W 00A

IN THE SUPREME COURT

STATE OF FLORIDA

TALLAHASSEE HOUSING AUTHORITY,

Employer/Appellant,

vs. CASE NO.: 66,663

FLORIDA UNEMPLOYMENT APPEALS COMMISSION and CONNELL BARRON,

Claimant/Appellees.
_____/

FILED
SID J. WHITE
SEP 9 1985
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

# INITIAL BRIEF OF APPELLANT

PAULA L. WALBORSKY
EDGAR C. BOOTH and
PAULA L. WALBORSKY, P. A.
324 E. Virginia Street
Tallahassee, FL 32301
(904) 224-3761

and

JAMES C. CONNER, JR.
325-F John Knox Road
Suite 120
Tallahassee, FL 32303
(904) 385-1171

Counsel for Employer/Appellant

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases:

## STATEMENT OF THE CASE AND OF THE FACTS

Mr. Barron was fired by the Tallahassee Housing Authority for excessive absenteeism. (R. at 65.) Mr. Barron missed 298 hours of work in 1983. (R. at 61.) The dates of those absences, the number of absences, and the reasons for the absences have been at issue since, pursuant to the Tallahassee Housing Authority's own employee disciplinary policy, Mr. Barron was given a pre-determination hearing. (R. at 65.) Mr. Barron was represented by counsel at this pre-determination hearing and was given notice of the evidence that would be considered at the hearing. (R. at 65; R. at 66; R. at 70.)

A review of the payroll records for the six months prior to the pre-determination hearing indicated that Mr. Barron had received a check for less than 40 hours of work on at least 7 different occasions. (R. at 65.) In an affidavit and attached chronology of Mr. Barron's absences for the calendar year 1983, Mary Kathryn Lewis, Administrative Assistant to the Director of the Tallahassee Housing Authority, indicated that Connell Barron had taken 95 hours of annual leave, 85 hours of sick leave and 118 hours of leave without pay for a total of 298 non-working hours during the year 1983. (R. at 61 - 64.) Counsel for Mr. Barron presented no documentation, witnesses or other evidence to refute the Tallahassee Housing Authority's charges of excessive absenteeism. (R. at 65.) Pursuant to the Tallahassee Housing Authority's own disciplinary policy, the decision of the Executive Director that Mr. Barron be fired for this excessive absenteeism was then appealed to Herschel Williams, a commissioner of the Housing Authority, who acted as hearing

officer to review the decision of the Executive Director. (R. at 65.) Again the issues of number of absences, dates of absences and reasons for absences formed the outline for the Hearing Officer's review of the Executive Director's decision. (R. at 65.) The letter written by Mr. Williams to Mr. Barron as a result of that appeal, makes it clear that Mr. Barron raised the same defenses to the Hearing Officer that he ultimately raised to the Appeals Referee and the Appeals Commission: that he had received full paychecks and that he had time accrued but that he believed he was being treated more harshly than other employees. (Id.) The Hearing Officer responded by listing the exact dates on which Mr. Barron had received pay for less than 40 hours of work per week. The Hearing Officer also noted that Mr. Barron had taken 48 hours of sick leave and 48 hours of vacation leave from July through December of that year. In regard to Mr. Barron's feelings that he was being unfairly disciplined, the hearing officer stated,

> The attendance records also show that there are only two other employees with comparable records, one of whom was also terminated for excessive unauthorized absences. The other has been disciplined for major offenses in accordance with policy.

The Hearing Officer affirmed the Executive Director's decision to dismiss Mr. Barron for cause. (Id.)

Subsequently, when Mr. Barron applied for unemployment compensation, a Claims Adjudicator for the Unemployment Compensation Commission investigated the reason Mr. Barron had been fired by the Tallahassee Housing Authority. (R. at 24.) There then ensued an exchange of forms between Mr. Barron and the Tallahassee Housing

Authority questioning the number of his absences, the dates of the absences and the reasons for his absences. (R. 2 - 12.) The Claims Adjudicator determined that Mr. Barron had been fired for excessive absenteeism and was not entitled to benefits. (R. at 24.) Mr. Barron appealed this denial of benefits to the Appeals Referee and an evidentiary hearing was held on March 21, 1984. (R. at 13.)

