

**STATE OF FLORIDA**  
**REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 16-01735

vs.

Referee Decision No. 0028115885-03U

Employer/Appellant

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**ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION**

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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.

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 voluntarily left work without good cause or was discharged by the employer for misconduct connected with work within the meaning of Section 443.101(1), Florida Statutes.

The referee made the following findings of fact:

The claimant began working for the employer as a processor on January 15, 2016. On January 30, 2016, the claimant reported for work, and shortly after arriving she found out her son was in the hospital. The claimant notified the person she believed was her supervisor that she needed to leave to check on her son. The claimant could not find the store supervisor before she left. The claimant went to the neighboring business to wait for her ride.

The store supervisor saw her waiting, but she did not approach the claimant. The claimant called the employer later that day and asked to speak to the night time manager. The person that answered the phone told the claimant they believed she had quit, and that her services were no longer needed.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission finds merit in one argument raised by the appellant. We thus conclude the record was not sufficiently developed and the evidence not fully considered; consequently, the case must be remanded.

The record reflects that in her appeal of the March 3, 2016 determination, the claimant stated: "I did not quit this job . . . I left home sick and they asked me to not return. Also I called the afternoon I left and spoke to the night manager she advised me not to come back." During the hearing before the appeals referee, however, the claimant offered a conflicting account of what transpired her last day of employment. The claimant testified she left work on January 30, 2016, after receiving a telephone call that her son was ill and being taken to the hospital. The claimant also testified that she called the employer the afternoon of January 30 and requested to speak to the night manager, but that the person who answered the telephone refused to connect her and informed the claimant that her services were no longer needed. The findings of fact in the referee's decision reflect the claimant's testimony at the hearing.

Where a witness has given inconsistent and/or contradictory statements,<sup>1</sup> the referee must take into account such variations in the testimony. Some contradictions are so material that they effectively preclude any weight being given to the party's testimony. See *Evans v. Unemployment Appeals Commission*, 42 So. 3d 931 (Fla. 5th DCA 2010). In *Evans*, the employer's testimony at two different hearings was directly contradictory on two points, and both versions of the testimony as to the lack of availability of overtime were definitively refuted by the claimant's presentation of a pay stub showing that he had worked overtime. Taking all of that into consideration, the court concluded that the referee's acceptance of the employer's evidence could not stand, holding that the employer's position was not supported by competent, substantial evidence.

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<sup>1</sup> Inconsistent statements are those in which there is a material, substantive difference between the two statements; contradictory statements are inconsistent statements where the two statements are directly conflicting, such as a witness giving one statement that she did come to work on a particular day, and giving another statement that she did not.

More commonly, inconsistent or contradictory testimony or evidence is simply a factor to be considered in assessing credibility and weighing the evidence. Inconsistencies do not always reflect a lack of credibility, as there are many valid reasons why a witness's testimony may have changed: having his or her recollection refreshed by additional reflection or by an external source, having misremembered initially due to lack of reflection, having misspoken the prior time, having misunderstood the question, etc. However, a referee must recognize any inconsistencies, ensure that the witness has an opportunity to explain them during the hearing, and consider their impact on credibility and the weighing of evidence.

As to considerations the referee should evaluate in assessing credibility and weighing evidence where inconsistent or contradictory evidence is present, we find pertinent the following excerpted language from the U.S. Eleventh Circuit Court of Appeals Pattern Jury Instruction (Civil Cases) 3.5.1:<sup>2</sup>

You should . . . ask yourself . . . whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial. But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

Of course, even an innocent lapse in memory is a factor to be considered in assessing credibility and weighing evidence, because credibility does not merely depend on whether a witness is being honest and sincere, but also on the quality of his recollection, his capacity to observe, and other factors established in our precedent. Accordingly, where inconsistent or contradictory evidence is given, the referee should consider whether the discrepancies are significant or minor, whether they have been adequately explained, and what version of the witness's testimony, if any, is worthy of credence.

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<sup>2</sup> Available at <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf>.

As to the issue in this case, while the appeal statement is not testimony or even evidence *per se*, the variation in the claimant's testimony at the hearing from her appeal statement – which is intended to give the referee and opposing party an understanding of the basis for the appeal – must be addressed on remand. In this case, the referee held the claimant's testimony to be more credible; however, the referee did not acknowledge or develop the record regarding the inconsistencies in the claimant's prehearing statement and testimony. On remand, the referee is directed to hold a supplemental hearing to question the claimant about the discrepancies between her prehearing statement and her testimony at the hearing, to whatever extent inconsistent or contradictory statements exist. The referee is further instructed to identify whether or not, based on the claimant's appeal statement, the claimant's testimony at the hearing should be rejected in any part, and, if so, the basis for the rejection. In doing so, the referee should make any modifications necessary in the findings and conclusions.

