

ATTACHMENT C
RESPONDENT(S) ARGUMENT

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8 Attorney for Respondent,
 9 DEBRA DOUGHERTY

10 BOARD OF ADMINISTRATION

11 CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

12 In the Matter of Accepting the Application for) Case No.: 7216
 13 Disability Retirement of:) OAH No.: 2006100452
 14 DEBRA DOUGHERTY,)
 15 Respondent,) **RESPONDENT'S ARGUMENT**
 16 and)

17 CALIFORNIA DEPARTMENT OF)
 18 CORRECTIONS AND REHABILITATION)
 19 (MULE CREEK STATE PRISON),)
 20 Respondent.)

21 James J. Tiehm from the Law Offices of Ilija Cvetich, attorney for Respondent DEBRA
 22 DOUGHERTY in this California Public Employees' Retirement System ("CalPERS") matter,
 23 submits this argument for why the Board of Administration of CalPERS should decline to adopt
 24 the proposed decision of the administrative law judge or remand the case for further proceedings.

25 **I. ISSUE**

26 The issue in the proceeding on March 27, 2013, was limited to whether respondent, under
 27 *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, may file an
 28 application for disability retirement when she could no longer work due to her disabling
 condition and was deemed to have "automatically resigned."

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II. FACTS

On or about December 2, 1993, through the Limited Examination and Appointment Program ("LEAP") with the Department of Rehabilitation, respondent was hired by California Department of Corrections Mule Creek State Prison as an office assistant where she worked until 2004. She has not worked anywhere since 2004 and is currently on Social Security.

During the course of her employment with Mule Creek State Prison, respondent sustained a series of industrial injuries. On March 30, 2000, she sustained injury to her right shoulder when a chair collapsed and she fell to the floor. On September 13, 2002, she sustained injuries to her neck, back, and shoulders. On September 17, 2003, she again sustained injuries to her upper extremities when she was punched in the shoulder by a coworker. On March 15, 2004, she sustained a psychiatric injury after a series of traumatic events at work. She was repeatedly harassed by coworkers, causing her mental distress for which she sought treatment.

Due to respondent's orthopedic conditions, her doctor had prescribed her to modified duty; however, respondent's work restrictions were not accommodated, causing her pain and forcing her to leave work. Respondent's work restrictions due to her industrial injuries prohibited her from lifting more than five pounds and repetitively using her arm. On November 24, 2004, respondent left work because she had severe pain in her right shoulder that radiated into her neck and lower back. When she left work, her supervisor, Ronda Holtorf, told her not to return to work until she saw a doctor. Respondent advised her supervisor that she had an appointment scheduled for November 29, 2004, with her doctor, Michael B. Purnell, M.D. On November 29, 2004, respondent saw Dr. Purnell and advised him that her employer was not accommodating her restrictions. Dr. Purnell advised that she would have to find other employment if her work required her to perform duties that caused her pain. On December 14, 2004, although respondent's employer knew that she was taking time off due to her medical conditions, her employer notified her that she had automatically resigned for being absent without approved leave from November 30, 2004, through December 13, 2004.

III. LEGAL ANALYSIS

Applicant is not barred from applying for disability retirement. The evidence presented at the hearing does not support the administrative law judge's findings and legal conclusions.

1 The Board of Administration of CalPERS should decline to adopt the proposed decision of the
2 administrative law judge or, in the alternative, remand the matter for further proceedings.

3 **A. Respondent Is Not Barred From Applying For Disability Retirement**

4 Because respondent Debra Dougherty's termination related to her disability and she was
5 eligible for disability retirement at the time of her termination, she is not barred from applying
6 for disability retirement. As discussed below, while termination *may* prevent application for
7 disability retirement, it is not an automatic bar.

8 Public employee pension legislation should be construed liberally in favor of the
9 applicant. (*See e.g., Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189
10 Cal.App.3d 1593, 1603.) The legislative purpose is paramount. (*City of Huntington Beach v.*
11 *Board of Administration* (1992) 4 Cal.4th 462, 472.) In part, "[d]isability pension laws are
12 intended to alleviate the harshness that would accompany the termination of an employee who
13 has become medically unable to perform his job duties." (*Haywood v. American River Fire*
14 *Protection District* (1998) 67 Cal.App.4th 1292, 1369 (citing Cal. Gov. Code § 20001).)

15 Disability retirement requires, in part, that the applicant be "incapacitated for the
16 performance of duty." (Cal. Gov. Code § 21150.) An application for disability retirement may
17 be made "within four months after the discontinuance of the state service of the member..."
18 (Cal. Gov. Code § 21154(c).)

19 In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, the
20 court implicitly recognized that an employee could properly file an application for disability
21 retirement *even after termination*. In finding that the applicant was ineligible for disability
22 retirement, the court noted that there was "no claim, or evidence which would support a claim,
23 that the termination for cause was due to behavior caused by a physical or mental condition."
24 (*Id.* at 1370-71.) The court also noted that there was "no claim, or evidence which would
25 support a claim, of eligibility for disability retirement that could have been presented before the
26 disciplinary actions were taken." (*Id.* at 1371.) By logical inference, an applicant is eligible for
27 disability retirement if the termination was "due to behavior caused by physical or mental
28 condition" and there was a claim or evidence to support a claim of eligibility for disability
retirement at the time of termination.

1 The facts which supported ineligibility for disability retirement in *Haywood* are
2 significantly distinguishable. Based on the facts of the case, the court explained, “[T]here is an
3 obvious distinction in public employment retirement laws between an employee who has become
4 medically unable to perform his usual duties and one who has become unwilling to do so.
5 Disability retirement laws address only the former.” (*Id.* at 1363.) The applicant had
6 “challenged his employer’s authority and lost when, after a series of disciplinary actions, he was
7 properly terminated for cause.” (*Id.* at 1370.) The court found that “the behavior which resulted
8 in Haywood’s firing – his unwillingness to faithfully perform his duties – was not caused by a
9 physical or mental condition, and Haywood had no valid claim for disability retirement which
10 could have been presented before he was fired.” (*Id.*)

11 At the time of her termination, respondent had filed for industrial benefits for severe and
12 disabling injuries to her upper extremities, back, neck, right shoulder, psyche, and stress. The
13 repeated injuries to her right shoulder over the years caused her pain that radiated to her neck and
14 back. She had continued to work with the restriction that she was not to lift more than five
15 pounds. Her employer continuously failed to accommodate this restriction and respondent was
16 forced to work with extreme pain. On November 24, 2004, when she had to leave work because
17 the pain was so severe, her disabling conditions were such that she qualified for disability
18 retirement. She stopped working because of the pain – not for lack of a desire to work. Neither
19 CalPERS nor her employer have alleged any other reason for why she ceased working.

20 Respondent’s physician, Dr. Purnell, advised that she would have to find other
21 employment if her work required her to perform duties that caused her pain. On December 14,
22 2004, although respondent’s employer knew why she was absent, her employer notified her that
23 she was automatically resigned for being absent without approved leave from November 30,
24 2004, through December 13, 2004 without engaging in an interactive dialogue of how to
25 accommodate respondent’s conditions.

26 **B. The Administrative Law Judge’s Proposed Decision Should Not Be Adopted**

27 The evidence presented at the hearing does not support the administrative law judge’s
28 findings and legal conclusions. The Board of Administration of CalPERS should decline to

1 adopt the proposed decision of the administrative law judge or, in the alternative, remand the
2 matter for further proceedings.

3 The administrative law judge's factual finding regarding applicant's job duties is
4 inconsistent with the testimony given at the hearing and is not supported by evidence. The
5 proposed decision states, "The job involved sitting at a computer, taking individual items of mail
6 out of a bin, and looking up information on the computer to re-route the mail. The evidence is
7 persuasive that there was no lifting required in this position." (Proposed Decision, pg. 2, ¶ 4.)
8 At the hearing, respondent testified at length regarding her job duties and the amount of lifting
9 that the position required. Respondent Debra Dougherty worked as an office assistant in the mail
10 room of the Mule Creek State Prison. The prison processed a large volume of incoming and
11 outgoing mail. She testified that when she arrived in the morning she would drag a bag of
12 outgoing mail that weighed roughly 50 pounds from the center of the room to her work station
13 for sorting, a distance of roughly 10 feet. She spent the entire time standing, bending to pick up
14 pieces of mail to be sorted in a tray. She would generally spend roughly two hours sorting

15 outgoing mail. Once the incoming mail arrived, she would then spend the rest of her day sorting
16 and inspecting the incoming mail. She would scoot a bucket of incoming mail that weighed
17 roughly 50 pounds from the center of the room to her work station for sorting, a distance of
18 roughly 10 feet. She spent the entire time standing, bending to pick up pieces of mail and then
19 putting them in the appropriate mailboxes. She constantly had to bend, kneel, stoop, and reach to
20 place mail in the appropriate mailboxes.

21 Additionally, the evidence does not support the administrative law judge's holding that
22 respondent's automatic resignation was not the result of her disabling conditions. The proposed
23 decision states, "There was no persuasive evidence in the instant hearing or at the DPA hearing
24 that appellant's failure to obtain leave or to return to work was caused by a disabling medical
25 condition." (Proposed Decision, pg. 10, ¶ 30.) However, it is uncontested that respondent
26 sustained industrial injuries for which she was being treated and that she continued to experience
27 pain related to these injuries. The proposed decision states, "On November 24, 2004, respondent
28 left work complaining of severe pain in her right shoulder that radiated into her neck and lower
back. Her supervisor, Ronda Holtorf, told her not to return to work until she saw her doctor...."

1 (Proposed Decision, pg. 2, ¶ 5.) The evidence clearly established that respondent stopped
 2 working due to the pain caused by her industrial injuries. Thus, her automatic resignation was
 3 caused by the disabling conditions which she is claiming as the basis for her disability retirement
 4 and should not bar her from applying for such retirement.

5 Whether respondent complied with the procedures for timely providing a doctor's note
 6 may have been relevant to the proceedings regarding her resignation, but it is not relevant to this
 7 proceeding and the determination of whether she ceased working due to her disability. As noted
 8 above, in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292,
 9 1370-71, the court implicitly recognized that an employee could properly file an application for
 10 disability retirement *even after* termination if "the termination for cause was due to behavior
 11 caused by a physical or mental condition." The question then is solely whether the termination
 12 was due to behavior caused by a physical or mental condition. Whether the termination for
 13 cause was proper or justified is not relevant. Here, respondent stopped working because of her
 14 physical conditions and was terminated for failing to show up for work. Respondent believed

15 ~~that she had followed the proper procedures regarding sick leave; however, if she failed to follow~~
 16 ~~the proper procedures it was likely due to cognitive issues as a result of her chronic pain and~~
 17 ~~stress from being forced to perform work that caused her pain.~~

18 **IV. CONCLUSION**

19 The Board of Administration of CalPERS should decline to adopt the proposed decision
 20 of the administrative law judge or, in the alternative, remand the matter for further proceedings.
 21 Respondent is not precluded from applying for disability retirement because her disabling
 22 condition caused her to no longer be able to work which ultimately led to her termination.

23 Dated: June 7, 2013

24 Respectfully submitted,
 25 LAW OFFICES OF ILJA CVETICH

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 27 _____
 28 JAMES TIEHM,
 Attorney for Respondent Debra Dougherty

In the Matter of Accepting the Application for Disability Retirement of: DEBRA DOUGHERTY
Case No.: 7216
OAH No.: 2006100452

PROOF OF SERVICE

I am over the age of 18 and not a party to this case. I am a citizen of the United States of America. I am employed by the Offices of Ilija Cvetich my business address is: 3465 American River Drive, Suite B, Sacramento, CA 95684.

On June 7, 2013, I served the attached document(s):

RESPONDENT'S ARGUMENT

I served the document BY CERTIFIED MAIL enclosing a true copy in a sealed envelope addressed to each person whose name and address is shown below and depositing the envelope in the United States mail with the postage fully prepaid.

I served the document BY PERSONAL DELIVERY by enclosing a true copy in an envelope clearly labeled to identify the attorney being served and leaving said envelope with an office employee.

I served the document VIA FACSIMILE to the facsimile machine maintained by each person whose facsimile machine telephone number as last given by that person on any document, which that person filed in the case and served on the firm's office.

Attached to this Proof of Service is a certificate of transmission, which contains the facsimile telephone number, date and time to which the document was transmitted.

Cheree Swedensky, Assistant to the Board
CalPERS Executive Office
P.O. Box 942701
Sacramento, CA 94229
Fax: (916) 795-3972

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 7, 2013

By: *A. Thobhani*
ANISA THOBHANI