CalHR Case Number 15-S-0136
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: April 13, 2016
By: Richard Gillihan

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 3, 2016 in Sacramento, California.

The appellant, was present and self-represented. Courtney S. Lui, Deputy Attorney General, Department of Justice, represented the California Public Utilities Commission (CPUC), respondent.

I – JURISDICTION

On October 20, 2015, CPUC, respondent, notified appellant he was being automatically resigned for being absent without leave (AWOL) from September 16, 2015 through October 19, 2015. Appellant filed a request for reinstatement appeal with CalHR on November 5, 2015.

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

II – ISSUES

The issues to be determined are:

1. Did the appellant have a satisfactory explanation for his absence from September 16, 2015 through October 19, 2015?
2. Did the appellant have a satisfactory explanation for not obtaining leave from September 16, 2015 through October 19, 2015?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Legal Secretary?

III – FINDINGS OF FACT

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

The appellant began his career with respondent, CPUC, on March 14, 2012. In 2013, he transferred to another State of California agency and returned to respondent on May 7, 2014 in his most recent position as a Legal Secretary. The appellant was part of a typing pool and worked a Monday through Friday 8:30 a.m. to 5:00 p.m. shift. In January 2015, his supervisor was [name redacted].

On January 29, 2015, the appellant testified he became catatonic and for an hour or so just sat at his desk staring and staring. The following day he filed for disability. By April 2015, his 12 weeks of Family Medical Leave Act (FMLA) leave were exhausted. On June 30, 2015, the appellant asked his Personnel Specialist for a one-year unpaid leave of absence (LOA) "to recover." On July 1, 2015, she advised him any LOA request must be approved by his supervisor, the Human Resources Director and must be accompanied with substantiation supporting his need for a LOA.

On July 20, 2015, the appellant sent his supervisor an email detailing his need for a medical LOA, but provided no medical substantiation. He sent a copy of his email to his union representative and to his Personnel Specialist. The appellant acknowledged that

during his extended time away from work, a new supervisor succeeded his original supervisor. He did not send his new supervisor or the Human Resources Director his medical LOA request.

On September 14, 2015, the appellant sent an email to his new supervisor. The email stated his doctor had extended his disability through November 15, 2015. He did not request leave, ask for an update on his medical LOA request, and never contacted his new supervisor again. On September 22, 2015, one of respondent's Human Resources employees, sent the appellant a letter regarding reasonable accommodation. On September 23, 2015, this employee sent a copy of her September 22, 2015 letter to the appellant by email.

Her September 22, 2015 letter requested information regarding the appellant's current work restrictions and what reasonable accommodation he might need to perform the essential functions of his job. The letter included copies of respondent's policies, procedures and forms required to request a reasonable accommodation. The appellant denied receiving this letter outlining the policies, procedures and the reasonable accommodation forms.

On September 24, 2015, the appellant sent the following email to this employee:

"Dear [name redacted],
I still need to look over all that you sent in regards to information covering reasonable accommodation request, etc., but to clarify, I did provide the agency clarification as to my current leave status; basically, that I have been extended on disability by my physician through November 15th.
Please find such substantiation in the attached. [footnote 1: The attachments were: a copy of his EDD claim effective January 30, 2015 and a note from his doctor indicating continuance of his disability benefits to November 15, 2015. Footnote ends].

> Also, I turned in an FMLA packet that my physician had filled out sometime ago; in it, please find all information regarding accommodations as to my work, etc.
> Please let me know if you have any other questions.
> Thanks,
> [name redacted]."

The employee immediately responded to the appellant's email and told him to contact her no later than September 30, 2015 if he needed assistance with completing the forms or had questions regarding any reasonable accommodation. Her emails went unanswered.

On October 1, 2015, she sent another letter to the appellant's home address which stated in relevant part:

> "It is important that you understand that a note from a doctor does not have the effect of placing an employee on approved leave. A medical note such as the one you submitted, functions as a **request** for leave. An employee is not on approved leave until such time as the Division **approves** the request, which your Division has not done . . . Please provide the requested information quickly, so that your Division can evaluate your request for further leave as well as other possible accommodations." [Emphasis in original.]

She also sent a copy of her October 1, 2015 letter attached to an email the same day. The appellant claimed he did not receive the October 1, 2015 letter or email attachment telling him his leave was not approved.

On October 12, 2015, respondent's Chief ALJ sent a letter to the appellant. The letter told the appellant he had failed to provide the necessary information regarding his medical condition and had been absent without leave since September 16, 2015. She stated:

> "You are being ordered to either:
>
> 1. Return to work, or
> 2. Provide the requested information (to the person in the HR Office) and engage in good faith in the interactive process to exploring reasonable accommodations.
>
> Failure to do either of the above by 5:00 p.m. on **Thursday, October 15, 2015,** will result in the California Public Utilities Commission invoking the AWOL statute (Government Code 19996.2) because you have been absent without authorized leave for five (5) or more consecutive working days." [Emphasis in original.]

The appellant claimed he did not receive the Chief ALJ's October 12, 2015 letter ordering him to return to work.

On October 20, 2015, respondent issued its AWOL separation notice to the appellant because he had been absent for more than five consecutive working days. The AWOL separation notice was signed by the Chief ALJ. On October 31, 2015, the appellant sent the following email to her:

> "I got your letter, and here's my response:
>
> I am unmoved, and unbroken by it… this has not weakened me, it has empowered me; and I will be stronger and better because of it--in fact, in a lot of ways, I already am.
>
> I've lived my whole life fighting against overwhelming odds, and have successfully turned every negative situation into incalculable opportunity, as I will in this situation….
>
> I don't want, nor need, a response from you.
>
> [initial redacted]."

The appellant testified he is conditionally ready, able, and willing to return to work. "Notwithstanding . . . uhm possible . . . uhm accommodations – reasonable accommodations, and those have yet to be determined – but things like, like a quiet work

environment and stuff like that notwithstanding accommodations, reasonable ones, yes." Except for a quiet work environment, he does not know what reasonable accommodations are needed, but, "they will be determined . . . as I work – issues will arise." When asked if his working environment was quiet, he emphatically testified, "no it's not – it's incredibly loud." 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 his testimony at the hearing, including, but not limited to . . . (e) His character for honesty or veracity or their opposites . . . (f) The existence or nonexistence of a bias, interest, or other motive.

The appellant's selective memory is suspect. He recalled receiving an email from the HR employee on September 23, 2015 but denied receipt of her September 22, 2015 letter with several reasonable accommodation documents attached. His denial is belied by the fact he emailed her the next day stating, "Dear [name redacted], I still need to look over all that you sent in regards to information covering reasonable accommodation request . . . ." His acknowledgement "all that you sent in regards to reasonable accommodation," is diametric to his denial under oath he did not receive the reasonable accommodation documents.

Additionally, his testimony he did not receive the HR employee's October 1, 2015 letter is not believable. He testified he received her October 1, 2015 email but denied receipt of the October 1, 2015 letter attached to the email. This October 1, 2015 letter was also sent to his home address, which he denied receiving, stating, "I don't recognize it." The HR employee's October 1, 2015 letter specifically told him, "[a]n employee is not on approved leave until such time as the Division **approves** the request, which your Division has not done . . . [p]lease provide the requested information quickly, so that your Division can evaluate your request for further leave as well as other possible accommodations."

[Emphasis in original.] The appellant is under the mistaken belief his story is more credible if he denies receipt of respondent's letters.

Moreover, his failure to recall receiving the Chief ALJ's October 12, 2015 letter ordering him to return to work or provide the requested medical substantiation is also not believable because his own conduct contradicts his testimony. Specifically, he sent a very detailed message to Clopton on October 31, 2015 acknowledging her correspondence. Here again, the appellant is under the erroneous belief his testimony,"I believed my doctor's note would extend my leave," would sound more credible if he denied receipt of respondent's instructions to return to work. The appellant's lack of veracity is troubling.

V – ANALYSIS

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 . . . [r]einstatement may be granted only if the employee makes a satisfactory explanation to the department [CalHR] as to the cause of [his] absence and [his] failure to obtain leave therefor, and the department finds that [he] is ready, able, and willing to resume the discharge of the duties of [his] position."

Additionally, in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the court held that an employee terminated under the automatic resignation provision of section 19996.2 has a right to a hearing to examine whether he had a satisfactory explanation for being absent, whether he had a satisfactory explanation for not obtaining leave and whether he is ready, able, and willing to return to work. The *Coleman*, *supra*, court concluded the employee's unapproved absence is deemed an abandonment of employment or a constructive resignation.

Lastly, appellant has the burden of proof in these matters and must prove by a preponderance of the evidence he had a satisfactory explanation for his absence and

failure to obtain leave and that he is currently ready, able, and willing to return to work. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.) The party who bears the burden of proof has the general burden of coming forward with a prima facie case. (*Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries* (1994) 512 U.S. 267.)

The appellant had a satisfactory explanation for his absence.

The illness of an employee has long been held by CalHR as a satisfactory reason for an absence from work. On September 22, 2015, the appellant's doctor extended his disability leave until November 15, 2015. Therefore, the appellant had a satisfactory explanation for his absence from September 16, 2015 through October 19, 2015.

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

The respondent did not excuse the appellant for his absence from September 16, 2015 through October 19, 2015. Respondent's HR employee unequivocally explained to the appellant, "[a]n employee is not on approved leave until such time as the Division approves the request." The appellant did nothing to request leave or contact his supervisor and failed to complete a request for a medical leave of absence.

Instead, he ignored respondent's instructions and referred to irrelevant FMLA documents sent months earlier and disability documents from the Employment Development Department (EDD). FMLA, which he exhausted in April 2015, was no longer at issue and disability documents from EDD were insufficient to approve or justify his need for a medical leave of absence. 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. As opined in *Bettie Davis v. Department of Veterans Affairs* (1986) 792 F.2d

1111, “an essential element of employment is to be on the job when one is expected to be there.”

It is clear, that despite his denials to the contrary, the appellant received the respondent’s correspondence explaining the process to obtain leave and the order to return to work. “The state 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 1102 at p. 1122.) The appellant’s failure to follow the instructions of respondent in order to obtain leave is fatal to his claim he had a satisfactory explanation for not obtaining leave.

The appellant is not ready, able, and willing to return to work.

The appellant conditions his return on “possible reasonable accommodations,” however, he never requested a reasonable accommodation. “There is an obvious distinction between an employee who has become medically unable to perform his usual duties and one who has become unwilling to do so.” (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292.) The appellant’s emphatic declaration his work environment is “incredibly loud” together with his testimony he needs a quiet work environment is evidence he is not ready, able, and willing to return to work, and is unwilling to perform the duties of a Legal Secretary for respondent.

VI – CONCLUSIONS OF LAW

The appellant proved by a preponderance of the evidence he had a satisfactory explanation for his absence. The appellant failed to prove by a preponderance of the evidence he had a satisfactory explanation for not obtaining leave. The appellant is not ready, able, and willing to return to work.

* * * * *

THEREFORE, IT IS DETERMINED, the appellant's appeal for reinstatement after automatic resignation from the position of Legal Secretary with the California Public Utilities Commission effective September 15, 2015 is denied.