BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 33580
	)	
LOLITA GONZALES	)	**BOARD DECISION**
	)	(Precedential)
From medical termination from the	)	
position of Office Assistant	)	**NO. 94-13**
(General) with the State Compensation	)	
Insurance Fund at San Francisco	)	April 5-6, 1994

Appearances: Theresa M. Beiner, Attorney, Howard, Rice, Nemerovski, Canady, Robertson and Falk, represented appellant, Lolita Gonzales; Donald Fratus, Attorney, State Compensation Insurance Fund, represented respondent, State Compensation Insurance Fund.

Before Carpenter, President; Ward, Bos and Villalobos, Members.

DECISION AND ORDER

This case is before the State Personnel Board (SPB or Board) for consideration after having been heard and decided by an SPB Administrative Law Judge (ALJ).

We have reviewed the ALJ's Proposed Decision. The Board has decided to adopt the attached Proposed Decision as a Precedential Decision of the Board, pursuant to Government Code section 19582.5.

The attached Proposed Decision of the Administrative Law Judge in the above-entitled matter is hereby adopted by the State Personnel Board as its Precedential Decision.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

*Vice President Alice Stoner did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on April 5-6, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board

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the position of Office Assistant)
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Compensation Insurance Fund)
at San Francisco)

PROPOSED DECISION

This matter came on regularly for hearing before Philip E. Callis, Administrative Law Judge, State Personnel Board, on October 29, 1993, and November 8, 1993, at San Francisco, California.

The appellant, Lolita Gonzales, was present and was represented by Theresa M. Beiner, Attorney, Howard, Rice, Nemerovski, Canady, Robertson, & Falk.

The respondent was represented by Donald Fratus, Attorney, State Compensation Insurance Fund.

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

The above medical termination effective July 12, 1993, and appellant's appeal therefrom comply with the procedural requirements of the State Civil Service Act. The matter was considered submitted on November 29, 1993, when closing briefs were filed.

II

The appellant has been employed as an Office Assistant (General) with the State Compensation Insurance Fund (SCIF) since 1989. She had two previous periods of employment with SCIF as a Seasonal Clerk beginning in 1987. The appellant has no disciplinary actions of record.

III

As cause for this medical termination, it is alleged that the appellant is psychiatrically disabled from performing her duties. The notice of medical termination alleged that the appellant worked only 144.5 hours in the 18 months prior to her termination and that she made threatening statements about her supervisor to health care workers.

IV

The appellant entered State service as a LEAP candidate. She had generally satisfactory performance for two years but left work in December 1991 because of worsening psychiatric problems. The appellant was granted nonindustrial disability insurance (NDI) benefits for a period of six months. During this time, she went to the Philippines to visit her ailing mother. While in the Philippines, the appellant sought an extension of her leave of absence from SCIF but failed to provide adequate medical substantiation. She was advised that she would be terminated from her position unless she returned to work.

V

The appellant returned to work on October 13, 1992. Because of previous attendance problems, the appellant was placed on leave restriction which required her to provide medical substantiation for any absence due to illness and to obtain advance permission for any form of scheduled leave. The appellant failed to comply with these restrictions. She resented her supervisor for imposing these requirements. The appellant stopped coming to work in December 1992 after working only 144.5 hours since October 1992. The appellant filed a workers' compensation claim alleging that was unable to return to work because she had been treated unfairly by her supervisor. The claim was denied, but the appellant is planning to appeal.

VI

The respondent sent the appellant to a psychiatrist to determine her condition. In the opinion of the psychiatrist, the appellant suffered from a longstanding psychiatric condition (dysthymia/depression) which prevented her from returning to work. The psychiatrist was of the opinion that the appellant was totally disabled and that her disability would continue for an extended and uncertain duration.

VII

The appellant has a past history of violence. She previously stabbed two women in the Philippines in the mid-1970's. She also struck her daughter on a least one occasion

since returning to work. She told the psychiatrist that she has thoughts of killing her supervisor because the supervisor treated her unfairly by placing her on leave restriction. She blames the supervisor for "ruining" her life. Another health care worker contacted the supervisor and advised her that the appellant expressed violent feelings about her on another occasion.

VIII

At the hearing, the appellant claimed that she would be able to return to work with reasonable accommodation. Her treating psychiatrist suggested that the appellant might eventually be able to return to work on a part-time schedule if she had a different supervisor and worked at a different worksite. However, the appellant would have to have the flexibility to leave work whenever things became too difficult for her.

IX

The appellant's medical records disclose that she has had similar problems with another supervisor. There is little likelihood that the appellant would be able to work on a sustained basis with the respondent in any position, even if she were permitted to work under a different supervisor at a different worksite.

