

**ATTACHMENT C**  
**RESPONDENT'S ARGUMENT**

**Attachment C**

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6  
 7 **BOARD OF ADMINISTRATION**  
**CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM**  
 8

9 In the Matter of the Reinstatement from  
 10 Industrial Disability Retirement of:

Case No. 2014-0585

11 JOSEPHINE OKWU,

OAH No. 2015010373

12 Respondent

**RESPONDENT JOSEPHINE OKWU'S  
 ARGUMENT**

13 vs.

14 CALIFORNIA DEPARTMENT OF  
 TRANSPORTATION

15 Respondent.  
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 19 Respondent, JOSEPHINE OKWU, herewith submits this RESPONDENT'S ARGUMENT.  
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**I.  
ARGUMENT**

First, it should be noted the Administrative Law Judge, ruled in his Orders on CalPERS' motions in limine that Ms. Okwu, "is not precluded from introducing testimony or documentary evidence that she could perform her former duties with reasonable accommodation. See Order, attached hereto as Exhibit A. However, the proposed decision by Judge Washington did NOT address the reasonable accommodation.

Second, Okwu put one testimony by her current treating physician Dr. Heifeng Yu, that she is fit to return to work. He testified that she has no medical episodes since 2009, and has been consistently taking her medications. She has engaged in volunteer and other "light" work since 2007.

Okwu further offered into evidence [and had admitted into evidence], a series of letters and notes from additional doctors who opined that she was fit to return to work.

The administrative law judge seemed to completely disregard these opinions.

While she has remained episode free since 2009, CalPER's independent medical examiner Dr. Damon Walcott opined in part that her risk of having another episode was "virtually 100 percent." This creates an unfair, illogical "catch-22" for Okwu: if she takes her medications, and has not suffered episodes for 5 or 6 years, it is somehow almost certain that she will have another, more severe episode at some point in the future, and she is deemed unfit to return to

1 work. But, if she does not her medications, and still suffers episodes, she is also deemed unfit to  
2 return to work.

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4 Though it is admittedly not likely that Okwu will ever be clear of her medical conditions, she has  
5 certainly shown improvement over the years, and a willingness/eagerness to return to her work.  
6 She should be allowed to do so. The fact that she "could" have another episode sometimes in the  
7 unspecified future is no basis for denying her the opportunity to return to her position at  
8 CalTrans.

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12 Respectfully submitted,

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Dated: December 7, 2015

14  
15 Herman Franck, Esq.  
16 Elizabeth Betowski, Esq.  
Attorney for Josephine Okwu

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

In the Matter of the Application for Reinstatement  
from Disability Retirement of:

JOSEPHINE OKWU,

Applicant/Respondent,

and

DEPARTMENT OF TRANSPORTATION

Employer/Respondent.

OAH No. 2015010373

**ORDERS RE: CalPERS' IN  
LIMINE MOTIONS AND  
RESPONDENT OKWU'S EXPERT  
WITNESS**

This matter is set for hearing on August 31 through September 3, 2015, in Sacramento, California, before Ed Washington, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California.

D. Gregory Valenza, Attorney at Law, represents the California Public Employees' Retirement System (CalPERS).

Staff Counsel Navtej S. Bassi represents the California Department of Transportation (CalTrans).

Herman Franck and Elizabeth Betowski, Attorneys at Law, represent applicant Josephine Okwu.

Petitioner, CalPERS filed five in limine motions on or about July 8, 2015. Respondent Okwu filed an opposition to these motions on July 21, 2015. Pursuant to the Prehearing Conference Order and Notice of Oral Argument issued on August 5, 2015, oral argument on each of these motions occurred on August 10, 2015. The rulings are set forth below. In addition, an order regarding respondent Okwu's expert witness is set forth below.

CalPERS's Motion to Exclude Evidence Concerning Reasonable Accommodations.

