decision: The determination issued on December 19, 2014, is REVERSED. The claimant is disqualified from benefits beginning November 9, 2014, through December 13, 2014, and until they earn \$4,675.00. The employer's tax 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 March 26, 2015.

H. FINN
Appeals Referee

By: *Adrienne Kidder*

Adrienne Kidder, 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.