STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

vs.

R.A.A.C. Order No. 15-02700
Referee Decision No. 0025105636-02U

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.

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 referee's pertinent findings of fact recite as follows:

> The claimant worked for the employer from November 18, 2013 until January 28, 2015, as a wellness coordinator. At the time of hire, the claimant was told that she would be hired as a salaried worker. The claimant was only [required] to clock in for work once a day and did not have to clock out for lunch breaks. For traveling to other locations, the claimant was able to clock in once and travel to the location while getting paid mileage. On April 14, 2014, the employer changed the claimant's type of income from salary to hourly. The claimant was not given the opportunity to stay employed at her position as a salaried worker. The claimant was required to clock out for lunch every day and could not clock into a location until the claimant actually was present [at the] location, which may have been a several hour drive from the claimant's

> original location. Up until January 28, 2015, the claimant repeatedly informed her supervisor and the human resources department of her issue with the change from salary to hourly. However, the employer indicated that the claimant would be required to work with the employer as an hourly employee because there was no other option. On January 28, 2015, the claimant quit work from the employer. On February 13, 2015, the Department disqualified the claimant due to a quit not attributable to the employer.

Based upon the above 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 the record was not sufficiently developed; consequently, the case must be remanded.

A review of the record reflects the evidence was not sufficiently developed regarding the events leading to the claimant's job separation and, as a result, the Commission is unable to determine whether the claimant was separated under nondisqualifying circumstances. Pursuant to Florida Administrative Code Rule 73B-20.024(3), the appeals referee "shall examine or cross-examine any witness as is necessary to properly develop the record." The referee is advised that the hearing record in this case must include background information from each party that includes, at a minimum, the claimant's dates of employment; job title; full-time or part-time status; scheduled days and hours of work; the claimant's supervisor's name and title; and an affirmative statement from each party regarding whether the claimant was discharged, quit the job, or was laid off for lack of work. On remand, the referee is directed to ensure the hearing record contains the above information.

The referee's decision held that the claimant quit with good cause attributable to the employer due to a change in her pay structure that allegedly reduced her wages. The record, however, was not developed regarding the claimant's agreement of hire in November 2013, to include the amount of the claimant's salary at hire, the additional amount she received for travel mileage, or the number of hours she was required to work. The record also does not reflect whether there was any change in the claimant's net income after the change was made to move her from salaried to hourly employee. No specific evidence was offered by either party regarding the claimant's salaried or hourly pay; rather the evidence offered by the parties was conclusory in nature, consisting of statements that after the change was made, the claimant's wages were reduced, as stated by the claimant, or remained the same, as stated by the employer. To compound the problem, the referee failed to ask the

parties what the claimant's specific wages were before or after the change. The record also reflects that the claimant was absent from work for medical reasons during her employment, but the record is not clear regarding whether the claimant was paid for the days she was absent, either before or after the change was made. The referee failed to inquire as to whether the claimant had paid time off in the form of paid leave or had paid sick days that could be used to cover her absence, and whether the claimant's absences resulted in reduction of wages because she was not at work. These are important factors that aid in determining whether a reduction in wages was attributable to the employer. As the record now stands, there is insufficient evidence to allow the Commission to determine whether the claimant's wages were reduced because of the change in status, reduced for other reasons, or reduced at all.

A reduction in hours or salary may constitute good cause attributable to the employer for quitting. In *Diaz v. Unemployment Appeals Commission*, 31 So. 3d 271 (Fla. 5th DCA 2010), the court quoted with approval the opinion in *Manning v. Florida Unemployment Appeals Commission*, 787 So. 2d 954 (Fla. 4th DCA 2001):

> In *Manning*, the referee found that the employee quit her job because her hours had dropped to only six hours per day. The referee determined that because the employer did not guarantee a specific number of hours at the time of hire, the employee was not eligible for unemployment benefits. Our sister court noted, however, that the employer's right to change the conditions of employment is irrelevant in determining the employee's entitlement to unemployment compensation.

