STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 15-05112

vs.

Referee Decision No. 0026849092-04U

Employer/Appellant

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

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

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.

The referee's findings of fact state as follows:

> The claimant began working for the employer as a yard hand on July 24, 2012. The claimant had to carry buckets of acid up a flight of stairs in order to dump them into a vat of crude oil. The acid sometimes splashed back and burned the claimant. The claimant reported the burns to his supervisor, but they never gave him paperwork to report the accidents or workers comp information forms. The claimant told his supervisor the bucket dumping system was too dangerous and that they should use another acid transportation method. The employer installed an acid delivery pump on the crude oil vat, but the acid burned through the pipes of the pump, and the claimant was put back to work carrying buckets of acid up the stairs. The claimant decided to quit on July 14, 2015, because the job was too dangerous.

Based on these findings, the referee held the claimant voluntarily left work with good cause attributable to the employing unit. Upon review of the record and the arguments on appeal, the Commission concludes that additional evidence is necessary on relevant issues; consequently, the case must be remanded.

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 which would compel a reasonable employee to cease working. 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). Moreover, even if the employee arguably has "good cause" to leave his or her employment, he or she may be disqualified from benefits based on a failure to expend reasonable effort to preserve his or her employment. *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) (claimant voluntarily left work without good cause when he quit due to dissatisfactions with his pay without first bringing his concerns to the employer's attention or making any other reasonable effort to preserve his employment); *Tittsworth v. Unemployment Appeals Commission*, 920 So. 2d 139 (Fla. 4th DCA 2006) (claimant quit her job without good cause attributable to her employer since no evidence was presented to show she asked the employer for time off or otherwise sought to take leave and retain her job). Courts have held that employees may have good cause to leave work when their personal safety is reasonably in question. *See*, *e.g.*, *Wall v. Unemployment Appeals Commission*, 682 So. 2d 1187 (Fla. 4th DCA 1996); *Saenz v. Unemployment Appeals Commission*, 647 So. 2d 283 (Fla. 2d DCA 1994). While most of the available precedent deals with threats caused by other persons, we agree with the referee that when a work environment becomes unreasonably unsafe, an employee may have good cause to quit. The record in this case, however, is insufficiently developed on certain relevant facts for the Commission to determine whether the referee's decision is consistent with the law.

The referee, in the conclusions of law, stated:

> The claimant described working conditions that were unreasonably dangerous, and would compel any normal person to leave the job for fear of their personal safety. The claimant made sufficient efforts to retain his employment by reporting his acid burns to the employer, and explaining that the bucket delivery method was too dangerous. Despite his complaints, the employer

> did not take action to permanently improve the working conditions for the claimant. The employer did not seem to take the claimant's injuries or safety concerns seriously. Therefore, the claimant has met the burden of proof by demonstrating that he quit for good cause attributable to the employer.

Contrary to the referee's conclusions, the record, as developed, is not sufficient to establish whether the working conditions were unreasonably dangerous or would compel any normal person to leave the job for fear of their safety. The record, as developed, also does not clearly establish whether the claimant made sufficient efforts to retain his employment.

Occupational safety is a highly developed and regulated field. Federal and state regulations provide specific standards for many work environments, and there are general requirements that can be applied in the absence of site, equipment or material-specific standards. While the issue of whether an employee has good cause to quit due to safety issues is fact-specific, the starting point in such cases should *always* be whether there are any applicable occupational safety standards applicable to the situation, and if so, whether they were complied with. Where the record reflects that the employer managed the claimant's work environment consistent with applicable Occupational Safety and Health Administration (OSHA) or other governmental requirements, the work site is presumptively safe. By contrast, if the record reflects that the employer materially failed to comply with applicable standards, and that such non-compliance caused unsafe working conditions, the claimant will presumptively have good cause attributable to the employer. The referee may then look at other relevant factors or requirements to reach a final conclusion, such as addressing why the employer did not fully comply, whether any non-compliance was material to the decision to resign, the extent to which the claimant himself was responsible for the non-compliance; and when the employer has complied, whether other special circumstances would make the work environment unreasonably hazardous to the employee, including an employee's particular and documented sensitivity, or similar factors such as pregnancy.

The claimant in this case worked with sulfuric acid (H_2SO_4),[1] which is a hazardous chemical, but is not on the OSHA list of *highly* hazardous chemicals in its liquid form. *See* 29 C.F.R. §1910.119 Appx. A. As such, the applicable hazards and safety requirements are required to be included on its Safety Data Sheet (formerly

[1] Sulfuric acid varies in concentration, with more concentrated acid being more hazardous. Concentrated acid is typically used in industrial applications. However, on remand the referee should ask the parties what concentration in either molarity or percentage of acid was used, if known.

known as Material Safety Data Sheet or MSDS).[2] Typically, all that is required for the chemical to be used safely is a workplace with adequate ventilation (otherwise respiratory protection might be required); and adequate protective gear, including impermeable clothing, gloves, and if splashing is a potential hazard, face or eye protection. Additionally, a safety shower or other rinsing capability should be available in order to wash off any acid that comes in contact with human tissue.

