STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-02355

vs.

Referee Decision No. 0025530185-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

The referee made the following findings of fact:

> The claimant began work as a varying exceptionalities teacher, for the [employer]. The claimant reported to the principal. On November 3, 2014, the claimant was injured due to a car accident. The claimant began approved family and medical leave (FMLA)

> effective from November 4, 2014, through January 19, 2015. The claimant worked for the employer from January 20 to January 25, 2015. The claimant had pain and was medically restricted to light duty. The claimant was partially disabled and was medically limited to eight hours per workday; the claimant was limited to no repeated lifting, no lifting above shoulder, no climbing; limited to short periods of standing, sitting, walking, bending, twisting, or crouching; and she was required to stand and walk 10 minutes every two hours or as necessary for pain reduction. The claimant believed the medically ordered limits to the work would not impact her work as a teacher and she believed she could do the work even though she was medically restricted. The employer could not accommodate the work restrictions. The claimant received notice that there were too many work restrictions preventing her from providing the core work functions of her position. The claimant's leave was extended using the employer's personal health leave beginning January 26, 2015, through March 31, 2015. The employer did not respond to the claimant's request for an enumeration of work restrictions. The claimant told the doctor that there were too many restrictions. The claimant recuperated and the doctor decreased the medical work restrictions. The doctor reduced or removed the claimant's medical restrictions and released the claimant for work effective March 31, 2015. The claimant returned to work as scheduled about April 1, 2015.

Based on these findings, the referee held that the claimant was disqualified through the week ending March 29, 2015,[1] for being absent from work due to a voluntarily-initiated leave of absence.

[1] The referee incorrectly ended the benefit week on Sunday, March 29, 2015. Pursuant to Florida Administrative Code Rule 73B-11.011(16), the term "week" encompasses the "seven (7) calendar day period from Sunday through Saturday." Therefore, the applicable benefit week ended on Saturday, March 28, 2015. Consequently, the referee's decision is corrected to reflect the claimant was disqualified through the week ending March 28, 2015.

Our review reflects that the referee's material findings above, such as they are written, are supported by competent, substantial evidence. However, the findings omit portions of the chronology and result in a confusion of the events. Accordingly, we supplement the referee's findings with the following additional findings based on undisputed evidence, to be inserted after the sentence ending "January 25, 2015":

> When the claimant returned to work from FMLA leave during the week of January 20-25, 2015, she discovered that she had not sufficiently recovered to perform her duties. She requested and was given additional personal health leave beginning January 27, 2015. An extension of this leave was set to expire on March 1, 2015. On February 27, 2015, the claimant's physician released her to work effective March 2, 2015, with light duty restrictions.

We also modify the sentence reading, "The claimant's leave was extended using the employer's personal health leave beginning January 26, 2015, through March 31[,] 2015" to read, "The claimant's leave was further extended using the 'personal health leave' offered by the employer from March 2, 2015, through March 31, 2015." As modified, the findings accurately reflect the evidence in this case.

We review the referee's conclusions *de novo* to determine whether the referee correctly applied the reemployment assistance law in determining that the claimant should be disqualified through the week ending March 28, 2015, due to a leave of absence.

Section 443.101(1)(c), Florida Statutes, provides that an individual will be disqualified for benefits "[f]or any week with respect to which the department finds that his or her unemployment is due to a leave of absence, if the leave was voluntarily initiated by the individual."[2] Although not reflected in the referee's decision, Department records indicate that the claimant's initial claim for benefits was not filed until the week beginning March 1, 2015. Thus, the issue in this case is whether the claimant was disqualified for the period of March 1, 2015, through the week ending March 28, 2015, by virtue of a voluntarily-initiated leave of absence.

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[2] A leave of absence is defined as "a temporary break in service to an employer, for a specified period of time, during which the employing unit guarantees the same or a comparable position to the worker at the expiration of the leave." §443.036(28), Fla. Stat.

There is no dispute that the claimant voluntarily initiated her leave in November 2014 due to an off-work injury, and that when her return to work in January 2015 proved premature given her level of recovery, the employer again granted a voluntarily-initiated extension of the leave.[3] [4] During the additional leave that began January 27, 2015, the claimant was released to work under light duty restrictions effective March 2, 2015. The employer, however, did not permit the claimant to return because the restrictions prevented the claimant from performing the essential functions of her job. This case thus requires us to determine at what point a voluntarily-initiated leave becomes non-disqualifying when the parties dispute when it should end. As to this question, neither the statutory language nor the existing case precedent is helpful.

Typically, when an employer grants leave to a claimant, the leave is granted either under specific employer policies or agreed understandings that will govern administration of the leave, including the time and conditions for the claimant's return to work. In this case the documents submitted did not provide guidance,[5] but the employer's testimony indicated that the claimant was not permitted to return to work because of her restrictions that left her unable to perform the essential functions of her position, a decision that was consistent with its established policy. The employer's testimonial evidence may not have been the best evidence available – a written policy indicating that employees must be released to work able to perform

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[3] The January 27, 2015 extended leave request identified the requested extended leave as Family and Medical Leave Act (FMLA) leave. However, it was undisputed that the claimant had already exhausted her FMLA entitlement for the year, and that leave was granted as personal health leave. The leave form further advised that "all extended leave will be subject to rules of the DCPS, Civil Service Board and/or employee bargaining agreements in effect the date leave is approved." The employer did not provide written copies of any specific provisions of such rules or policies that may have affected its decision in this case. Thus, we are left only with the employer's testimony as to the relevant policies.