In order to address the foregoing, the referee's decision is vacated and the case is remanded for further proceedings. On remand, the referee is directed to hold a supplemental hearing to develop the record as outlined above and render a new decision that contains accurate and specific findings of fact regarding the circumstances surrounding the claimant's job separation and a proper analysis of those facts, along with an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025(3)(d) and *Evans, supra*. Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record. That portion of the referee's decision addressing the nonappearance issue is supported by the record and is approved.

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

10/21/2016 ,

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: Mary Griffin

Deputy Clerk



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



\*51785955 \*

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**Docket No.0028 1158 85-03**

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

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***CLAIMANT/Appellant***

***EMPLOYER/Appellee***

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APPEARANCES

Claimant

Employer

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### **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:**

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rules 73B-20.016; 20.017.

**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.**

**Jurisdictional Issue:** This hearing was originally scheduled for March 30, 2016 at 8:30 AM. The claimant received the notice of hearing on March 30, 2016 around 2:00 PM via the US Postal Service. The claimant had recently moved, and her mail had been forwarded from her previous address. The claimant did not appear for the hearing.

A case will be re opened for a hearing on the merits when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated.

The record shows that the claimant failed to appear at the March 30, 2016 hearing because she was not properly notified of the hearing. The claimant cannot be held accountable for missing a hearing if she was not properly notified. Accordingly, the case will be reopened, and the appeals referee has jurisdiction over the merits of the case.

**Findings of Fact:** The claimant began working for the employer as a processor on January 15, 2016. On January 30, 2016 the claimant reported for work, and shortly after arriving she found out her son was in the hospital. The claimant notified the person she believed was her supervisor that she needed to leave to check on her son. The claimant could not find the store supervisor before she left. The claimant went to the neighboring business to wait for her ride. The store supervisor saw her waiting, but she did not approach the claimant. The claimant called the employer later that day and asked to speak to the night time manager. The person that answered the phone told the claimant they believed she had quit, and that her services were no longer needed.

**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.).

In determining whether a separation is voluntary, examining the intent of the worker is necessary. The word "voluntary" connotes something freely given and proceeding from one's own choice or full consent. *St. Joe Paper Company v. Gautreaux*, 180 So.2d 668 (Fla. 1st DCA 1968).

An employee is considered discharged if the words and actions of the employer would logically lead a prudent person to believe he or she has been terminated from the job. *LeDew v. Unemployment Appeals Commission*, 456 So.2d 1219 (Fla. 1st DCA 1984).

The record shows that the claimant was discharged for reasons other than misconduct connected with work. The claimant left work on January 30, 2016 due to a family emergency. The claimant notified the person she believed was her supervisor that she was leaving. The claimant was unable to locate the store supervisor before she left, but she contacted the store via telephone later that evening. It appears that the claimant did her best to inform the employer of her emergency, and that she intended to return to work. The claimant could reasonably conclude that she had been discharged when the employer told her over the phone that her services were no longer needed. The employer did not present a rule of policy that the claimant violated with her behavior. The claimant's behavior does not demonstrate a conscious disregard for the employer's interest, as she did her best to notify the employer of her emergency, and she intended to return to work. Leaving work due to a family emergency does not constitute misconduct under the law. Accordingly, the employer has not met the burden of proof, and the claimant is not disqualified from benefits beginning January 24, 2016.

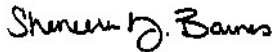
The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

**Decision:** The determination of the claims adjudicator dated March 3, 2016, is REVERSED. The claimant is not disqualified from benefits beginning March 3, 2016.

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 4, 2016.

**D. Ellis**  
Appeals Referee



By:

SHANEDRA BARNES, 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 20<sup>th</sup> 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](https://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 the last five digits of the 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.

There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department's CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.



**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](https://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 los últimos cinco dígitos del 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.

No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representado por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

**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](https://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 mesajè lèt 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 senk dènye chif nimewo sekirite sosyal demandè a 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.

Pa gen okenn kou pou Komisyon an revize yon ka, ni ke yon pati dwe reprezante pa yon avoka oubyen lòt reprezantan pou ke la li a revize. Komisyon Apèl Asistans Reyanbochaj pa te entegre antyèman nan sistèm CONNECT Depatman an. Byenke korespondans kapab fakse oubyen pòste bay Komisyon an, okenn korespondans pa kapab soumèt bay Komisyon an atravè sistèm CONNECT. Tout pati ki nan yon apèl devan Komisyon an dwe mentni yon adrès postal ki ajou avèk Komisyon an. Yon pati ki chanje adrès postal li nan sistèm CONNECT la dwe bay Komisyon an adrès ki mete ajou a tou. Tout korespondans ke Komisyon an voye, sa enkli manda final li, pral pòste voye bay pati yo nan adrès postal yo genyen nan achiv Komisyon an.

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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.