STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-03206

vs.

Referee Decision No. 0022271241-02U

Employer/Appellant

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. On appeal to the Commission, the appellant argues that the Commission should afford greater weight to the testimony presented by the employer's witnesses regarding the contents of the employer's sexual harassment policy and the contents of text messages purportedly sent by the claimant to another employee. The record reflects the claimant, who worked as a general manager, was discharged from employment after the employer concluded the claimant sent messages to an employee that violated the employer's sexual harassment policy.

The factual pattern in this case presents two similar but distinct issues that require analysis. The first issue is whether the claimant's interactions with an employee constitute sexual harassment, as the term is commonly defined by law, and the second issue is whether the claimant's interactions with an employee violated the employer's sexual harassment or any other policy.

As defined in the law, sexual harassment is "*unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. §1604.11 (emphasis added). *See also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-67 (1986) (citing the above-quoted EEOC regulation). The Commission has previously held that a

manager's romantic pursuit of a subordinate could constitute misconduct as the term is defined in Section 443.036(30)(a), Florida Statutes. R.A.A.C. Order No. 14-00065 (May 29, 2014). However, under the legal definition, only unwelcome conduct violates an employee's statutory rights under Title VII and similar laws. Consensual activity does not.

In this case, the employer did not present the allegedly harassed employee's testimony during the hearing, or submit a written statement from the employee for the hearing establishing that the conduct was unwelcome. Indeed, there was no competent evidence offered at any time that the receiving employee herself complained about the texts. While the claimant acknowledged text messaging the employee in question, the claimant did not make sufficient admissions during the hearing to support a finding that he was sexually harassing the employee. Thus, the record in this case lacks competent, substantial evidence to demonstrate that the claimant made unwelcome advances towards the employee or sexual comments to the employee. Therefore, the employer has failed to establish misconduct as the term is defined in subparagraph (a) of the statutory definition of misconduct.[1]

A private sector employer is, of course, not limited to the traditional legal definition of sexual harassment in its workplace policies. Employers may prohibit sexual comments regardless of whether they are welcome, and many do. An employer may include an anti-fraternization policy which prohibits employees from dating, especially with regard to a supervisor dating or pursuing a relationship with a subordinate. To establish a violation under subparagraph 443.036(30)(e)1., the employer must present evidence establishing the policy/rule and evidence that the claimant violated it. If the employer establishes the claimant violated a rule/policy, the burden shifts to the claimant to establish one of the affirmative defenses set forth in subparagraph (e)1.a-c. The claimant has the burden of showing that he/she did not know, and could not reasonably know, of the rule's requirements; the rule is not lawful or not reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced.

In this case, the employer did not present the terms of its sexual harassment policy or the text messages purportedly sent by the claimant. The Commission has ruled on many occasions that proof of a policy is best accomplished by providing a copy of the policy for the record and that, when the employer fails to do so, and the claimant does not admit to knowledge of the policy provisions, it is in the sound

[1] The employer also contended that it was common sense that a manager should not send text messages of the type in this case to a subordinate. While that may be generally true, whether or not such conduct constitutes "conscious disregard of an employer's interest" depends on facts not established in this case.

judgment of the referee how much, if any, oral testimony to accept. R.A.A.C. Order No. 13-04349 (August 29, 2013).[2] The employer in this case never offered to read into the record the terms of its sexual harassment policy. Thus, there is no competent evidence regarding the terms of that policy, especially as to whether or not consensual conduct is prohibited. Furthermore, the referee correctly concluded that the inappropriate conduct policy did not address sexual harassment specifically. The claimant's testimony indicates he did not believe his actions violated the employer's policies, as he understood them to be, and that he did not recall sending the specific messages read into the record by the employer.

In her conclusions of law, the referee recognized that conflicting evidence was presented by the parties. After analyzing the evidence, the referee resolved material evidentiary conflicts in favor of the claimant. "[T]he Commission may not reweigh the evidence and substitute its findings of fact for those of the referee." *Kelly v. Unemployment Appeals Commission*, 823 So. 2d 275, 278 (Fla. 5th DCA 2002); *See also*, *Wall v. Unemployment Appeals Commission*, 682 So. 2d 1187, 1188 (Fla. 4th DCA 1996) ("It is well settled that the [Commission] cannot reweigh the evidence."). The referee found that the claimant was unaware there were any policies prohibiting him from engaging in this behavior. Thus, the employer has also failed to establish disqualifying misconduct pursuant to subparagraph (e)1. of the statutory definition of misconduct. The Commission, therefore, concludes the record adequately supports the referee's material findings and the referee's conclusion is a correct application of the pertinent laws to the material facts of the case.

[2] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-04349.pdf.

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

11/20/2014 ,

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

*27913127 *

Docket No.0022 2712 41-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Employer

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.

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.)

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.

Findings of Fact: The claimant was employed with the employer from July 14, 2013 through March 27, 2014. He worked full time as a general manager. On March 11, 2014, it was reported that the claimant had sent inappropriate text messages to a female employee. The claimant had a company cell phone and used the company cell phone to send text messages to the employee. The employee and the claimant had a friendly and mutual relationship. The claimant was unaware that there were any policies prohibiting him from engaging in this behavior. On March 27, 2014, the human resources manager met with the claimant and asked him about the text messages. The claimant stated that he made a mistake. The claimant was discharged that day for allegedly violating the employer's sexual harassment policy. The claimant knew that sexual harassment was prohibited. He had not engaged in any sexual harassment.

Conclusions 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 law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

The record in this case shows that the claimant was discharged. Consideration was given to the employer's testimony that the claimant was discharged for violating the employer's sexual harassment policy. However, the employer did not submit a copy of the sexual harassment policy to be used as evidence at that hearing. The employer's testimony was primarily hearsay in nature. It was not shown that the claimant had a clear understanding of the sexual harassment policy. Whereas the claimant admitted sending text messages to the employee, the claimant did not admit to any sexual harassment. The claimant engaged in an exchange of personal texting with the employee. There was no competent testimony or evidence that the text exchange constituted sexual harassment. At the hearing the employer's witness read text messages that were allegedly sent from the claimant to the employee. When questioned at the hearing, the claimant did not admit that he wrote or sent the text messages read into the record by the employer's witness. The employer did not submit a copy of the text messages to be used as evidence at the hearing. The employer also alleged that at the termination that the claimant stated that he made a mistake. However, at the time there was no admission of guilt relating to sexual harassment or violation of any policies. It was not shown that the claimant violated any known or enforced rules. The claimant did not consciously disregard the employer's interests or intentionally violate the standards of behaviour that the employer had a right to expect. The employer did not meet the burden of proof showing that the claimant was discharged for misconduct connected with the work as defined by the statutes. The claimant remains entitled to 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 set forth factors to be considered in resolving credibility questions. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated April 17, 2014 is AFFIRMED. The claimant is eligible.

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 June 2, 2014

TERRY SHINE
Appeals Referee

By: Armia J. Durden

ARMIA DURDEN, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the mailing date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown 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.
