BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by **SUSAN ALEXANDER** From constructive medical termination from the position of Fish Culturist with the Department of Fish and Game at Oroville	)))))))))	SPB Case No. 97-0100 **BOARD DECISION** (Precedential) **No. 99-04** April 6, 1999

APPEARANCES: Colin McLeod, Labor Relations Representative, California State Employees Association, on behalf of appellant, Susan Alexander; Marguerite D. Shea, Labor Relations Counsel, Department of Personnel Administration, on behalf of respondent, Department of Fish and Game.

BEFORE: Florence Bos, President; Richard Carpenter, Vice President; Ron Alvarado and Lorrie Ward, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) after the Board rejected the Proposed Decision of an administrative law judge (ALJ) to consider whether respondent, the Department of Fish and Game (DFG or Department), constructively medically terminated appellant, Susan Alexander, when it refused to grant her request for light duty.

In this Decision, the Board finds that since appellant wished to return to work only if she were given light duty or an alternative work assignment, she did not show that she was ready, willing and able to perform all of the duties and responsibilities of her job. She, therefore, failed to prove that DFG constructively medically terminated her when it refused her request for light duty.

BACKGROUND

Factual Summary[1]

(Employment History)

Appellant has been employed by the state of California since 1978. On September 15, 1980, she was appointed as a Fish and Wildlife Seasonal Aid with DFG. On October 13, 1981, she was appointed as a Fish and Wildlife Assistant I. On June 1, 1989, she was appointed as a Fish Culturist. On July 1, 1993, appellant started working as a Fish Culturist in DFG's Feather River Hatchery (FRH) and its satellite facility, the Thermalito Annex (Annex), spending approximately three months of the year working at FRH, and nine months working at the Annex.

(Duties of a Fish Culturist)

Appellant's duties as a Fish Culturist were very physically demanding. She spent most of her time feeding the fish and cleaning the ponds. She was also responsible for fish loading; weight counts; treating, sorting and spawning fish; and maintaining the facilities and equipment.

Appellant had to feed the fish approximately once an hour every workday for 10 to 30 minutes each feeding. While the fish were young, she would carry a bucket with fish food that weighed a total of 15 pounds when full, and broadcast the food by hand into the ponds. She would feed the young fish this way approximately 10 times a day. As the fish aged, she would have to lift as many as twenty 50 pound bags of fish food a day and empty them into a feed cart. The feed cart would broadcast the fish food into

[1] Some of this factual summary was taken from the Proposed Decision.

the ponds while she drove, constantly turning her head to the left to watch the feeding. She spent approximately 30% of her time feeding the fish.

Appellant spent most of the remaining 70% of her time (3 to 6 hours a day, 4 to 5 days a week) cleaning the fish ponds. To clean the ponds, she had to stand on a catwalk and use a brush, which had a foot-wide head and two inch bristles, to clean the pond screens. While she was cleaning the ponds, she periodically had to lift the pond screens, which weighed 20 to 25 pounds. The cleaning process required a great deal of pushing, pulling, bending, reaching, lifting and twisting.

Appellant worked five days a week, Monday through Friday. She was the only person at the Annex performing these duties on Wednesdays and Thursdays. On Monday, Tuesdays and Fridays, she worked at the Annex with Ron Davis (Davis), a Fish and Wildlife Assistant I.

(Appellant's Injuries and Medical Evaluation)

Beginning in 1991, appellant began experiencing work-related injuries to her neck and back. Her most recent work injuries to her back and neck occurred on February 12, 1996 and March 25, 1996. Appellant filed workers' compensation claims with respect to these injuries.

On October 5, 1996, appellant's medical condition was evaluated by Dr. Alan Brown as part of her workers' compensation case. During his evaluation, Dr. Brown reviewed doctors' reports describing appellant's prior medical examinations and a description of appellant's job duties dated April 17, 1996. On October 11, 1996, Dr. Brown issued an "Agreed Medical Legal Evaluation – ML 104-94" (Medical

Evaluation),[2] which diagnosed appellant as having: 1) lumbosacral strain; 2) cervical strain; 3) bilateral patellofemoral chondrosis; 4) possible mild bilateral carpal tunnel syndrome; 5) possible bilateral shoulder subacromial bursitis; and 6) hip pain, bilaterally, of unknown etiology.[3] He also found that her MRI scan and her x-rays showed that she had degenerative disc disease and degenerative joint disease of the spine. Dr. Brown's Medical Evaluation determined that appellant's condition was "permanent and stationary" and recommended the following work restrictions:

> The patient has a disability to her spine which will prophylactically preclude her from heavy lifting, repetitive bending and stooping. I would also recommend that she be precluded from prolonged standing for greater than two hours without the opportunity to alternate for 15 minutes. Because of her shoulder problems, I would recommend that she be precluded from repeated work above the head. No restrictions are necessary for her possible carpal tunnel syndrome. No additional work restrictions are necessary for her knees.

Dr. Brown concluded that:

> Based on the patient's complaints, she will be unable to continue in her pre-injury capacity as a fish culturist. Given her subjective complaints, as she related them to her job activities, she should be prophylactically precluded from this job. She is therefore medically eligible as a Qualified Injured Worker for vocational rehabilitation.

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[2] Appellant objected to Dr. Brown's Medical Evaluation as hearsay since Dr. Brown did not testify at the hearing before the ALJ, and asked that the Medical Evaluation be sealed since it contained private medical information. The ALJ agreed to admit the Medical Evaluation on the issue of what notice the Department had received about appellant's medical condition, and not for the truth of the matters it asserted. The ALJ also agreed to seal the Medical Evaluation from public inspection. The Board in this Decision does not rely upon the Medical Evaluation for truth of the matters it asserts. The Medical Evaluation will remain sealed to the extent permitted by applicable law.

[3] Dr. Brown also found that appellant exhibited "evidence of symptoms magnification" and recommended that she see a psychiatrist.

Dr. Brown also stated that, based upon "her subjective complaints," appellant was "unable to continue with the type of work that she is doing and she should be retrained for a job that does not require so much physical labor."

(Appellant's Requests for Light Duty and Reasonable Accommodation)

From the date stamp on the Medical Evaluation, it appears the Dr. Brown forwarded his Medical Evaluation to the State Compensation Insurance Fund (SCIF) on November 18, 1996. Elise Montrose (Montrose), DFG's Return to Work Coordinator, who handled workers' compensation matters relating to DFG employees, received a copy of Dr. Brown's Medical Evaluation from SCIF in or before December 1996. Montrose reviewed the Medical Evaluation and, on December 20, 1996, telephoned Patrick Overton (Overton), a Fish Hatchery Manager II and appellant's second line supervisor, to make him aware of appellant's work restrictions and determine whether appellant's restrictions could be accommodated. On or about December 23, 1996, Terry West (West), a Fish Hatchery Manager I at the time [4] and appellant's first line supervisor, informed Montrose that there were no positions available at either FRH or the Annex that could accommodate appellant's work restrictions.

In the morning of December 23, 1996, appellant telephoned West and asked whether there were any modified duty positions available at FRH. West told her there were no modified duty positions available. At about 2:30 p.m. that same day, appellant visited West in his office and gave him a copy of two pages (pages 10 and 11) from Dr. Brown's Medical Evaluation that described appellant's work restrictions. After West had

[4] On February 28, 1997, West was appointed as a Fish Hatchery Manager II.

read those restrictions, appellant asked him whether there were any light duty positions available at FRH that she could do. West informed her that there were no light duty positions available. Appellant repeated her request for a light duty position, and West again stated there were no light duty positions available. West told appellant to go home and informed her that she could return to work when her doctor released her for regular duty. Appellant left West's office and never returned to work after this meeting.

Montrose spoke to appellant sometime during the week of Christmas 1996 about the possibility of appellant laterally transferring for a training and development assignment to another posting within the Department. After this discussion, Montrose caused appellant's name and home address to be included on the mailing list for DFG's employment opportunity bulletin, which was sent out every two weeks and listed all the jobs available in the Department. Montrose wanted to make sure that appellant would be aware of Department job openings so that she would be able to apply in a timely manner for any available jobs that interested her.

On January 16, 1997, appellant submitted to DFG a request for reasonable accommodation. In this request, appellant asked for the following accommodations:

> I could work the graveyard shift at FRH or continue in my current job eliminating the heavy lifting, repetitive bending and stooping.

Appellant attached to her request for reasonable accommodation the two pages from the Medical Evaluation that described her work restrictions. By memorandum (memo) dated January 28, 1997, Overton informed appellant that her request for reasonable accommodation had been received and was being reviewed.

Appellant's request for reasonable accommodation was forwarded to Margaret Ware (Ware), DFG's Equal Employment Opportunity (EEO) Manager. According to Ware, supervisors at DFG had the authority to grant employees' reasonable accommodation requests, but not to deny them. If a supervisor believed that a request for reasonable accommodation should be denied, he or she would recommend denial to Ware, who would make the final determination. Ware had sole authority at DFG to deny a request for reasonable accommodation.

Ware discussed appellant's request for reasonable accommodation with Montrose, who had received a complete copy of Dr. Brown's Medical Evaluation. On January 31, 1997, Montrose sent a letter to appellant that stated that the Department had:

> adopted the findings of Alan Brown, M.D. (dated October 11, 1996) that you can no longer perform the duties of Fish Culturist due to your industrial injury …

Montrose's January 31 letter informed appellant further that:

> You are unable to perform your regular duties without modification, and the Department is unable to accommodate these restrictions and still have the essential functions of the job performed. I have contacted Region 2 to inquire into modified or light duty and find that there are no permanent modified positions available.

In light of these findings, Montrose's letter described four options available to appellant: (1) the Department, on appellant's behalf, could apply to the Public Employees' Retirement System (PERS) for disability retirement; (2) appellant could laterally transfer to a vacant position in another class; (3) appellant could renew her request to participate in vocational rehabilitation with SCIF; or (4) appellant could voluntarily resign. Montrose's letter asked appellant to respond by February 15, 1997

as to her desired option; and informed her that if DFG did not hear from her by that date, it would apply for disability retirement on her behalf.

