STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 15-01911

vs.

Referee Decision No. 0022303926-05U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

On appeal to the Commission, the appellant requests another hearing to present additional evidence. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case to the referee. Upon review of the hearing record and the arguments on appeal, it has not been shown that the appellant is entitled to an additional hearing. The request is, therefore, denied.

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 basis exists to reopen or remand the case for further proceedings. The Commission 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.

As noted in the referee's findings of fact, the claimant worked as an electrician for the employer. During the hearing before the appeals referee and on appeal to the Commission, the claimant alleged that he quit his employment because he felt the employer treated him unfairly and overlooked him for promotions based on his ethnicity. It is undisputed that the claimant tendered his resignation because of this belief.

Both the courts and the Commission have previously held that an individual may have good cause to quit attributable to the employer if he or she is the victim of illegal discrimination. *See, e.g., Fowler v. Unemployment Appeals Commission*, 670 So. 2d 1202 (Fla. 4th DCA 2002); R.A.A.C. Order No. 14-02560 (December 30, 2014). However, a sincere belief that one is a victim of such discrimination is not sufficient to establish good cause. R.A.A.C. Order No. 14-02560 at 5. Instead, the claimant must establish by competent, substantial evidence that he or she in fact suffered illegal discrimination with respect to a term or condition of employment. *Id.* at 4.

Because the claimant offered no direct evidence of discrimination, we analyze his contentions, and the referee's findings and conclusions regarding them, under the circumstantial evidence paradigm established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. *See Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000) (en banc); *Smith v. Brevard Optometry Assocs.*, 136 So. 3d 761, 762 n.1 (Fla. 5th DCA 2014) (applying *McDonnell Douglas* framework to circumstantial evidence cases under the Florida Civil Rights Act). Since the existence of discriminatory motive is an issue of fact once fully tried, we can only reverse if we conclude that the claimant provided competent, substantial evidence supporting his claim under the *McDonnell Douglas* requirements, and that the employer did not meet its burden of production of evidence.

Assuming that the claimant established a *prima facie* case of discrimination as required by *McDonnell Douglas* – which is far from certain on this record - the employer need only have articulated legitimate, non-discriminatory justifications to meet its burden of production of evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). The employer did so. The claimant then bore the burden of proving pretext. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993) (citing *Burdine*, 450 U.S. at 255-56). However, the record is devoid of any competent evidence that the employer's explanations were pretext for discrimination. Moreover, the referee's findings reflect that the referee accepted the employer's explanations as more credible. Since they are supported by competent, substantial evidence, they must be accepted.

Even assuming the claimant in this case presented a series of events that might make some individuals consider relinquishing their employment, the claimant did not properly inform his employer of the issues that he felt necessitated his resignation. The claimant testified that he quit before offering the employer an opportunity to address his concerns. It is well established that "whenever feasible, an individual is expected to expend reasonable efforts to preserve his employment." *Glenn v. Unemployment Appeals Commission*, 516 So. 2d 88, 89 (Fla. 3d DCA 1987). The standard has been applied in numerous cases where an employee failed to utilize an internal grievance or other procedure to resolve the issues affecting his or her employment, or to attempt to resolve workplace concerns by further discussion with his employer. *Morales v. Unemployment Appeals Commission*, 43 So. 3d 157, 158 (Fla. 3d DCA 2010); *Lawnco Servs., Inc. v. Unemployment Appeals Commission*, 946 So. 2d 586 (Fla. 4th DCA 2006; *Klesh v. Unemployment Appeals Commission*, 441 So. 2d 1126 (Fla. 1st DCA 1983). However, a claimant is not required to exhaust a procedure in circumstances where it would be futile to do so. *Schenk v. Unemployment Appeals Commission*, 868 So. 2d 1239, 1241 (Fla. 4th DCA 2004); *Grossman v. Jewish Community Center*, 704 So. 2d 714, 717 (Fla. 4th DCA 1998).

Florida courts have uniformly held, in harassment cases, that an employee must give the employer an opportunity to address harassment where such efforts would not be futile. *See* R.A.A.C. Order No. 13-05313 (February 18, 2014) at 4-5 (analyzing cases). There is no reason not to apply the same general rule to cases involving perceived discrimination. Thus, the referee reached the correct conclusion on this issue. The claimant's failure to advise the employer of his reasons for quitting or to allow the employer to attempt to address his concerns was unreasonable. Consequently, the claimant has not demonstrated that the referee's decision disqualifying him from benefits should be reversed.

The Reemployment Assistance Appeals Commission has received the request of the claimant's representative for the approval of a fee for work performed in conjunction with the appeal to the Commission, as required by Florida Statutes Section 443.041(2)(a). In examining the reasonableness of the fee, the Commission is cognizant that: (1) in the event a claimant prevails at the Commission level, the law contains no provision for the award of a representative's fees to the claimant's representative, by either the opposing party or the State (i.e., a claimant must pay his or her own representative's fee); and (2) the amount of reemployment assistance secured by a claimant may be very small. The legislature specifically gave referees (with respect to the initial appeal) and the Commission (with respect to the higher-level review) the power to review and approve a representative's fees due to a concern that claimants could end up spending more on fees than they could reasonably expect to receive in reemployment assistance.

Upon consideration of the complexity of the issues involved, the services actually rendered to the claimant, and the factors noted above, the Commission approves a fee of $200.

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

7/13/2015 ,

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: Kady Ross
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*41077701 *

Docket No.0022 3039 26-05 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.

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), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Findings of Fact: The claimant worked as a Electrician for the from October 12, 2000, to September 20, 2013. The claimant voluntarily quit his job effective September 20, 2013. The claimant resigned due to feeling that he was being treated unfairly and overlooked for promotions on the basis of his ethnicity. One year prior to his resignation, the claimant applied for a

promotion. The claimant did not get the position. The position had been eliminated after it was determined that the responsibilities could be met within two other separate positions. The reason that the claimant did not get the promotion was not due to being treated unfairly.

Additionally, the claimant felt that he was being overlooked when it came to job responsibilities and decisions to be made. The claimant believed that decisions that he may have once been responsible for, were being made by others. In the summer of 2012, the had thousands of dollars in insurance claims due to lightning strikes to equipment. The decisions made regarding these matters were made by a company that was certified in lightening prevention. The employer was required to hire the company to take care of these issues due to insurance purposes. The claimant was not overlooked by the employer in regards to job responsibilities and decision making.

Conclusions of Law: The law provides that a claimant who voluntarily left work without good cause as defined in the statute will be disqualified for benefits. "Good cause" includes only causes attributable to the employing unit or illness or disability of the claimant requiring separation from the work. However, a claimant who voluntarily left work to return immediately when called to work by a permanent employing unit that temporarily terminated the claimant's work within the previous 6 calendar months, or to relocate due to a military connected spouse's permanent change of station, activation, or unit deployment orders, is not subject to this disqualification.

The record shows that the claimant voluntarily quit his job. The burden of proof is on the claimant who voluntarily quit work to show by a preponderance of the evidence that quitting was with good cause. Uniweld Products, Inc., v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Good cause for voluntarily leaving a job is such cause as will reasonably impel the average, able bodied, qualified worker to give up employment. Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Testimony establishes that the claimant quit his job due to feeling that he was treated unfairly and was overlooked for promotions, job responsibilities, and decision making on the basis of his ethnicity. Testimony establishes that the employer did not treat the claimant unfairly, nor did the employer overlook the claimant in regards to promotions, job responsibilities and decision making. As such, the claimant has not met the burden of establishing that he quit with good cause attributable to the employer. Thus, the claimant is not qualified for the receipt of benefits.

Decision: The redetermination dated February 26, 2015, is **REVERSED**. The claimant is not qualified to receive benefits for the period beginning September 15, 2013, and until he has earned $4,675.00.

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 April 16, 2015.

S. Clifford
Appeals Referee

By: Adrienne Kidder

Adrienne Kidder, 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.
