STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-02942

vs.

Referee Decision No. 0025762310-02U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

I.
Procedural Background

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. The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record.

On appeal, the employer presents documents that were available prior to the appeals hearing, but that were not provided to the referee or the claimant. The notice of hearing contains a bolded disclaimer notifying the parties that, in order to have any documents considered that were not included with the notice of hearing, they must provide the documents to the referee and opposing party 24 hours prior to the appeals hearing, even if previously submitted to the Department. *See* Fla. Admin. Code R. 73B-20.014(3). In this case, the notice of hearing included a copy of the determination disqualifying the claimant from benefits, the claimant's appeal of that determination, a charge of discrimination, the claimant's letter of resignation (which references the charge and states it was enclosed with the resignation letter), and the claimant's response to the adjudicator's fact-finding questionnaire. Florida

Administrative Code Rule 73B-22.005 provides that the Commission can consider *newly* discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The employer's belated submission does not meet the requirements of the rule.[1]

The issues before the Commission are whether the claimant voluntarily left work with good cause within the meaning of Section 443.101(1), Florida Statutes, and if so, whether benefits are chargeable to the employer's account.

II.
The Decision Below

The referee made the following findings of fact:

> The claimant worked full-time as a server for a restaurant beginning on November 6, 2011. The restaurant was owned by a chef and the chef's [fiancée] was co-owner. The chef's nephew was the assistant manager. The chef made comments or asked questions pertaining to sex or parts of the anatomy throughout the claimant's employment. The claimant was the only female server.
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> On one occasion[,] the chef queried the claimant as to why she phoned her boyfriend before she left work. After the claimant answered him the chef said to the claimant that if he were her boyfriend he would be getting new "pussy" every night. On another occasion during a party, the chef told the claimant that a guest was an idiot because he would never get another hand job let alone another "blow job" after getting engaged. The chef often asked his female employees if their vaginas were fine or if they were bleeding. On another occasion[,] the chef was looking through a magazine with women in swimsuits and as he turned each page he said, "Fuck," repetitively.

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[1] The employer attempts to impeach the claimant's credibility by including a copy of the written suspension document, which was not previously provided, and by referencing a statement the claimant made to the adjudicator, which was included with the notice of hearing. The adjudicative question to which the claimant was responding asked "What was stated in the warning?" and the claimant's response appears to paraphrase the language within the suspension document, which was the sole written warning provided to the claimant. The claimant's response does not constitute an admission that she had received the prior warnings referenced within the suspension document or constitute an admission that she engaged in any of the charged acts.

> The chef made comments about women and sex in the presence of the male staff members and the manager. The latter would respond with "cheese and rice" in lieu of Jesus Christ. No one confronted the chef or asked him to stop. The claimant did not discuss the chef's utterances with his [fiancée] at any time.
>
> On February 7, 2015, the chef placed a dish on the line for the claimant to sample. He asked the claimant if she was going to eat it or masturbate. The claimant expressed that she did not like the comment and that he should not speak to her in that manner. The claimant was suspended the following Tuesday for an allegation of customer complaints.
>
> The claimant submitted a letter of resignation on March 10, 2015, due to discrimination and sexual harassment. The claimant's intent was to work until March 21, 2015. On March 12, 2015, the co-owner presented the claimant with a severance check of $1,000 when the claimant arrived at work, releasing the claimant from her obligation to the employer.

In making her findings, the referee recognized that conflicting evidence was presented by the parties and resolved material evidentiary conflicts in favor of the claimant. She also reached the following conclusions of law:

> The record and evidence in this case show that the claimant was subjected to sexual harassment and comments by her employer the entire time she worked for him and resigned. 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).
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> In this case, testimony was not only taken from the claimant but manager, the chef and the [fiancée]. While the chef contended that he never uttered anything sexual in the workplace or had any contact with the claimant other than courtesy salutation, the manager's testimony confirms that sexual comments were made but the claimant did not complain about them. The testimony of the chef is rejected as inherently improbable. The court in *Meditek Therapy, Inc. v. Vat-Tech, Inc.*, 658 So.2d 644, 646 (Fla. 2d DCA 1995) points out that testimony that is not rebutted or contradicted in any manner, cannot be disregarded or rejected by

the trial court unless it was illegal, inherently improbable or unreasonable, contrary to natural law, opposed to common knowledge or contradictory within itself, *Florida East Coast Ry. v. Michini*, 139 So.2d 452 (Fla. 2d DCA 1962; accord *Roach v. CSX Transp., Inc.*, 598 So.2d 246 (Fla. 1st DCA 1992); *Fletcher v. Metro Dade Police Dep.t Law Enforcement Trust Fund*, 593 So.2d 266 (Fla. 3d DCA 1992); *Duncanson v. Service First, Inc.*, 157 So.2d 696 (Fla. 3d DCA 1963).

Brief consideration was given as to whether the claimant had an obligation to report her dislike of the chef's comments to the chef, to the manager, to the assistant manager, or to the co-owner about the chef making comments about the chances of the claimant's boyfriend relations with as many women as possible, whether the claimant or anyone else was menstruating, hearing the chef say the word "fuck" over and over again, or hearing the chef's opinion on oral sex and masturbation. No employee should ever have to notify anyone that these types of comments make them uncomfortable in the workplace. No employee should ever have to listen to their employer make those types of comments.

The record reflects that the claimant confronted the chef on February 7, 2015, when she could no longer tolerate his comments and subsequently, was suspended. The claimant decided to sever the relationship and was given $1,000 and released from employment early. While the employer's witness contended that the claimant was reprimanded for customer complaints, no warnings were submitted for the hearing officer to review or any policy the claimant allegedly violated to warrant such warnings. Without competent evidence regarding the terms of the policy and evidence that the claimant was aware of the specific provisions that the claimant was accused of violating, the claimant's actions have not been shown to constitute misconduct connected with work as that term is used in the reemployment assistance law.

> The claimant's testimony reflects that the working conditions were such that a reasonable person would have given up gainful employment to become unemployed. In this case, the record supports the conclusion that the claimant expended reasonable effort to preserve the claimant's employment. Accordingly, it is concluded that the claimant voluntarily left work with good cause attributable to the employer within the meaning of the law. The claimant is qualified for the receipt of benefits.

Based upon the above findings, the referee held the claimant voluntarily left work with good cause attributable to the employing unit, and held her not disqualified from benefits, and the employer's account charged. The employer filed a timely request for review.

III.
Issues on Appeal

Among the employer's contentions on appeal, we address three: (1) whether the referee's finding that the claimant quit due to "discrimination and sexual harassment" is consistent with the record evidence; (2) whether the referee correctly concluded that the claimant quit with good cause attributable to the employer; and (3) whether the claimant failed to take reasonable steps to preserve her employment.

IV.
Analysis

The Referee's Findings

In challenging the referee's findings, the employer presents a version of events that relies chiefly upon the evidence presented by the employer's witnesses. The referee, however, credited the evidence presented by the claimant. Credibility is a matter that falls solely within the purview of the hearing officer's discretion as finder of fact and the evidence cannot be reweighed on appeal. *See Grossman v. Jewish Community Center of Greater Ft. Lauderdale*, 704 So. 2d 714 (Fla. 4th DCA 1998); *Maynard v. Unemployment Appeals Commission*, 609 So. 2d 143, 145 (Fla. 4th DCA 1992); *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281

(Fla. 1st DCA 1985). Thus, in reviewing the case, we evaluate the findings to determine whether they are supported by competent, substantial evidence. We also review the evidence as to any issues not explicitly addressed in the referee's findings in light of the credibility determination. Except as noted below, the findings are properly supported and are adopted.

The referee's finding that the manager's testimony confirms that sexual comments were made is not supported by the record. Consequently, that finding is corrected to reflect that the manager denied that comments were made[2] and testified the claimant did not complain about comments.

Additionally, although the referee found that the claimant quit due to "discrimination and sexual harassment," the referee's findings do not fully capture the claimant's specific explanation. The claimant's testimony reflects that, after years of dealing with the chef owner's crass, vulgar and offensive sexual comments, when she finally complained to him about his comments, she was suspended within a week allegedly for customer complaints. No male server had ever been suspended during her tenure, and the claimant was the only female server. Accordingly, we modify the findings consistent with this credited testimony of the claimant.

Good Cause Attributable to the Employer

The applicable legal standard in reemployment assistance proceedings involving voluntary separations is whether the employee has "good 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").[3]

[2] When the manager was asked if she was aware of comments from the chef owner, the witness first gave a very specific answer, "Directly towards [the claimant], No." When the claimant's attorney clarified "Not directly towards [the claimant], any at all?" the witness then replied "No."

[3] There are other exceptions not applicable to this case.

On appeal, the employer argues that the conduct alleged by the claimant was not sufficiently severe or pervasive to constitute a hostile work environment as the term is defined within Title VII or the Florida Civil Rights Act (hereinafter "FCRA").[4] Our review suggests otherwise. The employer's argument is based on the incorrect premise that the specific instances recited in the findings were the only ones that occurred over the years of the claimant's employment.

The claimant testified the chef made many sexual and vulgar comments that she believed were inappropriate in the workplace and gave several examples. She testified the chef made comments about women's menses by questioning employees as to whether their vaginas were bleeding. The chef also made reference to getting "pussy," "hand jobs," and "blow jobs," and, although not noted within the referee's findings, made vulgar implications about the origins of a cream sauce. The credited evidence reflects that these comments were made in front of numerous individuals, including the manager, and the claimant further testified (albeit without specification) that the chef also disrespected the co-owner, who was his fiancée. In the final comment made directly to the claimant, the chef explicitly asked her if she was going to masturbate.

While the findings of the referee recount certain specific instances to which the claimant testified, the claimant's testimony did not suggest that these were the only instances. To the contrary, the claimant testified that the chef "talked filthy most of the time." The referee's findings reflect that such comments occurred throughout the claimant's employment, indicating that such comments were pervasive. With respect to the issue of severity, it is highly significant in evaluating the workplace environment that the harassment came from the co-owner of the employer, with whom the claimant worked regularly, and in front of other staff.

Even if the incidents complained of were not sufficiently severe or pervasive to create a hostile work environment, it does not necessarily follow that they were not sufficient to establish good cause. While the federal and state body of case law interpreting Title VII and the FCRA guides the Commission's evaluation of cases involving allegations of discrimination or harassment, the Commission has held that harassing conduct need not necessarily reach a level sufficient to implicate Title VII or FCRA liability in order to establish good cause for an employee to quit, in the case

[4] The employer's cited authority on this issue, *Breda v. Wolf Camera, Inc.*, 148 F. Supp. 1371, 1381 (S.D. Ga. 2001) is distinguishable as the harassers in that case were co-workers, as opposed to supervisors or owners, a fact noted by the court ("No one with supervisorial power abused, much less touched, Breda in any way.")

of victims, or to establish misconduct as the term is defined within the reemployment assistance statutes, in the case of discharged perpetrators. *See* R.A.A.C. Order No. 14-04590 at 6 (February 26, 2015)[5]; R.A.A.C. Order No. 13-08300 at 4 fn. 2 (February 6, 2014)[6]; R.A.A.C. Order No. 13-05581 at 12 (January 28, 2014).[7] Cases must be taken in the context of the overall work environment.

In *Yaeger v. Unemployment Appeals Commission*, 786 So. 2d 48 (Fla. 3d DCA 2001), the court addressed the case of a claimant who was subjected to sexual remarks and innuendos from her male co-workers. The following four examples were noted by the court: if the claimant was in a bad mood, a co-worker would ask her whether it was her time of the month; the same co-worker referred to a winding tool as a "winding cock"; when the claimant was eating pita the co-worker also would ask if she was having "peter"; and, another co-worker molded a candy skeleton with a femur sticking straight through the middle with a note "Happy Halloweeny, [Claimant]." *Id*. at 52. The court held that the conduct of the claimant's co-workers met the good cause standard of Section 443.101(1)(a), Florida Statutes, and reversed the Commission's order that disqualified the claimant from benefits. The challenged behavior in this case is far more egregious than the behavior described in *Yaeger*.

Moreover, the referee's analysis of the good cause issue in this case was incomplete. The claimant made clear that the final straw was the suspension she received after challenging the chef on his comment to her. The claimant responded by providing her two-week notice within the month, and filing a charge of discrimination and retaliation.

Typically, an employee in a discriminatory discipline case must not only demonstrate that she was disciplined, but that persons not members of the same protected class were not similarly disciplined for substantially similar incidents. *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999). However, a *prima facie* case of discrimination can be shown in a number of ways, and is largely dependent upon the employment situation. *Wilson v. B/E Aero., Inc.*, 376 F.3d 1079, 1087 (11th Cir. 2004). What is relevant is whether the employee's evidence is sufficient to raise an inference of discrimination. The claimant's belief that she was the victim of sex discrimination with regard to the suspension arose from her experience being the victim of sex-based harassment, as well as being both the only female server and the only server who had ever been suspended. Under the circumstances of this case, the claimant had a reasonable basis for believing she had been the victim of sex discrimination with regard to the suspension.

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[5] Available at http://www.floridajobs.org/finalorders/raac_finalorders/14-04590.pdf.
[6] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-08300.pdf.
[7] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-05581.pdf.

Furthermore, although not specifically referenced in her letter, the claimant's testimony and the charge of discrimination indicate she believed the suspension was caused by her opposing the language used by the chef. Her testimony reflects that she was suspended the Tuesday after her complaint, but that she had not been advised of customer complaints on the night they allegedly occurred. Under these facts, the claimant established a *prima facie* case of retaliation. *See Grant v. Miami-Dade Cnty. Water & Sewer Dep't*, 2015 U.S. App. LEXIS 20770 (11th Cir. Nov. 23, 2015).[8]

The referee did not make any specific findings related to whether the employer was motivated by discriminatory or retaliatory intent in suspending the claimant, and the employer did testify to legitimate reasons for the suspension. However, such findings are not necessary in this case. An employee's purely subjective belief that he or she was the victim of discrimination or retaliation, and in most cases even a reasonable belief, will not alone suffice to establish good cause attributable to the employer. In this case, by contrast, the claimant's belief that she had been discriminated and retaliated against was intertwined with her complaints about ongoing sexual harassment that was objectively proven. The Commission concludes that the referee correctly held that the claimant had established good cause attributable to the employer.

Reasonable Efforts to Preserve Employment

Finally, the employer contends that the claimant failed to present any complaint to management or give the employer an opportunity to investigate her allegations of harassment. While we reject the referee's conclusion that "No employee should ever have to notify anyone that these types of comments make them uncomfortable in the workplace" because it is not an accurate reflection of reemployment assistance law, we conclude that the claimant did not unreasonably fail to attempt to preserve her employment.

The Commission has addressed in several orders the efforts an employee subjected to harassment must make prior to relinquishing her employment to avoid disqualification. *See, e.g.*, R.A.A.C. Order No. 15-00479 (July 31, 2015); R.A.A.C. Order No. 13-05313 (February 18, 2014).[9]

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[8] To establish a causal link at the *prima facie* case stage, the employee need only show a close temporal relationship between the protected activity and the adverse action. *Brown v. Ala. DOT*, 597 F.3d 1160, 1182 (11th Cir. 2010).

