STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-07710

vs.

Referee Decision No. 13-67888U

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 wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

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

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant began his employment as a host on May 8, 2012. The claimant's duties included cash handling. The claimant was aware that a host is not a tipped employee. The claimant was aware that as a host, he was required to turn in all monies left behind by customers or given to him in the form of tips or gratuity. On April 30, 2012, the claimant read and signed the [employer's] policies, procedures, and terms and the standards of business conduct booklet. The claimant kept tip money or monies left behind by customers. The claimant would forget the change while on duty, but once home, he determined that the amount was "insignificant" and chose not to turn in the monies. The employer

> began to suspect the claimant was not following their policy. On May 17, 2013, the finance analyst interviewed the claimant about the employer's suspicion. The claimant admitted that he would forget the change and he admitted that he may have kept $11-$12. The claimant provided a written statement about his behavior. The claimant determined that he was bullied into writing the statement; however, he chose not to address his issue. On May 25, 2013, the claimant was discharged.

Our review establishes that the referee's decision is supported by competent, substantial evidence, and the findings are thus confirmed.

Effective May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; or theft of employer property or property of a customer or invitee of the employer.
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> (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.
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> (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.
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> (d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

> (e)1. A violation of an employer's rule, unless the claimant can demonstrate that:
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> a. He or she did not know, and could not reasonably know, of the rule's requirements;
>
> b. The rule is not lawful or not reasonably related to the job environment and performance; or
>
> c. The rule is not fairly or consistently enforced.
>
> 2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The claimant was employed as an ice cream/beverage cart host in a position that was not intended to be tipped. The employer submitted a copy of the "Policies, Procedures and Terms" for the hearing and it was entered into evidence as an exhibit. The policy states, in relevant part, that "(o)nly tipped employees may accept tips . . . ." The stated sanction for violation of the employer policy, even on one occasion, includes disciplinary action not excluding termination.

After an investigation, the employer determined that the claimant violated the employer's policy when he did not turn over tip money or change left by the guests to the employer. The employer's testimony established that such monies, once turned in, were used for charitable donations rather than being retained by the employer. The referee held the claimant's violation of the employer's policy constituted misconduct connected with work within the meaning of subparagraphs (a) and (e) of the above-noted statute.

In a discharge case, the employer bears the burden of proof to establish misconduct by a preponderance of the evidence. *See generally*, *Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). Subparagraph (e) "expresses the legislative intent that a claimant may be disqualified from benefits where it is established he or she committed a 'violation of an employer's rule.'" *Crespo v. Florida Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3rd DCA 2012). Once the employer has shown a violation, the claimant bears the burden to establish one of the three defenses set forth in subparagraph (e)1. *Crespo*, *supra*; *Critical Intervention Servs. v. Reemployment Assistance Appeals Comm.*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013). The Commission concludes that the referee's holding that the claimant violated the employer's policy is correct. Although the policy does not specifically mention "change left by guests" in addition to tips, the claimant admitted that he knew that such change was supposed to be turned in to the employer.

With regard to the issue of the subparagraph (e)1. defenses, the Commission has considered whether, on these facts, the employer's rule is not lawful. While the claimant did not raise any such contention, we review this issue *sua sponte*. *See Madison v. Williams Island County Club, Ltd.*, 606 So. 2d 687, 688-89 (Fla. 3d DCA 1992) (holding that failure of unrepresented claimant to raise the Fair Labor Standards Act ("FLSA") as a defense did not preclude consideration of the legality of an employer's requirements). Furthermore, an employee cannot be held disqualified for misconduct under either subparagraphs (a) or (e) for violating an employer's directive that itself violated the FLSA. *Id*. at 689.

On April 5, 2011, the Wage and Hour Division of the U.S. Department of Labor ("DOL") issued new regulations under the FLSA, including, among other provisions, the act's definitions addressing the tip credit[1] and tipped employees.[2] Ostensibly authorized by the tip credit provisions, the regulations purport to govern the treatment of tips even where employers do not claim the tip credit. Furthermore, some of the language of the new regulations is ambiguous as to whether the regulation is intended to apply to employees who may occasionally receive tips, but are not "tipped employees" within the meaning of the FLSA. In particular, 29 C.F.R. §531.52 states as follows:

> **General Characteristics of "tips":** A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. *Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity. Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.* Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips (emphasis added).

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[1] Section 3(m) of the FLSA (29 U.S.C. §203(m)) permits, under the definition of wages, an employer to take a "tip credit" against its minimum wage obligations for a portion of the tips received by "tipped employees," subject to restrictions.

[2] Section 3(t) of the FLSA (29 U.S.C. §203(t)) defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips."

Because the regulation refers to "employees" in one instance and "tipped employees" in another, an inference might be drawn that the regulation is intended to apply to any employee who receives a tip, and not just "tipped employees."[3]

The interpretation of these regulations is crucial because in this case the employer did not take a tip credit with respect to the claimant. Nor is there any evidence that the claimant was a "tipped employee" within the meaning of the FLSA, even though he occasionally may have received unsolicited gratuities. If the regulation is intended to apply to employees who receive any tips but are not tipped employees, the employer's rule in this case would not be lawful under the DOL regulation.

As a result of this ambiguity, we have carefully reviewed the new regulations for 29 C.F.R. §531, Subpart D, as well as the extensive regulatory commentary accompanying the release of these regulations[4], and conclude that the regulations are not intended to apply to employees who are not "tipped employees."

Moreover, even if these regulations did apply to the fact pattern in this case, we would not hold the employer's policy to be unlawful. There is considerable legal debate as to the validity of the application of the DOL regulations to employers who do not claim the tip credit. Prior to the adoption of these regulations, the Ninth Circuit rejected the DOL's tip-retention position as to employers who do not claim a tip credit. *See Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010). Rather than following this precedent when drafting the regulations, the DOL contended it was wrongly decided. Subsequent to the adoption of these regulations, however, numerous district courts have rejected DOL's regulation as applied to employers who do not take the tip credit. In *Oregon Restaurant & Lodging Assoc. v. Solis*, 948 F.Supp.2d 1217 (D. Ore. 2013), the court applied the Ninth Circuit's *Cumbie* decision to find that the rules could not be lawfully enforced in the case before it, as the employer paid all of its tipped employees at least the base minimum wage prior to any accounting for tips. Several other district courts have followed the reasoning in *Oregon Restaurant & Lodging Assoc. See Cesarz v. Wynn Las Vegas, LLC*, 2014 U.S. Dist. LEXIS 3094 (D. Nev. Jan. 10, 2014); *Czarnik v. All Resort Coach, Inc.*, 2013 U.S. Dist. LEXIS 121766 (D. Utah Aug. 26, 2013); *Trinidad v. Pret A Manger (USA)*

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[3] Similar language can be found in 29 C.F.R. §§531.54 & 531.59, but the title and context of these provisions clearly indicate that they apply only to tip pooling and the tip credit, respectively.

[4] In particular, we have reviewed subpart 7B of the Summary of Comments, 76 FR 18838-18845, and did not find a single reference to the application of these regulations to receipt of tips by employees who do not meet the tipped employee requirement, other than the prohibition on including such employees in tip pools.

Ltd., 2013 U.S. Dist. LEXIS 97544 (S.D.N.Y. July 11, 2013). By contrast, we have found no cases upholding the regulations as applied to employers who did not claim a tip credit. Accordingly, there is no basis to conclude that the employer's policy was not lawful, and the referee properly held the claimant disqualified under subparagraphs (a) and (e).

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

2/19/2014 ,

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. **2013-67888U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee **EMPLOYER/Appellant**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3631-0

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 his employment as a host on May 8, 2012. The claimant's duties included cash handling. The claimant was aware that a host is not a tipped employee. The claimant was aware that as a host, he was required to turn in all monies left behind by customers or given to him in the form of tips or gratuity. On April 30, 2012, the claimant read and signed the employer's cast members' policies, procedures, and terms and the standards of business conduct booklet. The claimant kept tip money or monies left behind by customers. The claimant would forget the change while on duty, but once home, he determined that the amount was "insignificant" and chose not to turn in

the monies. The employer began to suspect the claimant was not following their policy. On May 17, 2013, the finance analyst interviewed the claimant about the employer's suspicion. The claimant admitted that he would forget the change and he admitted that he may have kept $11-$12. The claimant provided a written statement about his behavior. The claimant determined that he was bullied into writing the statement; however, he chose not to address his issue. On May 25, 2013, the claimant was discharged.

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 that the employer is the moving party in this separation. When an employer establishes prima facie evidence of misconduct, the burden shifts to the employee to come forward with proof of the propriety of that conduct. Alterman Transport Lines, Inc. v. Unemployment Appeals Commission, 410 So.2d 568 (Fla. 1st DCA 1982). The burden of proof in an employee discharge matter is initially upon the employer to prove misconduct. See Donnell v. University Community Hosp., 705 So. 2d 1031 (Fla. 2d DCA 1998). When the employer meets that initial burden, the employee is required to demonstrate the propriety of his/her actions. See Sheriff of Monroe County v. Unemployment Appeals Comm'n, 490 So. 2d 961 (Fla. 3d DCA 1986). The employer has provided competent substantial evidence to show that the claimant was discharged for misconduct as defined by subsections A and E; therefore, the burden has been shifted to the claimant. The claimant admitted that he was aware of the employer's policy. The claimant admitted that he was not a tipped employee. The claimant admitted to forgetting the change at the end of a shift, but he admitted that he determined the amount was "insignificant" and he chose not to turn in the monies when he returned to work. The claimant admitted that the employer's policy states to turn in all monies and not a specified amount. The claimant testified that he determined he was bullied into writing the statement; however, the finance analyst denied the allegations. The claimant's behavior demonstrated a conscious disregard for the employer when he chose not to turn in all monies, and he violated the employer's rule. Accordingly, the claimant should not be qualified for said benefits, and the employer's tax account should be relived of charges for said benefits.

The hearing officer was presented with conflicting testimony regarding whether he was bullied into writing his statement. 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 employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination dated July 8, 2013, is REVERSED. The claimant is disqualified from the receipt of unemployment benefits from the week effective May 19, 2013, the following five weeks, and until he earns $1,819. The employer's tax account is relived of charges for said benefits.

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

NIKI MARTIN
Appeals Referee

on August 21, 2013.

By: Sharene M. Price

SHARENE M. 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.