

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 Industrial Disability Retirement of:

JANETTE E. CAIN,

Respondent,

and

CITY OF GRIDLEY,

Respondent.

Case No. 2015-0045

OAH No. 2016030036

PROPOSED DECISION

Tiffany L. King, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter on August 22, 2016, in Sacramento, California.

John Shipley, Senior Staff Counsel, represented the California Public Employees' Retirement System (complainant or CalPERS).

Robert P. Henk, Attorney at Law, Henk Leonard, A.P.C., represented respondent Janette E. Cain (respondent), who was present.

Dean Price, Chief, Gridley-Biggs Police Department, appeared on behalf of respondent City of Gridley (City).

Evidence and argument were received on August 22, 2016. The record remained open to allow for filing of closing briefs. The parties were given until close of business September 2, 2016, to file closing briefs. Complainant's closing brief was filed on September 2, 2016, and marked for identification as Exhibit 17. Respondent's closing brief was filed on September 2, 2016, and was marked for identification as Exhibit 77.¹ The City

¹ Pursuant to the June 24, 2016 Prehearing Conference Order in this matter, complainant was preassigned Exhibit Numbers 1-40 and respondent was preassigned Exhibit Numbers 41-80.

did not file a closing brief. The matter was submitted and the record was closed on September 2, 2016.

ISSUE

Is respondent precluded from filing an application for industrial disability retirement by operation of *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292?

FACTUAL FINDINGS

1. Respondent was hired by the City as a Police Dispatcher for the Gridley-Biggs Police Department (Department) in approximately May 2000. She promoted to Dispatch Records Supervisor in 2006,² and remained in that position until her separation. By virtue of this employment, respondent was a local miscellaneous member of CalPERS subject to Government Code section 21154.

Respondent's Disability Retirement Application

2. On February 7, 2014, CalPERS received respondent's Disability Retirement Election Application (Application). Respondent designated the Application as "service pending industrial disability retirement."³ She also listed August 18, 2012 as her last day on the payroll, and September 15, 2012 as the effective date of her retirement.

3. In her Application, respondent described her disability as, "high blood pressure uncontrolled by medication caused by work related stress." She indicated the disability began sometime after November 2011, when the Department revised the Dispatch Records Supervisor position to include dispatcher duties. Respondent explained:

Although both positions have a lot of responsibility, dispatch is [definitely] higher stress and faster paced than the records position. The added stress of dispatching hampered my ability to control my blood pressure via medication. Also during this

² The Statement of Issues alleges respondent's job title was Police Dispatcher at the time she applied for disability retirement. At hearing, respondent testified her job title was Dispatch Records Supervisor.

³ Respondent simultaneously filed applications for service pending disability retirement and service pending industrial disability retirement. CalPERS treated both as a consolidated application for service pending industrial disability retirement.

time I experienced chest pains, tingling in my arms and hands, migraines, neck pain, trouble concentrating and sleeplessness.

Respondent further asserted her condition rendered her unable to perform her job because it precluded her from working in a high-stress environment.

4. By letter dated October 10, 2014, CalPERS notified respondent that she was ineligible for disability retirement because she was “dismissed from employment for reasons which were not the result of a disabling medical condition” and her dismissal did “not appear to be for the purpose of preventing a claim for disability retirement.” Accordingly, CalPERS canceled respondent’s Application. Respondent timely appealed on November 5, 2014.

5. Respondent retired for service effective November 2, 2012. She has been receiving her retirement allowance from that date.

Employment Background and Termination

6. Respondent began working as a Police Dispatcher for the Department in May 2000, and was subsequently promoted to Dispatch Records Supervisor in 2006. She had no record of disciplinary action prior to her termination.

7. On October 3, 2011, respondent saw her primary care provider, Bryan Pratt, Family Nurse Practitioner (FNP), and complained of tingling in her fingers and stiffness in her neck. FNP Pratt ordered respondent off work from September 30 through October 10, 2011. The Department informed respondent that it required a medical clearance from FNP Pratt before respondent would be allowed to return to work.

8. Respondent thereafter returned to work.⁴ In November 2011, as part of a proposed Department-wide reorganization, respondent’s duties as a Dispatch Records Supervisor were revised to include dispatch duties, in addition to her existing administrative and clerical duties. Respondent was also required to work variable shifts, including night shifts. Shortly after the change in her position, respondent began to experience uncontrolled high blood pressure and anxiety as a result of the added dispatch duties.