On February 3, 1997, appellant called Montrose and asked whether Montrose's January 31 letter constituted a denial of appellant's request for reasonable accommodation. Montrose responded that it was not. Montrose followed-up this telephone conversation with a confirming letter dated February 3, 1997 that stated that her January 31 letter "was not a denial of your request for reasonable accommodation. Your request for reasonable accommodation request is still being considered." Montrose's follow-up letter also informed appellant that she might be eligible for Nonindustrial Disability Insurance (NDI), and provided a pamphlet describing, and a blank application for, NDI. Montrose's letter told appellant to contact Overton if she had any questions about the Department's review of her request for reasonable accommodation.

Ware also contacted Overton about appellant's request for reasonable accommodation. She asked Overton to complete a "Job Analysis Check List" (Job Analysis) describing in detail the duties and functions of a Fish Culturist, so that Ware could determine what were the essential functions of the job and whether appellant's job restrictions could be accommodated. Overton completed the Job Analysis with the assistance of West and Bruce Barngrover (Barngrover), Senior Hatchery Supervisor and Overton's supervisor. All three of these men had worked as Fish Culturists and supervised Fish Culturists for many years. The Job Analysis described the extensive strenuous duties of the Fish Culturist position set forth above.

Overton forwarded the completed Job Analysis to Ware attached to a memo dated February 18, 1997 entitled “Recommendation for denial of reasonable accommodation request submitted by Susan Alexander.” In that memo, Overton set forth why he believed the Department could not accommodate appellant’s request that she either be allowed to work the graveyard shift at FRH or continue in her current job as a Fish Culturist without the heavy lifting, repetitive bending and stooping. According to Overton’s memo, the graveyard shift was not a position for a Fish Culturist. Instead, it was essentially a janitorial position that was filled by a Seasonal Aid. In any event, the job duties of that position involved lifting, bending, pushing, pulling, twisting, standing, walking, climbing, stooping, and reaching.

Overton’s memo stated further that the Fish Culturist position was a lead person position at the Annex. Its essential functions included feeding fish, preparing fish feed, cleaning screens and picking up fish loss, cleaning ponds, loading fish, inventorying and thinning out fish, doing weight counts, and treating fish. These essential functions required lifting, repetitive bending and stooping. Overton’s memo stated that although the heavy lifting could be accommodated through the use of a forklift, there was no mechanical way to accommodate the repetitive bending and stooping. Since all of the bending and stooping tasks had to be performed manually, if appellant could not do them, then another employee would have to perform them. According to Overton’s memo, this would place an undo burden on existing staff, who would have to work extra hours to accomplish all the essential tasks.

Ware reviewed Dr. Brown’s Medical Evaluation and Overton’s memo and Job Analysis to determine whether appellant was a qualified individual with a disability who

could perform the essential functions of her job with or without a reasonable accommodation, the standard of review set forth in the federal Americans with Disabilities Act of 1990 (ADA). After reviewing these documents, Ware decided that appellant had a disability as defined in the ADA, but determined that, given appellant's work restrictions, appellant could not perform the essential functions of a Fish Culturist with or without a reasonable accommodation.

Next, Ware reviewed appellant's 1981 state employment application to determine whether appellant was qualified to perform the duties of any available lateral positions in the Department. After reviewing appellant's qualifications as described in that 1981 application, Ware determined that appellant did not have the necessary qualifications for a clerical job or any other lateral positions in the Department. Ware did not contact appellant to determine whether appellant had obtained any new job skills or training between 1981, when she completed her application, and 1997, when she filed her request for reasonable accommodation.

On March 13, 1997, Ware sent to appellant a letter (Denial) that denied her request for reasonable accommodation. In that Denial, Ware explained that although DFG had determined that her "degenerative disc disease and degenerative joint disease" were disabilities as defined in state and federal laws, it found that she could not perform the essential functions of her job with or without a reasonable accommodation. The Denial also stated that the Department had reviewed vacant clerical positions, but determined that appellant's job application did not reflect that appellant had clerical work experience. The Denial reminded appellant that vocational rehabilitation services were still available to her through SCIF. The Denial also

informed appellant that if she wished to discuss the Denial with the Department's Reviewing Officer, she should contact his office within 10 days, and if she wished to appeal the Denial to the Board, she had 30 days in which to file her appeal. The record reflected that appellant did not contact the Department's Reviewing Officer to discuss the Denial, and did not file an appeal from the Denial with the Board.

(Application for Disability Retirement)

By letter dated March 14, 1997, Montrose informed appellant that the Department would "assist" her by filing an application for disability retirement with PERS on her behalf.[5] Montrose's letter again informed appellant of the availability of vocational rehabilitation.

On March 14, 1997, the Department applied for disability retirement with PERS on appellant's behalf. By letter dated October 9, 1997, PERS informed appellant that it had approved her application for disability retirement. Appellant's disability retirement became effective on October 17, 1997.

