

ATTACHMENT A
THE PROPOSED DECISION

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

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

Case No. 2015-0998

PATRICIA ALAMILLA,

OAH No. 2016050330

Respondent,

and

CALIFORNIA DEPARTMENT OF
CORRECTIONS & REHABILITATION-
CALIFORNIA STATE PRISON,
CORCORAN,

Respondent.

PROPOSED DECISION

This matter was heard before Timothy J. Aspinwall, Administrative Law Judge, Office of Administrative Hearings, State of California, on November 22, 2016, in Fresno, California.

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

Patricia Alamilla (respondent) appeared on her own behalf.

There was no appearance by or on behalf of the Department of Corrections and Rehabilitation (CDCR) and a default was taken pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for decision on November 22, 2016.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Dec 23 2016
Kathy Kasul

ISSUE

Is respondent precluded from filing an application for disability retirement by operation of *Haywood, Smith, Vandergoot, and/or McFarland*?

FACTUAL FINDINGS

1. Respondent was employed by the - CDCR - California State Prison, Corcoran (CSP Corcoran) as a Correctional Officer effective February 13, 1999. By virtue of her employment, respondent became a state safety member of CalPERS subject to Government code sections 21151, 21152, and 21154.

2. On or about April 11, 2014, CDCR served respondent with a Notice of Adverse Action (NOAA), which notified her that effective April 25, 2014, she would be dismissed from her position as a Correctional Officer. The NOAA was based on the following causes for discipline set forth in Government Code section 19572:

- (d) Inexcusable neglect of duty
- (f) Dishonesty
- (o) Willful Disobedience
- (r) Violation of the Prohibitions set forth in accordance with Section 19990, and
- (t) Other failure of good behavior either during or outside of duty hours which is of such a nature that it causes discredit to the appointing authority of the person's employment.

The NOAA alleged that respondent engaged in the following acts and omissions: In February 2013, respondent submitted a Family Medical Leave Certification of Healthcare Provider CDCR 2201 Form (FMLA Form) to Corcoran State Prison. On or about December 16, 2013, respondent admitted to a CDCR special agent that she personally completed the portion of the FMLA Form that she knew was to be completed by the health care provider, and that she forged the physician's signature on the FMLA Form without the physician's knowledge or consent.

3. Respondent appealed from the NOAA, and exercised her right to a *Skelly* review. The *Skelly* officer sustained the penalty of dismissal. On a date on or before the April 25, 2014 effective date of her termination, respondent submitted to CDCR an undated letter of resignation, effective April 25, 2014. On April 25, 2014, the warden at CSP Corcoran signed a letter to respondent accepting her resignation effective April 25, 2014,

noting that at the time of resignation respondent was facing disciplinary action for on-duty misconduct in that she falsified and forged an FMLA Form. CDCR would have enforced the termination of respondent's employment if she had attempted to withdraw her resignation.

4. On April 22, 2015, respondent filed a Disability Retirement Election Application (application) with CalPERS. On the application, respondent stated that her injury or illness affected her ability to perform her job as follows:

(Back) Neuritis and radiculitis in both the lumbar and thoracic regions of my spine. (Neck) No diagnoses to date however I experienced tightness in my cervical region. (Right shoulder) Constant pain and loss of strength. (Right wrist) Significant weakness and loss of grip strength. (Right ankle) Severe sprain/strain. (Head) Severe headaches.

Respondent also included a typed notation on the application stating as follows:

It should be noted that at the time I resigned from my employment with the California Department of Corrections & Rehabilitation I was injured do [sic] to my employment and at no time did my employer advised me that I could be eligible for Industrial Disability Retirement benefits. It was not till [sic] a later date [that] I was given this information by my treating physician.

5. July 16, 2015, CalPERS sent a letter to respondent informing her they received her application for industrial disability retirement, but was unable to accept it because she had been dismissed from employment for reasons which were not the result of a disabling medical condition, and because the dismissal does not appear to be for the purpose of preventing a claim for disability retirement. Respondent timely appealed from CalPERS's decision by letter to CalPERS dated August 14, 2015.

Respondent's Evidence and Arguments

6. Respondent admitted that she forged a physician's signature on an FMLA Form. She later went to a physician's office to get an FMLA Form signed by the physician. Respondent testified that she submitted her resignation on the advice of a CalPERS attorney who told her that resignation would be her best option. Respondent could not remember the attorney's name, nor did she describe the circumstances of the advice, other than it was prior to her *Skelly* hearing.

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Discussion

7. At the hearing, CalPERS argued that respondent was precluded from applying for disability retirement under *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*); *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*); and the precedential decisions issued by the CalPERS Board of Administration (Board) in *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (October 16, 2013) Precedential Decision No. 13-01, Case No. 2012-0287, OAH No. 2012050989 (*Vandergoot*); and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland*, (June 22, 2016) Precedential Decision No. 16-01, Case No. 2014-0177, OAH No. 2014060759 (*MacFarland*).

