STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 14-02274

vs.

Referee Decision No. 0021514568-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. 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.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

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, 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.

Having considered all arguments raised on appeal and having reviewed the hearing record, the Commission concludes no legal basis exists to reopen or supplement the record by the acceptance of any additional evidence sent to the Commission or to remand the case for further proceedings.

The Commission concludes that the referee's findings are supported by competent, substantial evidence, with one modification. The referee found that the claimant reported sexual harassment by her supervisor to the employer on January 6, 2014. While the claimant did initially testify to that date, further clarification of her testimony, and the testimony of the employer's witness provided a more detailed chronology of the events leading to the claimant's separation, which are recounted herein.

The referee's findings of fact accurately reflect the claimant's contentions regarding sexual harassment by her supervisor. The claimant testified to an increasingly direct series of comments by her supervisor of either an implicitly or explicitly sexual nature beginning June 2013. As noted by the referee, the final incident involved her supervisor walking up behind the claimant and placing his private parts against her body. About a week later, on January 3, 2014, the claimant spoke to her assistant store manager. The assistant manager initially suggested that she speak with her supervisor, but when the claimant told her that she already had, the assistant manager contacted the trainer, who relayed the complaint to the employer's market manager.

The record reflects the market manager called the claimant on the evening of January 3, 2014, and conducted a preliminary interview. During this interview, the claimant did not provide specific information regarding sexual harassment, but complained that the supervisor was "harassing her" and gave work related examples. The market manager discussed the options of having a formal investigation by human resources, or his conducting an informal investigation which

might result in the claimant transferring to another location and the supervisor possibly being written up. Because the claimant was upset, the market manager gave her a day to think about her options. He spoke with her again by phone on Saturday, January 4. During that conversation, it became clear that the harassment the claimant complained of was sexual in nature, and the claimant requested a formal investigation. Because the claimant was leaving on a previously scheduled vacation for the week of January 6-11, 2014, and because the human resources director was not available the first part of the following week, the market manager gave her the option of working on January 13-15 at another location, or accepting a "suspension"[1] with pay for three days until they could conduct interviews. The claimant chose the latter option.

On January 16, 2014, the employer's human resources director and market manager conducted interviews of the claimant, her supervisor, and the other employees at the claimant's work location. The claimant was initially interviewed for about 30 minutes by the human resources director, during which time she recounted the incidents of harassment referenced in the findings of fact. When the employer interviewed the supervisor, he claimed to have had a consensual sexual relationship with the claimant, and offered to provide text messages to support that assertion. Because he did not have his phone containing the messages on his person, he was given permission to retrieve his phone. In the interim, the market manager and human resources director re-interviewed the claimant for about 15 minutes regarding the text messages. The market manager asked the claimant whether there were any other text messages she would like to show them, whether her supervisor's text messages would be the same as hers or different, and whether she had a sexual relationship with her supervisor. About ten minutes after that interview, while the market manager was interviewing another customer service representative, the claimant approached the market manager and told him that "she was done, the keys are in the office, and I am out of here." The market manager attempted to get her to speak with the human resources director prior to resigning, but the claimant said that the process was "stressing me out, and I can't handle this right now." The claimant then left, and had no further contact with the employer.

[1] Although the employer called the three days off with pay a "suspension," a term that usually implies a disciplinary action, it was clear from the evidence that the time off was not disciplinary in nature, and was designed to relieve the claimant from having to work with the supervisor again until an investigation could be conducted. Such an action would typically be called administrative leave with pay, and is a fairly common practice in harassment investigations in order to protect the complaining party.

The employer continued its investigation, and while it was not able to reach a definitive conclusion as to whether or not the claimant had been sexually harassed, the supervisor's admission that he engaged in a relationship with his subordinate violated the employer's anti-fraternization policy, and he was terminated on those grounds.

The claimant testified that she quit because of the investigation, although she later modified her testimony to include the harassment as a reason.[2] She contended that the second interview caused her blood pressure to rise, and since she was pregnant at the time, she quit for her own health and that of her child. She provided no evidence, however, that her health required separation from employment, or that any health concerns could not have been resolved simply by taking a short period of leave. For purposes of our review, we will assume both the harassment and the investigation played a role in the claimant's resignation.

It is well-established that an individual who is subjected to sexual harassment may have good cause to quit employment attributable to her employer. *See* R.A.A.C. Order No. 13-05313 (February 18, 2014), summarizing cases, including *Rivera v. Unemployment Appeals Commission*, 99 So. 3d 505 (Fla. 3d DCA 2011) and *Yaeger v. Unemployment Appeals Commission*, 786 So. 2d 48 (Fla. 3d DCA 2001). However, whether viewed as part of the initial proof of good cause attributable to the employer, or the requirement that a claimant make a reasonable effort to preserve her employment, both the courts and the Commission have held that the claimant must, where feasible, make a reasonable effort to preserve her employment by bringing the harassment to the attention of the employer. *Id*. *See also Craven v. Unemployment Appeals Commission*, 55 So. 3d 650, 653 (Fla. 1st DCA 2011); *Brown v. Unemployment Appeals Commission*, 633 So. 2d 36 (Fla. 5th DCA 1994) (en banc).

As noted by the referee, the test for good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." *Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827, 829 (Fla. 4th DCA 1973). The referee's conclusion in this case that the claimant's decision to quit was unreasonable, and thus without good cause, is supported by the facts and the law. Accordingly, it is affirmed.

On appeal to the Commission, the claimant contends that she was constructively discharged. She argues that the hearing officer erroneously concluded that the interview process engaged in by the employer was normal, contending instead that it was a "berating, brow-beating set of accusations against her when she

[2] The referee noted that her initial testimony in the hearing, as well as prior statements to the Department, referenced only the investigation.

was the one reporting the sexual harassment following company procedure." These arguments are not supported by either the facts or the law. The claimant's testimony at the hearing did not demonstrate that the market manager yelled at her, berated her, "browbeat her" or engaged in any unprofessional conduct. Rather, she contended that "she felt like she was accused of having a sexual relationship with her supervisor." She testified that, during the second interview, the market manager commented that some of the facts she revealed in the second interview "she had not told him previously." She testified the market manager's facial expression suggested "that shouldn't have happened." She acknowledged that she "could be wrong," but that's how she interpreted the interview.

Under Title VII and the Florida Civil Rights Act, employers are required to take reasonable steps to prevent harassment, including investigating complaints, and taking remedial action where there are grounds to do so. This duty does not require, however, taking serious allegations of sexual harassment at face value. The uncontroverted evidence reveals that the claimant's supervisor had acknowledged a consensual relationship with the claimant, and had offered to provide text messages to prove this fact. The employer thus had a legitimate reason, if not a duty, to question the claimant regarding whether the harassment complained of was either part of, or at least related to, a consensual relationship with her supervisor.[3] While the claimant may have been uncomfortable discussing this issue, the evidence does not show any unreasonable action on the part of the employer, or that a reasonable employee would have resigned under these circumstances. As the Eleventh Circuit explained in *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1307 (11th Cir. 2007):

> While we have recognized that filing a sexual harassment complaint may be "uncomfortable, scary or both," [citation omitted], we have also explained that, "the problem of workplace discrimination . . . cannot be [corrected] without the cooperation of the victims**.** [citation omitted.]"

We conclude that this principle applies as well to the interview process in this case. Accordingly, the claimant's contentions are respectfully rejected.

[3] Apparently later that day, the claimant's supervisor provided text messages including an exchange with the claimant where she was coming to his apartment late in the evening.

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.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits. The employer's account is relieved of charges in connection with this claim.

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

12/2/2014 ,

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

*26141551 *

Docket No.0021 5145 68-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Claimant

Claimant Representative

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.

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.