CalPERS requests that respondent Okwu be precluded from introducing testimony or documentary evidence that CalPERS or CalTrans: (1) "must provide her with reasonable accommodations (2) or have violated any law requiring that reasonable accommodations be provided."; CalPERS also requests that respondent Okwu be precluded from offering any evidence that she could perform her former duties with reasonable accommodations.

Respondent is currently on disability retirement. She seeks reinstatement to her former position as an Accounting Officer with CalTrans. The authority of OAH to preside over this hearing stems from Ms. Okwu's appeal, pursuant to California Code of Regulations, title 2, section 555.1, from CalPERS' February 2, 2014 determination that she remains substantially incapacitated for the performance of her Accounting Officer job duties.

The Public Employees' Retirement Law governs disability retirement and reinstatements and grants sole jurisdiction to CalPERS to make such determinations. (Willie Starnes (January 2000) CalPERS Precedential Decision No. 99-03, citing Gov. Code §§, 20026, 20125, 21150, 21154, 21156, 21190, 21192 and 21193.)

California Code of Regulations, title 2, section 555, provides, in pertinent part:

The Executive Officer [of CalPERS] is hereby authorized to act: on any application for ... retirement for disability or service ... to cause medical examination of retired persons; and to reinstate such persons from retirement upon his determination that disability does not exist. ...

California Code of Regulations, title 2, section 555.1, provides, in pertinent part:

Any applicant dissatisfied with the action of the Executive Officer on his application, other than his referral of the matter for hearing, may appeal such action to the Board by filing a written notice of such appeal ...

California Code of Regulations, title 2, section 555.2, provides, in pertinent part:

Any applicant filing an appeal shall be entitled to a hearing, and upon the filing of an appeal in accordance with these rules ... the Executive Officer shall execute a statement of issues. ...

California Code of Regulations, title 2, section 555.4, provides, in pertinent part:

All hearings shall be conducted in accordance with the provisions of Chapter 5 [sections 11500 through 11530], Part 1, Division 3, Title 2 of the Government Code. ...

California Government Code section 11504, provides, in pertinent part:

A hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing and, in addition, any particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought. . . .

Accordingly, the jurisdiction of OAH in this matter is limited to the statutes and rules specified in the statement of issues and any particular matters that have come to the attention of respondent Okwu that would authorize overturning CalPERS' denial of her request for reinstatement.

Evidence concerning Ms. Okwu's contention that CalPERS or CalTrans must provide her with reasonable accommodations is beyond the scope of the statutes and rules specified within the statement of issues and is not a matter that would support overturning CalPERS' determination. The sole issue for determination is whether Ms. Okwu remains substantially incapacitated for the performance of her former duties as an Accounting Officer for CalTrans, irrespective of whether CalPERS or CalTrans has an obligation to provide her with reasonable accommodations. Similarly, any evidence that CalPERS or CalTrans may have violated any laws requiring that reasonable accommodations be provided is also beyond the scope of this hearing.

Ms. Okwu is not precluded from introducing testimony or documentary evidence that she could perform her former duties with reasonable accommodations. As the sole issue for determination is whether Ms. Okwu remains substantially incapacitated for the performance of her former job duties, evidence of reasonable accommodations that would permit her to substantially perform her former job duties relates to the ultimate determination in this action.

Consequently, CalPERS's requests that respondent Okwu be precluded from offering evidence of whether CalPERS or CalTrans must provide her with reasonable accommodations or whether they violated any laws requiring reasonable accommodations are GRANTED. CalPERS's request that respondent Okwu be precluded from offering evidence of whether she can substantially perform her usual Accounting Officer job duties with reasonable accommodations is DENIED.

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*CalPERS' Motion to Exclude the Testimony of Marylin Keller.*

Respondent Okwu identified Marylin Keller as a witness she intends to call at hearing in response to CalPERS' discovery demand, and in her Prehearing Conference Statement, dated July 21, 2015. Ms. Okwu did not identify Ms. Keller as a witness in her Amended Prehearing Conference Statement, dated July 30, 2015. Ms. Keller was a Retirement Program Specialist for CalPERS in 2012. In February 2012, she sent a letter to respondent Okwu on behalf of CalPERS advising her they received her November 28, 2011 application for reinstatement from disability retirement and would not be processing it until the litigation related to her 2005 application for reinstatement was resolved. CalPERS ultimately agreed to process the November 2011 application. Ms. Keller was not involved in the February 2014 denial of Ms. Okwu's August 2013 application for reinstatement and has no knowledge of Ms. Okwu's current level of incapacitation, if any.

CalPERS' motion to exclude the testimony of Marylin Keller is GRANTED.

*CalPERS' Motion to Exclude the Testimony of Donna Ramel Lum.*

Respondent Okwu identified Donna Ramel Lum as a witness she intends to call at hearing in response to CalPERS' discovery demand, and in her Prehearing Conference Statement, dated July 21, 2015. Ms. Okwu did not identify Ms. Lum as a witness in her Amended Prehearing Conference Statement, dated July 30, 2015. Ms. Lum was the Assistant Executive Officer for CalPERS in 2008. Ms. Lum sent a letter to Ms. Okwu in April 2008 specifying that CalPERS had reconsidered its decision to reinstate her from disability retirement in April 2006, and determined that she remained substantially incapacitated for the performance of her job duties of an Accounting Officer for CalTrans.

This April 2008 denial of Ms. Okwu's application for reinstatement was fully litigated in an administrative hearing before Judge Stephen A. Smith in September and November 2008. Ms. Lum was not involved in the February 2014 denial of Ms. Okwu's August 2013 application for reinstatement and has no knowledge of Ms. Okwu's current level of incapacitation, if any.

CalPERS' motion to exclude the testimony of Donna Ramel Lum is GRANTED.

*CalPERS' Motion to Exclude the Testimony of Tina Bowers.*

Respondent Okwu identified Tina Bowers as a witness she intends to call at hearing in response to CalPERS' discovery demand, and in her Prehearing Conference Statement, dated July 21, 2015. Ms. Okwu did not identify Ms. Bowers as a witness in her Amended Prehearing Conference Statement, dated July 30, 2015. Ms. Bowers was a Retirement Programs Specialist for CalPERS in 2006. In April 2006, Ms. Bowers sent a letter to Ms.

Okwu on behalf of CalPERS informing her that her that her application for reinstatement had been approved. Ms. Lum, the Assistant Executive Officer for CalPERS, sent a letter to Ms. Okwu in April 2008, on behalf of CalPERS, informing Ms. Okwu that CalPERS had reconsidered its decision to reinstate her from disability retirement and determined that she remained substantially incapacitated for the performance of her job duties of an Accounting Officer for CalTrans.

This April 2008 denial of Ms. Okwu's application for reinstatement was fully litigated in an administrative hearing before Judge Stephen A. Smith in September and November 2008. Ms. Bowers was not involved in the February 2014 denial of Ms. Okwu's August 2013 application for reinstatement and has no knowledge of Ms. Okwu's current level of incapacitation, if any.

CalPERS' motion to exclude the testimony of Tina Bowers is GRANTED.

*CalPERS' Motion to Exclude Irrelevant Documentary Evidence.*

CalPERS requests an order precluding Ms. Okwu from presenting evidence or making statements regarding the following documents, previously identified by Ms. Okwu as documents she intends to introduce at hearing:

1. Order Granting Motions to Dismiss in Okwu v. McKim et al., United States District Court, Eastern District of California Case No. 2:1 0-CV-00653-GEB-KSM.
2. Judgment in Okwu v. McKim et al., United States District Court, Eastern District of California Case No. 2:1 0-CV-00653-GEB-KSM.
3. Transcript of Hearing on Motions to Dismiss in Okwu v. McKim et al., United States District Court, Eastern District of California Case No. 2:1 0-CV-00653-GEB-KSM.
4. February 19, 2010 Notice of Right to Sue sent by US Department of Justice.
5. June 12, 2012 Ninth Circuit Court of Appeals Order Affirming Judgment of the District Court.
6. July 27, 2012 Ninth Circuit Court of Appeals Order Denying Petition for Rehearing and Rehearing en banc.
7. Settlement of the SPB action dated July 9, 2003.
8. Complaint in Okwu v. CalPERS et al, Sacramento Action No. 34-2012-00131656.
9. May 9, 2012 Minute Order Sustaining Demurrer by CalPERS in Sacramento Action No. 34-2012-00131656.

