STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 14-05924

vs.

Referee Decision No. 0023633193-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the employer's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision which held the claimant not disqualified from receipt of benefits and charged the employer's account.

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 was an assistant general manager of the hotel restaurant and he began work for the employer on February 27, 2003. The employer's policy was zero tolerance for sexual harassment at the workplace. The claimant was aware of the employer's policies. The employer considered the claimant to be in a leadership position. On July 13, 2014, the claimant and the server, who reported to the claimant and who was subordinate to the claimant in the chain of command, discussed losing weight. The claimant and the server walked down a hallway to the gym to weigh themselves. While walking to the gym the claimant and the server entered the storage room. The claimant occasionally used

the storage room for meetings. The claimant asked the server about her weight loss; the server showed the claimant pictures of herself. The claimant hugged the server and kissed her on the cheek as an act of friendship as he had done in the past. The claimant was not aware the server was uncomfortable. The claimant invited the server to dinner, the claimant did not ask the server to begin a personal relationship. On July 13, 2014, the general manager observed that the server was upset and crying. The claimant reported the incident and provided a written statement about the incident to the general manager. The general manager reported to the human resources manager. The human resources manager investigated the report and reviewed surveillance video of the hallway and interviewed the claimant and the server. On July 15, 2014, the server, reported to the human resources manager that the claimant pulled her into the storage room and while there pulled on her shirt, attempted to kiss her and hug her, and asked to see her breasts and other body parts; and asked her to begin a personal relationship. The server told the human resources manager she left the storage room and went to the gym with the claimant, at which time, she came to realize the incident made her uncomfortable and then went to the restroom and called the other supervisor to intervene. The human resources manager believed the video showed the claimant and server walking down the hallway towards the gym, and at the storage room door, the claimant takes the server's arm and guides her to the storage room. The human resources manager observed seventeen minutes elapsed of no activity until the server and the claimant left the storage room and proceeded to the gym, the server appeared to the human resources manager to be disheveled and had a different demeanor. While at the gym, the claimant and the server appeared to the human resources manager to act normally. The human resources manager believed the video next showed the server enter the restroom while the claimant lingered outside the restroom until another supervisor came into view at the restroom when the claimant then left. On July 15, 2014, the claimant told the human resources manager he and the co-worker went in the storage room and he hugged the server and kissed her on the cheek as a gesture of friendship. The claimant told the human resources manager he was not aware that the server was uncomfortable. On July 16, 2014, the human resources manager and the general manager discharged the claimant for sexual harassment.

Based on these findings, the referee held the claimant was discharged for reasons other than misconduct connected with work. Upon review of the record and the arguments on appeal, the Commission concludes the referee did not properly consider the employer's evidence, and also did not properly analyze the relevant legal issue with regard to the employer's policy; consequently, the case must be remanded.

Section 443.036(29), Florida Statutes (2014), 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 provision applicable to this case is subparagraph (e), which addresses violation of an employer rule. The employer provided a copy of its "Policy Prohibiting Harassment and Unprofessional Conduct." A section of that policy prohibits sexual harassment, which it describes as follows:

> Sexual harassment includes unwelcome sexual advances, requests for sexual favors, or any other visual, verbal or physical conduct of a sexual nature when:
>
> * * * * *
>
> c. The harassment has the purpose or effect of unreasonably interfering with the associate's work performance or creating an environment that is intimidating, hostile or offensive to the associate.

The policy further advises:

> Each associate must exercise his or her own good judgment to avoid engaging in conduct that may be perceived by others as harassment. The following is a partial list of conduct that would be considered sexual harassment.
>
> * * * * *
>
> 3. *Physical* – Unwanted physical contact including touching, interference with an individual's normal work movement or assault.

The employer contended that the claimant, a restaurant assistant general manager, violated this policy by his conduct towards a female subordinate on July 13, 2014. The referee, however, held that the employer had failed to meet its burden of proof. The referee noted the substance of the claimant's testimony, and stated that "absent sufficient competent testimony to the contrary, the referee accepts the claimant's testimony."

