

Title 85 O.S., Section 5(B), **Discharge of employee – Termination of health insurance – Prohibited grounds**, states, no person, firm, partnership, corporation, or other entity may discharge any employee during a period of temporary total disability, solely on the basis of absence from work.

Title 74 O.S., Section 840-2.21(D), **Leave without pay**, as amended in 2002, states in pertinent part, the right to return to the original position shall expire one (1) year from the date of the start of leave without pay. Notwithstanding the provisions of Section 1, et seq. of Title 85 of the Oklahoma Statutes, the employee may be separated in accordance with the Oklahoma Personnel Act and Merit Rules if the employee has not returned to the original position of the employee or some other position within the agency within one (1) year from the date of the start of leave without pay.

Merit Rule 530:10-15-49(j)(2), **Leave and first preference due to work related illness or injury**, states in pertinent part, if an employee does not return to the original position or an alternate position within 1 year after the start of leave without pay, the appointing authority may terminate the employee under Section 840-2.21.

In their briefs, both Appellee and Appellant discuss Title 85 O.S., Section 5, Title 74 O.S., Section 840-2.21 and the case of *Upton v. State, ex rel. 2000 OK 46, 9 P.3d 84*, decided by the Oklahoma Supreme Court in 2000. The Upton case involved Martin Upton, an employee of the Department of Corrections, who was discharged pursuant to Title 74 O.S., Section 840-2.21 and who later challenged the language of the Oklahoma Personnel Act alleging that Title 85 prohibited discharge during a period of temporary total disability.

In the Upton case, the Oklahoma Supreme Court found an irreconcilable conflict between the provisions of Title 85 and the provisions of Title 74 and because of the conflict between the two statutes, the Court held that agencies were not able to terminate employees solely because of their absence from work if the employee was temporarily totally disabled.

Two years later in 2002, the Oklahoma Legislature address the conflict between the statutory provisions of Title 85 and Title 74 which was noted by the Court in the Upton case by adding language to Title 74 and thereby clarifying its intent. Specifically, the line of Title 74 O.S., Section 840-2.21, "Notwithstanding the provisions of Section 1 et seq. of Title 85 of the Oklahoma Statutes", was added by the Legislature to remedy the conflict.

Appellant has acknowledged the intent of the Legislature to overrule the holding in Upton was made clear in its amendment of Title 74. Appellant then asks that the undersigned consider the whole wording of Section 840-2.21 and specifically subsections (F) and (I).

Title 74 O.S., Section 840-2.21(F) states in part, if the employee is unable to perform the duties of the original position with reasonable accommodation, but is medically able with

reasonable accommodation to perform the duties of any other position within the agency for which the employee is qualified and appointment to such position does not constitute a promotion, the employee shall have first preference for any such position which became vacant within the agency.

Title 74 O.S., Section 840-2.21(I), states in pertinent part, a classified employee who is separated pursuant to subsection D of this section shall be eligible for reinstatement to employment with any state agency for twelve (12) months after the date of separation whether in the classified or unclassified service in accordance with rules adopted by the Administrator of the Office of Personnel Management provided the employee is qualified for the position to which reinstated.

Appellant argues that she was given sedentary releases by her treating doctors on four separate occasions and that Appellee's inability to provide Appellant with work is in violation of, "the implied obligation of good faith and fair dealing in employment contracts" found by the Oklahoma Supreme Court in *Burke v. Kmart Corporation, 1989 OK 22, 770 P.2d 24*. The undersigned finds the Burke case is distinguishable from this case and further finds Appellee's argument that Burke is not applicable to the facts in this case persuasive.

In addition, although the Appellant argues subsection (I) supports her position, Appellant fails to assert that she has applied for reinstatement for employment with any state agency within the past twelve months.

Appellant was placed on leave without pay status on October 10, 2004 and discharged on November 2, 2005: more than one year later.

A reading of Title 74 O.S., Section 840-2.21(D) and Merit Rule 530:10-15-49 allows that an appointing authority may terminate an employee who does not return to his/her original position or an alternate position within one year after the start of leave without pay. Section 840-2.21 references the Merit Rules. Merit Rule 530:10-15-49 allows for termination. Reading these two together, the undersigned does not find that the discharge of Appellant was prohibited or in violation of Title 85.

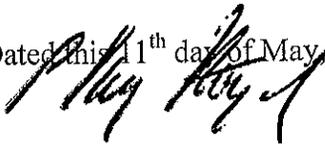
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The second issue raised by Appellant is that Appellee did not provide proper medical attention for Appellant according to the requirements of Title 85 which requires prompt medical treatment be provided for injured employees.

The Oklahoma Merit Protection Commission powers and duties are set forth in Title 74 O.S., Section 840-1.9. After reviewing this statute, the undersigned finds no language granting the Commission, or this Administrative Law Judge, the authority or jurisdiction to determine issues arising from alleged violations of Title 85. Therefore, any allegations of violations of Title 85 by Appellant should be filed in the appropriate forum.

Accordingly, after review of all briefs and materials submitted and considering all arguments made by both parties, the undersigned Administrative Law Judge finds the Appellee's Motion for Summary Judgment is hereby **GRANTED**.

Dated this 11th day of May, 2006.


P. Kay Floyd
Administrative Law Judge
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