

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:

MARK BROOM III, Respondent,

and

FRANCHISE TAX BOARD, Respondent.

Agency Case No. 2020-1104

OAH No. 2021020210

PROPOSED DECISION

Erlinda G. Shrenger, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter on May 24, 2021, by videoconference.

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

Respondent Mark Broom III was present and represented himself.

No appearance was made by or on behalf of respondent Franchise Tax Board.

Oral and documentary evidence was received. The record closed and the matter was submitted for decision on May 24, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. Keith Riddle, Chief of the Disability and Survivor Benefits Division of CalPERS, made and filed the Statement of Issues in his official capacity.
2. Mark Broom III (respondent Broom) was employed by the Franchise Tax Board (FTB). By virtue of this employment, respondent Broom was a miscellaneous member of CalPERS subject to Government Code sections 21152, 21154, and 21156.
3. Respondent Broom began his employment with the FTB in 2006 as an Associate Information Systems Analyst. In 2014, he was promoted to the position of Information Technology Specialist I. As discussed below, the FTB terminated respondent Broom's employment, for cause, effective August 23, 2019.
4. On December 5, 2019, respondent Broom submitted an application for service pending disability retirement, with a requested retirement date of August 25, 2019. In filing the application, respondent Broom claimed disability on the basis of orthopedic (left shoulder, lower back, left hip) and sleep apnea conditions.
5. Respondent Broom retired for service effective August 25, 2019. He has been receiving his service retirement allowance since that date.
6. CalPERS determined respondent Broom is ineligible to apply for disability retirement and canceled his application. The determination was based on CalPERS's

review of information regarding respondent Broom's separation from employment with the FTB and applicable legal precedent, including *Haywood v. American River Fire Protection District* (1998) 67 Cal.App.4th 1292. CalPERS received documentation from the FTB indicating the FTB's decision to separate respondent Broom from employment was based on the Notice of Adverse Action (discussed below) and its supporting factual basis. (See Exh. 6.) The FTB did not separate respondent Broom as a result of any alleged disabling condition or to prevent or preempt him from filing a claim for disability retirement. (*Id.*)

7. By letter dated March 17, 2020, CalPERS notified respondent Broom of the cancellation of his application on the grounds he was ineligible to apply for disability retirement due to the FTB terminating his employment for cause. The letter advised respondent Broom of his appeal rights.

8. After respondent Broom claimed he did not receive CalPERS's March 17, 2020 letter, CalPERS re-sent the letter to respondent Broom on April 3 and April 16, 2020. CalPERS also extended the appeal period by 30 days. CalPERS did not receive a request for appeal from respondent Broom within the 30-day appeal period. However, after respondent Broom provided proof of mailing to CalPERS, CalPERS agreed to process a late appeal for him. CalPERS deemed respondent Broom to have filed a timely appeal and request for an administrative hearing, based on his letter received by CalPERS on July 30, 2020. (See Exh. 5.) The Statement of Issues was filed on January 5, 2021.

9. The issue in this appeal is whether respondent Broom is eligible to apply for disability retirement, or whether his eligibility is precluded by operation of applicable caselaw, specifically, *Haywood v. American River Fire Protection District*, *supra*, 67 Cal.App.4th 1292, and *Smith v. City of Napa* (2004) 120 Cal.App.4th 194.

Termination of Employment

10. On February 25, 2019, respondent Broom was placed on paid administrative time off by the FTB, pending an investigation into his alleged violations of departmental policy.

11. On August 14, 2019, the FTB issued a Notice of Adverse Action to respondent Broom. The Notice of Adverse Action notified respondent Broom he was being dismissed due to his violation of FTB's Policy File 4101A – Anti-Harassment, and the dismissal would be effective August 23, 2019.

