STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 16-03433

vs.

Referee Decision No. 0029327432-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

I.
Introduction

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

The Commission's review is generally limited to the issues before the referee and the evidence and other pertinent information contained in the official record. Parties are advised prior to the appeals hearing before the referee that the hearing is their only opportunity to present evidence in support of their position in the case. The referee has the responsibility to develop the hearing record, weigh the evidence, judge the credibility of the witnesses, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. The Commission reviews the evidentiary and administrative record and the referee's decision to determine whether the referee followed the proper procedures, adequately developed the evidentiary record, made appropriate and properly supported findings, and properly applied the reemployment assistance law established by the Florida Legislature. The Commission cannot reweigh the evidence and the inferences to be drawn from it. Further, absent extraordinary circumstances, the Commission cannot give credit to testimony contrary to that accepted as true by the referee.

II.
The Findings of Fact and Decision Below

The referee made the following findings of fact:

> The claimant worked for the employer from March 30, 2014 until August 08, 2016 as a new housing sales [counselor]. The employer has a policy regarding confidentiality which requires employees to not distribute or otherwise disclose sensitive proprietary information including customer information and sales incentives to individuals who were not authorized to have access to that information. Failure to maintain the confidentiality of that information would lead to termination. The claimant was aware of that policy. During the claimant's employment with the employer, the employer assigned the claimant a laptop and a company email for work usage. The claimant could access her company email through the employer-assigned laptop or through the claimant's own cellular device. In April 2016, a personal friend of the claimant who also was a director in the employer's interior design department was discharged by the employer. Prior to July 30, 2016, that individual was removed from the employer's "all sales" email list and any email sent to that address was sent to the Director of Sales. After April 2016, that same individual's separate business was contracted to complete design work which started prior to that individual's discharge. The claimant's friend and former co-worker was not assigned to work any assignments at the sale made at the [Buckingham Way] address. On July 30, 2016, one of the claimant's [supervisors] forwarded an email to all of the sales team employees, which did not include the claimant's friend, congratulating one of the employee[s] for a sale made. That email contained the names of the customers in the sale, the marital status of those customers, the former residence of those customers, the contract amount, and various incentives given by the employer to the customers for the sale. The claimant received that forwarded email on July 30, 2016 and sent a copy of that email to her personal email address on the same date in order to keep an example of the term "excelsior" used by her supervisor. The claimant did not have permission from the employer to send that email to her personal email address. The claimant then used her email address to [forward] the same email containing the contract information with a subject line indicating "Contract Signed for the Community" to her friend and former co-worker

> with the text "[s]mall wood chips strikes again . . ." on July 30, 2016. The email intended for the claimant's friend and former co-worker was forwarded to the Director of Sales. The employer discharged the claimant on August 08, 2016 for attempting to release confidential information to a third party.

Based on these findings, the referee held that the employer had established misconduct under subparagraphs (a) and (e) of Section 443.036(29), Florida Statutes, resulting in the claimant's disqualification from receipt of benefits pursuant to Section 443.101(1)(a), Florida Statutes.

III.
Issues on Appeal

The claimant challenges the referee's decision on a number of grounds, four of which merit discussion. Two of these relate to the sufficiency of the evidence as to specific facts. First, the claimant contends that the record lacked competent evidence to support a finding that the former employee to whom the claimant forwarded the email was not in the "all sales" group at the time. Second, the claimant contends that the record evidence was not sufficient to support any finding that the claimant violated an employer rule by sending the work email to her personal email address. The other two contentions address the legal issues. The clamant contends that, because the email she sent was redirected to the employer rather than making it to the former employee, she did not violate the rule prohibiting disclosure of confidential information. Finally, the claimant contends that her actions did not constitute misconduct within the meaning of the law; her argument is that a single violation of an employer's rule is not misconduct.

IV.
Discussion

A. Accuracy of the Findings and Sufficiency of the Evidence

After review of the hearing recording, we modify the findings to conform to the credited evidence as discussed below. The referee's finding that "After April 2016, that same individual's separate business was contracted to complete design work which started prior to that individual's discharge," is modified to conform to the evidence: "After April 2016, that same individual's separate business completed design work which had been contracted and started prior to that individual's discharge."

