STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-05581

vs.

Referee Decision No. 13-33064U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

I.
Introduction

This case comes before the Commission for disposition, pursuant to Section 443.151(4)(c), Florida Statutes, of an appeal of the decision of a reemployment assistance appeals referee entered on June 5, 2013. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent and substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case to the referee. In her appeal, the claimant provides additional documents relating to her employment. Pursuant to Florida Administrative Code Rule 73B-22.005, the Commission may permit supplementation in a circumstance where the party has newly discovered evidence that could not have been discovered with the exercise of due diligence prior

to the appeals hearing. Although it is not clear whether the evidence is newly discovered, the Commission will accept the additional document as part of the record in this case. We note, however, that the document does not materially change the record in the case. Accordingly, while the opposing party is entitled to present rebuttal to newly discovered evidence accepted by the Commission, we believe the record is complete without the need for additional briefing.

II.
The Proceedings Below

This case appears before the Commission for the third time, this time on an appeal from a decision on the merits entered on June 6, 2013. The referee conducted an evidentiary hearing on June 5, 2013. The claimant appeared and was represented by her counsel. The employer was also represented by counsel, and presented a witness, [G. B.], who serves as a manager at the restaurant where the claimant was employed.

Based on the evidence presented at the hearing, the referee made the following findings of fact:

> The claimant worked as a bartender and server for a restaurant from March 2011, through June 25, 2012. The employer's policy states that harassment is prohibited, and that any employee who feels they are being harassed should contact their manager, their supervisor, or the executive secretary to the owner, whichever they feel most comfortable speaking to. Company policy states that employees must pay for their uniforms (including pens, paper, and a wine key), bank shortages, and walkouts. The claimant was made aware of both of these policies at the time of hire. In March 2012, a customer who was being served by the claimant told her to sit on his lap while she recited the day's features. She ignored him and he repeated the comment. She reported it to a manager about 10 minutes later. The manager said she did not have to put up with that, but she should have come to him sooner. The customer came back periodically after that date. On another occasion, the claimant and a hostess heard the customer make a comment about "you bitches can't take a joke." They reported the comment to the manager on duty, who told the customer to stop it or he would be expelled. The claimant quit due to dissatisfaction with her working conditions and harassment by a customer.

The Commission has conducted a thorough review of the evidentiary record and finds that there is competent, substantial evidence to support the referee's findings of fact. Accordingly, the referee's findings are adopted in this order.

The referee also reached the following material conclusions of law:

> The record reflects that the claimant was the moving party in the separation. Therefore, the claimant is considered to have voluntarily quit. The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827 (Fla. 4th DCA 1973). It was shown that the claimant quit because of dissatisfaction with her working conditions and harassment by a customer. It was shown that the claimant was aware of the employer's policies on uniforms, shortages, and walkouts, that she was informed of them at the time of hire, and worked under those conditions for well over a year. It has not been shown that the employer failed to take reasonable steps to protect the claimant, or that there was an obvious nexus between the final act of harassment and the claimant's decision to quit. While the claimant may have had good personal reasons for quitting, it has not been shown that the decision to quit was impelled by any action on the part of the employer. Accordingly, the claimant should be disqualified from the receipt of unemployment benefits.

Based on these findings and conclusions, the referee held that the claimant had failed to establish good cause attributable to the employer to quit her employment, and held her disqualified from benefits. The claimant filed a timely request for review.

III.
<u>Issues on Appeal</u>

On appeal to the Commission, the claimant makes three major contentions. First, she contends that the referee erroneously concluded that, because she accepted the employer's policies regarding deductions at the time of hire, she had no basis for challenging them. Request for Review ("RFR") at 3. Second, the claimant contends that the employer's policy requiring the claimant and other employees to pay for certain work-required items, and to reimburse the employer for walkouts and register shortages out of their own tip compensation, violates the Fair Labor

Standards Act ("FLSA"), 29 U.S.C. §201 *et seq*., and the Florida Minimum Wage Act ("Minimum Wage Act"), Section 448.109 *et seq*., Florida Statutes, and gave the claimant good cause attributable to the employer to quit. RFR at 4-5. Finally, the claimant contends that the referee erroneously concluded that she failed to establish good cause attributable to the employer to voluntarily quit employment due to sexual harassment by a customer. RFR at 5-6. The Commission will analyze each of these issues in detail.

IV.
Analysis

A. Did the Referee Correctly Determine that the Claimant's Acceptance of the Terms of Employment at the Time of Hire Precluded a Showing of Good Cause?

The claimant contends that the referee erred in concluding that the claimant failed to show good cause because she accepted, at the time of hire, the employer's policies regarding purchase of uniforms and coverage of shortages and walkouts. The claimant contends that "the UAC [sic] erred in its conclusion that Claimant had waived her rights under the FLSA to be properly paid and, therefore, there was 'no good cause for separation.'" RFR at 5. In this case, the referee did not "erroneously conclude that the claimant had waived her rights under the FLSA" – to the contrary, the referee did not address the claimant's FLSA rights *at all*.

As a general rule under the reemployment assistance law, an employee will not have good cause attributable to the employer to voluntarily separate from employment on the basis of working conditions when the working conditions were agreed to at the time of hire. *See generally Sollecito v. Hollywood Lincoln Mercury*, 450 So. 2d 928, 929-930 (Fla. 4th DCA 1984). However, as correctly argued by the claimant, her rights under the FLSA, which were not addressed by the referee, although raised (albeit briefly) by the claimant at the hearing, are not diminished by the fact that she agreed to terms that she now claims violated those rights. It has long been established that the protections of the FLSA cannot be waived prospectively by agreement between an employee and an employer. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740-41 (1981), *citing Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 & n.16 (1945). Even retrospective waivers are limited: in the Eleventh Circuit, a release of accrued claims under the FLSA is only valid if (1) supervised by the Department of Labor pursuant to 29 U.S.C. §216(c); or (2) approved by a court in a stipulated judgment. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-53 (11th Cir. 1982).

Applying this rule, in *Martinez v. Ford Midway Mall, Inc.*, 59 So. 3d 168, 173 (Fla. 3d DCA 2011), the court held that an employee's acceptance of terms that are contrary to the FLSA does not preclude a determination that the employee quit with good cause attributable to the employer. To the contrary, the court in *Martinez* held that the employer's failure to pay the employee minimum wage *did* give the claimant therein good cause to separate.

Because the referee erred in failing to consider the FLSA and Minimum Wage Act arguments raised by the claimant, the Commission must determine whether these issues can be addressed on the record before us, or whether the case must be remanded for an additional hearing. Our review of the record reveals that the claimant, through her counsel, was able to place into the record all the evidence she desired regarding her FLSA claims, and because there was no material dispute in the evidence regarding these issues, a remand for additional fact-finding and conflict resolution proves to be unnecessary. Moreover, the Commission is empowered to "affirm, modify, or reverse the findings and conclusions of the appeals referee based on evidence previously submitted in the case . . . ." §443.151(4)(c), Fla. Stat.

B. Did the Claimant Prove She Voluntarily Quit with Good Cause Attributable to the Employer by Virtue of the Employer's Violation of the FLSA and Minimum Wage Act?

1. Introduction

The ultimate issue in this case is whether the claimant's voluntary separation effective June 30, 2012, was with good cause attributable to the employer within the meaning of Section 443.101(1)(a), Florida Statutes. As noted by the referee, the claimant bears the burden of proof as to this issue. *Uniweld Products*, 277 So. 2d at 829.

Both the courts and this Commission have held that, where an employee's compensation structure violates the FLSA, the employee may have good cause attributable to the employer to quit. *Martinez*, *supra*; *Mueller v. Harry Lee Motors*, 334 So. 2d 67 (Fla. 3d DCA 1976) (holding that employee who voluntarily quit due to his employer only paying overtime for hours in excess of 44 per week had good cause, apparently relying on, although not citing, the FLSA); R.A.A.C. Order No. 13-04651 (September 25, 2013).[1] We note, however, in resolving the issue of whether the

[1] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-04651.pdf.

claimant was disqualified under Section 443.101(1)(a), Florida Statutes, that the issue in this case is not whether the employer violated the FLSA or the Minimum Wage Act; rather, it is whether the claimant had good cause to quit attributable to the employer. These two concepts are neither synonymous nor coextensive.

The FLSA provides for both minimum wage and overtime for most employees.[2] However the statute, while conceptually simple, is highly complex in interpretation and application. Seventy-five years after its passage, the FLSA is still being interpreted and applied in situations where employers have designed compensation structures intending to comply with the FLSA, but where employees contend that there are violations of the act. In particular, there is extensive litigation both in the state of Florida and nationally on issues such as (1) compensable time; (2) proper application of the various exemptions to the FLSA; and (3) non-authorized deductions. This case arises out of the last category.

2. Did the Claimant Establish Coverage Under the FLSA and Minimum Wage Act?

Before reaching the issue of whether the claimant had good cause due to a violation of the FLSA and Minimum Wage Act, the Commission must first consider whether these laws were applicable. The FLSA and Minimum Wage Act do not apply to all employers. To determine whether the claimant had good cause to quit due to a violation of the FLSA, it must first be established that the employer in this case was a covered enterprise, or that the claimant was a covered employee. *Lawnco Services, Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586 (Fla. 4th DCA 2006). Failure to demonstrate FLSA coverage is fatal to a claim of good cause based on an alleged FLSA violation. *Id*. 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).

The record below contains no findings and insufficient evidence to establish FLSA jurisdiction in this case. The claimant seemed to assume FLSA coverage. Under *Lawnco*, however, we cannot. While it is certainly possible, even likely, that the claimant's employer met the requirements of enterprise coverage, the

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[2] Although there are numerous exemptions to the minimum wage and/or overtime requirements of the FLSA, the employer did not contend that any of these applied to claimant. This is not surprising, as given the facts of this case, we cannot conceive of any applicable exemption.

Commission cannot simply speculate that this is the case. Nor does the fact that the claimant worked at a restaurant that was one of several related stores establish coverage. There is no record evidence regarding the organizational structure of the employer, whether each restaurant was a separate statutory employer, and whether the various restaurants met the "unified operation" or "common control" tests of 29 U.S.C. §203(r). Under the FLSA, the employee bears the burden of proof of coverage. *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 120 (1946). This is not an onerous requirement. Enterprise coverage could have been established with a single question, or by submission of a single financial statement. The claimant, despite being represented by counsel, provided no such evidence. Likewise, individual coverage was not established, even though any relevant evidence could have been adduced in only a few questions at most.

Moreover, because the Minimum Wage Act adopts the jurisdictional coverage of the FLSA, Section 448.110(3), Florida Statutes, the same inadequacy applies to that claim as well. Thus, the Commission concludes the claimant has failed to demonstrate FLSA and Minimum Wage Act coverage in this case, and has thus failed to establish good cause under the FLSA and Minimum Wage Act.

3. Assuming the Claimant Established Coverage, did the Claimant Prove a Violation of the FLSA or Minimum Wage Act?

The claimant was a restaurant server. Since it was not shown that the claimant was exempt from the FLSA, she was entitled to be paid a minimum wage pursuant to that act, as well as the Minimum Wage Act. Under both acts, "tipped employees" (29 U.S.C. §203(t)) may be paid the minimum wage in either of two ways. First, the employer may simply directly pay the employee the full applicable minimum wage. Second, and more commonly, the employer may claim a partial credit against its minimum wage obligations for tips received by the employee which, when combined with an hourly amount paid by the employer, together equals or exceeds the applicable minimum wage. 29 U.S.C. §203(m). Because the amount of tip credit is capped by statute, employers are always required to pay the tipped employees a portion of the hourly minimum wage directly out of employer revenues rather than tips. Additionally, if the tips received by the employee are not sufficient to equal or exceed all of the allowable tip credit, the employer must pay additional hourly compensation to cover the gap, so that the total compensation paid by the employer, combined with the employees' actual tips up to the tip credit limit, equals or exceeds the statutory minimum wage. 29 C.F.R. §531.59(b). For the purposes of this order, we will refer to the hourly amount that the employer must always pay directly rather than through tips as the "employer-paid minimum."

The federal employer-paid minimum at all times relevant to this case was $2.13 per hour.[3] The Florida employer-paid minimum was $4.23 from March 2011 through May 31, 2011[4]; $4.29 from June 1, 2011 through December 31, 2011; and $4.65 in 2012.[5] The claimant does not contend that, at any time, the employer failed to pay her an hourly rate equal to the applicable Florida employer-paid minimum wage, or that her tips failed to equal or exceed the applicable hourly maximum tip credit for a pay period. The claimant thus does not contend that her basic compensation structure violated either the FLSA or the Minimum Wage Act. Instead, the claimant contends that, because she was required to pay for certain items which she was required to use for work, and that she was required on occasion to make up register shortages or walkouts, that the employer violated the FLSA by making these deductions.

Testimony at the hearing below revealed the following: The claimant was employed as a bartender and a server at the employer's restaurant. [Transcript of June 5, 2013 hearing (hereinafter "T") at 12]. All employees are required to follow a standard dress code. [Exhibit A2]. The dress code required an F.'s logo shirt, and black pants, skirts, or shorts, along with black shoes. [*Id.*; T–26]. When working in the bar, the claimant was also required to wear an apron with a F.'s logo. [T-27]. The employer provided one free uniform shirt [Exh. A2] and apron. [T-33]. Additional shirts had to be purchased for $13.50 each. [T-32]. The claimant testified that she wore out about three shirts and one or two aprons a month. [T-26, 27].

The claimant was also required to provide her own pens, pads, and corkscrew [T-27], although these items were sometimes available free of charge. [T-33-35].[6]

Finally, the claimant was required to make up any register shortages and customer walkouts. [T-22-24]. On a typical night when the claimant tended bar, her shortage would run $4 to $7, although there was one occasion where her shortage was $20. [T-24]. There were also two occasions during her employment in which she was required to cover walkouts of $25 out of her own compensation. [T-22].

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[3] 29 U.S.C. §203(m)(1); http://www.dol.gov/whd/minwage/q-a.htm.

[4] Florida's tip credit is capped by the terms of the Minimum Wage Amendment at $3.02 per hour, the 2003 federal tip credit maximum. Art. X, §24(c), Fla. Const. The Florida employer-paid minimum at any time can be calculated by subtracting that amount from the regular minimum wage located at http://www.floridajobs.org/minimumwage/FloridaMinimumWageHistory2000-2013.pdf.

[5] http://www.myfloridacfo.com/Agents/Industry/News/docs/FL_MinWage2012.pdf.

[6] There is no testimony as to the relative costs of these items if claimant had to supply them. We note, however that Sharpie® style pens can be purchased for about a dollar each, and a good quality "waiter's"-style corkscrew can be purchased for under $10.

Record evidence also showed that the claimant earned anywhere from $50-150 per night in tips while tending bar. [T-25]. While the claimant provided no pay records during the evidentiary hearing, she provided on appeal to the Commission her last paystub and one for what appears to be a two-week period ending March 17, 2012. The March paystub demonstrates that she was paid the Florida employer-paid minimum of $4.65 per hour, and also received tips during that pay period at a net rate of $16.23 per hour. During her last pay period, she received tips at a net rate of $11.57 per hour.[7]

The claimant's argument that the FLSA was violated, although not clearly articulated, is likely based on a theory which is commonly advanced and accepted in tipped employee cases: (1) under the regulations adopted by the Wage and Hour Division of the U.S. Department of Labor, a tip left by a customer or client is solely the property of the tipped employee (or employees, if the employer has instituted a tip pooling arrangement);[8] (2) because the tips "belong" to the employee, any deduction made from a tipped employee's total compensation can only be deemed to have come from the employer-paid minimum even though they are typically deducted from tips received; so therefore (3) any deduction not authorized by law[9]

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[7] Although it was not specified in the testimony, it appears that deductions for shortages were taken out of claimant's gross tips. There is no indication in the paystubs available that the employer ever reduced her actual wages paid by the employer.

[8] 29 C.F.R. §531.52. The claimant cites as authority for her propositions the Wage and Hour Division ("W&HD" or "Division") Fact Sheets. These documents are prepared by the Division as guidance for employees and employers, but do not have the force of law. Instead, they are derived from case law, W&HD regulations, or W&HD interpretations, the last of which are not binding on the courts. The Commission will cite instead to the relevant case law, statutory provisions, or regulations.

[9] The claimant is correct that in the U.S. Fifth and Eleventh Circuits, at least, cash register shortages from customer walkouts or inadvertent losses are not "authorized" deductions. Authorized deductions are those permitted under 29 U.S.C. §203(m), required by other law such as tax withholding (29 C.F.R. §§531.38 & 531.39), or voluntarily elected by the employee such as for employee benefits (29 C.F.R. §531.40). Authorized deductions may reduce an employee's compensation below minimum wage, but non-authorized deductions cannot. Deductions made for the benefit of an employer violate the rule that employees' minimum wage must be received "free and clear" pursuant to 29 C.F.R. §531.35. Non-authorized deductions are not a *per se* violation of the FLSA, but do violate the act if the deduction has the effect of reducing the employee's effective hourly wage below the statutory minimum for that pay period. *Mayhue's Super Liquor Stores v. Hodgson*, 464 F.2d 1196, 1199 (5th Cir. 1972) (binding in the Eleventh Circuit under *Bonner v. Pritchard*, 661 F.2d 1206, 1209-10 (11th Cir. 1981)). The claimant is also correct that uniforms and materials required for the employer's business are also deemed non-authorized deductions [29 C.F.R. §531.3(d)(2)], although what constitutes a "uniform" is highly case-specific. *See, e.g.*, *Hodgson v. Daniel Morgan Seafood, Inc.*, 433 F.2d 918, 920 (5th Cir. 1970). W&HD guidance provides that clothing required by the employer that is not suitable for use on other occasions constitutes a uniform. W&HD Pub. 1428, rev. Mar. 1984, https://www.osha.gov/pls/epub/wageindex.download?p_file=F11211/wh1428.pdf. The Division also considers any required apparel containing the employer's logo as a uniform. For purposes of our

that is taken from the employer-paid minimum wages due to the employee automatically constitutes a *per se* violation of the FLSA, no matter how small or occasional, and regardless of the actual compensation received by the employee. Under this theory, *if the employee is only paid the employer-paid minimum by the employer*, any amount of non-authorized deduction violates the FLSA, even if the employee's actual compensation including tips exceeds the regular minimum wage, perhaps substantially. Thus, according to the claimant, in any pay period she had to purchase a single uniform shirt or even a $1 Sharpie, the employer deprived her of a minimum wage even though her effective total hourly rate of compensation exceeded $20 per hour.

