

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 16-03023

vs.

Referee Decision No. 0028997456-04U

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.

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 and 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 and 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, as stated above, 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 that the case does not require reopening or remanding 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 employer's policy in this case is broad and vague, and does not clearly apply to the situation. Thus, even if we deemed the employer to have initially shown a rule violation, the findings do not establish that the claimant knew or should have known that the rule prohibited his specific actions as they were determined by the referee. *See* R.A.A.C. Order No. 13-06171 at pg. 5 (February 12, 2104).¹

This case ultimately comes down to an interpretation of facts. Was the claimant ignoring his shift duties and goofing off with a friend while on the clock? Or, after obtaining coverage over his area, was he attempting to help a guest who happened to be his friend with a device the employer used to entertain guests? Either interpretation could reasonably be drawn from the evidence. However, the weighing of evidence and inferences is the duty of the referee, and the Commission cannot second-guess the referee's interpretation of events if it is supported by the evidence. Because the referee's interpretation was supported by the evidence and reasonable inferences, it must be affirmed.

¹ Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-06171.pdf.

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

12/14/2016 ,

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: Benjamin Bonnell

Deputy Clerk



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



*55499641 *

Docket No.0028 9974 56-04

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:

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.

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 worked as a recreational manager for a hotel/resort from August 31, 2015, through July 12, 2016. On July 5, 2016, the claimant asked the supervisor to cover his area for 30 minutes while he assisted a guest with the assimilation machine. The claimant then went over to the ride with the guest, and observed that the machine was still active. The claimant got on the board with the child guest to assist him with the ride. On July 12, 2016, the human resources director discharged the claimant for unauthorized use of employer's equipment, and violation of employer's safety rules/procedures.

Conclusions of Law: 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 record reflects that the claimant was discharged. The burden of proof is upon the employer to prove that the claimant was discharged for misconduct.

The employer presented competent testimony regarding the claimant being on the ride during his shift, and being on the ride's board with another person. The claimant presented competent testimony regarding him being allowed on the ride during work hours to assist guests, and him previously riding the ride with guests with members of management present. While the employer testified that employees were not allowed on the ride during work hours, and were not allowed to be on the ride with guests, the claimant's testimony indicated that the employer's rules related to such were not consistently enforced. As such, the claimant's actions are not considered disqualifying under any of the subsections of the law outlined above. Therefore, the claimant is not subject to disqualification.

The hearing officer was presented with conflicting testimony regarding the experience manager being present during previous times that the claimant rode on the ride with a guest, and whether the person on the ride with the claimant on July 5, 2016 was a guest. The hearing officer is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors 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 dated August 4, 2016, is REVERSED. The claimant is not disqualified from the receipt of benefits. The employer's account will be charged for benefits paid on this claim.

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 September 15, 2016.

S. NELSON
Appeals Referee

By: 

MONTY CROCKETT, 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 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 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 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 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.

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.

ENGLISH :

This document contains important information, dates, or eligibility status regarding your Reemployment Assistance claim. It is important for you to understand this document. This document is available in Spanish and Creole. If you do not read or understand Spanish, English, or Creole, call 1-800-681-8102 for free translation assistance regarding your Reemployment Assistance claim.

FRENCH / FRANCAIS :

Le présent document contient des informations importantes, dont des dates ou le statut d'éligibilité relatif à votre demande d'aide au réemploi. Vous devez absolument en comprendre les tenants et les aboutissants. Si vous ne lisez ni ne comprenez l'anglais, veuillez composer le numéro de téléphone 1-800-681-8102 pour obtenir une traduction gratuite par rapport votre demande d'aide au réemploi.

SPANISH / ESPAÑOL :

Este documento contiene importante información, fechas, o estado de elegibilidad con respecto a su solicitud de Asistencia de Reempleo. Es importante que usted comprenda este documento. Este documento está disponible en Español http://floridajobs.org/Unemployment/bri/BRI_Spanish.pdf. Si no lee o entiende Inglés, llame al 1-800-204-2418 para asistencia de traducción gratuita en relación con su solicitud de Asistencia de Reempleo.

ITALIAN / ITALIANO :

Questo documento contiene informazioni importanti, date o stato di idoneità relativi alla richiesta di reimpiego. È importante comprendere questo documento. Se non legge o comprende l'inglese, chiamare il numero 1-800-681-8102 per assistenza gratuita alla traduzione a proposito della richiesta di reimpiego.

GERMAN / DEUTSCHE :

Dieses Dokument enthält wichtige Informationen, Daten oder Berechtigungsstatus hinsichtlich Ihrer Wiedereinstellungshilfsanspruchs. Es ist wichtig für Sie, dieses Dokument zu verstehen. Falls Sie Deutsch nicht verstehen oder nicht lesen können, wenden Sie sich für eine kostenlose Übersetzungshilfe hinsichtlich Ihres Wiedereinstellungshilfsanspruchs an 1-800-681-8102.

SERBIAN / SRPSKI :

Ovaj dokument sadrži važne informacije, datume ili dostupnost vezano za Vaš zahtjev za pomoć kod ponovnog zapošljavanja. Važno je da razumijete ovaj dokument. Ako ne možete pročitati ili razumjeti engleski jezik, pozovite 1-800-681-8102 za besplatnu pomoć s prijevodom vezano za vaš zahtjev za pomoć pri ponovnom zapošljavanju.

BOSNIAN-CROATIAN / BOSANSKI-HRVATSKI :

Ovaj dokument sadrži važne informacije, datume ili status kvalificiranosti po pitanju vašeg traženja podrške pri ponovnom zapošljavanju. Za vas je važno da razumijete ovaj dokument. Ako ne možete čitati ili razumjeti engleski, pozovite 1-800-681-8102 da dobijete besplatnu pomoć pri prijvodu u vezi vašeg traženja podrške pri ponovnom zapošljavanju.

HAITIAN CREOLE / KREYÒL AYISYEN :

Dokiman sa a gen enfòmasyon enpòtan, dat, oubyen estati kalifikasyon konsènan reklamasyon Asistans Reyanbochaj ou. Li enpòtan pou ou konprann dokiman sa a. Dokiman sa disponib an kreyòl nan http://floridajobs.org/Unemployment/bri/BRI_Creole.pdf. Si ou pa li oswa konprann anglè rele 1-800-204-2418 pou sèvis tradiksyon gratis konsènan reklamasyon Asistans Reyanbochaj ou.

CHINESE TRADITIONAL / 中國 :

本檔包含與您的再就業援助申請相關的重要資訊、日期或資格有效狀態。請您務必理解本檔之內容。如果您閱讀或理解英語的能力有限，請撥電話 1-800-681-8102，取得與您的再就業援助申請相關的免費翻譯協助。

CHINESE SIMPLIFIED / 中文 :

本文件包含與您的再就業援助申請相關的重要信息、日期或資格有效狀態。請您務必理解本文件的內容。如果您閱讀或理解英語的能力有限，請撥電話 1-800-681-8102，獲得與您的再就業援助申請相關的免費翻譯協助。

JAPANESE / 日本語 :

この文書には、あなたの再雇用支援の申し立てに関する重要な情報、日付、または資格が示されています。必ずこの文書をよく読んで内容を理解してください。英語を読むことも理解することもできない場合は、お電話（1-800-681-8102）にてお問い合わせになり、再雇用支援の申し立てに関する無料の翻訳支援を受けてください。

VIETNAMESE / TIẾNG VIỆT :

Hồ sơ này có các thông tin quan trọng, ngày tháng, hoặc tình trạng điều kiện hội đủ về đơn đề nghị Hỗ Trợ Tìm Việc Làm của quý vị. Điều quan trọng là quý vị phải hiểu rõ hồ sơ này. Nếu quý vị không đọc hoặc hiểu được tiếng Anh, hãy gọi đến số 1-800-681-8102 để được hỗ trợ biên dịch miễn phí về đơn đề nghị Hỗ Trợ Tìm Việc Làm của quý vị.

ARABIC / العربية اللغة :

يحتوي هذا المستند على معلومات مهمة أو تواريخ أو وضع الأهلية فيما يتعلق بدعوى المساعدة في إعادة التوظيف. ومن الأهمية لك أن تفهم هذا المستند. وإذا لم تقرا النص الإنجليزي أو تفهمه، يرجى الاتصال على للحصول هاتف رقم: 1-800-681-8102 على الترجمة المتعلقة بدعوى المساعدة في إعادة التوظيف.

FARSI / فارسی :

این سند حاوی اطلاعات، تاریخها یا تقاضای ایجاد شرایط بودن شما در مورد درخواست کمک هزینه استخدام مجدد شما می باشد. درک این سند برای شما مهم است. اگر نمی توانید به انگلیسی بخوانید یا انگلیسی نمی فهمید با شماره 1-800-681-8102 برای ترجمه رایگان در مورد تقاضای کمک هزینه استخدام مجدد خود تماس بگیرید.

RUSSIAN / РУССКИЙ :

В этом документе содержится важная информация, даты или сведения о статусе соответствия требованиям в отношении Вашего заявления о помощи в получении новой работы при увольнении. Важно, чтобы Вы поняли этот документ. Если Вы не можете прочесть текст на английском языке или не понимаете английский язык, позвоните по номеру 1-800-681-8102, чтобы получить бесплатные услуги перевода в отношении Вашего заявления о помощи в получении новой работы при увольнении.