IN THE SUPREME COURT
OF THE STATE OF FLORIDA

TALLAHASSEE HOUSING AUTHORITY, Petitioner, vs. FLORIDA UNEMPLOYMENT APPEALS COMMISSION and CONNELL BARRON, Respondents.	)	CASE NO.: 66,663

Petition for Discretionary Review of a Decision
of the District Court of Appeal of the First District of Florida

ANSWER BRIEF ON THE MERITS

OF

THE RESPONDENT

UNEMPLOYMENT APPEALS COMMISSION

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PREFACE

The following reference words and symbols will be used throughout this brief:

"Employer" will designate Appellant, Tallahassee Housing Authority.

"Claimant" will designate Appellee, Connell Barron.

"Commission" will designate Appellee, Unemployment Appeals Commission.

"Florida Statutes" unless otherwise indicated will designate Florida Statutes (1983).

"R" will designate the Record.

"IB" will designate citations to the appellant's initial brief.

STATEMENT OF THE CASE AND THE FACTS

The employer's Statement contains extensive discussion of a "hearing" conducted by the employer shortly before the employer discharged the claimant (IB at 1-3). It has not been shown, or even alleged, that the employer's proceeding provided the parties with the due process protections provided by judicial and formal administrative proceedings. Moreover, the issue involved in the employer's proceeding was obviously different from that involved in this proceeding, the claimant's entitlement to unemployment compensation benefits. The employer's proceeding was totally collateral to and without binding effect on this proceeding. The obvious basis for the employer's inclusion of such matters in its Statement is an attempt to bolster the feeble case it presented at the hearing before the unemployment compensation appeals referee.

Although the employer does not specifically allege it, the employer's Statement repeatedly suggests that the summary of evidence (R-62-64) introduced at the referee's hearing had been provided to the claimant at the employer's pre-termination hearing. The employer's reference to the employer's termination letter (R-65) makes no mention of the summary. The employer's witness did not testify that she provided the claimant a copy of the summary prior to the

referee's hearing. Moreover, the following exchange between the claimant and the referee demonstrates that he was unaware of the summary until it was presented at the referee's hearing.

> REFEREE: * * * Now, is there anything beyond page one of exhibit number seven that you have specific disagreement with starting with page two?
>
> BARRON: It's hard for me to sit here and say I agree with it or disagree with it and I haven't had time to--to study all of it.

(R-45).

The employer asserts that the referee and the claimant scrutinized the summary item by item and the claimant admitted the truth of its contents. (IB at 4). The record, however, will not support such findings. The claimant did not materially challenge the employer's calculation of the total hours missed from work (R-42-44), but when confronted with the detailed summary the claimant could not specifically agree or disagree. (R-45). As to an item-by-item scrutiny, pages 41 through 49 of the record referenced by the employer for that proposition, reveal that only two of the more than 50 items in the summary were discussed. The employer's assertion that the claimant admitted the truth of the matters contained in the summary is equally without support in the record. The record merely demonstrates that the claimant was

unfamiliar with the summary and unprepared to admit or deny its contents. (R-45-49).

SUMMARY OF ARGUMENT

The Court has exercised its discretionary jurisdiction to review a decision of the First District Court of Appeal. The decision under review affirmed a final order of the Unemployment Appeals Commission. The Commission's order reversed an unemployment compensation hearing officer's decision and awarded unemployment compensation benefits to the claimant Connell Barron. Two independent legal theories support the award of benefits. First, as indicated in the Commission's order, the employer's evidence was hearsay and, therefore, legally incompetent to support a finding that the claimant violated any policy of the employer. Second, as indicated by the opinion of the First District Court of Appeal, even if the employer's evidence had been competent, it nevertheless was legally insufficient to carry the employer's burden of proving misconduct by a preponderance of the evidence.

The employer attempts to overcome the deficiencies in its evidence by arguing that the First District Court of Appeal announced a rule of law which conflicts with a rule supposedly announced in City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979), that excessive absenteeism is for the purposes of unemployment compensation misconduct per se. The Commission

does not concede that any such misconduct per se rule exists, but will demonstrate that, if it does exist, it is contrary to the statutory definition of misconduct and the case law of Florida appellate courts.

Misconduct, as defined by the statute and consistently construed by the courts, requires a showing that the claimant either willfully disregarded his employer's interests or was negligent to such a degree or recurrence as to manifest equal culpability. Although absenteeism, particularly if it is frequent, may be harmful to an employer's operations, it does not constitute misconduct, unless the employee violated the employer's policies or was absent for an invalid reason. To hold that absenteeism, whether excessive or not, is misconduct per se would conflict with both the statute and the case law. To the extent that the Court perceives such a holding exists in the case law, it should overrule it. To the extent that the court below held that something more than mere proof of absenteeism is necessary to establish misconduct, it should be affirmed.

ARGUMENT

ISSUE I

MISCONDUCT, WITHIN THE MEANING OF FLORIDA'S UNEMPLOYMENT COMPENSATION LAW, REQUIRES A SHOWING OF A WILLFUL DISREGARD OF AN EMPLOYER'S INTERESTS. ABSENTEEISM, EVEN IF EXCESSIVE, IS NOT MISCONDUCT PER SE.

The claimant was discharged by the employer for absenteeism. At a formal administrative hearing[1] convened to determine the claimant's entitlement to unemployment compensation benefits, the employer introduced evidence of the claimant's attendance record, but nothing more.

The hearing officer, an unemployment compensation appeals referee,[2] rendered a decision denying benefits on the grounds that the claimant had been discharged for misconduct connected with work. §§443.036(24), 443.101(1), Fla. Stat. (1983). The Unemployment Appeals Commission[3] reversed the appeals referee's decision because the employer's evidence was hearsay which would be inadmissible in a civil action and, therefore, incompetent to support a finding of misconduct.

1/ §§120.57(1)(b), 443.151(4), Fla. Stat. (1983).

2/ §120.57(1)(a)2., Fla. Stat. (1983) authorizes appeals referees to conduct formal hearings in unemployment compensation cases in lieu of hearing officers of the Division of Administrative Hearings.

3/ §443.151(4)(c), Fla. Stat. (1983).

§120.58(1)(a), Fla. Stat. (1983). The First District Court of Appeal, affirming the order of the Unemployment Appeals Commission, held that even if the employer's evidence was admissible, it was insufficient to establish misconduct within the meaning of the unemployment compensation law. Specifically, the court held:

> [A]n employer has the burden under section 443.036(24), Florida Statutes, to show misconduct with a preponderance of proof that the absences were indeed unexcusable and in detriment to the employer's interests.

463 So.2d at 1218; Appendix at A-3.

The employer argues that the First District Court of Appeal erroneously interpreted the law applicable to this case. According to the employer, the following pronoucement by the Second District Court of Appeal is the correct interpretation:

> Continued absenteeism, which hampers the operation of a business, constitutes an intentional disregard of the employer's vital interests, and of the employee's duties, and amounts to misconduct per se, Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2d DCA 1971).

City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007, 1008 (Fla. 4th DCA 1979); Appendix at A-12. To the extent that the above language of the Second District

announces a rule of law that absenteeism is misconduct per se, it is in conflict with the decision of the First District below. Moreover, as a rule of law, it is erroneous and should be overturned.

The definition of employment related misconduct is presently found at Section 443.036(24), Florida Statutes (1983).

> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

The statutory definition encompasses two types of misconduct: (1) willful acts in disregard of an employer's interests and (2) negligent acts that are so egregious or repetitious as to manifest an equivalent willful disregard of an employer's interests.

The statutory definition of misconduct, which was enacted in Florida in 1977,[4] is merely a codification of the

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4/ Ch. 77-399, §4, Laws of Fla., amending §443.06(9), Fla. Stat. (1977), transferred to §443.036(24) by Ch. 80-95 Laws of Fla.

case law that preceded it. In 1941, when unemployment insurance was a relatively new concept in the United States, the Wisconsin Supreme Court was faced with the task of defining the term "misconduct" as used in its statute. In Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941); Appendix at A-13, the court sought guidance from decisions of the British Umpire, established by Parliament for the ultimate review of decisions by the Court of Referees in matters of unemployment compensation.[5] The Wisconsin court was particularly persuaded by a British decision that held:

> It should be noticed that the term used in the statute is "misconduct" and not "unsatisfactory conduct" ***.[6]

In light of that consideration, the Wisconsin court reasoned:

> If mere mistakes, errors in judgment or in the exercise of discretion, minor and but casual or unintentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term "misconduct", and no such element as wantonness, culpability or wilfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statute, then there will be defeated, as to many of the great mass of less capable industrial

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5/ English Act, sec. 8(2), 20 Halsbury's Statutes of England, p. 662.

6/ Case No. 2835/1927, 6 Eng. U. I. Sel. Dec., p. 195

> workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a lay-off, which is apt to be most serious to such workers.

296 N.W. at 640; Appendix at A-17. The court's reasoning reflects the public policy declaration contained in the Wisconsin statute. Wis. Stat. §108.1 (1979-80). A similar declaration is found in Florida's statute. §§443.021 and 443.031, Fla. Stat. (1983).

The court ultimately adopted the following definition of misconduct:

> [C]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

296 N.W. at 640; Appendix at A-17. Applying its newly formulated definition to the facts of the case before it, the

court held that the claimant, a taxicab driver who had been discharged because of three auto accidents, two of which were not properly reported to the employer, was not guilty of misconduct. Although the court did not commend the claimant's work performance, it did not find that it demonstrated the kind of disregard of an employer's interests which would constitute misconduct.

The Boynton Cab definition was first adopted by a Florida appellate court in Spaulding v. Florida Industrial Commission, 154 So.2d 334, 337-38 (Fla. 3d DCA 1963). Spaulding involved a supermarket cashier who was discharged for failure to promptly ring up an "exact amount" purchase left by a customer while the claimant was checking out another customer. The claimant's act violated a rule of the employer, but the Third District Court of Appeal held that her violation merely demonstrated "inadvertence," ordinary negligence or poor judgment and inattention," but did not constitute "misconduct" within the meaning of the statute. 154 So.2d at 339.

The Second District Court of Appeal adopted the Boynton Cab definition in Castillo v. Florida Department of Commerce, 253 So.2d 162, 165 (Fla. 2d DCA 1971), and followed it in Fredericks v. Florida Department of Commerce, 323 So.2d 286, 288 (Fla. 2d DCA 1975). Castillo and Fredericks are particularly instructive because, like the instant case, they involved absenteeism. Castillo was discharged for repeated

absenteeism which severely hampered the employer's operations. In finding misconduct, the court observed that the claimant's absences were due to "'personal problems', which from the record appears (sic) to have been of his own making." 253 So.2d at 165. The court concluded:

> By its very essence this was an intentional disregard of the employer's vital interests and of the employee's duties, which disregard amounts to misconduct per se.

Id. In contrast to Castillo, the record in this case is devoid of any evidence of the reasons for Barron's absences. For that reason, it cannot be ascertained whether he intentionally disregarded the employer's interests.

Fredericks, supra, also decided by the Second District, not only involved absenteeism but also the failure of the absent worker to keep his employer informed of the reason for his absence. Obviously, a worker's obligation to attend work in accordance with his schedule is conditioned upon his ability to do so. Personal illness, family emergencies and other similar exigencies beyond the worker's control will excuse the duty to report, but the worker is nonetheless obligated to provide notice to the employer of the reason precluding attendance. When a worker absents himself from work and gives no notice to his employer, he demonstrates a willful disregard of his employer's interests. Such

behavior, without explanation, would constitute prima facie evidence of misconduct. In Alterman Transport Lines, Inc. v. Unemployment Appeals Commission, 410 So.2d 568 (Fla. 1st DCA 1982), the court held that, once an employer has established prima facie evidence of misconduct, the burden shifts to the employee to come forward with proof of propriety of that conduct. Alterman Transport Lines involved prima facie evidence that an employee misappropriated company facilities, materials and on-the-clock employees for his personal projects. Similarly, a worker who is a "no call-no show" is obliged to demonstrate why he should not be disqualified for misconduct. The claimant in Fredericks met that burden when he established a good faith attempt to notify the employer of his status. Similarly, the employers in Howlett v. South Broward Hospital Tax District, 451 So.2d 976 (Fla. 4th DCA 1984); Campbell v. Department of Labor and Employment Security, Unemployment Appeals Commission, 455 So.2d 569 (Fla. 1st DCA 1984); Lamb v. Unemployment Appeals Commission, 424 So.2d 197 (Fla. 5th DCA 1983); and Tucker v. Florida Department of Commerce, 366 So.2d 845 (Fla. 1st DCA 1979), established violations of rules or directives regarding attendance, but the claimants in each instance were able to show mitigating circumstances precluding a finding of misconduct.

The crucial distinction between Alterman Transport, Fredericks, Howlett, Campbell, Lamb and Tucker, supra, and

this case is the failure of the employer in this case to establish a prima facie case of misconduct. The employer here never proved by a preponderance of the evidence that the claimant violated a rule or policy of the employer. The only thing the employer proved was absenteeism. Consequently, the employer must resort to the argument that absenteeism is misconduct per se in order to prevail.

The employer relies on four Florida cases to support the per se argument. The least persuasive of them is Sanchez v. Department of Labor and Employment Security, 411 So.2d 313 (Fla. 3d DCA 1982). Sanchez involved a hospital employee who "fought a constant, losing battle with the time clock." 511 So.2d at 314. His ultimate discharge was the result of an unapproved absence to undergo elective surgery. The Third District Court of Appeal held:

> [A]n unauthorized absence from work for personal reasons not of a critical nature may comprise employee misconduct justifying a refusal of compensation.

Id. Sanchez is the least persuasive case cited by the employer because the Sanchez court did not state that absenteeism is misconduct per se. Additionally, it is distinguishable from this case on the facts because it has not been shown here that the claimant's absences were unauthorized or for personal reasons.

The three remaining cases relied upon by the employer do arguably lend some support for the per se argument. In City of Riviera Beach, supra, the Second District Court of Appeal held:

> Continued absenteeism, which hampers the operation of a business, constitutes an intentional disregard of the employer's vital interests, and of the employer's duties, and amounts to misconduct per se, Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2d DCA 1971).

372 So.2d at 1008; Appendix at A-12. Hillsborough County, Department of Emergency Medical Services v. Unemployment Appeals Commission, 433 So.2d 24, 25 (Fla. 2d DCA 1983) held:

> Continued absenteeism caused by personal problems for which an employee bears culpability amounts to misconduct per se for purposes of section 443.101(1)(a). Castillo v. Florida Department of Commerce, 253 So.2d 162 (Fla. 2d DCA 1971).

As previously discussed, Castillo which obviously spawned City of Riviera Beach and Hillsborough County, Department of Emergency Services, involved a worker who was absent because of personal problems and his absences greatly disrupted the employer's business. The court held:

> By its very essence this was an intentional disregard of the employer's vital interests and of the employee's duties, which disregard amounts to misconduct per se.

253 So.2d at 165.

Castillo and Hillsborough County, Dept. of Emergency Services do not unqualifiedly state that absenteeism is per se misconduct because their pronouncements are hedged by such considerations as the claimant's fault or culpability and the harm caused to the employer. Compare Hillsborough County, Department of Emergency Services, supra, with Parker v. Department of Labor and Employment Security, 440 So.2d 438 (Fla. 1st DCA 1983).

City of Riveria Beach is the most problematic of the cases relied upon by the employer. Although the facts of the case demonstrate that the claimant was guilty of much more than simple absenteeism, she defied her employer's denial of a leave request, it could be inferred from the language used by the Second District that absenteeism is misconduct per se. For that reason, City of Riveria Beach is a bad precident and might mislead a future court into applying that interpretation to a case where there is no showing of a willful disregard of the employer's interests. To the extent that City of Riveria Beach conflicts with the decision of the First District on appeal here, it should be overturned. The decision on appeal should be affirmed.

ISSUE II

THE DECISION OF THE APPEALS REFEREE WAS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE: THE EMPLOYER'S DOCUMENTARY EVIDENCE IS HEARSAY TO WHICH NO EXCEPTION APPLIES; THE TESTIMONY OF THE EMPLOYER'S WITNESS IS ENTIRELY DERIVED FROM THAT DOCUMENTARY EVIDENCE; AND THE CLAIMANT'S TESTIMONY CANNOT REASONABLY BE CONSTRUED AS AN ADMISSION.

The cornerstone of the employer's case against the claimant is a three page document found at pages 62 through 64 of the record. The Unemployment Appeals Commission held that the document was inadmissible hearsay and, therefore, legally insufficient to support the referee's decision. (R-71); §120.58(1)(a), Fla. Stat. (1983); Appendix at A-5. The First District Court of Appeal held that, even if the document were admissible, it was nonetheless legally insufficient to support the referee's decision. 463 So.2d at 1218; Appendix at A-3. The district court thus left the evidentiary question undecided.

The document in question is purportedly a summary of the claimant's attendance gleaned from the employer's records. The employer argues that the document is admissible as an exception to the hearsay rule under Section 90.956, Florida Statutes (1983). Section 90.956 of the Florida Evidence Code provides:

> When it is not convenient to examine in court the contents of voluminous writings, recordings, or photographs, a party may present them in the form of a chart, summary, or calculation by calling a qualified witness. The party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the court, and shall make the summary and the originals or duplicates of the data from which the summary is complied available for examination or copying, or both, by other parties at a reasonable time and place. A judge may order that they be produced in court.

The employer's document fails to meet three requirements of the statutory exception to the hearsay rule. First, there is no record foundation for the assertion that the records supposedly summarized by the employer's document were "voluminous." Although employer's counsel has argued on appeal that preparation of the summary required extensive "culling" of the employer's records (IB at 15-16), the employer's witness at the hearing merely alluded to time logs and time cards that were supposedly consulted in the preparation of the summary. No evidence regarding the data base involved or the method by which the summarized information was extracted appears in the record. (R-27). In the absence of such a showing, the summary should be rejected. See Javelin Investment S.A. v. Municipality of Ponce, 645 F.2d 92 (1st Cir. 1981).

Second, the employer failed to give timely written notice to the claimant of its intention to use the summary at the hearing. The obvious intent of Section 90.956, Florida Statutes (1983), is a shortcut to avoid an evidentiary quagmire. If a party can summarize hundreds or thousands of entries of information into a single document and the opposing party can, prior to trial, ascertain the accuracy of the summary relative to the data, it would serve no useful purpose to introduce into evidence the data base underlying the summary. For protection of the due process rights of the party against whom the summary of evidence is to be used, however, the statute requires that the party proffering a summary of evidence must provide "timely written notice of his intention to use the summary." §90.956, Fla. Stat. (1983). See S. Kornreich & Sons, Inc. v. Titan Agencies, Inc., 423 So.2d 940 (Fla. 3d DCA 1982); Annot., 80 ALR 3rd 405 (1983); Union Electric Co. v. Mansion House Center North Redev. Co., 494 S.W.2d 309 (Mo. 1973). The record contains absolutely no evidence to support a finding that the claimant was put on notice that the employer's summary would be used against him at the unemployment compensation hearing. To the contrary, the claimant testified that he was unfamiliar with the contents of the summary and unprepared to address it. (R-45). It is patently obvious from the record that the claimant was "blindsided" by the employer's document

alleging some fifty-plus attendance related incidents over a one-year period. Neither due process not the specific provisions of Section 90.956 will permit such tactics.

The employer seeks to deminimize this flagrant violation of the claimant's rights by asserting that the claimant's receipt of the summary was "never explicitly stated in the record" (IB at 16) and "[t]here is every indication" [that it was received] (Id.) and "Mr. Barron arguably had notice of the summary." (IB at 18). Such speculation falls far short of the statutory notice requirement.

Finally, Section 90.956, Florida Statutes (1983), requires that not only the summary must be made available to the opposing party, but also the underlying data from which the summary was compiled. There is no suggestion in the record that the underlying data were ever made available to the claimant.

Citing Kornreich, supra, the employer attempts to argue that these gross violations of Section 90.956 are mere technical defects. The party against whom a summary of evidence was used in Kornreich had actual notice of the evidence several weeks before trial. That crucial difference obviously distinguishes Kornreich from this case where no notice has been proven. See also Bowman Instrument Corp. v.

Fidelity Electronics, Ltd., Inc., 466 So.2d 344 (Fla. 3d DCA 1985).

Contrary to the employer's assertions, the fact that the claimant failed to object to the summary when presented, and failed to exercise his right to cross-examine the personnel officer did not serve to lend competency to an otherwise incompetent document. The record reflects that the claimant was not given the opportunity to object to the admission of the summary by the referee when it was offered by the employer. (R-27-30). The claimant was only asked whether he agreed or disagreed with the contents of the summary. (R-41, 45). While it is true that the employer's witness was the person who compiled the summary and was available at the hearing for questioning by the claimant; without having been afforded the opportunity to examine the underlying documents, the claimant could not conduct an effective cross-examination. The evidence against the claimant was contained in the summary, not in the mind of the employer's witness. Since the claimant was deprived of an opportunity to examine the data underlying the summary, his right to cross-examination was totally frustrated.

The employer's arguments regarding the business records exception to the hearsay exclusion, Section 90.803(6), Florida Statutes (1983), are baffling. No records kept in the regular course of the employer's business were introduced

into evidence. CF Chemicals, Inc. v. Florida Department of Labor and Employment Security, 400 So.2d 846 (Fla. 2d DCA 1981) has absolutely no application to this case.

Finally, the employer argues that, even if the summary were hearsay, it would have been admissible at the hearing because it only served to supplement the direct testimony of the employer's personnel officer and was further rendered admissible through the admissions of the claimant pursuant to Section 90.957, Florida Statutes (1983). Both arguments are without merit. It is axiomatic that hearsay evidence standing alone is not sufficient to support a finding of fact in an administrative proceeding, but may be used for the purpose of supplementing or explaining other evidence. §120.58(1)(a), Fla. Stat. (1983); Fla. Admin. Code Rule 38E-5.24(4)(d). Here, the employer presented the testimony of one witness -- its personnel officer -- whose sole purpose was to present a document upon which the employer's entire case rested. The document, did not supplement or explain the witness' testimony because the witness could offer no testimony independent of the document. She was not competent to testify as to the events set forth in the summary. She could only testify to its preparation. The summary is an out-of-court statement offered to prove the truth of the matters asserted. It is hearsay and, as has been demonstrated herein, does not fall within any recognized

exception to the hearsay rule. It is legally insufficient to support the referee's decision disqualifying the claimant.

As to the effectiveness of the claimant's "admissions" under Section 90.957, Florida Statutes (1983), the record reflects that the claimant never specifically admitted to the truth of the summary's contents. At worst, the claimant's testimony can be construed as expressing an inability to challenge the truthfulness of the employer's evidence. The claimant's predicament is not surprising since he was not permitted any opportunity to assess the accuracy of the summary prior to the hearing. Any curative effect the claimant's statements might have had with regard to the competence of the summary was rendered moot by the employer's failure to comply with the notice requirement of Section 90.956, Florida Statutes (1983).

The employer's assertion that the claimant was obliged to prove his innocence in order to collect benefits is undermined by the very case it cites. The issue involved in Florida Industrial Commission v. Ciarlante, 84 So.2d 1 (Fla. 1955), was whether an unemployment compensation claimant was available for work while claiming benefits. Availability is one of several eligibility requirements found at Section 443.091, Florida Statutes (1983). Every claimant must satisfy these requirements in order to collect benefits. Ciarlante held that claimants are charged with the burden of

proving eligibility, but in the same breath the Court acknowledged that claimants were not subject to such a burden in cases involving disqualifications. Disqualifications may be imposed for the specific affirmative acts specified in Section 443.101, Florida Statutes (1983), such as misconduct, fraud, etc. In such cases the burden of proof lies with the party asserting the affirmative of the issue, i.e., the employer or the agency. See Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412 (Fla. 4th DCA 1974).

The employer in this case failed to carry its burden. Its only witness at the hearing had no firsthand knowledge of the claimant's alleged misconduct. The documentary evidence introduced is also hearsay and, therefore, incompetent to support the employer's position or the referee's decision. The deficiencies in the employer's evidence were not cured by any admissions of the claimant. Since the employer failed to carry its burden and no other evidence to support a disqualification of the claimant is found in the record, the Unemployment Appeals Commission acted within the scope of its authority when it reversed the referee's denial of benefits.

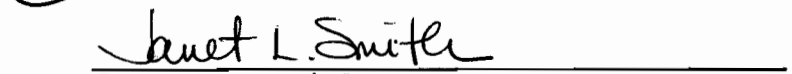
CONCLUSION

Absenteeism is not misconduct per se. To impose a disqualification from unemployment compensation it must be proven by a preponderance of competent, substantial evidence that the discharged worker willfully disregarded the employer's interests. The employer in this case failed to present competent, substantial evidence that the claimant committed misconduct.

The decision of the First District Court of Appeal below is in accord with the law. To the extent that the First District's decision conflicts with City of Riviera Beach v. Florida Department of Commerce, 372 So.2d 1007 (Fla. 4th DCA 1979), or any other decision, the decision of the First District should be upheld and such other decisions should be overturned.

Respectfully submitted,

John D. Maher



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to the parties listed below on this 3rd day October, 1985.

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