STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-00331

vs.

Referee Decision No. 0022320730-04U

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 voluntarily left work without good cause within the meaning of Section 443.101(1), Florida Statutes.

The referee's findings of fact state as follows:

> The claimant worked for the employer, a childcare facility, as a fulltime Spanish/art teacher, from August 20, 2012. On December 13, 2013, the claimant resigned her position in order to relocate to Puerto Rico to provide care for her sister [who] had been diagnosed with cancer for the second time in Puerto Rico. A transfer was not an option for the claimant because the only other location was located more than three hours from her sister's residence. The claimant was the only person available to provide care for her sister. The claimant explained her sister's medical condition to the employer. The claimant's situation was

> considered to be a qualifying (FMLA) reason. The employer did not notify [her] that she was eligible to take Family [and] Medical Leave (FMLA). The claimant resigned her position effective [December 13,], 2013, in order to provide care for her sister who became seriously ill in Puerto Rico.

Based on these findings, the referee held the claimant voluntarily left work with good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes that while the referee properly and carefully complied with the remand order by the Commission, additional record development is necessary to determine the ultimate application of the Family and Medical Leave Act ("FMLA") to this case. Therefore, it is remanded for a limited supplemental hearing and additional fact-finding, and a new decision consistent with this order.

The referee's finding that "The claimant's situation was considered to be a qualifying (FMLA) reason" is not completely accurate given the record evidence. Although the employer testified that the claimant's situation would have been covered under their FMLA leave policy, it does not necessarily follow that the claimant's leave was "FMLA qualifying." Employer leave policies can be, and often are, broader than required by the FMLA. However, an employer does not violate the FMLA if it fails to grant leave under its policy where such leave is not required by the FMLA. *Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F. Supp. 2d 965, 971-72 (W.D. Tenn. 1999). The claimant sought leave to care for her sister. Siblings are not specifically included under the family care provisions of the FMLA. The FMLA states:

> An eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> * * * * *
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> * * * * *

29 U.S.C. §2612(a)(1)(C). The claimant's need to care for her sister does not automatically fall within the protections of the FMLA. However, because the definitions of "parent," "son," and "daughter" are not limited to biological family members, but also apply in situations where a family member has *in loco parentis*

status, it is possible, if the claimant had an *in loco parentis* status as to her sister, that the claimant's relationship would have been within the scope of the FMLA family care provision. *See, e.g.*, U.S. Department of Labor Opinion Letter FMLA2003-2 (June 30, 2003).[1] However, as we discuss below, it will not be necessary for the referee to further develop the record or make findings on this issue, because the employer's responsibility to determine whether the claimant was eligible for FMLA (or other employer leave) in this instance was not triggered. Thus, the referee's finding that the employer "did not notify [the claimant] that she was eligible to take [FMLA]" leave, while supported by the facts, is not material to the outcome of the case.

The responsibilities of both employees and employers under the FMLA are well-established and highly regimented. A covered employer has four different notice responsibilities that apply at different points in the leave process. *See generally* 29 C.F.R. §825.300. Relevant to this case are the initial or "general" notice duties.

A covered employer must post an approved[2] notice of FMLA rights in a "conspicuous place" in each worksite. 29 U.S.C. §2619; 29 C.F.R. §825.300(a)(1). Typically, these are posted on a bulletin board in an employee break room, lounge, or other common area that most employees will routinely visit. Additionally, if the employer has eligible employees, the employer must include a compliant notice of rights in an employee handbook that is distributed, if it has one, or otherwise provide a copy of the general notice to each employee. 29 C.F.R. §825.300(a)(3).[3] Of possible significance in this case, "Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate." 29 C.F.R. §825.300(a)(4). Collectively, these responsibilities constitute the general notice requirement. Once the employer has complied with the general notice requirement, and has provided any explanation regarding these rights an employee may request, the employer has met its general notice obligation.

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[1] Available at http://www.dol.gov/whd/opinion/FMLA/2003_06_30_2_FMLA.pdf.

[2] The Department of Labor has prepared standard language. *See* http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol3/pdf/CFR-2011-title29-vol3-part825-appC.pdf (last visited July 23, 2015). Most employers post commercially available posters containing numerous such notifications of rights, which incorporate approved language. *See, e.g.,* https://www.laborlawcenter.com/documents/CA50_sample.pdf (last visited July 23, 2015).

[3] The employer may use electronic means for the required posting and for providing the handbook or general notice to employees.

The next obligation falls on the employee, not the employer. *Assuming* the employer has complied with its general notice obligation [*see* 29 C.F.R. §825.304(a)], the employee must advise the employer of a desire or need for leave. *See* 29 C.F.R. §825.302 (foreseeable leave) and 29 C.F.R. §825.303 (unforeseeable leave). There are no magic words required, and the employee need not mention FMLA leave for the first instance of such leave. 29 C.F.R. §825.302(c); 29 C.F.R. §825.303(b). However, the employee must put the employer on notice that he or she is *requesting* leave. An employee's merely discussing a family situation without indicating that the claimant needs or wants some form of time off to address it will not suffice. *Sanders v. May Dep't Stores Co.*, 315 F.3d 940, 944-45 (8th Cir. 2003); *McGraw v. Sears, Roebuck & Co.*, 21 F. Supp. 2d 1017, 1022 (D. Minn. 1998). An employer may take the initiative to suggest or offer leave in that situation, but such an act is not required under the FMLA. The employer's next obligation, providing the "eligibility" notice, is triggered only when a request is made sufficient for the employer to learn that potentially FMLA-qualifying leave has been requested. "When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days . . . ." 29 C.F.R. §825.300(b)(1). *See, e.g., Cruz v. Publix Super Mkts., Inc.*, 428 F.3d 1379, 1383 (11th Cir. 2005) ("Once an employee gives sufficient notice to her employer that potentially FMLA-qualifying leave is needed, the employer must then ascertain whether the employee's absence actually qualifies for FMLA protection").

The evidence in this case reflected that the employer included notice of FMLA rights in its employee handbook and online. The record also indicated that the claimant never made it known to the employer that she wanted time off to attend to her sister. Thus, *assuming* the employer properly complied with its general notice obligations, the claimant failed to trigger any further responsibility of the employer.

In this case, however, the record needs further development to determine whether the employer fully complied with its general notice obligations. If the employer failed to post the required notice or, if so required, to provide the notice in Spanish, *and* if this failure or failures contributed to the claimant's failure to request leave, the claimant's resignation was with good cause attributable to the employer. Otherwise, the claimant's resignation was not legally attributable to the employer. Accordingly, on remand, the referee must inquire as to whether the employer posted the statutory notice, either physically or electronically, and make a finding as to this issue.[4] Given the employer's testimony as to the posting of notice online, the referee

[4] Federal surveys reflect a high compliance percentage for this requirement. *See* Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, Appendix A-2, ("The 2000 Survey Report"), Table A2-6.1, available at www.dol.gov/whd/fmla/APPX-A-2-TABLES.htm (last visited July 16, 2015).

must inquire where and how this notice was accessible to the employees, and whether this was the general "poster" notice, a specific set of employer policies, or both. Also, given the claimant's testimony that, if she read the employee handbook provision she didn't understand it because her English is not good, the referee should determine whether a "significant portion" of the employer's workforce at the relevant location is not literate in English. If so, the referee should determine whether the employer provided a Spanish version of the notice available to the claimant directly or electronically. If the employer advised the claimant that a Spanish language version was available and the claimant did not request it, the employer has met any obligation. If the employer did not comply with these requirements, the referee should then make a finding as to whether there was a causal connection between the employer's non-compliance and the claimant's failure to request leave.

We also hold that because the claimant did not request leave, she did not establish that she quit with good cause due to illness under the rationale of R.A.A.C. Order No. 14-05679 (March 24, 2015). Thus, whether or not she is disqualified from receipt of benefits will depend upon whether her failure to request leave is attributable to the employer as outlined above. On remand, the referee shall conduct a supplemental hearing to address the general notice issues and enter a decision with appropriate findings and conclusions.

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
7/24/2015 ,
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

*36538390 *

Docket No.0022 3207 30-04 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES Claimant

Employer

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 worked for the employer, a childcare facility, as a fulltime Spanish/art teacher, from August 20, 2012. On December 13, 2013, the claimant resigned her position in order to relocate to Puerto Rico to provide care for her sister that had been diagnosed with cancer for the second time in Puerto Rico. A transfer was not an option for the claimant because the only other location was located more than three hours from her sister's residence. The claimant was the only person available to provide care for her sister. The claimant explained her sister's medical condition to the employer. The claimant's situation was considered to be a qualifying (FMLA) reason. The employer did not notify that she was eligible to take Family Medical Leave (FMLA). The claimant resigned her position effective November 28, 2013, in order to provide care for her sister who became seriously ill in Puerto Rico.

Conclusions 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).

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:

1. The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and

2. 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.

Effective January 19, 2009, 29 C.F.R. S825.300a(b)(1) provides:

When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA qualifying reason, the employer must notify the employee of the employee's ability to take FMLA leave with five business days, absent extenuating circumstances (emphasis added).

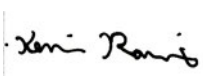
The record and evidence in this case establishes that the claimant resigned her position effective November 28, 2013, in order to provide care for her sister who became seriously ill in Puerto Rico. It has been shown that an able bodied qualified worker as applied to the average man or woman, would give up his/her employment under the same circumstances. Further, the claimant provided first hand testimony that the employer failed to notify the claimant of her eligibility to take FMLA leave. Thus, it is concluded that the claimant voluntarily left work with good cause attributable to the employing unit within the meaning of Florida reemployment assistance law.

Decision: That portion of the Notice of Disqualification made by the claims adjudicator dated April 24, 2014, holding the claimant disqualified from the receipt of reemployment assistance benefits from December 8, 2013, and until she earns $3,825, because she voluntarily left work without good cause attributable to the employer, is **REVERSED**. That portion of the Notice of Disqualification made by the claims adjudicator dated April 24, 2014, holding benefits paid on this claim will not be charged to the employer, is **REVERSED**. The employer's account is 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 Enero 2, 2015.

JEAN PENA
Appeals Referee

By: 

KEVIN RAMIREZ, 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.
