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:
KIMBERLY A. LARSON,
Respondent,
and
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION,
Respondent.

Case No. 2016-0947
OAH No. 2016110104

PROPOSED DECISION

This matter was heard before Administrative Law Judge (ALJ) Ed Washington, Office of Administrative Hearings (OAH), State of California, in Sacramento, California, on April 13, 2017.

Senior Staff Attorney Charles H. Glauberman represented complainant Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Kimberly A. Larson (respondent) represented herself.

CalPERS properly served California Department of Corrections and Rehabilitation (CDCR), with the Statement of Issues and Notice of Hearing. CDCR made no appearance. This matter proceeded as a default against CDCR pursuant to Government Code section 11520, subdivision (a).

Evidence was received, the record was closed, and the matter was submitted for decision on April 13, 2017.

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ISSUE

Is respondent precluded from applying for disability retirement because she was dismissed from employment with CDCR, effective July 23, 2008?

FACTUAL FINDINGS

1. Complainant filed the Statement of Issues in his official capacity.

Respondent’s Employment

2. Respondent was employed by CDCR as an Associate Governmental Program Analyst. By virtue of this employment, respondent is a state industrial member of CalPERS.

3. On July 16, 2008, CDCR served on Respondent a Notice of Adverse Action (NOAA), seeking to dismiss Respondent from employment for cause, effective July 23, 2008. The dismissal became effective July 23, 2008, and was based on the following causes for discipline specified under Government Code section 19572:

   (c) Insubordination.

   (f) Dishonesty.

   (m) Discourteous treatment of the public or other employees.

   (o) Willful disobedience.

   (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 or the person’s employment.

4. These causes for discipline were based on the following allegations: (A) On February 8, 2008, while traveling for business as a CDCR employee, respondent was arrested at her hotel for disorderly conduct, public intoxication, and resisting arrest. She had returned to the hotel with three other individuals at approximately 2:30 a.m., after spending time at a local bar, and was loud and disruptive. A hotel employee contacted law enforcement for assistance. When the officers arrived and attempted to arrest respondent, she resisted arrest and shouted threatening profanities at the officers. She was arrested and remained in custody until 8:00 a.m. (B) Respondent did not immediately report her arrest to her supervisor when released from custody, as required. When respondent eventually reported her arrest to her superiors, her written description of the events conflicted with the video surveillance and audio recordings of the events. (C) Respondent falsely reported her work hours during this business trip, by reporting work hours that were either not consistent with the visitor’s sign-in log at her assignment or that occurred when she was in police custody.
Respondent's Disability Retirement Application

5. On March 24, 2016, CalPERS received a completed Disability Retirement Election Application (Application) from respondent. In the Application, respondent indicated her application type as “Service Pending Disability Retirement.” Respondent indicated in the Application that her last day on the payroll was “August 2008,” and that the effective date of her retirement was May 31, 2016.

6. In the Application, respondent described her disability as “PTSD, panic attacks, anxiety, etc.” She specified that her disability occurred “April 2006” as a result of “[d]uring travel for work with boss.” In response to a question on the Application that asks what her limitations or preclusions are due to her condition, respondent indicated “See Attached Physicians [sic] Report.” Respondent also specified that her condition affected her ability to perform her job as follows: “PTSD, panic attacks, anxiety, etc., see attached physicians [sic] report.”

7. By letter dated June 7, 2016, CalPERS notified respondent that it could not accept her application for disability retirement. This letter specifies that CalPERS determined that respondent was not eligible for disability retirement because she “left employment for reasons which were not the result of a disabling medical condition.” The letter also specifies that respondent had a right to appeal the determination, and, although her disability retirement application had been cancelled, she would continue to receive service retirement benefits. On August 11, 2016, respondent appealed from CalPERS’s cancellation of her application for disability retirement.

CalPERS’s Challenge to Respondent’s Application

8. At hearing, CalPERS argued that respondent was precluded from seeking disability retirement pursuant to 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). As set forth in the Legal Conclusions below, the courts in Haywood and Smith held that civil service employees may not apply for disability retirement if they have been dismissed from their civil service employment. These courts recognized two exceptions to this preclusion: (1) when the employee establishes that the dismissal was the ultimate result of a disabling condition; and (2) when the employee establishes that the dismissal preempted the employee’s otherwise valid claim for disability retirement. CalPERS argued that, as a result of her dismissal from employment for cause, effective July 23, 2008, respondent is precluded by Haywood and Smith from applying for disability retirement.

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1 Respondent initially submitted an incomplete application to CalPERS on March, 10, 2016, which was rejected.

