

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:

SCOTT A. SHIRK,

Respondent,

and

HUMBOLDT STATE UNIVERSITY
CENTER,

Respondent.

Case No. 9179

OAH No. 2010061136

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on September 17 and 19, 2012, in Sacramento, California.

Patricia B. Miles, Senior Staff Attorney, California Public Employees' Retirement System, represented the petitioner.

Respondent Scott A. Shirk appeared on his own behalf.

Respondent Humboldt State University Center did not appear.

Evidence was received, the hearing was closed, and the record was held open for the submission of briefs. Petitioner's Closing Brief was received on November 9, 2012, and marked as Exhibit 18. Respondent's closing brief was due on December 10, and petitioner's reply was due December 24, 2012. No additional briefs were received. Thereupon, the record was closed and the matter was submitted on December 24, 2012.

CALIFORNIA PUBLIC EMPLOYEES'
RETIREMENT SYSTEM
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FACTUAL FINDINGS

1. Mary Lynn Fisher, Chief, Benefits Services Division, California Employees' Retirement System (PERS), made and filed the Statement of Issues in her official capacity.

2. Scott A. Shirk (respondent) was employed by respondent Humboldt State University Center as a Dining Services Manager. By virtue of his employment, respondent became a miscellaneous member of PERS subject to Government Code section 21154. Respondent separated from employment with Humboldt State University Center on November 19, 2004.

3. On or about November 14, 2007, respondent signed an application for disability retirement. In filing the application, disability was claimed on the basis of an orthopedic (back and neck) condition and multiple sclerosis.

4. By letter dated November 19, 2008, Humboldt State University informed PERS that respondent was ineligible to submit an application for disability retirement because he was dismissed "after a performance improvement process that occurred from August through November 2004, failed to show any positive results." Humboldt State University Center characterized respondent's dismissal as an "adverse action towards Scott Shirk."

5. PERS reviewed information and documents concerning respondent's termination from employment. PERS determined that respondent had been terminated for cause effective November 18, 2004.

6. PERS determined that respondent was barred from any entitlement to disability retirement because he was terminated for cause and the discharge was neither the ultimate result of a disabling medical condition nor preemptive of any otherwise valid claim for disability retirement. PERS notified respondent of its determination by letter dated December 8, 2008, which included notice that respondent could appeal.

7. Respondent filed an appeal by letter dated December 30, 2008, and requested a hearing. As noted in the Statement of Issues, the appeal is limited to the issue of whether respondent may file an application for disability retirement, or whether his application and eligibility for disability retirement is precluded by operation of law. (See *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292 (*Haywood*).)

Employment Background and Termination

8. Respondent was hired by Humboldt State University Center in 1999. He worked five years as a Dining Manager, an exempt position which afforded him a

fair degree of independence and considerable latitude in how he scheduled his time and activities. He reported directly to Ron Rudebock, the Director of Dining. Leading up to October 2004, respondent was often absent, and he depleted all of his accumulated vacation and sick leave by that time. As a result of these absences, Mr. Rudebock determined that respondent had several work performance issues. Mr. Rudebock determined that these issues negatively impacted dining operations. He identified 16 examples of tasks that respondent had not completed, or had not completed in a timely manner.

9. Heidi Chien is the Associate Executive Director of the Humboldt State University Center. She testified at hearing to the following sequence of events leading up to respondent's separation from employment. By memorandum dated August 4, 2004, the Humboldt State University Center advised respondent that he did not have enough sick leave or vacation banked to cover time that he was absent. He was asked to provide a medical note from his doctor per protocols set forth in the Employee Handbook, and to arrange a meeting with Ron Rudebock and Heidi Chien to discuss the University Center's medical/catastrophic leave policy, and also state disability insurance benefits. Respondent did neither.

10. On September 21, 2004, Ms. Chien sent a second memorandum to respondent. She noted that she had not received any response from the August 4, 2004 memorandum, and that his attendance reports continued to have "many absences due to illness." Ms. Chien advised respondent that she had scheduled a meeting with him and Ron Rudebock on September 28, 2004. She instructed respondent as follows: "You need to bring a medical note from your treating physician to this meeting in accordance with Section IV, item A on 'doctor's verification' of the University Center Employee Handbook." This second memorandum was sent via certified mail to respondent. Respondent failed to appear at the September 28, 2004 meeting, or to provide a medical note as requested.

11. On September 29, 2004, Ms. Chien sent a third memorandum to respondent. She noted that he had failed to attend the September 28, 2004 meeting, and that she had re-scheduled the meeting for October 5, 2004, in her office. She asked that he bring a medical note to the meeting as previously requested. The September 29, 2004 memorandum concluded: "Failure to attend this meeting will have an impact on your future employment with the University Center."

