

**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:

STEPHANIE LYNN LAMB,

Respondent,

and

CITY OF MONTEREY,

Respondent.

Case No. 2015-0485

OAH No. 2015070140

**PROPOSED DECISION**

Administrative Law Judge Regina Brown, Office of Administrative Hearings, State of California, heard this matter on November 24, 2015, in Monterey, California.

Preet Kaur, Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

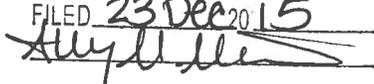
Respondent Stephanie Lynn Lamb represented herself at hearing.

No appearance was made by or on behalf of respondent City of Monterey.

The record was closed and the matter submitted for decision on November 24, 2015.

**ISSUE**

Whether respondent Stephanie Lynn Lamb is precluded from filing an application for disability retirement with CalPERS after being served with a notice of release from probation from her job with the City of Monterey.

CALIFORNIA PUBLIC EMPLOYEES'  
RETIREMENT SYSTEM  
FILED 23 Dec 2015  


## FACTUAL FINDINGS

### *Factual Background*

1. Respondent began her employment as a police services technician with the City of Monterey Police Department on October 17, 2011. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code sections 21152 and 21154. Prior to this, respondent worked for the City of Modesto, effective May 20, 2006.

2. Respondent's initial 12-month probationary period with the City of Monterey was from October 17, 2011 through October 16, 2012. On April 5, 2012, she suffered an injury to her left knee while in a defensive tactics training exercise. She filed a workers' compensation claim and was placed on light duty. Respondent completed approximately 10 months of her probation. On August 7, 2012, Lieutenant Leslie F. Sonne with the Monterey Police Department recommended to the police chief that respondent be released from probation. Sonne and other police records/detention supervisors agreed that respondent would not be able to improve in the areas where she was deficient to an acceptable standard in the amount of time left on her probation.

3. On August 24, 2012, respondent had surgery on her left knee and was placed on a leave of absence for temporary disability. Per Section 25-10.03 of the city's personnel rules, an employee's probationary period may be extended a corresponding length of time, at the discretion of the Human Resources Director, when an employee has been absent from work in excess of 20 cumulative workdays during the probationary period. Because it was unknown how long it would take respondent to recover, her probationary period was extended to equal the length of time between her surgery and her return to full unrestricted duty.

4. On February 13, 2014, respondent was released to return to full unrestricted duty. On February 21, 2014, her probationary period was extended and scheduled to end on April 7, 2014. On April 2, 2014, respondent was notified that her probationary period would be further extended and end on May 30, 2014. The Chief of Police, in a memorandum to respondent, wrote the following:

I have reviewed your time at work during your probationary period, specifically the time you were at work and evaluated by Department training staff. During the first Core Course, you were not evaluated by Department staff for approximately 22 days. While away at the current Core Course, you were again not evaluated by Department staff for an additional 31 days. This equals a total of 53 days, or approximately 15% of your probationary period. While your probationary period was tolled while you were out on temporary disability leave, the time spent away at Core Course was not. As a result, I am extending your

probationary period an additional 53 days from the scheduled end of your probationary period so the Department can fully evaluate your performance and give you an opportunity to demonstrate your capabilities.

5. On April 16, 2014, Lt. Sonne again recommended that respondent be released from probation. According to Lt. Sonne, respondent continued to have deficiencies and she had been involved in a significant incident involving an inmate in the jail. In particular, he wrote that respondent has “issues with attention to detail, responding to training, retaining training, command[ing] presence and most importantly with officer safety.” On April 17, 2014, respondent was served with a Notice of Release from Probation (Notice) due to her failure to satisfactorily complete the probationary period. The evidence did not establish whether respondent had any right to appeal the Notice as a probationary employee. Her last day on the job was April 17, 2014.

6. On September 4, 2014, CalPERS received respondent’s application for service pending disability retirement. She claimed disability on the basis of an orthopedic (left knee) condition. According to respondent, her limitations are that she cannot bend, kneel, squat or stoop and this affects her ability to work in the jail.

7. On March 5, 2015, Diane Alsup, Interim Chief of the Benefit Services Division of CalPERS, wrote a letter to respondent canceling her application for disability retirement. Alsup wrote, in pertinent part:

Following a review of your application and file, it has been determined that the facts of your case fit within the *Haywood* [*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292] case. You were dismissed from employment for reasons which were not the result of a disabling medical condition. Additionally, the dismissal does not appear to be for the purpose of preventing a claim for disability retirement. Therefore, under the *Haywood* case, you are not eligible for disability retirement. For that reason, CalPERS cannot accept this application for disability retirement.