Although Mr. Barron and the Tallahassee Housing Authority had the right to be represented by counsel at this hearing before the Appeals Referee, neither side was represented by counsel at this stage of the proceedings. Mr. Barron represented himself and Tallahassee Housing Authority was represented by Mary Kathryn Lewis, an administrative assistant responsible for maintaining employee time records and attendance sheets. (R. at 9.) Mary Kathryn Lewis personally researched all time cards, daily attendance logs and payroll record sheets for the calendar year 1983 and compiled the detailed three page summary of Mr. Barron's absences. (R. at 27.) Miss Lewis testified that these records were kept in the ordinary course of business and they were maintained by her personally as an employee for the Housing Authority. (R. at 28.) Mr. Barron was supplied with a copy of this summary (R. at 28.) and, of course, was well aware that this information was at issue (1) at the time of his pre-determination hearing when he was represented by counsel, (2) in his appeal to the Tallahassee Housing Authority's hearing officer, (3) in the exchange of forms with the Tallahassee Housing Authority during Mr. Barron's application for unemployment compensation

benefits, and (4) in the present hearing which was to review his denial of benefits because of those enumerated absences.

The Appeals Referee and Mr. Barron scrutinized this summary of absences together, item by item and page by page (R. at 41 - 49.) Mr. Barron admitted that he took 95 hours of annual leave. (R. at 43.) He also admitted that he took 85 hours of sick leave. (R. at 43.) He further admitted that he took 118 hours of leave without pay. Mr. Barron's only explanation for the excessive absenteeism was that he believed he had the time accrued but his supervisor wouldn't approve the time as the supervisor was treating him unfairly. (R. at 44.) In fact, Mr. Barron admitted the truth of each and every page of the summary, with the exception of one item which he admitted was true but felt there were justifying reasons for his absence which should be added to the explanation on the summary, (R. at 48 - 49.), and another item which he disputed as being totally untrue, which, on examination, is merely a question of interpreting Mr. Barron's actions. (R. at 47.) Mr. Barron's position before the Appeals Referee was exactly as it had been before the Tallahassee Housing Authority's Hearing Officer. Mr. Barron admitted that he had been guilty of excessive absenteeism but felt that he was being treated especially harshly. (R. at 51.)

In sum, the Appeals Referee had before him as witnesses, the woman whose duty it was to keep the employee's records in the normal course of business with the Tallahassee Housing Authority and who had personally compiled the summary of Mr. Barron's absences, and Mr. Barron, who admitted the truth of each of the items on the summary and offered not a single piece of

evidence of any kind to refute the summary or the testimony of Miss Lewis. (R. at 51.) The Appeals Referee also had the opportunity to observe the demeanor and to weigh the credibility of each witness. In the face of this evidence, the Appeals Referee affirmed the decision of the Claims Adjudicator that Mr. Barron was not entitled to unemployment compensation benefits.

Mr. Barron then appealed the decision of the Appeals Referee to the Unemployment Compensation Appeals Commission. The Appeals Commission reviewed the evidence on which the Appeals Referee had based his determination and held that the determination of the Appeals Referee was not supported by substantial competent evidence. The Appeals Commission characterized all evidence before the Appeals Referee as hearsay. (R. at 71.) The Tallahassee Housing Authority then appealed that decision to the First District Court of Appeal. That court, leaving the evidentiary issue undecided, affirmed the decision of the Unemployment Appeals Commission holding that the Tallahassee Housing Authority had not proven that Mr. Barron's 298 hours of absences were "misconduct", unexcusable and a detriment to the employer. This appeal followed.

## SUMMARY OF ARGUMENT

An employee's excessive absenteeism is inherently detrimental to his employer and in conflict with the very essence of being an employee. Excessive absenteeism by its very nature hampers the operation of a business; absenteeism is misconduct per se.

Mr. Barron admitted that he had a bad attendance record. (R. at 51.) Absenteeism, even tardiness, is sufficient to support a finding of "misconduct" and to deny unemployment compensation benefits.

The decision of the Appeals Referee that Mr. Barron is not entitled to unemployment compensation benefits because of misconduct is supported by substantial competent evidence. The Tallahassee Housing Authority alleged, and Mr. Barron admitted that he had been absent a total of 298 hours in 1983. The chronological summary of Mr. Barron's absences submitted by the Tallahassee Housing Authority is not hearsay. A summary of voluminous records kept in the ordinary course of business is specifically permitted under Section 90.956 of the Florida Evidence Code. In addition, the person who maintained the records and who compiled the summary gave affirmative, in-court testimony, which corroborated the summary. Indeed, Mr. Barron, himself, corroborated the truth of the summary, and had an opportunity when appearing before the Appeals Referee to cross-examine the very person who compiled the summary. Even if the summary were to be characterized as hearsay, the Administrative Procedures Act states that hearsay testimony is admissible and

may be used as a basis for determination so long as it is not the only evidence before the administrative tribunal. Further, the Administrative Procedures Act specifically permits the admission of excerpts of documentary evidence. Finally, it must be emphasized that Mr. Barron himself corroborated the truth of the summary, never objected to the admission of the summary into evidence, and made no attempt to submit any evidence, documents or witnesses on his own behalf. The decision of the Appeals Referee that Mr. Barron is not entitled to unemployment compensation benefits because he was fired for excessive absenteeism should be reinstated as it is supported by substantial, competent evidence.

## ISSUE I

AN EMPLOYEE'S EXCESSIVE ABSENTEEISM IS INHERENTLY DETRIMENTAL TO HIS EMPLOYER.

Although the Unemployment Appeals Commission reversed the Appeals Referee's denial of benefits to Mr. Barron because it felt that the only evidence before the Referee was hearsay in nature, the First District Court of Appeal held that even if the summary were admissible evidence, the Commission's reversal of the Appeals Referee would be affirmed as Tallahassee Housing Authority had failed to meet its burden of proof "that the absences were, indeed, unexcusable and in detriment to the employer's interest." (A. at 4.) The First District Court of Appeal in reaching its decision cites City of Riviera Beach v. Florida Department of Commerce, Division of Unemployment Security, 372 So.2d 1007 (Fla. 4th DCA 1979) to require a showing that the absenteeism constitutes a detriment to the employer. The critical paragraph of City of Riviera Beach states:

> An employer has a right to expect reasonable work habits from an employee. 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).

Id. at 1008.

Although the First District majority reads this paragraph to require a showing that the absenteeism constitutes a detriment, the dissent, and case law from other districts, reads this paragraph to mean that excessive absenteeism by its very nature hampers the operation of a business; absenteeism is misconduct

per se. In Hillsborough County Department of Engineering Medical Services v. Unemployment Appeals Commission, 433 So.2d 24 (Fla. 2d DCA 1983), the court stated that absenteeism amounts to misconduct per se. Then, in a separate paragraph, it mentions that the failure of the claimant to come to work hampered the operation of the business. See, also, Sanchez v. Department of Employment Security, 411 So.2d 313 (Fla. 3d DCA 1982).

The use of "per se" and "hampering" language in the same opinions has caused significant confusion as to exactly what proof is required of an employer who feels that a fired employee should not be entitled to unemployment compensation benefits. Indeed, the First District had previously stated, in Alterman Transport Lines, Inc. v. Unemployment Appeals Commission, 410 So.2d 568, 569 (1982) that an employer need only establish a prima facia case of misconduct, then the burden shifts to the employee to show proof of the propriety of that conduct. In the instant case, the Tallahassee Housing Authority surely established a prima facia case of misconduct by documenting 298 hours of absences during a single year. The fact of these absences was corroborated by the claimant who, under the holding of Alterman, should then have borne the burden of showing the propriety of his excessive absenteeism. In fact, Mr. Barron presented no evidence of any kind, either documentary or testimonial, and in fact, he contested only two entries in a three-page summary of his failure to come to work. As the Housing Authority's evidence was the only evidence submitted to the Appeals Referee (except for Mr. Barron's own admissions), the preponderance of the evidence was clearly in the Housing Authority's favor.

The tenor of the District Court's opinion is that "merely" failing to come to work for 298 hours is not sufficient alone to establish a prima facia case of misconduct; one must also show that failure to come to work was a detriment to the employer. This opinion poses the conundrum of what value an employee could be whose 298 hours of absence was not a detriment to his employer?

The problem of determining what constitutes "misconduct" might be analogized to determining when an expert witness is required in a malpractice action. When a doctor amputates the wrong leg, or leaves yards of gauze sewn into a wound, no expert witness is required for the finder of fact to recognize malpractice. Compare, Atkins v. Humes, 110 So.2d 663, 667 (Fla. 1959) with Sims v. Helms, 345 So.2d 721 (Fla. 1977). Similarly, when an employee misses 298 hours of work, an employer need not prove that he suffered some detriment for the finder of fact to recognize "misconduct". Common sense, the very soul of reasonableness, says that amputating the wrong leg is contrary to the very essence of "doctoring". So, too, an employee who doesn't come to work is inherently in conflict with the essence of being an employee. Mr. Barron conceded that he had been absent 118 unauthorized hours. He offered not one shred of evidence that his absences were anything other than a willful disregard for his employer's interests. See, Section 443.036(24), Florida Statutes.

Absenteeism, even tardiness, is "misconduct" sufficient to deny unemployment compensation benefits. In Sanchez v. Department of Labor and Employment Security, et al, 411 So.2d 313,

314 (Fla. 3d DCA 1982), Sanchez failed to work a full 40 hour week in a 4-month period. He also failed to come to work without authorization for his leave in order to undergo elective surgery. The Court, in affirming Sanchez' denial of unemployment benefits quoted Chapman v. Division of Employment Security of the Department of Labor, a case concerning an employee who had been tardy on 3 consecutive days, stating:

> From time immemorial, promptness in reporting to work has been regarded as essential to the proper conduct of an employer's business, and tardiness has been accepted as sufficient grounds for termination of the employer-employee relationship.

104 So.2d 203-204 (LA. App. 1958).

If Sanchez' failure to work 40-hour weeks and Chapman's 3 days of tardiness were sufficient to deny unemployment compensation benefits, then surely Mr. Barron's admissions of 118 hours of unauthorized leave -- nearly three weeks time, assuming a 40 hour work week -- in addition to 95 hours of annual leave and 85 hours of sick leave is substantial competent evidence sufficient to substantiate "misconduct" that would disqualify him for unemployment compensation benefits. See, also, Hillsborough County Department of Emergency Medical Services v. Unemployment Appeals Commission, 433 So.2d 24 (Fla. 2d DCA 1983) (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).)

The Fourth District Court of Appeal was faced with a similar straining at gnats in Co-Tran Florida Transit Management, Inc. v. Goodman, 415 So.2d 155, 156 (1982). There, a bus driver for the Transit company had his license revoked in the State of Georgia

for driving while intoxicated. Because his driving in Georgia had not been connected with his work, the Unemployment Appeals Commission granted the dismissed bus driver unemployment compensation benefits. Reversing the Appeals Commission, the District Court stated:

> If under these circumstances, the employer has to pay, then when can an employer discharge, without being obligated to pay for benefits, an employee whose repeated rules violations vitiate the basic requirements of his employment and render him useless to his employer?

An employee who does not come to work is useless to his employer. The employee in the instant case did not come to work for 298 hours in 1983.

It is the duty of the Unemployment Appeals Commission to review the Appeal Referee's decision and determine whether the findings are supported by competent, substantial evidence, and that the legal conclusions are in accordance with the essential requirements of law. (Chapter 38E-3.02(3), Administrative Code.) The Florida Supreme Court defines "substantial competent evidence" in Greyhound Corporation, Southeast Greyhound Lines Division v. Carter, 124 So.2d 9 (Fla. 1960):

> [W]e are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed... . We are of the view, however, that the evidence relied upon to sustain the ultimate findings should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent, the "substantial" evidence should also be "competent".

Id. at 15 quoting DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957) (Emphasis added.)

The Tallahassee Housing Authority submits that the admissions of Mr. Barron and the documented evidence of his absences are such that a reasonable mind would accept it as adequate to support the finding of excessive absenteeism, misconduct that is inherently detrimental to his employer. The decision of the Appeals Referee denying Mr. Barron's unemployment compensation benefits should be reinstated.

## ISSUE II

THE DECISION OF THE APPEALS REFEREE WAS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE; THE CHRONOLOGICAL SUMMARY OF MR. BARRON'S ABSENCES IS PERMITTED UNDER THE EVIDENCE CODE AND IS FURTHER PROVED BY MR. BARRON'S OWN TESTIMONY.

The second issue in the instant case is whether the evidence before the finder of fact, the Appeals Referee, was sufficient to support his findings or whether it was hearsay as the Appeals Commission contends. The evidence before the Appeals Referee consisted of (1) the testimony of Mary Kathryn Lewis, an employee of the Tallahassee Housing Authority whose duties included the maintenance of all employee time records and attendance sheets (R. at 9); (2) the admissions of Mr. Barron (R. at 43-44); and (3) a summary or excerpts from the time records and attendance sheets kept in the normal course of business (R. at 61-64). In reviewing the decision of the Appeals Referee, the Unemployment Compensation Appeals Commission stated:

> The only evidence offered by the employer was a chronological abstract of the claimant's attendance for the one-year period prior to his discharge, purportedly prepared from the employer's personnel records. This abstract indicated absences taken by the claimant and designated them as either approved or unapproved without explanation as why they were so designated. The documentary evidence was accompanied by the testimony from the employer's personnel director regarding the total number of hours of leave taken by the claimant during that year. The abstract presented was not the record kept by the employer during the normal course of business, but was, according to the testimony a compilation of information taken from various time sheets and time cards. The personnel director did not proffer the original records into evidence. This documentary evidence does not come within any recognized exception to the hearsay rule, and therefore, cannot form the basis for finding of fact. Section 120.58 (1)(a), Fla. Stat.; Florida Administrative

> Code Rule 38E-5.24(4)(d). The employer's hearsay evidence was not sufficient to substantiate its allegation that the claimant's discharge was for misconduct connected with his work.

(R. at 71.)

Appellant here, Tallahassee Housing Authority, respectfully submits that (1) Section 90.956 of the Florida Evidence Code specifically permits the admission of summaries and (2) Section 90.957 of the Florida Evidence Code states that the contents of the writing may be proven by the admission of a party. The in-court admissions of Mr. Barron are not hearsay by definition. Therefore, the evidence before the Appeals Referee was not hearsay. As absenteeism, even tardiness, has been held to be "misconduct" sufficient to deny unemployment benefits, the decision of the Appeals Referee should be reinstated.

Section 90.956 of the Florida Evidence Code states:

> 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 compiled 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.

(Emphasis added.)

The Tallahassee Housing Authority compiled the summary of Mr. Barron's absences. This required culling Mr. Barron's work

hours from all other employees work hours on the time cards, daily attendance logs and payroll record sheets for a full year. (R. at 9.) The summary, and attached affidavit are dated January 25, 1984, indicating their use at Mr. Barron's pre-determination hearing before the Tallahassee Housing Authority. (R. at 61; R. at 27 - 28.)

Whether Mr. Barron received a copy of this same summary before his appearance before the Appeals Referee is never explicitly stated in the record. However, the attached affidavit is dated six days before his pre-determination hearing, which had been two months earlier. (R. at 61.) The last absence noted on the summary is for eleven days before the pre-determination hearing. (R. at 64.) When filling out the Unemployment Compensation Fact-finding Report, the Claims Adjudicator had to supplement the affidavit received from the Housing Authority with the additional absences taken after the summary and affidavit were prepared. (R. at 12.) The summary and affidavit do not reflect the additional 24 hours Mr. Barron failed to report to work after January 20, the last date on the summary (which would raise Mr. Barron's total number of absences to 322 hours, 142 of these hours unapproved.)

There is every indication that the summary and affidavit were prepared for the pre-determination hearing. There was simply no other reason to have made the affidavit and summary in that time frame. The letter to Mr. Barron from the Housing Authority's Hearing Officer, Herschel Williams, states that he was given notice of the evidence that would be considered at his pre-determination hearing, and the summary and affidavit were appar-

ently prepared for use as evidence at that hearing, although it does not specifically mention the summary. (R. at 65.) Finally, Mr. Barron, who successfully objected to the entry of other evidence on the grounds that he had not previously seen it (R. at 31-34) never claims that he has not seen or received a copy of the summary before. The District Court's statement to the contrary (A. at 3.) is completely unsupported by the record. ("He [Mr. Barron] maintains that he has never been confronted with the summary prior to that hearing and was unprepared to contest specific entries therein.") Not only does Mr. Barron not object to the summary, he does take issue with two of the entries, and affirmatively admits the truth of the summary and affidavit. (R. at 43-44.) Mr. Barron was unable to more effectively contest the summary, or present any evidence in his own behalf, he says, because he "gave out of gas" when he went to retrieve his papers from his lawyer. (R. at 45-46.)

At the hearing before the Appeals Referee, two months later, the same affidavit was presented and each unauthorized absence was further specifically detailed in an attached three-page summary. (R. at 61-64.) Mr. Barron was provided a copy of the summary and the affidavit. (R. at 28.) There was, however, no written notice filed with the court of the Housing Authority's intent to use the summary. This is not critical in this instance, however, as Mr. Barron arguably had actual notice of the summary and it has been held that failure to file notice is not reversible error under facts similar to those in the instant case.

In Kornreich & Sons, Inc. v. Titan Agencies, Inc., 423 So.2d 940, 942 (Fla. 3d DCA 1983), the trial court admitted the financial summary prepared by Titan into evidence. The appellate court affirmed the decision of the trial court because Kornreich & Sons had received a copy of the disputed summary several weeks before the trial and had deposed the person who compiled the summary. The court stated, "On these facts we cannot agree that the technical violation of Section 90.956[1], F. S. (1977) was harmful". (Footnote omitted.)

As has been stated, Mr. Barron arguably had notice of the summary several weeks before he appeared before the Appeals Referee. In addition, the woman who compiled the summary by researching the daily attendance logs, time cards and payroll record sheets of the Tallahassee Housing Authority for the pertinent period was before the Appeals Referee in person to testify to the veracity and accuracy of her summary and to submit to any cross-examination that Mr. Barron might have wanted. (R. at 20.) The Appeals Referee laid the proper predicate for the admission of the summary by having Miss Lewis, a qualified witness, testify as to how the summary was made. (R. at 27 - 27.); EHRHARDT, Florida Evidence, 616 (2d Ed. 1984); Scott v. Caldwell, 160 Fla. 861, 37 So.2d 85, 88 (1948) (Summary admissible when witness who examined and analyzed books and records testifies to accurate summary.) This is analogous to the deposition in the Kornreich case; it removes the hearsay taint by permitting cross-examination of the one person who compiled the summary. Mr. Barron could have

easily objected to the summary and insisted that Tallahassee Housing Authority produce the original records. He did not. Mr. Barron could also have insisted on an opportunity to examine the original records and compared them to the summary. He did not.

