

**ATTACHMENT A**

**THE PROPOSED DECISION**

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

**In the Matter of the Appeal of Accepting the Application for  
Industrial Disability Retirement of:**

**SUSAN G. WILLIS, Respondent,**

**and**

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, Respondent.**

**Case No. 2018-1263**

**OAH No. 2019010527**

**PROPOSED DECISION**

Cindy F. Forman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, decided this matter on the parties' written submissions.

Elizabeth Yelland, Senior Attorney, represents Anthony Suine, Chief, Benefit Services Division, Board of Administration, California Public Employees' Retirement System (CalPERS).

Susan G. Willis (respondent) represents herself.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED Aug 5. 20 19



Respondent California Department of Corrections and Rehabilitation (CDCR) did not submit any written submissions regarding the matter.

The matter presented is a legal issue. Jurisdictional documents, other documents, and briefs were exchanged between CalPERS and respondent, and the administrative law judge admitted the documents as Exhibits 1 through 12 and A through F. Respondent's request that CalPERS's opening brief be stricken because it was untimely received on July 3, 2019, instead of on July 2, 2019, is denied; CalPERS's service of the opening brief was timely as it was delivered for overnight delivery to respondent on July 2, 2019, the ordered service date, and respondent demonstrated no prejudice from the July 3, 2019 delivery. (Code Civ. Proc., § 1013, subd. (c).)

The record was closed and the matter was submitted for decision on July 17, 2019.

## **SUMMARY**

The sole issue on appeal is whether respondent is eligible to apply for industrial disability retirement. CalPERS asserts that respondent's application for industrial disability retirement is barred by *Haywood v. American River Fire Protection Dist.* (1998) 67 Cal.App.4th 1292 (*Haywood*), *Smith v. City of Napa* (2004) 120 Cal.App.4th 194 (*Smith*), *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot* (2013) CalPERS Precedential Decision 13-01 (*Vandergoot*), and the recent decision in *Martinez v. Public Employees' Retirement System* (2019) 33 Cal.App.5th 1156, *review denied* (June 26, 2019). Respondent argues that these cases are inapposite because they involve employees who were either terminated for cause or resigned to avoid disciplinary proceedings, neither of which occurred in this matter.

Respondent's construction of *Haywood* and its progeny, however, is too narrow. The cases cited by CalPERS stand for the proposition that the permanent separation of an employee from employment, without any opportunity for reinstatement, precludes a disability retirement. Here, respondent resigned her employment with CDCR and agreed, in exchange for monetary consideration, that she would never seek re-employment with CDCR, and she would be subject to immediate dismissal if she did. Under these circumstances, respondent permanently severed her employment relationship with CDCR and is thus ineligible for disability retirement benefits.

## **FACTUAL FINDINGS**

### **Jurisdiction and Parties**

1. Anthony Suine, Chief of CalPERS's Benefit Services Division, signed the Statement of Issues on January 10, 2019, in his official capacity. Paragraph XIII of the Statement of Issues provides that the "appeal is limited to the issue of whether respondent Willis is eligible to apply for industrial disability retirement under Government Code section 21151, or whether her eligibility is precluded by operation of *Haywood, Smith, and Vandergoot*."

2. CalPERS is the state agency responsible for the administration of the Public Employees' Retirement Law (PERL), Government Code section 20000 et seq.

3. Respondent commenced employment with the State of California on April 2, 2004, as a Staff Attorney with the State Compensation Insurance Fund. On April 1, 2008, respondent transferred to CDCR as an Attorney with CDCR's Employment Advocacy and Prosecution Team (EAPT). On January 15, 2012, respondent promoted to

the position of Attorney III with EAPT.<sup>1</sup> By virtue of her employment with CDCR, respondent became a state industrial member of CalPERS subject to Government Code section 21154.

4. CDCR is a state agency that contracts with CalPERS for retirement benefits for its eligible employees. CDCR is subject to the provisions of the PERL.