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PURSUANT TO THE FOREGOING FINDINGS OF FACT THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Respondent established by a preponderance of the evidence that the appellant was medically unable to perform the duties of her present position or any other position in the agency. The appellant suffers from long-term psychiatric problems which preclude her working in any position which requires regular attendance.

The test for both disability retirement and medical termination proceedings is whether the employee has a ". . . disability of permanent or extended and uncertain duration . . ." (Gov. Code § 21020). (See Dana Jackson (1993) SPB Dec. No. 93-01.) In the 18 months prior to the termination, the appellant worked only 144.5 hours. She is unlikely to be able to return to work in the foreseeable future. The appellant's disability is of a "permanent or extended and uncertain duration" which justified the medical termination taken by the respondent in this case.

THE AMERICANS WITH DISABILITIES ACT OF 1990

The appellant's claim that the Americans with Disabilities Act of 1990, 42 U.S.C § 12101 et seq. (hereafter ADA), required the respondent to reasonably accommodate her psychiatric disability by assigning her to a different supervisor and worksite with relaxed attendance requirements is rejected.

The ADA prohibits an employer from discharging a qualified individual with a disability "because of" the employee's disability. (42 U.S.C. § 12112(a).) A "qualified individual with a disability" is one who can perform the "essential functions" of the position, either with or without reasonable accommodation. (42 U.S.C. § 12111(8).) "Reasonable accommodation" may include job-restructuring, part-time or modified work schedules, reassignment to a vacant position, and other similar accommodations. (42 U.S.C. § 12111(9).) Failure of an employer to provide reasonable accommodation to the known physical or mental limitations of an "otherwise qualified" disabled employee is a violation of the ADA, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the employer's business. (42 U.S.C. § 12112(b)(5) (A).)

The ADA makes it clear, however, that disabled employees are to be held to "the same standards of production/ performance as other similarly situated employees without disabilities." (EEOC Technical Assistance Manual VII-7.)

> "An employer should not give employees with disabilities 'special treatment.' They should not be evaluated on a lower standard or disciplined less severely than any other employee." (Ibid.)

The ADA requires reasonable accommodation only for "otherwise qualified" disabled employees. (42 U.S.C. § 12112(b)(5)(B).) A mentally disabled employee with unsatisfactory performance or conduct is not entitled to special protection under the ADA or similar legislation. If similar performance or conduct by a non-disabled employee

would result in discharge, the disabled employee is not "otherwise qualified" for the position, even if the employee claims that the misconduct was "caused" by the disability. Discrimination laws such as the ADA protect only those who can do their job satisfactorily in spite of their disability, not those who could do it but for their disability. (Fields v. Lyng (D. Md. 1988) 705 F.Supp. 1134, 1136, affd. (4th Cir. 1989) 888 F.2d 1385.)[1/]

In the instant case, the appellant's continual attendance problems prevented her from performing the "essential functions" of her position.

> "It is self-evident that while perfect attendance is not a necessary element of all jobs, reasonably regular and predictable attendance is necessary for many. Few would dispute that, in general, employees cannot perform their jobs successfully without meeting some threshold of both attendance and regularity." (Walders v. Garrett (E.D. Va. 1991) 765 F.Supp. 303, 309, affd. (4th Cir. 1992) 956 F.2d 1163.)

An employee whose disability prevents regular and predictable attendance is not "otherwise qualified" for the position and may be discharged, even if the attendance problems are caused by the disability. (See Carr v. Barr (D.D.C. 1992) 2 A.D. Cases 692; Magel v. Federal Reserve Bank (E.D. Pa. 1991)

[1/] The appellant's suggestion that cases decided under the Rehabilitation Act of 1973 should not be used to construe the ADA is rejected. The statutes are similar in most respects including the terminology "reasonable accommodation," "undue hardship," and "otherwise qualified." The Board has previously observed that cases decided under the Rehabilitation Act of 1973 can provide useful guidance in construing similar provisions of the ADA (Michael K. Yokum (1993) SPB Dec. No. 93-25). The EEOC also refers to such cases in its Interpretative Guidance to regulations under the ADA.

776 F.Supp. 200; Walders v. Garrett, supra, 765 F.Supp. 303; Santiago v. Temple University (E.D.Pa. 1990) 739 F.Supp. 974, affd. (3rd Cir. 1991) 928 F.2d 396; Lemere v. Burnley (D.D.C. 1988) 683 F.Supp. 275; Matzo v. Postmaster General (D.D.C 1987) 685 F.Supp. 260, affd. (D.C. Cir. 1988) 861 F.2d 1290; Wimbley v. Bolger (W.D. Tenn. 1986) 642 F.Supp. 481, affd. (6th Cir. 1987) 831 F.2d 298.)

