

CalHR Case Number 16-P-0010
Request for Reinstatement after Automatic Resignation (AWOL)

Final Decision Adopted: June 24, 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 1:00 p.m. on April 20, 2016 in Sacramento, California.

The appellant was present and represented by Wendy M. Looney, Labor Relations Representative, Association of California State Supervisors. Jeannie Lee Jones, Senior Attorney, represented the Department of Water Resources (DWR), respondent. The parties submitted written closing arguments on May 13, 2016.

I – JURISDICTION

On January 29, 2016, DWR, respondent, notified appellant he was being automatically resigned for being absent without leave (AWOL) from January 25, 2016 through January 29, 2016. Appellant filed a request for reinstatement appeal with CalHR on February 10, 2016.

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 appellant argued he had a satisfactory explanation for his absence and for not obtaining leave and is now ready to resume the duties of his position.

The respondent argued the appellant knew what was required of him to obtain leave, yet made no effort to retain his job and the AWOL separation should be sustained.

The issues to be determined are:

1. Did the appellant have a satisfactory explanation for his absence for the period January 25, 2016 through January 29, 2016?
2. Did the appellant have a satisfactory explanation for not obtaining leave for the period January 25, 2016 through January 29, 2016?
3. Is the appellant ready, able, and willing to return to work and discharge the duties of a Construction Supervisor II?

III – FINDINGS OF FACT

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

The appellant began his career as a State of California employee on January 18, 2011. His duties included oversight of the Levee Repair Project Headquarters in respondent's Division of Engineering, Construction Branch. The appellant's hours were flexible because his position involved some field work. The Chief, Construction Supervisor III, Levee Repair Project Headquarters, Division of Engineering, was the appellant's supervisor.

In late 2015, the appellant failed to follow the call-in procedures when sick and was verbally counseled by his supervisor. During the verbal counseling session, he reiterated the call-in procedures and warned the appellant he could be considered absent without leave (AWOL) if he failed to call in each day by 9:00 a.m. if he was not going to report to

work. His supervisor provided the appellant with two (2) business cell phones – (916) 838-9019 and (916) 247-2282.

On January 2, 2016, the appellant was injured while skateboarding. He did not seek immediate medical attention. On January 4, 2016, he sent the following email from his business email, [email link redacted] [footnote 1: DWR employees can access their work email through any computer or cell phone with an internet portal. End footnote], to his supervisor and another person.

“[names redacted], I will not be in to work due to an accident that I suffered a concussion in. It would be appreciated if someone could pick up my check for me. Now that I am overwhelmed with late charges and a hugely overdrawn bank account I really don't know what I'm going to do or when I'll be able to come back to work. I can come by later today when I have a ride to pick it up.”

On the afternoon of January 4, 2016, the appellant, who lives only a few blocks from respondent's office, walked to work to pick up his payroll check. He had a swollen eye and a gash on his head and told his supervisor he had a concussion from a skateboarding accident. He had not yet seen a doctor.

The appellant did not contact his supervisor on January 5, 6, 7 or 8, 2016, report to work or provide a doctor's note. The appellant did not provide the doctor's note because, “I didn't know how long I was going to be out – or anything of that nature.”

On January 8, 2016, his supervisor sent the appellant an email instructing him to have his doctor provide a signed clearance/return-to-work form. On January 11, 2016, the appellant told him he was going to see his doctor. The appellant did not see a doctor that day or provide a doctor's note.

On Friday, January 15, 2016, appellant's supervisor sent another email asking for an update on his condition. The appellant did not respond. On Monday, January 18, 2016,

His supervisor left voicemail messages on the appellant's cell phones to call him. The appellant did not respond.

On January 19, 2016, his supervisor again emailed the appellant asking for an update on his condition and when he would return to work. The appellant did not respond.

His supervisor then consulted with respondent's Human Resources (HR) department and was advised to send the appellant Family Medical Leave Act (FMLA) paperwork via Golden State Overnight. On January 20, 2016, appellant's supervisor called him on each of his cell phones and left voicemail messages for him to return his call. The appellant did not respond.

On January 21, 2016, the appellant received the FMLA paperwork and saw his doctor. The doctor's note indicated, "Intermittent work as tolerable with post-concussive symptoms. May need several days off up to 8 hours each day." On January 22, 2016, Hicks again called each of appellant's cell phones and both immediately went to voice mail. He then sent the appellant an email stating he must contact him before close of business or he would be considered absent without leave, and he must contact him on a daily basis if he did not report to work. The appellant did not respond. The appellant did not provide a doctor's note to respondent or return the FMLA paperwork on January 25, 26, 27, 28 or 29, 2016.