Finally, it must be noted that the documents on which the summary was based are admissible as an exception to the hearsay rule. EHRHARDT, Florida Evidence, 616 supra. Section 803.6 of the Florida Evidence Code permits the admission of records of regularly conducted business activities. Again, the Appeals Referee made sure that this predicate for the admissibility of the summary was properly laid by questioning Miss Lewis. (R. at 28.) The summary, therefore, was admissible, documentary evidence of Mr. Barron's absences. Contrary to the decision of the Unemployment Compensation Appeals Commission, it was substantial, competent evidence on which the Referee could base his findings of fact. It should be noted that although the summary is not hearsay, it would have been admissible at the hearing even if it were hearsay pursuant to the Administrative Procedures Act which provides:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Section 120.58(1)(a), Florida Statutes 1983. It further provides:

> Documentary evidence may be received in the form of a copy or excerpts if the original is not available. Upon request, the parties shall be given an opportunity to compare the copy with the original.

Section 120.58(1)(d), Florida Statutes 1983. (Emphasis added.)

There was further evidence to substantiate the decision of the Appeals Referee: the testimony of Miss Lewis and the admissions of Mr. Barron. Of course, by definition, neither the testimony of Miss Lewis nor the admissions of Mr. Barron are hearsay. Hearsay is defined as:

> [A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Fla. Stat., Section 90.801 (1983)(Emphasis added). Both Miss Lewis and Mr. Barron testified during the hearing. Miss Lewis testified that Mr. Barron had taken 118 hours of leave without pay in addition to 95 hours of annual leave and 85 hours of sick leave. (R. at 43.) Mr. Barron testified that he had taken 95 hours of annual leave (R. at 43), 85 hours of sick leave (R. at 44) and had taken 118 hours of leave without pay though stating that he felt he had the time accrued and was being unfairly treated. (R. at 44).

Mr. Barron's admissions are important for at least two reasons:

1. They are positive party admissions tantamount to conceding the correctness of the Tallahassee Authority's position, and
2. His admissions further prove the contents of the summary submitted by the Housing Authority and doubly prove its non-hearsay character.

Section 90.957 of the Florida Evidence Code provides:

> A party may prove the contents of writings, recordings, or photographs by the testimony or deposition of the party against whom they are offered or by his written admission, without accounting for the non-production of the original.

Mr. Barron's in-hearing admissions before the Appeals Referee proved the contents of the disputed summary. EHRHARDT, Florida Evidence at 617.

The hearsay character of documentary evidence was before the Second District Court of Appeal in CF Chemicals, Inc. v. Florida Department of Labor and Employment Security, 400 So.2d 846 (1981). There, as here, the appeals referee denied the claimant unemployment benefits because he had been fired for "misconduct". The claimant had been absent for 3 consecutive shifts without notice. The Unemployment Appeals Commission reversed the appeals referee, contending that the referee relied on a personnel document introduced by petitioner and that that document was hearsay. The employer appealed pointing out that at the hearing before the referee it had introduced evidence of claimant's numerous absences and that the referee had reviewed these events with the claimant and listened to his comments on them. This is the very procedure that the referee employed in the instant case; in reviewing a three-page history of his absences with the appeals referee on an item-by-item basis, the claimant indicated that of the 118 hours the Housing Authority claimed he was on leave without pay, only 2 entries could be challenged. (R. at 41 - 49.) The District Court in CF Chemicals

reversed the Appeals Commission and reinstated the decision of the referee stating that the business records exception to the hearsay rule applied and that:

> The foundation for the document might have been better laid. However, since the Rules of Procedure permit employee and employer alike to appear before the Appeals Referee without counsel, rigorous and technical adherence to those rules may not be exacted upon appeal if the court is satisfied on the entire record before it that the findings of the lower tribunal were correct. Giddens v. Appeal Board of Michigan Employment Security Commission, 4 Mich. App. 526, 145 N.W. 2d 294 (1966).
>
> Having found that the evidence supported the referee's findings, we must reinstate his decision. Florida Department of Commerce v. Dietz, 349 So.2d 1226 (Fla. 2d DCA 1977).

Id. at 848.

In the instant case, a summary of the Housing Authority's attendance records was admitted into evidence. This is permitted by Section 90.956 of the Florida Evidence Code and Section 120.58 (1)(d), Florida Statutes (1983). As in CF Chemicals, Appellant asserts that the entire record in this case indicates that the referee's findings are based on substantial competent evidence.

