STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02200

vs.

Referee Decision No. 0021716257-03U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

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

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 worked for the employer as a Retail Media Merchandiser from 5/4/2011 to 2/10/2014. On 2/10/2014, a customer at the employer's client location asked the claimant to get a product from the back. The claimant could not find the product in the back of the store and informed a manager there were none available. The manager and the claimant went to the back and looked for the product and it was discovered that there were more boxes now that were unopened that the claimant did not look for to locate the product. The manager and the claimant had an argument. The manager called the claimant's immediate supervisor and notified the supervisor to remove the claimant and that she is not allowed to return to the store. The claimant was

> warned on 11/27/2012 by the employer for similar conduct at the employer's client location but was not asked to be removed at that time. The employer has a policy that states that if an employee is asked to be removed from the client company then they are automatically discharged. The employer found the removal to be justified, and on 2/10/2014, discharged the claimant for violating company policy.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the record was not sufficiently developed; consequently, the case must be remanded.

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

The record reflects the claimant was discharged for purportedly violating the employer's policy, which provides that if a client company's store manager requests that an employee be removed from its store for any reason, the employee will be automatically terminated by the employer. The referee held the claimant disqualified from receipt of benefits under subparagraph (e) of the above-stated statute, reasoning she was aware of the employer's policy, it was reasonably related to the job, and was fairly and consistently enforced. The referee noted that the employer found the claimant's removal by the client company was justified. The referee, however, did not adequately develop the record regarding the claimant's actions in the final incident leading to her discharge or address the employer's submitted documents. Consequently, the case must be remanded.

Initially, it should be noted that the current record does not support the referee's conclusion that the claimant's purported actions in the final incident constitute misconduct pursuant to subparagraph (e) of Section 443.036(30), Florida Statutes. The operative part of the employer's policy at issue does not require culpability on the part of an employee. A policy that provides that an employee will be discharged if a particular event happens does not support disqualification under subparagraph (e) because the word "violation" in the subparagraph presupposes an action, or failure to act, on the part of the claimant where he or she can be deemed culpable under the law. Thus, the occurrence of an event that triggers a separation under an employer policy or rule will not constitute misconduct under subparagraph (e) absent an express requirement that the claimant be culpable in some way. Accordingly, we hold that misconduct cannot be established under this policy pursuant to subparagraph (e).[1]

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[1] We note that the policy was apparently not enforced as strictly stated, since the employer did conduct an investigation to determine whether the client was justified in making the request. Because this was apparently not a part of the policy as stated, however, this action does not save the policy from being unenforceable under subparagraph (e).

The referee, however, did not adequately develop the record to determine whether the claimant's conduct was disqualifying under Section 443.036(30)(a), Florida Statutes. On remand, the referee is directed to develop the record regarding the specific actions of the claimant during the final incident that resulted in her being removed from the client company store by its manager and determine whether the claimant was culpable in the final incident. The referee is then to consider whether the claimant's actions in the final incident constitute misconduct pursuant to subparagraph (a) of Section 443.036(30), Florida Statutes.

The Commission further notes that the employer's evidence concerning the claimant's alleged actions in the final incident consisted of the employer's district manager's hearsay testimony concerning what the client company's store manager purportedly told her had occurred during the final incident. The employer also submitted a typed statement, apparently from a general manager, that contains hearsay assertions about what one of the general manager's employees told her occurred in the final incident, along with payroll documents, an excerpt from the employer's progressive discipline policy, and an electronically executed employee handbook acknowledgment. The typed statement from the general manager contains multiple levels of hearsay. The employer's representative did not ask the referee to admit any of the employer's documents as exhibits.

As the hearing officer, the referee has a duty to preserve the right of each party to present evidence relevant to the issues. Fla. Admin. Code R. 73B-20.024(3). Generally, parties are laypersons unfamiliar with the technical requirements of administrative law. When evidence is submitted by a party pursuant to Florida Administrative Code Rule 73B-20.014(2) and references are made to that evidence at the hearing, the referee should ask the party whether the party intends for the evidence to be made an exhibit and considered by the referee when making his or her decision.

Under Section 443.151(4)(b)5.a., Florida Statutes: "Any part of the evidence may be received in written form . . . ." As the statutory language implies, documentary evidence should be received and considered where properly admissible, and an absolute preference for oral testimony over probative documentary evidence is unjustified. However, documentary evidence often is, or contains, hearsay, and its admissibility must be properly determined. In making evidentiary rulings, the referee must be guided by the statutory standard in Section 443.151(4)(b)5., as well as, when applicable, the Florida Evidence Code.

"Hearsay" evidence is an oral or written assertion made outside the hearing, which is offered into evidence to prove the truth of the matter asserted. *See* §90.801, Fla. Stat. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, and can be used to support a finding of fact if the hearsay evidence falls within an exception to the hearsay rule and would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence that does not fall within one of the exceptions contained in Sections 90.803 and 90.804, Florida Statutes, may nevertheless support a finding of fact in a proceeding before an appeals referee under the new statutory "residual exception" if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the 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.

In determining whether documentary evidence is hearsay that may be used to base a finding of fact pursuant to Section 443.151(4)(b)5.c., Florida Statutes, the referee is required to make and outline the following analysis in the decision:

- Confirm that the evidence was properly provided to the parties, either by the referee as an attachment to the notice of hearing or by proper advance transmittal by the offering party to the referee and other party;
- Determine whether the evidence can be authenticated, i.e., whether a witness can explain with personal knowledge what the document is and how it was created or obtained;
- Identify whether the evidence is in fact hearsay, or, alternatively, is tangible non-hearsay evidence that is admissible without any further showing;
- If the document is hearsay, determine whether one of the statutory exceptions in the Florida Evidence Code applies; if so, it should be admitted;
- If the evidence does not fall within the exceptions in the Florida Evidence Code, then the referee should determine whether the residual exception applies, including whether the party against whom the documents are being offered had a reasonable opportunity to review such evidence prior to the hearing, and whether the hearsay evidence is trustworthy and probative and the interests of justice would best be served by its admission into evidence;

- If the evidence meets the statutory requirements for its admission into evidence, an analysis must then be made regarding such evidence in light of any conflicting evidence that may have been presented by the opposing party.

