

ATTACHMENT A

THE PROPOSED DECISION

**BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA**

**In the Matter of Accepting the Application for Disability
Retirement of:**

DUANE D. REED II and FRANCHISE TAX BOARD, Respondents

Agency Case No. 2019-0923

OAH No. 2020010861

PROPOSED DECISION

Sean Gavin, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter by videoconference on March 4, 2021, from Sacramento, California.

Helen L. Louie, Staff Attorney, appeared on behalf of the California Public Employees' Retirement System (CalPERS).

Respondent Duane D. Reed II appeared on his own behalf.

Respondent Franchise Tax Board (FTB) did not appear, and a default was taken pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on March 4, 2021.

ISSUE

Is respondent precluded from filing an application for disability retirement by operation of *Haywood* and *Smith*?

FACTUAL FINDINGS

1. Respondent was employed by the FTB and last held the position of a Seasonal Clerk. By virtue of this employment, respondent became a state miscellaneous member of CalPERS subject to Government Code sections 21150 and 21154.

2. On April 10, 2014, the FTB served respondent by mail with a Notice of Termination with Fault (notice of termination), which notified him that effective April 10, 2014, he would be terminated from his position. The notice of termination stated it was "the result of [respondent's] insubordinate behavior on April 7th and April 9th, 2014. [Respondent's] refusal to meet with management to discuss a work issue is considered insubordinate behavior."

3. On April 2, 2019, respondent applied for disability retirement. In his application, respondent identified his specific disabilities as post-traumatic stress disorder (PTSD) and schizophrenia. He indicated his injuries occurred on April 20, 2012 as a result of "sexual harassment at work and also retaliation from employer," and claimed that his injury prevented him from working at all because he "can not concentrate or hear at times, restroom use is constant, hands shake, constant vibrations in entire body cause fatigue."

4. On August 2, 2019, CalPERS sent a letter to respondent stating that he is not eligible for disability retirement because his employment ended for reasons not related to a disabling medical condition. On August 27, 2019, respondent appealed CalPERS's determination that he is not eligible for disability retirement. This hearing followed.

CalPERS's Evidence

5. Angelica Ortega is a Staff Services Manager at the FTB. She reviewed the notice of termination and its supporting documents. She explained the notice of termination was sent because respondent had been insubordinate on two occasions. Specifically, respondent refused to meet with management on April 7 and again on April 9, 2014, to discuss a work performance issue. Based on her training from FTB, Ms. Ortega believes insubordination means "refusal to adhere to directives or directions typically given to an employee."

Respondent's Evidence

6. Respondent asserted he was sexually harassed at work in 2012 and 2013. He complained to his supervisors about the sexual harassment. He subsequently filed a worker's compensation claim for work-related stress in 2013. He further claimed FTB management retaliated against him for complaining about the sexual harassment and for filing the worker's compensation claim. He refused to attend the April 7 and 9, 2014, meetings with management because he believed he was denied his right to bring a union representative with him. He did not assert at hearing that his failure to meet with his supervisors on April 7 and 9, 2014, was due to his disability.

7. Respondent informed his supervisors of his disability prior to his termination and asserted his "mental illness prevented [him] from being

insubordinate." He also made a successful claim for unemployment insurance benefits after his termination and believes he could not have received those benefits if he had truly been terminated for insubordination.

8. Respondent's former coworker, Debra Ruiz, testified on respondent's behalf. She had no supervisory duties at the FTB and did not participate in the decision to terminate respondent's employment. Ms. Ruiz never observed respondent behave insubordinately. She believes "he did nothing wrong." The individuals who allegedly sexually harassed respondent also "made [Ms. Ruiz's] work environment very stressful." She suspected the FTB management retaliated against respondent for making a worker's compensation claim in 2013, but had no direct knowledge about it.

Analysis

9. CalPERS determined respondent was precluded from applying for disability retirement pursuant to the holdings in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*).

10. *Haywood* and *Smith* hold that civil service employees are precluded from applying for disability retirement if they have been dismissed for cause from their civil service employment. However, the cases recognized two exceptions to this preclusion: (1) when the employee established that the dismissal was the ultimate result of a disabling condition; and (2) when the employee established that the dismissal preempted the employee's otherwise valid claim for disability retirement.

11. Respondent did not establish he should be allowed to apply for disability retirement under either exception. He presented no evidence that his separation from state service was the ultimate result of a disabling condition, nor that his separation

from state service preempted an otherwise valid claim for disability retirement. Respondent's refusal to meet with management on two separate occasions resulted in his termination. Respondent presented no evidence that his disability prevented him from attending such meetings. Rather, he alleged he was terminated in retaliation for complaining about sexual harassment and for filing a worker's compensation claim. These claims, even if substantiated, are not related to his claimed disabilities and therefore do not demonstrate that his termination was the ultimate result of those disabling conditions.

12. Respondent also did not establish that his separation from state service preempted an otherwise valid claim for disability retirement. There was no indication in the notice of termination or any other evidence that the FTB instituted dismissal proceedings to preempt respondent from filing an application for disability retirement based upon a disabling physical condition.

13. When all evidence and arguments are considered, respondent did not establish that he should be allowed to file an application for disability retirement. Consequently, respondent's appeal must be denied.

LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS has the burden to prove that respondent was terminated for cause prior to seeking disability retirement. (Evid. Code, § 500 ["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"]; *Haywood, supra*, 67 Cal.App.4th 1292.) The standard of proof is a

preponderance of the evidence. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].) Evidence that is deemed to preponderate must amount to "substantial evidence." (*Weiser v. Bd. of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be "substantial," evidence must be reasonable in nature, credible, and of solid value. (*In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644.) If CalPERS meets its burden, the burden then shifts to respondent to show whether either of the *Haywood* exceptions apply.

Applicable Law

2. An individual may apply to the CalPERS Board for disability retirement on his own behalf. (Gov. Code, § 21152.)

3. By virtue of his employment with FTB, respondent became a state miscellaneous member of CalPERS subject to Government Code sections 21150 and 21154. Section 21154 provides, in relevant part:

The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion.

4. When an employee is fired for cause and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid

claim for disability retirement, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood, supra*, 67 Cal.App.4th at p. 1297.) The *Haywood* court explained that the dismissal "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement - the potential reinstatement of his employment relationship with the District if it ultimately is determined that he is no longer disabled." (*Ibid.*)

5. CalPERS met its burden of establishing that respondent was dismissed for cause. Respondent did not establish that any of the *Haywood* exceptions apply. Thus, under the criteria set forth in *Haywood* and its progeny, respondent was properly precluded from applying for disability retirement. Accordingly, respondent's appeal from CalPERS's cancellation of his application must be denied.

ORDER

The appeal of respondent Duane D. Reed II to be granted the right to file an application for disability retirement is DENIED.

DATE: April 5, 2021


Sean Gavin (Apr 5, 2021 09:20 PDT)

SEAN GAVIN

Administrative Law Judge

Office of Administrative Hearings