The referee's finding "That email contained the names of the customers in the sale, the marital status of those customers, the former residence of those customers, the contract amount, and various incentives given by the employer to the customers for the sale" is modified to conform to the credited evidence: "That email contained the names of the customers in the sale, the marital status of those customers, the purchased location, the former residence of those customers, the buyers' home phone number and email address, the contract amount, and various incentives given by the employer to the customers for the sale."

As to the referee's finding that "The claimant received that forwarded email on July 30, 2016 and sent a copy of that email to her personal email address on the same date *in order to keep an example of the term 'excelsior' used by her supervisor,"* the italicized language is supported by the claimant's testimony, but this finding is limited by the referee's conclusion regarding the incident that "the claimant failed to demonstrate the propriety of her actions."[1]

The referee's finding that "The claimant then used her email address to forwarded [sic] the same email containing the contract information with a subject line indicating 'Contract Signed for the Community' to her friend and former coworker with the text '[s]mall wood chips strikes again . . .' on July 30, 2016" is modified and clarified to conform to the documentary evidence: "Three minutes later, the claimant forwarded the same email containing the contract information with a subject line indicating 'Contract Signed for the Community' to her friend and former coworker with the added text '[s]mall wood chips strikes again.'"

With these modifications and limitations, the Commission concludes the record supports the referee's material findings.

The claimant contends that the record does not support the referee's finding that "Prior to July 30, 2016, that individual was removed from the employer's 'all sales' email list and any email sent to that address was sent to the Director of Sales," arguing that the employer's evidence was hearsay. We find no merit to that contention because the finding is supported by two different evidentiary showings. First, while the claimant characterizes the employer's testimony that the employer's IT department regularly removes individuals from email groups after separation as hearsay, such evidence is not hearsay, but is instead an accepted form of inferential evidence. *See* §90.406, Fla. Stat.; R.A.A.C. Order No. 13-05686 (August 14, 2013) [2] (discussing business practice evidence). Moreover, the employer's witness provided

[1] Notwithstanding this finding, as we discuss immediately below, the claimant forwarded the email only three minutes later to the former coworker, making clear that the claimant was motivated at least in part by an intent to forward the email to her friend.

[2] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-05686.pdf.

competent evidence that the former employee's email was set to redirect or auto-forward to the employer's witness, and when the claimant testified that the former employee's name was still in the "all sales" group, the referee further inquired of the employer's witness as to whether any emails had been redirected other than the one sent by the claimant. The witness' testimony that she had not received emails redirected from the all sales group supports the referee's finding.

The claimant's contention that *the employer's witness' testimony* did not support a finding that she violated a company policy by forwarding the email to her personal email is technically correct, but the referee made no such finding. The referee's finding, instead, was that the claimant did not have permission from the employer, which is reasonably drawn from the evidence as well as inferences from the related findings.[3] It is the documentary evidence of the employer's policies, rather than the witness' testimony, that provides the proper proof of the specific prohibitions in the employer's policies. These will be discussed further below.

B. Legal Conclusions

The referee held that the claimant's actions constituted misconduct under subparagraphs (a) and (e) of Section 443.036(29), Florida Statutes. We focus on subparagraph (e), which provides that "misconduct" includes:

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

[3] The referee's conclusions relating to these findings indicate that the referee rejected the existence of a legitimate business reason for forwarding the email either to her personal email or then on to her former coworker. We agree with this analysis.

1. Subparagraph (e) Misconduct

Subparagraph (e) "expresses the legislative intent that a claimant may be disqualified from benefits where it is established he or she committed a 'violation of an employer's rule.'" *Crespo v. Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3d DCA 2012). Once the employer has shown a violation, the claimant bears the burden to establish one of the three defenses. *Id.* at 52*; Critical Intervention Servs. v. Reemployment Assistance Appeals Commission*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013). The amendment of the definition of misconduct in 2011 has made a violation of policy subject to disqualification in situations where it would not have been so prior to the amendment. *Alvarez v. Reemployment Assistance Appeals Commission*, 121 So. 3d 69, 70-71 (Fla. 3d DCA 2013).