9. On June 21, 2012, FNP Pratt ordered respondent off work through July 9, 2012, for “medical condition management.” By letter dated July 3, 2012, Rob Hickey, City Administrator, advised respondent that the City was placing her on FMLA status due to its concern respondent’s health condition made her unable to perform her job duties. Mr. Hickey also directed respondent to have her health care provider complete the enclosed form entitled, “Certificate of Health Care Provider for Employee’s Serious Health Condition” (FMLA Certification).

⁴ The record did not establish the date respondent returned to work, only that she returned to work at some point after October 10, 2011, and before June 21, 2012.

10. On July 9, 2012, FNP Pratt ordered respondent remain off work through July 23, 2012. On July 11, 2012, FNP Pratt completed the FMLA Certification in which he noted that respondent's "condition deteriorates with high stress exchanges and shift variability." He further noted that "[w]e are working to establish that [respondent] is safe to continue in her current capacity with diagnostic testing with specialist as multiple medication combinations have failed to this point.

11. Thereafter, FNP Pratt extended respondent's medical leave through September 1, 2012. On August 9, 2012, respondent requested and received a long-term disability package as she had almost exhausted her accrued vacation and sick leave.

12. On August 23, 2012, respondent was seen by cardiologist, Rupinder Brar, M.D. Dr. Brar ordered a stress test of respondent's heart, as well as sonograms of her heart, kidneys, and legs. Dr. Brar also ordered respondent off work until September 15, 2012.

13. In a medical note dated September 17, 2012, FNP Pratt wrote, "Please continue [respondent's] disability through 3 Oct 2012 or until finalized copy of [respondent's] job description is available after revised from City. Thank you." Respondent gave the medical note to Dean Price, the then-Assistant Chief of Police. Assistant Chief Price responded to FNP Pratt by letter on the same date. In his letter, he noted that the City Council had not yet approved the revisions to respondent's job description. Instead, he enclosed a copy of respondent's current job description and the proposed job description. Assistant Chief Price also confirmed respondent was on excused medical leave through October 3, 2012.

14. By letter dated September 21, 2012, Mr. Hickey advised respondent that the City would no longer accept FNP Pratt's signature on her medical notes. Instead, the City would only accept medical notes signed by a doctor. When respondent informed FNP Pratt that his signature was no longer acceptable, FNP Pratt indicated he would have his supervising physician, Dr. Brown,⁵ sign future medical notes. Relying on FNP Pratt's representation, respondent did not seek an appointment with Dr. Brown.

15. On September 25, 2012, respondent emailed the following message to Chief of Police, Gary Keeler:

As you are aware[,] I have exhausted all of my sick leave and vacation time. Although I hope to return to work soon I find it necessary to request the assistance of my co-workers in donating sick leave to me. The main reason for this request is that I can not (sic) have any lapse in my benefits and due to no hours to report the city is not contributing. Ish has advised me that you would have to approve the request before moving forward.

⁵ Dr. Brown's first name was not established by the record.

16. On October 1, 2012, respondent saw FNP Pratt again. FNP Pratt noted that he had not received clearance from Dr. Brar yet to release respondent to her dispatcher duties. FNP Pratt released respondent to return to work for clerical and administrative duties without restriction as of October 3, 2012. However, he noted respondent could not return to her dispatch duties until cleared by Dr. Brar.

17. On October 2, 2012, respondent provided FNP Pratt's note to Chief Keeler. She also advised that Dr. Brown was on vacation and unavailable to review her medical charts or provide a release to work. Chief Keeler advised respondent that the Department did not have a clerical position available, and again requested respondent provide a medical clearance from a doctor releasing her to return to her position.

18. On October 9, 2012, Chief Keeler emailed respondent advising that her FMLA leave and other leave credits were exhausted, and that she was scheduled to return to work on October 15, 2012. Chief Keeler also ordered respondent to submit a doctor's note clearing respondent for full duty without restrictions by October 12, 2012.

19. After receiving Chief Keeler's email, respondent called FNP Pratt's office and requested an appointment with Dr. Brown. She was advised Dr. Brown was still on vacation. Respondent then requested a medical note from Dr. Brar releasing her to full duty. However, Dr. Brar stated he could not sign a release because respondent's test results were not available yet.

20. On October 10, 2012, with respondent's permission, FNP Pratt spoke with Mr. Hickey by telephone. Mr. Hickey advised FNP Pratt that clearance from the cardiologist was required for respondent to return to work. FNP Pratt responded that he had not received clearance from Dr. Brar as of that date.

21. On October 11, 2012, at 10:24 a.m., respondent emailed Chief Keeler as follows:

I am really looking forward to returning to work but unfortunately I will not be able to produce the [doctor's] release for dispatcher as requested by Friday at 1600 hrs. My doctor is on vacation and the report is not back from the cardiologist.

Please let me know what the next step will be.

Chief Keeler replied to respondent later that afternoon, and asked when she expected Dr. Brown to return from vacation and to receive the cardiologist's report. He sent a second email thirty minutes later, stating:

You have been scheduled to return to work on Monday, October 15, 2012 at 0800. You will need to have another doctor provide the City with a release prior to returning to work. [T]hanks.

At 5:12 p.m., respondent replied to Chief Keeler, "unfortunately, I will not be able to get a release by Monday."

22. On October 15, 2012, respondent did not report to work because she did not have a full medical release from a doctor as required by the City. Respondent also did not report to work on October 16 or 17, 2012.

23. By letter dated October 17, 2012, Chief Keeler notified respondent of his proposal that she be dismissed from her position for violating Department and City attendance policies. In his letter, Chief Keeler noted the specific acts or omissions which served the basis for the proposed discipline:

You have exhausted all of your paid leave time. Additionally, your Family Medical Leave Act (FMLA) time has expired. At this time you are on an unpaid and unapproved leave. You were scheduled to return to work on Monday, October 15th. However, you did not show up for work as scheduled. As of today's date, you still have not returned to work. Per City of Gridley personnel rule section 7.7(a) "An employee who, without approved leave, fails to report to duty for (2) two consecutive work days, shall be deemed to have voluntarily terminated from the position.

Chief Keeler closed the letter by advising respondent of her rights to respond to the proposed discipline and to appeal any disciplinary action.

24. On October 23, 2012, respondent requested to respond to the proposed disciplinary action. On October 30, 2012, she met with Mr. Hickey. During the meeting, Mr. Hickey asked respondent if she could provide a medical note from a doctor releasing her to work without restriction. Respondent stated that she had not received the cardiologist report yet, and that Dr. Brown could not sign a medical release without reviewing the report. Respondent also noted that she had provided a medical note from FNP Pratt releasing her for clerical and administrative duties only. Mr. Hickey reiterated there was no clerical position available. He asked respondent to resign, which respondent refused.

25. By letter dated November 1, 2012, Mr. Hickey advised respondent of his decision to uphold the proposed discipline and that respondent was terminated effective November 2, 2012. In his letter, Mr. Hickey reiterated the dismissal was based on the reasons listed in the October 17, 2012 letter.

Complaint Against the City and Signed Stipulation

26. On August 30, 2013, in the Butte County Superior Court, respondent filed a complaint against the City alleging discrimination on the basis of a disability and failure to provide reasonable accommodation, and failure to engage in an interactive process. On July 10, 2014, respondent and the City entered into a Settlement Agreement and Release of All Claims (Settlement Agreement) to resolve the dispute.

27. Paragraph 11 of the Settlement Agreement provides:

No Future Employment or Affiliation with [the City].

[Respondent] agrees, warrants, and represents that she will not apply for, and if offered will not accept, any employment with or by [the City] at any time. [Respondent] understands and agrees that a violation of this Agreement shall constitute good cause by [the City] to reject [respondent's] application for employment or terminate her employment status. [Respondent] further understands and agrees that should she accept employment with [the City], the acceptance shall constitute misconduct and [respondent] may be terminated without cause or notice and without recourse.

Discussion

28. At hearing, CalPERS challenged respondent's Application, arguing that she was precluded from seeking disability retirement under the holdings of the court decisions 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*), and the precedential decision issued by CalPERS's Board of Administration (Board) in *In the Matter of Robert Vandergoot* (October 16, 2013) Precedential Decision 13-01, Case No. 2012-0287, OAH No. 2012050989 (*Vandergoot*).

29. 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, supra*, 67 Cal.App.4th at p. 1295.) The appellate court concluded that the employee was not entitled to disability retirement, stating as follows:

... [T]here 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. [Citation] Nor are disability retirement laws intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty.

(*Id.* at pp. 1304-1305.)

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 relationship with the District if it is ultimately determined that he is no longer disabled.

(*Id.* at pp. 1306-1307.)

30. The *Haywood* court articulated two exceptions to the preclusion from applying for disability retirement following a termination: (1) when the discharge was the ultimate result of a disabling medical condition; and, (2) when the discharge was preemptive of an otherwise valid claim for disability retirement. (*Haywood, supra*, 67 Cal. App. 4th at 1306-1307.) In *Smith*, the same appellate court explained its rationale for these exceptions:

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 [citations] or indirectly through cause based on the disability [citations].

(*Smith, supra*, 120 Cal.App.4th at 205.)

31. Finally, in *Vandergoot*, an employee who was dismissed for cause entered into a stipulated settlement agreement with his employer in which he resigned in lieu of termination and waived his return rights to that employer. The Board found that entering into such an agreement was tantamount to a dismissal for cause under the *Haywood* and *Smith* criteria. (*Vandergoot, supra*, at p. 7.)

32. Here, respondent argues that her dismissal was not for cause, but rather was the ultimate result of her disabling medical condition. Therefore, she should be allowed to apply for disability retirement under the first exception in *Haywood*. As respondent asserts, the City was on notice of respondent's medical condition as early as October 2011. In July 2012, the City placed respondent on FMLA leave due to her health condition. In September 2012, the City advised respondent it would no longer accept medical notes from her primary care provider, FNP Pratt. Yet, the City left respondent on FMLA leave until October 2012. On October 9, 2012, the City demanded respondent report to work on October 15, 2012, with a doctor's medical release returning respondent to full duty with no restrictions. Respondent

could not obtain the requested release from a medical doctor by October 15, 2012, and as a result, she was terminated by the City.

33. CalPERS does not contest that respondent's termination was based on any reason other than her failure to report to work with a medical release returning her to full duty without restriction. Respondent presented credible and uncontested evidence that she could not obtain a full release to work due to her medical condition which, as of that time, precluded her from performing her dispatch duties. The evidence further established that the City would not allow respondent to return to work without a full release. Accordingly, respondent established that the first *Haywood* exception applies in this case, i.e., her dismissal was not for cause but was the ultimate result of her disabling medical condition.

34. CalPERS contends that respondent is nevertheless precluded from applying for disability retirement because, pursuant to the Settlement Agreement, she is barred from applying for or accepting future employment with the City. Thus, CalPERS argues, the employee-employer relationship was permanently severed and respondent was barred from seeking disability retirement. However, this ignores the fact that respondent was terminated as a result of her disabling medical condition and not for cause, which is a requirement to trigger the preclusive effect of *Haywood*. Nothing in *Smith* or *Vandergoot* negates the exception in *Haywood* that an employee cannot be barred from applying for disability retirement benefits if she is terminated as a result of her medical condition. Moreover, this case is factually distinct from *Vandergoot*. The employee in *Vandergoot* was dismissed for cause, filed an administrative appeal of his dismissal, and thereafter entered into a settlement agreement for the purpose of avoiding a termination for cause. Here, respondent was terminated as a result of her medical condition, sued the City for disability discrimination under the Fair Employment and Housing Act, and settled the matter to resolve her disability claim, not to avoid a termination for cause.

35. In sum, respondent established that her case falls within the first exception articulated in *Haywood*, and that her dismissal was the ultimate result of her disabling medical condition. Her appeal from the cancellation of her Application should therefore be granted, and her disability retirement application should be reviewed on the merits to determine whether, before she was dismissed, she was substantially disabled from performing her usual duties as a Dispatch Records Supervisor.

LEGAL CONCLUSIONS

1. Government Code section 21152 states in pertinent part:

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

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

2. By virtue of her employment with the City, respondent became a local miscellaneous member of CalPERS subject to Government Code section 21154, which provides in relevant part:

The application [for disability retirement] 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.

3. 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, termination of the employment relationship renders the employee ineligible for disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal. App.4th 1292, 1297.) As set forth in the Factual Findings, respondent's application for disability retirement is not precluded by operation of *Haywood* in that her termination was the ultimate result of a disabling medical condition.

4. All other arguments of the parties not specifically addressed herein were considered and are rejected.

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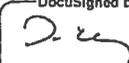
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ORDER

The appeal of respondent Janette E. Cain is GRANTED. CalPERS shall review respondent's disability retirement application to determine whether she should be granted disability retirement.

DATED: October 3, 2016

DocuSigned by:

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TIFFANY L. KING
Administrative Law Judge
Office of Administrative Hearings