[9] Available at http://www.floridajobs.org/finalorders/raac_finalorders/13-05313.pdf.

> [W]henever 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).

R.A.A.C. Order No. 13-05313, *supra,* at 4. In R.A.A.C. Order No. 13-05313, the Commission summarized the body of court cases addressing the need for an employee to provide the employer an opportunity to remedy harassment prior to quitting.[10]

Although the general rule requires an employee to make the employer expressly aware of their complaints about harassment in the workplace, this case is materially distinguishable from most of our prior cases involving allegations of discrimination or harassment because the harasser in this case is the owner of his namesake corporation, the co-owner is the owner's fiancée, and, per the credited evidence, the claimant's manager also witnessed much of the chef's conduct.[11] In applying the preservation doctrine, the courts and Commission consider whether any steps the claimant failed to take would have been futile. A claimant cannot be "disqualified for leaving employment voluntarily when the available grievance

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[10] As noted in R.A.A.C. Order No. 13-05313, some courts have considered the provision of notice to the employer to be part of the good cause analysis, since harassment by a co-worker of which the employer has no notice would not constitute good cause attributable to the employer. Our analysis in this section reaches the same result regardless of whether the duty to seek redress for harassment is considered part of the good cause analysis, or the preservation analysis.

[11] The employer cites to *Brown v. Unemployment Appeals Commission*, 633 So. 2d 36 (Fla. 5th DCA 1996) (en banc) to support its position that the claimant did not expend reasonable efforts to preserve her employment. However, the claimant in *Brown* had individuals above her harasser and above her harasser's wife to whom she could have complained if the harassment continued. Those facts differ from this case.

procedure provided no real possibility that the claimant could have preserved his or her employment." *Willick v. Unemployment Appeals Commission*, 885 So. 2d 440 (Fla. 2d DCA 2004). *See also Grossman, supra* (holding a claimant who failed to utilize a grievance procedure not disqualified from benefits when the procedure required her to complain to the same supervisors that abused her).

Moreover, the record in this case does not reflect that the claimant made no efforts to preserve her employment. She expressed her objection directly to the individual who was making the offensive comments, an action that is often the first step in formal harassment policies for resolution of verbal harassment. The response, according to the claimant, was a suspension issued to her within a week. The claimant testified that the manager witnessed some of the sexual language, and although she made exclamations, did not rebuke the owner. When the claimant told the manager about the final incident, the manager simply replied, "He's a pig."

Even if management had not been aware of the ongoing comments or the claimant's objection to them, the claimant's resignation letter contained allegations of discrimination and attached her charge of discrimination, which contained detailed allegations of harassment.[12] There was no indication that the employer followed up at that time; instead, the employer paid the claimant severance so she would not work out her notice period.

During the appeals hearing, the employer presented no evidence of a grievance procedure or a policy addressing harassment that would have advised the claimant how she could proceed. Under Title VII, even if the employer had such a procedure, "[a]bsence of notice to an employer does not necessarily insulate the employer from liability." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). This rule continues even in light of the affirmative defense detailed in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), in cases where the harasser is a proxy for an employer. Two fairly recent examples include *Bryars v. Kirby's Spectrum Collision, Inc.,* 2009 U.S. Dist. LEXIS 39136, Civil Action No. 02-283-KD-B (S.D. Ala. May 7, 2009) and *Medina v. United Christian Evangelist Assoc.*, 2009 U.S. Dist. LEXIS 88927, Case No.: 08-02111-CIV, at *14 (S. D. Fla. September 28, 2009) (citations omitted). In both cases, the