In this case, the employer's evidence included the confidentiality policy in its handbook [Emp. Ex. 1 at 13-14] as well as the employment agreement the claimant signed [Emp. Ex. 1 at 29]. The employer also established an electronic systems use policy that included prohibitions regarding confidential information. [Emp. Ex. 1 at 10.] The handbook's discipline section further advised the claimant that violation of these policies would be grounds for discipline including discharge. [Emp. Ex. 1 at 15, 17.] Because the subject matter of the policies involves protection of business assets and customer information, and because the employer advised the claimant that she may be disciplined for violation of the policies, the policies are "rules" within the meaning of subparagraph (e). R.A.A.C. Order No. 13-09166 at p. 5 (July 24, 2014) (not all employer policies are "rules"; "rules" are generally significant policies relating to behavioral expectations, legal mandates, protection of assets or persons, and the like)[4]; R.A.A.C. Order No. 16-01723 at p. 2 (August 29, 2016) (a policy should normally advise the claimant that failure to comply may result in discipline in order to constitute a "rule" and be fairly enforceable as such).[5] The employer also established that the claimant violated the employer confidentiality and electronic systems use rules by sending an email containing confidential information to a former employee who had no business reason or authorization to receive it.

The claimant contends that she did not violate the rules because the email did not actually reach its intended recipient. However, under the plain language of the employer's confidentiality policy, the claimant's action in sending the email to her personal account for non-business purposes violated the rule: "You may not disclose, duplicate, or use confidential information, except as required in the performance of your duties with [the employer]." [Emp. Ex. 1, p. 13.] Likewise, the mere act of forwarding it to the former coworker violated the electronic systems use policy:

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[4] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-09166.pdf.
[5] Available at http://www.floridajobs.org/finalorders/raac_finalorders/16-01723.pdf.

"Such confidential information must not be forwarded by means of our electronic systems to any individuals outside the company under any circumstances."[6] [Emp. Ex. 1, p. 10.] Moreover, we agree with the referee that even if the rules were not explicitly applicable to the claimant's sending the email to her personal account for non-work related use and her *attempt* to send the email to a non-coworker, an attempt to commit an action that would be a rule violation if completed is also a violation of a rule unless the rule or context shows otherwise.

Because the credited evidence demonstrates that the claimant violated the employer's rules, the claimant must establish one of the affirmative defenses to avoid disqualification. The referee specifically addressed the unfair and inconsistent enforcement defense, and implicitly addressed the defense regarding knowledge of the rule; we consider all three.

The claimant cannot demonstrate that she did not know and reasonably could not have known she was violating the employer's confidentiality policy. Under this defense, a claimant may show that she was not aware of the employer's policy, and could not reasonably have been aware of it; the defense may also be established by showing that she did not know and could not reasonably have known that the policy applied to the specific conduct at issue. R.A.A.C. Order No. 13-06171 at p. 5 (February 12, 2014).[7] The claimant acknowledged that she was aware of the employer's confidentiality policy, and the policies were provided in the handbook which she received. Moreover, while the claimant testified she was not aware that the email contained confidential information, she cannot establish that she could not reasonably have known that it did. The subject line of the forwarded email readily disclosed that employer confidential information was included; the text of the original email would further reveal confidential customer data.

Likewise, the claimant cannot show that the employer's rules are not lawful or are not reasonably related to the job environment. Florida law, like that of other states, has long recognized an employer's interest in protecting confidential business information. *See, e.g.,* §542.335(1)(b)2., Fla. Stat. (recognizing advantageous, confidential business information as a protectable interest sufficient to support restrictive covenants). More recently, however, tort law has recognized not just a right, but a *duty,* to protect sensitive customer and third party confidential information. *See, e.g.*, *Long Star Nat'l Bank, N.A. v. Heartland Payment Sys.*, 729 F.3d 421 (5th Cir. 2013); *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012).

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[6] It is not clear whether, absent the employer's redirection of the email to the former employee, the former employee would have been able to access it. The claimant provided no credible explanation for why she selected that email address for the former employee. Accordingly, we agree with the employer that the most likely explanation is that the claimant accidentally selected an internal email address for her friend in lieu of an external one.

[7] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-06171.pdf.

The data contained in the email the claimant sent included personally identifiable information from the employer's customers, including the customers' full names, current and purchased residence addresses, home telephone number, and email address. *See* "Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)" at 2.2, National Institute of Standards, U.S. Dep't of Commerce, Spec. Pub 800-122, April 2010 (available at http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-122.pdf) (last accessed August 13, 2017). The employer's rules were fully consistent with the employer's rights and duties.