8. *Haywood* and *Smith* hold that civil service employees are precluded from applying for disability retirement if they have been dismissed from their civil service employment. *Haywood* and *Smith* recognized two exceptions to this preclusion: (1) when the employee established that the dismissal was the ultimate result of a disabling condition; and (2) when the employee established that the dismissal preempted the employee's otherwise valid claim for disability retirement. In *Vandergoot*, the Board determined that a stipulated settlement agreement in which an employee settled a dismissal action by agreeing both to resign and to give up all return rights was tantamount to a dismissal for purposes of applying the *Haywood* and *Smith* criteria.

9. Respondent did not establish that she should be allowed to apply for disability retirement under either of the two exceptions recognized in *Haywood* and *Smith*: (1) her separation from state service was not the ultimate result of her disabling condition; and (2) her separation from state service did not preempt an otherwise valid claim for disability retirement. Respondent's misconduct, not her physical condition, was the ultimate cause of her dismissal. Consequently, respondent failed to establish that her separation from state service was the ultimate result of a disabling condition.

10. Respondent also did not establish that her separation from state service preempted an otherwise valid claim for disability retirement. There was no indication in the NOAA or any other competent evidence presented at the hearing that anyone at CDCR was aware that respondent had or contended she had a disabling physical condition before it served the NOAA. Nor is there any evidence that CDCR instituted dismissal proceedings against respondent to preempt her from filing an application for disability retirement based upon a disabling physical condition.

11. Furthermore, the facts of *MacFarland*, are applicable to respondent's case. In *MacFarland*, a prison psychologist was served with written notice that his employment would be terminated for cause. The written notice included an effective date for the termination, the bases therefor, and the employee's right to respond to his employer before the dismissal took effect or to appeal the termination to an independent adjudicative agency. Two days before the dismissal took effect, the psychologist notified his employer of his service retirement, effective immediately, and his intent to file for disability retirement. He

subsequently applied for disability retirement. CalPERS denied the application on grounds that the psychologist was terminated for cause.

Concluding the psychologist was ineligible for disability retirement benefits pursuant to the holdings in *Haywood* and its progeny, the Board of Administration explained:

The record is clear that applicant's employer made its decision to terminate him on or before it issued the July 7, 2013 [Notice of Adverse Action], advising that his employment would be terminated on July 23, 2013. Applicant service-retired from his employment three days before the effective date of his termination for cause. Had applicant not service-retired on July 23, 2013, his employment would have been terminated on July 26, 2013. The evidence is persuasive that should applicant attempt to reinstate with his employer, the [Notice of Adverse Action] would be enforced and he would be barred from reinstatement. Additionally, applicant waived any appeal rights and would be barred from seeking to overturn the [Notice of Adverse Action].

Furthermore,

The law does not respect form over substance. [Citation.] The courts look to the "objective realities of a transaction rather than to the particular form the parties employed. Thus, we focus on the actual rights and benefits acquired, not the labels used." [Citation.] Here, the evidence is persuasive that applicant retired to avoid termination from employment. His relationship with his employer had been severed prior to his retirement, when the NOAA was served on him. His severance became irrevocable when he withdrew any appeal he filed. Applicant is barred from returning to his former employment and thus the holdings in *Vandergoot* and *Haywood* render him ineligible for disability retirement, unless he meets an exception identified in *Haywood* and *Smith*.

(*MacFarland, supra*, at pp. 7-8.)

12. Like *MacFarland*, respondent resigned on the effective date of the NOAA for the purpose of avoiding dismissal. Accordingly, unless an exception applies, respondent is ineligible for disability retirement pursuant to *Haywood* and *MacFarland*.

13. 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, respondent's appeal must be denied.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. CalPERS has the burden of proving that respondent was terminated for cause prior to seeking disability retirement, or that he resigned under circumstances which are tantamount to a dismissal for cause. (Evid. Code, § 500 [“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting”]; *Haywood, supra*, 67 Cal.App.4th 1292.) The standard of proof is a preponderance of the evidence. (Evid. Code, § 115 [“Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence”].) Evidence that is deemed to preponderate must amount to “substantial evidence.” (*Weiser v. Board of Retirement* (1984) 152 Cal.App.3d 775, 783.) And to be “substantial,” evidence must be reasonable in nature, credible, and of solid value. (*In re Teed’s Estate* (1952) 112 Cal.App.2d 638, 644.) If CalPERS meets its burden, the burden then shifts to respondent to show whether either of the *Haywood* exceptions applies.

Applicable Law

2. 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.

3. By virtue of her employment with CDCR, respondent became a state safety member of CalPERS subject to Government Code sections 21154, which provides in relevant part:

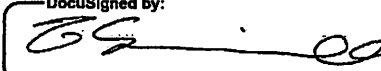
The application shall be made only (a) while the member is in state service, or (b) while the member for whom contributions will be made under Section 20997, is absent on military service, or (c) within four months after the discontinuance of the state service of the member, or while on an approved leave 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.

4. CalPERS established that respondent was dismissed for cause, and that the dismissal did not preempt an otherwise valid disability claim. Thus under the criteria set forth in *Haywood* and its progeny, respondent was properly precluded from applying for disability retirement. Accordingly, respondent’s appeal from CalPERS’ cancellation of her application must be denied.

ORDER

The appeal of respondent Patricia Alamilla to be granted the right to file an application for disability retirement is DENIED.

DATED: December 21, 2016

DocuSigned by:

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings