

CalHR Case Number 16-K-0089
Request for Reinstatement after Automatic Resignation (AWOL)
Final Decision Adopted 8/29/2017
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 February 14, 2017 in Sacramento, California. Appellant was present and represented by Karen Maxson, Senior Union Representative, Service Employees International Union Local 1000 (SEIU Local 1000). Melinda Williams, Staff Counsel III, represented the Department of Water Resources (DWR), respondent.

I

JURISDICTION

On September 15, 2016, DWR, respondent, notified appellant, she was being automatically resigned for being absent without leave (AWOL) for the period September 9, 2016 through September 15, 2016. Appellant filed a request for reinstatement appeal with CalHR on September 29, 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

PROCEDURAL HISTORY

On October 10, 2016, CalHR issued a Notice of Time and Place of Hearing for December 13, 2016. On November 2, 2016, appellant's representative, Karen Maxson, Senior Union Representative, SEIU Local 1000, filed a Motion for Abeyance pending the determination of a Petition for Rehearing before the State Personnel Board (SPB). On November 3, 2016, the ALJ granted the motion. On December 8, 2016, appellant's

representative, SEIU Local 1000, filed a Motion to Calendar Hearing. The Statutory Appeals Unit scheduled this February 14, 2017 evidentiary hearing.

III ISSUES

The appellant argued the respondent improperly invoked the AWOL statute, Government Code section 19996.2, and the AWOL separation should be set aside.

Respondent argued the appellant did not have a satisfactory explanation for her absence or for not obtaining leave, is not ready, able, and willing to return to work 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 September 9, 2016 through September 15, 2016?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period September 9, 2016 through September 15, 2016?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of an Associate Governmental Program Analyst?
4. Was the AWOL statute improperly invoked?

IV 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 March 2, 2010. On October 3, 2011, she was appointed to the classification of Associate Governmental Program Analyst. She was assigned to respondent's Division of Integrated Regional Water Management, Financial Assistance Branch (FAB). Her supervisor was a Program Manager.

The appellant's last day at work was May 23, 2014. On July 3, 2014, she filed a Workers' Compensation claim for an injury suffered on May 27, 2014. The appellant was not at work on May 27, 2014. Shortly thereafter, she was evaluated by a mental health professional for her claimed workplace injuries. The appellant's Workers' Compensation

claim was later denied, but she continued treatment for her health issues and provided Work Status Reports to respondent.

On April 16, 2015, the appellant filed a Charge of Discrimination with the California Department of Fair Employment and Housing for respondent's denial of a modified duty request. On April 23, 2015, the appellant was seen by the Kaiser Mental Health Clinic and provided a Visit Verification. The Visit Verification indicated she was traumatized by her previous working environment at the Bonderson Building 213-A, and her three supervisors. It also indicated she should not have to return to the Bonderson Building or report to the named supervisors.

On May 28, 2015, the appellant filed her fourth Reasonable Accommodation Request with respondent. She requested a "cubicle or office with more than three 'sides/walls.' One side must have a window or be 'open.'" She also requested that respondent "consider its management, supervisory and communication methods." On June 18, 2015, the respondent denied her Reasonable Accommodation Request because her treating physician had failed to identify any essential functions which the appellant was unable to perform.

In early 2016, the appellant filed a Complaint of Denial of Reasonable Accommodation with the SPB. On July 1, 2016, a SPB Administrative Law Judge (ALJ), dismissed the appellant's Reasonable Accommodation Complaint because she failed to prove she was a qualified person with a disability. The ALJ cited the appellant's "inability to work under particular supervisors is not a disability within the meaning of the Fair Employment and Housing Act." (Gov. Code, § 12926.) The appellant's subsequent SPB Petition for Rehearing was also denied.

On August 11, 2016, the appellant sent an email to respondent with another Work Status Report. The Work Status Report, similar to previous reports, stated in relevant part:

"The patient is placed on modified activity at work and at home from 8/10/2016 through 9/8/2016.

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:

Restricted from working in customary worksite (901 P Street) due to the risk of environmental/interpersonal triggers flaring up/ [sic] exacerbating symptoms. In addition, she is restricted from all but incidental auditory/visual contact with (three supervisors). Communication is limited to written form only (e.g. email, memo). No meetings, telephone calls, conversations.” [Emphasis in original.]

On September 6, 2016, respondent sent a letter to the appellant entitled “Return To Work Notice.” It advised the appellant she was to return to work on September 9, 2016 at 9:00 a.m. and report to a new supervisor. The letter told her that failure to report to work would be considered an unexcused absence and five consecutive unexcused absences may be cause for separation from state service under the absence without leave statute.

The appellant did not report to work on September 9, 2016. She sent an email in response to the directive to report to work which stated in relevant part, “[I] will not be coming to work tomorrow unless you can provide another location for me to work.” She attached a Work Status Report identical to the August 11, 2016 Work Status Report. At 10:12 a.m. on September 9, 2016, the new supervisor told the appellant via email that no more leave extensions would be approved and referred her to the September 6, 2016 letter requiring her to report to work on September 9, 2016. The appellant did not report to work but acknowledged her supervisor’s response with, “Thanks, (new supervisor). Have a Blessed day. Sincerely, (appellant).”

The appellant did not report to work on September 12, 13, 14, or 15, 2016 and did not request leave of respondent. On September 15, 2016, respondent invoked the AWOL statute with an effective date of September 30, 2016. No doctors testified.

V

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 (5) consecutive working days as she was not at work for the period September 9, 2016 through September 15, 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 did not have an illness which provided a satisfactory explanation for not reporting to work. The appellant’s belief the respondent was required to accommodate her by providing a new workplace and supervisor is ill-conceived and beyond all reason.

Moreover, the SPB provided the appellant a full evidentiary hearing and adjudicated her accommodation claim. She did not prevail. The SPB ALJ unequivocally stated in his decision, the appellant’s “inability to work under particular supervisors is not a disability within the meaning of the Fair Employment and Housing Act.” The appellant’s misplaced belief she is entitled to reasonable accommodation does not provide her with a satisfactory explanation for her absence.

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

By her own admission, the appellant never requested leave of respondent. 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. (*Bettie Davis v. Department of Veterans Affairs* (1986) 792 F.2d 1111; 1113.) The appellant’s failure to request leave or report to work when instructed to do so is fatal to her claim she had a satisfactory explanation for not obtaining leave.

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

The appellant's prolonged and consistent admission she is unable to work in respondent's building or with certain supervisors, is clear evidence she is not ready, able, and willing to return to work. "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 District* (1998) 67 Cal.App.4th 1292.)

Additionally, the appellant did not have a disability under Government Code section 12926, which required accommodation because, "inability to work under particular supervisors" is not a disability within the meaning of the Fair Employment and Housing Act (FEHA). By conditioning her return to work, she demonstrated she is not ready, able, and willing to return to work. Similarly, her request for only incidental auditory or visual contact with her three supervisors is not a disability which requires reasonable accommodation as contemplated by FEHA. Therefore, the appellant failed to meet her burden of proof she is ready, able, and willing to return to work.

The AWOL statute was properly invoked.

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. All that is required is the AWOL notice give a date certain on which the AWOL statute will be invoked giving the employee adequate opportunity to request her *Coleman* hearing.

On September 15, 2016, the respondent properly issued its letter of intent to invoke the AWOL statute after the appellant failed to report to work for five (5) consecutive working days. The letter of intent indicated the AWOL statute would be invoked on September 30, 2016 providing the appellant with adequate opportunity to appeal her voluntary resignation as required by law. Thus, the AWOL statute was properly invoked.

VI
CONCLUSIONS OF LAW

The appellant failed to prove by a preponderance of the evidence she had a satisfactory explanation for her absence or for not obtaining leave. The appellant is not ready, able, and willing to return to work. The AWOL statute was properly invoked.

* * * * *

THEREFORE, IT IS DETERMINED, the appeal for reinstatement after automatic resignation from the position of Associate Governmental Program Analyst with the Department of Water Resources effective September 30, 2016 is denied.