



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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September 19, 2008

CBCA 1152-RELO

In the Matter of KRISTINA KLEIN

Kristina Klein, Blaine, WA, Claimant.

Debra J. Murray, Chief, Travel Section, National Finance Center, Customs and Border Protection, Indianapolis, IN, appearing for Department of Homeland Security.

**KULLBERG**, Board Judge.

Claimant, Ms. Kristina Klein, an employee of Customs and Border Protection (CBP), a component of the Department of Homeland Security, seeks review of CBP's determination that she repay her relocation costs in the amount of \$15,566.62. Ms. Klein executed a service agreement that required repayment of her relocation costs if she did not remain in government service for twenty-four months after her reassignment, but she resigned before completing her required period of service. She contends that she was unable to perform her job due to problems related to her pregnancy, and she had no choice but to resign after the denial of her request for extended sick leave. For the reasons stated below, the claim is denied.

Background

On March 16, 2006, Ms. Klein signed a service agreement in connection with her reassignment from Lynden, Washington, to Vancouver, British Columbia. Ms. Klein agreed to repay her relocation costs if she did not remain in government service for twenty-four months from the effective date of her new assignment unless her separation was for reasons

that were beyond her control and acceptable to CBP. Ms. Klein reported to her new duty station in Vancouver on April 30, 2006.

In the fall of 2007, Ms. Klein advised her supervisor that she was in the first trimester of her pregnancy, and she was unable to perform her duties due to “constant nausea, headaches, and weakness.” After Ms. Klein provided a doctor’s letter stating that she was pregnant, her supervisor then directed her to obtain from her doctor a statement that she was incapable of performing her duties due to her pregnancy. Her doctor was unwilling to write such a letter because “such letters are not something that is routinely given out to pregnant women since pregnancy is not an illness, it is not something with universal symptoms and typical limitations.” Ms. Klein was denied extended sick leave and directed to return to work as soon as possible.

Ms. Klein resigned from her position with CBP on December 13, 2007, which was almost twenty months after her reassignment. She did not provide any reasons in writing for her resignation, and she executed a memorandum that simply stated “I . . . would like to resign as of December 13, 2007.” By letter dated March 19, 2008, CBP informed Ms. Klein that she had not complied with the terms of her service agreement and she would be required to repay her relocation costs, which totaled \$15,566.62, unless she could obtain a release from her agreement. Ms. Klein requested a release from her service agreement in her letter dated March 25, 2008, in which she contended that problems related to her pregnancy and her inability to obtain sick leave left her with no choice but to resign. By letter dated April 9, 2008, CBP denied Ms. Klein’s request. She was advised that her request could not be approved unless she could provide medical documentation that she had to resign. CBP’s letter also recognized that although her request for sick leave had been denied, she chose to resign rather than exercise any other options such as requesting leave without pay.

### Discussion

The issue in this case is whether CBP abused its discretion in finding that Ms. Klein’s resignation was not for reasons beyond her control and acceptable to the agency. A government employee who transfers to a permanent duty station outside of the continental United States is entitled to be reimbursed for the costs of his or her relocation. 5 U.S.C. § 5724(d) (2000). Reimbursement for such relocation costs, however, is conditioned upon an employee’s entering into a service agreement to remain in government service for a period of not less than twelve months and not more than thirty-six months. 5 U.S.C. § 5722(c). Failure to remain in government service for the required period subjects an employee to the following penalty under the Federal Travel Regulation (FTR):

**Will I be penalized for violation of my service agreement?**

Yes, if you violate a service agreement (other than for reasons beyond your control and which must be accepted by your agency), you will have incurred a debt due to the Government and you must reimburse all costs that your agency has paid towards your relocation expenses . . . .

41 CFR 302-2.14 (2007). This Board, following well-established precedent, has recognized:

It is within an agency's discretion to determine whether a separation from service which appears to be voluntary was for a reason beyond the employee's control and acceptable as a reason for not fulfilling the terms of a service agreement. We will not question the agency's exercise of its discretion so long as it has a reasonable basis. *Melinda K. Kitchens*, GSBCA 16639-RELO, 05-2 BCA ¶ 33,062; 46 Comp. Gen. 724 (1967); Comp. Gen. Dec. B-174823 (Jan. 26, 1972).

*Paula A. Shimata*, CBCA 1135-RELO, 08-2 BCA ¶ 33,901, at 167,775. Our inquiry, therefore, is limited to whether CBP properly exercised its discretion. The Board finds no abuse of such discretion.

CBP was reasonable in its determination that Ms. Klein's resignation was for reasons that were not beyond her control in that she has provided no evidence of her inability to work due to her pregnancy. The burden of proof is on a claimant to prove all of the elements of his or her claim in a relocation case. *Gary Twedt*, GSBCA 16905-RELO, 06-2 BCA ¶ 33,433. A claimant must produce sufficient evidence to document that a separation from government service for health-related reasons was beyond his or her control. *Raymond B. Provost*, GSBCA 16952-RELO, 07-1 BCA ¶ 33,448 (2006) (doctor's note suggesting that employee work no more than eight hours a day was deemed insufficient to prove that ill health forced claimant to retire). It is well established that a finding of pregnancy by itself "does not establish the fact of incapacity . . ." *Dorothy J. Austin*, B-131398 (May 14, 1957). An agency may request supporting documentation to justify a request for sick leave in excess of three days. 5 CFR 630.403 (2007). Ms. Klein's supervisor requested that she obtain a letter from her doctor stating her inability to perform her job as a condition for being granted extended sick leave, but her doctor was unwilling to do so. Aside from her statements that she was unable to work due to her pregnancy, Ms. Klein has submitted no documentary evidence from any competent source to support her assertions. Although Ms. Klein may have honestly believed that she could not work, the record shows that she was unable to gain the concurrence of her doctor, and she went no further in attempting to find competent

evidence to support her claim. Given the lack of supporting evidence for her contention, the Board does not find that CBP abused its discretion.

Ms. Klein argues that she would not have resigned after the denial of her sick leave request if she had known that she could have requested leave without pay (LWOP) without first using up her accrued leave. This Board will not find that an agency abused its discretion based upon a claimant's speculation that a separation from government service would have been avoided if the claimant had been granted LWOP. *See Marilyn Fournier*, CBCA 460-RELO, 07-1 BCA ¶ 33,495 (claimant argued that she would have found government employment at another location if she had been granted LWOP). Ms. Klein has produced no evidence that she ever discussed LWOP with anyone at CBP before her resignation, and the Board finds no indication that Ms. Klein's resignation was the result of a misunderstanding of her right to take LWOP. Ms. Klein's argument is, at best, speculative, and is, therefore, insufficient to support a finding that her separation was for reasons beyond her control.

Additionally, Ms. Klein argues that she was entitled to leave under the Family and Medical Leave Act of 1993 (FMLA), 5 U.S.C. §§ 6381-6387 (2000); 29 U.S.C. §§ 2601-2654 (2000). Under the FMLA, a qualified employee may take up to twelve weeks of unpaid or accrued paid leave. 29 CFR 825.100(a) (2007). CBP required that an employee's request for leave under the FMLA should be filed within thirty days before beginning leave or as soon as practicable in a medical emergency. Ms. Klein has neither shown nor alleged that she requested leave under the FMLA or that she made any inquiry that could be construed as a request for leave under the FMLA due to her pregnancy. Although Ms. Klein could have requested leave under the FMLA, the fact that she did not do so is not proof that her resignation was for reasons beyond her control. Moreover, this Board does not decide pay and leave issues. *See Marilyn Fournier*. It would be speculative, therefore, on the part of this Board to assume that leave under the FMLA would have been granted and that she would have satisfied the terms of her service agreement.

Finally, Ms. Klein argues that her pregnancy was not accommodated under CBP's maternity leave policy. The Board requested that CBP provide a copy of its maternity leave policy, if it existed, but CBP's response only referenced the FMLA. Ms. Klein has not provided a copy of such a policy, and she has made only a general reference to it. The Board does not find Ms. Klein's statements about not being accommodated under CBP's maternity leave policy to be persuasive where there is no evidence that such a policy was in effect. Even if such a policy existed, there is no evidence that anyone within CBP failed to accommodate her pregnancy. The fact that Ms. Klein was asked to document the state of her health was not unreasonable, and her resignation cannot be deemed to have been due to circumstances beyond her control. Although it may be unfortunate that Ms. Klein chose to

resign rather than remain in government service, the Board does not find that CBP abused its discretion under those circumstances.

Decision

The claim is denied.

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H. CHUCK KULLBERG  
Board Judge