

- 1 4) Respondent's Reply to Appellant's Response to Respondent's Motion and
2 Memorandum for Summary Judgment and Dismissal, filed February 1, 2010,
3 with the following:
4 a) Declaration of Jessica Todorovich, with exhibit A.

5 **II. BACKGROUND**

6 2.1 By letter dated July 23, 2009, Appellant received a disability separation from her position
7 with DOT. Appellant's separation was effective July 29, 2009.

8 2.2 Pursuant to WAC 357-52-010, Appellant appealed her separation on August 7, 2009.
9

10 2.3 On January 8, 2010, Respondent filed a motion for summary judgment.
11

12 **III. FINDINGS**

13 3.1 Appellant was employed as a Washington Management Service (WMS) Band 2 Assistant
14 Human Resource Manager in Respondent's Northwest Region Human Resources office.
15

16 3.2 The Family and Medical Leave Act (FMLA) permits an eligible employee to take up to
17 12 work weeks of leave during a calendar year for a number of reasons, including any serious
18 health condition that makes the employee unable to perform one or more of the essential
19 functions of the employee's job. On September 16, 2008, Appellant went on Family FMLA
20 medical leave until December 17, 2008. After exhausting her 12 weeks of FMLA leave,
21 Appellant was granted additional approved leave by her employer. Appellant was on approved
22 leave until July 29, 2009.
23

24 3.3 On November 20, 2008, both Appellant and her medical provider signed a FMLA
25 Certification of Health Care Provider requesting leave. In the certification, Appellant's medical
26 provider indicated that Appellant "will likely not be capable of a return to work until 5-15-09."
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1 3.4 By letter dated May 11, 2009, Appellant's medical provider provided DOT with updated
2 return to work and medical leave information. He indicated that Appellant "is unable to perform
3 her job in all capacities. In order to comply with healthcare recommendations she must not return
4 to work yet."

5
6 3.5 On July 7, 2009, Appellant's medical provider completed a DOT Disability Medical
7 Questionnaire. He indicated that Appellant was capable of performing the essential functions of
8 her position but "not within the department of transportation." He also indicated that Appellant
9 was permanently restricted from having contact with her manager or the regional manager of
10 DOT's Northwest Region. Appellant's medical provider returned the questionnaire to DOT on or
11 about July 10, 2009.

12
13 3.6 Given the restrictions identified by Appellant's medical provider, Appellant could not
14 perform the essential functions of her position or other positions at DOT. This restriction
15 prevented Appellant from returning to work at DOT. As a result, DOT determined that there
16 were no alternative positions within DOT that Appellant could perform.

17
18 3.7 By letter dated July 23, 2009, DOT notified Appellant of her disability separation. Her
19 separation was effective July 29, 2009.

20 21 **IV. ARGUMENTS OF THE PARTIES**

22 4.1 Respondent argues that Appellant raises a host of claims that are outside of the Board's
23 jurisdiction and she alleges violations of civil service rules that were not brought as exceptions to
24 a director's review. In addition, Respondent argues that Appellant is requesting remedies the
25 Board cannot give. Respondent asserts that these other allegations will have to be resolved before
26 another tribunal and that the issue before the Board is the disability separation issue.

27
28 In regard to DOT's efforts to provide accommodation for Appellant, Respondent asserts that
29 Appellant requested and was granted 9 months of leave as accommodation and that while she

1 was on leave, DOT engaged in an interactive process with Appellant's medical provider to
2 identify an accommodation for Appellant. Respondent argues that despite the time off to allow
3 Appellant to seek treatment and to either return to her job or to another position for which she
4 was qualified within DOT, the medical information provided by Appellant's medical provider
5 established that DOT could not reasonably accommodate Appellant in positions with the DOT
6 organization. Respondent asserts that the agency was under no obligation to search for positions
7 outside of DOT. Therefore, Respondent contends that because DOT could not reasonable
8 accommodate Appellant, she was separated in accordance with WAC 357-46-165. Respondent
9 maintains that DOT acted in compliance with the civil service rules and that the appeal should be
10 dismissed.

11
12 4.2 Appellant argues that she suffers from post-traumatic stress and depression caused by
13 discrimination based on gender, a hostile work environment and retaliation engaged in by
14 Respondent. Appellant contends that after her disability resulted in a medical leave of absence,
15 DOT failed to contact her between November 2008 and May 2009 to discuss accommodation
16 and therefore, failed to take steps to have an interactive process for accommodation or to offer
17 her reasonable accommodation. Appellant does not dispute that her disability restricted her from
18 returning to her former job at DOT. But, Appellant argues that DOT made no efforts to assist her
19 with finding another position for which she was qualified, failed to assist her in transferring to
20 another agency, and did not allow her to exhaust her accrued sick leave balance prior to
21 termination. Therefore, Appellant contends that Respondent failed to provide her with a
22 reasonable accommodation and as a result, improperly subjected her to separation.

23 24 **V. RELEVANT WACS**

25 5.1 WAC 357-26-015 provides in relevant part:

26 For persons with disabilities, as defined by state or federal law, reasonable
27 accommodation may include, but is not limited to:

28 . . .

29 (2) Modification or adjustments to a job, work method, or work environment that
make it possible for a qualified person with a disability to perform the essential

functions of a position, or enjoy the benefits and privileges of employment equal to employees without disabilities.

5.2 WAC 357-46-160 provides that “[a] disability separation is an action taken to separate an employee from service when the employer determines that the employee is unable to perform the essential functions of the employee's position or class with or without reasonable accommodation due to mental, sensory, or physical incapacity. Disability separation is not a disciplinary action.”

5.3 WAC 357-46-165 states:

An employer may separate an employee due to disability when any of the following circumstances exist:

- (1) The employer is unable to reasonably accommodate the employee.
- (2) The employer has medical documentation of the employee's inability to work in any capacity.
- (3) The employee requests separation due to disability and the employer has medical information which documents that the employee cannot perform the essential functions of the employee's position or class.

VI. DISCUSSION

6.1 The Board may decide an appeal by motion if the documents on file, depositions and affidavits show there is no genuine issue as to any material fact and the appeal should be dismissed as a matter of law. WAC 357-52-140. All facts and reasonable inferences therefrom are to be determined in favor of the nonmoving party. For purposes of Respondent’s motion to dismiss, we must assume any disputed facts in favor of Appellant. *See, Hall v. University of Washington*, PAB No. 3863-V2 (1995).

6.2 In order to preclude summary judgment, the non-moving party must set forth specific facts by affidavit or otherwise show a genuine dispute of material fact. A material fact is one upon which the outcome of the litigation depends. *Hudemand v. Foley*, 73 En.2d 880, 886, 441 P.2d 532 (1968).

1 6.3 In an appeal of a disability separation, the appointing authority has the burden of
2 supporting both the basis for the action taken and compliance with the civil services law(s) or
3 rule(s) governing the action. WAC 357-52-110.

4
5 6.4 There is no question of material fact that the restrictions identified by Appellant's medical
6 provider established that Appellant could not perform the essential functions of her position and
7 that she could not work in other positions at DOT. These restrictions prevented Appellant from
8 returning to work at DOT. After receiving information about Appellant's disability, DOT had a
9 responsibility to take the necessary steps that would reasonably enable Appellant to perform her
10 job. However, based on the prognosis provided by Appellant's medical provider, DOT reasonably
11 concluded that accommodation could not be provided. The provisions of WAC 357-46-165(2)
12 allow an employer to separate an employee under such circumstances.

13
14 6.5 There is no question of material fact that after exhausting her 12 weeks of FMLA leave,
15 Appellant was allowed to continue to take leave for 6 more months. Allowing the extended use of
16 leave is a type of reasonable accommodation. However, once DOT determined that no further
17 reasonable accommodation could be provided that would allow Appellant to return to work, neither
18 the civil service rules nor the FMLA require an employer to postpone or delay the separation of an
19 employee until his or her leave balances are exhausted. See Clay v. Department of General
20 Administration, PAB Case No. DSEP-00-0007 (2001).

21
22 6.6 Appellant argues that DOT made no efforts to assist her in transferring to another agency.
23 However, the civil service rules do not require an employer to assist an employee in transferring to
24 another agency. Appellant asserts that WAC 357-19-535 requires an employer to assist in the
25 transfer of an employee. But, Appellant's argument is out of context with the rule in its entirety.
26 WAC 357-19-535 addresses return-to-work opportunities for employees receiving compensation
27 under RCW 51.32.090 of the industrial insurance statute. There is no evidence that Appellant in
28 this case was receiving such compensation.

6.7 Further, in Havalina v. Washington State Department of Transportation, 142 Wn. App 510 178 P.3d 354 (2007), the Washington State Court of Appeals held that a state agency has no duty to search for vacant positions in all state agencies and departments in order to fulfill its obligation to reasonable accommodate a disabled employee. Therefore, under Havalina, DOT had no duty to search for vacant positions in other agencies in order to accommodate Appellant.

6.8 Under the undisputed facts, Respondent has established both the basis for the action taken and DOT's compliance with the civil service rules governing the action. Therefore, Appellant's disability separation was appropriate, Respondent's motion should be granted, and the appeal should be denied.

6.9 The Board having reviewed the files and documentation, being fully advised in the premises now enters the following:

VII. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Respondent's Motion for Summary Judgment is granted and the appeal of Karen Johnson is denied.

DATED this ____ day of _____, 2010.

WASHINGTON PERSONNEL RESOURCES BOARD

LAURA ANDERSON, Vice Chair

DJ MARK, Member