(Payments to Appellant from December 23, 1996 to October 17, 1997)

On December 23 or 24, 1996, after she was informed by West that appellant could not be accommodated at FRH or the Annex, Montrose telephoned SCIF Vocational Rehabilitation Counselor Sarah Norrington (Norrington) to determine what types of vocational rehabilitation benefits appellant might be eligible for in light of Dr. Brown's determination in his Medical Evaluation that appellant was a "qualified injured worker." Norrington told Montrose that appellant was eligible for Vocational

[5] Appellant presented no evidence that showed that she disagreed with DFG's decision to file for disability retirement on her behalf.

Rehabilitation Industrial Leave (VRIDL), which would pay 2/3 of her salary. Norrington testified that she had started processing appellant for vocational rehabilitation benefits when she received a letter from appellant's workers' compensation counsel requesting such benefits.

Appellant began receiving VRIDL on December 24, 1996. Appellant received VRIDL from December 24, 1996 until January 16, 1997. On January 17, 1997, appellant was examined by Dr. Russo at the Urgent Care Clinic at Oroville Hospital for a flare-up of her neck problems brought on by her use of a staple gun. On January 21, 1997, she was seen by Dr. David McKinney, her primary care physician, for this problem. Dr. McKinney completed a medical verification that stated that appellant was unable to work until April 1, 1997. This medical verification was faxed to SCIF on February 6, 1997.

Appellant notified Norrington that, as a result of this injury, she could not participate in vocational rehabilitation until she got better. Norrington, therefore, caused appellant's vocational rehabilitation benefits to stop until appellant was well enough to return to vocational rehabilitation.

Barbara Massoni (Massoni), Personnel Services Specialist II and a Workers' Comp Specialist in the Transaction Unit of DFG, testified that appellant received a full paycheck for the month of December 1996. For the month of January 1997, appellant received approximately 80% of her regular salary through VRIDL and using some of her leave credits. In February and March 1997, appellant received her full salary by using her leave credits. In April 1997, appellant received 16 days, 2.5 hours of salary by exhausting her remaining leave credits.

On April 30, 1997, Montrose sent a letter apprising appellant of the leave and benefit continuation options available to her. Montrose explained that appellant's leave credits were exhausted on April 16, 1997 and that appellant, therefore, had the following options pending PERS's determination on disability retirement: (1) request catastrophic leave; (2) apply for NDI; or (3) request leave under the Family and Medical Leave Act (FMLA). The letter explained that under FMLA, appellant was entitled to 12 weeks of unpaid leave a year, and DFG would maintain her health, dental and vision care coverage during an FMLA leave. The letter also explained that, if she applied for it, appellant could receive NDI while she was on FMLA leave. DFG put appellant on FMLA leave effective May 1, 1997. She remained on FMLA leave until June 25, 1997. Appellant did not apply for NDI.

For the month of May 1997, appellant was paid for 2 days and 5 hours, the leave benefits she had accrued during that month. On June 25, 1997, she began receiving VRIDL again and was paid 2/3 of her regular salary for four days in June 1997. For the months of July, August, and September 1997, and until October 17, 1997 when her disability retirement became effective, appellant received 2/3 of her regular monthly salary under VRIDL.

The record also indicates that appellant received permanent disability payments from SCIF as a result of her workers' compensation cases. From letters admitted as evidence during the hearing before the ALJ, it appears that, SCIF sent appellant a

check for $4,849,71 on November 21, 1996, a check for $6,161.71 on January 16, 1997, and a check for $9,800.00 on June 27, 1997 as permanent disability payments.[6]

(Disparate Treatment Claims)

Appellant contended that Fish Culturist Jack Welton (Welton) and Fish and Wildlife Assistant Steve Britewell (Britewell) were allowed to rotate their assignments. She also claimed that Fish and Wildlife Assistant Jim Shipp (Shipp) and Fish Culturist Bob Poole (Poole) were granted reasonable accommodations that she was denied.

West testified that neither Welton nor Britewell received reasonable accommodations. Instead, because of their special skills (carpentry, plumbing, and vehicle inspection), they received special assignments. West also testified that although Shipp and Poole had received accommodations, those accommodations were very limited: Shipp's only accommodation was that he did not have to drive a vehicle with a clutch because of a titanium hip replacement; Poole did not have to plant fish in streams that had sloping banks because he could not walk on uneven ground.

Procedural Summary

By letter dated January 8, 1997, appellant's representative filed with the Board appellant's appeal from constructive termination dated January 6, 1997. After hearing, the ALJ issued a Proposed Decision that relied upon Bostean v. Los Angeles Unified School District (Bostean)[7] and concluded that DFG's failure to give appellant notice and

[6] In her "Initial Vocational Evaluation," Norrington found that appellant owned an antique store in downtown Oroville, but appellant stated that she just "broke even" in this business. Norrington's evaluation also found that appellant raised exotic birds, but did not state whether appellant received any income from this enterprise.

[7] (1998) 63 Cal. App. 4th 95.

opportunity to be heard before she was told that she would not be given a light duty position on December 23, 1996 violated her due process rights. The Proposed Decision recommended that appellant be awarded backpay and reinstatement of benefits from December 23, 1996 until her disability retirement became effective on October 17, 1997.

The Board rejected the Proposed Decision to consider: (1) whether the Department refused to allow appellant to work under circumstances where she asserted that she was ready, willing and able to work and had a legal right to work; (2) whether the Department was obligated to accommodate appellant's medical restrictions pending the PERS determination on her application for disability retirement; and (3) whether the Department was obligated under Government Code § 19253.5(c) and (d) to attempt to find appellant another position within the agency before applying for disability retirement on her behalf.

The Board has reviewed the record, including the transcripts, exhibits, and written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

ISSUE

Was appellant constructively medically terminated?

DISCUSSION

Procedural Issues

The only matter before the Board in this case is appellant's appeal from constructive medical termination dated January 6, 1997. Notably, appellant has not

appealed to the Board from DFG's denial of her request for reasonable accommodation, nor has she filed any other discrimination appeals with the Board. During the hearing before the ALJ, DFG's counsel made a motion requesting that testimony on issues not directly related to appellant's constructive medical termination appeal be excluded. In response to this motion, the ALJ asked appellant's representative to describe the scope of appellant's appeal. Appellant's representative stated that appellant's appeal was for constructive medical termination and discrimination based upon "perceived disability, disability, and gender." DFG's counsel stated that DFG did not object to appellant's disability discrimination claims being part of the case since they were "pretty much encompassed in a constructive medical termination" claim, but objected to appellant presenting any evidence relating to gender discrimination. The Board finds that the ALJ correctly concluded that since appellant had not properly filed an appeal for gender discrimination with the Board in accordance with Government Code § 19702, she could not raise any claims as to gender discrimination during the hearing.

The Board also finds that since appellant never appealed to the Board from DFG's denial of her request for reasonable accommodation pursuant to Government Code § 19702, the issue of whether that denial was proper under the ADA and Government Code §§ 19230 and 19702 is not before the Board for determination in this case, nor are any issues relating to whether DFG may have discriminated against appellant when it granted other employees' reasonable accommodation requests, but denied her reasonable accommodation request. Instead, the only issue before the Board is whether DFG constructively medically terminated appellant on December 23, 1996 when West failed to grant her request for light duty and sent her home.

Constructive Medical Termination

Government Code § 19253.5

Government Code § 19253.5 sets forth procedures a state agency must follow when it seeks to demote, transfer or terminate an employee for medical reasons. Government Code § 19253.5(d) allows a state agency to terminate an employee for medical reasons only if: (1) it concludes, based upon a medical examination or other medical evidence, that the employee is not fit to perform the work of his or her position or any other position in the agency; and (2) the employee either is not eligible for, or waives the right to apply for, disability retirement.[8]

In this case, it is clear that DFG did not invoke the provisions of Government Code § 19253.5(d) to terminate appellant's Fish Culturist appointment for medical reasons. Instead, DFG applied for disability retirement on appellant's behalf. Appellant retained her appointment as a Fish Culturist in the Department until October 17, 1997, when PERS approved her for disability retirement.

Elements of a Constructive Medical Termination

Even though DFG took no official action under Government Code § 19253.5(d) to terminate her appointment, appellant contends that West's refusal to grant her request

[8] Government Code § 19253.5(d) provides:

> When the appointing power after considering the conclusions of the medical examination provided for by this section or medical reports from the employee's physician, and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, or any other position in the agency, and the employee is not eligible or waives the right to retire for disability and elects to withdraw his or her retirement contributions or to permit his or her contributions to remain in the retirement fund with rights to service retirement, the appointing power may terminate the appointment of the employee.

for light duty work constituted a constructive medical termination under the reasoning set forth in C[redacted] [redacted]. M[redacted] (M[redacted]).[9]

In M[redacted], the Board determined that a state agency was required to reinstate an employee to her position in the agency after PERS had denied her application for disability retirement. The agency in M[redacted] refused to reinstate the employee until the employee obtained medical releases from her doctors. The Board found that the agency's conditioning the employee's reinstatement upon her obtaining medical releases from her doctors after her disability retirement application had been denied amounted to a constructive medical termination. The facts set forth in M[redacted] indicate that, after PERS had denied her request for disability retirement, the employee sought reinstatement to her prior position without any work restrictions.

In M[redacted], the Board recognized that the employee, who had been denied the right to return to work, had stated a claim for constructive medical termination, which the Board described as follows:

> A "constructive medical termination" arises when an appointing power, for asserted medical reasons, refuses to allow an employee to work, but has not served the employee with a formal notice of medical termination, and the employee challenges the appointing power's refusal to allow the employee to work under circumstances where the employee asserts that he or she is ready, willing, and able to work and has a legal right to work.[10]

Applying the analysis recently adopted by the Board in J[redacted] B[redacted],[11] the Board finds that in order for appellant to establish that she was constructively medically

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[9] (1993) SPB Dec. No. 93-08.

[10] Id. at p. 6. (Footnote omitted.)

[11] (1999) SPB Dec. No 99-02. This decision is not yet final. See Board Rule 51.6.

terminated, she must show that: (1) DFG refused to allow her to work in her position as a Fish Culturist for asserted medical reasons; and (2) she asserted to DFG that she was ready, willing and able to work and had a legal right to work under circumstances that indicated that she was, in all good faith, ready to return to work as a Fish Culturist and perform the duties of that position as it was then structured. As set forth below, appellant has failed to prove either of these two elements.

Appellant presented no evidence that showed that DFG ever refused to allow her to work as a Fish Culturist and perform all the duties and responsibilities of her job. On December 23, 1996, in light of the work restrictions Dr. Brown had imposed, appellant requested a light duty assignment. West denied this request and sent her home until her doctor released her to perform her regular tasks. Appellant did not, thereafter, ever ask to return to her regular job. Unlike the employee in C[redacted]. A[redacted][12] who was placed on an involuntary, unpaid medical leave of absence although she claimed that she could perform all the functions of her position, appellant did not claim that she could perform all the functions of her job. Appellant put on no testimony or evidence that showed that after West denied her request for a light duty assignment, she ever asked to return to her job as a Fish Culturist and perform all its duties, or that such a request was, or would have been, refused. Thus, appellant has failed to meet the first prong of the M[redacted] test by failing to establish that DFG refused to allow her to work in her position as a Fish Culturist for asserted medical reasons.

[12] (1997) SPB Dec. No. 97-01.

Appellant also presented no evidence to indicate that she met the second prong of the M[redacted] test: that she was, in all good faith, ready, willing and able to return to work as a Fish Culturist and perform all the duties and responsibilities of that position. There was no dispute that appellant only wished to return to work if either her job duties as a Fish Culturist were significantly modified to accommodate her work restrictions, or she were placed in a less strenuous job, such as working the graveyard shift. An employee who seeks to work only if significant modifications are made to her job functions is not "ready, willing and able to work" as that phrase is used in M[redacted]. Because appellant sought to return to work only if DFG granted her request for significant modifications to her job, she failed to establish that she was "ready, willing and able" to work in her job as a Fish Culturist as it was then structured. Appellant has, therefore, failed to show that DFG's denial of her request for a light duty assignment amounted to a constructive medical termination.[13]

DFG's Obligation to Pay Appellant Pending PERS's Decision on Disability Retirement

Appellant claims that DFG's failure to maintain her on full paid status after her request for light duty was denied and until PERS granted her application for disability retirement constituted a constructive medical termination.

[13] Although the Board finds that an employee cannot state a claim for constructive medical termination when that employee is not ready, willing and able to perform all the duties of his or her job without modification, an employee who has filed with his or her employer a request for reasonable accommodation, which the employer has denied, may appeal that denial to the Board pursuant to Government Code § 19702 and Board Rule 53.2. In this case, since appellant did not appeal DFG's denial of her request for reasonable accommodation to the Board, that denial is not before the Board for review.

Appellant has not cited any statute, regulation or case law that mandates that a state agency keep an employee on paid leave status while that employee is out of work for medical reasons awaiting PERS's decision on a disability retirement application.[14]

The Board agrees with PERS's position set forth in its Circular Letter No. 400-316 dated June 12, 1989. In that Circular Letter, PERS stated that while its decision on a disability retirement application is pending, a state agency is not precluded:

> from temporarily removing the member from the job until the initial determination of disability or non-disability is made. PERS recognizes that the employer may have medical reports at this point which indicate the member may injure himself/herself or others if kept on the job. It is hoped that the member would be receiving sick leave or other short-term disability benefit during this period.

The Attorney General has opined that a state agency cannot order an employee to use his or her sick leave or take a leave of absence pending a PERS determination on an application for disability retirement.[15] The Attorney General has recognized, however, that an employee is not entitled to continue his or her regular work assignment when he or she is unable to do so due to illness or injury:

> The medical termination provisions (Gov. Code § 19523.5); the disability retirement provisions (Gov. Code § 20000 et seq. [now found at Government Code § 21150 et seq.]); the industrial disability leave provisions (Gov. Code § 18120 et seq. [now found at Government Code § 19869 et seq.]) all clearly contemplate that there are occasions when employees are too sick or disabled to perform the duties of their class. It would be totally irrational to assume therefore that the Legislature intended an employee physically incapable of performing the duties of his class to nevertheless appear on the job until he either recuperated or was retired on a disability. The agency itself therefore makes the initial determination of fitness to work. As we have earlier stated in cases of

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[14] Id. at p. 67.

[15] 60 Ops. Cal. Atty. Gen. 61, 65 (1977).

> slight injury of short duration if the employee does not wish to use his sick leave he simply is not paid for the time….
>
> As to more serious illnesses the employee is protected during his illness by the various programs already described [temporary disability indemnity and industrial disability leave].[16]

Thus, neither PERS nor the Attorney General has ruled that an employee who, for medical reasons, cannot work while a disability retirement application is pending is entitled to a paid leave of absence.

In D[redacted] J[redacted],[17] the Board suggested in dicta that a state agency should place an employee "on paid status in some position within the agency" pending a PERS disability retirement determination. But, the Board in J[redacted] did not mandate that an employee who is not working for medical reasons remain on full paid status. As this case shows, there are many options available for an employee who cannot work for medical reasons to obtain benefits pending a PERS determination on a disability retirement application, including using leave credits and applying for vocational rehabilitation or other short-term disability benefits. From the evidence presented in this case, it appears that appellant received income,[18] by exhausting her leave credits and obtaining VRIDL, through much of the period between when she asked for light duty

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[16] Id. at p. 67.

[17] (1993) SPB Dec. No. 93-01, p. 10.

[18] During the hearing before the ALJ, appellant argued that certain kinds of payments could not be deemed to be "income" as that term is defined for tax purposes. In this case, the Board is using the term "income" in its colloquial sense to include any kind of payment appellant may have received during the period between her request for light duty and her disability retirement, whether or not such payment may be defined as "income" for tax purposes.

and PERS approved her for disability retirement.[19] In addition, appellant received disability benefits from SCIF as a result of her workers' compensation claims. These payments are consistent with the "hope" expressed in PERS's Circular Letter No. 400-316 that an employee not go entirely without any income pending its determination on his or her disability retirement application. Appellant has not presented to the Board any law that would have required DFG to keep appellant on full paid status while she was not working, until PERS approved her for disability retirement. Since appellant was not ready, willing and able to perform the duties of her job pending PERS's decision on her disability retirement application, DFG was not required to keep her on full paid status. DFG's failure to pay appellant her regular salary while she was out of work pending PERS's disability retirement decision did not constitute a constructive medical termination.

Appellant's Request for Alternative Placement under Government Code § 19253.5

Appellant claims that, under Government Code § 19253.5(c) and (d), pending PERS's determination on disability retirement, DFG was required to place appellant in another position that she was able to perform given her work restrictions. Appellant reads into the statute an obligation that is simply not there.

As explained above, Government Code § 19253.5 sets forth procedures a state agency must follow when it seeks to demote, transfer or terminate an employee for

[19] The only time when she did not receive any income was from May 1 to June 25, 1997 while she was on FMLA leave, which is an unpaid leave of absence under the law. Even though her leave during this time was unpaid, DFG continued to pay for her health, dental and vision insurance coverage.

medical reasons. Subdivision (c), in relevant part, provides:

> When the appointing power, after considering the conclusions of the medical examination and other pertinent information, concludes that the employee is unable to perform the work of his or her present position, but is able to perform the work of another position including one of less than full time, the appointing power may demote or transfer the employee to such a position. (Emphasis added.)

By its terms, Government Code § 19253.5(c) provides a state employer the option of demoting or transferring an employee who, due to medical reasons, cannot perform all the functions of his or her job; it does not mandate that an employer implement this option if the employer chooses not to do so.[20]

As set forth above, Government Code § 19253.5(d) provides, among other things, that if an employee is not eligible for or waives disability retirement, a state employer can seek to medically terminate that employee. Before it medically terminates the employee, however, the employer must review whether that employee is medically unable to perform not only his or her job, but also any other position within the agency. If the employee can perform in another position, the employer may not medically terminate that employee. Government Code § 19253.5(d) contains no language, however, that requires an employer to terminate an employee who, due to medical reasons, cannot perform the duties of his or her job. Moreover, there is no language in Government Code § 19253.5(d) that grants a state employee a right to an alternative or light duty position when that employee, for medical reasons, is unable to perform the work of his or her position. Thus, while an employer must invoke the requirements set forth in Government Code § 19253.5(c) and (d) to effectuate a medical demotion,

[20] See Kuhn v. Department of General Services (1994) 22 Cal. App. 4th 1627.

transfer or termination of an employee,[21] it has no obligation under these subdivisions to transfer or demote an employee to a light duty position.[22]

DFG never invoked the provisions of Government Code § 19253.5(c) or (d) in an effort to transfer, demote or terminate appellant due to her medical condition. Since DFG never sought to invoke those provisions, it was not subject to any of their terms. In the absence of clear statutory language, the Board declines to read Government Code § 19253.5 as imposing an accommodation requirement upon DFG pending PERS's determination on disability retirement.

J[redacted] does not compel a different result. In the instant case, appellant filed a request for reasonable accommodation, which sought either another position within the Department or light duty. After performing a reasonable accommodation analysis, the Department determined that appellant could not perform the essential functions of her job with or without a reasonable accommodation, and there were no vacant positions available within the Department for which appellant was qualified that could accommodate her work restrictions. DFG, therefore, denied appellant's request for a reasonable accommodation. Appellant never appealed to the Board from that denial. Since appellant did not appeal the denial of her request for reasonable accommodation to the Board, that denial is not before the Board for review. While the Board

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[21] See W[redacted] [redacted]. P[redacted] (1995) SPB Dec. No. 95-12, pp. 16-17.

[22] Since the issue is not before us, the Board takes no position as to whether other statutes not applicable in this case may require an employer to create a light duty position for an employee who may be disabled. But see, Malabarba v. Chicago Tribune Co. (7th Cir. 1998) 149 F.2d 690. (In a case brought under the ADA, a court found that an employer was not required to provide an employee, who had degenerative disc disease in his lumbar spine and could not perform the essential functions of his strenuous job, a light duty assignment or, in the absence of an available vacant position, create a new, less taxing position for the employee that did not include all of the physically demanding essential functions of his job.)

encourages a state employer to work with an employee who, for medical reasons, cannot perform all the duties of his or her job to determine whether there may be available alternative jobs or light duty tasks that the employee can perform,[23] appellant has not cited to any law that would have required DFG to eliminate, reassign or alter the essential job functions of the Fish Culturist position, or create a new or light duty position for her, in order to accommodate her work restrictions under the circumstances presented by this case. The Board finds that, pending PERS's disability retirement determination, DFG was not required to place appellant in an alternative or light duty position when appellant could not perform the essential functions of her job.

Due Process Issues

Appellant relies upon Bostean[24] to support her contention that her due process rights were violated in this case. In Bostean, a school district placed an employee on an involuntary, indefinite, unpaid leave of absence when that employee requested an accommodation. The Second Circuit Court of Appeal concluded that since that employee was a civil service employee with permanent status, he had a constitutionally protected property interest in continued employment and was, therefore, entitled to due process before the school district could suspend him without pay and deny his request for reasonable accommodation. The court ruled that the employee should have received notice and an opportunity to be heard before being placed on an unpaid leave of absence and denied the reasonable accommodation he requested.

[23] For example, under Board Rule 443, a state agency has the option of placing in a temporary light duty assignment an employee, who, due to disability, injury or illness, cannot perform the essential functions of his or her job.

[24] (1998) 63 Cal. App. 4th 95.

Extrapolating from Bostean, appellant argues that, given the due process rights of state civil service employees recognized in Skelly v. State Personnel Board,[25] DFG should have given her notice and an opportunity to be heard before it denied her request for light duty work. The Board disagrees.

The facts set forth in Bostean are distinguishable from the facts of this case. First, DFG did not place appellant on an involuntary leave of absence; appellant never sought to return to her regular work after West refused her request for light duty.

Second, in Bostean, the court found that there were no procedures available to the employee under the school district's rules pursuant to which the employee could have challenged the school district's decision or been made whole if that decision was found to be erroneous:

> In the instant case, there was no such collateral or related proceeding in which Bostean was involved which could have assured his supervisors that the decision to place him on involuntary illness leave was medically warranted.
>
> Further weighing in Bostean's favor in the balancing of factors is District's denial of back pay and benefits for the substantial period of time--seven months--while he was on involuntary illness leave of absence. District's rules apparently do not afford the successful employee in Bostean's position the right to be made whole as a result of a favorable ruling in a post-deprivation hearing. Thus, there is no indication in this record that there were any additional or substitute procedural safeguards to remedy the erroneous deprivation of a property interest. The procedures in Rule 836B also do not contain any provisions to guarantee that the appellant is afforded a timely post-deprivation hearing or any method for Bostean to attempt to resolve the appeal more quickly.[26]

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[25] (1975) 15 Cal. 3d 194.

[26] Id. at p. 117.

Unlike the school district's rules in Bostean, the rules and procedures available to appellant under the Civil Service Act,[27] and the Board Rules adopted under that Act, afforded appellant procedures pursuant to which she could have challenged DFG's decisions and, most importantly, been made whole in the event that those decisions were determined to be wrong.[28] If PERS had denied the disability retirement application DFG filed on her behalf, in accordance with M[redacted], DFG would have been required to reinstate appellant and pay to her backpay and benefits if she asserted she was ready, willing and able to return to her regular work. If appellant had appealed to the Board from DFG's denial of her request for reasonable accommodation and the Board had found that denial to be improper, in accordance with Government Code § 19702(f), the Board could have granted her backpay, compensatory damages and whatever other relief it deemed appropriate. If appellant had waived her right to apply for disability retirement and DFG had decided to medically terminate her, DFG would have been required to grant appellant all the procedural protections set forth in Government Code § 19253.5 and Board Rule 52.3.[29]

Thus, appellant had available to her far greater due process protections under the Civil Service Act and Board Rules than the school district offered to its employees in Bostean. The court's ruling in Bostean is, therefore, not applicable to the facts of this

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[27] Government Code § 18500 et seq.

[28] In addition, appellant had available procedural protections under regulations applicable to PERS. Under 2 C.F.R. § 555.3, an employee whose disability retirement has been requested by his or her employer is entitled to a hearing. In addition, under 2 C.F.R. § 555. 1, an employee who is dissatisfied with the PERS Executive Officer's decision on a disability retirement application may appeal that decision to the PERS Board.

[29] See W[redacted] [redacted]. P[redacted] (1995) SPB Dec. No. 95-12, pp. 16-17.

case. DFG was not required to give appellant notice and opportunity to be heard before it denied her request for light duty on December 23, 1996.

CONCLUSION

Appellant has failed to carry her burden of showing that DFG constructively medically terminated her when it denied her request for light duty on December 23, 1996. The Board, therefore, dismisses her appeal.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The Appeal of Susan Alexander from constructive medical termination from the position of Fish Culturist with the Department of Fish and Game at Oroville is hereby dismissed.

2. This decision is certified for publication as a Precedential Decision. (Government Code § 19582.5).

STATE PERSONNEL BOARD[30]

Florence Bos, President
Richard Carpenter, Vice President
Ron Alvarado, Member
Lorrie Ward, Member

* * * * *

[30] Board member William Elkins did not participate in this decision.

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 6, 1999.

_____
Walter Vaughn
Executive Officer
State Personnel Board

[Alexanderdec]