

CalHR Case Number 16-H-0065
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted November 10, 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 October 4, 2016 in Coalinga, California.

The appellant was present and represented by Kim Urie, Staff Attorney, Service Employees International Union Local 1000 (SEIU Local 1000). Heather Kalstrom, Employee Relations Officer, California Department of Corrections and Rehabilitation (CDCR), Pleasant Valley State Prison (PVSP), represented CDCR, PVSP, respondent.

I – JURISDICTION

On June 27, 2016, CDCR, PVSP, respondent, notified appellant she was being automatically resigned for being absent without leave (AWOL) for the period June 16, 2016 through June 27, 2016. Appellant filed a request for reinstatement appeal with CalHR on July 8, 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 argued she had a satisfactory explanation for not reporting to work, made attempts to secure leave and is ready to return to work.

Respondent contends the appellant was absent without leave for five consecutive working days 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 June 16, 2016 through June 27, 2016?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period June 16, 2016 through June 27, 2016?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Case Records Technician?

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 August 28, 2006. Her most recent appointment on May 3, 2010 was to the position of a Case Records Technician at respondent's Pleasant Valley State Prison. She worked a Monday through Friday shift from 8:00 a.m. to 4:00 p.m. Her duties included maintaining and controlling inmate records, typing and preparing documents for inmate transfers, disciplinary actions and contracts.

On August 12, 2013, the appellant injured her foot when she fell at work. She returned to work briefly on modified duty in September 2013 and continued treatment for right foot and ankle pain. October 4, 2013 was the appellant's last day at work. She understood she was required to call her supervisor at least 30 minutes before her shift, unless she had a doctor's note excusing her from work.

On August 21, 2015, the appellant was seen by a Qualified Medical Examiner (QME) for a Qualified Medical Examination (QME). In the QME report, the doctor indicated the appellant's work status: "[i]n my opinion, she may work regularly but with restrictions to preclude prolonged/strenuous ambulatory activities." On October 10, 2015, the appellant had an MRI (Magnetic Resonance Imaging) for pain across the top of her right foot. The MRI revealed: "[t]here is a contusion [bruise] at the base of the 4th metatarsal. There is moderate osteoarthritis at the 4th TMT joint. Mild plantar fasciitis."

On February 23, 2016, the respondent sent the appellant an AWOL notice, but later rescinded the AWOL separation and granted her a Leave of Absence (LOA) through April 6, 2016. The respondent warned it was her responsibility to engage in ongoing communication regarding her LOA. Specifically, "you are expected to communicate regarding any extension to your approved leave of absence, prior to your anticipated return to work date. Any lapse resulting from your failure to communicate or provide appropriate documentation, including medical verification, will be considered unauthorized leave and may result in your AWOL Separation [*sic*]."

The appellant explained she was absent during the AWOL period because "my doctor had not released me and I did not want to undermine his orders." On May 25, 2016, the QME performed a second QME which indicated her work status: "[i]n my opinion, she may work regularly, but with restrictions to preclude prolonged or strenuous ambulatory activities, repetitive kneeling, squatting, etc." The appellant then explained she needs modified duty because she can't stand for long periods of time, pushing and pulling the cart, and "putting pressure on my foot would be very difficult."

On June 8, 2016, the Warden sent the appellant a letter indicating no additional leave would be granted and she must return to work on June 16, 2016. His letter indicated she had no work restrictions to prevent her return to work and could be accommodated in her current job. The letter also advised the appellant, in accordance with her Bargaining Unit 4 Memorandum of Understanding section 8.2 (F), leave could be denied if the respondent ascertained the leave was not for an authorized reason. The appellant acknowledged

receipt of the Warden's letter on June 11, 2016. She did not report to work or contact respondent to request leave on June 16, 17, 20, 21, 22, and 2016.

Respondent's Return-to-Work Coordinator's (RTWC) primary duties are to assist employees returning to work after a long absence. She reviewed the essential functions of the classification of a Case Records Technician and found the appellant's limited mobility issues could be easily accommodated in the Case Records Technician classification. The appellant provided a doctor's note to the RTWC which stated: "chronic right foot pain." Upon receipt of the doctor's note, the appellant was told the Warden's letter of June 8, 2016 was still in effect and she was considered AWOL.

The respondent issued its Notice of AWOL separation on June 27, 2016. On July 11, 2016, the appellant was provided a *Coleman* hearing and advised the *Coleman* hearing officer she was not able to return to work. No doctors testified.

IV – ANALYSIS

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." It is not disputed the appellant was absent for more than five consecutive days as she was not at work for the period June 16, 2016 through June 27, 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 did not have 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. However, in the instant case, the appellant was assessed in two different Qualified Medical Examinations (QME) as “may work regularly, but with restrictions.” The restrictions were, “preclude prolonged/strenuous ambulatory activities” and avoid “repetitive kneeling, squatting, etc.” Because the appellant could work regularly, she did not have a satisfactory explanation for her absence.

The appellant’s mistaken belief her doctor’s notes had different conclusions does not assist in her meeting her burden of proof. Each of the QME reports, one dated August 21, 2015, the other May 25, 2016, indicated an identical work status for the appellant. Specifically, “she may work regularly, but with restrictions,” and was therefore capable of returning to work. Additionally, the respondent acknowledged the appellant’s work restrictions could be easily accommodated because nothing prevented the appellant from performing the essential functions of her job.

The appellant’s final doctor’s note provided to respondent stated: “chronic foot pain.” Although pain can be a disability under California’s Fair Employment and Housing Act, it must actually limit the employee’s ability to work. (*Leatherbury v. C&H Sugar Company, Inc., et al.* (N.D. Cal. 2012). However, neither QME report limited the appellant’s ability to work. Thus, the appellant did not have a satisfactory explanation for her absence.

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

The automatic resignation provision of [Government Code section 19996.2] . . . links “a civil service employee’s right to continued employment to the state’s legitimate expectation that employee appear for work as scheduled.” (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 at p. 1125.) The appellant was expected to report to work on June 16, 2016. She did not report to work and did not call respondent to report she would be absent on June 16, 17, 20, 21, and 22, 2016.

In *Coleman, supra*, 52 Cal.3d at p. 1111, the court concluded “an employee’s unapproved absence is deemed an abandonment of employment or a constructive resignation.” By failing to report to work when instructed, the appellant was manifesting her intent to abandon her position with respondent. The state employer need not attempt to locate AWOL employees and prove the employee intended to abandon her position, all that is required is the employer give notice of the effective date of the AWOL separation. “Once the state has provided notice and an opportunity to respond, neither the federal nor state Constitution require anything more.” (*Coleman, supra*, 52 Cal.3d at p. 1123.)

Furthermore, 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.” Because the appellant had been provided clearance to return to work, it was incumbent upon her to report to work as instructed. Her failure to return to work or request leave does not assist her in meeting her burden of proof she had a satisfactory explanation for not obtaining leave.

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

The appellant’s duties as a Case Records Technician are to maintain and control inmate records which includes typing and document preparation. The RTWC indicated the

appellant's limitations could be easily accommodated, yet the appellant appeared reluctant to testify she was ready, able, and willing to return to work as a Case Records Technician. Similarly, at her *Coleman* hearing, she stated she was unable to return to work even though she had been told by the QME she "may work regularly, but with restrictions."

The appellant's refusal to report to work, despite the determination as early as 2015, she "may work," is troubling. "There is an obvious distinction between an employee who has become medically unable to perform [her] usual duties and one who has become unwilling to do so." (*Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292.) The appellant's reluctance to return to work, and her inability to unequivocally state she is ready, able, and willing to return to work, is fatal to her claim she is ready, able, and willing to return to work.

V – CONCLUSIONS OF LAW

The appellant failed to prove 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 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 Case Records Technician with the California Department of Corrections and Rehabilitation, Pleasant Valley State Prison is denied.