

## **PROPOSED DECISION**

This matter was heard before Karla Broussard-Boyd, Administrative Law Judge II (ALJ), Department of Human Resources (CalHR) at 1:00 p.m. on September 28, 2016 in Sacramento, California.

Appellant was present and represented by Bobby P. Luna, Attorney at Law, Law Offices of Bobby P. Luna. Sharon Brady Silva, Senior Tax Counsel, Board of Equalization (BOE), represented BOE, respondent.

### **I**

## **JURISDICTION**

On July 29, 2016, BOE, respondent, notified appellant, she was being automatically resigned for being absent without leave (AWOL) from July 20, 2016 through July 26, 2016.<sup>1</sup> Appellant filed a request for reinstatement appeal with CalHR on August 5, 2016.

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 should not have been invoked and she is entitled to back pay.

Respondent argued the appellant was absent for five consecutive working days and the AWOL separation should be sustained.

The issues to be determined are:

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<sup>1</sup>This amended AWOL notice corrected the last date the appellant was on approved leave from June 22, 2016 to June 27, 2016.

1. Did the appellant have a satisfactory explanation for her absence for the period July 20, 2016 through July 26, 2016?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period July 20, 2016 through July 26, 2016?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Business Taxes Representative?
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 her career with the State of California on December 6, 1999. Her most recent appointment on January 17, 2011, was to respondent's Business Taxes Representative classification. She worked a Monday through Friday, 7:00 a.m. to 3:30 p.m. shift, and her supervisor was a Business Taxes Administrator I, Special Taxes Program and Compliance Division. In May 2015, the appellant availed herself of Family Medical Leave Act (FMLA) leave and was familiar with the process.

In November 2015, appellant's supervisor provided his staff, including the appellant, Staff Expectations of Special Taxes and Fees Division employees. It stated in relevant part:

"If you are ill and unable to report to work, please call your supervisor within half an hour of your start time. Employees should call their supervisor and either speak directly with him/her or leave a message on the supervisor's voice mail. If a message is left on the voice mail, the employee must also contact another STFD supervisor *within their branch* to advise them of their absence. Leaving a message with a co-worker is not permitted. At the discretion of a supervisor, employees may be allowed to advise the supervisor of an absence due to illness via e-mail. This procedure must be approved in advance by the supervisor."  
[Emphasis in original.]

On December 16, 2015, he advised his staff they could call in within one hour of their regular start time to talk to a supervisor and to take home all supervisors' phone numbers for this purpose.

The appellant's last day at work was June 27, 2016. Her left arm became numb and she was unable to work. She was treated in the Emergency Room for pain to her arm and shoulder. She provided her supervisor with off-work orders releasing her from work through July 19, 2016. On July 19, 2016, the appellant had a lengthy conversation with her co-worker; it was not clear from the evidence the exact nature of the conversation. On July 19, 2016, the appellant also learned her uncle had passed away.

The appellant admits she was taking various drugs for her pain, and believed the Hydrocodone combined with Valium and Gabapentin caused her to be "out of body, dizzy, tired, and nauseous." She did not return to work on July 20, 2016 as scheduled or call her supervisor. The appellant did not report to work on July 21, 22, 25, or 26, 2016, or call her supervisor. On the morning of July 26, 2016, her supervisor sent her the following text message:

"Good morning . . . This is (Supervisor). Please give me a call as soon as you can. I haven't heard from you for a long time, and it's been five days past the end date of your last doctors [sic] note. At present you are considered AWOL. We need to address this issue now before it becomes more serious."

Her supervisor also left her a voicemail message which indicated he had not heard from her in "quite a while" and that her last doctor's note expired on July 19, 2016. He told her to provide a new doctor's note. At 2:07 p.m., on July 26, 2016, the appellant called and left her supervisor a voicemail message which promised a doctor's note. She did not contact another supervisor as required in the Staff Expectations memo, nor did she provide a doctor's note.

On July 26, 2016, the respondent invoked the AWOL statute for the appellant's absence without leave from July 20, 2016 through July 26, 2016. On July 28, 2016, she called her supervisor who told her to contact the *Coleman* Officer. On July 29, 2016, the respondent issued a new AWOL notice which amended the appellant's last day of approved leave from June 22, 2016 to June 27, 2016.

The appellant explained she brought the July 28, 2016 doctor's note to respondent's headquarters on July 29, 2016 and gave it to "somebody else." She did not identify the "somebody else." On August 1, 2016, her supervisor found a doctor's note, signed by a Mercy Medical Group physician, from the appellant on his desk. The doctor's note was dated July 28, 2016 and excused her from work from July 1, 2016 through August 9, 2016. No doctors testified.

#### IV 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." It is not disputed the appellant was absent for more than five consecutive days as she was not at work from July 20, 2016 through July 26, 2016.

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 or, if not, that [she] has obtained the consent of [her] appointing power to a leave of absence to commence upon reinstatement." The appellant has the burden of proof in these matters and must prove by a preponderance of the evidence each element of her claim. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

#### The appellant had a satisfactory explanation for her absence.

CalHR has long held that an illness of an employee or employee family member is a satisfactory explanation for an absence from work. Although the appellant did not provide a doctor's note excusing her from work from July 20, 2016 through July 26, 2016, until after respondent had invoked the AWOL statute, the July 28, 2016 doctor's note provided her with a satisfactory explanation for her absence from work.

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

The appellant's supervisor advised his staff what was expected in order to obtain leave. Specifically, he advised the appellant, and she acknowledged, she was required to call him within an hour of her start time if she was not reporting to work. If she was unable to talk to him, she was required to "contact another STFD supervisor." She also understood her doctor's notes could not lapse or she risked being marked absent without leave. The appellant's doctor's note expired on July 19, 2016, and her supervisor expected her to return to work on July 20, 2016. She did not return to work on July 20, 2016, or at any other time.

In *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, the court concluded an employee's unapproved absence is deemed an abandonment of employment or a constructive resignation. The state employer need not attempt to locate AWOL employees and prove the employee intended to abandon her position. Even though not required to do so, her supervisor sent the appellant a text message on her fifth and final day of absence and also left her a voicemail message. Although she did return his call on the afternoon of July 26, 2016, she failed to follow respondent's procedure of "contact[ing] another STFD supervisor" and did not provide a doctor's note.

The appellant's argument she was unable to obtain a doctor's note until July 28, 2016 because her doctor was out of the office, is not persuasive. Mercy Medical Group, as the name implies, has more than one doctor. If her doctor was out of the office, it would be a simple matter to have another doctor review her file and provide the necessary medical excuse. Moreover, after she knew her doctor was out of the office, she still promised to provide a doctor's note on July 26, 2016. She did not.

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, 1113: "an essential element of employment is to be on the job when one is expected to be there." The appellant failed to follow her supervisor's instructions which required her to report her absence.

Furthermore, her argument she was "out of body, dizzy, tired and nauseous" is equally unpersuasive. Her physical and mental condition did not preclude her from

talking to her co-worker for nearly an hour on July 19, 2016. Thus, she was clearly capable of making the required phone call to report her absences. Yet for reasons unknown, she chose not to do so. Therefore, the appellant did not have a satisfactory explanation for not obtaining leave.

Appellant's readiness, ability, and willingness to return to work 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.) Because the appellant failed to meet her burden of proof on each element of her request for reinstatement appeal, no purpose would be served in determining her readiness, ability, and willingness to discharge the duties of a Business Taxes Representative.

The appellant is not entitled to back pay.

The appellant has failed to prove essential elements of her claim for reinstatement and she is not entitled to back pay.

## V

### CONCLUSIONS OF LAW

The appellant proved by a preponderance of the evidence she had a satisfactory explanation for her absence. The 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 to return to work are no longer at issue. She is not entitled to back pay.

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**THEREFORE, IT IS DETERMINED**, the appeal for reinstatement after automatic resignation from the position of Business Taxes Representative with the Board of Equalization is denied.