

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Cancellation of the
Application for Industrial Disability
Retirement of:

GRACE S. HERRERA

Respondent,

and

CALIFORNIA STATE UNIVERSITY,
SONOMA,

Real Party In Interest.

Case No. 2016-0582

OAH No. 2016070711

PROPOSED DECISION

Administrative Law Judge Michael A. Scarlett, State of California, Office of Administrative Hearings, heard this matter on October 3, 2016, in Oakland, California.

Austa Wakily, Senior Staff Attorney, represented the California Public Employees' Retirement System (CalPERS).

Grace S. Herrera (respondent) represented herself and was present at the hearing.

The matter was submitted for decision on October 3, 2016.

FACTUAL FINDINGS

1. Anthony Suine, Chief, Benefits Services Division, CalPERS, made and filed the statement of issues in his official capacity.
2. Respondent was employed by California State University, Sonoma (CSUS) as an Accounting Technician II, at all times relevant to this matter. By virtue of her employment, respondent was a local miscellaneous member of CalPERS subject to Government Code sections 21152 and 21154.

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3. On July 29, 2015, respondent signed an application for disability retirement, received by CalPERS on July 31, 2015. Respondent claimed disability on the basis of bipolar disorder, brain injury, attention deficit hyperactivity disorder (ADHD), and schizophrenia.

4. On September 28, 2015, CalPERS notified respondent of its determination that her disability application would be cancelled because respondent was dismissed from employment with CSUS for cause, not based on a disabling medical condition or for the purpose of preventing a claim for disability retirement. Thus, CSUS informed respondent that she was ineligible for disability retirement and that her application for disability retirement could not be accepted.

5. On October 24, 2015, respondent appealed CalPERS's determination to cancel her disability retirement application and requested an administrative hearing.

Employment History

6. Respondent was hired by CSUS in 2000 as a cashier. In July 2005, respondent was reassigned to the Accounts Payable Department where she eventually became an Accounting Technician II, the position she held until the date of her termination. Respondent experienced difficulty and stress adjusting to her new assignment.

7. The record established that in 2005 respondent was diagnosed with bipolar disorder and began treatment with Jane Ellen Heath, M.D., a psychiatrist, for this mental condition. However, the evidence did not establish that respondent had been diagnosed with ADHD, schizophrenia or that she had suffered a brain injury.

8. From approximately July 2005 through 2013, respondent and CSUS engaged in the Americans with Disabilities Act (ADA) accommodation process based primarily on difficulties respondent had with attention, focus and concentrating in the workplace. In July 2005, respondent requested, and CSUS provided, various workplace ADA accommodations including allowing respondent a note taker, providing emotional support, providing more time to finish tasks, and the ability to get up and walk around her work area. In December 2005, respondent also requested an accommodation to allow placement of her cubicle on a back wall to reduce audio and visual distractions. From approximately 2005 through 2012, respondent continued to seek workplace accommodations based on stress, anxiety and depression as a result of her bipolar disorder. Some of the accommodation requests were approved, others were denied.

9. In July 2007, respondent began experiencing conflicts with her supervisor in the Accounts Payable Department. In October 2008, respondent filed a complaint and grievance with CSUS claiming disability discrimination based on harassment, retaliation, and failure to accommodate. This complaint was based primarily on conduct allegedly committed by respondent's supervisor.

10. In December 2008, respondent sought and received employment assistance through the Department of Rehabilitation (DOR). As a condition of receiving DOR eligibility, respondent agreed to undergo a neuropsychological evaluation by Peggy O'Toole, Ph.D. On April 17, 2009, Dr. O'Toole prepared an evaluation report diagnosing respondent with bipolar disorder. Based on psychological testing administered, Dr. O'Toole indicated that respondent's cognitive functioning was generally within normal limits across domains of attention, visual spatial skills, memory, and executive functioning, concluding her overall intelligence problem-solving skills were solidly within the normal range. She noted that respondent's depression, anxiety, and stress levels interfered with her daily ability to attend to tasks at work and recommended several strategies to deal with respondent's difficulties in the workplace. Thus, Dr. O'Toole did not conclude that respondent was unable to perform her job duties.