The wording of the referee's decision leads the Commission to conclude that the referee failed to grasp the value of the employer's evidence. As we discuss below, not only was much of the employer's evidence competent to support a finding of fact, but the combined weight of the direct and circumstantial evidence was more than sufficient to support a decision in the employer's favor. Since we cannot determine what findings would have been made had the referee recognized the evidentiary value of the employer's evidence, we must remand the case for additional consideration of the evidence in accordance with the principles discussed below. Additionally, the referee's new decision must demonstrate that further consideration has been given to the employer's policy and its wording.

The Evidentiary Issues

The record in this case shows that the employer offered extensive direct, circumstantial, and hearsay evidence (both competent and corroborative) supporting its contention that the claimant engaged in sexual harassment. This includes testimony regarding the contents of security video, and testimony regarding statements made by both the claimant and the subordinate he was accused of harassing. All of this evidence was probative: that is to say, it was sufficient in character and significance, if believed, to support a conclusion that the claimant did what the employer contended.

1. *Video Evidence*

As noted in the referee's decision, the employer's human resources ("HR") manager offered extensive testimony regarding the contents of a surveillance video. According to the HR manager, the video showed the claimant and the subordinate walking towards the gym to get weighed; the claimant leading the subordinate into a storage room, the interior of which was not covered by a security camera; the two remaining in the room for 17 minutes; the subordinate leaving the room looking upset and disheveled, trying to walk away from the claimant; and the claimant then

getting the subordinate and leading her to the gym. While the video did not reflect what occurred in the storage room, the employer's testimony regarding the subordinate's demeanor and appearance after emerging from the room is highly probative circumstantial evidence that the subordinate had just been exposed to upsetting and inappropriate behavior.

We have held in numerous cases that testimony regarding the contents of surveillance video is permissible under the statutory standard for reemployment assistance appeals. *See generally* R.A.A.C. Order No. 13-04687 (August 21, 2013). The evidence must be weighed under specific factors. While the referee elicited substantial testimony from the HR manager regarding what she observed on the video, the referee failed to specifically comment on this evidence in the decision, even though the manager's evidence was corroborated by testimony from other witnesses, including the claimant himself. Furthermore, the referee's findings do not indicate the value the referee gave the employer's testimony – they merely state that the employer "believed the video showed" various things. These statements are not findings, and do not establish that the referee properly weighed the evidence. In short, while the video evidence offered was probative, the referee's decision failed to specifically address and weigh it. On remand, the referee must enter a new decision that contains a proper analysis of the video evidence and demonstrates it has been given the proper weight. If necessary, the referee may further expand on the evidence at the supplemental hearing directed below, but the referee can also consider the evidence in light of the other testimonial evidence.

2. *Hearsay Evidence – "Competent vs. Corroborating"*

The employer introduced hearsay evidence, some of which was admissible to support a finding of fact and other that was only supporting. For example, the HR manager testified that she interviewed both the subordinate employee and the claimant. The subordinate's statement indicated that the claimant asked her to let him see her breasts, kissed her (the testimony did not reflect where), and told her that "this did not have to change their work relationship." The HR manager interviewed the claimant, who admitted that he pulled on the subordinate's shirt.

The general manager also interviewed the subordinate immediately after the events in question. The subordinate told him that the claimant had pulled her shirt, and tried to kiss her. The general manager also spoke to the claimant two days later when the claimant met with the HR manager. The claimant told him that "small things that he did look pretty big from outside."

Under the reemployment assistance law, all hearsay evidence falls into one of two categories. The relevant statutory provision provides as follows:

> c. 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 s.120.57(1)(c), hearsay evidence may support a finding of fact if:
> (I) The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
> (II) 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. (emphasis added).

§443.151(4)(b)5.c., Fla. Stat. Thus, hearsay that falls within a hearsay exception in the Florida Evidence Code or the statutory "residual" exception above may directly support a factual finding. Such evidence is referred to as "competent" hearsay because it is competent to support a finding. Hearsay that does not fall within an exception may still be introduced, but it may only be used to "supplement" or "explain" other evidence, and thus is "corroborating" evidence. It may not serve as the sole basis to support a dispositive, disputed finding of fact. *Tassone v. Unemployment Appeals Commission*, 662 So. 2d 1003, 1004-05 (Fla. 1st DCA 1995); *Doyle v. Florida Unemployment Appeals Commission***,** 635 So. 2d 1028, 1031-32 (Fla. 2d DCA 1994). However, such hearsay evidence, when combined with other competent evidence, must be weighed, and it is error to fail to do so. *See GTO, Inc. v. Unemployment Appeals Commission*, 783 So. 2d 1201, 1202-03 (Fla. 1st DCA 2001).

In reemployment assistance appeals hearings, formal objections to evidence are not required, and the referee is not required to make contemporaneous rulings on the admissibility of evidence. *The issue when relevant hearsay testimony is offered is not whether or not it is "admissible" in the hearing, but whether or not it is "competent" to support a finding of fact.* In that regard, any statement offered by either witness which fell within a hearsay rule exception was "competent" evidence to support a finding of fact. *Such competent hearsay evidence is not second-class evidence.* It can be as probative as, and often is more probative than, direct testimony. The hearsay exceptions exist because courts have recognized that, under certain circumstances, out-of-court statements have a high degree of trustworthiness.

A. *The Claimant's Alleged Statements are Admissions*

The statements the claimant allegedly made to either manager are competent evidence because they constitute admissions. *See* §90.803(18), Fla. Stat. While the referee concluded that the employer did not offer sufficient evidence, the HR manager testified that the claimant admitted to her that he pulled on his subordinate's shirt. Admissions are a sufficient basis to establish misconduct, particularly when supplemented by additional evidence. *Arbor Tree Mgmt. v. Unemployment Appeals Commission*, 69 So. 3d 376, 381-82 (Fla. 1st DCA 2011). The HR manager's testimony regarding the claimant's admission, combined with the subordinate's subsequent complaint, is sufficient to establish a *prima facie* case of misconduct under the employer's policy. Thus, the referee must determine whether the employer's testimony as to these alleged statements is credible, and determine the weight to be given them.

B. *The Subordinate's Statements to the General Manager must be Evaluated as "Excited Utterances"*

The subordinate's statements to the general manager should have been considered under the "excited utterance" hearsay exception. Section 90.803(2), Florida Statutes, defines an "excited utterance" as "a statement or excited utterance relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Despite the common use of the word "excitement" as referring to an anticipated or pleasing event, the meaning of the word in this evidentiary rule includes any heightened or agitated emotional state, including that possessed by a victim of a crime or other traumatic incident. For example, the exception has been applied in cases involving sexual battery. *Akien v. State*, 44 So. 3d 152, 154-55 (Fla. 4th DCA 2010).

Under this exception, a statement made by an individual who is under the immediate emotional effect of an exciting or traumatizing event may be admissible as an exception to the hearsay rule. *Hayward v. State*, 24 So. 3d 17 (Fla. 2009). As reflected in *Hayward*, for a statement to qualify as an excited utterance pursuant to Section 90.803(2), Florida Statutes, "the statement must be made: (1) regarding an event startling enough to cause nervous excitement; (2) before there was time to contrive or misrepresent; and (3) while the person was under the stress or excitement caused by the event." 24 So. 3d at 18 (citations and sub-quotations omitted). While typically an excited utterance is made shortly after the exciting or

traumatic event, "[t]he lapse of time between the startling event and the out-of-court statement although relevant is not dispositive in the application of [the] rule." *U.S. v. Iron Shell*, 633 F.2d 77, 85-86 (8th Cir. 1980). "The test regarding the time elapsed is not a bright-line rule of hours or minutes." *Rogers v. State*, 660 So. 2d 237, 240 (Fla. 1995).

"[F]actors that the trial judge can consider in determining whether the necessary state of stress or excitement is present are the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event and the subject matter of the statements." *Hudson v. State*, 992 So. 2d 96, 108 (Fla. 2008) (citations omitted). In *Williams v. State*, 967 So. 2d 735, 749 (Fla. 2007), the court held that a statement made 20 minutes after the event was still sufficiently close to constitute an excited utterance. Other courts have held far longer time periods sufficiently proximate. *See Henyard v. State*, 689 So. 2d 239 (Fla. 1996) (several hours after extreme trauma); *Edmond v. State*, 559 So. 2d 85, 86 (Fla. 3d DCA 1990). What is crucial is whether the facts indicate that the declarant is still in a state of emotional agitation proximate to the event at the time the statement is made. The record testimony shows this could be the case. According to the HR manager, the subordinate left the storage room upset and trying to walk away from the claimant. After then going to the gym with him long enough to find the scales did not work, she went into a restroom and did not come out for about 15 minutes, according to the claimant's own testimony. When she did, she was taken to the general manager, who testified that she was crying and disheveled. Based on this testimony, the subordinate's statements should have been evaluated to determine whether they were excited utterances, which are competent and probative hearsay evidence. At a minimum, the referee must give consideration as to whether the record suggests the subordinate had sufficiently "calmed down" to reflect on and fabricate the story she provided to the general manager.

C. *The HR Manager's Corroborative Hearsay Regarding the Subordinate's Statements*

The subordinate who was the subject of the claimant's actions did not testify at the hearing, nor was her statement submitted by the employer. The HR manager explained that she was still upset about the event, and that the employer as a matter of practice did not disclose such sensitive material. However, at the request of the referee, the HR manager provided some of the statements made by the subordinate as part of a lengthier written statement given to the HR manager. This testimony was hearsay, but it may be considered as corroborating hearsay. Such testimony may be useful in supporting other evidence and providing additional detail. Here, the statements were consistent with other evidence, and should be considered for the purpose of further explaining the events at issue.

3. *Circumstantial Evidence*

In addition to the testimony of the employer's witnesses, the claimant, a married man, admitted that he hugged the subordinate and kissed her on the cheek, although claiming he did so outside the storage room. He further contended that he had done so previously, implying he had done so without complaint. He admitted asking her to go out to dinner, but said that it was related to their goal of losing weight rather than an attempt to start a relationship.

In concluding that the employer did not provide sufficient competent evidence to counter the claimant's testimony, the referee also failed to give proper weight to the employer's circumstantial evidence. As we have held in several cases previously, any element of proof in a reemployment assistance case may be made, or rebutted, by either direct or circumstantial evidence. *See* R.A.A.C. Order No. 14-04612 (December 1, 2014); R.A.A.C. Order No. 14-00590 (August 27, 2014). "Direct evidence" is provided by witnesses who testify to their direct observation of a fact. *Mosley v. State*, 46 So. 3d 510, 526 n.14 (Fla. 2009). For example, a witness who testifies that he saw another employee take money out of a cash register has provided direct evidence to that fact. Circumstantial evidence, by contrast, is evidence of facts from which another material fact may be inferred. *Id.*; *see also Lake County Sheriff's Department v. Unemployment Appeals Commission*, 478 So. 2d 880, 881 (Fla. 5th DCA 1985). For example, a store manager testifies that a store's safe contained $1000 when he counted it after closing one night, but contained only $500 when he counted it before opening the next morning. He further testifies that he reviewed the store's security access log and found that an assistant manager was the only individual in the store during the interim. These facts are sufficient to prove by circumstantial inference that the assistant manager stole the money, and are sufficient to prove that fact over the assistant manager's denial, if the weight of the evidence favors that inference. There is no basis for automatically concluding that direct evidence will trump circumstantial evidence. Doing so may deprive a party of a fair hearing.

We emphasize, yet again, that circumstantial evidence is not inherently inferior to direct evidence. For example, circumstantial evidence is sufficient to establish, by itself, the mental state necessary for a first-degree murder conviction under the high standard of proof required in criminal prosecutions. *See Wilson v. State*, 493 So. 2d 1019 (Fla. 1986), *receded from on other grounds*, *Evans v. State*, 838 So. 2d 1090 (Fla 2002). There are whole fields of law – including discrimination and retaliation theories in labor and employment law – that rely overwhelmingly on circumstantial evidence. Likewise, circumstantial evidence is sufficient to prove facts under the preponderance of the evidence standard used in reemployment assistance appeals proceedings. The issue in this case is not whether the employer

directly rebutted the claimant's assertions regarding the events in the storage room or elsewhere with the best possible evidence.[1] Instead, the issue in cases where the claimant's actions are contested is whether, after considering all relevant evidence, weighing it appropriately, and drawing reasonable inferences, the referee concludes it is more likely than not that the claimant committed the acts he was accused of. If the employer's testimony is believed, then certain inferences would reasonably be drawn from it that are contrary to the claimant's version of events. Such inferences must be considered in making findings in this case.

In sum, we reject the referee's conclusion that the employer's evidence was not sufficient in this case, because the decision contains no analysis of the claimant's alleged admissions to the witnesses, or the subordinate's statements to the general manager right after the event. Because the issue of misconduct in this case ultimately turns on disputed facts, which we cannot decide in our appellate capacity, we remand rather than reverse, and instruct the referee to render a decision that establishes the evidence of the case has been evaluated in light of the principles discussed in this order.

Legal Issues Regarding Violation of the Sexual Harassment Policy

In the decision, the referee found that "the claimant was not aware that the server was uncomfortable" and concluded that "the claimant's testimony shows that he did not harass the server or act inappropriately towards the subordinate." Even if the Commission accepted the referee's findings, the decision reflects that the referee failed to evaluate the claimant's conduct appropriately in light of the employer's policy.

The claimant's intentions and understanding of the subordinate's reactions, although relevant, are not dispositive here. As we have previously held, harassment must be viewed through the eyes of the recipient, not the perpetrator. "The law is clear that harassment is not measured primarily by the intent of the actor, but by the individuals exposed to the conduct and actions will be considered harassing if they are both subjectively perceived by the recipient as such, and would also be deemed as such by a reasonable person." *See* R.A.A.C. Order No. 13-08300 (February 6, 2014) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)); *see also* R.A.A.C. Order No. 14-00676 (September 25, 2014). Since actions of the kind the claimant admitted to (and even more so those he was accused of) can be perceived as harassing in some circumstances and not in others, depending on

[1] We do not suggest that the failure of a party to bring what might appear to be the best possible evidence can never be a consideration in weighing evidence, but the referee should also consider whether a party has provided a reasonable explanation for not providing the most direct evidence, such as the employer did in this case.

whether they are "welcomed" by the recipient, the employer in this case adopted policy language specifically intended to discourage such behavior: "Each associate must exercise his or her own good judgment to avoid engaging in conduct that may be perceived by others as harassment." The claimant in this case was a married man who was the supervisor of the individual at issue. *Compare Sears, Roebuck & Co., v. Florida Unemployment Appeals Commission*, 463 So. 2d 465 (2d DCA 1985) (disqualifying married male claimant who admitted to kissing a minor female subordinate on the cheek). Under the circumstances of this case, the claimant's intentions are less important than his behavior, and how it might have been perceived by the recipient.

We note that the referee failed to authenticate and mark into evidence the employer's policy documents. Accordingly, on remand the referee is directed to conduct a supplemental hearing to permit the parties to discuss the policy, to provide evidence as to whether the claimant received it or otherwise had access to it, and discuss what training the claimant had regarding the policy (if any), and any other matter the referee deems appropriate.

Based on the foregoing, we remand the case for additional consideration of the evidence and analysis of the employer's policy in the light of the discussion herein. After the supplemental hearing, the referee shall prepare a new decision with a credibility determination as necessary, and specific findings and conclusions regarding whether the claimant violated the employer's policy, and if so, whether any of the statutory defenses are applicable.

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 4/24/2015, 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

*34065103 *

Docket No.0023 6331 93-02 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.

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), (13); 443.036(29), 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 was an assistant general manager of the hotel restaurant and he began work for the employer on February 27, 2003. The employer's policy was zero tolerance for sexual harassment at the workplace. The claimant was aware of the employer's policies. The employer considered the claimant to be in a leadership position. On July 13, 2014, the claimant and the server, who reported to the claimant and who was subordinate to the claimant in the chain of command, discussed losing weight. The claimant and the server walked down a hallway to the gym to weigh themselves. While walking to the gym the claimant and the server entered the storage room. The claimant occasionally used the storage room for meetings. The claimant asked the server about her weight loss; the server showed the claimant pictures of herself. The claimant hugged the server and kissed her on the cheek as an act of friendship as he had done in the past. The claimant was not aware the server was uncomfortable. The claimant invited the server to dinner, the claimant did not ask the server to begin a personal relationship. On July 13, 2014, the general manager observed that the server was upset and crying. The claimant reported the incident and provided a written statement about the incident to the general manager. The general manager reported to the human resources manager. The human resources manager investigated the report and reviewed surveillance video of the hallway and interviewed the claimant and the server. On July 15, 2014, the server, reported to the human resources manager that the claimant pulled her into the storage room and while there pulled on her shirt, attempted to kiss her and hug her, and asked to see her

breasts and other body parts; and asked her to begin a personal relationship. The server told the human resources manager she left the storage room and went to the gym with the claimant, at which time, she came to realize the incident made her uncomfortable and then went to the restroom and called the other supervisor to intervene. The human resources manager believed the video showed the claimant and server walking down the hallway towards the gym, and at the storage room door, the claimant takes the server's arm and guides her to the storage room. The human resources manager observed seventeen minutes elapsed of no activity until the server and the claimant left the storage room and proceeded to the gym, the server appeared to the human resources manager to be disheveled and had a different demeanor. While at the gym, the claimant and the server appeared to the human resources manager to act normally. The human resources manager believed the video next showed the server enter the restroom while the claimant lingered outside the restroom until another supervisor came into view at the restroom when the claimant then left. On July 15, 2014, the claimant told the human resources manager he and the co-worker went in the storage room and he hugged the server and kissed her on the cheek as a gesture of friendship. The claimant told the human resources manager he was not aware that the server was uncomfortable. On July 16, 2014, the human resources manager and the general manager discharged the claimant for sexual harassment.

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 the employer discharged the claimant. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986). The testimony shows the claimant was discharged based on a report of sexual harassment of a subordinate.

The employer’s witnesses were the human resources manager and the general manager. The managers’ testimony relied on the report and statement they received from the server, who did not appear for the hearing to provide testimony. The managers’ testimony is hearsay. 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 s. 120.57(1)(c), 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. The claimant's testimony shows he did not harass the server or act inappropriately towards the subordinate. Absent sufficient competent testimony to the contrary, the referee accepts the claimant's testimony. In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. The employer did not meet the burden of proof. The behavior of the claimant, as described by the claimant, did not meet the statutory definition of misconduct. The claimant is thus not subject to disqualification.

The law provides that benefits will not be charged to the employment record of a contributory employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer, was discharged for misconduct connected with the work, refused without good cause an offer of suitable work from the employer, was discharged from work for violating any criminal law punishable by imprisonment or for any dishonest act in connection with the work, refused an offer of suitable work because of the distance to the employment due to a change of residence by the claimant, became separated as a direct result of a natural disaster declared pursuant to the Disaster

Relief Act of 1974 and the Disaster Relief and Emergency Assistance Amendments of 1988, or was discharged for unsatisfactory performance during an initial probationary period that did not exceed ninety calendar days and of which the claimant was informed during the first seven days of work. Since the employer discharged the claimant for reasons other than misconduct, the employer's account will be charged.

Decision: AFFIRMED. The claimant is qualified for benefits. The employer's account will be charged.

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/mailed to the last known address of each interested party on October 22, 2014.

EDWIN LOSCHI
Appeals Referee

By: Lisa Rell

LISA RELL, 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 distribution/mailed 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 distribución/fecha de envìo 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 distribisyon/postaj. Si 20yèm 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.