2 A physician’s report was not attached to the Application admitted into evidence at hearing, and no physician’s report was otherwise admitted into evidence.
Respondent's Evidence

Respondent's Testimony

9. At hearing, respondent asserted that she worked for the State of California for 19 years and is entitled to receive retirement benefits stemming from her retirement contributions during that period. She is currently receiving service retirement benefits. Respondent does not dispute that she was terminated from employment with CDCR on July 23, 2008, for cause. However, she asserted she was wrongfully terminated in retaliation for filing a sexual harassment complaint against her supervisor in April 2006. Additionally, she asserted she was denied the opportunity to have and participate in a preliminary administrative review of the proposed disciplinary action (Skelly hearing). Respondent also claimed that her termination was preemptive of an existing valid claim for disability retirement due, at least in part, to her supervisor's conduct.

10. In 2006, respondent filed a discrimination complaint with CDCR asserting that she was sexually harassed by her supervisor. CDCR investigated her complaint and determined her supervisor's conduct, which formed the basis of her complaint, violated the CDCR Sexual Harassment Policy. Respondent asserted that CDCR was aware that her supervisor had also sexually harassed another employee prior to engaging in the conduct she complained of, and failed to take adequate steps to prevent the conduct from recurring.

11. Respondent was off work for an unspecified period following the sexual harassment incident. She testified that she suffered from Post-Traumatic Stress Disorder (PTSD), as a result of her supervisor's conduct. She also asserted that her PTSD was so severe that her physician recommended that she "stop working." Respondent continued to work despite her physician's recommendations. However, she worked pursuant to restrictions that limited her exposure to her former supervisor.

12. Respondent asserted that CDCR retaliated against her in response to her complaint of sexual harassment. She stated this retaliation included wrongfully terminating her for the conduct described in Finding 4. Respondent was apprised of her right to appeal her termination to the State Personnel Board (SPB) when she received the NOAA, but filed no appeal with SPB.

13. Respondent did not apply for either service retirement or disability retirement until March 24, 2016, because she did not learn that she was eligible for retirement benefits speaking with representatives from CalPERS in 2015. Prior to that, she was unaware that she could apply for disability retirement as a result of any injuries she suffered from her supervisor's conduct. She also stated that, at the time of her dismissal, representatives from CDCR told her she would not be eligible to receive any CalPERS retirement benefits due to her termination.
Respondent's Exhibits

14. During the hearing, respondent offered into evidence documents regarding her sexual harassment complaint against her supervisor at CDCR, her workers' compensation claim against CDCR, the Skelly hearing associated with the NOAA, a civil action she filed against CDCR, and a declaration and two medical records from Irving Hellman, Ph.D., describing his treatment of respondent and diagnoses that she suffers from Post-Traumatic Stress Disorder due to sexual harassment from her former supervisor. Respondent also submitted documents which reflect that she performed her job duties satisfactorily, prior to her dismissal. These documents were admitted as administrative hearsay and have been considered to the extent permitted under Government Code section 11513, subdivision (d).

15. One medical record indicates that respondent was taken off work by Dr. Hellman the day after she was served with her NCAA. The second medical record reflects that respondent was taken off work at another time; however, the dates are illegible. Dr. Hellman's declaration indicates that respondent was restricted from any visual or verbal contact with her former supervisor "in September of 2006 through January 2008." The declaration also specifies that respondent was "encouraged to return to full duty by her employer in December 2007 . . . [and] attempted to return to full duty with the understanding that she would have no contact with her assailant . . . ."

Discussion

16. As set forth in Haywood and Smith, subject to the two listed exceptions, civil service employees dismissed from their civil service jobs may not apply for disability retirement. Those exceptions apply when the employee's separation from state service was the ultimate result of the employee's disabling condition, or when the employee's separation from service preempted an otherwise valid claim for disability retirement. Respondent asserted her termination was "wrongful" for several reasons. That respondent claimed to have been wrongfully terminated is only relevant in this action to the extent it supports either of the exceptions specified in Haywood and Smith.

17. Respondent claimed her termination resulted from a disabling medical condition. However, the evidence at hearing clearly established that respondent's behavior during the early morning hours of February 8, 2008, formed the basis for her termination. With respect to her claims that her termination was unjustified, she was apprised of her right to appeal her termination to SPB and did not do so.

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3 Government Code section 11513, subdivision (d), in relevant part, provides:

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.
18. Respondent also claimed her termination was preemptive of an otherwise valid claim for disability retirement. She identified her otherwise valid claim for disability retirement as her PTSD and the effect it had on her ability to work.

19. Where an agency dismisses an employee solely for a cause unrelated to a disabling medical condition, it does not result in the forfeiture of a matured right to a pension allowance. (Smith v. City of Napa (2004) 120 Cal.App.4th 194, 206.) "Thus, if a plaintiff were able 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.)

