

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-03457

vs.

Referee Decision No. 0026030856-04U

Employer/Appellant

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.

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. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has the responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a

finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

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.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no basis exists to reopen or remand the case for further proceedings. The Commission concludes the record adequately supports the referee's material findings and the referee's conclusion is a correct application of the pertinent laws to the material facts of the case.

The record reflects the claimant checked the identification of the person to whom she sold a tobacco product in the final incident as required by policy, but erroneously concluded the shopper was not a minor. In concluding the claimant's actions in the final incident were careless or negligent rather than deliberate, the referee properly applied the law under Section 443.036(29)(b), Florida Statutes, because the actions were not indicative of a disregard of the employer's interests. Additionally, it is not clear whether the claimant violated the employer's policy as written, but to the extent that she did, any violation would simply be of minor negligence. The Commission has held that inadvertent or negligent violations of a rule are subject to a weighing process, which measures the degree of the claimant's culpability in violating the rule against the nature and purpose of the rule, and the risk of harm to the employer, coworkers or others due to violation of the rule. *See* R.A.A.C. Order No. 15-02076 (September 25, 2015).¹ While enforcement of laws regarding sales of restricted products is an important interest, and the employer's

¹ Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-02076.pdf.

rules fulfill a government mandate, the claimant made a good faith effort to comply with the rule, and there was no indication that the employer suffered any particular harm in this instance. Under these circumstances, while the employer may have fairly enforced its policy to discharge, any rule violation cannot be fairly enforced to disqualify the claimant from benefits. *See* §443.036(29)(e)1.c., Fla. Stat. (2014).

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

12/28/2015 ,

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: Kady Ross
Deputy Clerk



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



*44306325 *

Docket No.0026 0308 56-04

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

CLAIMANT/Appellee

EMPLOYER/Appellant

APPEARANCES

Employer

DECISION OF APPEALS REFEREE

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

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

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

Issues Involved:

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

TIMELINESS: Whether an appeal, request for reconsideration, or request to reopen an appeal was filed within twenty days after mailing of the determination or decision to the adversely affected party's address of record or, in the absence of mailing, within twenty days after delivery, pursuant to Sections 443.151(3); 443.151(4)(b)1., Florida Statutes; Rules 73B-10.022(1); 10.022(5); 10.023(1); 11.017(2); 20.002-007, Florida Administrative Code.

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.)

JURISDICTION: The employer was sent an adverse determination dated 5/27/2015, qualifying the claimant. The employer received the determination by mail on 6/01/2015. The employer is aware of the twenty day appeal due date. The twentieth day was 6/16/2015. The system shows the appeal was filed 6/24/2015, however, on 6/08/2015 the employer faxed the department a paper appeals request.

CONCLUSION OF LAW: The law provides that a determination is final unless an adversely affected party files an appeal or request for reconsideration within twenty days after the mailing date of the determination notice to the party's last-known address or, in lieu of mailing, within twenty days after delivery of the notice.

The record reflects the employer's appeal is timely filed.

FINDING OF FACTS: The Claimant began working as a part time Cashier/Assistant Manager in December of 2013 for . At the time of hire, and ongoing during the course of employment, the claimant was warned that a failure to identify a customer's age prior to selling tobacco would result in immediate discharge if the policy is violated during a mystery shop by State or Federal Agents. Around April of 2015, the employer received a notice that the location had been shopped by a seventeen year old decoy presented by the Food and Drug Administration. The decoy requested to buy cigarettes. The claimant requested identification, but failed to realize the person was seventeen years old and not authorized to purchase tobacco in accordance with employer's policies and state and federal regulation. The claimant sold the items to the seventeen year old decoy. Once the letter was received, the employer and claimant reviewed surveillance and observed that the claimant was the only employee working at the time, thus was the employee who violated the policy. As a result of the claimant's actions of failing the mystery shop, the claimant was discharged on 4/27/2015 and performed no further services for the employer.

CONCLUSION OF LAW: Florida Statute §443.036 (29), defines "misconduct" 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 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 record reflects the claimant was discharged. The burden of proof in an employee discharge matter is initially upon the employer to prove misconduct. See Donnell v. University Community Hosp., 705 So. 2d 103/1 (Fla. 2d DCA 1998). At the hearing, before the Appeals Referee, the employer's witness provided hearsay testimony of the events leading up to the claimant's discharge. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
2. The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

When the employer meets that initial burden, the employee is required to demonstrate the propriety of his/her actions. See Sheriff of Monroe County v. Unemployment Appeals Commission, 490 So. 2d 961 (Fla. 3d DCA 1986). The employer shifted the burden to the claimant to come forward with evidence to explain. The claimant confirmed knowledge of the policy and the incidents that took place leading up to her separation. The claimant did not have an independent recollection, however testified from what she recalled after reviewing surveillance video. Based on the evidence and testimony submitted, the allegations that the claimant violated the policy were substantiated. However, no evidence or testimony was provided that the claimant's actions were willful, wanton, or intentional. It appears that the claimant made a mistake of overlooking the decoy's age which was careless, but occurred on only one occasion per the employer's testimony. Careless and negligent acts which may justify termination but are neither willful, wanton, nor deliberate are not misconduct under the statute. Williams v. unemployment appeals commission, 484 so.2d 89 (Fla. 5th DCA 1986). Therefore, in accordance with Florida reemployment assistance laws, the claimant is not disqualified from the receipt of unemployment compensation benefits.

CHARGEABILITY: 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 employer failed to provide competent substantial testimony that the claimant was discharged for misconduct connected with work. Thus, the employer has not met the requirements of the law for the non-charging of benefits paid in connection with this claim on the issue of separation.

DECISION: the determination dated 5/27/2015, holding the claimant entitled to receive benefits for the period beginning

4/26/2015 if otherwise eligible, is AFFIRMED. The claimant is qualified for the receipt of benefits. The employer's account (2233285) will be charged for benefits paid in connection with this claim, based on the separation.

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 July 23, 2015.

C. PELLOT-STOKES
Appeals Referee

By: 

CONNIE DEMORANVILLE, 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 reembolsar 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 diskalfye 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.