

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-010-10

(MANAGEMENT SERVICES/RESCINDED RESIGNATION)

DOLORES MILLER,	)	
	)	
Appellant,	)	
	)	DISMISSAL ORDER
v.	)	
	)	
STATE OF OREGON, DEPARTMENT	)	
OF HUMAN SERVICES, SENIORS AND	)	
PEOPLE WITH DISABILITIES,	)	
	)	
Respondent.	)	

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Dolores Miller, Marylhurst, Oregon, *pro se* Appellant.

Gary Cordy, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

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On October 29, 2010, Dolores Miller (Miller) appealed a decision of the Department of Human Services, Seniors and People with Disabilities (Department), refusing to allow Miller to rescind her resignation from a management service position as a Principal Executive Manager B (PEM B) in the Department's Milwaukie office. The resignation was effective July 31, 2010.

On November 2, 2010, the Department moved to dismiss the appeal, and the Administrative Law Judge (ALJ) notified Miller by letter that she had until November 15 to respond to the motion. After Miller failed to respond, the ALJ told Miller that he would recommend that this Board dismiss her appeal. Miller told the ALJ that she had been out of town dealing with illness in her family, and the ALJ granted her an extension of time to respond to the motion. Miller responded to the motion on December 7 and 20, 2010.

For purposes of this Order, we assume that the facts alleged in the appeal are true. *Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institution, and Association of Oregon Correctional Employees*, Case Nos. UP-49/50-98, 17 PECBR 907, 908 (1999). We also rely on undisputed facts discovered during our investigation. Based on our review of the appeal and the undisputed facts, we find the following:

1. Miller was originally employed by Clackamas County in a social services program as a manager. On July 1, 2009, Miller and the program for which she worked were transferred to the Department. Miller became a PEM B, a position in the management service, in the Seniors and People with Disabilities In-Home Unit in the Department's Oregon City office. She supervised approximately 20 staff and approximately three interns or volunteers.

2. Some of the work Miller performed in her position as a PEM B was beyond the scope of her job classification and job description. Miller hoped that she would eventually be promoted to a PEM C. Shortly after Miller's transfer from the county to the state, the Department's District Manager retired, and the Department decided to restructure the program. On January 22, 2010, Miller left on Family Medical Leave Act (FMLA) leave, from which she returned in April 2010.<sup>1</sup> While she was absent, another manager was assigned to Miller's position.

3. After she returned from FMLA leave, the Department assigned Miller to work in a PEM B position in the Eligibility Unit in its Milwaukie office. Miller received similar wages and benefits in her new position.<sup>2</sup> The Department's Milwaukie office was four miles from Miller's residence.

4. In her new position, Miller supervised approximately seven employees. The new assignment was consistent with the PEM B classification, although Miller's position description was different. Miller believed that the Department changed her job description and corresponding duties because Department managers realized that the work she performed in the Oregon City office was outside the scope of the PEM B classification.

5. When Miller began working in the Department's Milwaukie office, the Department directed her to change the time she reported to work from 8:30 a.m. to

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<sup>1</sup>Miller contends that she later discovered that Department officials misled her as to the amount of FMLA leave she was entitled to.

<sup>2</sup>The Department contends that Miller retained identical wages and benefits. Miller contends that, as of July 1, 2010, she would have received "a \$750 loss of pay" in that position which would not have taken place if she had been promoted to a PEM C. It is unclear whether Miller is referring to an annual pay decrease, decrease per pay period, or the result of furlough days. Resolution of this dispute is not material to this Order.

8:00 a.m. because she was now the branch office manager. Miller objected to this change because it made it difficult to get her special needs child to school. The Department refused to allow her to continue reporting at 8:30 a.m., however.

6. On June 28, 2010, Miller gave the Department a handwritten letter of resignation, addressed to "DHS Personnel." The letter stated, in part,

"Please consider this my letter of resignation which will be eff. 7/31/10.

"I will be submitting more specific information re: why am ending my employment w/ DHS/SPD in the next couple of weeks.<sup>[3]</sup> I will send this information to DHS Personnel in Salem OR."

7. On June 29, 2010, Miller's supervisor, Genevieve "Gene" Sundet, wrote "Accepted" on a copy of Miller's resignation letter. On June 30, 2010, Department Senior Human Resources Manager Angela Young did the same.