If the employer submits a written statement of a nontestifying witness, the referee must first decide whether the claimant has had a reasonable opportunity to review the statement/report prior to the hearing (as with all documentary or tangible evidence). Under Florida Administrative Code Rule 73B-20.014(3), 24 hours advance receipt is required for evidence to be admissible under the residual exception. The referee must then determine whether the evidence can be authenticated (again, as is required with any documentary or tangible evidence). As stated in Section 90.901, Florida Statutes, authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is not onerous – it merely requires that someone with personal knowledge testify as to what the document is and how the document was prepared, received, or was retained as a record, etc. Finally, the referee must determine whether to admit the statement/report into evidence for either general (admissible hearsay) or corroborative (otherwise inadmissible hearsay) purposes. This does not mean the referee denies admission of any hearsay evidence the referee deems to be less credible than the claimant's testimony. If the referee does admit the hearsay evidence into the record, the referee can nonetheless find the claimant's evidence/testimony that conflicts with, for example, the written statement, is more credible.

The referee is also directed to determine whether the claimant was provided a sufficient opportunity to prepare for the hearing and to confront the employer's witnesses whose hearsay testimony against the claimant is contained in the employer's documents and the record as discussed above. This determination is essential because due process requires that the claimant be able to anticipate the witnesses and evidence its opponent will present against her so that she can confront said evidence and witnesses and/or rebut them with her own evidence and/or witness testimony. The referee shall include copies of the employer's documents, which should be numbered properly, with the next hearing notice to ensure each party has a copy of the evidence prior to the hearing. The referee must then determine whether the evidence can be authenticated and admitted. If properly authenticated and admissible, the evidence should be labeled and entered into evidence as exhibits. Additional testimony may then be presented by the parties in response to this evidence.

In order to address the foregoing issues, the referee's decision is vacated and the case is remanded for further proceedings. On remand, the referee is directed to hold a supplemental hearing to develop the record regarding the contents of the employer's evidence and render a new decision that contains accurate and specific findings of fact regarding the circumstances surrounding the claimant's job separation and a proper analysis of those facts, along with an appropriate credibility determination in accordance with Florida Administrative Code Rule 73B-20.025(3)(d). Any hearing convened subsequent to this order shall be deemed supplemental, and all evidence currently in the record shall remain in the record.

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
10/2/2014 ,
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 PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*26654777 *

Docket No.0021 7162 57-03 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Claimant

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.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rules 73B-20.016; 20.017.

JURISDICTIONAL ISSUE: A determination was mailed on 2/24/2014 that was adverse to the

employer. The employer filed an appeal and a hearing was scheduled to be held on 4/2/2014. The notice of hearing was mailed on 3/24/2014 and the claimant acknowledged she received it a few days after that. The claimant did not hear her phone for the hearing on 4/2/2014. She was unaware a hearing had taken place until it was past the scheduled time. That same day the claimant filed a request to reopen. A case will be re-opened for a hearing on the merits when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated. The claimant did not hear her phone ringing on 4/2/2014. It was her intention to attend the hearing, but missed it because she did not know she was called. She immediately filed a request to reopen when she realized a hearing had in fact taken place. The claimant has shown good cause for not appearing at the 4/2/2014 hearing. A decision will be rendered based upon the merits of the case.

FINDINGS OF FACT: The claimant worked for the employer as a Retail Media Merchandiser from 5/4/2011 to 2/10/2014. On 2/10/2014, a customer at the employer's client location asked the claimant to get a product from the back. The claimant could not find the product in the back of the store and informed a manager there were none available. The manager and the claimant went to the back and looked for the product and it was discovered that there were more boxes now that were unopened that the claimant did not look for to locate the product. The manager and the claimant had an argument. The manager called the claimant's immediate supervisor and notified the supervisor to remove the claimant and that she is not allowed to return to the store. The claimant was warned on 11/27/2012 by the employer for similar conduct at the employer's client location but was not asked to be removed at that time. The employer has a policy that states that if an employee is asked to be removed from the client company then they are automatically discharged. The employer found the removal to be justified, and on 2/10/2014 discharged the claimant for violating company policy.

CONCLUSION OF LAW: As of May 17, 2013, 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. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

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. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record shows that the claimant was removed from the client store after an incident had taken place over the claimant not locating product she was asked to find. The employer discharged the claimant based on the policy that states that if the employer's client asks to remove an employee from their location, the employee is immediately discharged by the employer. The employer found that the removal by the client was justified. The claimant knew about the employer's policy. It was reasonably related to the job environment and performance and the rule was fairly and consistently enforced. Therefore, the claimant's discharge was for misconduct connected with work under the statute, and as such she is disqualified from benefits for weeks starting 2/9/2014.

DECISION: The determination dated 2/24/2014 is **REVERSED**. The claimant is disqualified from benefits for weeks starting 2/9/2014, plus five weeks and until she earns $3,536.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed to the last known address of each interested party on May 5, 2014

ROBERT RUSEK
Appeals Referee

By: C E Demoranville

CONNIE DEMORANVILLE, 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 above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and 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 connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y 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, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak nimewo sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.