20. Respondent had a vested right to apply for disability retirement upon acceptance of employment with CDCR. While that “right” vests upon acceptance of employment, an employee would not be entitled to receive the benefit until all conditions to receive it have been met. (Dickey v. Retirement Board of the City and County of San Francisco (1976) 16 Cal.3d 745.) There is a marked difference between the vesting of a pension right and the accrual of a cause of action to enforce a vested right. “The right to a pension is a vested right; the amount of the pension may not always be ascertained until the last contingency has occurred.” (Id. at p. 750; Brooks v. Pension Board (1938) 30 Cal.App.2d 118, 123.) The vested right to the pension benefit may be lost upon occurrence of a condition subsequent such as lawful termination of employment before it matures, or because of the nonoccurrence of one or more conditions precedent. (Id. at p. 749.) Thus, the issue here is whether respondent’s vested interest in disability retirement “matured” prior to her separation from employment.

21. A vested right matures when there is an unconditional right to immediate payment. (Smith, supra, 120 Cal.App.4th at p. 206.) Typically, this arises at the time a pension board determines that the employee was no longer capable of performing his or her duties. (Ibid; Tyra v. Board of Police etc. Commrs. (1948) 32 Cal.2d 666, 671-672.) Here, there has been no determination by CalPERS that respondent was eligible for disability retirement at any time. Accordingly, respondent’s right to disability retirement could not have matured prior to her dismissal.

22. Even where there has not yet been a determination of eligibility, there may be facts under which a court, applying principles of equity, will deem an employee to still have a right to disability retirement. (Smith, supra, 120 Cal.App.4th at pp. 206-207.) The equitable principles described in Smith have been considered and found not applicable to the facts established at hearing. Respondent failed to even apply for disability retirement benefits until nearly eight years after she was terminated from employment.

23. Nor was there “undisputed evidence” that respondent was eligible for a CalPERS disability retirement, “such that a favorable decision on [respondent’s] claim would have been a foregone conclusion (as perhaps with a loss of limb).” (Ibid.) That respondent
had been taken off work on two occasions due to PTSD is insufficient to conclude that she was eligible for disability retirement at any time prior to her termination. Her medical evidence at hearing was provided entirely through the hearsay statements of Dr. Hellman. Those statements alone are not sufficient to support a finding in an administrative hearing. As in Smith, for purposes of the standard for disability retirement, the medical evidence here is not unequivocal. CalPERS would have a basis for litigating whether the evidence provided by respondent demonstrated a substantial incapacity to perform her job duties or instead only made it difficult to perform her duties, which is insufficient. (Ibid.) CalPERS noted, for example, that respondent was working on a full-time basis without any meaningful work restrictions as of the date of her termination.

24. When the above matters are considered, respondent has not presented unequivocal medical evidence of such nature that approval of her application for disability retirement was a “foregone conclusion.” Any right to disability retirement allowance cannot be deemed to have matured in this case. For all these reasons, respondent’s application for disability retirement is precluded by operation of Haywood and Smith.

LEGAL CONCLUSIONS

1. Government Code section 21152 provides, 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. 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 any 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 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. On receipt of the application with respect to a local safety member other than

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4 See footnote 3, ante, page 5.
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
67 Cal. App.4th 1292, 1297.) The Third District Court of Appeal explained that the dismissal
"constituted a complete severance of the employer-employee relationship, thus eliminating a
necessary requisite for disability retirement—the potential reinstatement of [the] employment
relationship with the [employer] if it ultimately is determined that [the employee] is no longer
disabled." (*Ibid.*)

4. As set forth in Findings 3, 4, and 9, complainant established that respondent's
separation from employment was a dismissal for cause for purposes of applying the *Haywood*
criteria. Complainant also established that respondent's separation from employment was
not the ultimate result of a disabling medical condition.

Appeal reiterated the principles of the *Haywood* decision. The court 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 or her job 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.)

6. As set forth in Findings 22 and 23, when the principles of equity are applied to
the facts established at hearing, there was no undisputed evidence that respondent was eligible
for a CalPERS disability retirement allowance at the time of her dismissal, such that a
favorable decision on a claim would have been a "foregone conclusion." There was no
evidence that respondent had a vested interest in a disability retirement allowance that
"matured" prior to her separation from employment.

7. In sum, respondent was terminated from employment for cause nearly eight
years before she applied for disability retirement. Her right to disability retirement could not
have matured prior to her dismissal and there was no undisputed evidence that respondent
was eligible for a CalPERS disability retirement allowance at the time of her dismissal, such
that a favorable decision on a claim would have been a "foregone conclusion." For all the
above reasons, cause exists to uphold CalPERS's determination that respondent is not
entitled to file an application for disability retirement allowance.
ORDER

The appeal of Kimberly A. Larson to be granted the right to file an application for disability retirement is DENIED.

Dated: May 15, 2017

ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings