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FLORIDA DEPARTMENT of ECONOMIC OPPORTUNITY

STATE OF FLORIDA ★ REEMPLOYMENT ASSISTANCE APPEALS COMMISSION ★ RAAC

APPEALS QUARTERLY

Outreach Seminars

Beginning in the fall of 2014, RAAC Chairman Frank E. Brown and RA Appeals Manager Magnus Hines initiated a series of Appeals outreach seminars. Conducted at regional CareerSource locations across the state, the seminars are an opportunity for HR professionals and claimant representatives to learn more about the higher and lower authority appeals processes in the state of Florida. In September 2014, a seminar was held at CareerSource Gulf Coast (Panama City). In November 2014, seminars were held at CareerSource Escarosa (Pensacola), CareerSource Broward (Fort Lauderdale), and CareerSource Northeast Florida (Jacksonville).

Chairman Brown and Appeal Manager Hines have started the new year with a seminar at CareerSource Tampa Bay, and have another one scheduled for CareerSource Southwest Florida (Ft. Myers) at the end of January. We are excited that participants throughout Florida have taken advantage of this opportunity to learn more about appeals and to voice their own concerns.

At the CareerSource Escarosa presentation, RAAC's Amanda Hunter fields questions from attendees Jennifer Klein of Landrum Companies; Gayle Meacham of Landrum Companies; and Carol Brownell of Baptist Health Care.

With the assistance and participation of staff at the various CareerSource locations, the outreach seminars present a general overview of the appeals operations as well as helpful techniques to present a cohesive case to both appeal levels.

Additionally, a "Q&A" session gives the attendees the opportunity to ask specific questions about areas of concern to them. The meetings provide crucial feedback regarding processes not only in the appeals sections, but throughout Reemployment Assistance operations. These issues are then brought back to the attention of the respective area of RA for handling. The outreach has proved extremely beneficial for all parties concerned.

RAAC Chairman Frank Brown and RA Appeal Manager Magnus Hines pose with Tony Ash, a CareerSource Broward Senior Business Services Manager. We thank Mr. Ash for his contributions in planning the presentation in Ft. Lauderdale.

Moving forward in 2015, the appeals areas will continue to meet with groups at CareerSource locations as well as other interested local organizations.

Participants at the seminar conducted at CareerSource Tampa Bay

In this Issue:

Recent Miscellaneous R.A.A.C. Orders

Guzman v. G4S Secure Solutions USA Inc., R.A.A.C. Order No. 13-08813 (May 20, 2014)

The claimant worked as a custom protection officer for a security service. The employer had a policy against sleeping or gross inattention on the job, of which the claimant was aware. The employer assigned the claimant to the location of a client who was receiving threats from an outside person and had requested an armed security guard for protection. A receptionist took a picture of the claimant; he had his head back against the wall and his eyes were closed. Thus the client cancelled the contract with the employer. The employer discharged the claimant for gross inattention while on duty. The referee held the claimant was discharge for misconduct connected with work. On review, the Commission noted that, while the claimant in the instant case was not found to be sleeping, it considers gross inattentiveness such as that attributed to the claimant to be somewhat analogous to sleeping on the job and, therefore, used a comparable analysis by considering the following factors developed in case law:

- the nature of the employee's job responsibilities;
- the location in which the employee was found sleeping;
- whether the employer had a rule prohibiting sleeping on the job;
- whether the employer previously warned the employee for sleeping on the job; and
- the existence of any mitigating factors, e.g. sleepiness caused by illness or medication, in some circumstances.

In the instant case, several aggravating factors were present. First, the claimant's occupation was a particularly dangerous one. The claimant's gross inattentiveness on duty jeopardized the personal safety of the client's employees and invitees.

These actions also resulted in the employer's loss of the contract with client, causing harm to the business and potential harm to the employer's reputation. Given the number and gravity of the aggravating factors present in the case, and the absence of any mitigating factors, the Commission concluded the claimant's actions constituted misconduct under both subparagraphs (a) and (b) of the statutory definition of misconduct.

Falconer v. City of North Lauderdale, R.A.A.C. Order No. 13-08938 (August 25, 2014)

The claimant, a utility worker for a city, was discharged following an incident in which he retaliated against the aggression of a co-worker. During the incident, a verbal altercation ensued after the coworker made a comment that the claimant's underwear was showing due to his pants being low. The coworker also stated that the claimant's mother was a "bitch" and a "whore" and that he was going to "knock [the claimant] down and knock [the claimant's] motherfucking head off." The claimant replied, "If you hit me make sure you kill me because I'm going to [commit] you to surgery." The crew leader witnessed this exchange and believed the altercation was going to escalate into a physical altercation. The crew leader left his machine and held the claimant's coworker back. The referee held that, because the claimant was provoked, his actions did not constitute misconduct under subparagraph (a) of the definition of misconduct. The Commission affirmed that conclusion. The Commission also addressed whether the claimant's actions constituted misconduct under subparagraph (e) on the grounds that the claimant violated the employer's rule. The Commission concluded that the employer established a prima facie case of misconduct under subparagraph (e) by establishing the claimant violated its rule during the incident at issue thus shifting the burden to the claimant to establishing the existence of a statutory affirmative defense. Commission precedent established that with respect to the "fair enforcement" defense of (e)3., provocation must be considered. The Commission concluded that since the referee's findings of fact presented a clear case of provocation, the employer's rule could not be deemed to have been fairly enforced to disqualify the claimant.

Herdon v. Officemax North America Inc., R.A.A.C. Order No. 13-09587 (May 15, 2014)

The record reflected the employer discharged the claimant for taking business that belonged to the employer in violation of company policy. The employer's policy states:

> [The employer] will not condone, under any conditions, offering of paying kickbacks, under-the-table payments, illegal rebates or similar improper or inappropriate payments in exchange for business. All sales to customers must be based upon price, terms, types of service, customer service to be provided to the account and similar relevant and lawful factors.

In a statement provided to the employer, the claimant admitted accepting payments from customers for services personally rendered which, based on the believed evidence, could have been performed by the employer's third party vendor. The referee concluded the claimant's actions amounted to misconduct under subparagraph (a). The Commission affirmed the referee's holding.

In New World Fashions v. Lieberman, 429 So. 2d 1276, 1277 (Fla. 1st DCA 1983), the court held, "An agent may not, without the principal's knowledge and consent, enter into any business in competition with his principal and keep for himself any profit accruing from such transaction." The general rule regarding the common law duty of loyalty is explained in Fish v. Adams, 401 So. 2d 843, 844 (Fla. 5th DCA 1981) as follows:

> "The general rule with regard to an employee's duty of loyalty to his employer is that an employee does not violate his duty of loy-

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alty when he merely organizes a corporation during his employment to carry on a rival business after the expiration of his employment. However, that employee may not engage in disloyal acts in anticipation of his future competition, such as using confidential information acquired during the course of his employment or soliciting customers and other employees prior to the end of his employment."

The Commission concluded that even if the claimant's actions were not dishonest, as found by the referee, his actions were nonetheless in violation of a duty owed to the employer and, therefore, demonstrated a conscious disregard of the employer's interests amounting to misconduct as defined under Section 443.036(30)(a), Florida Statutes. The claimant's actions also constituted misconduct under Section 443.036(30)(e), Florida Statutes, because they violated the employer's rule.

Haynes v. Town of Indian River Shores, R.A.A.C. Order No. 14-00075 (August 27, 2014)

The employer discharged the claimant, a municipal public safety officer, for alleged insubordination in failing to write a report after being ordered to do so. To prove its case that the claimant was discharged for misconduct, the employer submitted documents including the termination letter it sent to the claimant as well as its internal investigation report. The investigation report contained unofficial transcripts of sworn interviews of witnesses who had firsthand knowledge of the incident at issue. Without specifically referring to the employer's evidence, the referee held the employer did not present competent evidence to meet its burden of proof.

The Commission remanded the case on the grounds that it was unclear whether the referee properly analyzed the employer's evidence. The Commission's order required the referee to engage in the following analysis in determining whether documentary evidence is admissible and competent (whether or not hearsay) to serve as the basis for a finding of fact pursuant to Section 443.151(4)(b)5.c., Florida Statutes:

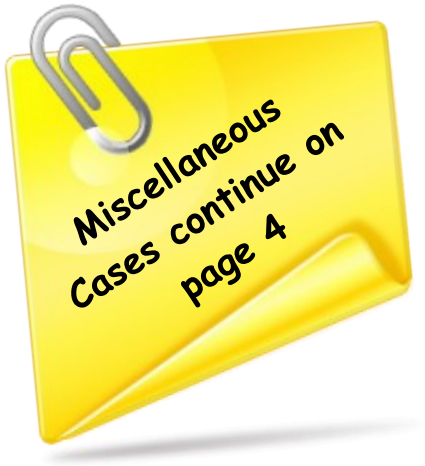
- Confirm the evidence was properly provided to the parties in advance of the hearing;
- Determine whether the evidence can be authenticated;
- Identify whether the evidence is in fact hearsay, or, alternatively, is tangible non-hearsay evidence that is admissible and competent without any further showing;
- If the document is hearsay, determine whether one of the statutory exceptions in the Florida Evidence Code applies; if so, it should be admitted and deemed competent;
- If the evidence does not fall within the exceptions in the Florida Evidence Code, then the referee should determine whether the residual exception applies, including whether the party against whom the documents are being offered had a reasonable opportunity to review such evidence prior to the hearing, and whether the hearsay evidence is trustworthy and probative and the interests of justice would best be served by its admission as competent evidence;
- If the evidence meets the statutory requirements for its admission as competent evidence, an analysis must then be made regarding such evidence in light of any conflicting evidence that may have been presented by the opposing party.
- If the evidence is hearsay that does not meet one of the statutory exceptions, it should still be admitted to corroborate, supplement, or explain other evidence, but will not be competent to serve as the sole basis for a material finding of fact.

Bodman v. Fabrications Plus Inc., R.A.A.C. Order No. 14-01005 (July 18, 2014)

The claimant quit employment, advising his employer that he was returning to school. At the hearing, the claimant testified he actually quit because he was exposed to secondhand smoke. The claimant did not advise the employer that he was affected by the smoking in the office nor did he request any accommodations or a leave of absence from the employer to prevent his exposure to the smoke. The referee held the claimant disqualified because he did not make an effort to preserve his employment prior to quitting. On review, the Commission remanded the case because the referee did not make a specific finding of fact regarding the reason the claimant quit in light of evidence that he gave the employer a different reason for quitting than he presented in his hearing testimony. The referee also did not adequately develop the record regarding the employer's evidence that it could have provided the claimant with a smoke-free work environment had it known of his concerns and whether the accommodation would have been sufficient under the circumstances.

Livingston v. Target Corporation, R.A.A.C. Order No. 14-01009 (August 4, 2014)

The employer discharged the claimant upon learning he had been convicted for retail theft at Walmart while he was employed by Target. The employer considered the act a violation of its integrity policy and the employer's best interests. The referee held the claimant was discharged for misconduct connected with work. The Commission reversed, noting the employer's integrity policy referenced only theft of inventory from Target rather than theft of employees occurring elsewhere and, therefore, did not constitute misconduct on the grounds that the claimant violated an employer rule.



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The Commission also held that, absent a specific rule prohibiting such conduct, an off-duty theft involving another party as victim, must at least indirectly impact the employer's interests to be considered misconduct when defined as a conscious disregard of an employer's interests and deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. This standard requires that the claimant's behavior impact the employer in a meaningful sense. Because the claimant's theft conviction did not involve the employer's property or that of its customers or invitees, and the employer presented no job-related impact other than its desire not to employ someone convicted of theft from a different retailer, the Commission concluded that the claimant's act did not constitute misconduct.

Moore-Williams v. United Collection Bureau Inc., R.A.A.C. Order No. 14-01455 (August 22, 2014)

The claimant, a debt collector, was discharged for failing to adhere to a call script after warnings and in violation of the employer's rule. The employer developed specific call procedures including scripts for its employees to use to ensure strict compliance with the relevant laws and regulations including the Fair Debt Collections Practices Act and utilized a progressive discipline policy that provided for increasing discipline for individuals who failed to comply with these call procedures. The referee held the claimant discharged for misconduct. The Commission affirmed in a written opinion that held that, although it does not consider every multi-step work procedure to be a "rule" within the meaning of the Section 443.036(30)(e), Florida Statutes, a procedure mandated by governmental regulation and for which an employer thus requires strict compliance rises to the level of significance necessary to establish a "rule." The Commission also held that a progressive discipline policy may also constitute a "rule" where (1) the policy indicates what conduct is subject to discipline under the rule (which it can do by reference to other rules or standards); (2) it indicates the range of disciplinary actions for each offense; and (3) it ensures that an employee is disciplined only for actions for which the employee can be held culpable. The Commission concluded that both of the employer's policies that were violated by the claimant were "rules" within the meaning of the reemployment assistance law.

Edmond v. Central Florida Cardiology Group, R.A.A.C. Order No 14-00590 (August 27, 2014)

The employer discharged the claimant after attempting to verify her FMLA paperwork but being advised by the physician's office that the documents submitted by the claimant were forged since they had not been prepared by the only individual it authorized to issue medical certifications. At the hearing, the claimant denied she falsified the forms or had any knowledge of someone else falsifying them. She testified that, after the employer confronted her about the alleged forgery, she attempted to reach the person who provided her the documents but was unable to do so. She further testified she did not call her employer back because, without the help of the person who provided her the documents, she could not clear up the issue and she knew she was going to be fired as a result. The referee found the employer failed to establish that the claimant falsified the documents or was aware that they had been falsified and, therefore, did not establish she was discharged for misconduct.

On review, the Commission held that the employer established a prima facie case of misconduct by showing by direct evidence that the claimant presented the employer with forged medical notes. The burden then shifted to the claimant to establish the propriety of her actions. Though the claimant denied being complicit in the falsification of the documents, the referee failed to properly evaluate the employer's documents and testimony for circumstantial evidence and reasonable inferences that could be drawn from that evidence that the claimant either falsified the documentation or knew that it had been falsified. The Commission remanded the case for the referee to properly evaluate the employer's circumstantial evidence and to determine, in light of that evidence, whether the claimant's explanation was sufficiently credible to rebut the employer's prima facie case of misconduct.

Kemp v. DCF-HRS District 7-OC 602407, R.A.A.C. Order No. 14-01582 (October 2, 2014)

The claimant, a DCF investigator, was discharged for failing to follow orders. The claimant had been warned to have no further contact with the child of a family she had previously investigated. After the write-up, the claimant began to care for the child (who she discovered was extended family) in her home. It was undisputed that the claimant circumvented court procedures for child placement when she began personally caring for the child in question. The referee held the claimant discharged for misconduct.

The Commission affirmed. Though the claimant contended her supervisor was aware she was involved with the child after warning, the supervisor's overlooking the claimant's willful violation of an agency warning, circumvention of court procedures, and possible violation of applicable statutes, of which they both should have been aware, did not exonerate the claimant's actions. The Commission rejected the claimant's argument that the disqualification from benefits impermissibly infringed on her First Amendment rights of familial and religious association. The Commission held the claimant did not establish the requisite degree of kinship or that she was engaged in bona fide religious association but, in any case, any right the claimant may have had was outweighed by a compelling government interest.

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Department of Economic Opportunity	
Jesse Panuccio	Executive Director
Tom Clendenning	Director, Division of Workforce Services
Magnus Hines	RA Appeal Manager
Sondra Timpson	OMC Manager, Office of Appeals
Mary Gordon Gavalas	Special Deputy, Office of Appeals

Reemployment Assistance Appeals Commission	
Hon. Frank E. Brown	Chairman
Hon. Thomas Epsky	Commissioner
Hon. Joseph Finnegan	Commissioner
Amanda Neff	Executive Senior Attorney, Editor
Lesley Blanton	Staff, Case Summaries and Design

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For editorial issues, email amanda.neff@raac.myflorida.com.

Contact the Commission at:

2740 Centerview Drive, Suite 101, Tallahassee, FL 32399-4151.

Phone: 850-487-2685, Fax: 850-488-2123