Tuesday 11 of Aug 2015, Faxination

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10. May 9, 2012 Minute Order Sustaining Demurrer by CalPERS in Sacramento Action  
No. 34-2012-00131656.

Each of these documents relate to claims filed in federal and state court that have no bearing on whether Ms. Okwu is currently substantially incapacitated for the performance of her former job duties as an Accounting Officer for CalTrans.

CalPERS' motion to exclude the aforementioned documentary evidence is  
GRANTED.

*Order that Respondent Serve Expert's Curriculum Vitae or Resume*

No later than 5:00 p.m. on August 11, 2015, Respondent Okwu shall file with OAH, with copies served simultaneously upon all parties, the curriculum vitae or resume of her designated expert, Haipeng Yu, M.D. Failure to file and serve the curriculum vitae or resume by August 11, 2015, may result in an order excluding Dr. Yu from testifying in this matter.

DATED: August 11, 2015



ED WASHINGTON  
Administrative Law Judge  
Office of Administrative Hearings

**DECLARATION OF SERVICE**Case Name: Okwu, Josephine

OAH No.: 2015010373

I, Poh-Ling Oon, declare as follows: I am over 18 years of age and am not a party to this action. I am employed by the Office of Administrative Hearings. My business address is 2349 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833. On August 11, 2015, I served a copy of the following document(s) in the action entitled above:

**ORDERS RE: CALPERS' IN LIMINE MOTIONS AND RESPONDENT OKWU'S  
EXPERT WITNESS**

to each of the person(s) named below at the addresses listed after each name by the following method(s):

Shaw Valenza  
PERS  
Outside Counsel  
980 9th Street Suite 2300  
Sacramento, CA 95814  
Sent via fax 916-497-0708

Herman Franck  
1801 7TH Street, Suite 150  
Sacramento, CA 95811  
Sent via fax 916-447-0720

Navtej Bassi  
Department of Transportation  
1120 N Street  
P. O. Box 1438  
Sacramento, CA 95812-1438  
Sent via fax 916-654-6128

**Fax Transmission.** Based upon agreement of the parties to accept service by fax transmission, I personally transmitted the above-described document(s) to the person(s) at the fax number(s) listed above, from fax machine number (916) 376-6349, pursuant to Government Code section 11440.20 and California Code of Regulations, title 1, section 1008, subdivision (d).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This declaration was executed at Sacramento, California on August 11, 2015.

DocuSigned by:  
*Poh-Ling Oon*  
700089CFB74447E

Poh-Ling Oon, Declarant

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**PROOF OF SERVICE**

I, Elizabeth Betowski, declare as follows: That I am an adult over the age of 18, and reside in Sacramento, California, and am not a party to the present action. On the date signed below, I caused to be mailed by first class mail postage prepaid, the following documents:

1. Respondent Josephine Okwu's Argument

The above-listed document(s) were served on all parties by mailing them to the following addressees:

SHAW VALENCIA, LLP  
D. Gregory Valenza,  
Even Beecher  
980 Ninth Street, Suite 2300  
Sacramento, CA 95814  
Tel: 916-326-5150  
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*Attorney for CalPERS*

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Fax: 916-654-6128  
[navtej.bassi@dot.ca.gov](mailto:navtej.bassi@dot.ca.gov)

I declare under oath and under penalty of perjury that the foregoing is true and correct and that this Declaration was executed in Sacramento, California, on December 7, 2015.

  
Elizabeth Betowski