

ATTACHMENT E
THE PROPOSED DECISION

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

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

TRACY R. CRAIG,

Respondent,

and

FRANCHISE TAX BOARD,

Respondent.

Case No. 2016-0508

OAH No. 2016061209

PROPOSED DECISION

On November 15, 2016, this matter was heard before Danette C. Brown,
Administrative Law Judge, in Sacramento, California.

California Public Employees' Retirement System (CalPERS), was represented by
Charles H. Glauber, Senior Staff Counsel.

Tracy R. Craig (respondent) represented herself.

No appearance was made by or on behalf of respondent Franchise Tax Board (FTB).
Proper service of the Statement of Issues and Notice of Hearing was made. The matter
proceeded as a default against respondent FTB, pursuant to Government Code section 11520.

Evidence was received, the record was closed, and the matter was submitted for
decision on November 15, 2016.¹

¹ CalPERS requested Official Notice, pursuant to Government Code section 11515
and Evidence Code section 452, of the following legal authorities:

1. *Haywood v. American River Fire Protection District* (1999) 67 Cal.App.
4th 1292 (*Haywood*).
2. *Smith v. City of Napa* (2004) 120 Cal.App. 4th 194 (*Smith*).

ISSUE

This appeal is limited to the issue of whether respondent may file an application for disability retirement based on a bipolar, arthritis, tendonitis, anxiety, carpal tunnel, depression, and back condition, or whether her application and eligibility for disability retirement is precluded by operation of *Haywood*.

FACTUAL FINDINGS

1. Respondent was employed by FTB as a Tax Program Technician I. By virtue of her employment, respondent became a state miscellaneous member of CalPERS subject to Government Code section 21154.

2. Starting on July 10, 2009, respondent was absent without leave (AWOL) for five consecutive working days. On July 24, 2009, FTB sent respondent a Notice of AWOL Separation, intending to invoke the AWOL statute under Government Code section 19996.2.² The Notice advised that the effective date of respondent's resignation would be the close of business on August 6, 2009. The Notice explained respondent's right to request a "Coleman"³ hearing, file an appeal with the Department of Personnel Administration (DPA), and provided procedures for doing each.

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3. Precedential Decision, *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot, Respondent*, dated February 19, 2013, made Precedential by the CalPERS Board of Administration, effective October 16, 2013 (*Vandergoot*).
 4. Final Decision, *In the Matter of the Application for Industrial Disability Retirement of Kevin Davey, Respondent*, dated December 28, 2015, adopted by the CalPERS Board of Administration on February 18, 2016 (*Davey*).

Respondent did not object to CalPERS' request for Official Notice. Official Notice was taken of the items cited above.

² Government Code section 19996.2, subdivision (a), provides, in relevant part: "Absence without leave, whether voluntary or involuntary, for five consecutive working days is an automatic resignation from state service, as of the last date on which the employee worked."

³ *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 [due process requires that an employee be given notice and opportunity to respond before his employer invokes the provisions of Government Code section 19996.2].

3. Respondent did not request a *Coleman* hearing. Effective August 6, 2009, respondent was automatically resigned for being AWOL on the following grounds: 1) failing to report to work; 2) failing to make personal contact with her supervisor; 3) failing to respond to various correspondence; or 4) failing to mail, fax, or otherwise providing the required medical substantiation to cover her absences.

4. Respondent timely filed an appeal to the DPA, requesting reinstatement. On October 28, 2009, a hearing was held before an administrative law judge (ALJ) with the DPA. However, respondent failed to appear. The ALJ opined that respondent had the burden of proof and the burden of going forward in the appeal hearing, and by failing to appear and proceed at the hearing, respondent did not meet either burden. The ALJ further opined that respondent made no effort to notify DPA that she did not intend to be present. The ALJ considered respondent's appeal withdrawn, and dismissed the appeal with prejudice. The proposed decision of the ALJ was adopted by the DPA on October 30, 2009.

5. On March 23, 2015, CalPERS received respondent's application for disability retirement. Disability was claimed on the basis of bipolar, arthritis, tendonitis, anxiety, carpal tunnel, depression, and back conditions.

6. On February 9, 2016, CalPERS notified respondent that it was unable to accept her application, and that her application had been cancelled based on *Haywood*, which held that 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, the termination of the employment relationship renders the employee ineligible for disability retirement." CalPERS also relied on *Smith* and *Vandergoot* "to provide further clarification for the purposes of applying *Haywood*." Although respondent's application was cancelled, CalPERS informed respondent that she was still going to continue to receive her service retirement benefits. Respondent timely appealed the cancellation of her application, and requested an administrative hearing.

7. Respondent testified at hearing that it was unclear to her why her application was "denied," despite CalPERS' letter of February 9, 2016, notifying her that her application had been *cancelled* based upon *Haywood*. Respondent testified that in 2003, her medical issues began affecting her work attendance. Respondent did not believe she was AWOL in 2009. She stated that her "mind frame" at the time was suicidal, and she felt that she lost everything. Respondent asserted that she did not know that she could file for disability at the time that she was AWOL, and "never looked into it" due to her illness.

Discussion

8. In *Haywood*, the appellate court found that "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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed." The court explained that "a firing for cause

constitutes a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement-the potential reinstatement of [the employee with the employer] if it is ultimately determined that he is no longer disabled ... The disability provisions of the PERS law contemplate a potential return to active service and a terminated employee cannot be returned to active service.” (*Id.* at pp. 1306-1307.) CalPERS deemed respondent’s automatic resignation as a termination for cause, such that respondent could not be reinstated, and she would have to go through the normal hiring process in order to return to state service.

9. *Smith* analyzed the holding in *Haywood*. *Smith* involved a firefighter who filed a backdated application for disability retirement on the effective date of the termination of his employment. *Smith* held that a termination for cause extinguishes the right to disability retirement, except if an employee were able to prove that the right to disability retirement matured before the date of the event giving cause to dismiss. (*Id.* at p. 206.) The court explained that a right to disability retirement matures as follows:

A vested right matures when there is an unconditional right to immediate payment. [Citations.] In the course of deciding when the limitations period commenced in a mandate action against a pension board, the Supreme Court noted that a duty to grant the disability pension (i.e., the reciprocal obligation to a right to immediate payment) **did not arise at the time of the injury itself but when the pension board determined that the employee was no longer capable of performing his duties.** (*Tyra v. Board of Police etc. Commrs.* (1948) 32 Cal.2d 666, 671-672 [197 P.2d 710] [“the right has not come into existence until the commission has concluded that the condition of disability renders retirement necessary.”] [Footnote omitted.] In the present case, a CalPERS determination of eligibility did not antedate the unsuccessful certification on the ladder truck. His right to a disability retirement was thus immature, and his dismissal for cause defeated it.

(*Ibid.* Bold added.)

10. The court further stated in *Smith*:

Conceivably, 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. This case does not present facts on which to explore the outer limits of maturity, however.

It is not as if the plaintiff had an impending ruling on a claim for a disability pension that was delayed, through no fault of his own, until after his dismissal. Rather he did not even initiate the process until after giving cause for his dismissal.

(*Ibid.*, at pp. 206-207.))

11. *Vandergoot* determined that *Haywood* applies whether the employee was terminated for cause or voluntarily resigned from employment and waived any reinstatement rights. The court explained:

This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship ... if it ultimately is determined that respondent is no longer disabled.

Mr. Vandergoot was not terminated, but he agreed to voluntarily resign pursuant to a Stipulation and Settlement Agreement (Stipulation). The terms of the Stipulation severed the employment relationship, and Mr. Vandergoot was not eligible for reinstatement. The court stated that “[s]uch a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement ...” (*Id.*)

12. Although respondent testified at hearing that she had health and mental issues starting in 2003, there was no evidence that FTB severed respondent’s employment due to a disabling medical condition, nor was the severance preemptive of an otherwise valid claim for disability retirement pursuant to *Haywood*.

13. Moreover, respondent did not apply for disability retirement until more than six years after the effective date of her automatic resignation. Therefore, respondent did not have a matured right to disability retirement before her automatic resignation pursuant to *Smith*, and the severance of her employment relationship with FTB did not effectuate a forfeiture of a matured right to a disability retirement. Consequently, respondent’s appeal must be denied, because her application and eligibility for disability retirement is precluded pursuant to *Haywood*.

LEGAL CONCLUSIONS

1. CalPERS has the burden of proof to establish by a preponderance of the evidence that respondent’s application and eligibility for disability retirement is precluded by operation of *Haywood*. (Evid. Code, § 500.)

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2. Government Code section 20026 provides, in pertinent part:

“Disability” and “incapacity for performance of duty” as the basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board ... on the basis of competent medical opinion.

3. Government Code section 21152, subdivision (d), provides that an application to the board for retirement for disability may be made by the member or any person on her behalf.

4. Government Code section 21154 provides, in pertinent 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. 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, on 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.

5. The termination of a member’s employment in such a manner that there is no possibility of reinstating the employer-employee relationship in the future renders him ineligible for disability retirement so long as such termination was neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement. (*Haywood*, at pp. 1306-1307.) The severance of respondent’s employment relationship with FTB eliminated a necessary requisite for disability retirement – the potential reinstatement of her employment with FTB. Respondent was not determined to be disabled within the meaning of Government Code section 20026 at the time her employment was severed. The exceptions articulated in *Haywood* and *Smith* do not apply as set forth in Findings 12 and 13.

Conclusion

6. Respondent is not eligible for disability retirement for the reasons explained above. Therefore, her appeal is denied.

ORDER

Respondent Tracy R. Craig's appeal of the cancellation of her application for disability retirement is **DENIED**.

DATED: December 14, 2016

DocuSigned by:

Danette C. Brown

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DANETTE C. BROWN

Administrative Law Judge

Office of Administrative Hearings