On January 29, 2016, the appellant appeared at respondent's office at approximately 4:00 p.m. to pick up his payroll check, drop off a doctor's note but did not do any work for respondent. Hicks told the appellant he could not accept any documents and referred him to respondent's HR department. At the close of business January 29, 2016, the respondent invoked the AWOL statute for the appellant's absences from January 25, 2016 through January 29, 2016.

On February 1, 2016, the appellant called his supervisor to ask what he should do. He was told he was no longer employed because he had been separated from state service for being absent without leave. The appellant then went to the respondent's HR office on February 1, 2016 and was personally served a copy of the AWOL letter.

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 . . . (h) A statement made by him that is inconsistent with any part of his testimony at hearing. (Evid. Code, § 780.)

The appellant's testimony, "it appeared" he was allowed leave for the entire month of January 2016, is not believable. Additionally, his testimony he believed it was clear his leave was for an "indeterminate amount of time" because he sent an email on January 4, 2016, is troubling. His email indicated:

"[I] will not be in to work due to an accident that I suffered a concussion in . . . [N]ow that I am overwhelmed with late charges and a hugely overdrawn bank account I really don't know what I'm going to do or when I'll be able to come back to work."

The appellant's testimony "I had a concussion," is not credible because he had yet to seek medical treatment and receive a diagnosis. Moreover, his email indicated he was overwhelmed with late charges which is not a satisfactory explanation for an absence from work.

Even after the appellant saw his doctor on January 21, 2016, he failed to provide a doctor's note to respondent claiming he had no idea he was required to contact his supervisor or provide a note. This claim is diametric to his testimony he understood he must call in every day unless he had a doctor's note excusing him from work because in late 2015, Hicks talked to him about the importance of calling the office if he was going to be absent.

When asked if he received any phone calls from respondent during the month of January, his answer is non-responsive, “Uhhh – up until – there was a certain period of time I didn’t have access to a telephone.” He testified he did not have access to email either and claimed he was unable to “pull up his emails until February 4 or 5, 2016” because he had misplaced his telephone charger. Respondent has a designated employee who is responsible for all of respondent’s phones, contacting carriers and troubleshooting problems. She testified credibly there was cell phone activity from the appellant’s state-issued cell phone 916-247-2282 as early as January 17, 2016 indicating his phone was used for data transfer. Also on January 22, 2016, he sent at least one text message. This credible testimony outweighs the appellant’s self-serving testimony he did not have access to his phone or email. The appellant’s inconsistent testimony is not trustworthy or credible.

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.” It is not disputed appellant was absent for more than five consecutive days as he was not at work from January 25, 2016 through January 29, 2016.

Government Code section 19996.2, subdivision (a) also provides: “[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. The appellant has the burden of proof in these matters and must prove by a preponderance of the evidence all the elements of section 19996.2. (*Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826.)

The appellant did have a satisfactory explanation for his absence.

An illness of an employee or employee family member has been determined by CalHR to be a satisfactory explanation for an absence from work. Although the appellant did not immediately seek medical attention after his fall from the skateboard, he eventually went to the doctor. The January 21, 2016 doctor's note indicated, "[I]ntermittent work as tolerable with post-concussive symptoms. May need several days off up to 8 hours each day."

Although the doctor's note is not the model of clarity, it does appear to indicate the appellant had suffered a concussion earlier in January and may need time off from work. The doctor's note was not given to respondent until after he was AWOL separated from state service, but does provide the appellant with a satisfactory explanation for his absence.

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

The appellant's argument, "he requested leave initially on January 4 – in person at the office and in writing via email," is neither an accurate account of the facts nor persuasive. Although the appellant did appear at work on January 4, 2016 with a swollen eye and a gash on his head, he did not request leave. He merely told his supervisor he was on his way to see a doctor because he had fallen off his skateboard. Under Family Medical Leave Act (FMLA), governed by the Code of Federal Regulations (C.F.R.), an employee must give notice [of his need for leave] to the employer as soon as practicable. (29 C.F.R. § 825.302(a) (2013).) "As soon as practicable means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case." (29 C.F.R. § 825.302(b) (2013).)

Contrary to his assertions, the appellant did not see a doctor on January 4, 2016 and his email merely stated, "I will not be in to work due to an accident that I suffered a concussion in. It would be appreciated if someone could pick up my check for me." This

is not a request. A request is, “to ask for something or for permission or authority to do, see, hear, etc., something; to solicit.” (See Black’s Law Dict. (6th ed. 1990) p. 1304, col. 1.) Moreover, the appellant’s reference to a concussion is not a true statement of fact because he had yet to see a doctor or receive a diagnosis.

The appellant further argued FMLA notice requirements under title 29 of the Code of Federal Regulations section 825.303(b) (2013) only requires notice sufficient to make the employer aware the employee needs FMLA-qualifying leave. Here again, however, the appellant was more concerned with the state of his finances than requesting leave, stating, “[N]ow that I am overwhelmed with late charges and a hugely overdrawn bank account I really don’t know what I’m going to do or when I’ll be able to come back to work.” FMLA leave protects employees with a “serious health condition of the employee that makes the employee unable to perform any one or more of the essential functions of his or her position.” (5 C.F.R. § 630.1203(a)(4) (2011).) A “hugely overdrawn bank account” is not a serious health condition contemplated by the FMLA. While it appears the appellant had a serious financial condition, he did not attribute his inability to come to work to a health issue.

On January 8, 2016, the appellant’s supervisor sent him an email requesting information regarding his absence. The appellant did not respond until January 11, 2016 with, “I’m going to see what my Dr [sic] wants me to do today.” The appellant did not provide additional information and on January 15, 2016, his supervisor again requested information regarding the appellant’s medical condition, but again received no response. In fact, the appellant did not see his doctor for another ten (10) days and provided no explanation for his delay.

“An employee has an obligation to respond to an employer’s questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection” (29 C.F.R. § 825.303(b) (2013).) The appellant’s conduct did nothing to place respondent on notice of a serious medical condition, and his failure to respond to

inquiries from his employer is sufficient under the laws governing the FMLA to deny him leave.

The respondent did not deny the appellant leave even after he failed to contact his supervisor for over a week. Instead, on January 19, 2016, four (4) days after its last request for information, respondent sent the appellant FMLA leave paperwork. “The employer must notify the employee of the employee’s eligibility to take FMLA leave within five business days, absent extenuating circumstances.” (29 C.F.R. § 825.300(b) (2013).) The respondent, otherwise unaware of the appellant’s medical condition, sent the FMLA paperwork because of the lengthy duration of his absence.

Although he received the FMLA paperwork on January 21, 2016, by his own admission, the appellant did not provide his doctor the FMLA paperwork until February 5, 2016, nearly a week after he had been AWOL separated from state service. It is axiomatic “[An] employee may not subsequently assert FMLA protections for the absence.” (*Rowe v. Laidlaw Transit Inc.* (2001) 244 F.3d 1115, 1118.) By ignoring respondent’s numerous requests for information, the appellant failed to provide notice of his need for leave until after he had been separated from state service.

Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.” (29 C.F.R. § 825.303(b) (2013).) Additionally, “[if] an employee does not comply with the employer’s usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.” (29 C.F.R. § 825.303(c) (2013).)

Therefore the appellant’s argument the respondent knew he suffered from a serious medical condition is not persuasive. The appellant chose not to contact his employer for nearly a month and subsequently attempted to claim a serious medical condition protected by FMLA. As 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. By his own conduct, the appellant ignored repeated

requests for information from respondent, failed to timely provide his doctor with FMLA paperwork, never requested leave, and abandoned his employment.

The circumstances surrounding the appellant's absences do not provide a satisfactory explanation for not obtaining leave.

The 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 he is asserting." (Evid. Code, § 500.) The appellant has failed to meet his burden of proof on all of the elements on his request for reinstatement appeal. Because each is essential to his appeal, no purpose would be served in determining his readiness, ability, and willingness to discharge the duties of a Construction Supervisor II.

VI – CONCLUSIONS OF LAW

Appellant proved by a preponderance of the evidence he had a satisfactory explanation for his absence. Appellant failed to prove by a preponderance of the evidence he had a satisfactory explanation for not obtaining leave. The appellant's readiness, ability, and willingness to return to work are no longer at issue.

* * * * *

THEREFORE, IT IS DETERMINED, the appellant's appeal for reinstatement after automatic resignation from the position of Construction Supervisor II with the Department of Water Resources effective January 21, 2016 is denied.