The application has been canceled. You will not be eligible to apply for disability retirement in the future unless you return to work for a CalPERS-covered employer and subsequently become unable to perform your job duties because of a physical or mental condition.

8. Respondent timely appealed CalPERS’s cancellation of her application for disability retirement.

9. Anthony Suine, acting in his official capacity as Chief of the Benefit Services Division of CalPERS, signed the Statement of Issues in this matter.

10. At hearing, Debbie Jones, Benefits Manager for the City of Monterey, stated that the purpose of probation is to observe a probationary employee's performance and an extension of probation can give an employee an opportunity to demonstrate adequate performance. However, a probationary employee can be released from probation with or without cause.

According to Jones, the issues with respondent's work performance had been brought to respondent's attention in February 2012, before she sustained her knee injury in April 2012. These issues continued when she returned to work in February 2014. Because respondent was released from probation for cause, she cannot be reinstated for employment into her position with the City of Monterey.

*Application of Haywood, Smith, and Vandergoot*

11. CalPERS contends that this matter is controlled by the appellate decisions in *Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th 1292 (*Haywood*), and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*). According to CalPERS, these decisions support its conclusion that severance of respondent's employment relationship with the City of Monterey rendered her ineligible to apply for industrial disability retirement benefits.

12. In *Haywood*, the employee "was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the [employer]." (*Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th at p. 1295.) The appellate court concluded that the employee was not entitled to disability retirement, stating the following:

As we shall explain, there is an obvious distinction in public employment retirement laws 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. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential

reinstatement of that relationship if the employee recovers and no longer is disabled. . . .

Haywood's firing for cause 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 no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District's authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside determination through the grievance process.

It follows that where, as here, 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.

(*Id.* at pp. 1296-1297; italics original; footnote omitted.)

13. In *Smith v. City of Napa, supra*, 120 Cal.App.4th 194, the same court reiterated the principles of the *Haywood* decision. The court further explained that a disability claim must have “matured” in order to find that a disciplinary action preempts the right to receive a disability retirement pension, and this maturation did not occur at the time of the injury, but rather when the pension board determined that the employee was no longer capable of performing his duties. (*Id.* at p. 206.) The *Smith* court further allowed consideration of equitable principles to “deem an employee's right to a disability retirement to be matured and thus survive a dismissal for cause.” (*Id.* at p. 207.)

14. Also, CalPERS' contends that the decision in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (Precedential Decision 13-01, OAH No. 2012050989) (*Vandergoot*) provides further clarification of *Haywood*. The decision in *Vandergoot* concluded that the principles of the *Haywood* decision apply when a member's termination for cause is withdrawn in exchange for his resignation and permanent waiver of future reinstatement. In *Vandergoot*, the employee applied for industrial disability retirement after he had been served with a Notice of Adverse Action, but before he appealed the termination to the State Personnel Board. While his appeal was pending before the State Personnel Board, the employee and his employer reached a settlement agreement, whereby

the employer agreed to withdraw the Notice of Adverse Action in exchange for the employee's agreement to resign and not to seek, transfer to, apply for, or accept any employment in any capacity with his employer at any time in the future. CalPERS determined that Vandergoot was ineligible for disability retirement because he was terminated for cause and the termination was neither the ultimate result of a disabling medical condition nor preemptive in any otherwise valid claim for disability retirement.

#### *Respondent's Evidence*

15. Respondent contends that the City of Monterey retaliated against her because she filed a workers' compensation claim. Initially, she was allowed to work on light duty until August 24, 2012, when she had her first surgery. She states that she was treated differently because other employees were allowed to work on light duty, but she was prohibited from returning to work until she was released to full duty in February 2014.

Respondent also states that one week before her surgery, she had received less than average performance scores. However, she later admitted that some work performance issues had been brought to her attention earlier than that. Respondent also contends that when she was required to complete the second academy [Core Course] in mid-March, her probationary period was improperly extended to cover the times that she attended both academies. Moreover, if her probation had not been improperly extended, then she would not have been released on probation.

