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FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

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APPEALS QUARTERLY

ANALYZING ATTENDANCE ISSUES IN RA LAW

Attendance cases are perhaps some of the most complex cases in RA law. The question of whether poor attendance constitutes misconduct has always required detailed factual development. However, the significant amendment to the statutory definition of misconduct in 2011 has made the analysis more complicated since multiple subparagraphs must be considered. The following analysis can be found in Wilson v. Superior Sheds, Inc., RAAC No. 14-01818 (October 29, 2014).

The Relevant Statutory Provisions

In cases involving a claimant's discharge for absenteeism or tardiness, the Commission analyzes the evidence under the relevant subparagraphs in an order that runs from the most specific standards (the content of an employer rule), to moderately specific, to more general: subparagraph (e), subparagraph (c), and subparagraph (a). Those provisions provide, in pertinent part:

> (e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:
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> a. He or she did not know, and could not reasonably know, of the rule's requirements;
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> 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.
>
> (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.
>
> (a)Conduct demonstrating a 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.

Since the subparagraphs may not be construed in pari materia with one another, each one must be analyzed independently. Thus misconduct within the meaning of any one of these subparagraphs requires disqualification even if the claimant's actions do not constitute misconduct pursuant to any other subparagraph.

Fault Remains an Essential Element of Misconduct

While the subparagraphs are separate, the analysis of each requires a core consideration. Misconduct under the statute presumes some degree of fault on the part of a claimant. Accordingly, analysis of attendance issues under each subparagraph must give consideration to determining what fault, if any, the claimant bore. As discussed more fully below, the existence of fault generally should be determined by examining 1) the reason for the attendance infraction, 2) the claimant's compliance with the employer's notice and verification requirements, and 3) any failure by the claimant to take available leave that would have excused an absence.

In considering attendance infractions under any of the subparagraphs, the referee must first determine whether the absences or tardiness were for "compelling" reasons. Although the definition of misconduct was substantially amended in 2011, the legislative history does not reflect any intention to abrogate the body of case law holding that absences which the claimant could not reasonably prevent are not misconduct. See Cargill, Inc. v. Unemployment Appeals Commission, 503 So. 2d 1340 (Fla. 1st DCA 1987); Howlett v. South Broward Hospital Tax District, 451 So. 2d 976 (Fla. 4th DCA 1984); Taylor v. State Department of Labor and Employment Security, 383 So. 2d 1126 (Fla. 3d DCA 1980). Compelling reasons include those such as illness, emergencies, or other unpredictable events that prevent an employee from attending work or arriving on time. They may also include predictable events such as planned medical treatment when the timing is necessitated by circumstances outside the claimant's control.

In determining whether absences are for compelling reasons when they may otherwise violate an employer's policy, the referee should consider whether the claimant reasonably availed himself or herself of leave opportunities, such as leave under the Family and Medical Leave Act ("FMLA") or other applicable leave offered by the employer, of which the claimant was given due notice.

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ATTENDANCE ISSUES *CONTINUED...*

In McMath v. JP Morgan Chase Bank NA, RAAC Order No. 13-06859 (2013), the referee held that the claimant should not be held responsible for absences due to illness even though the evidence showed that the employer had offered intermittent FMLA leave on several occasions and the claimant failed to avail herself of the offered FMLA. The Commission reversed, reasoning as follows:

> [T]he claimant's failure to accept the employer's offer of intermittent FMLA, in light of her knowledge that her continued unapproved absences due to illness would ultimately result in her discharge, constituted misconduct under the plain language of the second prong of subparagraph (c). Because the record reflects the choice of whether to apply for intermittent FMLA was within the claimant's control, the Commission holds that the claimant's failure to apply for intermittent FMLA leave resulted in her being culpable for the resulting unapproved absences.

However, the claimant cannot be held responsible for failing to take leave unless the record establishes the employer properly advised the employee of his or her leave rights. See Ramirez v. Reemployment Assistance Appeals Commission, 135 So. 3d 408 (Fla. 1st DCA 2014)(declining to address the significance of a claimant's failure to pursue FMLA leave when offered by the employer in the absence of record development with respect to the employer's compliance with FMLA notice requirements).

If absences or tardiness are for compelling reasons, the referee should then determine whether the claimant, to the extent feasible, gave notice to the employer as required by any employer policy, or otherwise gave reasonable notice. The referee should further determine whether the claimant provided any documentation or verification reasonably required by the employer, and if not, why the claimant did not do so.

Subparagraph (e)

In considering subparagraph (e), the referee must specifically address whether the claimant's tardiness/absences amounted to a violation of an employer's "rule." To prove the existence of a rule violation under this subparagraph, the employer must present evidence of its attendance policy/rule and evidence that the claimant violated it. The claimant would then have the burden of showing that he/she did not know, and could not reasonably know, of the rule's requirements; the rule is not lawful or not reasonably related to the job environment and performance; or the rule is not fairly or consistently enforced. With respect to the issue of fair enforcement, the Commission takes the position that, generally, if an employee violates an employer's rule as a result of his/her absences from work based upon compelling reasons, and where notice is reasonably given and verification reasonably provided as discussed above, that policy/rule cannot be considered fairly enforced against the claimant for the purposes of disqualifying him/her from receipt of benefits. For example, if any employer's policy provides that an employee will be discharged after six absences, but four of the claimant's six absences were for medical reasons and the claimant gave proper notice and verification for each absence, the policy cannot be considered fairly enforced to disqualify.

Subparagraph (c)

Should the referee find that the claimant's actions did not constitute misconduct pursuant to the provisions of subparagraph (e), the referee must then consider subparagraph (c), which contains two prongs. Under the first prong, the referee shall address whether the claimant's absenteeism or tardiness was both chronic and in deliberate violation of a known policy of the employer. Any absence or tardiness caused by a compelling reason and for which any required notice or verification are given cannot be considered deliberate. Although similar to consideration of attendance under subparagraph (e), this prong differs in one significant respect. Under this prong, when an employee is discharged for exceeding the number of attendance infractions allowed under the employer's attendance policy, the employer is not required to prove that the claimant's unexcusable absences and tardies exceeded those permitted under the rule; the employer need only prove that the claimant's unexcusable absences or tardies were chronic and deliberate, and violated the employer's general policy standards regarding attendance.

If the first prong of subparagraph (c) does not apply, the referee should then address the second prong of that subparagraph. This requires inquiry as to whether the claimant was absent without approval following a written reprimand or warning relating to more than one unapproved absence. No explicit requirement of fault exists under this prong of subparagraph (c); rather, all that is required is that the employer establish that the final absence was unapproved and followed a written warning for unapproved absences. The Commission has, however, previously held that despite the lack of an express intent standard in the second prong of (c), a claimant could not be disqualified from benefits in the absence of any fault whatsoever on his/her part such as where the absences are for compelling reasons and for which reasonable notice and verification were provided as required. In such cases, an employer may choose whether to grant approval for such absences, but a claimant will not be disqualified if such absences are not approved.

Subparagraph (a)

Should the referee conclude that subparagraphs (e) and (c) are inapplicable, it would be appropriate to consider the more general definition of misconduct set out in subparagraph (a). Generally, such an analysis would encompass all of the foregoing analyses, but would also include a wider range of factors and circumstances that have traditionally been considered. "Conscious disregard" may be shown by prior warnings or employer policies, but neither is necessarily required. The referee should also consider the impact of the absences on the employer, including the impact on the claimant's coworkers. Under subparagraph (a), the referee should consider the totality of the claimant's attendance, even if the final incident was excusable due to compelling circumstances, as was required under the predecessor definition of misconduct. See Mason v. Load King Mfg. Co., 758 So. 2d 649 (Fla. 2000); C.F. Industries, Inc. v. Long, 364 So. 2d 864 (Fla. 2d DCA 1978).

RAAC ORDERS ON ATTENDANCE ISSUES

CASES INVOLVING NO-FAULT POLICIES

Calvin v. H Lee Moffitt Cancer Center, R.A.A.C. No 13-04522 (October 18, 2013)

The referee found that the claimant accrued seven absences and two occurrences of tardiness, the absences were due to her being ill or not feeling well, the claimant called to report all her absences, and that she received four warnings for the attendance infractions before eventually being discharged. The referee held the claimant was discharged for reasons other than misconduct connected with work. The Commission remanded the case because the factual findings were not specific enough to enable it to conclude whether the claimant's attendance infractions constituted misconduct under subparagraphs (e), (c), or (a) of the definition of misconduct. In particular, the record was not clear whether the employer provided a means by which unscheduled absences could be approved or whether the policy was a no-fault policy, in which case the second prong of (c) would not apply. The record was also not clear regarding whether the claimant would have qualified for intermittent FMLA leave and whether her failure to apply for FMLA leave resulted in her being culpable for her absences being unapproved.

Poole v. Southern Baptist Hospital of FL Inc., R.A.A.C. Order No. 13-04867 (October 9, 2013)

The employer gave the claimant a final warning and two day suspension after accumulating seven unscheduled absences within a 12 month period. The employer informed the claimant that if she called out again in the next four months she would be discharged under the employer's attendance policy. Two months later the claimant left work early with approval from the employer because was having chest pains and needed to see a doctor. The claimant was admitted to the hospital and did not return to her shift. The next day the claimant was released from the hospital but informed the employer that her doctor ordered her not to return to work until she had a stress test. The supervisor responded, "Okay, that's fine." Accordingly, the claimant's absence continued. She spoke to her supervisor most days she was absent. A few weeks after her last period of absence began, she notified her supervisor that she could return to work but the employer had already decided to discharge her under its attendance policy.

The referee held the claimant's discharge was for misconduct as defined in subparagraph (e) and the second prong of subparagraph (c). The Commission reversed. The record showed the employer had a no-fault policy regarding unscheduled absences. The referee did not account for the claimant's unrebutted evidence that all of her absences, both before and after her warning, were due to illness and were properly reported to the employer. Under these circumstances, the claimant's absences were not disqualifying under the second prong of subparagraph (c). Furthermore, while the employer established a prima facie case of misconduct under subparagraph (e), the claimant met the burden of establishing the affirmative defense that the employer's attendance policy was not fairly enforced under the circumstances since the absences were for compelling reasons not within the claimant's control and the supervisor had given the claimant cause to believe that her absences were approved.

Sheppard v. Orlando Health Inc., R.A.A.C. Order No. 13-07968 (April 22, 2014)

The claimant was discharged pursuant to the employer's attendance policy. The policy stated that employees would receive a warning if they accrued six tardies or three absences within three months. The policy also provided that if an employee received two warnings within twelve months, she would be discharged for any additional absences or tardiness. The claimant was tardy three times and absent once after receiving her second warning and was then discharged for violating the employer's attendance policy.

The referee held the claimant's discharge was for misconduct as defined in subparagraph (c). As in *Poole*, *supra*, the Commission rejected that conclusion because the employer had a no-fault policy, all of the claimant's absences were due to a medical condition, and she properly reported the absences to the employer. For the same reasons, the claimant established the subparagraph (e) affirmative defense that the policy was not fairly enforced under the circumstances. However, the Commission remanded the case for the referee to develop the record regarding the claimant's tardiness. The Commission noted that it is critical for an employee who is repeatedly absent, albeit for compelling reasons, to be mindful that his or her tardiness places an added burden on an employer that is already suffering from the disruption to its operation caused by the employee's absenteeism.

CASES INVOLVING TARDINESS

Scott v. Connextions Inc. and Subsidiaries, R.A.A.C. Order No. 13-08456 (February, 21, 2014)

The claimant was discharged for chronic absenteeism and tardiness after warning. The referee held that since the claimant's absences were for compelling reasons, they were not disqualifying. However, the referee did not address the claimant's tardiness. The Commission remanded the case for additional factual development regarding the reasons the claimant was tardy during the incidents at issue. As in *Sheppard*, *supra*, the Commission noted that it is critical that an employee who is repeatedly absent, albeit for compelling reasons, be mindful that his or her tardiness places an added burden on an employer that is already suffering from the disruption to its operation caused by the employee's absenteeism.

Angelastro v. Avionica Inc., R.A.A.C Order No. 14-02366 (August 15, 2014)

The claimant worked for the employer for five months. He was absent 6 times before receiving a verbal warning regarding

R.A.A.C. ORDERS ON ATTENDANCE ISSUES CONTINUED

attendance. Subsequently, the claimant called to report he would be absent due to an accident on the public transportation system by which he was travelling. The following day, he was an hour late for work. After these infractions, the claimant received a written warning for attendance. The claimant was then late again and was discharged.

The referee held the claimant was discharged for reasons other than misconduct connected with work. The referee reasoned that the employer failed to establish a known policy under subparagraph (e). The referee also concluded the first prong of subparagraph (c) was not applicable because two incidents of tardiness was not "chronic." The referee also concluded the second prong of (c) was not applicable because the claimant did not have one or more unapproved absences following a written warning relating to more than one unapproved absence.

The Commission reversed. The employer established misconduct under subparagraph (a) by proving the claimant was tardy after warning, shifting the burden of proof to the claimant to show a justification or an excuse for the tardiness. Since the claimant missed the hearing and his opportunity to provide justification for the tardiness, he did not meet that burden.

Tonn v. Welcome to Moes, Inc., R.A.A.C. Order No. 14-02822 (August 12, 2014)

The claimant was discharged for excessive tardiness. The referee concluded that she was discharged for reasons other than misconduct because she had never been warned regarding tardiness. The Commission remanded the case. The employer had a policy that provided for discharge for "excessive" tardiness. The Commission directed the referee to question the employer regarding what constitutes "excessive" under the rule such that discharge will result. The Commission also directed that the record be developed regarding the details surrounding each of the specific instances of tardiness that led to the claimant's discharge including the specific dates of each tardy, the reason for each tardy, the duration of each tardy, and whether each instance of tardiness was properly reported. Without this information, the Commission was unable to determine whether the claimant's discharge was for misconduct.

Joseph v. Publix Super Markets, Inc., R.A.A.C. Order No. 14-01723 (August 13, 2014)

In the last six months of the claimant's eight years of employment, the claimant was warned about arriving late for work on several occasions. The employer tried to work with the claimant and offered to change her schedule to a later time so she would have more time to get to work. The claimant did not accept the employer's offer. After receiving several warnings and continuing to arrive late, the claimant was discharged for violating the employer's attendance policy.

The referee held the claimant was discharged for reasons other than misconduct connected with work because the employer's witnesses could not provide the dates the claimant was tardy. The Commission reversed. Though the witnesses could not independently identify the dates the claimant had been tardy, the employer submitted four written warnings signed by the claimant that included the dates the claimant was tardy. The warnings also advised her that failure to improve would result in further discipline up to and including discharge. The employer also submitted its policy prohibiting "excessive tardiness or absenteeism or unexcused absences." The claimant admitted to being aware of this policy and admitted to being late on multiple occasions due to car problems and child care issues. Because the claimant's tardiness was chronic and violated the employer's policy, the Commission concluded the employer established misconduct under subparagraph (e) and the first prong of (c). The Commission noted that even if the employer had not established a rule violation, the claimant's continued tardiness after warning was misconduct under subparagraph (a).

Morales v. JP Morgan Chase Bank, R.A.A.C. Order No. 13-04271 (August 6, 2013)

The claimant worked for JP Morgan Chase Bank as a full-time sales and service associate. The claimant accumulated 7 absences and several tardies between January 2012 to early November 2012. The claimant was given a written warning in June for his violations of the employer's attendance policy. In the months that followed, the branch manager continued to give the claimant a couple of verbal warnings regarding his attendance. The claimant was discharged in December 2012 for accumulating the maximum attendance points allowed by the employer's attendance policy. Most of the absences were due to illness.

The referee held the claimant was discharged for reasons other than misconduct connected with work because his absences were due to illness. However, the appeals referee neglected to address the issue of the claimant's tardiness.

The claimant's tardiness did not exceed the maximum point threshold under the employer's policy and thus did not constitute misconduct under subparagraph (e). However, the record showed the claimant's tardiness was both chronic and deliberate. The claimant was tardy seven times within an eight-month period, and the record was devoid of any evidence that the tardiness was authorized or excused by compelling circumstances. The claimant attributed his tardiness to oversleeping (sometimes after a night out), not waking up early enough or not leaving home early enough to allow enough time for traffic, and car trouble. Furthermore, the amount of time by which the claimant was late was excessive. Since the claimant did not provide evidence to establish the propriety of his tardiness or absences, the Commission concluded his discharge was for misconduct connected with work within the meaning of the subparagraphs (c) and (a).

Medina v. Tube Light Company Inc., R.A.A.C. Order No. 14-01276 (August 22, 2014)

The claimant was discharged for alleged excessive tardiness. The employer alleged the claimant was late for several days of work, but the employee insisted he was not late. The referee resolved conflict in favor of the claimant, found that he had not

been late, and held he was discharged for reasons other than misconduct.

The Commission remanded the case. The record contained a written warning signed by the claimant during the period at issue. In addition, the claimant's prehearing statements were inconsistent with his hearing testimony, as he indicated in his prehearing statement that he reported to work after the scheduled start of his shift, but within what was described as a "grace period."

The referee was directed to develop the evidence regarding the claimant's arrival times during the period at issue, whether any late arrivals were for compelling reasons outside the claimant's control, the dates and details of any prior warnings, and whether the employer offered a grace period in connection with arrival times.

Bryant v. Macy's Credit Operations Inc., R.A.A.C. Order No. 14-02438 (September 22, 2014)

The claimant was discharged for exceeding the points permitted under the employer's point-based attendance policy. The policy was a no-fault policy. The employer did not issue warnings so long as an employee still had points to cover an absence. The claimant's childcare arrangements became unreliable and she began to report late for her shifts. She was also absent a few times when her child was sick.

The referee held the claimant was discharged for reasons other than misconduct. The referee concluded that the tardiness was not chronic, apparently taking into consideration only whether the frequency and degree of infractions had increased. The referee also reasoned that the claimant could not avoid being absent or tardy because she was taking care of her family.

The Commission remanded the case, concluding that the frequency of the claimant's attendance infractions alone showed a chronic problem. In the three week period leading to her discharge the claimant was tardy nine times thus depleting her attendance credits under the employer's policy. The Commission also noted that the claimant voluntarily transferred out of a department where her schedule was flexible into a department where her schedule was not. She testified that she was aware at the time of her transfer that she would not receive any special consideration for time missed from work due to childcare issues. The referee's decision, however, did not address what degree of accountability should be assigned to the claimant given the notice she received from the employer regarding its expectations for her to report to work as scheduled. The case was remanded for more specific findings of fact regarding the employer's policy and the circumstances surrounding the claimant's attendance record.

CASES INVOLVING NOTICE ISSUES

Kastner v. Wal-Mart Associates Inc., R.A.A.C. Order No. 14-01213 (September 4, 2014)

The claimant was discharged for job abandonment. The employer had a policy requiring employees to call a 1-800 telephone line to report when they would be late or absent. According to the policy, three no-call no-shows will result in termination. The claimant was absent for six of his shifts in a two week period, during which he was hospitalized. He did not call the 1-800 number to report any of these absences. However, he did report all of his absences to his supervisor who he also advised of the date he expected to return to work. The supervisor told him to take care of his health and to bring a doctor's note when he returned to work. He did not advise the claimant his job was in jeopardy or that he was required to return to work by a certain date. When the claimant returned to work with a doctor's note, he was advised that he had been discharged for violating the employer's policy.

Based on the claimant's unrebutted testimony regarding his contact with his supervisor, the Commission rejected the referee's finding that the claimant did not report or provide a reason for his last three absences. The Commission concluded that although the employer established a prima facie case of misconduct under subparagraph (e) by showing that the claimant did not comply with its policy requiring employees to report absences to the 1-800 line, the claimant established the affirmative defense that the rule was not fairly enforced since the claimant was not advised of the consequences of failing to call the 1-800 line. The Commission also concluded that the employer did not establish misconduct under subparagraph (c) since the claimant's absences were all for compelling reasons not within his control and he provided notice to his employer for all his absences. For the same reasons the employer did not prove misconduct under subparagraph (a).

CASES INVOLVING VERIFICATION ISSUES

Williams v. Lakeside Behavioral Healthcare, R.A.A.C. Order No. 13-06717 (March 5, 2014)

The Commission affirmed the referee's conclusion that the claimant was discharged for reasons other than misconduct. The Commission wrote to explain that, while the employer established a prima facie case of misconduct under subparagraph (e) by establishing the claimant violated its policy requiring her to obtain a doctor's note for absences due to illness, the claimant established an affirmative defense that she could not reasonably know of the rule's requirements. The Commission considered that the claimant was never specifically advised in advance that she was required to have a note to excuse her absences as opposed to establishing her fitness for duty. Additionally, the claimant had been absent the two prior days without a doctor's note being required. Furthermore, the record showed the claimant did not have health insurance through the employer and could not afford to visit a physician on the dates in question. The Commission recognized that employers may require a medical excuse to ensure that its sick leave policies are properly utilized, but where the employer requires a note merely to confirm an absence is medically necessary without making some provision to mitigate the financial impact of this requirement on the claimant, the policy may not be fairly enforced.

COURT CASES ON ATTENDANCE ISSUES

C.F. Industries, Inc. v. Long, 364 So. 2d 864 (Fla. 2d DCA 1978)

Long's employment record showed 22 separate instances of excessive tardiness, excessive absenteeism, violation of safety rules, failure to report an accident involving injury, and unsatisfactory performance. In each event, Long was given a warning or a suspension. The employer also alleged that Long had falsified records and then lied when confronted with evidence of the falsification. This final occurrence directly resulted in Long's termination from employment. The referee found that the employer failed to prove that Long had fabricated the records, but nevertheless believed the employer presented sufficient evidence to justify Long's discharge for misconduct. The Board of Review reversed this decision, holding that Long would not have been fired but for the alleged final act of falsifying records that the employer failed to prove. The court reversed, holding the Board erroneously reversed the referee since competent, substantial evidence supported the referee's decision.

Tallahassee Housing Authority v. Unemp. Appeals Com'n, 483 So. 2d 413 (Fla. 1986)

The employee in this case was discharged for excessive absenteeism. At the hearing, the employer presented a summary of the employee's attendance record which it compiled based on time cards, daily attendance logs, and payroll record sheets. The summary showed the employee had taken 95 hours of annual leave, 85 hours of sick leave, and an additional 118 hours of leave without pay during his final year of employment. The employee was unfamiliar with the summary and unprepared to admit or refute its contents, but noted that the amount of unapproved leave reflected in the summary seemed excessive. Based on the summary, the appeals referee held he was discharged for misconduct. The Commission reversed, concluding that the summary upon which the referee relied was inadmissible hearsay and that the employer failed to prove the employee's absences violated any of the employer's policies or otherwise constituted misconduct. The district court of appeal affirmed, holding that an employer must show that the absences were inexcusable and detrimental to the employer's interests in order to establish a prima facie case of misconduct. The Florida Supreme Court rejected the lower court's statement of the employer's burden, stating "excessive unauthorized absenteeism presumptively hampers the operation of a business and is inherently detrimental to an employer." The Court held that once an employer establishes an employee's chronic absenteeism, the burden shifts to the employee to prove that the absences should not constitute misconduct connected with work. Because the employee did not receive proper notice of the attendance summary created by the employer, as well as the underlying data on which it was based, the Court remanded the case for a new evidentiary hearing.

Mason v. Load King Mfg. Co. 758 So. 2d 649 (Fla. 2000)

The Florida Supreme Court accepted jurisdiction to resolve conflict between *Mason v. Load King Mfg. Co*., 715 So. 2d 279 (Fla. 1st DCA 1998) and *Blumetti v. Unemployment Appeals Commission*, 675 So. 2d 689 (Fla. 5th DCA 1996). *Blumetti* involved a worker who was warned of excessive tardiness. Since the worker had good excuses for the last two incidents and was not discharged because of the earlier incidents, the court reasoned he should not be disqualified for benefits. Citing *Tallahassee Housing Authority v. Unemployment Appeals Commission*, 483 So. 2d 413 (Fla. 1986), *Mason* criticized the reasoning in *Blumetti* and affirmed the Commission's disqualification of the claimant. The Court held that, to the extent that *Blumetti* required a finding that the last offense precipitating the discharge was inexcusable in order to find misconduct, it was wrong and disapproved it. *Mason* was approved.