

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:**

**GERI E. CHILELLI and DEPARTMENT OF CONSUMER AFFAIRS,
Respondents.**

Case No. 2019-0639

OAH No. 2019101143

PROPOSED DECISION

Heather M. Rowan, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically on July 14, 2020.

Charles Glauberman, Senior Attorney, represented complainant California Public Employees' Retirement System (CalPERS).

Respondent Geri E. Chilelli appeared and represented herself.

There was no appearance by or on behalf of the Department of Consumer Affairs (Department). CalPERS established that it properly served the Department with a Notice of Hearing. Consequently, this matter proceeded as a default hearing against the Department pursuant to Government Code section 11520, subdivision (a).

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
FILED Aug 3, 2020
EMC

Evidence was received and the record remained open to allow CalPERS to submit corrected and redacted exhibits. The record was closed and the matter was submitted for decision on July 16, 2020.

ISSUE

Whether respondent's application for disability retirement based on a broken hip and liver disease conditions is precluded by operation of *Haywood*.¹

FACTUAL FINDINGS

1. Respondent was an Office Technician for the Department. By virtue of her employment, respondent became a state miscellaneous member of CalPERS subject to Government Code sections 21152, 21154, and 21156. On June 26, 2018, the Department served respondent with a Notice of Automatic Resignation by Absence Without Leave (AWOL) letter. The AWOL letter informed respondent that the Department was invoking Government Code section 19996.2² (the AWOL statute) because respondent was AWOL for five or more consecutive working days from June

¹ *Haywood v. American River Fire Protection District* (1999) 67 Cal.App. 4th 1292 (*Haywood*).

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."

20 through 26, 2018. The letter informed respondent she could request reconsideration from California Department of Human Resources (CalHR) and an informal meeting with the Department.

2. On July 6, 2018, the Department held a *Coleman* hearing³ with respondent. Following the hearing, the Department provided respondent a letter informing her of the outcome: there was no cause to “amend, modify, or revoke” the AWOL resignation. Respondent appealed to CalHR. On October 3, 2018, respondent, her union representative, and the Department signed a Stipulation for Settlement and Release (Stipulation), which provided in relevant part:

[The Department] agree[s] to withdraw the Notice of Automatic Resignation by Absence Without Leave (Notice), dated June 26, 2018.

[Respondent], by her signature on this Agreement, agrees to withdraw her appeal in the instant case, CALHR CASE NO. 18-C-0046. [She] also agrees to waive any right she may have to appeal the Notice, either before CalHR or any other court of law that may have jurisdiction over the matter.

[¶] . . . [¶]

[Respondent] acknowledges and agrees that if in the future she applies for or seeks employment with the Department

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 her employer invokes the provisions of Government Code section 19996.2).

or with any of the Department's current or future constituent entities as reflected in section 101 of the Business and Professions Code, or any of their successors in interest that are reflected, at the time of application, in section 1010 of the Business and Professions Code, she will do the following: (a) she will attach to any application a copy of this Agreement and the Notice; (b) [respondent] further agrees that should she apply for employment with [the Department] in the future, she will, regardless of any answers on the STD 678 (Rev. 12/2017), or future revisions of the form, include in the "Explanations" section of the Application, "Please see attached Stipulated Settlement and the Notice of Automatic Resignation by Absence Without Leave"; and (c) she will include the period of employment with [the Department] in the Employment History section of the STD 678 and specify "voluntary resignation in lieu of AWOL separation" as the Reason for Leaving [the Department]. [Respondent] acknowledges that any future employment decisions are at [the Department's] sole discretion. [Respondent] hereby waives any right to challenge any decisions by [the Department] concerning whether or not to hire [respondent]. Should [respondent] not comply with the terms of this Agreement and subsequently obtain employment with [the Department], [respondent] agrees that [the Department] may summarily

dismiss [respondent], and [respondent] hereby waives any right to appeal that dismissal in any forum whatsoever.

[¶] . . . [¶]

3. On October 2, 2018, CalPERS issued a decision approving the Stipulation. On February 1, 2019, respondent filed an application for disability retirement (application) based on broken hip and liver disease conditions, with a requested retirement date of June 20, 2018. Respondent was retired for service effective June 20, 2018. She has been receiving a retirement allowance since April 1, 2019.

4. By letter dated June 4, 2019, CalPERS informed respondent her application had been cancelled. CalPERS explained:

When an employee is separated from employment as a result of a 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 result of a disabling medical condition or preemptive of an otherwise valid claim for disability retirement, termination, and/or a mutual understanding of separation from employment due to a pending adverse action, [the employee is rendered] ineligible to apply for disability retirement.

CalPERS informed respondent of her appeal rights. Respondent filed a timely appeal. This hearing followed.

Respondent's Testimony

5. Respondent testified at hearing. She stated she was in the hospital during the period she was considered AWOL, and she was "nonresponsive." She believes the Department informed her she could either resign or her doctor could release her to work. Her doctor was unwilling to do so. She did not produce evidence regarding the Department's offer. She did not dispute she had signed the Stipulation.

PRINCIPLES OF LAW

6. 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.)

7. 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.

8. 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. 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, or of 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.

9. Several cases have provided guidance regarding disability retirement applications following separation for cause. In *Haywood, supra*, 67 Cal.App. 4th 1292, 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.)

Smith v. City of Napa (2004) 120 Cal.App. 4th 194 (*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.*)

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.

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

The CalPERS Board of Administration designated *In the Matter of the Application for Industrial Disability Retirement of Robert Vandergoot, Respondent*, dated February 19, 2013, a Precedential Decision effective October 16, 2013 (*Vandergoot*). *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.

10. Mr. Vandergoot was not terminated, but he agreed to voluntarily resign pursuant to a Stipulation and Settlement Agreement (Agreement). The terms of the Agreement 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 . . .” (*Vandergoot*.)

ANALYSIS

11. 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 her 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, supra*, 67 Cal.App. 4th 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 to return to state service.

12. Because respondent could not be reinstated, a necessary requisite for disability retirement was lacking. Respondent was not determined to be disabled within the meaning of Government Code section 20026 at the time her employment was severed.

13. Although respondent testified at hearing that she had health issues and was hospitalized, there was no evidence that the Department 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*.

14. Respondent did not apply for disability retirement until more than eight months after she was determined to be AWOL. Therefore, respondent did not have a matured right to disability retirement before her automatic resignation under *Smith*, and the severance of her employment relationship with the Department did not effectuate a forfeiture of a matured right to a disability retirement. Consequently, respondent's application and eligibility for disability retirement is precluded under *Haywood*.

LEGAL CONCLUSION

1. Based on the foregoing, CalPERS established by a preponderance of the evidence that respondent is precluded from applying for disability retirement under *Haywood*. Her appeal must therefore be denied.

ORDER

Respondent Geri E. Chilelli's appeal is DENIED.

DATE: August 3, 2020

DocuSigned by:
Heather M. Rowan
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HEATHER M. ROWAN

Administrative Law Judge

Office of Administrative Hearings