The claimant testified as to the employer's process which required him to carry open buckets of the acid up a flight of stairs and pour them into a large vat or tank. The record and findings need to be further developed as to that process, however, including such issues as to whether there were safety strips on the stairs, how high above the vat the acid was poured from, how the exposure occurred, whether it was caused by acid splatter or the oil reacting with the acid that splattered on him, how often the claimant was splattered with the acid/oil, and whether the burns were chemical, thermal or both (if known). The employer put a pump into service for a period of time, but the pump failed allegedly due to acid corrosion. The referee should inquire as to the duration of time that the claimant was not required to carry the acid, and when he was required to resume such duties, in proximity to the time the claimant decided to resign.

The claimant also testified that he brought the matter to his supervisor's attention on multiple occasions but he was only told to wash the exposures. The claimant contended that his supervisor never provided any safety information regarding use of the compound. The employer, by contrast, contended that its facility was operating as permitted by OSHA and had been inspected without incident. While this contention, if verified, would be significant, the employer's testimony was not sufficiently clear to indicate the extent to which the specific process was approved or inspected by OSHA, whether any safety protocols had been established, and whether they were followed. On remand, the employer shall provide any specific permitting or other documentary evidence that supports its contention that OSHA has approved its process. The employer is advised that absent documentary evidence, the referee is not required to accept the employer's contentions as to the scope of the OSHA permits or inspections.

[2] An example of a MSDS for sulfuric acid is located at http://avogadro.chem.iastate.edu/MSDS/H2SO4.htm. The National Institute for Occupational Safety and Health summary is located at http://www.cdc.gov/niosh/ipcsneng/neng0362.html.

Additionally, the employer contends that the claimant never complained to human resources. It is unclear from this record whether the employer had established any policies that advised the claimant to whom he could report any workplace concerns, what position his supervisor held in the chain of command at the plant, whether there was a higher-ranking manager that was reasonably accessible, whether the employer had any occupation safety manager to which the claimant had access, and whether the claimant was aware that human resources might be able to address his concerns. On remand, the referee should further develop the record as to these issues.

Finally, on remand the referee is directed to develop the record regarding any safety procedures the employer adopted, whether employees were provided or required to wear protective clothing, gloves or other gear, what rinsing or other treatments were available for exposures, and any other safety protocols in place, if any.

We are *not* vacating the referee's decision in this case, which is still under review. Because of the highly technical nature of the issues in this case, the case is remanded pursuant to Florida Administrative Code Rule 73B-22.002(2). The referee is directed to conduct a supplemental hearing, take additional testimony and receive any documentary evidence consistent with the issues identified in this case and any other pertinent issues that may arise, and upon completion of the hearing, enter an order indicating that the referee has complied with this order and directing the clerk to transfer the case to the Commission. The Commission will take original jurisdiction of the case at that time for additional fact-finding if necessary.

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
3/31/2016 ,
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

*47431861 *

Docket No.0026 8490 92-04 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 began working for the employer as a yard hand on July 24, 2012. The claimant had to

carry buckets of acid up a flight of stairs in order to dump them into a vat of crude oil. The acid sometimes splashed back and burned the claimant. The claimant reported the burns to his supervisor, but they never gave him paperwork to report the accidents or workers comp information forms. The claimant told his supervisor the bucket dumping system was too dangerous and that they should use another acid transportation method. The employer installed an acid delivery pump on the crude oil vat, but the acid burned through the pipes of the pump, and the claimant was put back to work carrying buckets of acid up the stairs. The claimant decided to quit on July 14, 2015 because the job was too dangerous.

Conclusion 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 cause attributable to the employing unit or illness or disability of the claimant requiring separation from the work.

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). The record shows that the claimant quit for good cause attributable to the employer. The claimant described working conditions that were unreasonably dangerous, and would compel any normal person to leave the job for fear of their personal safety. The claimant made sufficient efforts to retain his employment by reporting his acid burns to the employer, and explaining that the bucket delivery method was too dangerous. Despite his complaints, the employer did not take action to permanently improve the working conditions for the claimant. The employer did not seem to take the claimant's injuries or safety concerns seriously. Therefore, the claimant has met the burden of proof by demonstrating that he quit for good cause attributable to the employer. Accordingly, the claimant is not disqualified from benefits beginning July 5, 2015.

Decision: The determination of the claims adjudicator dated September 15, 2015, which held that the claimant quit due to dissatisfaction with the working conditions, which were such as to constitute good cause for leaving the job, is AFFIRMED. The claimant is not disqualified from benefits beginning July 5, 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 November 17, 2015.

D. Ellis
Appeals Referee

Shaundrea Jewett

By:

SHAUNDRECIA LOVETT, 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.