12. Respondent attended the October 5, 2004 meeting. He failed to bring with him any medical note or other documentation related to his absences, but he promised to do so. On October 6, 2004, Ms. Chien sent a fourth memorandum to respondent. She confirmed that respondent had agreed to provide the University Center with a "medical certification" and that he would do so by Friday, October 8, 2004. Respondent failed to do so.

13. Respondent was provided with information regarding his rights under the Family and Medical Leave Act (FMLA), and also the California Family Rights Act (CFRA). He did not ask for leave under either the FMLA or CFRA.

14. Ms. Chien wrote a fifth memorandum to respondent dated October 11, 2004. She noted that respondent had failed to provide the requested medical certification by October 8, 2004, and that such failure precluded him from receiving leave under either FMLA or CFRA. She further noted that he had depleted all accumulated leave, and that over the period April to October 2004, "you have consistently missed several days of work in each semi-monthly pay period."

Ms. Chien detailed a number of examples of tasks that respondent had either not completed or had not completed in a timely manner, and that she contended had a negative impact on operations. She then specified a new work schedule requiring respondent to physically report to work at the specified location, 8:00 a.m. to 5:00 p.m., Monday through Friday, unless otherwise directed by Mr. Rudebock. She concluded: "It is important that we reinforce that if you fail to meet this expectation, it could result in disciplinary action up to and including termination."

15. The Humboldt State University Center and respondent executed a Separation Agreement & General Release of All Claims, effective November 18, 2004. In consideration of resigning his employment with the University Center, respondent received a lump sum separation allowance of \$9,024.00, minus applicable wage deductions, which was equal to three months of his annual salary. In addition to waiving other claims he may have had against the University Center, respondent agreed to waive any right he might have to reinstatement and/or reemployment, and he agreed that he had not and would not apply for or seek future employment with the Humboldt State University Center.

16. By letter to PERS dated November 19, 2008, Ms. Chien indicated that respondent was "dismissed" from employment. (See Finding 4.) She explained that respondent's illness was never established and that he failed to provide the University Center with any doctor's certification after repeated requests. She concluded: "Scott Shirk was not able to provide any proof that he could not work due to a medical condition. Therefore, he was dismissed."

At hearing, Ms. Chien pointed out that when an employee fails to appear for work, the University Center does not know that it is due to illness. When an employee has been absent for more than three days in a row, without substantiation, the University Center will request medical documentation as it did here. She noted that respondent did not apply for medical leave and he failed to provide any medical documentation. Given these circumstances, she explained that the University Center sought to take adverse action against respondent and intended to permanently terminate him from employment for non-performance. She characterized his separation from employment as a dismissal, and not a voluntary resignation.

17. This interpretation of respondent's separation from employment was confirmed by Mr. Rudebock and by Joan Tyson, Director of Business Services for the University Center. Mr. Rudebock indicated that respondent's termination was "involuntary" and that it was due to respondent's lack of performance.

Ms. Tyson noted that she met with respondent on November 18, 2004. At that time she advised him that effectively immediately, he was no longer employed by the University Center. She had received no letter of resignation from respondent, and she believed that the University Center was dismissing respondent from employment at that time.

18. Ms. Chien explained that respondent was in a management position, and that the University Center generally enters into the type of Separation Agreement that it did in this case to allow an employee to "voluntarily resign" in lieu of Humboldt State University Center terminating him. It was intended to be a permanent separation from employment, and thus the language regarding reinstatement and/or reemployment, and respondent's agreement that he had not and would not apply for or seek future employment with the Humboldt State University Center. (See Finding 15.)

19. Respondent acknowledged that it was a mutually agreed upon separation, and that he "resigned in lieu of being fired." He understood that his choice was to resign and receive 90 days' pay, or not receive anything.

Respondent further suggested that he did provide the University Center with a doctor's note or other medical documentation when it was requested of him. At hearing, respondent offered medical documentation of his medical condition. However, there was no reliable evidence that he had earlier provided the University Center with a doctor's note or other medical documentation. The several memoranda from Ms. Chien to respondent requesting that he provide medical certification, and confirming that none had been received by the University Center, is persuasive evidence that respondent never provided any medical documentation to his employer when it was requested. His testimony to the contrary was not credible.

