

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:

CARLA J. HARRISON, Respondent,

and

FRANCHISE TAX BOARD, Respondent.

Case No. 2019-0207

OAH No. 2019040967

PROPOSED DECISION

Timothy J. Aspinwall, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on August 20, 2019, in Sacramento, California.

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

Ronald M. Metzinger, Attorney at Law, represented Carla J. Harrison (respondent) who was present.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED August 20, 2019
Kady Koster

There was no appearance by or on behalf of the Franchise Tax Board (FTB), 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 August 20, 2019.

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 FTB effective August 1, 1984, and last held the position of a Tax Compliance Representative. By virtue of this employment, respondent became a state miscellaneous member of CalPERS subject to Government Code section 21154.

2. On or about January 18, 2008, the FTB served respondent by mail with a Notice of Adverse Action (NOAA), which notified her that effective February 4, 2008, she would be dismissed from her position. The FTB's stated basis for the NOAA was respondent's "continued failure to meet the performance expectations of a Compliance Representative, for continuously providing poor customer service to taxpayers, for falsifying comments in the Accounts Receivable Collection System (ARCS), and for Internet misuse." Respondent appealed the dismissal.

3. On February 17, 2010, the matter of respondent's appeal from dismissal came before an ALJ at the State Personnel Board (SPB) for a pre-hearing settlement

conference. Respondent was present and represented by a union representative, and the FTB was represented by its general counsel. At the pre-hearing settlement conference, with the assistance of the ALJ, the parties settled this matter by stipulation in the form of a proposed decision on terms including the following:

Respondent [FTB] hereby agrees to withdraw the Notice of Adverse Action of dismissal dated January 18, 2008, and effective close of business February 4, 2008.

Appellant [respondent Harrison] agrees to withdraw and hereby does withdraw her pending appeal from the Notice of Adverse Action.

Appellant hereby resigns for medical reasons effective retroactively to the beginning of business on February 4, 2008, and agrees she will neither seek nor accept re-employment in any capacity with the FTB or any successor agency or department. If in violation of this agreement Appellant ever accepts employment with FTB or its successor agency in the future she can be dismissed immediately without right to appeal to the State Personnel Board or any other remedy.

[¶] . . . [¶]

Should Appellant file an application for disability retirement, Respondent does not oppose nor take any position on such application. Appellant recognizes and acknowledges that there are procedural requirements,

including timeliness, for filing claims for disability retirement and that Respondent makes no representation as to Appellant's eligibility for disability retirement.

On April 27, 2010, the SPB issued a decision approving the parties' stipulation and settlement.

4. On December 30, 2010, respondent submitted an application for industrial disability retirement.¹ On September 15, 2018, respondent submitted an application for service retirement pending industrial disability retirement. On December 3, 2018, CalPERS sent a letter to respondent stating that she is not eligible for disability retirement because her employment ended for reasons not related to a disabling medical condition. On January 3, 2019, respondent appealed CalPERS's determination that she is not eligible for disability retirement.

Respondent's Evidence

5. Respondent testified that she does not recall ever receiving a copy of the NOAA or filing an appeal of the FTB's action; that she does not recall attending a pre-hearing settlement conference before an ALJ for the SPD, or having contact with a union representative at a settlement conference; and she does not recall agreeing to the terms of the stipulated settlement with the FTB. When asked at hearing to clarify

¹ The Statement of Issues in this matter alleges that respondent submitted an application for service pending disability retirement on January 29, 2010. This document is not in evidence. It is among those withdrawn by CalPERS at hearing, without objection from respondent.

whether she recalls not attending a settlement conference with a union representative, or whether she simply does not recall, respondent stated that she does not recall.

6. Respondent testified that she left the FTB on January 9, 2008, because of illness, and that she also had a workers' compensation case ongoing at the time. Respondent did not present any documentary evidence at the hearing.

Discussion

7. CalPERS determined 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 a 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, is what caused the FTB to serve the NOAA, leading to respondent's departure from CalPERS.

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 FTB was aware that respondent had or contended she had a disabling physical condition before it served the NOAA. Nor is there any evidence that FTB instituted dismissal proceedings against respondent to preempt her from filing an application for disability retirement based upon a disabling physical condition.

11. 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.

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LEGAL CONCLUSIONS

Burden of Proof

1. CalPERS has the burden of proving that respondent was terminated for cause prior to seeking disability retirement, or that she 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 FTB, respondent became a state miscellaneous 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 met its burden of proof by establishing that respondent was dismissed for cause, and that the dismissal did not preempt an otherwise valid disability claim. Respondent did not establish that any of the *Haywood* exceptions apply. 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.

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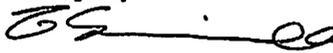
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ORDER

The appeal of respondent Carla J. Harrison to be granted the right to file an application for disability retirement is DENIED.

DATE: August 28, 2019

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TIMOTHY J. ASPINWALL

Administrative Law Judge

Office of Administrative Hearings