As noted above, an employer's right to change the conditions of employment does not necessarily obviate the claimant's entitlement to reemployment assistance benefits. However, we reject any conclusion that a mere change from salaried to hourly status constitutes good cause attributable to the employer. Employers may, for example, change an employee's status from salaried to hourly because a review of the employee's duties suggest that a salaried, exempt-from-overtime status is no longer legally tenable under the Fair Labor Standards Act. We will not interpret reemployment assistance law to require an employer to maintain an agreement of hire that may not be compliant with federal law. This does not mean that the reason for the change is immaterial, and it is a factor that the referee should inquire into and make findings on. However, the primary inquiry must be into specific evidence as to whether there was a material change in her income, benefits, etc.

Section 443.101(1)(a), Florida Statutes, provides that an individual shall be disqualified from receipt of benefits for voluntarily leaving work without good cause attributable to the employing unit. Under the statute, "the term 'good cause' includes only that cause attributable to the employing unit which would compel a reasonable employee to cease working." §443.101(1)(a)1., Fla. Stat. *See also Uniweld Products, Inc. v. Industrial Relations Commission*, 277 So. 2d 827, 829 (Fla. 4th DCA 1973) (holding good cause is such cause as "would reasonably impel the average able-bodied qualified worker to give up his or her employment"). Applying this test also requires more than just a determination of a unilateral and material change in the conditions of employment; the referee must also consider the specific issue of whether the change is sufficient to "compel a reasonable employee to cease working." Thus, after developing the record and making findings as to how the change impacted the claimant, the referee must then consider all the circumstances and make this ultimate determination.

As noted above, the record lacks evidence regarding the claimant's customary work schedule and the number of hours she worked each week for the months prior to and after the change of her payroll status. For this reason, the parties are advised to submit to the referee for the hearing any pay records they may have regarding the claimant's wages during her employment before and after the change in her payroll status and to provide copies to the opposing party listed on the hearing notice prior to the next scheduled hearing.

Additionally, the record reflects that the claimant alleged that she also quit due to harassment; however, the referee's decision mentions nothing about the claimant's contentions.

On remand, the referee is directed to convene a supplemental hearing, develop the record as outlined above, authenticate and enter all properly delivered relevant documents into evidence, and allow the parties to offer additional testimony, present witnesses, and question one another. A new decision that features specific findings of fact as well as an appropriate conflict resolution with respect to all disputed material facts must then be issued.

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 9/30/2015, 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: Ebony Porter
Deputy Clerk

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

*41941203 *

Docket No.0025 1056 36-02 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.

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 for the employer from November 18, 2013 until January 28, 2015 as a wellness coordinator. At the time of hire, the claimant was told that she would be hired as a salaried worker. The claimant was only require to clock in for work

once a day and did not have to clock out for lunch breaks. For traveling to other locations, the claimant was able to clock in once and travel to the location while getting paid mileage. On April 14, 2014, the employer changed the claimant's type of income from salary to hourly. The claimant was not given the opportunity to stay employed at her position as a salaried worker. The claimant was required to clock out for lunch every day and could not clock into a location until the claimant actually was present for location, which may have been a several hour drive from the claimant's original location. Up until January 28, 2015, the claimant repeatedly informed her supervisor and the human resources department of her issue with the change from salary to hourly. However, the employer indicated that the claimant would be required to work with the employer as an hourly employee because there was no other option. On January 28, 2015, the claimant quit work from the employer. On February 13, 2015, the Department disqualified the claimant due to a quit not attributable to the employer.

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). Moreover, an employee with good cause to leave employment may be disqualified if reasonable effort to preserve the employment was not expended. See Glenn v. Florida Unemployment Appeals Commission, 516 So.2d 88 (Fla. 3d DCA 1987). See also Lawnco Services, Inc. v. Unemployment Appeals Commission, 946 So.2d 586 (Fla. 4th DCA 2006); Tittsworth v. Unemployment Appeals Commission, 920 So.2d 139 (Fla. 4th DCA 2006).

The record reflects that the claimant quit due to a change in her type of income. Generally, a material, unilateral change in a worker's hours constitutes good cause for an employee to leave that employment. In Manning v. Florida Unemployment Appeals Commission, 787 So.2d 954 (Fla. 4th DCA 2001), the court stated, "It does not matter that the employer was entitled to change the employee's hours under the employment agreement. The employer's right to change the conditions of employment is relevant to whether a breach of the employment contract occurred, but is not relevant to the employee's entitlement to unemployment compensation." Here, the employer unilaterally changed the claimant's type of income from salary to hourly. Florida courts have held that that a party asserting modification of an employment at will contract must prove (1) notice of the change and (2) acceptance of the change. There is no presumption that an employee acquiesces in a pay reduction simply by remaining on the job. See Recio v. Kenty Security Services, Inc. 727 So.2d 320 (Fla. 3rd DCA 1999). Although the claimant signed the paperwork, the fact that the claimant had no opportunity but to work as an hourly employee if the claimant desired to continue working for the employer shows that the claimant did not truly consent to this change in type of income. Furthermore, the continued working on the job after April 2014 is not an indication that the claimant acquiesced to the changes; instead, both parties indicated that the claimant continuously disagreed with the change in the circumstances of the claimant's employment , Therefore, the employer unilaterally changed the terms of the claimant's type of pay and even number of hours worked. Specifically, the employer admitted that, before the change in April 2014, the claimant was already able to obtain mileage due to distance travelled. However, before the change in April 2014, the claimant was allowed to clock in once from one location and drive to another location without clocking out and therefore getting paid for that period of time. After the change to hourly in April 2014, the claimant was required to clock out when leaving location and not being able to clock into a new location until the claimant reached one of the employer's other locations, which could have resulted in a two hour drive during which the claimant was not paid by the employer. Thus, the fact that the claimant was paid for mileage which altered only by the standard set by the Internal Revenue Service is not sufficient alone to show that the claimant was adequately compensated in lieu of hours worked because the claimant was already given mileage before the change to hourly in April 2014. By significantly reducing the claimant's hours of work and, thus, her earnings, the employer materially breached the claimant's terms and conditions of employment and provided her with good cause within the meaning of the unemployment law to leave her employment. See LeCroy v. Unemployment Appeals Commission, 654 So.2d 1054 (Fla. 1st DCA 1995) (a five percent reduction in pay was substantial enough to compel the average reasonable worker to voluntarily quit a job). Thus stated, the claimant had good cause attributable to the employer for quitting.

Both parties indicated that the claimant "continuously" spoke to the employer about her change from salaried to hourly. The record reflects that the claimant spoke with her supervisor and to a human resources department individual who informed the claimant that the claimant would be required to work as an hourly employee and would not be able to change back to salary status. Thus stated, the claimant exhausted all reasonable steps prior to quitting. Therefore, there is no disqualification under Glenn above.

During the hearing, the claimant also alluded that she quit due to issues with her leave under the Family Medical Leave Act as well as issues with her short term disability. However, since the record reflects that the claimant was given leave under the Family Medical Leave Act and the employer complied by providing all information regarding her short term disability, there remains nothing in the record that would have reasonably impelled the average able bodied worker to give up his or her employment for her leave and short term disability. Accordingly, there is no quit with good cause for issues with her leave and short term disability.

At the hearing, the referee was presented with conflicting testimony regarding material issues of fact. The referee alone is charged with

resolving these conflicts. The appeals referee considered the factors set forth by the Unemployment Appeals Commission in Order No. 03 10946. Based on consideration of the following factors, (1) the witness' opportunity and capacity to observe the event or act in question; (2) any prior inconsistent statement by the witness; (3) a witness' bias or lack of bias; (4) the contradiction of the witness' version of events by other evidence or its consistency with other evidence; (5) the inherent improbability of the witness' version of events; and (6) the witness' demeanor, the referee accepts the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

Decision: The determination dated February 13, 2015, disqualifying the claimant, is REVERSED. If otherwise eligible, the claimant is qualified for the receipt of benefits for the weeks beginning January 25, 2015.

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 May 13, 2015.

R. PAHOTA
Appeals Referee

By: Kristi Snyder

Kristi Snyder, 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.
