

ATTACHMENT B

STAFF'S ARGUMENT

STAFF'S ARGUMENT TO ADOPT THE PROPOSED DECISION

Duane D. Reed II (Respondent) was employed by Respondent Franchise Tax Board (Respondent FTB) as a Seasonal Clerk. By virtue of his employment, Respondent is a state miscellaneous member of CalPERS.

On April 10, 2014, Respondent FTB issued Respondent a Termination with Fault Memorandum, terminating him from his employment with fault effective April 10, 2014 at 2:30 p.m. The Termination with Fault was based on Respondent's insubordinate behavior on April 7, 2014 and April 9, 2014 – Respondent refusal to meet with management to discuss a work issue.

Through his union representative, on May 6, 2014, Respondent appealed the Termination with Fault. A Name Clearing Hearing was held on May 20, 2014. On June 11, 2014, Respondent FTB sent Respondent a letter informing him that following the Name Clearing Hearing and consideration of his statements, his appeal letter, the "Declaration of Duane Reed" he submitted at the hearing, and additional relevant documents, Respondent FTB determined his termination status of "with fault" remained unchanged. Additionally, the letter informed Respondent that Respondent FTB's determination is final.

Approximately five years later, on April 2, 2019, Respondent submitted an application for disability retirement. Respondent claimed disability on the basis of psychological conditions.

Based on the Termination with Fault, CalPERS determined that Respondent was ineligible for disability retirement pursuant to *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*).

The *Haywood* court found that when 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, termination of the employment relationship renders the employee ineligible for disability retirement. The ineligibility arises from the fact that the discharge is a complete severance of the employer-employee relationship. A disability retirement is only a "temporary separation" from public service, and a complete severance would create a legal anomaly – a "temporary separation" that can never be reversed. Therefore, the courts have found disability retirement and a "discharge for cause" to be legally incompatible.

The *Smith* court explained that to be preemptive of an otherwise valid claim, the right to a disability retirement must have matured before the employee was terminated. To be mature, there must have been an unconditional right to immediate payment at the time of termination unless, under principles of equity, the claim was delayed through no fault

of the terminated employee or there was undisputed evidence of qualification for a disability retirement.

Respondent appealed this determination and exercised his right to a hearing before an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH). A hearing was held on March 4, 2021. Respondent represented himself at the hearing and was permitted to consult with a non-attorney throughout the hearing.

Respondent FTB did not appear at the hearing. At the hearing, the ALJ received documentary evidence demonstrating that CalPERS had provided Respondent FTB with proper notice of the date, time and place of the hearing. The ALJ found that the matter could proceed as a default against Respondent FTB, pursuant to Government Code section 11520.

Prior to the hearing, CalPERS explained the hearing process to Respondent and the need to support his case with witnesses and documents. CalPERS provided Respondent with a copy of the administrative hearing process pamphlet. CalPERS answered Respondent's questions and clarified how to obtain further information on the process.

Documentary evidence including the Termination with Fault Memorandum and decision of Respondent FTB following the Name Clearing Hearing were admitted into evidence. A representative of Respondent FTB confirmed in testimony that Respondent was terminated for being insubordinate. Respondent FTB did not terminate him due to any claimed medical condition and Respondent FTB did not terminate him to preempt him from filing for and receiving a CalPERS disability retirement.

Respondent testified on his own behalf. He testified that he complained to his supervisors that he was sexually harassed at work in 2012 and 2013 and filed a workers' compensation claim for work-related stress as a result. He argued that Respondent FTB retaliated against him for the sexual harassment complaint and his workers' compensation claim.

Respondent called a former FTB coworker to testify on his behalf. She testified that she worked with Respondent in 2012 and testified about her observations of Respondent and her coworkers. She testified that she did not have supervisory duties at FTB, did not supervise Respondent and that she did not participate in Respondent FTB's decision to terminate Respondent.

After considering all of the evidence introduced, as well as arguments by the parties, the ALJ denied Respondent's appeal. The ALJ found that CalPERS established that Respondent was terminated for cause and Respondent failed to establish that he met any exception to the *Haywood* doctrine that would allow him to apply for disability retirement. The ALJ found as follows:

[Respondent] presented no evidence that his separation from state service was the ultimate result of a disabling condition, nor that his separation from state service preempted an otherwise valid claim for disability retirement. Respondent's refusal to meet with management on two separate occasions resulted in his termination. Respondent presented no evidence that his disability prevented him from attending such meetings. Rather, he alleged he was terminated in retaliation for complaining about sexual harassment and for filing a worker's compensation claim. These claims, even if substantiated, are not related to his claimed disabilities and therefore do not demonstrate that his termination was the ultimate result of those disabling conditions.

Respondent also did not establish that his separation from state service preempted an otherwise valid claim for disability retirement. There was no indication in the notice of termination or any other evidence that the FTB instituted dismissal proceedings to preempt respondent from filing an application for disability retirement based upon a disabling physical condition.

In the Proposed Decision, the ALJ concluded that Respondent is precluded from applying for disability retirement as a result of the *Haywood* line of cases.

For all the above reasons, staff argues that the Proposed Decision be adopted by the Board.

June 16, 2021

Helen L. Louie
Staff Attorney