Issues Involved: CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will 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 charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

FINDINGS OF FACT: The claimant worked for the employer as a Customer Service Representative from January 2008 to January 16, 2014. The claimant reported sexual harassment by her supervisor to the employer on January 6, 2014. The claimant alleges that her supervisor made sexual comments that began in June of 2013, where the supervisor did not like the relationship the claimant had with another male employee, and told the claimant he would like to have that type of relationship with her as well. In October 2013, he began talking about her breasts to her. He also talked to the claimant about her underwear line in September 2013. The comments continued through December 2013. At the end of December 2013, the supervisor talked about the claimant's private parts in relation to her being pregnant. A few days prior to the claimant filing her complaint, the supervisor pressed his private parts up against the claimant in the back area of the employer's premises where the claimant was working at the time. She than filed her complaint with the employer. The employer contacted the claimant on 1/3/2014 and gave her an option to take a few days off meaning a suspension with pay and have the investigation into her complaint or she can be transferred to another location. The claimant did previously request a transfer to another location but was not transferred. The claimant chose to take the few days off and have the investigation. She was interviewed by the employer twice for the investigation. In the first interview, she told what had occurred to the employer. In the second interview the claimant retold what had happened as in the first interview, and was also asked about text messages between her and the supervisor as well as questioned about any sexual relationship or contact that she had with the supervisor. The claimant became stressed out and overwhelmed with the questions and the investigation as well as the harassment she felt by her supervisor during this interview and told the employer she cannot do this anymore and walked out. The claimant quit on January 6, 2014. She did not contact the employer again after quitting.

CONCLUSION OF LAW: The law provides that an individual will be disqualified for benefits who voluntarily leaves work without good cause attributable to the employing unit. Good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment." Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Moreover, an employee with good cause to leave employment may be disqualified if reasonable effort to preserve the employment was not expended. See Glenn v. Florida Unemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987). See also Lawnco Services, Inc. v. Unemployment Appeals Commission, 946 So.2d 586 (Fla. 4th DCA 2006); Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006).

The record shows that the claimant's supervisor allegedly made inappropriate comments to the claimant that began in June 2013 and went on till the end of December 2013. The record also shows that the claimant filed a sexual harassment complaint to the employer after her supervisor allegedly pressed his private parts against her while at work. The employer conducted an investigation after the sexual harassment complaint was made and interviewed the claimant twice. The first interview the claimant told the employer what happened. She retold the same thing in the second interview and was questioned about text messages between her and the supervisor. The claimant was overwhelmed and stressed by the questions and the investigation, as well as the alleged harassment she had to deal with and told the employer she cannot take it anymore and left the interview. She quit the same day on January 6, 2014 and did not contact the employer again. An investigation into sexual harassment is usually standard procedure that employers do after a complaint has been made. The employer did just that in this case. The claimant felt overwhelmed and stressed during the second interview during the

investigation and quit her job. She did not request a postponement to calm down, nor did she wait for the investigation to be completed and see a result by the employer to her complaint. She simply quit. The employer did as was requested by the claimant in conducting the investigation in response to her complaint. Even if her allegations were deemed to be founded, she did not wait for the investigation to be completed to see what disciplinary action if any would be taken against the supervisor or what would actually be done by the employer in response to her complaint. She walked out in the middle of the interview and quit. Her quit was without good cause attributable to the employing unit. In this case, the claimant also did not make a reasonable effort to preserve the employment relationship prior to leaving. She could have asked to be transferred to a different location or waited for the investigation to be over to make further requests to accommodate the situation and see what could be done for her. She did not contact the employer again. Thus, it is concluded that the claimant voluntarily left work without good cause attributable to the employing unit within the meaning of Florida reemployment assistance law. She is disqualified from benefits for weeks starting 1/12/2014.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer. The claimant in this case quit without good cause attributable to the employing unit, therefore the employer's record will not be charged for any benefits paid in connection with this claim.

DECISION: The determination dated 2/21/2014 is **affirmed**. The claimant is disqualified from benefits for weeks starting 1/12/2014 and until she earns $3,910. The employer's record will not be charged in connection with this claim.

REPRESENTATION FEES: The claimant's representative charged a flat fee of $300 for her representation. This fee is approved.

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 April 22, 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.
