

STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 13-05159

vs.

Referee Decision No. 13-39061U

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 claimant not disqualified from receipt of benefits and charged the employer's account.

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 qualified for benefits.

The referee made the following findings of fact:

The claimant began working as a driver for the employer, a gas and diesel distributor, on October 3, 2012. Company policy established that an associate would be discharged if they caused an accident. The claimant was aware of the policy. While driving on March 28, 2013, a car hit the passenger side of the claimant's truck. The passenger side headlight, bumper, and tire of the claimant's truck were damaged. The claimant did not cause the accident. The claimant received a citation for the accident. The

claimant reported the accident and the damages to the president of the company. The claimant did not lie about the accident or the damages. Effective March 28, 2013, the president discharged the claimant due to the belief the claimant caused the accident and lied about it.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee erred by discounting the employer's evidence; consequently, the case must be remanded.

Section 443.036(30), 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":

- (a) Conduct demonstrating a 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.
- (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 interests 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) A violation of an employer's rule, unless the claimant can demonstrate that:
 - 1. He or she did not know, and could not reasonably know, of the rule's requirements;

2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

At the hearing before the appeals referee, the employer's witnesses testified that the claimant was discharged for being involved in an accident and violating the employer's zero tolerance accident policy, which provided that an employee could be discharged for not reporting any and all accidents and damage to company vehicles. The employer presented the accident reports, which were taken into the record and marked as exhibits. The referee held the employer's evidence was hearsay because neither of the employer's witnesses observed the accident and the claimant testified he did not lie about the accident or the damages. The referee's conclusion that the employer's evidence was inadmissible hearsay, however, is erroneous and is rejected by the Commission.

Section 90.803(8), Florida Statutes, provides for an exception to the hearsay rule for public records and reports, finding admissible those “[r]ecords, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or *matters observed pursuant to duty imposed by law as to matters which there was a duty to report*, excluding in *criminal* cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness” (emphasis added). Contrary to the referee’s conclusion that the police report was inadmissible hearsay, a Florida Highway Patrol Officer's Traffic Crash Report (“accident report”) is prepared by statutory mandate under Section 316.066(1)(a), Florida Statutes, and is thus admissible under the public records and reports exception. Any information in such a report relating to the observations of law enforcement personnel is admissible as competent evidence. Moreover, the accident report is self-authenticating under Section 90.902(2), Florida Statutes, and, except for privileged statements made in connection with the report, can be accepted as competent evidence. *See Prof. Medical Group v. United Automobile Ins. Co.*, 12 Fla. L. Weekly Supp. 2d 240a.

The accident report contains several items of relevant information. Page one identifies the two vehicles involved in the accident. It also contains the officer’s observation that the other vehicle was disabled and had to be towed from the accident. Page two of the document lists the name of the claimant, the driver of the vehicle he collided with, and three independent witnesses. It also contains the officer’s report that the driver of the passenger vehicle was injured and had to be transported by EMS to Broward General Hospital. All of this information is based on the officer’s own observation, and is admissible into evidence.

Page three of the document contains a summary of the officer's report of the cause of the accident, and is based on interviews with the claimant, the driver the passenger vehicle, and three independent witnesses. These statements are hearsay within hearsay (*See* §90.805, Florida Statutes), but should still be considered if admissible under a separate hearsay exception and not otherwise inadmissible.

The referee is advised that, while the claimant's own statements in the report cannot be considered as they are privileged under Section 316.066(4), Florida Statutes, the statements of the other driver and the witnesses reflected in the report should be considered as competent if the statements meet the residual hearsay exception requirements of Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes. Under this exception, hearsay evidence may support a finding of fact if "(I) the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and (II) the appeals referee . . . determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence." The Commission notes that witness statements not otherwise admissible under the business records exception are among the type of documents the residual exception was enacted to permit into evidence. We also note that the statements of the non-involved witnesses should be considered trustworthy and probative. The statements were given to an officer in the course of an official investigation, and thus were given under the potential of criminal penalty if the witnesses lied. Additionally, although the statements are memorialized by the officer rather than the witnesses, officers are trained to, and routinely do, take and memorialize such statements as part of their duties. Finally, and most significantly, the independent witnesses were not involved in the accident and had no stake in its outcome. Thus, their statements lacked the sort of bias that either the claimant or the other driver might have. These witnesses confirm that the accident was caused by the claimant. The statement of the other driver (driver 02) may also be considered, at least as corroborating hearsay.

Additionally, since the report is admissible under a hearsay exception, the referee should consider whether the hearsay statements of other witnesses may be admitted as corroborating hearsay evidence. For example, the employer's transport manager testified that he spoke to the other driver regarding what happened in the accident. The manager's testimony regarding what he was told by the other driver, if believed, would be corroborating hearsay evidence.

As a result of the referee's failure to give proper evidentiary value to the accident report, the decision must be vacated and the case remanded for further proceedings. The referee is to then issue a new decision, giving proper weight to the accident report and the employer's corroborative hearsay evidence, and resolving

any conflicts in the evidence. Because the referee improperly excluded the accident report, the referee's credibility determination is also vacated and the referee must reconsider that determination in light of the full record. Finally, we note that the referee's findings regarding the employer's policy are incomplete and should be revisited in the context of the documents and testimony. The written policy was admitted into evidence; if the employer testified that this or other policies included additional terms, it must establish that these terms were communicated to the claimant and that he was aware of them. The referee shall then render a new decision addressing the claimant's entitlement to benefits.

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

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

This is to certify that on

10/8/2013,

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: Natasha Green

Deputy Clerk



DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 350WD 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 asistè ou gratis, nou gendwa rélé 1-800-204-2418. Si l vou plè pa pràn àmpil tòn, paské tòn limité pou ou ranpli apèl la.

Docket No. **2013-39061U**

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

CLAIMANT/Appellant

EMPLOYER/Appellee

APPEARANCES: CLAIMANT & EMPLOYER

LOCAL OFFICE #: 3649-0

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.

CHARGES TO EMPLOYMENT RECORD: Whether benefit payments made to the claimant shall 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 employer charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant began working as a driver for the employer, a gas and diesel distributor, on October 3, 2012. Company policy established that an associate would be discharged if they caused an accident. The claimant was aware of the policy. While driving on March 28, 2013, a car hit the passenger side of the claimant's truck. The passenger side headlight, bumper, and tire of the claimant's truck were damaged. The claimant did not cause the accident. The claimant received a citation for the accident. The claimant reported the accident and the damages to the president of the company. The claimant did not lie about the accident or the damages. Effective March 28, 2013, the president

discharged the claimant due to the belief the claimant caused the accident and lied about it

Conclusions of Law: As of June 27, 2011, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

- (a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
- (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) A violation of an employer's rule, unless the claimant can demonstrate that:
 - 1. He or she did not know, and could not reasonably know, of the rules requirements;
 - 2. The rule is not lawful or not reasonably related to the job environment and performance; or
 - 3. The rule is not fairly or consistently enforced.

The record shows the president discharged the claimant due to the belief the claimant caused the accident and lied about it. 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, 483 So.2d 413 (Fla. 1986). The record shows a car hit the passenger side of the claimant's truck. The record reveals the claimant did not cause the accident, reported the accident and the damages to the president, and did not lie about the accident or the damages. The employer's witnesses, the president and the supervisor, did not have first-hand knowledge regarding whether the claimant caused the accident and lied about it. Neither witness was present when the accident occurred. The employer provided hearsay regarding the claimant causing the accident and then lying about it. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding s. 120.57(1)(c), hearsay evidence may support a finding of fact if:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
2. The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

The employer's hearsay testimony does not meet the statutory criteria outlines above, and does not support a finding of fact. The employer failed to provide sufficient competent testimony that would substantiate that the claimant was discharged for misconduct. The employer did not meet the required burden of proof; thus, the claimant is qualified for the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

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.

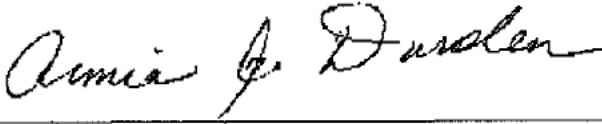
The record shows the claimant was discharged for reasons other than misconduct; therefore, the employer's account will be charged.

Decision: The determination dated April 25, 2013, is AFFIRMED in part, REVERSED in part. The claimant is qualified for the receipt of benefits. The employer's account will be charged.

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 30, 2013.

ALEXIS RIVERS
Appeals Referee

By: 
ARMIA J. DURDEN, 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 definitiv 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.

Any questions related to benefits or claim certifications should be referred to the Claims Information Center at 1-800-204-2418. An equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Voice telephone numbers on this document may be reached by persons using TTY/TDD equipment via the Florida Relay Service at 711.
