STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-04651

vs.

Referee Decision No. 13-36768U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision holding the claimant disqualified from receipt of benefits.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

Procedural error requires this case to be remanded for further proceedings; accordingly, the Commission does not now address the issue of whether the claimant is eligible/qualified for benefits.

The referee made the following findings of fact:

> The claimant was hired on July 21, 2010, and was separated on March 19, 2013. The [employer] employed the claimant as a full-time Sales Associate. There was continuing work available to him. The claimant became dissatisfied with his work schedule and with the amount of money he was making. The claimant, a white man, became convinced that he was being discriminated against by his black supervisor. He abandoned the job after working a shift on February 22, 2013. He did not respond to phone calls made to him on February 25, 26, and 28, and March 1, nor did he respond to a Certified Letter addressed to him at his address of record.

Based on these findings, the referee held the claimant voluntarily left work without good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes the record was not sufficiently developed; consequently, the case must be remanded.

Section 443.101(1), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973).

The referee concluded the claimant in this case quit due to dissatisfaction with his working conditions. The referee held the claimant quit without good cause attributable to the employer. While the referee found that the claimant was dissatisfied in part with "the amount of money he was making," the referee did not specifically address the claimant's testimony that in his last two or three checks, he was only paid approximately $400 for 80 hours of work. It is not clear whether he was referring to the gross or net pay he received.

Minimum wage and overtime issues are governed by the Fair Labor Standards Act (FLSA), 29 U.S.C. §201 et seq., as well as the Florida Minimum Wage Act ("FMWA"), Section 448.110, Florida Statutes. "The FLSA provides that 'every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, [minimum] wages' during each applicable pay period." *Martinez v. Ford Midway Mall Inc.*, 59 So. 3d 168, 172 (Fla. 3d DCA 2011) (quoting 29 U.S.C. §206 (2009)). "It is unlawful for an employer to not pay an employee at least a minimum wage for every hour worked during the applicable pay period." *Id.* (citing 29 U.S.C. §215(2) (2009)). As such, an employer is statutorily on notice that it must pay an employee at least the minimum wage for each hour of service performed, unless the employee or employer is exempt. When an employee's basic compensation structure violates the minimum wage or overtime requirements of the FLSA, the employee has good cause to quit attributable to the employer. *Martinez*, *Id.* at 174. While a claimant generally must make a reasonable effort to address wage issues with the employer prior to quitting, *Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586 (Fla. 4th DCA 2006), the employee is never required to accept a basic compensation structure that clearly and facially violates the FLSA or FMWA. Because the referee did not develop the record or analyze these issues, the case is remanded for further consideration by the referee, including the conducting of a supplemental hearing.

On remand, the referee must first determine whether the claimant's employment was "covered" by the FLSA. *Lawnco*, *supra* at 589. FLSA coverage can be established by one of two methods. First, "enterprise" coverage applies to all employees of a business engaged in commerce that has annual revenue of $500,000 or more. 29 U.S.C. §203(s)(1)(A). Second, even if the employer is not covered as an enterprise, employees who are engaged in "commerce or the production of goods for commerce" are covered. 29 U.S.C. §§206(a)(l) & 207(a). We note that the employer in this case is a large national retailer. The form 10-K filed by [the parent company of the employer], shows total revenues for fiscal year 2012 of over $39 billion. The report also shows that [the unit that appears to include the employer's stores] in the U.S., had revenues of almost $21 billion. The Commission further notes that the description of claimant's sales duties also suggests that he met the requirements of individual coverage.[1] However, if the employer contends that neither enterprise nor individual coverage applies to the employee, it may offer evidence to that issue.

If it is established that an employee is "covered" by the FLSA, the employee is presumptively entitled to both minimum wage (29 U.S.C. §206(a)) and overtime (29 U.S.C. §207) protections. However, the FLSA contains a number of exemptions for various classes of employers or employees. The employer bears the burden of proof to establish an exemption. *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227 (10th Cir. 2008). Exemptions are to be narrowly construed. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Some exemptions apply to both the minimum wage and overtime provisions (29 U.S.C. §213(a)); others apply only to the overtime requirement (29 U.S.C. §213(b)). One additional overtime exemption that may be at issue in this case is the "retail sales" exemption. 29 U.S.C. §207(i). This partial exemption applies to employees who work for a retail or service establishment and receive more than half of their compensation from commissions. However, to qualify for this exemption, the employee must be paid at a base hourly rate of at least one and one-half times the applicable federal minimum wage. *See* 29 C.F.R. §779.419(a). The federal minimum wage in effect during the claimant's period of employment with this employer was $7.25 per hour. *See* 29 U.S.C. §206. Additionally, as calculated and reported by the Department of Economic Opportunity, the hourly minimum wage in Florida was $7.67 from January 1 through December 31, 2012, and became $7.79 on January 1, 2013. *See generally* Section 448.110, Fla. Stat. Unless the employer provides evidence that some FLSA exemption applies[2], and that it complied with the requirements of that exemption, the claimant was entitled to

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[1] For example, the U.S. Department of Labor has opined that the regular processing of credit card transactions by an employee by itself establishes individual coverage. Assoc Solicitor Letter to National Rest. Assoc. (March 30, 1990). *See also Silk v. Albino*, 2007 WL 853752 (M.D. Fla. Mar. 19, 2007).