[12] The Commission has previously observed that "An employee's expression of an intent to resign may provide the employer full notice of the severity of the employment situation that they had theretofore misunderstood or otherwise underappreciated." R.A.A.C. Order No. 15-00479, supra, at pg. 6. In this case, the claimant provided a two-week notice, which gave the employer an opportunity to investigate and address the issues, if the employer had so desired. Inasmuch as the employer argues it lacked notice of actual harassment, and instead focuses on the claimant's claim of gender discrimination, the claimant included her charge of discrimination with the resignation letter, and it contained allegations of sexual harassment. During the appeals hearing, the employer did not contend that the charge of discrimination was not provided with the resignation letter.

plaintiffs alleged harassment by their employer's president, and, relying on the decisions of several federal circuit courts, both courts held that the "*Ellerth-Faragher* affirmative defense is not available where the harassing employee is within the class of official that may be said to be a proxy or alter-ego of the employer." *Medina* at 14. *See also Brayers* at 41.[13] The logic of these cases is simple – a harassment policy is designed to provide an employee with an opportunity to advise the employer when co-workers or supervisors are engaging in impermissible behavior and to seek a remedy from the employer. However, when the harassment is perpetrated by an individual who effectively *is* the employer, not only is the employer aware of the behavior, the employee will often have no reason to believe that any effective remedy exists.

We find the principles in these cases applying Title VII persuasive in analyzing the scope of the claimant's duty under the reemployment assistance law. Whether an employee failed to take reasonable steps to preserve her employment or to demonstrate that the harassment she experienced was attributable to the employer must be determined on a case by case basis.

Under the facts of this case and the standards developed within reemployment assistance law, the claimant cannot be faulted for not presenting an additional protest to the employer before providing her resignation. The totality of the credited evidence supports the legal conclusion that the claimant voluntarily relinquished her employment with good cause attributable to the employer.

[13] Additionally, there have been cases where the work environment is so steeped in impermissible behavior that the employer can be considered to have constructive knowledge of the harassment. *See, e.g., Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647-49 (11th Cir. 1997) (reversing a granting of summary judgment in favor of the employer, remanding the case for further proceedings, highlighting that constructive knowledge is a question of fact, and detailing the factors to be considered in determining if an employer had constructive knowledge of harassment).

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 12/28/2015, 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

*42725996 *

Docket No.0025 7623 10-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES 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.

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Issues Involved: SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

Findings of Fact: The claimant worked full-time as a server for a restaurant beginning on November 6, 2011. The restaurant was owned by a chef and the chef's fiancé was co-owner. The chef's nephew was the assistant manager. The chef made comments or asked questions pertaining to sex or parts of the anatomy throughout the claimant's employment. The claimant was the only female server.

On one occasion the chef queried the claimant as to why she phoned her boyfriend before she left work. After the claimant answered him the chef said to the claimant that if he were her boyfriend he would be getting new "pussy" every night. On another occasion during a party, the chef told the claimant that a guest was an idiot because he would never get another hand job let alone another "blow job" after getting engaged. The chef often asked his female employees if their vaginas were fine or if they were bleeding. On another occasion the chef was looking through a magazine with women in swimsuits and as he turned each page he said, "Fuck," repetitively.

The chef made comments about women and sex in the presence of the male staff members and the manager. The latter would respond with "cheese and rice" in lieu of Jesus Christ. No one confronted the chef or asked him to stop. The claimant did not discuss the chef's utterances with his fiancé at any time.

On February 7, 2015, the chef placed a dish on the line for the claimant to sample. He asked the claimant if she was going to eat it or masturbate. The claimant expressed that she did not like the comment and that he should not speak to her in that manner. The claimant was suspended the following Tuesday for an allegation of customer complaints.

The claimant submitted a letter of resignation on March 10, 2015, due to discrimination and sexual harassment. The claimant's intent was to work until March 21, 2015. On March 12, 2015, the co-owner presented the claimant with a severance check of $1,000 when the claimant arrived at work, releasing the claimant from her obligation to the employer.

Conclusions of Law: The law provides that a claimant who has voluntarily left work without good cause as defined in the statute shall be disqualified from receiving benefits. "Good cause" includes only such cause as is attributable to the employing unit or which consists of an illness or disability of the claimant requiring separation from the work. The term "work" means any work, whether full-time, part-time or temporary.

