

CalHR Case Number 15-H-0134
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: May 19, 2016
By: Richard Gillihan, Director

PROPOSED DECISION

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 9:00 a.m. on March 22, 2016 in Fresno, California.

The appellant was present and represented by Eric R. Johnson, Staff Attorney, Service Employees International Union Local 1000. Shirley Ogata, Attorney, represented the Department of Veterans Affairs (CalVet), respondent.

I – INTRODUCTION

On October 9, 2015, CalVet, respondent, notified appellant she was being automatically resigned for being absent without leave (AWOL) from October 2, 2015 through October 9, 2015. Appellant filed a request for reinstatement appeal with CalHR on October 21, 2015.

California Government Code section 19996.2 authorizes CalHR, after timely appeal, to reinstate an employee after automatic resignation if she makes a satisfactory explanation as to the cause of her absence and her failure to obtain leave and CalHR finds she is ready, able, and willing to resume the discharge of the duties of her position. The appeal complies with the procedural requirements of Government Code section 19996.2. CalHR has jurisdiction over the appeal.

II - ISSUES

The appellant contends the AWOL statute was improperly invoked because she had a satisfactory explanation for not reporting to work and is entitled to back pay.

Respondent argues the appellant did not have a satisfactory explanation for her absence, failed to obtain leave and the AWOL separation should be sustained.

The issues to be determined are:

1. Did the appellant have a satisfactory explanation for her absence for the period October 2, 2015 through October 9, 2015?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period October 2, 2015 through October 9, 2015?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Food Service Technician II?
4. Is the appellant entitled to back pay?

III - FINDINGS OF FACT

The evidence established the following facts by a preponderance of the evidence.

The appellant began working for CalVet, respondent, on December 2, 2013 as a Cook Specialist I. Her supervisor was a Supervising Cook I. On April 11, 2014, the appellant was promoted to the position of Cook Specialist II. On September 1, 2015, she voluntarily demoted to the position of Food Service Technician II. Her supervisor approved the appellant's voluntary demotion to a Food Service Technician II because the appellant expressed the desire for a less strenuous job.

A Food Service Technician II in a state institution works with employees and helpers from the resident population engaged in serving meals, cleaning and maintaining work areas. The appellant explained she did not want to work in "the back of the house," also known as the kitchen, and wanted to be with the veterans "in front of the house." After her

demotion, she worked “in front of the house,” the resident’s dining hall. She set up the continental breakfast, assisted with breakfast service and functioned much like a waitress. She also kept the dining hall clean, dusted and washed the entry doors during her work hours of 6:00 a.m. to 2:00 p.m.

On September 24, 2015, the appellant suffered a workplace injury to her left middle finger when a swinging door hit her left hand. It was painful, became swollen, but was not broken. Her supervisor sent her to the doctor to have her finger examined.

Respondent’s Associate Personnel Analyst is the Return-to-Work Coordinator (RTWC). She processes Workers’ Compensation, Family Medical Leave Act claims and light duty assignments. On September 24, 2015, the appellant provided the RTWC with a doctor’s note indicating she could return to work with certain restrictions. It stated in relevant part:

“DIAGNOSIS: LEFT FINGER CONTUSION, INIT

Modified Activity (Applies to work and home)

This patient is placed on modified activity at work and at home from 9/24/2015 through 10/8/2015.

If modified activity is not accommodated by the employer then this patient is considered temporarily and totally disabled from their regular work for the designated time and a separate off work order is not required.

Other needs and/or restrictions:

Avoid repetitive and forceful gripping/grasping/pinching activities, no lifting, pulling or pushing > 2 lbs on left hand.” [Emphasis in original.]

The following day, September 25, 2015, the appellant called her supervisor to tell him she would not be reporting to work. He never heard from the appellant again.

