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FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

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# APPEALS QUARTERLY

# Meet Chairman **Frank E. Brown**

Chairman Frank E. Brown was appointed to the Commission effective July 1, 2013, by Governor Rick Scott. He has twenty-four years of labor and employment law and litigation experience in both the public and private sectors. He is an honors graduate of the University of North Carolina at Charlotte in 1983 and Florida State University College of Law in 1987, and first served as a commercial litigator with the Tampa office of Carlton, Fields, Ward, Emmanuel, Smith & Cutler.

In 1989, he joined the Florida Attorney General's office as a senior attorney in its Labor and Employment Litigation Branch where he served for five years, litigating dozens of cases for state agencies, including, in particular, the state university system. He has worked at the law firm Zinober & McCrea, as well as MacFarlane, Ferguson and McMullen, P.A., where he practiced until his appointment to the Commission. He has been recognized as a peer-selected outstanding practitioner in a number of publications, including Best Lawyers In America, Florida Super Lawyers, Florida Trend's "Legal Elite," Chambers USA's "America's Leading Lawyers For Business," and Tampa Bay Magazine's "Top Lawyers." He has been board certified by The Florida Bar in Labor and Employment Law since the certification was first established.

Chairman Brown has extensive substantive law and litigation experience across a broad spectrum of labor and employment subject areas, including equal employment opportunity law (discrimination, harassment and retaliation), wage and hour law, employee benefits law, federal and state collective bargaining law, employment contract law, and civil rights law. He has tried over 25 employment or civil rights cases in court or arbitration, as well as dozens of administrative hearings. Chairman Brown also served over ten years as counsel to the Hillsborough County Civil Service Board, where he presided over hundreds of administrative hearings including evidentiary hearings on employee discharge cases.

He has devoted a significant portion of his time to legal scholarship and education, with particular emphasis on civil discovery, employee benefits, and wage and hour law. His published works include a book chapter on discovery (with the Hon. Elizabeth A. Jenkins) in the *Eleventh Circuit Federal Civil Practice Before Trial* (Lawyers Cooperative Publishing/American Inns of Court Practice Series (1998)); the chapter on discovery in *ERISA Litigation* (Bloomberg BNA, 1st and 2nd eds.); and as a contributing editor for the chapter on "White-Collar Exemptions" in the American Bar Association's treatise on The Fair Labor Standards Act (Bloomberg BNA, 1st and 2nd eds.). He has also served as a contributing author to other ABA/BNA treatises, including Employee Benefits Law, Age Discrimination In Employment Law, and The Family And Medical Leave Act. He has authored numerous articles on a variety of labor topics. He has given over 50 continuing legal education presentations for the American Bar Association, The Florida Bar Labor and Employment Law Section, and other sponsors.

Chairman Brown has served as a member of the Executive Council of The Florida Bar Labor and Employment Law Section since 2002 and has served in numerous positions for the Section, including chairman of the Employee Benefits Committee (1998 - 2003), Editor of the Section column for The Florida Bar Journal (2003 - 2012), Legal Education Director (2012 - 2013) and currently serves as Section Secretary/Treasurer for the 2013-14 bar year. He has also served on The Florida Bar's Federal Court Practice Committee (2001 - 2006) and is a member of the Continuing Legal Education Committee for the 2013-14 year. He is a member of the American Bar Association Labor and Employment Law Section, where he has served on numerous committees, including the Federal Labor Standards Committee.

His years of experience in advising and representing both management (from Fortune 500 companies and large public employers to small businesses), as well as employees (from managers and professionals to blue-collar laborers) gives him an understanding of the dynamics of the workplace across the spectrum of industry sectors and job classifications. Chairman Brown applies this real-world understanding of human resource management to the broad scope of cases that come before the Commission.

## In this Issue:

# THE STATUTORY DEFINITION OF MISCONDUCT

The Florida Legislature has made several revisions to Sections 443.101 and 443.036, Florida Statutes, during the past several years. As a result, appeals referees may find it challenging to understand how to develop the hearing record in order to make qualified legal arguments and a sound legal decision. Section 443.036(30), Florida Statutes, provides this definition of misconduct:

"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, or 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 interests, 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.**

Our higher courts have issued opinions that provide guidance for how to apply the statutory definition of misconduct to the circumstances surrounding a claimant's discharge from employment. In particular, the following Commission orders and Court decisions involve an alleged violation of an employer's rule and the application of subparagraph (e) of the statutory definition of misconduct.

## Important "Employer Rule" Cases and Commission Orders

**Critical Intervention Services v. Florida Reemployment Assistance Appeals Commission, 106 So. 3d 63 (Fla. 1st DCA 2013)**

The claimant worked for the employer as a protection officer at various client sites. On April 15, 2011, the client site, a store, issued a "post order" specific to the client the claimant was working with, directing protection officers "not to pursue shoplifters past" the location's entrance. The claimant started working at a new client site in August 2011. On September 28, 2011, the employer issued an "area alert" stating that protocols had been updated for the client site at which the claimant worked and that, if the updated protocols were not in place, employees should contact the employer for the updated information. In early November 2011, the claimant was discharged for violating the employer's policy by pursuing a suspected shoplifter beyond the location's front doors, at the request of the store manager. The employer's rule prohibited guards from pursuing shoplifters beyond the store's entrance/exit.

At the appeals hearing, the claimant testified that, even though he had worked at eight different sites for the same client, he was unaware of the client company's updated protocols. The appeals referee held that, since the claimant was not aware of the policy, his actions did not constitute misconduct. The Commission affirmed. The court observed that the affirmative defense found in Section 443.036(30)(e)(1), Florida Statutes (2011), applies only if the claimant can show that he did not know, and could not reasonably know, of the rule's requirements. While the referee found the employee did not know of the rule, the referee failed to make findings regarding whether the claimant could not have reasonably known of the rule. The court remanded the case for further development of the record.

**Crespo v. Florida Reemployment Assistance Appeals Commission, 128 So. 3d 49 (Fla. 3d DCA 2012)**

The claimant was employed as an armed security guard by Doyon Security Services. The claimant reported to his post for the Immigration and Customs Enforcement ("ICE") detention facility and learned he did not have all the necessary paperwork to fulfill his duties

He drove a company vehicle to the facility's office, and parked in a space designated for ICE employees. The claimant could not bring his gun into the office, so he left the loaded firearm in his glove compartment and locked the vehicle. The employer discharged the claimant for:

1) leaving his assigned post, 2) parking in an unauthorized space, and 3) leaving a loaded firearm in the glove compartment of a locked vehicle instead of in his assigned gun locker.

The claimant was initially awarded benefits. The employer appealed, arguing the claimant had violated a "reasonable and known policy" by negligently storing his service weapon in the glove compartment instead of in his assigned gun locker. The appeals referee issued a decision reversing the initial determination, and the referee's decision was affirmed by the Commission.

The court, however, held that, since the employer's policy of "storing a gun in a safe place" did not clearly require the claimant to always store the gun in his gun locker, the employer did not establish the claimant violated the employer's rule; consequently, the employer did not prove the claimant's discharge was for misconduct connected with work.

**Alvarez v. Florida Reemployment Assistance Appeals Commission, 121 So. 3d 69 (Fla. 3d DCA 2013)**

The claimant worked for the employer as a security guard, and was assigned to a performing arts complex. The employer discharged the claimant for violating a policy that prohibited unauthorized access to a designated security area near the box office. The claimant was held disqualified from receiving benefits.

The court held that, under the present statutory scheme, the definition of "misconduct" includes the deliberate violation of an employer rule which has not been shown to be unfairly or inconsistently enforced. The court noted that under subparagraph (e), conduct which would not meet the prior definitions of misconduct could now be disqualifying. The court also noted in a footnote that subparagraph (e) could potentially raise constitutional concerns on an *as applied* basis if minor violations of employer rules of little significance resulted in a complete denial of reemployment assistance benefits. However, the court found no issue with the referee's decision holding that a security guard was properly disqualified for violating a security rule.

**Pickett v. JP Morgan Chase Bank, R.A.A.C. Order No. 13-09166 (July 24, 2014)**

The claimant worked as a senior lead operations specialist for two years. The employer discharged the claimant for failing to meet her performance goal of processing a certain number of loans per hour worked for most of the months she was employed.

The appeals referee found the claimant performed her job to the best of her ability and concluded she violated the employer's rule but misconduct was not proven since the employer did not establish that the claimant's violation of the rule was willful or deliberate.

The Commission affirmed the referee's decision on alternate grounds, explaining that subparagraph (e) contains no requirement that a claimant's rule violation be willful or deliberate. The Commission's order further explained that a performance goal is not a "rule" within the meaning of subparagraph (e). A "rule" directs an employee to act or behave in a certain manner and contemplates that the employee can in all circumstances control whether or not he or she complies with the rule. The Commission contrasted performance goals from work rules that describe behavioral expectations such as disciplinary rules; attendance, leave and timekeeping policies; safety and security policies; and policies for protection of finances or property.

**Foss v. Cutrale Citrus Juices USA Inc., R.A.A.C. Order No. 13-04567 (August 7, 2013)**

The claimant worked as a forklift driver/packaging employee for the employer. The employer implemented an energy control program pursuant to Occupational Safety and Health Administration ("OSHA") regulations. Under its program, the employer had a safety policy that required employees entering machines to disconnect and padlock the air and the power source so that the machine cannot be started while an employee is inside. (The procedure is referred to as lock out/tag out.) The policy provided for immediate discharge for violations of the lock out/tag out program. During the incident at issue, the claimant entered a machine that wraps pallets with plastic wrap; he entered the machine in order to prevent leaning cases on the pallet from falling. He put his one lock on the power source, but it was not locked. The claimant testified the employer did not issue him the proper equipment to put two locks on the machine; however, he admitted that, with respect to the one lock he used, he did not check to make sure the lock was locked because he was in a hurry. The employer discharged the claimant for violating the safety policy.

The appeals referee held the claimant disqualified from receiving benefits, and the Commission affirmed the referee's decision. The Commission held that, in determining whether the employer's rule was fairly enforced in a case where the claimant's violation was merely inadvertent or negligent, the Commission must balance the degree of culpability of the claimant with the nature and purpose of the rule and the impact of the violation on the employer's operations. Since the employer's policy was a federally-mandated safety procedure, the Commission gave a high degree of deference to the employer and concluded the rule had been fairly enforced.

**Thompson v. JP Morgan Chase Bank, R.A.A.C. Order No. 13-05379 (November 5, 2013)**

The claimant worked as a customer service specialist for JP Morgan Chase for five months. The employer discharged the claimant for violating regulatory procedures in handling calls from customers. In particular, the claimant failed to verify a customer's identification during two phone calls and failed to verify a customer was listed on a checking account before taking a payment from the customer.


During the appeals hearing, the employer submitted numerous documents, but did not present testimony regarding the documents or request that they be entered into evidence. The claimant testified he was generally aware of the employer's procedures and acknowledged he may have inadvertently violated them. The referee dismissed the employer's evidence as insufficient hearsay and concluded the claimant's discharge was not shown to be for misconduct.

***CONTINUED ON PAGE 4***

# Cases and Orders continued…

On appeal to the Commission, the employer argued the claimant's failure to follow the multi-step procedure when dealing with customer calls was a violation of the employer's regulatory policies and, consequently, constituted misconduct connected with work. The Commission's order affirmed the referee's decision with a comment explaining that minor negligence in failing to strictly adhere to a detailed, multi-step work procedure is not an (e) violation because such a procedure does not constitute a "rule" as contemplated by the statutory definition of misconduct**.**

**Terbeche v. Gamestop Inc., R.A.A.C. Order No. 13-06848 (November 7, 2013)**

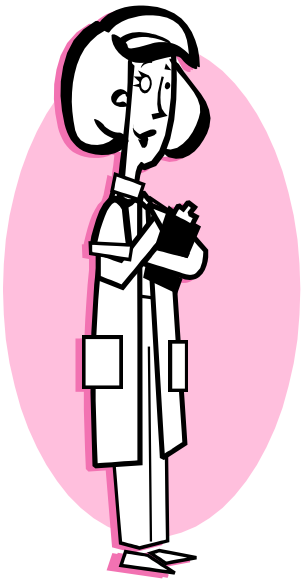
The claimant worked as a senior game advisor for the employer, Game Stop, Inc. The claimant was aware that the employer's policy prohibited providing customer information to outside parties. The claimant assisted a customer who wanted to submit a gaming system to the employer as a trade-in. The claimant believed the customer was attempting to trade-in a game system that had been stolen from one of the claimant's friends. The claimant gave his friend the customer's personal information. The claimant's friend confronted the customer, and the customer filed a complaint against the claimant for releasing his personal information. The employer discharged the claimant for violating the employer's policy and releasing the customer's information.

In explaining his actions, the claimant asserted he used his best judgment to address what he believed was a customer's attempt to trade-in a stolen item. The appeals referee held the claimant not disqualified. The Commission's order reversed the referee's decision. The Commission held the employer established a prima facie case of misconduct within the meaning of subparagraph (e). The claimant acknowledged he was aware of the policy, did not assert the rule was unlawful or not reasonably related to the job, and did not assert that the employer failed to enforce the rule consistently. The claimant also did not assert he violated the rule due to factors outside of his control. The "poor judgment" doctrine courts have applied in cases under subparagraph (a) was not incorporated into subparagraph (e) and, if such considerations exist in (e), they do so only in the "fair enforcement" defense. This case, however, involved a deliberate violation of the employer's rule because the claimant made a conscious decision to release the customer's information to an outside party, in a situation where no compelling justification existed for the claimant's behavior.

**Ingram v. Tretto Inc., R.A.A.C. Order No. 13-05983 (December 2, 2013)**

The claimant worked full-time for the employer as a dietary aide. The employer's code of conduct prohibited swearing, using abusive language, and engaging in disorderly conduct during work hours or on company property. The claimant was issued a handbook at time of hire and was aware of these rules. During the latter part of her employment, a woman came to the employer's jobsite, a hospital cafeteria, and confronted the claimant about the claimant's son's father. The claimant considered it harassment and reported the incident to the lead cook. The claimant did not go to human resources or to the director about the incident.

On a separate occasion, the same woman came into the dining room where the claimant was working and confronted the claimant. The woman spoke loudly and called the claimant names. The claimant walked away. The woman called the claimant a "bitch." The claimant then called the woman a "bitch" and told her to leave or she would call security. There were other employees and customers in the dining room at that time. The employer's director of food and nutrition called the claimant's name and told the claimant to step away three times. After the third time, the claimant walked away. The claimant was discharged for improper conduct in violation of company rules.



The referee held the claimant disqualified. The Commission's order reversed the referee's decision. The Commission's review of the record reflected the claimant reacted to uninvited provocation. In appropriate cases, provocation can be considered when determining whether a rule was fairly enforced by the employer. The employer did not necessarily act unfairly in discharging the claimant; however, under these facts, disqualification from receiving benefits constitutes an unfair enforcement of the employer's policy under subparagraph (e).

**Velez v. Orlando Health Inc., R.A.A.C. Order No. 13-06014 (October 7, 2013)**

The claimant worked for the employer as a clinical technician. The claimant's job duties required her to access patient records if she had received prior authorization. The employer believed the claimant accessed a patient's medical records without authorization. The employer discharged the claimant for alleged unauthorized access of patient records.

The referee held the claimant not disqualified. The Commission concluded the record had not been sufficiently developed, and issued an order vacating the referee's decision and remanding the case to the referee. In particular, the referee's decision did not address the claimant's testimony that she may have "left her screen up where she had logged in and maybe someone else accessed the records." Additionally, the Commission's order explained that subparagraph (e) generally requires the employer to provide notice to the employee of the potential consequences for the rule violation, or that the rule violation be sufficiently severe for the claimant to reasonably understand discipline, including termination, might result. On remand, the referee was required to

develop the record further regarding the specific terms of any policies/rules purportedly violated by the claimant and the claimant's specific conduct that allegedly violated those rules. The referee was also instructed to determine whether the claimant was given notice or warning that her failure to comply could result in discharge or, in the alternative, whether the rule violation was so severe that the claimant should have known the consequences.

**Atkinson v. Proly & LaPorte, PA., R.A.A.C. Order No. 13-06381 (October 30, 2013)**

The claimant worked as a full-time legal assistant for the employer. The employer's rule stated the employer's office computers were for business use only and that personal use of computers was prohibited. The claimant was aware of the rule. The claimant violated the rule and was suspended for two weeks for using Facebook and playing games on her office computer after being warned not to do so. She was warned that another occurrence of this behavior would result in her termination.

The claimant, however, continued using her work computer to access Facebook and play games during working hours. The employer was able to prove her activities through the use of a surveillance program and a contracted Information Technology company. The claimant knew about the surveillance and freely admitted to violating the rule. The claimant, however, asserted another co-worker engaged in similar behavior. The employer indicated it was not aware of the co-worker's actions. The employer discharged the claimant for violating its policy.

The referee held the claimant disqualified. The Commission's order affirmed the referee's decision. In order for the claimant to establish a defense of inconsistent enforcement of a rule by the employer, the claimant must show other employees also violated the rule and were not punished by the employer. Additionally, the claimant must also establish that the employer was aware other employees also violated the rule or that the employer "turned a blind eye" toward such conduct. In this case, the referee determined the employer was not aware of other employees engaging in behavior similar to the claimant's actions.

**McCall v. Waste Management Inc. of Florida, RAAC Order No. 13-04616 (August 5, 2013)**

The claimant worked as a truck driver for a waste management company. The employer's safety incident policy assessed points for each alleged violation of the policy. The policy provided for discharge upon the accumulation of 12 points in a rolling year, and four points were assessed for "preventable" accidents. The claimant was written up and assessed four points for failing to report damage on a vehicle. The claimant was later assessed four points for driving on a flat tire and four points for hitting a gate. The claimant was discharged for violating the employer's point-based safety policy.

The referee determined the claimant was discharged for misconduct connected with work. The Commission's review of the record before the appeals referee reflected the employer's witnesses did not observe the incidents causing damage. The record further reflected the employer submitted write-ups as evidence, and the employer discharged the claimant solely for the accumulation of points. The Commission's order reversed the referee's decision. The claimant's actions, as proved by the employer, did not violate the written terms of the employer's policy. In particular, the employer failed to prove that the damage to the vehicle was a preventable accident worth four points; consequently, the employer failed to prove a violation of its policy sufficient to establish misconduct.

**Callahan v. Carnival Corporation, R.A.A.C. Order No. 13-04349 (August 29, 2013)**

The claimant, an eight-year customer service representative, was discharged after a single incident with a customer. After a "tense and unsettling conversation" with the customer, the claimant sent an email to the employer. The email was titled "scumbag" and referred to the customer as an "asshole." The claimant intended to send the email to his supervisor, but he inadvertently sent a copy of the email to the customer. The employer discharged the claimant and asserted the claimant's actions violated its code of computing practice.

At the appeals hearing, the employer did not submit its written computing practice policy for consideration by the referee. The employer did submit its obscenity policy that provided that the "use of obscene, threatening, or abusive language or involvement in malicious gossip or harassment of other employees or customers" could result in immediate termination. The referee held the discharge was not for misconduct, noting the code of computing policy was not in evidence. Although the referee made a finding of fact regarding the obscenity policy, the referee concluded the claimant did not knowingly violate any policy. The Commission affirmed the referee's decision. The Commission concluded that, although the claimant's words were vulgar, they did not rise to the level of "obscene" nor were they "abusive" or "threatening" because they were not intentionally sent to the customer. The Commission also noted that the accidental nature of the email's transition to the customer was not a "conscious disregard of the employer's interests." The Commission further held that, with respect to the computing practices policy, when an employer provides only oral testimony regarding the contents of a written policy and a claimant does not concede knowledge of the requirements of the policy, the referee has the discretion to determine what weight, if any, to give such testimony, and the more specific and complex the language of the policy, the less likely oral testimony will suffice. The referee correctly determined the employer provided insufficient evidence to establish misconduct under (e).