The record and evidence in this case show that the claimant was subjected to sexual harassment and comments by her employer the entire time she worked for him and resigned. 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).

In this case, testimony was not only taken from the claimant but manager, the chef and the fiancé. While the chef contended that he never uttered anything sexual in the workplace or had any contact with the claimant other than courtesy salutation, the manager's testimony confirms that sexual comments were made but the claimant did not complain about them. The testimony of the chef is rejected as inherently improbable. The court in Meditek Therapy, Inc. v. Vat-Tech, Inc., 658 So.2d 644, 646 (Fla. 2d DCA 1995) points out that testimony that is not rebutted or contradicted in any manner, cannot be disregarded or rejected by the trial court unless it was illegal, inherently improbable or unreasonable, contrary to natural law, opposed to common knowledge or contradictory within itself, Florida East Coast Ry. v. Michini, 139 So.2d 452 (Fla. 2d DCA 1962; accord Roach v. CSX Transp., Inc., 598 So.2d 246 (Fla. 1st DCA 1992); Fletcher v. Metro Dade Police Dep't Law Enforcement Trust Fund, 593 So.2d 266 (Fla. 3d DCA 1992); Duncanson v. Service First, Inc.157 So.2d 696 (Fla. 3d DCA 1963).

Brief consideration was given as to whether the claimant had an obligation to report her dislike of the chef's comments to the chef, to the manager, to the assistant manager or to the co-owner about the chef making comments about the chances of the claimant's boyfriend relations with as many women as possible, whether the claimant or anyone else was menstruating, hearing the chef say the word "fuck" over and over again, or hearing the chef's opinion on oral sex and masturbation. No employee should ever have to notify anyone that these types of comments make them uncomfortable in the workplace. No employee should ever have to listen to their employer make those types of comments.

The record reflects that the claimant confronted the chef on February 7, 2015, when she could no longer tolerate his comments and subsequently, was suspended. The claimant decided to sever the relationship and was given $1,000 and released from employment early. While the employer's witness contended that the claimant was reprimanded for customer complaints, no warnings were submitted for the hearing officer to review or any policy the claimant allegedly violated to warrant such warnings.Without competent evidence regarding the terms of the policy and evidence that the claimant was aware of the specific provisions that the claimant was accused of violating, the claimant's actions have not been shown to constitute misconduct connected with work as that term is used in the reemployment assistance law.

The claimant's testimony reflects that the working conditions were such that a reasonable person would have given up gainful employment to become unemployed. In this case, the record supports the conclusion that the claimant expended reasonable effort to preserve the claimant's employment. Accordingly, it is concluded that the claimant voluntarily left work with good cause attributable to the employer within the meaning of the law. The claimant is qualified for the receipt of benefits.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. The Reemployment Assistance Appeals Commission set forth factors to be considered in resolving credibility questions. These include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant left the work without good cause attributable to the employer. Since the claimant's leaving employment was with good cause attributable to the employer, the employer's account shall be charged.

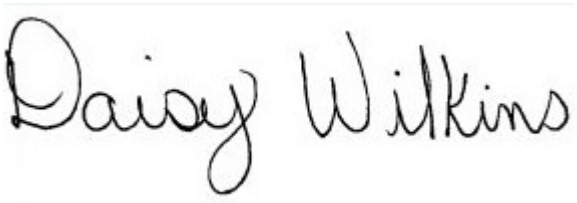
The claimant was represented at the hearing by an attorney who charged a flat fee of $350. The hearing officer approves that fee to be paid by the claimant.

Decision: The determination dated May 4, 2015, is REVERSED. The claimant is not disqualified from receipt of benefits beginning March 8, 2015. The employer's account shall 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 June 10, 2015.

M. MURDOCK
Appeals Referee



By:

DAISY L. WILKINS, 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.
