STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellee

R.A.A.C. Order No. 16-02976

vs.

Referee Decision No. 0027331972-04U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the appeal filed by the claimant's counsel pursuant to Section 443.151(4)(c), Florida Statutes, of that portion of the appeals referee's decision which authorized an attorney fee payable by the claimant in an amount lower than that requested. This order does not address the issue of the claimant's separation from her employment and, therefore, does not affect the referee's decision on the merits of the case.

Procedural History

This case was previously before the Commission and was remanded pursuant to R.A.A.C. Order No. 16-00571 (June 28, 2016). In its prior remand order, the Commission approved claimant's counsel's requested $650 fee for representing the claimant before the Commission.

The record reflects that attorney R. S., a professional colleague of the claimant's original (and current) counsel, represented the claimant during the September 14, 2016 remand hearing. When questioned at the start of the hearing regarding any fee the claimant was being charged for representation at the hearing, R. S. stated that the claimant had agreed to pay a flat fee of $650, and that she spent a total of four hours preparing for the hearing by reviewing the record, conducting legal research, and preparing her witness. The referee never questioned the claimant regarding the fee agreement, but announced she would not authorize the requested fee. After acknowledging that she did not know what the claimant's weekly or maximum benefit amounts were, the referee stated that since the Commission had already authorized a $650 fee for representation before the

Commission, authorizing an additional $650 fee "might be detrimental to [the claimant] – it would almost take most of her benefits." The referee did not indicate whether she would approve a reduced fee, but stated only that she would not approve the requested fee and that she would address it in her decision.

In her decision, the referee approved a reduced fee of $200 for representation at the remand hearing, and provided the following explanation:

> The claimant was represented by an attorney in the hearing held on September 14, 2016, and requested a fee of $650. The claimant's attorney's firm previously was approved by the Commission [to receive] a fee of $650. As the claimant's attorney [sic] additional fee of $650, [sic] is reduced to $200, as the Appeals Referee finds an additional $650 fee would end up costing the claimant more on her fees than her benefits.

Counsel appealed this reduction of the requested fee to the Commission. Upon review, we remand that portion of the referee's decision addressing the attorney's fee. That portion of the decision affirming the nonmonetary determination holding the claimant not disqualified from receipt of benefits was not appealed and is not addressed by this order.

Legal Analysis

A. Statutory Authority

Section 443.041(2)(a), Florida Statutes, provides that an individual claiming benefits may be represented by counsel or other representative in any proceeding before the Commission or the Department of Economic Opportunity Office of Appeals ("Department"), but that the counsel or representative may not charge or receive a fee for those services more than an amount approved by the Commission or the appeals referee.[1] This statutory authority is consistent with – even dictated by – federal guidance. *See* Emp't and Training Admin., U.S. Dep't of Labor, *Handbook for Measuring Unemployment Ins. Lower Auth. Appeals Quality*, ET Handbook No. 382, app. B, §V.B.1, at 19 (3d ed. 2011) ("To protect claimants, fees payable to their representatives for services should either be limited in amount or made subject to approval of the appeal tribunal").[2]

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[1] The Commission interprets this approval requirement to apply only to fees charged to or received from the claimant, and not those paid by a third party on the claimant's behalf, so long as the claimant is not responsible for the fees directly or indirectly.

[2] Available at https://wdr.doleta.gov/directives/attach/ETAH/ET_Handbook_No_382_3rd_Edition.pdf.

The statute does not contain any specific requirements for or limitations on fees other than the requirement that they be approved by the tribunal. Consistent with the statutory delegation of authority to the Commission with respect to reemployment assistance appeals proceedings,[3] the Commission establishes general principles for the approval of fees in this order.

B. The Decision under Review

The claimant's wage transcript and monetary determination reflects a maximum benefit amount of $3,850. Approving the additional fee of $650 for representation at the remand hearing would increase the total fees paid by the claimant to $1,300. Contrary to the referee's assertion, fees totaling $1,300 would not exceed the claimant's maximum benefit amount. The record is therefore devoid of any factual basis to support the referee's rationale that if she approved the requested $650 fee, the claimant's legal fees would exceed any benefits she might secure. Accordingly, the fee issue must be remanded for additional consideration by the referee.

The referee is directed to convene a supplemental hearing for the sole purpose of developing the record regarding the claimant's counsel's request for authorization of a $650 fee for representation at the September 14, 2016 remand hearing. At the September 14, 2016 hearing, the referee did not adduce testimony from the claimant regarding the amount of any fee she agreed to pay for representation at that hearing. The referee should do so on remand, if possible; otherwise, the referee should move into evidence counsel's fee agreement for representation at that hearing. The referee must also move the claimant's wage transcript and monetary determination into evidence and make an accurate and supported finding of fact regarding the claimant's maximum benefit amount and available credits.

Additionally, the record requires clarification regarding the amount of time the claimant's counsel spent preparing for the September 14, 2016 remand hearing. Although attorney R. S. stated at the remand hearing that she spent *four hours* preparing for the hearing, claimant's counsel asserts in its brief that "counsel" spent *more than nine hours* preparing for the hearing. Therefore, the referee must adduce either sworn testimony or secure an affidavit from attorney R.S. regarding the amount of time she spent preparing for the hearing, or obtain other clarification of the inconsistent information that has been provided by claimant's counsel.

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[3] *See* §443.012(3), Fla. Stat.

After further development of the record, the referee must decide whether to approve, reduce, or otherwise modify the requested fee in accordance with principles we discuss in this order, and any other principles she deems appropriate, so long as they are set forth in the decision.

C. Fee Approval Principles

1. Generally

Because of the relatively small amounts of fees at issue historically as compared to the amount of benefits at issue, the Commission has never found the need to adopt a formal set of criteria for fee approval, such as those used by the Florida courts in awarding fees under fee-shifting statutes. However, the Commission has traditionally considered a number of factors similar to those applied by courts in evaluating fee requests. *See, e.g.*, R.A.A.C. Order No. 14-00396 (September 18, 2014) (noting quality and persuasiveness of the brief, which resulted in remand for additional proceedings).

In considering requests for approval of fees, the Commission is mindful that: (1) the law contains no fee-shifting provision for an award of fees to the claimant's representative for representation at the appeals hearing or before the Commission, either as to the opposing party or the State, so that a claimant must pay his or her own representative's fee; and (2) the lack of a fee-shifting provision, combined with the relatively small amounts of benefits at issue,[4] make contingency representation unattractive if not infeasible, especially on appeals to the Commission where a claimant did not prevail below, so that claimants typically must agree to pay fees regardless of whether they prevail in order to secure representation.[5] In scrutinizing fees for approval, the Commission limits them in order to strike a balance between the ability of claimants to obtain counsel, on the one hand, with the need to preserve the bulk of the limited available benefits, as well as to prevent legal fees from significantly worsening the financial plight of an unsuccessful (and often still unemployed) claimant. Undoubtedly, part of the governmental interest served by the Florida Legislature's statutory restriction limiting fees to those approved by the Commission and Department, as it has been recognized in another context, is to further "the state's interest in protecting the amount of benefits secured by [a

[4] The current maximum benefit pursuant to Section 443.111(5), Florida Statutes, is $3,300 per claim year.

[5] There are of course exceptions to this principle. Florida Legal Services offices provide representation to claimants without charge, and other lawyers occasionally represent claimants on a *pro bono* basis or without additional charge as part of their representation in other matters.

claimant] from depletion to pay a lawyer's bills." *Jacobson v. Southeast Pers. Leasing, Inc.*, 113 So. 3d 1042, 1049 (Fla. 1st DCA 2013). However, given that representation at the administrative level is rarely contingent, we conclude that there is also a governmental interest in limiting fees to preserve a claimant's resources when no benefits are ultimately determined to be payable.

In assessing a request for fees before either the Commission or an appeals referee, certain factors are appropriate to consider.[6] These include the following:

1. The factual and legal complexity of the issues *properly* raised in the proceeding;
2. The significance of the issues with respect to the claimant's claim for benefits;[7]
3. The skill and efficiency of the representation;[8]
4. Whether the claimant was successful in the proceeding in which the representation occurred;[9]
5. Whether the representation was for a fixed fee or was contingent in whole or part; and,
6. The relationship between the requested fee and the benefits at issue in the proceeding.

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[6] We are familiar with the factors in Rule 4-1.5(b) of the Rules of Professional Conduct which are commonly used in fee-shifting cases. While some of our factors are drawn from case law adopting the criteria promulgated in the ethical rules preceding the current Rules of Professional Conduct (*see Lee Eng'g & Constr. Co. v. Fellows*, 209 So. 2d 454, 458-59 (Fla. 1968), and *Florida Patient's Comp. Fund v. Rowe,* 472 So. 2d 1145, 1150 (Fla. 1985)), not all of the factors in the rule are relevant to representation of parties in reemployment assistance proceedings. Moreover, while counsel representing any party are bound by the principles contained in the ethics rules, non-attorney representatives, which are authorized by Florida law in reemployment assistance cases (*see* §443.151(7), Fla. Stat.) are not. Our factors include those which, in our experience, best measure the value of services provided by counsel or other representative to a claimant in the reemployment assistance context.

[7] Some issues in a particular claim may be relatively minor, such as a temporary ineligibility or disqualification that delays entitlement to benefits in a particular claim but does not preclude receipt of benefits; other issues, such as lack of monetary qualification or a major disqualification, are completely and adversely dispositive of a claim.

[8] This includes, among others, issues such as whether the representative marshalled appropriate evidence, effectively facilitated the presentation of the claimant's case, raised pertinent factual and legal issues, demonstrated a thorough understanding of the reemployment assistance process, and maintained appropriate professionalism towards the tribunal and opposing party.

[9] Factors three and four must be judged independently. Due to the investigative and inquisitorial nature of the reemployment assistance process from adjudication through an appeal to the Commission, it is not appropriate to judge the quality of representation merely by reference to outcome because favorable outcomes may have little to do with the specific evidence or argument offered by a representative apart from that which was independently developed by the referee or independently applied by the Commission; likewise, excellent representation may fail to secure benefits given the facts of a particular case.

This list is not intended to be exhaustive or exclusive. The tribunal may consider other factors as may be appropriate in a given case. Additionally, the weight to be given these or other factors will vary from case to case depending upon the circumstances. However, the last factor must always be taken into account in determining whether a requested fee should be approved, modified, or even denied. This factor also takes on added significance where a representative requests fees for appearances in multiple proceedings on the same disputed issue, or multiple proceedings with respect to the same claim, as discussed below.

2. Aggregate Fees for Multiple Proceedings

The Commission has previously indicated that it would not approve, in an appeal involving representation in *multiple* proceedings, *aggregate* fees in excess of fifty percent of potentially available benefits. *See, e.g.*, R.A.A.C. Order No. 16-00347 (March 17, 2016). This is effectively an upper cap, although not as absolute as our prior orders indicate, as the Commission has authority to deviate from it if a truly exceptional case merits a deviation. However, only in *unusual* circumstances should aggregate fees in excess of one-third (33.3%) of a claimant's total available benefits be approved.[10] Under unusual circumstances, including cases involving complex factual or legal issues in which a representative has represented a claimant through multiple levels of the appeal process with a successful ultimate outcome, the Commission or appeals referee may permit aggregate fees exceeding one-third (33.3%) of potential benefits up to one-half (50%) of the claimant's total available benefits.[11] Thus, we establish two presumptive limits: (1) a typical limit of one-third (33.3%) of available benefits for cases of ordinary complexity; and (2) a higher limit of one-half (50%) for cases of unusual complexity *and* a successful result.

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[10] Even this limit is more generous than limits imposed in some jurisdictions. For example, Ohio law imposes an aggregate statutory cap of 25% unless a higher fee is approved by the review commission. *See* OAC Ann. §4146-19-03.

[11] The guidance in this case is limited to situations in which a claimant's counsel represents her at multiple levels or proceedings. A reasonable fee for a single appearance in a single proceeding would normally be well under the one-third limit for the ordinary case involving multiple appearances.

Neither the one-third lower limit, nor the one-half limit for unusual cases, are statutory or absolute. Instead, they are guidelines for what should be a *maximum* permissible aggregate fee in most cases. Moreover, we emphasize strongly that these are *ceilings*, not *floors*, and the Commission and the referees will not authorize fees up to these limits automatically. Both the Commission and the referees instead will review fees as to their overall reasonableness in the circumstances of the case as evaluated by the factors identified above and any other factor relevant to that case. A fee can be approved as requested, reduced, or even denied altogether as the individual case warrants.

The case before us is not an unusual case that would warrant approval of aggregate fees in excess of one-third of the claimant's total available benefits. The claimant's job separation did not involve any complex legal issues, and the claimant was not represented through all stages of the appeals process. While she was represented in her appeal to the Commission and at the remand hearing, she had no representation at the initial hearing. One-third of the claimant's total available benefits is $1,283.33, and the $650 fee requested by claimant's counsel for representation at the remand hearing, if authorized, would result in the claimant's legal fees exceeding the aggregate fee limit. Moreover, as stated above, the one-third limit is not a floor, and the referee has discretion to approve a lower amount if she finds it appropriate in accordance with the standards outlined in this order.

D. Counsel's Constitutional Argument

Finally, on appeal to the Commission, claimant's counsel asserts that the Commission's precedent limiting attorney's fees to an amount equal to fifty percent of the claimant's total available benefits was "overruled" by the court in *Miles v. City of Edgewater Police Dep't*, 190 So. 3d 171 (Fla. 1st DCA 2016). Although counsel did not explain precisely how *Miles* applies in a reemployment assistance case, we find no merit to this assertion.

Miles, and its predecessor *Jacobson, supra,* both involved the attorneys' fees provisions of the workers' compensation statute, Sections 440.105(3)(c) and 440.34, Florida Statutes. While Section 440.105(3)(c), Florida Statutes, is similar to Section 443.041(2), Florida Statutes, in requiring approval of fees by the tribunal, Section 440.34, Florida Statutes, has no parallel in the reemployment assistance law. This latter provision limits fees to a percentage of the benefits awarded to a claimant, and thus essentially prohibits any non-contingent fee approvals.

In *Jacobson*, the employee/claimant sought to enter into a non-contingent fee agreement to obtain representation to defend against the employer/carrier's motion to tax costs. 113 So. 3d at 1047. Since the employee would not be receiving benefits from the employer/carrier, the fee was deemed prohibited. *Id*. The court held that Section 440.34's prohibition on a fee agreement under those circumstances violated the First Amendment because it denied the claimant's rights to freely speak, associate, and petition government. *Id*. at 1048-51. The court also concluded that the statute impaired a freedom to contract protected by the First Amendment because it completely prohibited the contract into which the parties desired to enter. *Id*. at 1050-52. The court did not hold that the agreement was acceptable, however. Instead, it remanded the case to the Judge of Compensation Claims (JCC) for review and approval of the agreement, noting that the agreement must still meet the legal and ethical requirements for reasonableness. *Id*. at 1052.

In *Miles*, the claimant entered into a retainer agreement with his counsel agreeing to pay an hourly rate not contingent on the success of the litigation. 190 So. 3d at 175. This agreement was necessary because of the complexity and difficulty of his case, and the difficulty of obtaining counsel willing to work solely on a contingent fee basis given limited prospects for success and the limited relief available. *Id*. at 175-76. Additionally, the claimant's union also entered into an initial retainer agreement with his counsel to pay fees on his behalf. *Id*. at 174-75. The agreements were submitted for approval to the JCC. *Id*. at 175. The JCC declined to approve them because they were not permitted by Section 440.34, Florida Statutes. *Id*. at 175-76. On appeal, the court found the statute unconstitutional as applied to the agreements, relying largely on the rationales expressed in *Jacobson*. *Id*. at 178-82. Again, the court did not approve the agreements; it remanded the case to the JCC for review and approval of the reasonableness of the agreements. *Id*. at 184.

In sum, neither *Jacobson* nor *Miles* supports counsel's contention. Both cases involved agreements that were entirely barred by a statutory provision for which there is no equivalent under the reemployment assistance law. As counsel is well aware, the Commission does not predicate approval of fees for representation of claimants on the claimants' recovery of benefits. Moreover, the remedy the court provided in both cases was to remand the case to the JCC for review. Both cases, as well as *Castellanos v. Next Door Co.,* 192 So. 3d 431 (Fla. 2016), concluded that the proper remedy for an unconstitutional statutory prohibition or limitation was a case-by-case evaluation for reasonableness. *Id*. at 449. In none of these cases did the courts strike down the requirement in Section 440.105(3)(c), Florida Statutes, that fees be approved by a tribunal, or suggest that requiring fees to be approved was problematic.

To the extent that counsel suggests that our presumptive fee limits are unconstitutional, we disagree. The Florida Supreme Court has long regulated, through ethics rules and case precedent, attorneys' fee agreements with clients. Of particular relevance is Rule 4-1.5(f)(4)(B)(i) of the Rules of Professional Conduct, establishing presumptive caps in cases taken on contingency. Fees in excess of the caps are presumed excessive, although a party may obtain approval for such a fee agreement by a court if a sufficient showing can be made. Nor did the Florida Supreme Court reject the idea of a presumptive statutory fee schedule in *Castellanos*; the Court's concern, as expressed in the majority opinion, was the lack of discretion for the JCC or a court to modify a fee where the scheduled fee would be either insufficient or excessive in a given case. Indeed, the remedy implemented by the Court was to revive the predecessor statute, in which the presumptive fee schedule was the starting point for a fee analysis, but not conclusive. 192 So. 3d at 448-49. Because our limits are not statutory mandates, if counsel believes any particular case merits a departure from the presumptive limits, he or she can raise such a contention, and if unsatisfied with the resolution by the referee or Commission, raise the issue on further appeal.

Finally, in considering the constitutional issues, we also think that major differences between the workers' compensation system and the reemployment assistance system make the concerns that dictated the holdings in cases such as *Jacobsen*, *Miles,* and *Castellanos* irrelevant under our statute. Perhaps most fundamental is the relative importance of professional representation in the two systems. In *Jacobsen*, *Miles,* and *Castellanos,* a recurring motif is the practical necessity for attorney representation for claimants in workers' compensation cases.[12] This is simply not true for the reemployment assistance process.

[12] While there may be a variety of reasons why this is so, certainly many contested workers' compensation cases involve complex issues of fact that not only require evidence from physicians or other expert professionals, but also require representatives with a thorough understanding of medical practice, vocational rehabilitation practice, or other technical expertise in order to marshal and present the evidence effectively.

Nationally, unemployment benefits proceedings are intended[13] and designed[14] to work without the need for parties to be represented by counsel. In Florida, in only a small percentage of cases tried by the Office of Appeals does either party have attorney representation; employers sometimes have non-attorney outside professional representatives, but these often do no more than facilitate the appearance of witnesses or submission of documents. Likewise, only a minority of cases before the Commission involve attorney representatives for either party. Not only do both claimants and employers regularly appear before the Office of Appeals and the Commission without attorney or other professional representation, unrepresented parties *regularly* prevail against represented parties in both tribunals.

This ability to participate effectively without counsel is not merely serendipitous; it is fundamental to the design of the system nationally. The reemployment assistance process in Florida, like elsewhere, follows a national federal-state model in which the state agencies administering the programs are active participants, with active investigation at the initial administrative adjudication level and inquisitorial proceedings at the evidentiary hearing and administrative appellate review levels. A core part of this model involves state hearing officers such as Florida's appeals referees taking primary responsibility to develop the evidentiary record from witnesses and documents made available by the parties at a hearing. Likewise, when a party timely appeals a referee's decision to the Commission, the Commission automatically reviews the decision for procedural compliance, sufficiency and correctness of the findings, and the correctness of the legal conclusions. *See, e.g.,* R.A.A.C. Order No. 16-02528 at 3 (March 22, 2017). As a consequence, it is not necessary for a party to know the right questions to ask or all of the testimony to give, to know the rules of evidence in order to make objections to questions asked by the other party, or to understand and argue the law on appeal.

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[13] *See, e.g.*, ET Handbook No. 382, *supra*, app. B, §I at 4; Donald J. Kulick, Emp't & Training Admin., U.S. Dep't of Labor, Unemployment Ins. Program Letter No. 26-90 (1990) (exp. April 30, 1991), available at https://wdr.doleta.gov/directives/attach/UIPL/uipl1990/uipl_2690.cfm; Portia Wu, Emp't & Training Admin., U.S. Dep't of Labor, Training & Emp't Notice No. 7-16 (2016) (providing Unemployment Insurance Program Letter No. 26-90, *supra*, remains active), available at https://wdr.doleta.gov/directives/attach/TEN/TEN_07-16.pdf.

[14] A prime example is the relaxation in UI proceedings of the technical rules regarding admission of evidence that are generally applicable in judicial proceedings. Objections to evidence, although not prohibited, are not required in our proceedings, nor does the failure to object to evidence convert otherwise non-competent evidence to competent evidence. *See generally* ET Handbook No. 382, *supra*, app. B, §VI at 23.

A second major distinction is in the administration of the two programs. While workers' compensation benefits are largely administered by employers through their insurance carriers or third-party administrators, with the administrative tribunal available to resolve disputed claims, the reemployment assistance program is entirely state-administered. The conflicting interests of employers in the primary administration of the workers' compensation system has led the Florida Legislature and the courts to conclude that the *potential* availability of counsel for a claimant with fee-shifting to the employer – presumably whether or not counsel is *actually* obtained in a given case – is crucial to dissuade "recalcitrant employers" and "discourage[ ] the carrier from unnecessarily resisting claims." *See Castellanos*, 192 So. 3d at 439 (*citing Ohio Cas. Grp. v. Parrish,* 350 So. 2d 466, 470 (Fla. 1977)). This concern does not exist where, as here, the benefits are administered, at all levels, by a neutral state agency.

A third major distinction between the workers' compensation system and the reemployment assistance benefits system is that the former is carefully scrutinized for constitutionality in part because it was a replacement for common law rights. As part of the so-called "grand bargain," workers' compensation systems were adopted by states as alternatives to common law tort rights. *See generally Baker v. Bridgestone/Firestone & Old Republic Ins.*, 872 N.W.2d 672, 676-77 (Iowa 2015). In Florida, the courts have reviewed the rights provided by the workers' compensation statute to ensure the bargain remains a fundamentally fair one by providing an adequate substitute for the common law rights replaced. *See, e.g., Westphal v. City of St. Petersburg,* 194 So. 3d 311, 322-23 (Fla. 2016) (holding that while the workers' compensation statute predated the Access to Courts provision of the Florida Constitution, "in order to be upheld as constitutional, the workers' compensation law must continue to provide a 'reasonable alternative to tort litigation,'" (*citing Martinez v. Scanlan*, 582 So. 2d 1167, 1171-72 (Fla. 1991)). By contrast, the reemployment assistance system arises not from any replacement of common law rights, but rather is a statutory creation of rights in derogation of the common law doctrine of employment at will.

Conclusion

We establish in this order more formal guidance for the approval of fees than we have previously announced, and remand the case to the referee solely to develop the record and analyze the fee request under the principles set out herein. We believe that our standards for approval of attorneys' or other representatives' fees outlined herein are appropriate to the nature of our process and tribunals, are consistent with constitutional law and federal guidance, and necessary to ensure consistent and fair evaluation of fee requests in a period of declining maximum benefits.

Accordingly, the case is remanded for a supplemental proceeding and the entry of an order addressing attorney's fees as discussed herein. Because the attorney's fee issue is peripheral to the merits of the determination and decision on separation, which are not at issue in this appeal, we do not vacate the underlying decision. The referee's entry of an order addressing fees will supersede that portion of the prior decision when entered.

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 4/26/2017, 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

*55601393 *

Docket No.0027 3319 72-04 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

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

APPEARANCES	Claimant Representative
	Employer Representative
	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 began working for the employer, a locksmith company, as a bookkeeper, on March 1, 2015. The owner gave the claimant the employee handbook which outlined the dress code. The policy stated "We require all employees to maintain a dress code: collared shirts, uniform pants or short belted at the waist and/or jeans or fingertip length shirts/shorts for the ladies." The policy was not specific if the collared shirt was required to be button to the employee's neck. The employer supplied shirts for the staff. The claimant was issued one or three shirts. The employer's policy stated for professional atmosphere "Our goal is to maintain an atmosphere that is professional, considerate, and friendly. Employees should avoid personal activities that are inconsistent with that goal." The owner began talking to the claimant regarding her attire. The owner asked her to wear a blouse that "covered her up". The claimant continued to wear attire which the owner thought was inappropriate. The owner began receiving complaints from one of the shop employees regarding the claimant. The shop employee, who made the complaint was a male, stated she made statements that were sexual in nature and discussed her drinking habits which made them uncomfortable. The male employee told the owner the claimant had invited him and his fiancée to a party for "swingers" which he believed was having sex with different partners during the party. The male employee declined the offer. The claimant made other comments to the male employee which he did not report to the owner regarding having oral sex. The shop employee stated the claimant told him she was making a statement regarding his speech and had told other staff members he was getting or was going get government assistance for his issue. The male employee did not inform the owner. The owner told the claimant not to go to the shop were the male employee worked. The owner was served a notice from an attorney the claimant had obtained regarding that the claimant felt the owner was harassing her regarding her behavior and the clothes she wore to work. The owner stated she did not want the claimant working for her as she was no longer a loyal employee after she was informed of the claimant contacting an attorney regarding her being harassed by the owner. The claimant was discharged, by the owner, on October 11, 2015, as the owner could no longer trust her due to her contacting an attorney, due to the claimant's attire she wore at work, and inappropriate behavior towards a male employee.

Conclusions of Law: The Reemployment Assistance Law of Florida defines "misconduct" irrespective of whether the misconduct occurs at the workplace or during working hours, includes but is not limited to, the following, which may not be construed in pari materia with each other:

a. Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

b. Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

c. Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

d. A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

e. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b. The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record shows the claimant was discharged for the owner could no longer trust her due to her contacting an attorney, due to the claimant's attire she wore at work, and inappropriate behavior towards a male employee. The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals

Commission, 483 So.2d 413 (Fla. 1986). The employer's witnesses, the owner, presented vague testimony on the number of times the claimant was told her attire was inappropriate, what the claimant was told regarding her attire, the dates the owner talked to the claimant, and the employer's witness, the male employee presented vague testimony on the dates the claimant displayed inappropriate behavior towards him. The policy presented for the attire permitted at the work site was vague in regards to if any low cut shirts were allowed, if the any shirts had to be button to the neck. The record shows the employer provided shirts for the staff to wear at work, but the owner was unable to state how many shirts she gave the claimant to wear, and that she had to special order the shirts due to the claimant's size. The record is further void of any written counseling given to the claimant regarding her attire or inappropriate behavior at the work site. The employer's representative, questioned the owner regarding a picture in the documents for the hearing, however, the picture does not reflect the attire show a low cut shirt worn by the claimant. The owner testified the employer's sexual harassment policy was posted on a wall near the time clock; but she did not provide any testimony she saw the claimant reading the policy during her employment or if the claimant understood and acknowledged the policy. The employer's witness, the male employee, stated he did not tell the owner with the exception of one incident any other incidents that made him feel the claimant was harassing him while at the work site with the claimant. The record shows the owner stated that when she was informed the claimant had contacted an attorney regarding harassment at the work site, the owner decided to release the claimant from her employment as she could no longer trust the claimant. Whether an employer has the right to terminate an employee's employment and whether a terminated employee meets the disqualification criteria set out in the unemployment compensation statute are separate issues. SeeCooks v. Unemployment Appeals Commission, 670 So. 2d 178, 180 (Fla. 4thDCA 1996); Livingston v. Tucker Constr. & Eng., 656 So. 2d 499, 500 (Fla. 2d DCA 1995); Hummer v. Unemployment Appeals Comm'n.573 So. 2d 135, 137 (Fla. 5thDCA 1991." Lusby v. Unemplmt. App. Comm'n., 697 So. 2d 567, 568 (Fla. 1stDCA 1997. An employer is not prohibited from terminating an employee. While the employer may make a considered business decision to terminate an employee, it does not automatically follow that the employer's criteria for that decision are determinative of misconduct as defined in the unemployment compensation law. See: Cooks v. Unemployment Appeals Commission, 670 So.2d 178, 180 (Fla. 4thDCA 1996). In the previous hearing the claimant stated she continued to work after she was slapped by the owner, and that the owner never discussed the issue with her attire. However, the claimant submitted a text message stating that the owner again told her what she was wearing was not appropriate and stated she continued to work after being slapped by the owner as she needed the job. As such, the appeal referee rejects the claimant's contention that the owner slapped her as unreasonable and contrary to nature law. The Appeals referee rejects the claimant's statement the owner had never spoke to her regarding her attire for the work site as contradictory to the evidence presented from the claimant. However, the employer presented vague and inconclusive testimony on the number of times the owner talked to the claimant and the dates, and the employer's witness was unable to provide dates the incidents occurred related to the claimant's attire or behavior and the employer has the burden of proving misconduct. The employer's witness, the owner, stated she released the claimant directly after she was informed the claimant had obtained an attorney regarding her treatment from the owner. As such, the employer failed to provide competent substantial evidence to substantiate the allegation of misconduct. While, the employer may have made a valid business decision in discharging the claimant, it has not been shown that the claimant's actions constitute misconduct connected with work and cannot be regarded as a deliberate willful disregard of the employer's interests. The

claimant's actions do not rise to the statutory definition of misconduct. The employer did not provide substantial evidence showing the claimant's actions were an intentional and substantial disregard of the employer's interest. The employer did not meet the burden of substantiating misconduct. Accordingly, the claimant should be qualified for the receipt of benefits.

The claimant was represented by an attorney in the hearing held on September 14, 2016, and requested a fee of $650. The claimant's attorney's firm previously was approved by the Commission a fee of $650. As the claimant's attorney additional fee of $650, is reduced to $200, as the Appeal s Referee finds an additional $650 fee would end up costing the claimant more on her fees than her benefits.

Decision: The determination dated November 2, 2015, is AFFIRMED. The claimant is qualified for the receipt of benefits.

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 September 20, 2016.

K. MCCONNELL
Appeals Referee

By: Gail Allen

GAIL ALLEN, 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 the last five digits of the 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.

There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department's CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.

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 los últimos cinco dígitos del 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.

No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representado por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

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 senk dènye chif nimewo sekirite sosyal demandè a 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.

Pa gen okenn kou pou Komisyon an revize yon ka, ni ke yon pati dwe reprezante pa yon avoka oubyen lòt reprezantan pou ke la li a revize. Komisyon Apèl Asistans Reyanbochaj pa te entegre antyèman nan sistèm CONNECT Depatman an. Byenke korespondans kapab fakse oubyen pòste bay Komisyon an, okenn korespondans pa kapab soumèt bay Komisyon an atravè sistèm CONNECT. Tout pati ki nan yon apèl devan Komisyon an dwe mentni yon adrès postal ki ajou avèk Komisyon an. Yon pati ki chanje adrès postal li nan sistèm CONNECT la dwe bay Komisyon an adrès ki mete ajou a tou. Tout korespondans ke Komisyon an voye, sa enkli manda final li, pral pòste voye bay pati yo nan adrès postal yo genyen nan achiv Komisyon an.

ENGLISH :
This document contains important information, dates, or eligibility status regarding your Reemployment Assistance claim. It is important for you to understand this document. This document is available in Spanish and Creole. If you do not read or understand Spanish, English, or Creole, call 1-800-681-8102 for free translation assistance regarding your Reemployment Assistance claim.

FRENCH / FRANÇAIS :
Le présent document contient des informations importantes, dont des dates ou le statut d'éligibilité relatif à votre demande d'aide au réemploi. Vous devez absolument en comprendre les tenants et les aboutissants. Si vous ne lisez ni ne comprenez l'anglais, veuillez composer le numéro de téléphone 1-800-681-8102 pour obtenir une traduction gratuite par rapport votre demande d'aide au réemploi.

SPANISH / ESPAÑOL :
Este documento contiene importante información, fechas, o estado de elegibilidad con respecto a su solicitud de Asistencia de Reempleo. Es importante que usted comprenda este documento. Este documento está disponible en Español http://floridajobs.org/Unemployment/bri/BRI_Spanish.pdf. Si no lee o entiende Inglés, llame al 1-800-204-2418 para asistencia de traducción gratuita en relación con su solicitud de Asistencia de Reempleo.

ITALIAN / ITALIANO :
Questo documento contiene informazioni importanti, date o stato di idoneità relativi alla richiesta di reimpiego. È importante comprendere questo documento. Se non legge o comprende l'inglese, chiamare il numero 1-800-681-8102 per assistenza gratuita alla traduzione a proposito della richiesta di reimpiego.

GERMAN / DEUTSCHE :
Dieses Dokument enthält wichtige Informationen, Daten oder Berechtigungsstatus hinsichtlich Ihrer Wiedereinstellungshilfsanspruchs. Es ist wichtig für Sie, dieses Dokument zu verstehen. Falls Sie Deutsch nicht verstehen oder nicht lesen können, wenden Sie sich für eine kostenlose Übersetzungshilfe hinsichtlich Ihres Wiedereinstellungshilfsanspruchs an 1-800-681-8102.

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Овај документ садржи важне информације, датуме или доступност везано за Ваш захтјев за помоћ код поновног запошљавања. Важно је да разумијете овај документ. Ако не можете прочитати или разумјети енглески језик, позовите 1-800-681-8102 за бесплатну помоћ с преводом везано за ваш захтјев за помоћ при поновном запошљавању.

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Ovaj dokument sadrži važne informacije, datume ili status kvalificiranosti po pitanju vašeg traženja podrške pri ponovnom zapošljavanju. Za vas je važno da razumijete ovaj dokument. Ako ne možete čitati ili razumjeti engleski, pozovite 1-800-681-8102 da dobijete besplatnu pomoć pri prijevodu u vezi vašeg traženja podrške pri ponovnom zapošljavanju.

HAITIAN CREOLE / KREYÒL AYISYEN :
Dokiman sa a gen enfòmasyon enpòtan, dat, oubyen estati kalifikasyon konsènan reklamasyon Asistans Reyanbochaj ou. Li enpòtan pou ou konprann dokiman sa a. Dokiman sa disponib an kreyòl nan http://floridajobs.org/Unemployment/bri/BRI_Creole.pdf. Si ou pa li oswa konprann anglè rele 1-800-204-2418 pou sèvis tradiksyon gratis konsènan reklamasyon Asistans Reyanbochaj ou.

CHINESE TRADITIONAL / 中國 :
本檔包含與您的**再就業援助**申請相關的重要資訊、日期或資格有效狀態。請您務必理解本檔之內容。如果您閱讀或理解英語的能力有限，請撥電話 1-800-681-8102，取得與您的**再就業援助**申請相關的免費翻譯協助。

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本文件包含与您的**再就业援助**申请相关的重要信息、日期或资格有效状态。请您务必理解本文件的内容。如果您阅读或理解英语的能力有限，请拨电话 1-800-681-8102，获得与您的**再就业援助**申请相关的免费翻译协助。

JAPANESE / 日本語 :
この文書には、あなたの再雇用支援の申し立てに関する重要な情報、日付、または資格が示されています。必ずこの文書をよく読んで内容を理解してください。英語を読むことも理解することもできない場合は、お電話（1-800-681-8102）にてお問い合わせになり、再雇用支援の申し立てに関する無料の翻訳支援を受けてください。

VIETNAMESE / TIẾNG VIỆT :
Hồ sơ này có các thông tin quan trọng, ngày tháng, hoặc tình trạng điều kiện hội đủ về đơn đề nghị Hỗ Trợ Tìm Việc Làm của quý vị. Điều quan trọng là quý vị phải hiểu rõ hồ sơ này. Nếu quý vị không đọc hoặc hiểu được tiếng Anh, hãy gọi đến số 1-800-681-8102 để được hỗ trợ biên dịch miễn phí về đơn đề nghị Hỗ Trợ Tìm Việc Làm của quý vị.

ARABIC / العربية اللغة :
يحتوي هذا المستند على معلومات مهمة أو تواريخ أو وضع الأهلية فيما يتعلق بدعوى المساعدة في إعادة التوظيف. ومن الأهمية لك أن تفهم هذا المستند. وإذا لم تقرأ النص الإنجليزي أو تفهمه، يرجى الاتصال على للحصول هاتف رقم: 1-800-681-8102 على الترجمة المتعلقة بدعوى المساعدة في إعادة التوظيف.

FARSI / فارسی :
این سند حاوی اطلاعات، تاریخها یا تقاضای واجدالشرایط بودن شما در مورد درخواست کمک هزینه استخدام مجدد شما می باشد. درک این سند برای شما مهم است. اگر نمی توانید به انگلیسی بخوانید یا انگلیسی نمی فهمید با شماره 1-800-681-8102 برای ترجمه رایگان در مورد تقاضای کمک هزینه استخدام مجدد خود تماس بگیرید.

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В этом документе содержится важная информация, даты или сведения о статусе соответствия требованиям в отношении Вашего заявления о помощи в получении новой работы при увольнении. Важно, чтобы Вы поняли этот документ. Если Вы не можете прочесть текст на английском языке или не понимаете английский язык, позвоните по номеру 1-800-681-8102, чтобы получить бесплатные услуги перевода в отношении Вашего заявления о помощи в получении новой работы при увольнении.