Application of Haywood

20. The sole issue in this hearing is whether respondent may file an application for disability retirement based on an orthopedic condition (back and neck) and /or multiple sclerosis, or whether his application and eligibility for disability retirement is precluded by operation of *Haywood*. In *Haywood*, the employee "was terminated for cause following a series of increasingly serious disciplinary actions against him. After his discharge, the employee applied for disability retirement, claiming that stress from the disciplinary actions caused him to suffer a major depression, which rendered him incapable of performing his usual duties with the [employer]." (*Haywood v. American River Fire Protection District, supra*, 67

Cal.App.4th at p. 1295. The Court of Appeals concluded that the employee was not entitled to disability retirement, stating as follows:

As we shall explain, there is an obvious distinction in public employment retirement laws between an employee who has become medically *unable* to perform his usual duties and one who has become *unwilling* to do so. Disability retirement laws address only the former. They are not intended to require an employer to pension-off an unwilling employee in order to maintain the standards of public service. Nor are they intended as a means by which an unwilling employee can retire early in derogation of the obligation of faithful performance of duty. In addition, while termination of an unwilling employee for cause completely severs the employer-employee relationship, disability retirement laws contemplate the potential reinstatement of that relationship if the employee recovers and no longer is disabled.

In this case, Haywood challenged his employer's authority and lost when, after a series of disciplinary actions, he was terminated for cause. 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.

Haywood's firing for cause constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement--the potential reinstatement of his employment relationship with the District if it ultimately is determined that he no longer is disabled. Moreover, to award Haywood a disability pension would interfere with the District's authority to discipline recalcitrant employees. Such an award in effect would compel the District to pension-off an employee who has demonstrated unwillingness to faithfully perform his duties, and would reward Haywood with early retirement for his recalcitrance. In other words, granting Haywood disability retirement would override Haywood's termination for cause despite his inability to set aside the termination through the grievance process.

It follows 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, termination of the employment

relationship renders the employee ineligible for disability retirement.

(*Id.* at pp. 1296-1297, footnote omitted.)

21. Respondent does not contend that his termination was preemptive of an otherwise valid claim for disability retirement. His primary contention is that his termination was the ultimate result of a disabling medical condition, and that he is therefore entitled to file his application for disability retirement and have PERS evaluate whether he was in fact substantially incapacitated for the performance of his duties as a Dining Services Manager.

22. PERS has demonstrated through competent evidence that respondent's separation from employment was not voluntary, and that it was occasioned by both performance issues and respondent's failure to provide a doctor's note or other medical documentation, when requested. Respondent also failed to meet with his employer when requested to discuss his absences. Even within the procedures set by his employer, respondent did not establish that he was unable to work due to his medical condition. Accordingly, it was established that respondent's separation from employment was not the ultimate result of a disabling medical condition.

23. Respondent further contended that he was physically disabled at the time of his separation from employment, but that his disability was not diagnosed as multiple sclerosis until 2005. He suggested that had he been earlier diagnosed with multiple sclerosis he would have been better informed, and would have applied for disability retirement. He had not earlier applied for retirement because he was advised to wait until he was age 50.

24. The mere evidence of a possible medical condition will not remove an employment termination from the purview of *Haywood* unless the evidence constitutes "unequivocal medical evidence" of such nature that an approval of the application would be a "foregone conclusion." (*Smith v. City of Napa* (2004) 120 Cal.App.4th 194, 207 (*Smith*)). The *Smith* court explained:

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. Nor, for that matter, is there undisputed evidence that the plaintiff was eligible for a CalPERS disability retirement, such that a favorable decision on his claim would have been a foregone conclusion (as perhaps with a loss of limb).

(*Ibid.*)

25. Respondent did not present unequivocal medical evidence of such nature that approval of his application for disability retirement was a “foregone conclusion.” Any right to a disability retirement cannot be deemed to have matured in this case. For all the above reasons, his application for disability retirement should be precluded by operation of *Haywood*.

LEGAL CONCLUSIONS

1. Government Code section 21152 reads, 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 reads, 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 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 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. (*Haywood v. American River Fire Protection District* (1998) 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 his employment relationship with the District if it ultimately is determined that he is no longer disabled.” (*Ibid.*)

4. In *Smith v. City of Napa* (2004) 120 Cal.App.4th 194, the same court reiterated the principles of the *Haywood* decision. The court further 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 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.) As noted in Finding 24, even where principles of equity are applied, this was not a case where there was undisputed evidence that respondent was eligible for a PERS disability retirement, such that a favorable decision on his claim would have been a “foregone conclusion.”

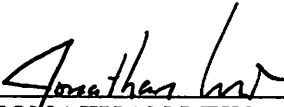
5. PERS demonstrated that respondent was terminated for cause and that his separation from employment was not the ultimate result of a disabling medical condition. Respondent filed a disability retirement application three years following his separation from employment. His disability did not “mature” before the filing of the claim, and respondent did not assert that his termination was preemptive of an otherwise valid claim for disability retirement. Therefore, respondent had completely severed his relationship with his employer, Humboldt State University Service Center, when he applied for disability.

6. For all the above reasons cause exists to uphold PERS’ determination that respondent is not entitled to file an application for disability retirement.

ORDER

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

Dated: January 15, 2013



JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings