

WP-1 (9/06)

STATE OF CONNECTICUT
EMPLOYMENT SECURITY APPEALS DIVISION
39 Marne Street
Hamden, CT 06514-3691
Telephone: (203) 230-3700 Fax: (203) 859-3350

**IMPORTANTE - TENGA ESTO TRADUCIDO
INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR**

Claimant's Name, Address & S.S. No.

Case No.: xx -CC- xxxx

Your name and address
(you are the "claimant").

↑
**This is your
case number.**

The name and address
of your lawyer, if
you have one.



S. S. #:

Employer's Name, Address, & Reg. No.

Employer Name
and Address

Mailing Date : November 16, 2010

E. R. No. : XXXXXXXX

DECISION OF APPEALS REFEREE

CASE HISTORY

On January 19, 2010, the administrator ruled the claimant's separation non-disqualifying, effective December 27, 2009. The administrator found that the claimant was discharged for reasons other than wilful misconduct in the course of her employment.

DECISION OF APPEALS REFEREE

CASE NUMBER XX -CC- XX

PAGE 2

The employer filed a timely appeal from the administrator's determination on January 21, 2010. The referee heard the employer's appeal on March 1, 2010.

By a decision issued on March 5, 2010, the referee reversed the administrator's decision.

The claimant filed an appeal to the board of review on March 11, 2010.

The board issued a decision on October 6, 2010, remanding the matter to the referee to conduct further proceedings and issue a new decision. The board found that the referee should have analyzed the case pursuant to the absenteeism provisions cited and that the referee failed to ascertain whether the claimant was absent without good cause or proper notice on August 18, 2009, or any other occasion during her final twelve months of employment. Specifically, the board found that "... the referee did not elicit testimony from the employer concerning the incident (August 18, 2009) and thereby afford the employer an opportunity to establish that the claimant was absent on a day it scheduled her to work." The employer failed to appear for the referee's hearing on October 27, 2010.

APPEARANCES

March 5, 2010

The claimant appeared along with [REDACTED] appeared for the employer.

October 27, 2010

The claimant appeared along with [REDACTED] appeared for the claimant. The employer did not appear for the hearing.

FINDINGS OF FACT

Read this section at Step 3.

1. The claimant was employed as a full-time companion from September 2008 until December 30, 2009, earning a final salary of between \$8 and \$9 per hour. The claimant was terminated on December 30, 2009, after failing to appear for an assigned client without contacting the employer or the client.
2. Employer policy provides that for reporting absences: "Employees who are going to be late for work or who are unable to report for work due to their own illness, the illness of a family member or an unforeseen emergency must contact our office as soon as possible and no later than 2 hours before the start of your shift with your clients."
3. Employer policy provides that if you are unable to report for an assigned shift you must contact a designated emergency pager line that is accessible 24-hours a day, 7-days a week. The number for the line is printed on the claimant's identification badge. Employer policy

DECISION OF APPEALS REFEREE

CASE NUMBER XX -CC- XX

PAGE 3

provides that all care givers must wear an identification badge at all times.

4. On December 30, 2009, the claimant was scheduled to report for work and care for her assigned client from 11:00 a.m. - 3:00 p.m. The claimant did not report for work because her car broke down. The daughter of the cited client contacted the employer on December 30th, reporting that the claimant failed to report for work or call her. When scheduler [REDACTED] asked the claimant why she did not contact management the claimant responded that she was "frustrated" about her car breaking down.
5. On November 17, 2009, the claimant experienced difficulty when she reported to the home of a client and knocked on the front door but found no answer. Due by 6:00 p.m. the claimant arrived prior to her assigned time and remained on the site until approximately 7:00 p.m.
6. On November 17, 2009, the claimant failed to initiate contact with the employer once she arrived home. Unbeknownst to the claimant the original assignment included directions for the claimant to report to the back door. The claimant contacted management the following day to report the November 17th incident, including her failure to wear her identification badge that day.
7. On November 17, 2009, the claimant violated employer policy, neglecting to wear her identification badge. Had the claimant worn the badge she would have had access to the emergency number on the back of the badge. The claimant failed to call this designated "live" emergency line, opting to leave a voice message on an office number. Had the claimant called the emergency number she would have been apprised to walk to the back of the home and enter the back door.
8. A *Client Information Sheet* for the November 17, 2009, assignment does not mention the need for the claimant to report to the back door of the residence.
9. On August 18, 2009, the claimant was absent from an assigned shift, failing to call the client or the employer. Previously, on July 30, 2009, the claimant reported that she would be undergoing surgery in the near future. A July 30, 2009, note from [REDACTED] reflects that the claimant was scheduled for surgery on August 18, 2009.
10. The surgery date was changed to [REDACTED] which the claimant reported to management on August 19, 2009.
11. The claimant worked on August 13, 2009, and did not hear from the employer on August 14th, August 15th, August 16th. The claimant understood that she would be handling "fill-in" cases as assigned.

DECISION OF APPEALS REFEREE

CASE NUMBER XX -CC- XX

PAGE 4

ISSUE

The issue raised by this appeal is whether the employer discharged the claimant for wilful misconduct in the course of her employment.

PROVISIONS OF LAW

Section 31-236(a)(2)(B) of the General Statutes provides that an individual is ineligible for benefits if he was discharged or suspended for wilful misconduct in the course of his employment. The individual will remain ineligible until he has earned at least ten times his benefit rate. Effective October 1, 2004, General Statutes § Section 31-236(a)(16) further provides that, except in the case of a discharge resulting from an absence from work, "wilful misconduct" means: 1) deliberate misconduct in wilful disregard of the employer's interest, or 2) a single knowing violation of an employer's reasonable and uniformly enforced rule or policy, when reasonably applied, unless the violation is due to an employee's incompetence. If the discharge resulted from an absence from work, "wilful misconduct" means an employee must be absent without either good cause for the absence or notice to the employer which the employee could reasonably have provided under the circumstances for three separate instances within a twelve-month period. Except with respect to tardiness, each instance in which an employee is absent for one day or two consecutive days without either good cause for the absence or notice to the employer which the employee could reasonably have provided under the circumstances constitutes a "separate instance."

ANALYSIS AND CONCLUSION OF LAW

Where a claimant is terminated because of an absence from work, whether with or without notice to the employer, the separation generally must be adjudicated under the absenteeism provision of the discharge statute, which requires three separate instances of either unreported absence and/or absence without good cause, and not under the deliberate misconduct or rule violation provisions, which require only a single act of wilful misconduct to deny benefits. *Niro v. Santz Fuel, Inc.*, Board Case No. 773-BR-96 (7/17/96).

In this case the claimant was terminated after abandoning a client in the absence of affording the employer with proper notice for her absence on December 30, 2009. The referee is unpersuaded by the claimant's unsupported March 5th assertion that she was "just about" to contact the employer when she was reached by the employer on December 30th. It is the duty of the referee, as trier of fact, to determine the credibility of the testimonial and documentary evidence in the record and the relative weight of such evidence. *Baez v. City of Meriden*, Board Case No. 1343-BR-91 (8/21/92). The referee notes that during the referee's hearing of October 27, 2010, the claimant failed to revisit this assertion that she was ready to contact the employer regarding an anticipated absence *just before* receiving a call from the employer. The claimant testified on October 27, 2010, that she did confer with her supervisor earlier on the morning of December 30th regarding her anticipated absence and

DECISION OF APPEALS REFEREE

CASE NUMBER XX -CC- XX

PAGE 5

that her supervisor said "ok," an assertion that the claimant wholly failed to mention during the referee's hearing on March 5, 2010, undermining the credibility of the claimant. Where a witness testifies to a material fact or raises a critical issue which was not mentioned in a prior statement, the testimony is sufficiently inconsistent to call into question the credibility of the witness. *Adams v. AM Data Services Corp.*, Board Case No. 2566-BR-92 (1/8/93). The referee must find that the claimant was absent without either good cause or proper notice on December 30, 2009.