Similarly, the appellant's conduct of making threatening statements about her supervisor falls outside of ADA protection. A mentally disabled employee who engages in violent, threatening, or insubordinate behavior is not "otherwise qualified" for the job and may be discharged, even if the employee claims that the misconduct arose from the disability. (See Mancini v. General Electric Co. (D. Vt. 1993) 820 F.Supp. 141; Adams v. Alderson (D.D.C. 1989) 723 F.Supp. 1531, affd. (D.C. Cir. 1990) 1990 WL 45737; Franklin v. U.S. Postal Service (S.D. Ohio 1988) 687 F.Supp. 1214.)

Nor does reasonable accommodation require an employer to transfer a mentally disabled employee to a different supervisor in the hope that the misconduct does not recur.

> "An agency is entitled to assign its personnel as the needs of its mission dictate. It is not obliged to indulge a propensity for violence - even if engendered by a 'handicapping' mental illness - to the point of transferring potential assailants and assailees solely to keep peace in the workplace." (Adams v. Alderson, supra, 723 F.Supp. 1531, 1532; accord: Mancini v. General Electric Co., supra, 820 F.Supp. 141.)

The ADA provides that otherwise qualified disabled individuals may be eliminated from consideration for a job if they pose a "direct threat" to the health or safety of themselves or others. (42 U.S.C. § 12113(b).) "Direct threat" is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." (29 C.F.R. § 1630.2(r).) This standard was adopted to prevent employers from eliminating disabled applicants for consideration because of mere speculation or stereotypic assumptions about their disabilities.

The respondent's concerns about the appellant were not based on speculation, however. To the contrary, the appellant made threatening statements about the supervisor to at least one health care worker who was concerned enough about the statements to warn the supervisor. The appellant repeated the statements to the respondent's examining psychiatrist as well as to her own therapist. In light of the appellant's past history of violent conduct, the respondent was not required to wait for a physical assault to take place at the workplace before acting upon these concerns. The "direct threat" standard of the ADA was met in both spirit and substance.

Moreover, even if the appellant had no past history of violence and no actual intention of harming the supervisor, threatening statements of this kind are so inherently disruptive to the workplace that they justify discharge. The Board has consistently sustained the dismissal of employees

who threaten to kill their supervisors or fellow employees (see, e.g., Stephen Hoss (1993) SPB Case No. 30499 (dismissal sustained for Correctional Officer who told a friend that he was going to climb the water tower behind the prison and begin shooting); Harold Taylor (1990) SPB Case. No. 27358 (dismissal sustained for Correctional Officer who told psychiatrist that he wanted to "blow away" the Correctional Captain who was investigating him); Alexander Thong (1990) SPB Case No. 27189 (dismissal sustained for chemist who told therapist that he had a gun and would kill the "conspirators" at the office before killing himself); Le'Jeune Williams-Brown (1989) SPB Case No. 23735 (dismissal sustained for DMV clerk who told co-workers that she would make headlines by "blowing away" her managers); John H. Wilson, Jr. (1988) SPB Case No. 23767 (dismissal sustained for machine operator who told a supervisor that he might "end up like the dude in Sunnyvale" referring to a highly publicized workplace shooting).

The respondent may apply the same behavioral standard to disabled employees that it applies to non-disabled employees. The appellant's inability to comply with this standard rendered her not "otherwise qualified" for the job, even if her behavior did not rise to the level of a "direct threat" under the ADA.

The appellant suffers from a psychiatric disorder which caused her to miss work on a frequent and unpredictable basis. Her attendance was so erratic that no reasonable accommodation would permit her to meet the attendance standards of the

respondent. When her supervisor attempted to place reasonable restrictions on her absences, the appellant blamed the supervisor and expressed violent feelings towards her. In light of the appellant's past history, it seems likely that she would develop similar feelings towards any supervisor who placed reasonable attendance restrictions on her. Supervisors should not have to work under a threat of physical violence because they impose reasonable work restrictions on employees. The ADA does not require retention of a disabled employee who is unable to meet the attendance and behavioral standards of the employer.

* * * * *

WHEREFORE IT IS DETERMINED that the medical termination taken by respondent against Lolita Gonzales effective July 12, 1993, is hereby sustained without modification. Her appeal from denial of reasonable accommodation is denied.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the case.

DATED: March 29, 1994.

PHILIP E. CALLIS

Philip E. Callis, Administrative Law Judge, State Personnel Board.