Finally, it must be remembered that the greatest reason hearsay testimony is not permitted is the lack of opportunity for cross-examination. EHRHARDT, Florida Evidence at 430 (1984). Cross-examination is considered imperative for discovering the truth. Id. Here, however, the person who compiled the summary was present and available for cross-examination. Mr. Barron was encouraged to cross examine the Housing Authority's representative. (R. at 36.) But, more importantly, Mr. Barron never said that the summary was untrue or inaccurate. Indeed,

Mr. Barron never objected to the admission of the chronology at all. In essence, Mr. Barron conceded the accuracy of the Housing Authority's position in all respects with the exception of the two instances to which he specifically objected. It should be further noted that Mr. Barron was well aware of his right to object to documentary evidence and did so when the Housing Authority sought to introduce a copy of their disciplinary policy. Mr. Barron objected stating that he had not had a chance to review this policy before the hearing and the hearing officer did not admit the document. (R. at 32 - 34.) As stated before, Mr. Barron did not object to the summary, either to its content or to having not seen it, and the dated affidavit attached to the summary indicates that it was prepared for his pre-determination hearing in January, long before Mr. Barron's appearance before the Appeals Referee. Therefore, even the policy reasons for disallowing hearsay are not present under the facts of this case.

In Florida Industrial Commission v. Ciarlante, 84 So.2d 1 (Fla. 1955) the Florida Supreme Court was asked to review the evidence before an appeals referee who had denied unemployment benefits. The evidence before the appeals referee consisted solely of the testimony of the claimant. Id. at 2. The Supreme Court examined the evidence and reinstated the referee's denial of benefits noting that:

> While the burden may be on the Commission to show that the claimant has become disqualified for unemployment compensation.... it is generally held that the burden is on the claimant to prove that he has met the requirements of eligibility prescribed by the act... .

Id. at 5. The Ciarlante case is important for at least two reasons: (1) it demonstrates that the testimony of the claimant alone can constitute substantial competent evidence to support a denial of unemployment benefits, and (2) it demonstrates that the burden of proof is on the claimant to make at least some showing that he is entitled to benefits.

Inasmuch as Mr. Barron flatly admits that he took 118 hours of leave without pay and then offered not one scintilla of documentary evidence or testimony to refute the allegations of excessive absenteeism, one can hardly say that there was conflicting testimony on this issue. The Appeals Referee, as finder of fact, could only reasonably determine the correctness of the Tallahassee Housing Authority's position.

The Appeals Referee's decision to deny Mr. Barron unemployment compensation benefits was supported by substantial, competent evidence: the chronological summary of Mr. Barron's absences, the testimony of Mary Kathryn Lewis, and the admissions of Mr. Barron that not only proved the contents of the summary, but conceded the position of the Tallahassee Housing Authority.

## CONCLUSION

The Appeals Referee was the finder of fact and his findings were supported by substantial competent evidence. This evidence included the admissions of Mr. Barron and the summary properly admitted under the Rules of Evidence that indicated that Mr. Barron had been away from his job for a total of 298 hours in a one-year time span. An employee who does not come to work vitiates the essence of an employer-employee relationship. Mr. Barron is not entitled to unemployment compensation benefits because his excessive absenteeism is a detriment to his employer and, as such, is misconduct within the meaning of the law. We respectfully request this court to reinstate the determination of the Appeals Referee.

Respectfully submitted,

Paula L. Walborsky

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant was forwarded by U. S.Mail this 7 day of September, 1985 to: Mrs. Geri Atkinson-Hazelton, General Counsel, Unemployment Appeals Commission, 1321 Executive Center Drive East, 221 Ashley Building, Tallahassee, FL 32301-8247 and James C. Conner, Jr., Esq., 325-F John Knox Road, Suite 120, Tallahassee, FL 32303.

Paula L. Walborsky

PAULA L. WALBORSKY