The Chief of Human Resources (Chief) oversees personnel, training, reasonable accommodation, return-to-work and Workers’ Compensation. She received a faxed copy of appellant’s September 24, 2015 doctor’s note and notified Food Service of the light duty request the following day. Food Service indicated there were no light duty

assignments for the appellant. The Chief also checked with Nursing, Laundry and Housekeeping to determine if the appellant's light duty work restrictions could be accommodated.

Housekeeping advised the Chief the appellant's light duty work restrictions could be accommodated. The RTWC contacted the appellant and told her to report to work on October 1, 2015 because a light duty position had been located in Housekeeping. On October 1, 2015, the Chief was present when the RTWC told the appellant she could not return to Food Service with her light duty work restrictions, but could work in Housekeeping. At the October 1, 2015 meeting, respondent provided the appellant with a Temporary Limited Duty (TLD) Assignment Agreement.

The appellant agreed to work in Housekeeping and signed the TLD Assignment Agreement which stated in relevant part:

“You must maintain contact with your supervisor during your TLD assignment and provide updated disability slips regarding your return to work status. If you are unable to report to report as directed, you must contact your supervisor. You may be considered absent without leave and/or be subject to adverse action if you do not report as directed.”

By her signature, the appellant acknowledged she understood the TLD Assignment Agreement and that she was to “clear in advance with the Return to Work Coordinator” any changes in her TLD assignment. She was told she would not be required to do anything in Housekeeping “that would be a problem with her modified duty limitation.” At the meeting, the RTWC reminded the appellant it was her responsibility to follow her medical restrictions while assigned to Housekeeping.

The appellant's new work hours in Housekeeping were 8:00 a.m. to 4:30 p.m., Monday through Friday. Her new supervisors in the Housekeeping department were Supervisor I and Supervisor II. Supervisor II is an Environmental Services Supervisor III and the appellant reported to him for her light duty assignment on October 1, 2015. Supervisor II

gave the appellant a spray bottle and rags to clean the windows around the hallway. She cleaned the windows as instructed and thanked him for accommodating her and did not complain about her housekeeping duties.

On the afternoon of October 1, 2015, the appellant told the RTWC something to the effect, "I don't want to do this job, I want to be back in Dietary, I banged my finger – and I don't like dusting." The RTWC told the appellant without a new doctor's note indicating a change in her medical condition, the TLD Assignment Agreement could not be altered. On October 2, 2015, the appellant did not perform any duties for respondent. She told her new supervisor, Supervisor II, she was going to talk to the Director of Dietetics and would be right back. She never returned.

On October 2, 2015, the Chief overheard the appellant tell the RTWC something to the effect, "I just don't want to come to work." The Chief intervened and explained if an employee chose not to report to work and has no doctor's note excusing them from work, they would be considered absent without leave (AWOL). The appellant told the RTWC she had a new appointment with her doctor at 11:00 a.m. She never saw her doctor that day, but spoke with a nurse who gave her a highlighted copy of the original September 24, 2015 doctor's note.

Later on October 2, 2015, the appellant gave the RTWC the original September 24, 2015 doctor's note highlighted by the nurse. The RTWC explained respondent already had the September 24, 2015 doctor's note and told the appellant she would need an off-work order if she was not going to report to work. The appellant told the RTWC the Housekeeping assignment did not meet the directions on her doctor's note and was "too much for her and was causing further injury." She told her she was going home and left respondent's facility without notifying either Supervisor I or Supervisor II.

The appellant did not request leave or report to work on October 2, 5, 6, 7, 8 or 9, 2015. She did not call Supervisor II or any other supervisor to report her absence or submit a leave request. On October 5, 2015, the appellant received another doctor's note taking her off work with the same restrictions as her earlier doctor's note through October 14, 2015. She did not give the doctor's note to the respondent. On October 9, 2015, the respondent invoked the AWOL statute. No doctors testified.

IV – CREDIBILITY DETERMINATION

The ALJ makes the following credibility determination. Except as otherwise provided by statute, the court or jury may consider, in determining the credibility of a witness, any matter that has any tendency in reason to prove or disprove the truthfulness of [her] testimony at the hearing, including, but not limited to . . . (e) [Her] character for honesty or veracity or their opposites . . . (f) The existence or nonexistence of a bias, interest, or other motive . . . (h) A statement made by [her] that is inconsistent with any part of [her] testimony at hearing. (Evid. Code, § 780.)

The appellant's testimony that on October 2, 2015 the RTWC said something to the effect, "[o]kay I'll let everyone know," when she told her she was going home, is not a true statement of fact. The RTWC credibly testified she never told the appellant to go home or that she would notify her supervisor she was going home. However, the appellant's most troubling fabrication is her testimony she was told on October 1, 2015 to vacuum Buildings 1 and 5, had to "drag her cord along," move chairs with her left hand and vacuumed for 7 hours. She testified, "[vacuuming] was a lot more than I bargained for and made my right hand swell." Supervisor II, with no motive to fabricate, credibly testified the appellant never vacuumed during her TLD assignment in Housekeeping. Moreover, when the appellant complained to the RTWC, she said, "I don't want to do this job . . . I don't like dusting," which is further evidence she did not vacuum.

Despite signing the TLD Assignment Agreement, the appellant unbelievably testified she did not know what type of duties she would be required to do in Housekeeping. Additionally, she testified she understood the respondent's call-in procedure; yet later

testified she did not understand she needed to call either of her supervisors during the AWOL period of October 2, 2015 through October 9, 2015.

Lastly, the appellant's testimony she told both Supervisor I and Supervisor II, her Housekeeping supervisors, that vacuuming "was a little much for me," is not believable, nor is her testimony she returned to Housekeeping on October 2, 2015 and dusted as instructed. Supervisor II credibly testified the appellant was asked to dust on October 1, 2015, never complained to him of the duties assigned and did not do any work for respondent on October 2, 2015. The appellant's numerous fabrications are neither credible or believable.

V – ANALYSIS

Generally referred to as the AWOL statute, Government Code section 19996.2, subdivision (a) states: "[a]bsence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked." Section 19996.2, subdivision (a) also provides, "[r]einstatement may be granted only if the employee makes a satisfactory explanation to CalHR as to the cause of [her] absence and [her] failure to obtain leave therefor, and the department finds that [she] is ready, able, and willing to resume the discharge of the duties of [her] position."

Additionally, in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the court concluded the employee's unapproved absence is deemed an abandonment of employment. The state employer need not attempt to locate an AWOL employee and prove the employee intended to abandon her position. Moreover, the appellant has the burden of proof in these matters and must prove by a preponderance of the evidence she had a satisfactory explanation for her absence from work and failure to obtain leave and she is currently ready, able, and willing to return to work. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

Notwithstanding appellant's definition of modified and alternative, [footnote 1: The ALJ took official notice of a Department of Industrial Relations glossary which defines modified and alternative work. End of footnote] she admitted she dusted as a Food Service Technician II and also dusted in her light duty assignment in Housekeeping. Therefore, whether characterized as modified or alternative, the duties she performed were similar, if not identical.

The appellant did not have a satisfactory explanation for her absence.

An illness of an employee or employee family member is held by CalHR to be a satisfactory explanation for an absence from work. However in the instant case, the appellant did not have a doctor's note which indicated she was too ill to work. Instead, she had a doctor's note which merely said, "[t]he patient is placed on modified activity at work and at home from 9/24/2015 to 10/8/2015 . . . Avoid repetitive and forceful gripping/grasping/pinching activities, no lifting, pulling or pushing > 2 lbs on left hand." The appellant is right-handed.

The appellant's argument her doctor's note stating: "*If **modified activity** is not accommodated by the employer then this patient is considered temporarily and totally disabled from their regular work for the designated time and a separate off work order is not required,*" [Emphasis in original] is sufficient to remove her from the workplace is not persuasive. The respondent offered, and the appellant accepted, modified activity in the form of a light duty assignment in Housekeeping. She signed a Temporary Limited Duty or TLD Assignment Agreement which clearly stated she was to "[a]void repetitive and forceful gripping/grasping/pinching activities, no lifting, pulling or pushing over 2 pounds."

Appellant's argument, the respondent's failure to provide 'modified activity' is sufficient to give her a satisfactory explanation for her absence, is based on the false premise that 'modified' work is different from 'alternative' work. Workers' Compensation, which has exclusive jurisdiction over employee workplace injuries, uses the words 'modified' and 'alternative' interchangeably. (Cal. Code Regs., tit. 8, § 10133.53.) It is only when

referring to an injured employee's pay that a distinction between modified and alternative work is required. The appellant's pay was not affected by her TLD assignment.

Moreover, the State of California form, "Notice of Offer of Modified or Alternative Work for Injuries," use of the conjunctive makes no distinction between modified and alternative. (Cal. Code Regs., tit. 8, § 10133.53 [Form DWC-AD 10133.53].) The words modified and alternative are only relevant when an employer is responsible for supplemental job displacement benefits if employees are not offered either modified or alternative work. (2 Witkin, Summary of Cal. Law (2015 supp.) Workers' Compensation, §§ 278, 283, pp. 380, 384, respectively.)

The appellant's explanation the work she was assigned was not "modified work" because, "it was a lot more than I was used to doing already – you know it was physically harder than the food service serving wise, so obviously it wasn't modified," is without merit. The appellant was offered modified/alternative work, did not have an off-work order removing her from the workplace, and she did not have a satisfactory explanation for her absence.

The appellant did not have a satisfactory explanation for not obtaining leave.

The State of California "has an interest in promptly removing from the state payroll those employees who have been absent without leave for five consecutive working days in order to make jobs available and to maximize its productive workforce." (*Coleman, supra*, 52 Cal.3d at p. 1122.) It is not disputed the appellant did not report to work from October 2, 2015 through October 9, 2015.

The appellant's argument she "stayed in contact with her back to work coordinator," is not a true statement of fact. Moreover, she acknowledged that the RTWC was not her supervisor and therefore could not approve her leave. The appellant, well aware of the call-in procedure, failed to request leave, left her light duty assignment without permission and never returned to work.

An employer has a right to expect an employee to report for work unless the employee has been excused for illness or injury or for other non-medical reasons. Respondent did not excuse the appellant from reporting to work for any reason. As opined in *Bettie Davis v. Department of Veterans Affairs* (1986) 792 F.2d 1111, 1113: It is axiomatic, “an essential element of employment is to be on the job when one is expected to be there.” The appellant, for reasons of her own, chose not to report to work when she was expected to be on a light duty in Housekeeping pursuant to the TLD Assignment Agreement. Therefore, she did not have a satisfactory explanation for not obtaining leave.

The appellant’s readiness, ability, and willingness are no longer at issue.

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that she is asserting. (Evid. Code, § 500.) The appellant has failed to meet her burden of proof on two of the three elements on her request for reinstatement appeal. Because each is essential to her appeal, no purpose would be served in determining her readiness, ability, and willingness to discharge the duties of a Food Service Technician II.

The appellant is not entitled to back pay.

“In any hearing of an automatic resignation (AWOL) pursuant to Government Code section 19996.2, the hearing officer shall have the decision to award back pay.” (Bargaining Unit 15 Memorandum of Understanding, § 6.13 [operative July 2, 2013 – July 1, 2016].) Because the appellant has failed to prove essential elements of her claim for reinstatement, she is not entitled to back pay.

VI – CONCLUSIONS OF LAW

Appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for her absence. Appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for not obtaining leave. The appellant's readiness, ability, and willingness are no longer at issue. The appellant is not entitled to back pay.

* * * * *

THEREFORE, IT IS DETERMINED, the appellant's appeal for reinstatement after automatic resignation from the position of Food Service Technician II with the Department of Veterans Affairs effective October 1, 2015 is denied.