11. On January 15, 2010, a Disability Retirement Evaluation was performed by Randall B. Smith, Ph.D., on respondent at the request of CSUS. Dr. Smith concluded that respondent was capable of performing all of the essential components of her usual and customary job assignment, without job limitations, restrictions, or modifications, and that she was able to work on a full-time basis.

12. In 2011, respondent ultimately filed a civil rights employment discrimination law suit against CSUS based on disability discrimination. The discrimination action was adjudicated in CSUS's favor after two Motions for Summary Adjudication were granted, resulting in a judgment in favor of CSUS entitling it to recovery of costs in the amount of \$6,796.97. On October 8, 2012, respondent and CSUS entered into a Settlement Agreement and General Release of All Claims between respondent and CSUS arising out of her employment with CSUS. The agreement terminated all litigation and waived CSUS's right to enforce the judgment and to collect the costs, and respondent's right to appeal the judgment.

13. On February 6, 2013, CSUS served respondent with a Notice of Pending Dismissal (Notice) seeking to dismiss her due to unprofessional conduct, incompetence and her failure and refusal to perform the normal and reasonable duties of her job. The Notice identified three causes for dismissal: attendance problems, poor performance, and sleeping on the job. In support of the cause for dismissal based on attendance problems, CSUS cited specific conduct from August 23, 2012, through January 30, 2013, in which respondent was absent (six times), and late for work (34 times), for unauthorized or inappropriate reasons. The Notice indicated that respondent provided reasons for the absences and late reporting times that ranged from no reason given, to "just late," "heavy traffic," "car stolen again," or "overslept." The Notice cited a list of prior warnings and discipline (nine instances) relating to attendance problems that had been given to respondent from September 21, 2009, through September 12, 2012. Regarding poor performance, the Notice cited two instances of specific conduct involving respondent mishandling high dollar amount checks on August 1, 2012 (\$29,555.42), and September 17, 2012 (\$125,550), in that she violated CSUS procedures in issuing the checks to the payees. The Notice cited six prior warnings and discipline for poor performance that had been given to respondent from August 31, 2010, through August 17,

2012, including a 10-day suspension from August 6, 2012, through August 17, 2012. With regards to sleeping on the job, the Notice cited a February 3, 2013, incident in which respondent's supervisor found her asleep in her cubicle at approximately 3:35 p.m. during normal work hours. The Notice cited five instances of prior warnings and discipline respondent had been given for sleeping on the job from March 22, 2010, through January 20, 2012.

14. On February 14, 2013, respondent submitted a response to the CSUS Notice. Her response did not assert that the conduct alleged had not occurred. Instead respondent defended that CSUS was precluded by the October 8, 2012 settlement agreement from asserting any causes for dismissal based on conduct occurring before the effective date of the settlement agreement because the agreement resolved all claims arising out of respondent's employment with CSUS prior to that date. Respondent also defended that her attendance and tardiness problems were a result of her disability and that she had requested an ADA accommodation to address these problems. She also claimed that her medications for her medical conditions seriously affected her ability to stay awake and caused her to sleep at work. Regarding the issue of poor performance, respondent stated that she was not aware of any incident involving the mishandling of checks, and that even if she had mishandled a check, one such incident did not merit her termination.

15. On February 18, 2013, a Skelly review was conducted by CSUS. Respondent did not request a meeting to present an oral response. Instead she relied solely on the February 14, 2013 written response and the settlement agreement dated October 8, 2012, attached to the response. CSUS concluded that the settlement agreement did not require CSUS to remove disciplinary actions from respondent's personnel file, and thus, it was proper for CSUS to consider all of respondent's conduct, including the incidents occurring prior to October 8, 2012. CSUS also concluded that respondent's assertion that CSUS had failed to provide ADA accommodations to address the problems she was having getting to work on time was not supported by the evidence. CSUS noted that although respondent stated she requested an ADA accommodation for this problem in July 2012, several late incidents occurred prior to that date, and the unexcused absences were not addressed in respondent's response at all. CSUS concluded that the record showed that CSUS had engaged in the interactive process with respondent, although it declined to address the effectiveness of that process in the Skelly proceeding. However, CSUS noted that respondent had failed to provide a doctor's verification that her medical condition was affecting her ability to report to work on time or caused the unexcused absences. CSUS also noted that respondent failed to provide a doctor's verification that her medication caused her to sleep at work or any proof that she had requested an accommodation related to this issue. Regarding the issue of poor performance based on the mishandling of checks, CSUS determined that dismissal on this ground was proper given the extensive record of prior warnings and discipline for poor performance contained in the Notice.

16. Respondent was terminated effective February 20, 2013. She did not appeal the termination.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. The applicant for a benefit has the burden of proof to establish the right to the claimed benefit; the standard of proof is a preponderance of the evidence. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051; Evid. Code, § 115.)

Eligibility for Disability Retirement

2. By virtue of her employment, respondent is a local miscellaneous member of CalPERS subject to Government Code sections 21152 and 21154.¹ Eligible CalPERS members, who are incapacitated physically or mentally for the performance of duty, shall be retired for disability. (§§ 21150 to 21154.)

3. Section 21152 provides, in relevant 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.

4. Section 21154 provides:

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....

¹ All further statutory references shall be to the Government Code unless otherwise specified.

Termination for Cause

5. The issue presented here is whether respondent is eligible to apply for disability retirement after being terminated for cause by CSUS on February 20, 2013. Where an applicant for CalPERS disability retirement benefits has been terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, the applicant is barred from any entitlement to a CalPERS disability retirement. (*Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292, 1297.) The employee's dismissal "constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement – the potential reinstatement of his employment relationship" if it is ultimately determined that the employee is no longer disabled. (*Ibid.*)

6. As stated above, respondent was terminated for cause on February 20, 2013. CSUS served respondent with a Notice of Pending Dismissal on February 6, 2013, and respondent was provided a Skelly review on February 18, 2013. CSUS terminated respondent for cause, i.e., attendance problems, poor performance and sleeping on the job, and respondent chose not to appeal CSUS's decision to terminate. (See Factual Findings 13 through 16.) Respondent's termination on February 20, 2013, constituted a complete severance of the employer-employee relationship, eliminating the possibility of reinstatement of the employment relationship if it ultimately is determined that respondent is no longer disabled, a necessary requisite for disability retirement. (See *Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at p. 1297.) Thus, CalPERS properly asserts that *Haywood* precludes respondent from applying for disability retirement because respondent was terminated for cause and an employment relationship no longer exist with CSUS.

7. Respondent argued that CSUS improperly terminated her because they considered conduct that was precluded by the October 8, 2012 settlement agreement between the parties, and because CSUS failed to provide ADA accommodations that would have addressed the problems cited in the Notice, i.e., poor attendance and sleeping on the job. Respondent had an opportunity to appeal her dismissal based on her asserted defense of disability discrimination, retaliation and the failure to accommodate, but she chose not to pursue such an appeal. She may not attack the basis for her termination in this proceeding.

Haywood Exceptions

8. Although respondent was terminated for cause, she may nevertheless apply for disability retirement if: 1) she establishes that the termination was the ultimate result of a disabling condition; or 2) she establishes that the termination preempted an otherwise valid claim for disability retirement. Neither of these exceptions was established in this case.

9. Respondent failed to establish that her termination was the ultimate result of a disabling condition. (See Factual Findings 6 through 10.) Although respondent had a bipolar disorder and was receiving psychiatric treatment for this disorder from 2005 to 2013,

there is insufficient evidence that CSUS terminated respondent because of this condition. The evidence established that respondent was terminated because of poor attendance, poor performance and sleeping on the job. The Notice showed that respondent had been given numerous prior warnings and discipline regarding this conduct, and respondent's conduct persisted. The evidence also established that respondent and CSUS engaged in the interactive process from 2005 through 2013 in an attempt to provide an ADA accommodation for respondent's medical condition, which primarily made it difficult for her to focus at work. CSUS actively engaged in the interactive process for over eight years to accommodate respondent's medical condition and to assist her in performing her job duties. CSUS's long term efforts to accommodate respondent is not indicative of an employer intent on terminating an employee for a disabling condition. Furthermore, respondent failed to present sufficient medical evidence, including a physician's note or verification, to establish that her medical condition caused the poor attendance, poor performance, or her to sleep on the job.

10. More significantly, however, there is no evidence that respondent's bipolar disorder was a disabling condition. Although respondent testified that her bipolar disorder was disabling and that she was being treated for this condition, the evidence did not establish that respondent was mentally incapacitated for the performance of her duties. To the contrary, two medical evaluations offered into evidence by respondent showed that she was able to perform her usual and customary job duties. In April 2009, Dr. O'Toole's neuropsychological evaluation concluded that respondent's cognitive functioning was within normal ranges, and that although her bipolar disorder interfered with her ability to perform certain tasks at work, with recommended strategies (accommodations) respondent could perform her job duties. Additionally, in January 2010, CSUS specifically requested a Disability Retirement Evaluation from Dr. Smith who concluded that respondent was capable of performing all of her job duties without restrictions or modifications. The evidence did not establish that respondent had a disabling condition that incapacitated her for performing her duties as an Accounting Technician II. Consequently, there is insufficient evidence to conclude that respondent termination was the ultimate result of a disabling condition.

11. Respondent also did not establish that CSUS terminated her for the purpose of preempting an otherwise valid claim for disability retirement. The courts have held that even if an agency dismisses an employee solely for cause unrelated to a disabling medical condition, this will not result in the forfeiture of a matured right to a disability retirement pension. (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 206.) In *Smith* the court held that "if a plaintiff were 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. [Citations omitted.] Conversely, 'the right may be lost upon occurrence of a condition subsequent such as a lawful termination of employment before it matures...' (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749.)" (*Ibid.*) "A vested right matures when there is an unconditional right to immediate payment." (*Ibid.*) This typically arises at the time the pension board determines that the employee is no longer capable of performing his or her duties. (*Ibid.*)

12. Here, CalPERS did not determine that respondent was eligible for a disability retirement prior to respondent being terminated for cause on February 20, 2013, or at any time pertinent to respondent's application for disability retirement. Respondent did not file her application for disability retirement until July 29, 2015, over two years after her termination. Thus, respondent's right to disability retirement did not mature in this case prior to respondent's lawful termination for cause. (See Factual Findings 3 through 5, and 13 through 16.)

13. Finally, in *Smith* the court stated that 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, where "there is undisputed evidence that the employee 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)." (*Smith v. City of Napa, supra*, 120 Cal.App.4th at pp. 206-207.) The court noted that for purposes of the standard for a disability retirement, the employee's medical evidence is not unequivocal. (*Id.* at 207.) Respondent's bipolar disorder also does not constitute undisputed evidence or a foregone conclusion that she would have been eligible for disability retirement had she not been terminated for cause prior to her application date.

14. Accordingly, respondent failed to establish that either of the two *Haywood* exceptions applied in this case. Consequently, CalPERS correctly determined that respondent is ineligible to apply for disability retirement. Therefore, respondent's appeal is denied.

ORDER

The appeal of respondent Grace S. Herrera is denied.

DATED: November 3, 2016

DocuSigned by:
Michael A. Scarlett
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MICHAEL A. SCARLETT
Administrative Law Judge
Office of Administrative Hearings