Also on June 29, Miller sent an e-mail to Sundet, stating that she would "be happy to help out in any way until my departure," and apologized for "the sudden notice." On July 7, 2010, Miller e-mailed Sundet to suggest a candidate for her replacement.

8. On July 7, 2010, Miller met with Sundet. The two discussed the future of the two units Miller supervised and each staff person's strengths, weaknesses and duties. Miller told Sundet that she was unhappy working for the State after her transfer to Milwaukie. She said that she believed she and Sundet differed in their ideas about administering services to clients. Miller also explained that she had some health concerns and asked that Sundet not disclose this information to anyone else.

Miller told Sundet that she believed there were different opportunities in the job market for her and hoped to work with people suffering from traumatic brain injuries.

9. By e-mails dated July 13 and 14, 2010, Miller told Sundet that she wanted to rescind her resignation. In her July 14 e-mail, Miller stated, in part:

"My unit is obviously pretty upset by the sudden and unexpected announcement \* \* \*.

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<sup>3</sup>Aside from Miller's July 7 conversation with Sundet, Miller does not contend that she supplied any other additional information to the Department about the reasons for her resignation.

"I'm also concerned about my medical coverage in the interim. As I've mentioned previously, I'm dealing with some chronic health issues of my own and it would be impossible for me to cover the Cobra or medical expenses on my own if something comes up and I need medical services. I can't take a gamble on being uninsured at this point.

"As I mentioned in my earlier emails, I'm requesting to withdraw my resignation. If nothing else, I need to extend my time here for awhile to keep medical coverage and benefits. I hope you can understand my concerns. As I mentioned before, I will be looking at other employment opportunities as they arise in the near future. I would like to work on a smoother transition to another manager for the sake of the employees I supervise and their clients."

Miller tried to meet with Sundet to discuss this request, but was unable to do so. Miller believed that Sundet used scheduling excuses to avoid meeting with her.

10. In an e-mail dated July 15, 2010, Department Senior Human Resources Manager Angela Young told Miller that the Department would not grant Miller's request to rescind her resignation, and that Young believed that the Department intended to keep the position vacant.

11. Miller's last day of work was July 31, 2010. On August 13, 2010, Miller filed this appeal. Her appeal letter concluded,

"I was completely overwhelmed and discouraged based on how I was treated at work, so I submitted my resignation in June 2010 effective July 31, 2010. After realizing the serious consequences to me and my children related to future pay, future employment, references and the benefits I received, I requested to rescind my resignation via email and voicemail with no response. I then sent an official request on June 29th, 2010. This request was done more than two weeks prior to the effective date. I eventually heard back from Angela Young in DHS HR stating they would not grant my request to rescind my resignation. I made this same request on two additional occasions and was denied. I never received an adequate explanation regarding why my request to rescind was denied. I then notified Angela Young on July 30, 2010 that I considered this a termination of my employment by the state and not a voluntary resignation. She responded to me by stating it was a resignation and not a termination of my employment. This will be a significant barrier if I apply for unemployment benefits in order to have some type of income for me and my children. I also have not been able to return to work."

The Department contends that it decided not to fill Miller's position due to budget cuts, but Miller alleges that her manager sought to fill the position as soon as she announced her departure, and that the Department did not act to close the position until she had submitted her request to rescind her resignation.

Miller contends that the refusal to permit her to rescind her resignation was based on discrimination or retaliation based on her utilization of FMLA leave for her own and her child's medical conditions, especially since she would have been eligible for additional FMLA leave as of August 2010. She also contends that the refusal was based on her assistance to, and advocacy with, the Department on behalf of a Department employee who was being harassed by a former Department employee.

### Discussion

Under ORS 240.086(1), an "employee" can request this Board to review "any personnel action." ORS 240.570, however, provides that management service employees have the right to appeal only six types of personnel actions. ORS 240.570(2) provides:

"An appointing authority may [1] assign, [2] reassign and [3] transfer management service employees for the good of the service and may [4] remove employees from the management service due to reorganization or lack of work."