16. In or about October 2014, respondent filed a first amended complaint for damages in the Superior Court of California, County of Monterey, for discrimination, failure to accommodate, failure to engage in an interactive process, and retaliation. In or about July 2015, respondent and the City of Monterey entered into a settlement agreement and general release of all claims. The settlement agreement did not address whether respondent could seek reinstatement of her employment relationship with the City of Monterey.

17. According to respondent, in June 2014, Michele Maloney, Acting Human Resources Director, encouraged her to apply for disability retirement.

#### *Ultimate Factual Findings*

18. The salient facts in this case are that: (1) respondent was released from probation which terminated her employment; and (2) there is no evidence that she has any return rights to the City of Monterey. Given these facts, in accordance with *Vandergoot*, respondent's release from probation which resulted in her separation from employment with the City of Monterey must be treated as tantamount to the dismissals at issue in *Haywood* and *Smith*. The fact that respondent filed a civil complaint for discrimination and ultimately settled that case does not compel a different result.

19. The evidence did not establish that respondent's application with CalPERS falls into either of the two exceptions recognized in *Haywood* and *Smith*: (1) her release from probation was not the ultimate result of her disabling condition; and (2) her release from probation did not preempt an otherwise valid claim for disability retirement. Other than speculation, respondent provides no evidence to substantiate her claims that she was released from probation because of her knee injury. Instead, the evidence established that she was released to return to work on full duty, and the earlier work performance issues resumed upon her return to work.

20. In addition, the evidence did not establish that principles of equity should be applied to grant respondent the right to seek disability retirement. There was no evidence to suggest that respondent had a matured right to a disability allowance prior to the time she was released on probation by the City of Monterey. (*Smith, supra*, 120 Cal.App.4th at p. 206.) Again, at the time, she had been released to return to work on full duty.

### LEGAL CONCLUSIONS

1. Government Code section 21154 provides the following deadlines by which a member must file her application for disability retirement benefits:

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. On receipt of an application for disability retirement of a member, other than a local safety member with the exception of a school safety member, the board shall, or of its own motion it may, order a medical examination of a member who is otherwise eligible to retire for disability to determine whether the member is incapacitated for the performance of duty. On receipt of the application with respect to a local safety member other than a school safety member, the board shall request the governing body of the contracting agency employing the member to make the determination.

2. A bright line distinction is not needed in determining when and under what circumstances a release from probation becomes a termination for purposes of applying *Haywood*. A necessary requirement under *Haywood* is the potential reinstatement of respondent's employment relationship with the City of Monterey if it is ultimately determined that respondent is no longer disabled. (*Haywood v. American River Fire*

*Protection Dist., supra*, 67 CalApp.4th at pp. 1296-1297.) Where 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. (*Id.* at p. 1297.)

3. The evidence established that respondent's release from probation for cause constituted a complete severance of the employment relationship for purposes of applying the *Haywood* criteria. (Finding 5.) The complete severance of the employer-employee relationship eliminated the necessary requirement for disability retirement, namely, respondent's ability to reinstate the relationship if she is no longer disabled. Respondent did not establish either: (1) that her separation from employment was the ultimate result of her disabling condition; or (2) that her separation from employment preempted her otherwise valid claim for disability retirement. To award respondent with a disability pension would in effect override her release from probation for cause despite her inability to demonstrate work performance to the satisfaction of her employer.

In addition, respondent did not establish that there were any equitable principles that should be applied to grant her the right to seek disability retirement. Even if principles of equity were applied, this was not a case where there was undisputed evidence that respondent was eligible for a CalPERS industrial disability retirement allowance, such that a favorable decision on her claim would have been a "foregone conclusion." (Findings 2-5 and 10.) Respondent's vested interest in an industrial disability retirement allowance never "matured" prior to her separation from employment.

4. Pursuant to the holdings in *Haywood*, *Smith*, and *Vandergoot*, respondent is precluded from filing for disability retirement. In sum, when all the evidence and arguments are considered, respondent did not establish that she should be allowed to file an application for disability retirement. Consequently, the appeal of respondent to file for disability retirement with CalPERS must be denied.

#### ORDER

The appeal of Stephanie Lynn Lamb to be granted the right to file an application for disability retirement is DENIED.

DATED: December 21, 2015

DocuSigned by:  
Regina Brown  
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REGINA BROWN  
Administrative Law Judge  
Office of Administrative Hearings