This final incident was preceded by at least two prior absences, one on November 17, 2009, and the other on August 18, 2009. On November 17, 2009, the claimant reported to the work site and attempted to contact her client. Where a claimant reports to the work site, but nevertheless goes home without starting the shift, her conduct in an instance of absenteeism rather than a single incident of walking off the job. *See, e.g., Edmond v. Hillcrest Health Care Center, Inc.*, Board Case No. 32-BR-98 (3/9/98). In the case under appeal the claimant did not enter the workplace and failed to contact her client inside the home, the purpose of the visit. The claimant was obligated to call the employer's emergency number in order to report for the assignment. The claimant failed to bring her badge, did not otherwise have the correct emergency number, and ultimately failed to contact the employer once she arrived home. The referee finds that the claimant was absent without good cause or proper notice on November 17, 2009.

The claimant presented testimony lacking in detail regarding August 18, 2009, asserting that she was working on a fill-in basis, and that even after not hearing from the employer on August 14th, 15th, and 16th, she nevertheless called on August 19th. The claimant's unchallenged testimony reveals that she reasonably believed that she was not scheduled to work on August 18, 2009. The employer failed to establish a specific instance of disqualifying absenteeism on August 18, 2009. Under the narrow confines of the absenteeism provisions, the decision is not governed by the fact that the claimant effectively abandoned clients on December 30, 2009, and November 17, 2009. Although an employer may be justified in discharging an employee for her overall attendance record, the referee is constrained by the Unemployment Compensation Act to determine whether the claimant is eligible for benefits based on whether the employer can show three specific instances of absenteeism in the twelve months prior to the claimant's discharge that are without good cause or proper notice, including the final incident which led to the claimant's discharge. *See Sarra v. McCabes Moving Preparations, LLC*, Board Case No. 826-BR-02 (9/2/02).

The referee must find that the employer discharged the claimant for reasons other than disqualifying absenteeism in the course of his employment. As a result, the claimant is not disqualified from receiving unemployment compensation benefits pursuant to General Statutes § 31-236(a)(2)(B).

DECISION OF APPEALS REFEREE

CASE NUMBER xx -CC- xx

PAGE 6

DISPOSITION AND ORDER

The administrator's determination is **affirmed**, and the employer's appeal is **dismissed**. Benefits are awarded, effective 12/27/09, provided the claimant is otherwise eligible.



Eric D. Beckenstein
Associate Appeals Referee

EDB/h

**IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY DECEMBER 7, 2010.
SEE NEXT PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.**

NOTICE OF APPEAL RIGHTS

This decision shall become final on the twenty-second (22nd) calendar day after the date of mailing unless, before that date, a party either appeals this decision to the Board of Review or moves the Referee to reopen, vacate, set aside or modify the decision. The appeal or motion may be mailed or faxed to the Appeals Division at the address or fax number listed in the heading of this decision. The appeal or motion may also be filed in person at any Connecticut Works/Job Center, or by the Internet at www.ctboard.org. **PLEASE NOTE:** To be timely filed, the appeal or motion must be actually received at any such office no later than the twenty-first (21st) calendar day after the date of mailing of this decision or, if filed by mail, must bear a legible United States Postal Service postmark showing that it was placed in the possession of the Postal Service for delivery within such twenty-one day period. Postmarks attributable to private postage meters are not acceptable, but you may use one of the private delivery services approved by the IRS: Airborne Express, DHL Worldwide Express, Federal Express, or United Parcel Service. If filed by fax or Internet, the appeal must be received by the Connecticut Appeals Division or the Department of Labor by 11:59 p.m. on the twenty-first day. The last day for filing an appeal or motion is listed at the end of the Referee's decision.

If the appeal or motion is late: Neither the Board of Review nor the Referee can entertain an untimely appeal or motion unless the appealing party can show good cause for failing to file the appeal or motion on time. Therefore, if your appeal or motion is late, you should explain why.

FORMS AND ASSISTANCE ARE AVAILABLE AT EACH CONNECTICUT WORKS/JOB CENTER OFFICE FOR USE IN PREPARATION OF AN APPEAL.

Each appeal may be filed by means of the prescribed form or a typed or legibly written statement which describes and explains all reasons for the appeal. The Board issues a written decision addressing the legal and factual claims stated in every timely-filed appeal. Generally, appeals are decided by two of the three members of the Board on the basis of the existing record, and the Board does not hold a further hearing. An appeal may include, under separate headings, a request for a decision by the full three-member Board, a request for a further evidentiary hearing indicating the reasons for such request, or written argument in support of the appeal.

NOTICE TO THE CLAIMANT: (1) If you appeal this decision, you should continue to file benefit claims, as directed, while unemployed to protect your benefit rights. (2) If you have already been paid unemployment compensation benefits and the decision of the Referee is against you, an overpayment will be established in your account which you may have to repay. Once this decision becomes final, you will not have another opportunity to contest the decision of ineligibility which created the overpayment.

NOTIFICACION DE DERECHOS DE APELACION

Esta decisión se considerará final a los veintidós (22) días calendario después de la fecha de envío, a menos que, antes de esa fecha, cualquiera de las partes apele esta decisión a la Junta de Revisión (Board of Review). La parte afectada apela ante la Junta de Revisión o conduce al árbitro a re-abrir, anular, ignorar o modificar la decisión. La apelación o moción puede ser enviada por correo o por medio del fax a la División de Apelaciones a la dirección postal o número de fax arriba mencionado. La apelación o moción también puede ser registrada en persona en cualquier oficina de Connecticut Works/Job Center, o por Internet a www.ctboard.org. **POR FAVOR NOTE:** Para que su apelación tenga validez debe ser enviada a una de estas oficinas dentro de los próximos 21 días calendario a la fecha de envío de esta decisión o si la envía por correo, debe tener una marca de matasello legible del Servicio de Correo de los Estados Unidos de América, indicando que fue colocado en el correo dentro de este período. No serán aceptados matasellos o marcas de correo privado, pero usted puede utilizar los servicios de correo privado aprobados por el IRS: Airborne Express, DHL Worldwide Express, Federal Express o United Parcel Service. En caso de ser enviado por fax o Internet, la apelación debe ser recibida por el Departamento del Trabajo o la División de Apelaciones antes de las 11:59 p.m. del vigésimo primer día (21). El último día para presentar una apelación o moción se encuentra al final de la decisión tomada por el Arbitro.

Si la apelación o moción es tardía: Ni la Junta de Revisión (Board of Review) ni el Arbitro (Referee) pueden considerar una apelación que haya sido enviada después de la fecha límite, a menos que la parte afectada pueda demostrar con causas justas el motivo de la demora.

TENEMOS FORMULARIOS Y AYUDA DISPONIBLE EN CADA OFICINA DE COMPENSACION POR DESEMPLEO PARA UTILIZAR EN LA PREPARACION DE UNA APELACION.

Cada apelación puede registrarse por medio de formularios establecidos o una declaración escrita legible explicando todas las razones para la apelación. La Junta promulga una decisión escrita señalando los aspectos legales y los objetivos establecidos en cada apelación que se haya presentado a tiempo. Generalmente, las decisiones de estas apelaciones están tomadas por dos de los tres miembros de la Junta, basada en el documento actual, y la Junta no tiene otra audiencia de evidencia. Una apelación puede incluir bajo títulos diversos, una petición para que la decisión sea tomada por los tres (3) miembros de la Junta; o una petición solicitando otra audiencia de evidencia indicando las razones de tal petición, o un argumento escrito que respalde su apelación. **AVISO AL RECLAMANTE:** (1) Si usted apela esta decisión, debe continuar sometiendo su reclamación de beneficios todas las semanas, como se indica, mientras está desempleado para proteger sus derechos de beneficios. (2) Si usted ya recibió beneficios de compensación por desempleo y la decisión del árbitro no está a su favor, se establecerá un sobrepago en su cuenta el cual usted tendría que repagar. Cuando esta decisión llegue a ser final, no tendrá otra oportunidad para disputar la decisión de ineligibilidad que creó el sobrepago.