

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
200 Folly Brook Boulevard
Wethersfield, CT 06109

COMPLAINANT

v.

EMPLOYER

TRACEY BROWN
198 West Euclid Street
Hartford, CT 06112

SAM'S CLUB #6636
Kevin Lawrence
245 Wilbur Cross Hwy.
Berlin, CT 06037

RESPONDENT'S ATTORNEY

Kristi E. Mackin, Esq.
Littler Mendelson, P.C.
One Century Tower
265 Church Street, Suite 300
New Haven, CT 06510

Docket No.: FM 2008-48

Date Mailed: April 20, 2011

FINAL DECISION

The undersigned, Glenn Marshall, Commissioner of the State of Connecticut Department of Labor, hereby issues his final decision in the complaint encaptioned Tracey Brown v. Sam's Club #6636, Case No. FM 2008-48. This decision is issued pursuant to Conn. Gen. Stat. § 4-180 and Sections 31-1-8 and 31-51qq-47 of the Regulations of Connecticut State Agencies.

Following the issuance of the Proposed Decision of Hearing Officer Anita Weeks on March 15, 2011, the Complainant, Tracey Brown, submitted a note on March 31, 2011, providing that her "car transmission ceased on January 21, 2011. Bank info showing purchase of one next day." Attached to the note is an online banking list of

expenditures. The introduction of additional evidence at this time is inappropriate, as the regulations only provide for the filing of exceptions via briefs and oral argument. Regulations of Connecticut State Agencies § 31-1-7(a). While Complainant did not specifically request an opportunity to file exceptions and present briefs and oral argument, it would nevertheless be improper and futile as Complainant did not appear at her scheduled hearing, no hearing was thus held, and the Hearing Officer issued a default decision with no findings of fact or conclusions of law as to the merits of the case. Exceptions and oral argument are only available when the Commissioner, who renders the final decision, has "not heard the matter or read the record." Regulations of Connecticut State Agencies § 31-1-7(a). As no matter was heard and no record established, a final decision can be rendered without providing the parties such opportunity, and as such, I hereby issue my final decision.

WHEREFORE, I affirm in part and incorporate in part the Proposed Final Decision of the Hearing Officer issued on March 15, 2011, as my final decision in this matter, a copy of which is attached hereto.

In making her conclusion in the Proposed Final Decision, the Hearing Officer invoked section 31-1-4(a) of the Regulations of Connecticut State Agencies, which specifies that "[u]nless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default." Complainant neither complied with the Hearing Officer's pre-hearing order to provide witness lists and exhibits nor attended the scheduled hearing. Complainant further failed to contact the Hearing Officer to notify her that she would be unable to attend the hearing or ask for a


postponement. The Hearing Officer, therefore, correctly found Complainant in default and issued a dismissal of the complaint.

I find improper, however, the Hearing Officer's finding dismissing the complaint "without prejudice, such that the complainant may file a motion to reopen the decision of dismissal within two weeks of the date it is adopted by the Commissioner, if the complainant can provide proof that she was prevented from appearing at the hearing or from requesting a continuance due to mistake, accident or other reasonable cause." There is no basis to dismiss the case "without prejudice," and I find instead that the case is dismissed with prejudice. Moreover, the Hearing Officer created an unwarranted remedy by finding that the Complainant could file a motion to reopen after issuance of the final decision. The regulations provide a remedy to a party who receives an unfavorable final decision: the party can either file a petition for reconsideration with the agency pursuant to section 31-1-8a of the Regulations of Connecticut State Agencies or file an appeal with the Superior Court and those remedies are available to the Complainant.

WHEREFORE, I am dismissing this case with prejudice.

4/19/11

Dated



Glenn Marshall
Commissioner

STATE OF CONNECTICUT
Department of Labor
200 Folly Brook Boulevard
Wethersfield, Connecticut 06109

PROPOSED FINAL DECISION OF HEARING OFFICER

Tracey Brown v. Sam's Club #6636

COMPLAINANT

TRACEY BROWN
198 West Euclid Street
Hartford, CT 06112

RESPONDENT

SAM'S CLUB #6636
Kevin Lawrence
245 Wilbur Cross Hwy.
Berlin, CT 06037

RESPONDENT'S ATTORNEY

LITTLER MENDELSON, P.C.
Attn: Attorney Kristi E. Mackin
One Century Tower
265 Church Street, Suite 300
New Haven, CT 06510

Docket No.: FMLA 2008-48

Date Decision is Mailed: March 15, 2011

Hearing Date: January 21, 2011

Appearances:

For the Complainant: None.

For the Respondent: Kristi E. Mackin, Attorney for the Respondent and Kevin Lawrence, Store Manager.

CASE HISTORY

On July 10, 2008, Tracey Brown filed a complaint with the State of Connecticut Department of Labor, Wage and Workplace Standards Division (hereinafter referred to as Wage and Workplace Standards Division), alleging that her former employer, Sam's Club #6636 (hereinafter referred to as the respondent), violated the provisions of General Statutes §§ 31-51cc, et seq., An Act Concerning Family and Medical Leave from Employment (hereinafter referred to as the CFMLA). On September 29, 2008, the respondent responded to the Wage and Workplace Standards Division, contending that the complaint was without merit.

On December 30, 2009, the Wage and Workplace Standards Division notified the parties that it had investigated the complainant's complaint and determined that the respondent did not violate the provisions of the CFMLA.

On January 14, 2010, the complainant requested a contested case hearing before the Labor Commissioner pursuant to Regs., Conn. State Agencies § 31-51qq-44(e). On April 20, 2010, Acting Labor Commissioner Linda Agnew designated Attorney Anita M. Weeks as the hearing officer. On December 22, 2010, Attorney Weeks mailed a Notice of Contested Case Hearing and Pre-Hearing Order to the complainant and the respondent for a hearing scheduled for January 21, 2011, at 9:30 a.m. at the Waterbury office of the Appeals Division, 249 Thomaston Avenue, Waterbury. On January 21, 2011, the respondent's attorney and a witness appeared for the hearing. The complainant did not appear. Attorney Weeks did not proceed with the hearing.

PROPOSED DECISION

I. PROVISIONS OF LAW

Section 31-51 pp (c)(2) of the General Statutes provides that : "Any employee aggrieved by a violation of this subsection may file a complaint with the Labor Commissioner alleging violations of this subsection. Upon receipt of such complaint, the Commissioner shall hold a hearing."

Section 31-1-4 (a) of the Regulations of Connecticut State Agencies provides, in part, that "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default."

II. PARTIES' CONTENTIONS / ISSUE STATEMENT

The complainant contends that the respondent discharged her for exercising her rights under the Connecticut Family and Medical Leave Act, (CFMLA) in violation of General Statutes §§ 31-51kk, et.seq.

The respondent denies that it interfered with the complainant's CMFLA rights and denies that it discharged the complainant in retaliation because she took CFMLA leave.

III. DISCUSSION

The parties were duly noticed of a hearing which was scheduled for 9:30 a.m. on January 21, 2011, at the Waterbury office of the Appeals Division, by a hearing notice mailed by United States Postal Service certified mail on December 22, 2010, to the individual parties and the respondent's representative. The hearing notice contained an order directing the parties to provide the hearing officer a list of witnesses and copies of any documents the parties intended to introduce as exhibits at the hearing, no later than January 13, 2011. The hearing notice and order mailed to the complainant was not returned by the U.S. Postal Service as undeliverable. The hearing officer

received a certified mail return receipt signed by the complainant on December 29, 2010.

Before scheduling the hearing, the hearing officer mailed the parties a letter containing proposed dates for the hearing. The complainant called the Waterbury office of the appeals division indicating that she wanted the hearing to be scheduled on January 21, 2011. The hearing officer scheduled the hearing for the date selected by the complainant and agreed upon by the respondent.

The complainant did not comply with the order contained in the hearing notice. The hearing officer did not receive a list of witnesses or any proposed exhibits from the complainant. The respondent submitted a witness list and two hundred and ten pages in response to the pre-hearing order. The claimant did not appear at the scheduled hearing or contact the hearing officer in advance of the hearing to request a postponement. The respondent appeared at the hearing represented by an attorney and the respondent's store manager.

The hearing was scheduled to commence at 9:30 a.m. At approximately 10:10 a.m., the hearing officer, with the respondent present, attempted to contact the complainant by calling the number she provided to the hearing officer; she received no answer. The hearing officer subsequently called the telephone number on the complaint, 860-243-5860, and left a message for the complainant to call the hearing officer within ten minutes or she would release the respondent's participants and issue a proposed decision dismissing the complaint. A telephone recording system digitally recorded the hearing officer's attempts to contact the complainant.

IV. CONCLUSION

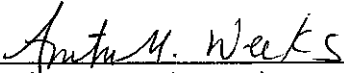
Section 31-1-4 (a) of the Regulations of Connecticut State Agencies provides, in part, that "Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default."

The complainant for this complaint chose the hearing date and received the notice of hearing and hearing order. Nevertheless, the complainant failed to attend the scheduled hearing. She did not contact the designated hearing officer to request a postponement or indicate that she would not be attending the hearing. She failed to comply with the hearing officer's pre hearing order directing her to provide a list of proposed witnesses and a copy of any proposed exhibits.

Since the complainant failed to participate in the scheduled hearing to pursue her appeal, the complainant has failed to meet her burden of proving that the respondent violated her rights under the CFMLA. Following a review of the record, the hearing officer concludes that the determination issued by the Wage and Workplace Standards Division is supported by the evidence presented and is consistent with the applicable provisions of the Connecticut Family and Medical Leave Act.

The designated representative of the Labor Commissioner and the authorized hearing officer in this matter finds the complainant has failed to prosecute the matter by failing to appear at the January 21, 2011 hearing on her complaint. It is recommended that the decision by the Wage and Workplace Standards Division determination remain in effect and the complainant's appeal be **dismissed**, without prejudice, such that the complainant may file a motion to reopen the decision of dismissal within two weeks of the date it is adopted by the Commissioner, if the complainant can provide

proof that she was prevented from appearing at the hearing or from requesting a continuance due to mistake, accident or other reasonable cause.



Anita M. Weeks, Designated Hearing Officer

AMW:

The parties are advised of their right to file an exception and present a brief and/or oral argument to the Commissioner before a final decision is issued. The deadline for filing an exception is March 29, 2011.

Mail any exceptions and briefs to: Commissioner of Labor, 200 Folly Brook Boulevard, Wethersfield, Connecticut, 06109. Refer to the docket number in any correspondence submitted.