[4] Although the referee and the parties referenced and discussed several pages of the hearing documents during their questions and testimony, the referee neglected to have them formally authenticated and admitted into evidence. We emphasize, as we have before, that any document that is referenced or relied upon for substantive evidence in a case should be authenticated and admitted as part of the hearing record. Because the record reflects no dispute that the documents were accurate copies of documents known to and relied upon by both parties, we supplement the hearing record by admitting pages 6-8, 10-11, and 17 as exhibits.

[5] The claimant relied on the employer's letter of February 24, 2015, advising her that she was due to report back by March 2, 2015, and that a doctor's release was required. The letter did not specifically address, however, the situation of a release that was not to full duty, or that included restrictions precluding the claimant from performing her job. It could just as reasonably be read to imply that the claimant would need to be released to regular duty as any other reading.

their essential job duties, and a job description containing a physical requirements analysis would have been better evidence – but the referee did not err in accepting the testimony of the employer's witness, the Executive Director of Human Resources, whose knowledge of these facts would reasonably be considered authoritative.

The employer's policy is consistent with standard human resources practice and federal law. Under both the FMLA and Title I of the Americans with Disabilities Act (ADA), an employee must be able to perform the essential functions of her position in order to be entitled to reinstatement. *See* 29 C.F.R. §825.216(c) (right to reinstatement under the FMLA dependent upon being able to perform the essential functions of the position); 42 U.S.C. §12111(8) (defining "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires," a precondition to protection under the ADA).

Under these circumstances, we conclude that the referee correctly held that the claimant was disqualified through the week ending March 28, 2015, due to absence on a voluntarily-initiated leave.[6] [7]

On appeal to the Commission, the representative for the claimant has neither set forth arguments to support the request for review nor requested approval of any representation fees charged to the claimant. Under the circumstances, the claimant's representative is not entitled to collect a fee from the claimant for representation of the claimant before the Commission.

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[6] Due to separate statutory provisions, we have reached a different conclusion with regard to injuries covered by workers' compensation.

[7] While our prior decisions such as U.A.C. Order No. 08-00223 (March 5, 2008) may be distinguishable on the facts, to the extent their reasoning is inconsistent with the analysis reflected herein, we recede from them as not giving adequate consideration to the initial agreement of the parties of the terms of the leave. Nothing in this order, however, is intended to address a situation in which the claimant does not make an initial voluntary request for leave.

The referee's decision is affirmed.

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

11/30/2015 ,

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

*42039405 *

Docket No.0025 5301 85-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

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.

Issues Involved: LEAVE: Whether the claimant's unemployment is due to a leave of absence voluntarily initiated by the claimant, pursuant to Sections 443.036(29); 443.101(1)(c), Florida Statutes.

Findings of Fact: The claimant began work as a varying exceptionalities teacher, for . The claimant reported to the principal. On November 3,

2014, the claimant was injured due a car accident. The claimant began approved family medical leave (FMLA) effective from November 4, 2014, through January 19, 2015. The claimant worked for the employer from January 20 to January 25, 2015. The claimant had pain and was medically restricted to light duty. The claimant was partially disabled and was medically limited to eight hours per workday; the claimant was limited to no repeated lifting, no lifting above shoulder, no climbing. Limited to short periods of standing, sitting, walking, bending, twisting, or crouching; and she was required to stand and walk 10 minutes every two hours or as necessary for pain reduction. The claimant believed the medically ordered limits to the work would not impact her work as a teacher and she believed she could do the work even though she was medically restricted. The employer could not accommodate the work restrictions. The claimant received notice that there were too many work restrictions preventing her from providing the core work functions of her position. The claimant's leave was extended using the employer's personal health leave beginning January 26, 2015, through March 31 2015. The employer did not respond to the claimant's request for an enumeration of work restrictions. The claimant told the doctor that there were too many restrictions. The claimant recuperated and the doctor decreased the medical work restrictions. The doctor reduced or removed the claimant's medical restrictions and released the claimant for work effective March 31, 2015. The claimant returned to work as scheduled about April 1, 2015.

Conclusion of Law: The law provides that a claimant will be disqualified for benefits for any week of unemployment due to a leave of absence voluntarily initiated by the claimant. As defined in the statute, "leave of absence" means a temporary break in service to an employer, for a specified period of time during which the employing unit guarantees the same or a comparable position to the worker at the expiration of the leave.

The record shows the claimant did not work for the employer due to medical restrictions from November 4, 2014, through March 31, 2015. The testimony shows the claimant's request for FMLA leave from work was approved. The testimony further shows the claimant had guaranteed return to the same or comparable position upon the expiration of the leave. The claimant contended that she was prevented from returning to work by the employer. The referee respectfully disagrees. The claimant's testimony shows she remained medically restricted from work beyond the expiration of the FMLA until she was medically released on March 31, 2015, and the employer accommodated the claimant's extension of leave to protect her job. As such, the claimant was on a bona fide leave of absence from November 4, 2014, through March 31, 2015.

Decision: AFFIRMED. The claimant is disqualified from November 2, 2014, through March 29, 2015.

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 May 15, 2015.

E. LOSCHI
Appeals Referee

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.