ORS 240.570(3) provides that a management service employee may be:

"\* \* \* [5] disciplined \* \* \* or [6] removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." ORS 240.570(4) specifies that management service employees can appeal only these six personnel actions. Board Rule OAR 115-045-0023 specifies the procedures for those appeals.

In *Dereli v. Oregon State Correctional Institution*, Case No. 1394 (July 1982), this Board held that a State agency's refusal to permit a management service employee to rescind a resignation was not a ground for appeal under ORS 240.570, and that, as a result, this Board lacked jurisdiction to consider such an appeal.<sup>4</sup> We held that there was

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<sup>4</sup>This Board has rejected appeals from reclassifications and reallocations of management service employees for the same jurisdictional reasons. See *Jester v. State of Oregon, Department of Corrections and Cook, Director*, Case No. MA-9-00 (October 2000); *Yandell v. Executive Department, Emergency Management Division 9-1-1 Program*, Case No. MA-2-85 (July 1985); *Butler v. Adult & Family Services Division*, Case No. MA-20-92 (February 1993); *Wishart v. Adult and Family Services Division*, Case No. MA-2-93 (May 1993).

an exception to this rule, however: a management service employee could appeal a refusal to rescind a resignation only if the resignation the employer refused to rescind was actually a constructive discharge.

In *Holley v. Department of Environmental Quality*, Case Nos. MA-9/13-89 (April 1990) we explained constructive discharge as follows:

“The Oregon Supreme Court has recognized and explained the elements of a constructive discharge based on intolerable working conditions. *Bratcher v. Sky Chefs, Inc.*, 308 Or 501, 783 P2d 4 (1989).

‘In sum, to establish a constructive discharge stemming from unacceptable working conditions, a plaintiff must prove (1) that the employer deliberately created or deliberately maintained the working condition(s) (2) with the intention of forcing the employee to leave the employment, and (3) that the employee left the employment because of the working conditions.’ 308 Or at 506-507.”

The working conditions that spark the constructive discharge must be so intolerable that a reasonable person in the employee’s position would have resigned. *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841 (1995).

Here, we examine the reasons for Miller’s resignation to determine if they constituted a constructive discharge. We do not, however, analyze the reasons the Department refused to rescind Miller’s discharge, as Miller urges us to do. As discussed earlier, we lack jurisdiction over this issue.

Miller contends that she resigned because of poor working conditions. In order to prove that the Department constructively discharged her, Miller must allege facts which could support the conclusions that: (1) the Department deliberately created or deliberately maintained intolerable working conditions; (2) the Department did so with the intention of forcing Miller to leave her employment; and (3) Miller left her employment because of the working conditions.

In her original appeal, Miller contended that she resigned because “I was completely overwhelmed and discouraged based on how I was treated at work.” After the Department argued, in its motion to dismiss, that rescission was not grounds for an appeal under ORS 240.570 unless Miller alleged a constructive discharge, Miller alleged that the Department misled her as to the amount of FMLA leave to which she was entitled, transferred her into a position in which she supervised fewer employees, and required her to begin her work day at a time that interfered with her child care

arrangements. These facts are insufficient to demonstrate that the Department deliberately created intolerable working conditions with the intention of forcing Miller to leave, and that Miller left work because of these conditions.

We consider each of the alleged Department actions that Miller contends caused her to resign, beginning with her claim concerning FMLA leave. Although Miller asserts that the Department misled her about her entitlement to FMLA leave, Miller does not contend that she resigned because she needed to use leave and none was available. In regard to her claim that the Department put her in a position in which she supervised fewer employees, Miller admits that these changes occurred because the Department moved her from a position in which her assigned duties exceeded her classification to one in which her duties were appropriate for her classification. Concerning her contention that the Department changed her start time and thereby made it difficult for her to get her child to school, Miller does not allege that her new start time was unique. We conclude that the working conditions that Miller alleges caused her to resign were not so intolerable that a reasonable person in Miller's position would have no choice but to resign. Accordingly, Miller failed to allege facts sufficient to demonstrate that the resignation the Department refused to allow her to rescind was a constructive discharge. Miller has not alleged a valid claim under ORS 240.570. We will dismiss the appeal.

ORDER

The appeal is dismissed.

DATED this 12 day of April, 2011.

  
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Paul B. Gamson, Chair

  
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Vickie Cowan, Board Member

  
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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.