Even accepting this theory, the claimant has failed to establish an FLSA violation in this case. The FLSA is violated only if the non-authorized deductions drop the amount actually paid directly by the employer below an effective hourly rate of $2.13, or the total effective hourly rate below the regular minimum. As a Florida employee, the claimant was paid between $2.10 and $2.52 per hour more than the federal employer-paid minimum. For purposes of the FLSA, any deductions would have to exceed the "buffer" created by the difference between the federal and Florida employer-paid minimums times the hours worked in that workweek. There is insufficient evidence to establish that this ever happened. For example, in the pay period ending March 17, 2012, the employer directly paid the claimant wages totaling $171.66 more than the federal employer-paid minimum. The deductions the claimant testified to do not come close to this amount for any period. Accordingly, the claimant has failed to prove that the employer's non-authorized deductions at any point reduced her employer-paid hourly rate below the federal employer-paid minimum and has thus failed to establish a violation of the FLSA.

The claimant appears to recognize this problem. In her argument, she quotes the W&HD fact sheet, but replaces the FLSA tip credit of $5.12 to read $3.02, apparently implicitly arguing that for purposes of the FLSA in Florida, the Florida tip credit limit applies. This argument is meritless. While the Minimum Wage Act incorporates much of the FLSA, the converse is not true. Application of the FLSA is unaffected by state minimum wage laws, as there are no borrowing provisions in the FLSA. An employer must simply comply with the FLSA as written and also comply with state laws as written, to the extent they provide greater protection than the FLSA. Not surprisingly, the claimant has cited no federal case law supporting her contention.

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order, the Commission will follow that guidance, notwithstanding the fact that it is questionable whether all logoed apparel would be considered "not suitable for use on other occasions," since many Florida businesses generate considerable revenue by selling logoed apparel.

Although the claimant's argument on appeal is primarily focused on the FLSA as opposed to the Minimum Wage Act, the Commission notes that her contention could still be supported under the Minimum Wage Act, assuming that law is interpreted to adopt the DOL regulation's approach to the handling of the tip credit. No Florida appellate court has of yet interpreted the Minimum Wage Act's tip credit so that it is violated by the taking of a deduction not authorized under federal law where the *actual* pay of the employee remained above the regular minimum wage. It appears that the claimant is advancing such an argument in a case in Miami-Dade Circuit Court. Because the Commission is an administrative appellate tribunal that lacks the plenary jurisdiction of a Florida appellate court, we do not address this complex issue as a matter of first impression.

However, even if Florida courts conclude that the Minimum Wage Act is also violated by a non-authorized deduction where the employee is only paid the exact employer-paid minimum directly by the employer, and even if the facts in this case showed that there were deductions that reduced the claimant's employer-paid wage below the federal employer-paid minimum, it does not follow that the claimant would automatically have good cause to quit.

4. Does Every Violation of the FLSA or Minimum Wage Act Give an Employee Good Cause to Quit Attributable to the Employer?

Even if FLSA coverage clearly existed in this case, we believe that good cause would require the claimant to demonstrate more than an occasional, technical violation of the FLSA. The Commission has held that, where an employee's basic compensation agreement with the employer is in facial violation of the FLSA, the claimant has good cause under the act to quit. *See* R.A.A.C. Order No. 13-04651 (September 25, 2013). This is consistent with the facts of relevant Florida precedent. In *Martinez*, the employer failed to ensure that a commissioned salesperson received minimum wage for all hours worked; to the contrary, the employer not only ran a negative commission balance, but required the employee to repay any unearned commissions regardless of whether he actually received minimum wage. In *Madison v. Williams Island Country Club*, 606 So. 2d 687 (Fla. 3d DCA 1992), a non-exempt salaried employee who was discharged for refusing to work overtime without additional compensation was held not to have engaged in misconduct. In *Mueller*, *supra*, the employee left because he was wrongfully deprived of overtime compensation for hours worked between 40 and 44 hours per week. In each of these cases, the employees were not paid in a manner consistent with the basic requirements of the minimum wage and overtime mandates of the FLSA. None of these cases involved a technical, "deemed" violation where the employer was accused of violating these laws, despite establishing a basic

compensation structure that directly paid the claimant the Florida employer-paid minimum and insured that the actual tips received never fell below the tip credit. Thus, the Commission is faced with an issue of first impression – does *every* violation of the FLSA or Minimum Wage Act, no matter how technical, occasional, or *de minimus*, provide good cause attributable to the employer to quit employment? We conclude it does not. The proper test to apply in these instances is that of *Uniweld Products* – "to voluntarily leave employment for good cause, the cause must be one which would reasonably impel the average able-bodied qualified worker to give up his or her employment." 277 So. 2d at 829. The Commission notes that at any given time in Florida and nationwide, there are tens of thousands of employees engaged in FLSA or state labor law litigation against their employers, either as named plaintiffs or collective- or class-action members, who remain in their employment while seeking additional compensation to which they may be entitled under wage and hour laws. Additionally, the Division routinely resolves complaints against employers by their current employees, ensuring compliance with the FLSA and the protection of employees' incomes, while also protecting their jobs. Thus, had the claimant actually established coverage under the FLSA and Minimum Wage Act, and that her employer actually violated either act, we would remand to the referee for additional fact-finding under the *Uniweld Products* test.[10] Because the claimant failed to establish either coverage under or a violation of either law as currently interpreted, a remand is unnecessary. We conclude that the claimant failed to establish good cause attributable to the employer due to violation of the FLSA or Minimum Wage Act.[11]

C. Did the Claimant Prove She Voluntarily Quit with Good Cause Attributable to the Employer by Virtue of Harassment by a Customer?

Unlike the FLSA and Minimum Wage Act issues, the referee properly developed the record, made factual findings supported by competent and substantial evidence, and applied the correct legal test in determining whether the claimant established that she had good cause attributable to the employer to quit due to harassment by a customer. On appeal to the Commission, our review is limited to

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[10] It would be up to the referee to determine, for example, whether a reasonable employee making over $2000 a month in tips, in addition to the employer-paid minimum wage, and working at an effective compensation rate sometimes exceeding $20 an hour, would feel impelled to leave her employment because she would have made about another fifty cents to a dollar an hour had she not been required to pay or reimburse the employer for items that arguably should have been borne by it.

[11] Because the claimant failed to establish good cause, it is unnecessary to determine whether she took reasonable steps to preserve her employment, *Lawnco*, *supra*, or whether such attempts would have been futile as in *Ogle v. Unemployment Appeals Commission*, 87 So. 3d 1264, 1269-70 (Fla. 1st DCA 2012).

determining whether the referee's findings are supported by competent and substantial evidence, and his legal conclusions are in accord with the essential requirements of the law. §120.57(1)(l), Fla. Stat.; Fla. Admin. Code R. 73B-22.002(3); *Peace River Distributing, Inc. v. Unemployment Appeals Commission*, 80 So. 3d 461, 463 (Fla. 1st DCA 2012) (competent, substantial evidence); *Ellis v. Unemployment Appeals Commission*, 73 So. 3d 887, 889 (Fla. 4th DCA 2011) (essential requirements of the law). The question of good cause attributable to the employer is a question of fact. *Gant v. Unemployment Appeals Commission*, 743 So. 2d 114, 116 (Fla. 2d DCA 1999). Since there was competent, substantial evidence to support the referee's decision, the Commission reviews the decision only to determine whether it departs from the essential requirements of the law. We conclude that it does not.

The claimant is correct that sexual harassment can constitute good cause attributable to the employer to resign. Both the courts and the Commission have so held on numerous occasions. *See Rivera v. Unemployment Appeals Commission*, 99 So. 3d 505 (Fla. 3d DCA 2011); *Brown v. Unemployment Appeals Commission*, 633 So. 2d 36 (Fla. 5th DCA 1994); R.A.A.C. Order No. 10-19794 (February 02, 2011). However, there is no *per se* rule that an employee who experiences any form of sexual or sex-based harassment has good cause to quit. Instead, the referee is required to evaluate the circumstances and render a decision under the *Uniweld Products* test. Additionally, courts look at the actions of the employer to determine whether it properly addressed any harassment brought to its attention. *Rivera*, *supra*; *Brown*, *supra*; *Morgan v. Unemployment Appeals Commission*, 842 So. 2d 222 (Fla. 1st DCA 2003).

The findings in this case, which were consistent with the record evidence, demonstrated that the claimant was exposed to harassing acts on two separate occasions by a customer. On the first occasion, the customer twice asked the claimant to "sit on my lap and tell me your specials." [T-17]. The second time he asked her, he leaned over towards her "to like [sic] grab me." *Id*. However, there is no indication that he made physical contact with the claimant or came close to doing so. After about 10 minutes, the claimant told her manager, who confirmed that she "didn't have to take that," but that she had not told him in time. [T-17-18]. Notably, there was no evidence that during that 10-minute interval, the customer had continued this conduct after the claimant demonstrated it was not welcome. In fact, there is no evidence that the customer ever repeated the comment to the claimant, even though "he came back over and over." [T-18].

The other incident involving the customer occurred sometime later when he apparently made a similar comment to another hostess, which the claimant only heard secondhand. However, as the hostess walked away, the claimant heard the customer say, "what is wrong with you bitches, can't you take a joke?" [T–19]. The claimant and the other hostess told manager [B.], who told them they didn't have to take that. She went immediately over to the table and confronted the customer, telling him that if he continued to talk to the hostess that way, he would be asked to leave. [T-37]. At some point after the claimant resigned, the customer was barred from the store. [T-36].

The Supreme Court recently reaffirmed that under Title VII, the standard of liability for harassment by persons other than supervisors is one of negligence. *Vance v. Ball State University*, 133 S.Ct. 2434 (2013). In other words, the employer is liable for permitting a hostile environment if "the employer knew or should have known of the offensive conduct, but failed to take prompt remedial action." *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). However, this test only comes into play if the employee demonstrates that the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Title VII is not implicated by conduct that is "merely offensive." *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993). Instead, the conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment." *Id.* While the Commission does not conclude that harassing conduct need necessarily reach a level sufficient to implicate Title VII or Florida Civil Rights Act ("FCRA") liability in order to establish good cause, neither do we ignore a developed body of law providing guidance as to when the conduct of harassers, or the inaction of employers, is sufficient to "reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products*, 277 So. 2d at 829.

Our review of Title VII, FCRA and Florida reemployment assistance case law shows that the harassing conduct the claimant was subjected to was well below that which is generally considered sufficient to establish a hostile environment under Title VII or the FCRA, or good cause under the reemployment assistance law. For example, in *Derouen v. Carquest Auto Parts, Inc.*, 2001 U.S. App. LEXIS 32005 (5th Cir. Sept. 24, 2001), the court held that conduct involving both physical contact by a coworker as well as the customer who twice made "sexually threatening remarks" to the employee failed to raise a triable issue of fact as to whether she had been subjected to a hostile environment actionable under Title VII. The court also found

insufficient evidence to support a claim of constructive discharge, the test for which – working conditions so intolerable that a reasonable employee would feel compelled to resign – mirrors the *Uniweld Products* test. The court also noted that under Title VII, "to prove constructive discharge, the evidence must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment claim." *Id.* at *3.

Likewise, in *Hallberg v. Eat'N Park*, 1996 U.S. Dist. LEXIS 3573 (W.D.N.Y. Feb. 28, 1996), another case involving harassment of a restaurant server by a customer, the court held that a waitress who had been subjected to physical contact and a graphic sexual overture by a customer that had previously harassed other employees failed to establish a hostile work environment.

The results of these cases are not surprising, given the fairly high standard of conduct necessary to establish a hostile environment. The facts of this case are not close to those of *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (en banc), which has served as the standard in the Eleventh Circuit for almost 15 years. Florida courts have also held conduct far more serious than that in this case to be insufficient to establish a hostile environment under the FCRA. *See*, *e.g.*, *Maldonado v. Publix Supermarkets*, 939 So. 2d 290 (Fla. 4th DCA 2006).[12]

The sole case cited by the claimant in her appeal to the Commission, *Rivera v. Unemployment Appeals Commission*, 99 So. 3d 505 (Fla. 3d DCA 2011), is not a pertinent comparison to this case. *Rivera* involved what is generally considered to be the worst class of harassment – physical harassment of a sexual nature by an individual's direct supervisor. Such conduct would readily pass the *Harris/Mendoza* tests, unlike that in this case. Other cases, such as *Brown*, *supra,* and *Yaeger v. Unemployment Appeals Commission*, 786 So. 2d 48 (Fla. 3d DCA 2001), involved far more serious or pervasive conduct than that occurring in this case.

We also find factually and legally unpersuasive the claimant's argument on appeal that the employer "refused twice to protect" the claimant. RFR at 6. The referee's findings were consistent with the unrebutted testimony of the employer that, after the second incident, the customer was told to stop the behavior or he would be asked to leave. This is similar to the employer's action in *Hallberg*, telling the customer to cease the conduct or be barred, which was held to constitute "prompt action designed to stop the harassment . . . ." *Supra* at **35-36.

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[12] Although we have found no such case, the Commission acknowledges that it is possible that a court somewhere has found facts similar to these sufficient to establish a hostile environment. However, our review is only to determine whether the referee's decision is erroneous as a matter of law, and the fact that the issue may be debatable does not establish error.

Although the employer did not react to the prior incident, we do not conclude the employer was unreasonable in failing to speak to a customer about an incident that the claimant herself did not feel the need to report for 10 minutes and which never reoccurred. In discussing the requirement that an employer take prompt remedial action, Judge Posner opined that "what is reasonable depends upon the gravity of the harassment," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir. 1995), noting that the more serious the harassment, the more care the employer must take in responding. Although the claimant does not articulate on appeal what action she contends the employer was required to take at what time, the employer is not required to take the most extreme step available. Indeed, Florida courts have approved the use of escalating steps in response to harassment where appropriate. *Maldonado*, 939 So. 2d at 297-98.[13]

For these reasons, the Commission concludes the referee did not err as a matter of law in finding that the employer's actions were reasonable, and that the claimant failed to establish good cause on these grounds. Nor are these actions, in combination with the employer's alleged but unproven violations of the FLSA or Minimum Wage Act, sufficient to collectively establish good cause. Accordingly, we find no error in the referee's ultimate conclusion in this case that the claimant did not prove that she voluntarily separated with good cause attributable to the employer.

The Commission notes that the claimant's Notice of Appeal was filed by a representative for the claimant. Section 443.041, Florida Statutes, provides that a representative for any individual claiming benefits in any proceeding before the Commission shall not receive a fee for such services unless the amount of the fee is approved by the Commission. The claimant's representative shall provide the amount, if any, the claimant has agreed to pay for services, the hourly rate charged or other method used to compute the proposed fee, and the nature and extent of the services rendered, not later than fifteen (15) days from the date of this Order.

[13] For this reason, the fact that the employer eventually barred the customer from the restaurant does not support claimant's argument, even if the Commission assumes that the banishment was for similar conduct, which was not shown in the record.

The referee's decision is affirmed.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

This is to certify that on

1/28/2014 ,

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: Kimberley Pena
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 pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-33064U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3683-0

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 worked as a bartender and server for a restaurant from March 2011, through June 25, 2012. The employer's policy states that harassment is prohibited, and that any employee who feels they are being harassed should contact their manager, their supervisor, or the executive secretary to the owner, whichever they feel

most comfortable speaking to. Company policy states that employees must pay for their uniforms (including pens, paper, and a wine key), bank shortages, and walkouts. The claimant was made aware of both of these policies at the time of hire. In March 2012, a customer who was being served by the claimant told her to sit on his lap while she recited the day's features. She ignored him and he repeated the comment. She reported it to a manager about 10 minutes later. The manager said she did not have to put up with that but she should have told him sooner. The customer came back periodically after that date. On another occasion, the claimant and a hostess heard the customer make a comment about "you bitches can't take a joke". They reported the comment to the manager on duty, who told the customer to stop it or he would be expelled. The claimant quit due to dissatisfaction with her working conditions and harassment by a customer.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause, as defined in the statute, will be disqualified from receiving benefits. "Good cause" includes only cause attributable to the employing unit, illness or disability of the claimant requiring separation from the work, or (for claims effective on or after July 1, 2004) relocation due to permanent change of station orders, activation orders, or unit deployment orders of a military spouse.

The record reflects that the claimant was the moving party in the separation. Therefore, the claimant is considered to have voluntarily quit. The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. Uniweld Products, Inc., v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). It was shown that the claimant quit because of dissatisfaction with her working conditions and harassment by a customer. It was shown that the claimant was aware of employer's policies on uniforms, shortages, and walkouts, that she was informed of them at the time of hire, and worked under those conditions for well over a year. It has not been shown that the employer failed to take reasonable steps to

protect the claimant, or that there is an obvious nexus between the final act of harassment and the claimant's decision to quit. While the claimant may have had good personal reasons for quitting, it has not been shown that the decision to quit was impelled by any action on the part of the employer. Accordingly, the claimant should be disqualified from the receipt of unemployment benefits.

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 has 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 employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

The claimant was represented by an attorney. A fee of $350 is approved.

Decision: The determination dated August 10, 2012, is MODIFIED to correct the claimant's date of disqualification. As modified, the determination is AFFIRMED. The claimant is disqualified from the receipt of unemployment benefits for the week ending June 30, 2012, and until the claimant earns $4,675. The employment record of the employer will not be charged for any benefits paid to the claimant.

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 June 6, 2013.

ARTHUR LEASURE
Appeals Referee

By: Robyn L. Deak
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 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.

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.