The last defense requires that the claimant show that the rules are not fairly or consistently enforced. There is no evidence that the employer did not consistently enforce its policies. Thus, we consider whether the claimant has established the defense that the rules cannot fairly be enforced to disqualify her from receipt of benefits. We analyze the defense as a matter of law. R.A.A.C. Order No. 15-02076 at p. 6 (September 25, 2015).[8] In our analysis, the Commission considers the nature and purpose of the employer's rule that was violated and the degree of culpability on the part of the claimant in violating the rule. *Id*. at p. 7 (citing R.A.A.C. Order No. 13-07369 (November 6, 2013) [9]; R.A.A.C. Order No. 13-04567 (August 7, 2013) [10]). In considering the nature and purpose of an employer's rule, the Commission examines the reason for the rule; the harm or potential harm the rule is designed to prevent; and the impact of a violation or potential violation on the employer, the claimant, coworkers, customers or clients, or the public at-large. R.A.A.C. Order No. 15-02076 at 7. The second consideration, the claimant's culpability, considers the relative degree of fault in the circumstances of the violation. Finally, the weighing of the culpability in comparison with the nature and purpose of the rule considers the legal significance of the rule. Rules that are adopted to comply with governmental or legal mandates or are designed to protect individuals from harm require a claimant to show a significantly lower relative degree of culpability on his or her part to prevail on the defense, because the risks to the employer or others are higher in such cases.

[8] Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-02076.pdf.
[9] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-07369.pdf.
[10] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-04567.pdf.

Historically, we have considered the defense only in instances of negligent or inadvertent violations of a rule. *See, e.g.*, R.A.A.C. Order No. 15-02076 and cases cited therein. This case presents a slightly different fact pattern; the claimant intended to send the email to the former employee. However, she was not specifically aware that the confidential information was in the email, even though she should have been.[11] Her violation of the rule was thus by an *intentional* action, but was not *purposeful*. As such, it is distinguishable from the facts of R.A.A.C. Order No. 15-02076.

Assuming the fair enforcement defense should be considered in this scenario, we conclude it is not satisfied here. Because the employer has both a legal right and a legal duty to maintain the confidentiality of certain types of information, the claimant must demonstrate a relatively low level of fault in order to prevail on the defense. There are facts that weigh in her favor, but other facts weigh against her. Favorable to the claimant is the fact that she did not purposely disclose confidential information; had she done so, the defense would not be applicable. The other fact in the claimant's favor is that the former employee did not receive the email. While this is a significant fact, it was the employer who prevented the breach – unless it was the claimant's error in selecting the wrong email address that was responsible. In either event, the claimant can take little credit for this serendipitous event. However, we do not consider in her favor her explanation in the hearing that the former employee was still in the "all sales" email list, or that the former employee was still working for the employer. Not only did the referee reject the factual accuracy of these explanations, we believe the referee also rejected them as honest explanations for the claimant's motives in sending the email.[12]

By contrast, several facts weigh against the claimant. First, while she was not aware that the email contained confidential information, she should have been. The evidence showed that she had received such emails and other forms of confidential information in the course of her duties. The employer could reasonably expect a professional regularly handling confidential information to be sensitive to that fact. Indeed, the employer had emphasized both in the employment agreement and the

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[11] The referee made no finding as to the claimant's specific purpose in sending the email, but we do not believe the evidence can reasonably be interpreted to support a finding that the claimant sent the email with the specific purpose of sending confidential information.

[12] To the extent that the referee did not explicitly reject these explanations, we do. The claimant's testimony as to the reasons for her sending the email was unconvincing and evasive; upon listening to it, we are left with the feeling that she was not fully forthcoming. In any event, in the absence of any acceptance of her explanations as honest (even if erroneous) by the referee, we do not credit them.

employee handbook the importance of protecting confidential information, including the importance of preventing inadvertent disclosure: "Unauthorized use or disclosure, *even if inadvertent*, compromises both you and [the employer] and can seriously erode the public confidence we work hard to maintain." [Emp. Ex. 1, p. 14 (emphasis added).]