[2] The FMWA specifically adopts the FLSA exemptions. §448.110(3), Fla. Stat.

payment of at least the relevant Florida minimum wage, and, under the FLSA, overtime based on that amount when applicable. When an employee is paid on a pure commission basis, with no set draw or guarantee, the employer must ensure that the claimant receives enough gross wages for each pay period so that his compensation does not drop below these requirements.[3]

On remand, the referee is directed to develop the record further as necessary in order to determine whether the claimant was paid in compliance with the law. Such record development should include, but is not limited to, adducing testimony regarding whether the employer considered the employee to not be covered under the FLSA, and if so, the factual basis for that contention; the stated terms and conditions of the claimant's basic compensation structure and whether the claimant was actually paid as provided in that agreement; and whether the employer considered the claimant to be exempt, and if so, the specific exemption(s) and factual basis for that exemption. The determination of whether an exemption is claimed properly can be a complex inquiry which is outside the scope of reemployment assistance hearings, and it is not necessary for the referee to make that determination. However, the referee should develop the record sufficiently to determine whether the employer at least had a good faith factual basis for claiming the exemption. For these purposes, it is sufficient to adduce a basic explanation by the employer as to why the *class* of jobs the claimant was employed in was considered exempt, and the claimant's response to the employer's evidence.

In the event the claimant was not paid in compliance with the FLSA or FMWA, the referee must determine whether this was due to an isolated payroll error or whether the claimant was routinely paid less than minimum wage. If the referee finds the claimant's basic compensation structure was clearly and facially non-compliant, or that the claimant *systematically* worked hours for which he was not properly compensated by the employer, then the claimant had good cause to leave his employment attributable to the employer. If the referee finds that the claimant was properly compensated for all hours worked, the referee may reinstate his prior decision featuring appropriate findings regarding the claimant's hours and wages. If the referee finds the claimant was not properly compensated at times but that any errors in compensation were not systematic, the referee shall determine whether the errors were sufficiently common and significant that the average worker would have felt impelled to leave his employment under the test in *Uniweld Products*, above.

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[3] For this reason, most employers provide a minimum guarantee or draw that will at least equal the minimum wage that would have been earned, and any overtime if applicable.

The referee must next determine if the claimant took appropriate steps to preserve his employment, as provided in *Lawnco*. We note that it is not necessary for the claimant to specifically raise the FLSA or FMWA to the employer, who is charged with knowledge of the law. Instead, it is sufficient that the claimant made the employer aware of his concern about his wages. If the claimant feels, for example, that a specific paycheck is erroneous or that his pay is not being properly calculated, he must bring that issue to the employer to give the employer an opportunity to correct it.

Finally, the referee must determine *why* the claimant quit. While a violation of the FLSA or FMWA may give a claimant good cause to quit, the referee must determine whether this claimant was motivated, at least in part, to quit because of a pay structure violating these laws. The referee has already determined that the claimant quit (at least in part) due to his dissatisfaction with the work environment, and this conclusion is supported by record evidence at least to the extent that it is one of the factors the claimant relied on. On remand, the referee must decide whether and to what extent the claimant's concerns about compensation that was in violation of the FLSA or FMWA were a motivating factor in the separation.[4]

In order to address the issues raised above, the referee's decision is vacated and the case is remanded. On remand, the referee is directed to develop the record in greater detail and render a decision that contains accurate and specific findings of fact concerning the events that led to the claimant's separation from employment and a proper analysis of those facts along with an appropriate credibility determination made in accordance with Florida Administrative Code Rule 73B-20.025. Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

[4] We note that at one point the claimant appears to have testified that even if he was making the money at the time of his resignation that he had originally, he would have probably left regardless due to the work environment.

The decision of the appeals referee is vacated and the case is remanded for further proceedings.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on 9/25/2013, 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 Thomas
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 344 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

IMPORTANT:	For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE:	Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN:	Pou yon intèpret asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa prán àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-36768U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3687-0

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); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Findings of Fact: The claimant was hired on July 21, 2010, and was separated on March 19, 2013. The employer, employed the claimant as a full-time Sales Associate. There was continuing work available to him. The claimant became dissatisfied with his work schedule and with the amount of money he was making. The claimant, a white man, became convinced that he was being discriminated against by his black supervisor. He abandoned the job after working a shift on February 22, 2013. He did not respond to phone calls made to him on February 25, 26, and 28, and March 1, nor did he respond to a Certified Letter addressed to him at his address of record.

Conclusions of Law: The law provides that an individual will be disqualified for benefits who voluntarily leaves work without good cause attributable to the employing unit. Good cause is such cause as "would

reasonably impel the average able-bodied qualified worker to give up his or her employment." Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Moreover, an employee with good cause to leave employment may be disqualified if reasonable effort to preserve the employment was not expended. See Glenn v. Florida Unemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987). See also Lawnco Services, Inc. v. Unemployment Appeals Commission, 946 So.2d 586 (Fla. 4th DCA 2006); Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006).

The record reflects that the claimant abandoned the job because he was dissatisfied with the working conditions. It was not shown that the working conditions were such as to constitute good cause for abandoning the job. In this case, the claimant did not make a reasonable effort to preserve the employment relationship prior to leaving. Thus, it is concluded that the claimant voluntarily left work without good cause attributable to the employing unit within the meaning of Florida unemployment compensation law.

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

Decision: The determination dated April 5, 2013, is REVERSED. The claimant is disqualified for the week beginning February 24, 2013, and until he earns $4,675.

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 mailed to the last known address of each interested party on May 24, 2013.

SEAN DIMON
Appeals Referee

By: Sharene M. Price
SHARENE PRICE, 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 mailing 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 below 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 https://iap.floridajobs.org/ or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la fecha 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 https://iap.floridajobs.org/ o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y el número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

ENPÒTAN – DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} 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, https://iap.floridajobs.org/ oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfimasyon an se va dat yo prezante demann nan pou reouvri kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.