

ATTACHMENT E
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:

DEBRA L. DOUGHERTY,

Applicant/Respondent.

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION
(MULE CREEK STATE PRISON),

Respondent.

OAH No. 2006100452

PROPOSED DECISION

On March 27, 2013, Ann Elizabeth Sarli, Administrative Law Judge (ALJ) of the Office of Administrative Hearings, State of California, heard this matter in Sacramento, California.

Complainant, California Public Employees' Retirement System (CalPERS), was represented by Wesley Kennady, Senior Staff Attorney.

Applicant Debra A. Dougherty was represented by James Tiehm, Attorney at Law.

There was no appearance on behalf of California Department of Corrections and Rehabilitation, Mule Creek State Prison.¹

Evidence was received. The matter was submitted and the record was closed on March 27, 2013.

¹ The matter proceeded as a default against this respondent pursuant to Government Code section 11520.

FACTUAL FINDINGS

Background

1. Applicant is 50 years old. In December 1993, applicant was hired by the California Department of Corrections, Mule Creek State Prison (Mule Creek) as an office assistant. By virtue of this employment, applicant became a state industrial member of CalPERS, subject to California Government Code sections 21150 and 20048. Applicant worked at Mule Creek until 2004.
2. The duties of an office assistant are to perform a variety of general office work which may include typing, dictation, transcription, mail and document handling, document preparation and review, correspondence composition, statistical and other record keeping, cashiering and ordering and maintaining supplies and equipment.
3. Applicant maintained that on March 30, 2000, she sustained an injury to her right shoulder when a chair collapsed and she fell to the floor. Appellant maintained that on September 13, 2002, she sustained injuries to her neck, back and shoulders at work and on September 17, 2003, she sustained injuries to her upper extremities when she was punched in the shoulder by a coworker. On March 14, 2004 she sustained a psychiatric injury after a series of traumatic events at work. These events included repeated harassment by coworkers, causing her mental distress. Applicant filed worker's compensation claims in respect to these injuries.
4. Applicant was released to full duty by her treating physician, Michael B. Purnell, on April 5, 2004. On August 27, 2004, due to written medical restrictions prohibiting her from lifting more than 10 pounds, applicant was placed on modified duty. Mule Creek was able to permanently accommodate her by assigning her to work in the mailroom, where she sorted and re-routed mail and inspected it for checks or contraband. The job involved sitting at a computer, taking individual items of mail out of a bin, and looking up information on the computer to re-route the mail. The evidence is persuasive that there was no lifting required in this position.
5. On November 24, 2004, respondent 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. Respondent advised Ms. Holtorf that she had an appointment with Dr. Purnell on November 29.
6. Dr. Purnell saw appellant on November 29, 2004. In his "Primary Treating Physicians Progress Report" dated that day, Dr. Purnell noted that appellant was apprehensive to use her arm away from her body in certain positions, but that "it is important that she continue to try to use the arm as much as possible for normal daily activities." He wrote that if the restrictions that had been imposed were met, she could continue to work.

7. Dr. Purnell did not take applicant off work as a result of the November 29, 2004, visit. Applicant, though, did not return to work. She called Ms. Holtorf and told her that if she came back to work and was required to do the duty she was currently assigned, she would have to be sent home. Ms. Holtorf asked appellant to provide a doctor's note which documented that she could not perform her current duties and listed any new restrictions. Appellant told Ms. Holtorf that Dr. Purnell was dictating this information and it would be sent to the Return to Work Coordinator. The employer never received a note from Dr. Purnell taking appellant off work, and she has not provided such a note to her provider. Dr. Purnell's Work Status Report for November 29, 2004 states that appellant's restrictions were the same as those in his previous note [8/27/ 2004].

8. It was the usual and customary practice at Mule Creek that employees who had not previously received approval for leave, based on a physician's note, were to call their supervisor each day of their absence. Appellant had leave to be absent on November 29, 2004. She did not call in to request leave on any of the remaining work days in November. Nor did she call in to request leave in December.

9. On December 2, 2004, appellant called Ms. Holtorf and then went into her office to pick up her paycheck and her personal items. She gave Ms. Holtorf a copy of Dr. Purcell's Work Status Report for November 29, 2004. On December 3, Margaret Holsteine, CDCR Personnel Officer and Return to Work Coordinator, spoke with appellant and discussed a doctor's note which added work restrictions to those that were in effect on November 29. Ms. Holsteine told appellant that Mule Creek could accommodate the restrictions in the new doctor's note and that she was "off work on her own time." In response, appellant told Ms. Holstein that the doctor was sending in additional restrictions.

10. On December 9, 2004, appellant received a December 7, 2004 "Warning Letter" from Mule Creek. The letter informed her that she had not made contact with her supervisor or the Return to Work Coordinator regarding her absence and that Mule Creek had not received any documentation from her doctor excusing her from work. The letter warned appellant that if she did not resign, return to work, or obtain approval for her absences, she would be automatically resigned. Appellant did not respond to the letter.

11. On December 13, 2004, appellant called Ms. Holsteine and told her that her doctor had advised her not to return to work. Ms. Holsteine told appellant she did not have a note saying appellant could not work. Appellant told her that Dr. Purcell would not put that statement in a note. Ms. Holsteine asked appellant to return to work and told her she would be separated if she did not return to work. In response, appellant told Ms. Holsteine she was going to call her doctor and her attorney.

12. By letter dated December 13, 2004, appellant was notified that she was being "automatically resigned" from her position pursuant to Government Code section 19996.2. Government Code Section 19996.2 provides in pertinent part:

(a) Absence without leave, whether voluntary or

involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked....

Reinstatement may be granted only if the employee makes a satisfactory explanation to the department as to the cause of his or her absence and his or her failure to obtain leave therefore, and the department finds that he or she is ready, able, and willing to resume the discharge of the duties of his or her position or, if not, that he or she has obtained the consent of his or her appointing power to a leave of absence to commence upon reinstatement....

[¶...¶]

Government Code section 19996 provides in pertinent part:

The tenure of every permanent employee holding a position is during good behavior. Any such employee may be temporarily separated from the state civil service through layoff, leave of absence, or suspension, *permanently separated through resignation* or removal for cause, or permanently or temporarily separated through retirement or terminated for medical reasons under the provisions of Section 19253.5. (Italics added)

13. Appellant pursued her appeal rights from her “automatic resignation,” and a hearing was held before an Administrative Law Judge (ALJ) of the Department of Personnel Administration (DPA) on August 24, 2005, and September 27, 2005. Appellant was represented by counsel and testified at the hearing. The ALJ identified the issues at hearing as: Whether appellant had a valid excuse for being absent from work; whether she had a valid reason for not obtaining leave and whether she was ready and willing to return to work. Appellant’s burden of proof was the preponderance of the evidence.

14. The ALJ found that appellant failed to prove she had a valid reason for being absent. She failed to produce a doctor’s note showing a need to be absent from work. Her statements that she could not perform the duties assigned to her immediately preceding her absence were unsubstantiated. Her statements that her doctor excused her from work based on Mule Creek’s failure to accommodate her restrictions were unsubstantiated. Mule Creek had not been presented with any restrictions, other than those in existence at the time appellant failed to return to work. The ALJ also found that appellant failed to report to work after she was informed that Mule Creek could accommodate any restrictions that were presented.

15. The ALJ also found that appellant failed to prove that she had a valid reason for not obtaining leave. Although she assured Mule Creek that she would be providing a doctor’s note validating her absence and providing even additional work restrictions, she

failed to produce such information. Because she did not provide a doctors' note excusing her absence, she was required to call her supervisor each day of her absence. She failed to follow this standard procedure. The ALJ found that appellant's testimony that any request for leave would have been denied was not persuasive and was not supported by the evidence. The ALJ found appellant's testimony that she was communicating with Mule Creek Staff about her absence was not persuasive or supported by the evidence.

16. The ALJ's Proposed Decision was adopted by DPA and appellant was not reinstated to employment with Mule Creek. Ms. Holsteine testified persuasively that due to appellant's termination pursuant to Government Code section 19996.2, she was permanently prevented from returning to work at the California Department of Corrections and Rehabilitation.

17. On December 29, 2004, respondent signed a Disability Retirement Election Application (Application) on the basis of a right shoulder injury in 2000 and two assaults in 2003. She stated her limitations were "no repetitive motions and I become so sore that I need to take pain pills while on the job." She noted she was currently working on modified duty that her "Dr. discourages returning to MCSP [Mule Creek]." CalPERS denied the application on February 27, 2006, pursuant to *Haywood vs. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292, on the ground respondent was terminated for cause and the discharge was not the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement.

18. Appellant timely appealed the denial of her application. Donna Ramellum, CalPERS Chief Benefit Services Division, made and filed a Statement of Issues on October 16, 2006, in her official capacity. The matter was heard before an Administrative Law Judge of the Office of Administrative Hearings, an independent adjudicative agency, pursuant to Government Code section 11500 et seq.

Applicant's Testimony

19. The ALJ's findings in the DPA matter are binding upon appellant and she is collaterally estopped from disputing them. Appellant provided additional information at the instant hearing regarding the reasons she did not return to work after meeting with Dr. Purnell on November 29, 2004. She testified that she did not return to work after November 29, 2004, even after she got the "AWOL letter" because she was "physically and mentally unable to do anything." "Physically I was sore and because of the assaults I had mental issues and started bawling when I approached work... They would all play head games... and I felt I got the bad end of the deal." She testified, as she did in the DPA hearing, that she was not being accommodated before November 29 and she believed she was not going to be accommodated thereafter. She testified that Dr. Purnell told her on November 29 that she should disability retire and that she intended to disability retire because Mule Creek was not accommodating her restrictions.

20. Appellant's testimony that she was not being accommodated on November 29 was vague and unpersuasive, particularly in light of Ms. Holsteine's persuasive testimony that she had been permanently assigned a job sorting mail to accommodate her 10 pound lifting limitation. It is also clear that appellant was not happy with this assignment. Appellant volunteered at hearing that she objected to this job assignment because "I felt I was being reprimanded because of the assaults and they changed me from the package area and made me sort the mail and sit at a computer looking everything up. I felt I was being reprimanded because I was not being quiet about the assault... towards the end, they had me doing it all day."

Issue

21. The issue at hearing is whether appellant is precluded from filing an application for disability retirement, because she had been "automatically resigned" from her position pursuant to Government Code section 19996.2, and did not meet the exceptions set forth *Haywood vs. American River Fire Protection District* (1998) 67 Cal. App. 4th 1292 [*Haywood*]. Appellant maintains that *Haywood* does not apply to automatic resignations and that even if *Haywood* was to apply, appellant's discharge was the ultimate result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement.

Application of Haywood and Smith

22. In *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, (3rd Dist.) the appellate court found: "Where an employee is terminated 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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." The court explained that: "A firing for cause constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled ... The disability provisions of the PERS law contemplate a potential return to active service and a terminated employee cannot be returned to active service." (*Id.* at 1306-1307.)

23. The *Haywood* court held:

Because faithful performance of duty is an implied condition of employment, (citing cases), an employee's unwillingness to faithfully discharge his duties is ample cause to terminate employment. Thus, there is an obvious distinction between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling

employee in order to maintain the standards of public service (citing cases)...This unable/unwilling dichotomy, and the role of disability retirement in addressing only the unable-to-work prong, is apparent in the PERS law. For example, while nothing in the PERS law restricts an employer's right to fire an unwilling employee, the Legislature has precluded an employer from terminating an employee because of medical disability if the employee would be otherwise eligible for disability retirement (citing statute). In such a case, the employer must instead apply for the disability retirement of the employee. In addition, while termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship, (citing statute), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues, (citing statute). And an employee on disability retirement may apply for reinstatement on the ground of recovery. If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates, (citing statute).

Id., at 1304-1305

24. The *Haywood* court also noted that its decision was consistent with two analogous workers' compensation system cases that held that where an employment relationship has been terminated by resignation, an award under Labor Code section 4850 is precluded. *Haywood, supra*, 67 Cal.App.4th at pp. 1307-1308.

25. More recently, the court in *Smith vs. City of Napa* (2004) 120 Cal App.4th 194 [*Smith*], also a Third District case, enlarged on the holding in *Haywood*. The *Smith* court held that dismissal for cause extinguishes the right to disability retirement, except if a plaintiff were able to prove that the right to disability retirement matured before the date of the event giving cause to dismiss; the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. *Id.* at 206. The court identified the key issue as whether the right to the disability retirement matures before the date of separation from service. It found that a vested right matures when there is an unconditional right to immediate payment. And, in the case of CalPERS disability retirement, there is no unconditional right to immediate payment without a finding by CalPERS that there is a right to a disability retirement pension. (*Ibid.*)

26. In *Smith*, the court pointed out that in its *Haywood* ruling

We took pains to exclude from our holding in *Haywood* a party otherwise entitled to a disability retirement before a dismissal for cause.... The distinction with which we were concerned is between employees dismissed for cause and employees unable to work because of a medical disability.... We repeatedly cautioned that our holding would not apply where the cause for dismissal was the result of a disabling medical condition, or where the dismissal would be 'preemptive of an otherwise valid claim for disability retirement.' This caveat flows from a public agency's obligation to apply for a disability retirement on behalf of disabled employees rather than seek to dismiss them directly on the basis of the disability (citing *Haywood*) or indirectly through cause based on the disability Our use of the term 'preempt' admittedly could lead one to the interpretation that both defendants have embraced: an intent to thwart an otherwise valid claim for disability. However, as the plaintiff has correctly attempted to argue throughout the CalPERS proceedings, even if an agency dismisses an employee *solely* for a cause *unrelated* to a disabling medical condition, this cannot result in the forfeiture of a matured right to a pension absent express legislative direction to that effect ... Thus, if a plaintiff were able to prove that the right to a disability retirement matured before the date of the event giving cause to dismiss, the dismissal cannot preempt the right to receive a disability pension for the duration of the disability. .. Conversely, the right may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures.... In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

(*Id.* at 205- 206.)

Conceivably, there may be facts under which a court, applying principles of equity, will deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause. This case does not present facts on which to explore the outer limits of maturity, however. It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather, he did not even initiate the process until after giving cause for his dismissal. Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on

his claim would have been a foregone conclusion (as perhaps with a loss of limb). At best, the record contains medical opinions of a permanent disability for purposes of the prior and pending workers' compensation claims. But a workers' compensation ruling is not binding on the issue of eligibility for disability retirement because the focus of the issues and the parties is different. And for purposes of the standard for a disability retirement, the plaintiff's medical evidence is not unequivocal.

(*Id.* at 206-207.)

The defendants would have a basis for litigating whether this evidence demonstrated a substantial inability to perform his duties or instead showed only discomfort making it difficult to perform his duties, which is insufficient. (*Hosford v. Board of Administration* (1978) 77 Cal.App.3d 854, 862, 143 Cal.Rptr. 760; *Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 877, 86 Cal.Rptr. 450; *In re Keck* (2000) CalPERS Precedential Bd. Dec. No. 00-05, pp. 12-14.) Thus, an *entitlement* to a disability retirement cannot rest on the medical evidence of the plaintiff.

(*Id.* at 207 FN 13.)

27. The evidence is persuasive here that appellant willfully failed to return to work after November 29, 2004, willfully failed to request leave and that appellant was unwilling to return to work at a job that met her work restrictions. The evidence is persuasive that applicant's "automatic resignation" under Government Code section 19996.2 was equivalent to a termination for cause from employment in that she was terminated for her conduct (absent for five consecutive working days without leave) and is permanently precluded from reinstatement by her employer.

28. Appellant maintains, as she did in her DPA appeal, that her "automatic resignation" was a retaliatory action her employer took against her for filing four worker's compensation claims, and particularly for reporting that she had been punched in the shoulder. The DPA ALJ found that appellant failed to provide good cause for her failure to come to work for more than five work days or to secure leave (or even to ask for leave) and that appellant was subject to the automatic resignation statute for these reasons. This finding precludes a finding that the automatic resignation was retaliatory. In addition, appellant produced no evidence in support of her argument of retaliation, at the DPA hearing or at the instant hearing.

29. Appellant maintains that the employer's use of the "automatic resignation" statute was preemptive of her otherwise valid claim for disability retirement. However, at

the time of her termination, appellant did not have a matured right to a disability pension, as that right is articulated in *Haywood* and *Smith*. She had not even filed an application for disability retirement and had simply been thinking about it and perhaps telling others that she was going to file for disability retirement.

30. Appellant maintains that her termination arose from her disabling medical condition. She maintains that she stopped working because her employer was not accommodating her restrictions and she was in pain. She maintains that her employer knew she had stopped working due to disability and took advantage of the "automatic resignation" statute to terminate her because she was not able to produce a doctor's note recommending that she be placed on leave. Essentially, appellant's claim is that she meets the exception in *Haywood* in that her discharge was the ultimate result of a disabling medical condition. Appellant was not persuasive. There was no persuasive evidence in the instant hearing or at the DPA hearing that appellant's failure to obtain leave or to return to work was caused by a disabling medical condition. Rather, the evidence was that she chose not to return to work or to request leave.

LEGAL CONCLUSIONS

1. Government Code section 21152 provides in pertinent part:

Application to the board of retirement of a member for disability may be made by:

[¶...¶]

(d) The member or any person in his or her behalf.

[¶...¶]

2. Government Code section 21154 provides in pertinent part:

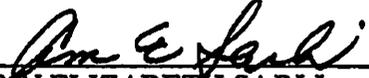
The application shall be made only (a) while the member is in state service, or (b) ... or (c) within four months of discontinuance of state service of the member, or while on an approved leave of absence, or (d) while the member is physically or mentally incapacitated to perform duties from the date of discontinuance of state service to the time of application or motion... On receipt of an application for disability retirement of a member... the board shall, or of its own motion it may, order a medical examination of the member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty....

3. As set forth in the Findings, Applicant's application for disability retirement is precluded by the holding in *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. Applicant's "automatic resignation" extinguished her right to file a Disability Retirement Election Application.

ORDER

CalPERS's determination that applicant may not file a Disability Retirement Election Application is Affirmed.

DATED: May 9, 2013


ANN ELIZABETH SARLI
Administrative Law Judge
Office of Administrative Hearings