Second, the claimant was on a performance improvement plan at the time. While the employer did not show that the claimant's prior performance could be considered misconduct, or that it was an independent basis for the termination, the significance of her being on a plan was considered by the employer in making the termination decision, which would be typical in such situations.[13]

Third, the claimant's own behavior evinces an understanding that her actions would not be considered appropriate. The claimant's efforts to hide the email she sent by routing it from her work email to her personal email account, and then to the former employee, may have been nothing more than a failed attempt to hide a snarky comment from the employer's eyes, but the claimant's actions reflect more than a momentary instance of poor judgment.

Finally, and most significantly, the claimant had no business purpose whatsoever for sending the email to her personal account or from there to the former employee. Good faith errors made in the course of performing one's duties are inevitable and understandable, and will not generally support disqualification, as we have held in similar cases. *See* R.A.A.C. Order No. 15-02076 (claimant accidentally submitted credit check after customer changed mind about seeking credit); R.A.A.C. Order No. 13-04349 (August 29, 2013) (claimant accidentally included customer in address field of derogatory email sent to supervisor warning about customer's behavior).[14] There is no convincing policy reason to apply the same rationale to this scenario where the claimant's intent was to make light of her supervisor rather than to attempt to fulfill the employer's expectations.[15]

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[13] The referee's conclusion that "no nexus was provided by the employer connecting the claimant's alleged unsatisfactory work performance to the reason for the termination" is correct insofar as the employer did not attempt to prove that the poor performance itself contributed to the termination, but the employer did address the significance of the claimant being placed on a performance warning prior to the incident.

[14] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-04349.pdf.

[15] The referee concluded that the email was not derogatory. We are not convinced the claimant's email was as benign as the claimant portrayed it, and the term "again" suggests that this was a repetition of a prior discussion. However, there would be few if any circumstances in which a private discussion between two individuals merely critical of their employer could be considered misconduct by itself, and this is not that rare case where it might be.

The claimant does not make any specific arguments as to the fair enforcement defense, arguing generally that a single instance of a policy violation does not constitute misconduct. The cases the claimant cites are, with one exception, cases that predate the 2011 amendments creating subparagraph (e), which as noted in the cases above changed the calculus on rule violations. The one exception appears to be a quotation from *Williams v. City of Winter Haven*, 210 So. 3d 75 (Fla. 2d DCA 2016), although the case is not cited by name. For the reasons expressed in our order on remand from the case, R.A.A.C. Order No. 15-01177 (August 3, 2017),[16] we do not follow that case because it inescapably conflicts with the plain language of the statute and the precedent of two other district courts.

2. Subparagraph (a) Misconduct

The referee also concluded that the employer established misconduct under subparagraph (a). Although admittedly a closer issue, the evidence in the case would support an inference that the claimant consciously disregarded the employer's interests in her actions in sending the email without any consideration of protection of confidential information. The lowered threshold of responsibility under subparagraph (a) resulting from the 2011 amendments can be met by establishing "a degree of carelessness or indifference sufficient to show . . . a lack of concern for the employer's interests." R.A.A.C. Order No. 15-00881 at p. 5 (May 11, 2015).[17] The manner in which the claimant violated policy while attempting to elude the employer's eyes in sending the email, giving no consideration to the fact that she would be disclosing confidential business and customer data, supports such an inference. This was not merely an instance of poor judgment.

C. Attorneys' Fees

The Reemployment Assistance Appeals Commission received the request of the claimant's representative for the approval of a fee for work performed in conjunction with the appeal to the Commission, as required by Section 443.041(2)(a), Florida Statutes, and Florida Administrative Code Rule 73B-21.006(4). We review fee approval requests under the standards established in R.A.A.C. Order No. 16-02976 (April 26, 2017).[18] In that order, we held that only in extraordinary circumstances should total fees in excess of one-third of a claimant's total available benefits be approved. This presumptive limit is an aggregate cap, not one for a particular hearing or phase of the appeals process. Under extraordinary

[16] Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-01177.pdf.
[17] Available at http://www.floridajobs.org/finalorders/raac_finalorders/15-00881.pdf.
[18] Available at http://www.floridajobs.org/finalorders/raac_finalorders/16-02976.pdf.

circumstances, such as rare cases involving complex legal issues in which a representative has represented a claimant through multiple levels of the appeal process to an ultimately successful result, the Commission would impose a presumptive limit on aggregate fees equal to fifty percent of the claimant's total available benefits.

The claimant's representative has requested approval of a fee of $783.75 for services performed in connection with the appeal before the Commission. The requested fee is in addition to the $2,140 fee the referee has already authorized for representation at the hearing. Since the referee authorized payment of a fee in an amount equal to almost two-thirds of the claimant's total available benefit amount, the Commission will not approve the payment of any additional fee.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits.

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

8/24/17 ,

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

*56671702 *

Docket No.0029 3274 32-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES:

Employer Representative

Claimant

Employer

Claimant Representative

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.

Findings of Fact: The claimant worked for the employer from March 30, 2014 until August 08, 2016 as a new housing sales counsellor. The employer has a policy regarding confidentiality which requires employees to not distribute or otherwise disclose sensitive proprietary information including customer information and sales incentives to individuals who were not authorized to have access to that information. Failure to maintain the confidentiality of that information would lead to termination. The claimant was aware of that policy. During the claimant's employment with the employer, the employer assigned the claimant a laptop and a company email for work usage. The claimant could access her company email through the employer-assigned laptop or through the claimant's own cellular device. In April 2016, a personal friend of the claimant who also was a director in the employer's interior design department was discharged by the employer. Prior to July 30, 2016, that individual was removed from the employer's "all sales" email list and any email sent to that address was sent to the Director of Sales. After April 2016, that same individual's separate business was contracted to complete design work which started prior to that individual's discharge. The claimant's friend and former co-worker was not assigned to work any assignments at the sale made at the Buckingham Way address. On July 30, 2016, one of the claimant's supervisor forwarded an email to all of the sales team employees, which did not include the claimant's friend, congratulating one of the employee's for a sale made. That email contained the names of the customers in the sale, the marital status of those customers, the former residence of those customers, the contract amount, and various incentives given by the employer to the customers for the sale. The claimant received that forwarded email on July 30, 2016 and sent a copy of that email to her personal email address on the same date in order to keep an example of the term "excelsior" used by her supervisor. The claimant did not have permission from the employer to send that email to her personal email address. The claimant then used her email address to forwarded the same email containing the contract information with a subject line indicating "Contract Signed for the Community" to her friend and former co-worker with the text "[s]mall wood chips strikes again…" on July 30, 2016. The email intended for the claimant's friend and former co-worker was forwarded to the Director of Sales. The employer discharged the claimant on August 08, 2016 for attempting to release confidential information to a third party.

Conclusions of Law: Florida Statutes §443.101(1)(a) states that an individual shall be disqualified from the receipt of benefits:

For the week in which he or she has voluntarily left work without good cause attributable to his or her employing unit or has been discharged by the employing unit for misconduct connected with his or her work, based on a finding by the Department of Economic Opportunity. As used in this paragraph, the term "work" means any work, whether full-time, part-time, or temporary.

Florida Statutes §443.036 (29), defines "misconduct" irrespective of whether the misconduct occurs at the workplace or during working hours, includesbut 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 proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 468 So.2d 413 (Fla. 1986).

During the hearing, the employer reference the claimant was issued warnings for unsatisfactory work performance. However, one of the employer's witness admitted that the unsatisfactory work performance was not the reason that lead to the decision to discharge the claimant. Accordingly, the employer failed to provide a sufficient nexus connecting the unsatisfactory work performance to the reasons of separation given by the employer's witnesses, namely that the claimant was discharged for violation of confidentiality. SeeR.A.A.C. Order No. 16-00025 (March 22, 2016). Since no nexus was provided by the employer connecting the alleged unsatisfactory work performance to the reason for separation, the appeals referee shall not analyze the claimant's alleged unsatisfactory work performance under the misconduct statute. The remainder of this decision shall analyze the claimant's actions regarding the July 30, 2016 email.

Here, the appeals referee agrees with the claimant's assertion that the July 30, 2016 language regarding wood chips is not derogatory language. At worst, the information written by the claimant seems to be a play on the various definitions of the word "excelsior" as well as the claimant's supervisor's name. Thus stated, the appeals referee does not find that the claimant's statement is derogatory as to be found as misconduct under any subparagraph above. The remainder of this decision shall analyze the claimant's forwarding of confidential information.

Under subparagraph (a), the employer met its burden of proof. During the hearing, the claimant admitted that she sent an email containing confidential and proprietary information to her personal email address and then used her personal email address to forward that same email containing the proprietary and confidential information to her friend and former employee of the employer on July 30, 2016. Although the claimant asserted the argument that the claimant did not violate any confidentiality because the claimant's friend still works with the employer, that argument is unpersuasive. The more credible testimony presented by the employer's witnesses indicates that the claimant's friend has not been an employee since April 2016 and had been removed from the employer's "all sales" email list some period of time prior to July 30, 2016 with any email sent to that address to be forwarded to the director of sales. The director of sales only received the claimant's email to her friend and former employee through that forwarding process. The record reflects that the claimant's friend does still "work" for the employer, but that friend is contracted by the employer through a separate company owned by that friend tasked with completion of projects started prior to April 2016 and not with the sale which was the subject of the July 30, 2016 email chain. Accordingly, there is no indication that the claimant's friend and former co-worker would have authorization to receive the information contained with the July 30, 2016 email. Furthermore, the claimant's indication that she needed to forward her email to her personal email address for perseveration purposes is also unpersuasive as the claimant had receive previous emails from the same supervisor with the same language congratulating the claimant. The claimant was also able to access her work email from home through her company-issued laptop or through the claimant's cellular device thereby precluding the need for the claimant to forward an email from her company-issued email address to a personal email address. Thus stated, the claimant's failed to provide competent and credible evidence to demonstrate the propriety of her actions. A mere factual impossibility that the claimant's friend may not have actually received the July 30, 2016 does not abrogate the claimant's intentions forwarding an email containing confidential information to a personal email address as well as to a her friend and former worker. The claimant's actions are therefore to be held as 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 as to be considered misconduct under subparagraph (a).

The employer also met its burden under subparagraph (e). Here, the claimant admitted during the hearing that she was

aware of the employer's confidentiality policy. Additionally, the claimant admitted to actions taken on July 30, 2016 which are in violation of the employer's confidentiality policy. As indicated above, the appeals referee does not find the claimant's proffered defenses that the claimant's friend was still "working" for the employer as well as the claimant's forwarding of the email to her personal email address to establish a personal record to be persuasive. Additionally, the credible testimony is that on July 30, 2016 the claimant, and only the claimant, sent an email to the claimant's friend as the friend had been removed from the employer's "all sales" list some period of time prior to July 30, 2016. Thus stated, the claimant failed to provide competent evidence to support the affirmative defenses that the employer's policy was not fairly or consistently enforced or otherwise not connected with the job environment. Accordingly, the claimant's actions are misconduct under subparagraph (e).

At the hearing, the referee was presented with conflicting testimony regarding material issues of fact. The appeals referee considered the factors set forth by the Reemployment Assistance Appeals Commission in Order No. 03-10946. Based on consideration of the following factors, (1) the witness' opportunity and capacity to observe the event or act in question; (2) any prior inconsistent statement by the witness; (3) a witness' bias or lack of bias; (4) the contradiction of the witness' version of events by other evidence or its consistency with other evidence; (5) the inherent improbability of the witness' version of events; and (6) the witness' demeanor, the referee accepts the testimonies of the employer's witnesses to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer's witnesses as presented in the "Findings of Fact" above.

Based on the above statements, the employer met its burden of proof that the claimant was discharged for misconduct connected with work. The claimant shall be disqualified from the receipt of reemployment assistance benefits.

Attorney's Fees: After the hearing, the claimant's representative requested approval for a fee of $2,140.00 in connection with the representation of the claimant for the hearing. This fee, to be paid by the claimant, is approved.

Decision: The determination dated September 01, 2016, qualifying the claimant, is REVERSED. The claimant is disqualified from the receipt of reemployment assistance benefits for the week ending August 13, 2016, plus five weeks, and until the claimant has earned $4,675.00.

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 November 3, 2016.

R. PAHOTA
Appeals Referee

By: K. Martin

KIMBERLY MARTIN, 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 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 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 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 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.

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.

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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.

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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.

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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.

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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.

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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。

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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.

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این سند حاوی اطلاعات، تاریخها یا تقاضای واجدالشرایط 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.

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