12. The Notice of Adverse Action arose from separate complaints made by two female co-workers. The FTB investigated the complaints and found both to be substantiated. One co-worker alleged that on February 15, 2019, while installing a new laptop system at her desk, respondent Broom made inappropriate comments about his sexual life. Respondent Broom told the co-worker about, among other things, the number of women he had sexual relations with and that his current girlfriend was a bisexual stripper who liked to experiment with new sexual activities. The other co-worker alleged that on February 12, 2019, respondent Broom grabbed her around her waist, squeezed her and lifted her upward, and as he let go of her, he grazed her butt with his hand.

13. On August 23, 2019, the FTB held a pre-termination *Skelly* hearing by telephone with respondent Broom.¹ After the hearing, the *Skelly* hearing officer recommended to uphold respondent Broom's termination.

14. On September 16, 2019, respondent Broom appealed his termination to the State Personnel Board (SPB). On September 17, 2019, the SPB sent written notice to respondent Broom and the FTB that a prehearing and settlement conference (PHSC) would take place on November 21, 2019.

15. On November 21, 2019, respondent Broom failed to appear at the PHSC, which was held before an Administrative Law Judge of the SPB. Under the applicable regulations, respondent Broom's failure to appear at the PHSC was "deemed a withdrawal of the appeal or the action." (Exh. 10, p. PERS063.) The SPB Judge issued a Proposed Decision dated November 21, 2019, in which he found there was no good cause for respondent Broom's failure to appear at the PHSC, and he ordered that the appeal was withdrawn and the SPB case was dismissed. The SPB approved the Proposed Decision and dismissed the appeal. (Exh. 6, p. PERS042.)

Respondent Broom's Testimony

16. Respondent Broom testified at the hearing. He does not dispute that the FTB terminated his employment for cause. Respondent Broom contends he is eligible for disability retirement based on his medical conditions. He feels he has been eligible for disability retirement long before the FTB's action to terminate his employment. He

¹ *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, gives certain employees the opportunity to respond to allegations of misconduct prior to the imposition of discipline. This procedure is commonly referred to as a *Skelly* hearing.

contends his doctors can prove his disability. Respondent Broom presented no documentary evidence to support his claims. Respondent Broom testified he did not understand the basis for the FTB's dismissal action against him. He testified he suffered mental stress and anxiety as a result of the disciplinary action. He feels the FTB treated him unfairly.

LEGAL CONCLUSIONS

1. Cause exists for CalPERS to cancel respondent Broom's application for disability retirement because he is ineligible for disability retirement due to his firing, for cause, by the FTB. (Factual Findings 1-15.)

2. Government Code section 21152, subdivision (d), provides that an application to the [CalPERS] board for retirement of a member for disability may be made by the member or any person on his behalf.

3. In *Haywood v. American River Fire Protection District, supra*, 67 Cal.App.4th 1292, 1307, the court held that "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, the termination of the employment relationship renders the employee ineligible for disability retirement regardless of whether a timely application is filed."

4. The two exceptions to the *Haywood* case are inapplicable to respondent Broom's case. First, respondent Broom's termination was not preemptive of an otherwise valid claim for disability retirement. The phrase "preemptive of an otherwise valid claim for disability retirement" was explained by the court in *Smith v. City of Napa, supra*, 120 Cal.App.4th 194. "The key issue is thus whether [the employee's] right

to a disability retirement matured before [the employee's] separation from service. A vested right matures when there is an unconditional right to immediate payment." (*Id.*, 120 Cal.App.4th at p. 206.) Here, respondent Broom did not have a matured right to disability retirement at the time he was terminated in August 2019. He did not apply for disability retirement until December 2019.

5. Second, there is no evidence respondent Broom's termination by the FTB was due to a disabling medical condition. There is no causal link between respondent Broom's inappropriate comments and conduct towards the two female co-workers and any medical condition.

6. Based on the foregoing, CalPERS properly canceled respondent Broom's application on the grounds he is ineligible for disability retirement.

ORDER

The appeal of respondent Mark Broom III from the decision of CalPERS to cancel his application for disability retirement is denied.

DATE: Jun 1, 2021

Erlinda Shrenger
Erlinda Shrenger (Jun 1, 2021 08:31 PDT)

ERLINDA G. SHRENGER

Administrative Law Judge

Office of Administrative Hearings