### **Respondent's Employment History**

5. While working at CDCR, respondent developed a number of medical issues that necessitated repeated absences from work and required certain accommodations upon her return. On May 25, 2016, CDCR notified respondent that it could satisfy her request for reasonable accommodations for her medical issues as an Attorney III in CDCR's Office of Legal Affairs Risk Management Team (RMT), and CDCR assigned respondent to that position effective June 1, 2016. Respondent worked one day for RMT in June 2016 after which she was placed on temporary disability leave. Other than her one day of work in June 2016, respondent did not report to work in 2016.

6. In response to CDCR's actions in connection with her request for reasonable accommodations, respondent filed three claims with the State Personnel Board (SPB): (1) Appeal from Constructive Medical Action, filed April 18, 2016; (2) Appeal from Involuntary Transfer, filed on May 25, 2016; and, (3) Appeal from Med

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<sup>1</sup> The Statement of Issues (Paragraph II) incorrectly alleges that respondent was employed by CDCR as of April 5, 2004. (See Ex. 6, Finding of Fact No. 6, p. PERS000041.)

Term/Dem/Susp/Transfer, filed on May 25, 2016 (collectively, the SPB appeals). In the SPB appeals, respondent claimed that CDCR had constructively terminated or suspended her from her position as Attorney III, involuntarily transferred her, or improperly transferred her for medical reasons. CalPERS offered no evidence to support the allegation in Paragraph IV of the Statement of Issues that respondent “appealed CDCR’s termination and suspension of her from her position as Attorney III” as CDCR had not terminated or suspended respondent at the time she filed the SPB appeals.

7. An SPB administrative law judge heard respondent’s consolidated appeal of the three actions on December 5 and December 6, 2016. In a Proposed Decision dated February 1, 2017, the administrative law judge found that respondent had failed to prove that CDCR had constructively terminated or suspended her from her position as Attorney III, involuntarily transferred her, or improperly transferred her for medical reasons, and dismissed the SPB appeals. The SPB adopted the Proposed Decision on March 9, 2017, and the decision became final.

8. In addition to the SPB appeals, respondent filed internal Equal Employment Opportunity complaints as well as complaints with the United States Equal Employment Opportunity Commission (EEOC) and the Department of Fair Employment and Housing (DFEH) regarding CDCR’s conduct (collectively, Administrative Claims). Respondent also filed an age discrimination claim. During this same period, respondent filed a workers’ compensation claim for her medical issues.

### **Respondent’s Settlement with CDCR**

9. On April 25, 2017, respondent executed a Settlement Agreement and Release (Settlement Agreement) with CDCR resolving all of her present and future

claims against CDCR in exchange for a monetary payment. The terms of the Settlement Agreement provide in pertinent part as follows:

1. CDCR agrees to pay [respondent] a lump sum in the amount of eighty thousand dollars (\$80,000) in full, final and complete settlement of all claims inclusive, without limitation, to those arising from or relating to [the SPB Appeals and the Administrative Claims] . . . .

[¶] . . . [¶]

4. The Parties agree that this Agreement is contingent upon the Workers' Compensation Appeals Board (WCAB) approval of a separate compromise and release agreement which settles all of [respondent's] workers' compensation claims . . . .
5. In exchange for the consideration set forth in this Agreement, the sufficiency of which is acknowledged by [respondent] and her attorneys, [respondent] shall voluntarily and irrevocably resign from her employment with CDCR effective on the date when the WCAB approves the compromise and release which settles all of [respondent's] workers' compensation claims. If [respondent] is unable or unwilling to resign from her employment with CDCR on the date when the WCAB approves the compromise and release which settles all of [respondent's] workers' compensation claims,

[respondent] agrees that CDCR has the authority to summarily separate her from her employment effective on such date, without further notice to her. Under no circumstances will [respondent's] employment with CDCR continue after the date when the WCAB approves the compromise and release which settles all of [respondent's] workers' compensation claims. From the time this Agreement is executed, and until the date when the WCAB approves the compromise and release which settles all of [respondent's] workers' compensation claims, CDCR will restore [respondent] to her Attorney III position, with the Office of Legal Affairs, Risk Management Team, as determined in CDCR's sole discretion, consistent with the collective bargaining agreement applicable to [respondent].

6. [Respondent] further agrees, as part of the consideration and inducement for execution of this Agreement, the sufficiency of which is acknowledged by [respondent] and her attorneys, to never apply for or accept re-employment with CDCR, the California Correctional Health Care Services (CCHCS), or any entity providing services to inmates or wards within CDCR. If CDCR inadvertently offers [respondent] a position, [respondent] breaches this Agreement by accepting a position with CDCR or CCHCS. [Respondent] agrees that if she becomes re-employed by CDCR or CCHCS, she may be

immediately dismissed without limitation to time and with no right to appeal. [Respondent] hereby waives any right she may have to appeal such termination in any forum.

7. As further consideration and inducement for execution of this Agreement, the sufficiency of which is acknowledged by [respondent] and her attorneys, [respondent] voluntarily and irrevocably waives any rights to reinstatement that she may have to her civil service position with CDCR, independently of any action by any other agency.

(Ex. 8, pp. PERS000058 – PERS000059.)

10. In an Addendum to Settlement Agreement and Release (Addendum), also signed by respondent on April 25, 2017, CDCR agreed to pay respondent an additional \$20,000 to resolve respondent's claims under the Age Discrimination in Employment Act.

11. The Settlement Agreement and Addendum were conditioned upon and did not become effective until the Workers' Compensation Appeals Board (WCAB) approved settlement of respondent's workers' compensation claims. (Ex. 8, p. PERS000065.) On May 4, 2017, the WCAB approved respondent's workers' compensation award in the amount of \$433,194.62. On May 5, 2017, CDCR signed the Settlement Agreement and the Addendum. Pursuant to the terms of the Settlement Agreement, respondent resigned from employment with CDCR on May 5, 2017.

CalPERS offered no evidence that respondent's resignation was to avoid any pending or threatened disciplinary proceeding.

12. Respondent had never been suspended or disciplined throughout her employment with CDCR, and she was an employee in good standing until her retirement. (Ex. F., ¶¶ 2, 10.) CalPERS offered no support for its allegation in the Statement of Issues that respondent was "terminated" after she failed to return to work. (Statement of Issues, Paragraph III.)

### **Respondent's Application for Disability Retirement**

13. On April 25, 2017, the same day she executed the Settlement Agreement and Addendum, but before resigning from employment with CDCR, respondent filed the Disability Retirement Election Application, seeking "Service Pending Industrial Disability Retirement" (Application). The Application was received by CalPERS on April 28, 2017. (Ex. 3.) The Application requested an effective retirement date of November 3, 2015. Respondent retired for service effective April 1, 2017, and has been receiving her service retirement allowance from that date.

14. On August 17, 2017, CalPERS sent a letter to CDCR requesting additional information regarding respondent's employment to allow CalPERS to begin the industrial disability retirement application review process.

15. On December 15, 2017, CalPERS denied the Application in a letter to respondent (December 2017 letter), stating in relevant part:

We have determined that your employment ended for reasons which were not related to a disabling medical condition. When an employee is separated from

employment as a result of disciplinary action or the employee enters into a settlement agreement where the employee chooses to voluntarily resign in lieu of termination, and the discharge is neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement, termination and/or a mutual release understanding of separation from employment due to a pending adverse action renders the employee ineligible to apply for disability retirement.

(Ex. 4.)

16. The December 2017 letter also states that CalPERS's rejection is based on the "determination of the court" in *Haywood* and *Smith* and in two CalPERS precedential decisions, *Vandergoot* and *In the Matter of Accepting the Application for Industrial Disability Retirement of Phillip D. MacFarland, Respondent, and California State Prison, Sacramento, CA Dept. of Corrects and Rehabilitation, Respondent*, dated October 7, 2015, and made Precedential effective June 22, 2016 (*MacFarland*). The December 2017 letter makes no mention of the Settlement Agreement or respondent's permanent separation from employment with CDCR as a result of the Settlement Agreement.

17. On January 18, 2018, respondent filed an appeal to CalPERS's rejection of the Application. In her appeal, respondent asserts that CalPERS's decision is based on a mistaken view of her settlement with CDCR because the settlement was not the result of any actual or pending disciplinary action. Respondent also claims that she was misled by CalPERS because, several months prior to the December 2017 letter, CalPERS had requested medical records from respondent and discussed setting a

medical exam for respondent, without any mention of the effect of the Settlement Agreement. Lastly, respondent requests to extend her appeal because of recent hospitalizations and medical issues. (Ex. 5.)

### **Submission of the Dispute on the Written Record**

18. Respondent was a proponent of, and active participant in discussions regarding whether, to submit the dispute on the written record. After the Statement of Issues was filed and a hearing before OAH was set for July 2, 2019, the parties met and conferred by telephone and email regarding the most efficient way to resolve the matter. On June 5, 2019, respondent wrote to OAH, stating as follows:

On today's date I spoke by telephone with Attorney Elizabeth Yellen who is representing CALPERS in the above-referenced matter. We agreed that the sole issue to be resolved in this matter is whether or not I was terminated from my employment with CDCR as set forth in the Statement of Issues. Paragraph XIII that reads in relevant part:

"The appeal is limited to the issue of whether respondent Willis is eligible to apply for industrial disability retirement under Government Code section 21151, or whether her eligibility is precluded by operation of *Haywood, Smith and Vandergoot*."

We further agreed that this matter is solely a legal question and can be handled by written briefs. Therefore, we respectfully request that the [OAH] set a written briefing

schedule for this matter and that the currently scheduled hearing date of July 2, 2019, be taken off calendar.

(Ex. 12, PERS000097.)

19. In its response to respondent's letter to OAH filed the same day, CalPERS agreed to submitting the appeal on the papers; however, CalPERS disagreed with respondent's characterization of the issue on appeal. Specifically, CalPERS disputed that the "sole issue to be resolved in this matter is whether or not [respondent] was terminated from her employment with CDCR . . . ." According to CalPERS, the sole issue for determination is set forth in Paragraph XIII in the Statement of Issues, as described in respondent's June 5 letter. (Ex. 12, p. PERS0000104.)

20. In a letter dated June 6, 2019, CalPERS informed OAH that the parties had met and conferred about the confusion over the issue of the appeal apparent in their June 5 exchange, and they now agreed that the sole issue of the appeal is set forth in Paragraph XIII of the Statement of Issues. (Ex. 12, p. PERS000106.) In an email to CalPERS, respondent noted her agreement with the June 6 letter, but further stated that she did not agree with CalPERS's interpretation of the pertinent facts. Additional correspondence between the parties confirms that the issue addressed in this matter is whether the settlement respondent reached with CDCR precludes respondent from filing her application for disability retirement benefits. (*Id.* at pp. PERS000111 – PERS000112.)

21. Based on the parties' correspondence, on June 24, 2019, OAH issued an Order Granting Submission on Written Record and Vacating Hearing Date on July 2, 2019 (Order). Pursuant to the Order, the parties agreed that the sole legal issue to be

determined in respondent's appeal is set forth in Paragraph XIII of the Statement of Issues.

22. By virtue of the correspondence and communications between the parties and with OAH as described in Factual Findings 18 through 21, respondent was aware of the scope of the issues to be resolved by respondent's appeal.

## **LEGAL CONCLUSIONS**

### **Burden of Proof**

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that she is entitled to it. (*Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327.) Respondent contends that it is CalPERS's burden to prove whether its denial of the Application was supported by a preponderance of evidence. On the contrary, once CalPERS notified respondent of the basis of its denial, the burden shifted to respondent as the applicant seeking benefits to establish she is entitled to such benefits by a preponderance of evidence. (Evid. Code, § 664.)

### **Adequacy of Notice – Due Process**

2. Respondent claims her appeal of CalPERS's rejection of the Application should be granted for reasons of due process and fundamental fairness. Respondent asserts CalPERS is limited in the appeal to the arguments asserted in its December 2017 letter, i.e., that respondent is ineligible for industrial disability retirement because she had been terminated from her employment as a result of a disciplinary action or had entered into a settlement agreement where she chose to voluntarily resign in lieu

of termination. Respondent maintains that because she was neither terminated nor threatened with termination by CDCR, her appeal must be granted. Thus, respondent argues that her rights to due process and fundamental fairness would be violated if CalPERS is allowed to make any arguments outside of those set forth in the December 2017 letter. Respondent further argues that she would not have agreed to submit the issue of her disability eligibility on the written record without testimony if she knew that CalPERS would be permitted to expand its reasons for denial beyond those made in the December 2017 letter.

3. "[D]ue process is the opportunity to be heard at a meaningful time and in a meaningful manner." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 576.) Procedural due process requires procedural safeguards "that will, without unduly burdening the government, maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decisionmaking process." (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 174.) A person or entity subject to administrative adjudication is entitled to notice and an opportunity to be heard, including the right to present and rebut evidence. (Gov. Code, § 11425.10, subd. (a)(1).)

4A. Respondent did not establish that her due process rights were violated by allowing CalPERS to assert arguments outside of those asserted in the December 2017 letter.

4B. Although the December 2017 letter inaccurately referred to respondent's termination as a result of actual or potential disciplinary proceedings, this deficiency was cured by the allegations in Paragraph VI of the Statement of Issues, which described the terms of the Settlement Agreement setting forth respondent's resignation, her agreement not to seek reemployment with CDCR, and CDCR's

authority to terminate her employment if she did not resign. The Statement of Issues further alleges in Paragraph X that CalPERS rejected the Application because her “employment ended for reasons which were neither the ultimate result of a disabling medical condition nor preemptive of an otherwise valid claim for disability retirement,” and that *Haywood* and its progeny, the same cases cited in the December 2017 letter, are controlling. These allegations placed respondent on notice at least as early as January 10, 2019, the date the Statement of Issues was filed, that the permanent severance of her employment relationship with CDCR, by virtue of the terms of the Settlement Agreement, precluded “her right to return to her employment which is a prerequisite in qualifying to apply for disability retirement under Government Code section 21154.” (Statement of Issues, Paragraph X.)

4C. Thus, the Statement of Issues provided sufficient notice of CalPERS’s position in canceling the Application well before respondent requested that the matter be submitted on the written record, and the subsequent briefing allowed respondent a full and unfettered opportunity to respond and refute that position. (See Gov. Code, § 11504 [statement of issues must specify “the statutes and rules with which the respondent must show compliance by producing proof at the hearing”]; *Moustafa v. Board of Registered Nursing* (2018) 29 Cal.App.5th 1119, 1133–1134 [statement of issues satisfied due process by providing requisite notice of basis of board’s denial of license application].) While the Statement of Issues does incorrectly allege that respondent was terminated from her position (see Factual Findings 6 and 12), these allegations are irrelevant to the effect of respondent’s resignation on her Application.

4D. In addition, as set forth in Factual Findings 18 through 22, respondent was on notice of CalPERS’s position before she agreed to submit the matter on the written record, and she raised no objection when the Order reaffirmed the parameters

of the dispute based on the parties' correspondence. Nor did respondent seek reversal of the Order or request the submission of additional evidence upon receipt of CalPERS's opening or closing briefs. Accordingly, respondent's claims of a lack of due process and fundamental fairness in this proceeding are denied.

### **Effect of Respondent's Resignation on Her Eligibility for Disability Benefits**

5. Pursuant to Government Code section 21151, subdivision (a), a state industrial employee, "incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability . . . regardless of age or amount of service." Government Code section 20026 defines "disability" and "incapacity for performance of duty" as "disability of permanent or extended and uncertain duration, which is expected to last at least 12 consecutive months or will result in death, as determined by the board . . . on the basis of competent medical opinion." Application to CalPERS for disability retirement may be made by the industrial employee. (Gov. Code, § 21152, subd. (d).) In determining whether an industrial employee is "eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process." (Gov. Code, § 21156, subd. (c).)

6. Under Government Code section 21154, the application for disability retirement "[s]hall 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 . . . .” Respondent timely filed the Application while she was in state service.

7. CalPERS asserts that the reasoning and rulings of *Smith*, *Haywood*, *Vandergoot*, and *Martinez* govern this case, and based on those cases, respondent is not entitled to apply for industrial disability retirement. Respondent asserts that none of the cases are relevant because they involve termination for either an actual or potential disciplinary violation, she never was served with a Notice of Adverse Action (NOAA), and she resigned on her own accord without any disciplinary action.<sup>2</sup> Respondent claims that, contrary to the circumstances considered in those cases, she did not resign under circumstances tantamount to a dismissal for cause.

8. Respondent interprets *Haywood* and its progeny too narrowly. As explained below, the crux of the holdings in the *Haywood* line of cases is that permanent termination of the employer-employee relationship renders the former

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<sup>2</sup> Respondent also points to the discussion of the *Haywood*, *Vandergoot*, and *Smith* cases in the CalPERS Disability Retirement Resource Guide (Guide), dated January 2019, (Ex. A, p. 14) as further support for her claim that the three cases only apply to “employees facing termination or who have been terminated.” (Ex. D, p. 10.) However, the Guide does not limit the cases’ application as respondent suggests. Rather, the Guide indicates in a section entitled “Haywood, Vandergoot, and Smith Cases” that “Case law impacts a member’s eligibility for disability retirement” and the three cases “provide clarification regarding the member’s eligibility for disability retirement.” While the cases also involve a termination for cause, nothing in the Guide restricts their significance to that issue alone.

employee ineligible to apply for a disability pension, so long as termination is neither the ultimate result of a disability nor preemptive of a valid claim for disability retirement. It matters not whether termination of the relationship was caused by the former employee's dismissal from employment for cause (*Haywood*) or his or her voluntary resignation and permanent waiver of any right to reinstate to his former position (*Vandergoot* and *Martinez*). Under either scenario, the termination constitutes "a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement—the potential reinstatement of his employment relationship with [CDCR] if it ultimately is determined that he no longer is disabled." (*Haywood, supra*, 67 Cal.App.4th at p. 1306)

9. In *Haywood*, the court upheld the denial of the disability retirement application of a firefighter whose employment had been terminated for cause. The Court of Appeals found that the employee's termination for cause permanently severed the employer-employee relationship integral to the state's disability retirement laws. Thus, the employee was ineligible for disability retirement because the "behavior which resulted in Haywood's firing—his unwillingness to faithfully perform his duties—was not caused by a physical or mental condition, and Haywood had no valid claim for disability retirement which could have been presented before he was fired." (67 Cal.App.4th at pp. 1296–1297.)

10. The Court of Appeals further reasoned:

[W]hile termination of an unwilling employee for cause results in a complete severance of the employer-employee relationship (§ 19583.1), disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled. Until an

employee on disability retirement reaches the age of voluntary retirement, an employer may require the employee to undergo a medical examination to determine whether the disability continues. (§ 21192.) And an employee on disability retirement may apply for reinstatement on the ground of recovery. (*Ibid.*) If an employee on disability retirement is found not to be disabled any longer, the employer may reinstate the employee, and his disability allowance terminates. (§ 21193.)

(*Haywood, supra*, 67 Cal.App.4th at p. 1305.)

11. The fact that Haywood filed a timely application for disability retirement made no difference. As the *Haywood* court stated:

[W]e conclude that where, as here, an employee is fired 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.

(*Haywood, supra*, 67 Cal.App.4th at p. 1308.)

12. *Smith* involved a firefighter whose employment was also terminated for cause. He filed an application for disability retirement on the effective date of his termination. CalPERS subsequently denied his application for disability retirement pursuant to *Haywood*. (*Smith, supra*, 120 Cal.App.4th at p. 198.) The *Smith* court

confirmed *Haywood's* view that disability retirement laws presuppose a continuing, if abated, employment relationship, i.e., the disabled annuitant could petition to return to active service, and/or the employing agency could compel testing to determine if the disability is no longer continuing, at which point it could insist on a return to active service. "Therefore, if an applicant is no longer eligible for reinstatement because of a dismissal for cause, this also disqualifies the applicant for a disability retirement." (*Smith, supra*, 120 Cal.App.4th at p. 203.)

13. Analyzing the *Haywood* court's qualification that an employer's dismissal may not preempt "an otherwise valid claim for disability retirement," the *Smith* court identified "the key issue [as] whether his right to a disability retirement matured before plaintiff's separation from service." (*Smith, supra*, 120 Cal.App.4th at p. 206.) According to *Smith*, "A vested right matures when there is an unconditional right to immediate payment," and "a duty to grant the disability pension . . . [does] not arise at the time of the injury itself but when the pension board determine[s] that the employee [is] no longer capable of performing his duties." (*Ibid.*) The appellate court also recognized an equitable exception when there is an impending ruling on an application for disability retirement that is delayed, through no fault of the applicant, until after his employer-employee relationship has been severed. (*Id.* at pp. 206–207.)

14. The CalPERS Board of Administration extended the rule articulated in *Haywood* and applied in *Smith* to the severance of an employer-employee relationship caused by an employee's voluntary resignation and irrevocable waiver of any rights to reinstate to his former position in *Vandergoot*. Vandergoot was a heavy equipment operator with the California Department of Forestry and Fire Protection. He too was dismissed from his employment for cause, and he appealed his dismissal to SPB. He ultimately settled his appeal by agreeing to voluntarily resign his employment and

waive any rights to reinstate to his former position in exchange for withdrawal of the disciplinary documents filed against him. Concluding *Haywood* applies whether Vandergoot was terminated for cause or voluntarily resigned his employment and waived any reinstatement rights, the Board of Administration, in adopting the Proposed Decision, explained:

In deciding this case, bright line distinctions need not be made in determining when and under what circumstances a resignation becomes a termination for cause for purposes of applying *Haywood*. This is because *Haywood* makes it clear that a necessary requisite for disability retirement is the potential reinstatement of the employment relationship with the District if it ultimately is determined that respondent is no longer disabled. (*Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th at pp. 1296 - 1297.) Such is not possible here. The employment relationship has not only been severed, but the terms of the Stipulation and Settlement Agreement expressly lock respondent out from being reinstated. Such a circumstance must be viewed as wholly inconsistent with the policy behind and rationale for disability retirement . . . .

(*Vandergoot, supra*, Precedential Bd. Dec. No. 13-01, at p. 7; quoting *Haywood, supra*, 67 Cal.App.4th at p. 1305.)

15. The court in *Martinez* affirmed the reasoning of *Vandergoot*. In *Martinez*, a former state employee served with an NOAA filed an unfair labor practices complaint against her employer, the Department of Social Services (DSS). To settle the unfair

labor practices complaint, the parties negotiated a settlement in which DSS would pay Martinez \$30,000, withdraw the NOAA, and remove certain matters from her personnel file. Martinez agreed to “voluntarily resign from her position after [DSS] accepted the settlement agreement” and that “she [would] never again apply for or accept any employment position” with DSS. (*Martinez, supra*, 33 Cal.App.5th at p. 696.) CalPERS cancelled Martinez’s subsequent application for disability retirement based on her agreement with DSS, asserting that the settlement permanently severed the employer-employee relationship. The *Martinez* court, relying on *Vandergoot*, *Haywood*, and *Smith*, upheld CalPERS’s cancellation.

16. As set forth in Factual Findings 9 through 11, respondent permanently terminated her employer-employee relationship with CDCR when she entered into the Settlement Agreement, resigned from her employment, and agreed never to seek reinstatement with CDCR. (See Gov. Code, § 19996 [“Any . . . employee may be . . . permanently separated through resignation.”]; Cal. Code Regs., tit. 2, § 446 [“Permanent separations from state service shall include . . . resignation.”].) Termination of respondent’s relationship with CDCR was precipitated solely by her voluntary resignation and her waiver of any right to reinstatement to her former position in return for financial consideration for doing so, and no evidence was presented that it was related to any disability from which she may have been suffering at the time. The fact that she filed the Application prior to termination of her relationship with CDCR is irrelevant. (*Haywood, supra*, 67 Cal.App.4th at p. 1307 [Government Code section 21154 “provides a procedural time limit within which an application for disability retirement must be filed, but does not provide for substantive eligibility whenever a timely application is filed”].)

17A. None of the exceptions set forth in *Haywood* or *Smith* apply to the circumstances here.

17B. Respondent permanently terminated her employer-employee relationship with CDCR to settle the SPB appeals, the Administrative Claims, and her age discrimination claims, not because of any disability she may have been suffering at the time. (Factual Findings 9 through 11.) Therefore, termination of her relationship with CDCR was not “the ultimate result of a disabling medical condition . . . .” (*Haywood, supra*, 67 Cal.App.4th at p. 1308.)

17C. Nor did the termination of respondent’s employment relationship with CDCR preempt an otherwise valid claim for an industrial disability pension. As stated in *Vandergoot*, “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 . . . . A vested right matures when there is an unconditional right to immediate payment.” (*Vandergoot, supra*, Precedential Bd. Dec. No. 13-01, at p. 8, citing *Smith, supra*, 120 Cal.App.4th at p. 206.) Here, CalPERS had not yet ruled on the Application before respondent’s permanent separation from employment; her right to industrial disability retirement thus had not matured. (Factual Findings 9 through 13.)

17D. Equitable exceptions to the principles articulated by *Haywood*, *Vandergoot* and *Martinez* are also absent. At the time of her retirement, respondent was not awaiting a ruling on a claim for a CalPERS disability pension that had been delayed through no fault of her own, as respondent did not initiate the application process until the day she entered into the Settlement Agreement. (See *Smith, supra*, 120 Cal.App.4th at p. 207.) Nor was there “undisputed evidence” that respondent was eligible for a CalPERS disability retirement, “such that a favorable decision on [her] claim would have been a foregone conclusion (as perhaps with a loss of limb).” (*Ibid.*)

The fact that respondent had been placed on temporary disability leave multiple times and received a workers' compensation award is not binding on the issue of eligibility for industrial disability retirement (see *ibid.*), particularly because in at least certain instances, CDCR indicated reasonable accommodations could be made to allow for respondent's reinstatement. (Factual Finding 5.)

18. In accordance with *Haywood, Smith, Vandergoot, and Martinez*, respondent's eligibility to file a disability retirement application is dependent on her having a continuing employment relationship with CDCR. By virtue of the Settlement Agreement, in which respondent resigned from her employment with CDCR and permanently waived her right to reinstatement in exchange for monetary consideration, respondent does not have such an employment relationship, and, accordingly, she is not eligible to file an industrial disability retirement application.

## ORDER

The appeal of Susan G. Willis to be granted the right to file an application for industrial disability retirement is denied.

DATE: August 2, 2019

DocuSigned by:  
*Cindy F. Forman*  
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CINDY F. FORMAN

Administrative Law Judge

Office of Administrative Hearings