STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 17-03270

vs.

Referee Decision No. 0031264001-02E

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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 employer's account chargeable for benefits paid on the claim.

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. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the employer's record is eligible for relief of benefit charges in connection with this claim as provided in Section 443.131(3), Florida Statutes, or as otherwise provided by law.

The referee made the following findings of fact:

> The claimant was hired by the employer on March 29, 2014. The claimant had been made aware of the employer's policies regarding shoplifters. The employer's policy does not allow for the pursuit of shoplifters outside of the store and the shoplifter can only be engaged by a member of management or loss prevention. On March 16, 2016, the claimant was outside the store on break, when another employe[e] came out after a suspected shoplifter. The claimant then chased the suspected shoplifter and tackle[d] him in a neighboring business parking lot. The other employee then came over and called the police. The suspect was arrested. The store manager was made aware of the situation on March 16, 2016. The claimant admitted to chasing down the suspected

> shoplifter. The store manager suspended the claimant. On April 19, 2016, the claimant was discharged. The employee who had initiated the chase for the suspected shoplifter was suspended for his part in the pursuit of the suspected shoplifter but not discharged.

Based on these findings, the referee held the employer's account chargeable for benefits paid on the claim because the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee did not analyze the legal issues correctly; accordingly, the referee's decision is reversed.

The claimant worked as a grocery clerk for a grocery store operated by the employer. The findings correctly reflect the claimant was discharged for chasing down a suspected shoplifter into the parking lot of a neighboring business, tackling the individual, and allegedly holding down the individual until law enforcement arrived. While the employer's policy does not specifically prohibit the pursuit of suspected shoplifters outside of the store, the policy provides: "*Only* managers or Loss Prevention Officers are authorized to *approach* a shoplifting suspect and question him or her about the merchandise." Because he violated the policy and his actions placed the employer at potential risk for liability, the claimant was discharged. The referee held the claimant's actions did not constitute misconduct connected with work because the employer did not consistently enforce the policy when it discharged the claimant, but only suspended the other associate involved in the incident. In reaching his decision, however, the referee misapplied Section 443.036(29)(e)1.c., Florida Statutes, to the facts of this case.

Section 443.036(29), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

* * * * *

> (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.

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. Florida 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. *Crespo, supra; 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 sufficient for disqualification in situations where it would not have been so prior to the amendment. *Alvarez v. Reemployment Assistance Appeals Commission*, 121 So. 2d 69, 70-71 (Fla. 3d DCA 2013).

The employer in this case met its burden of establishing misconduct under subparagraph (e) of the above-referenced statute when it presented evidence of the known policy the claimant purportedly violated and presented competent, substantial evidence that the claimant, in fact, violated the policy. Once the employer established its *prima facie* case that the claimant's actions violated the employer's known policy, the *claimant* had the burden of proving any of the three affirmative defenses listed in subparagraph (e)1.a.- c. Inasmuch as the employer was the only party who appeared for the hearing, the claimant did not meet this burden. Moreover, a defense of inconsistent enforcement requires more than a showing of superficially similar conduct and dissimilar results. Employers make disciplinary decisions taking into account a variety of case-specific factors which may include rank, class, duties of the employees, prior offenses, prior discipline administered to the employees, and *the nature of the violation*. *See* R.A.A.C. Order No. 17-01369 (July 18, 2017). In employment cases such as those cited in our prior orders,[1] individuals must be substantially similarly situated in all material respects to serve as appropriate comparators. The inconsistent enforcement defense must be carefully and thoughtfully applied in all instances, but this is particularly true when the employer has provided different degrees of discipline, as opposed to discharging one individual for violating the rule and not imposing any discipline at all on another for similar behavior.

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[1] *See, e.g.,* R.A.A.C. Order No. 14-01026 at pg. 6 (September 23, 2014) (citing, among other cases, *Maniccia v. Brown*, 171 F.3d 1364 (11th Cir. 1999)), available at http://www.floridajobs.org/finalorders/raac_finalorders/14-01026.pdf.

In this case, the employer established the other associate was suspended from work, rather than discharged, because his actions in engaging with the suspected shoplifter were significantly less egregious than the claimant's actions. While the other associate purportedly pursued the suspected shoplifter into the employer's parking lot, he stopped the pursuit once the individual was half-way across the employer's parking lot. On the other hand, the claimant not only pursued the individual across the employer's parking lot, but continued the pursuit into the parking lot of a neighboring business, tackled the individual, and allegedly held him down until law enforcement arrived. This behavior was far more potentially hazardous to all concerned, including the employer. Accordingly, the evidence presented during the hearing was insufficient to establish that the employer administered different discipline to two employees who were substantially similarly situated in terms of violation of the rule. Because the employer established the claimant was discharged for misconduct connected with work under Section 443.036(29)(e), Florida Statutes, the employer's account is eligible for relief from charges in connection with this claim.

The decision of the appeals referee is reversed. The employer's account shall be noncharged for benefits paid in connection with this claim.

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 1/18/2018, 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

*66671908 *

Docket No.0031 2640 01-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES:

Employer Representative

Employer

DECISION OF APPEALS REFEREE

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

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

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

Issues Involved: 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.)

c

Findings of Fact: The claimant was hired by the employer on March 29, 2014. The claimant had been made aware of the employer's policies regarding shoplifters. The employer's policy does not allow for the pursuit of shoplifters outside of the store and the shoplifter can only be engaged by a member of management or loss prevention. On March 16, 2016, the claimant was outside the store on break, when another employer came out after a suspected shoplifter. The claimant then chased the suspected shoplifter and tackle him in a neighboring business parking lot. The other employee then came over and called the police. The suspect was arrested. The store manager was made aware of the situation on March 16, 2016. The claimant admitted to chasing down the suspected shoplifter. The store manager suspended the claimant. On April 19, 2016, the claimant was discharged. The employee who had initiated the chase for the suspected shoplifter was suspended for his part in the pursuit of the suspected shoplifter but not discharged.

Conclusions of Law: The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The record reflects 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); TallahasseeHousing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The record shows the claimant was discharged for violation of the employer's policy regarding the handling of shoplifters, which may have been considered misconduct. However, although the claimant did violate the employer's policy, the other employee also violated the employer's policy and was only suspended and not discharged. Under the circumstances, the employer failed to follow the policy by only discharging the claimant, even though both employees engaged the suspected shoplifter. In this case, the employer did not consistently enforce the policy by only discharging the claimant, therefore, misconduct was not established. Since misconduct was not established, the employer's tax account will be charged.

Decision: The determination dated October 3, 2017, is AFFIRMED.

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 17, 2017.

C. GUNTER
Appeals Referee

Robyn L Deak

By:

ROBYN L. DEAK, 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.
