

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of:)
)
V M. Q)
) OAH No. 11-0100-PER
) Div. R&B No. 2011-006
_____)

DECISION

I. Introduction

V Q was discharged from her employment as a custodian for the No Name City School District effective June 3, 2010. Subsequently, Ms. Q filed an application for occupational disability benefits. The administrator denied the application on the grounds that (1) Ms. Q was discharged for reasons unrelated to the alleged disability, and (2) she was not presumably permanently disabled. Ms. Q appeals.

The administrative law judge conducted a hearing on June 6 and November 4, 2011. Ms. Q represented herself and provided testimony. Several of her co-workers testified, as did the superintendent of the No Name City School District (K T) and the district’s business manager (L H). Expert medical testimony was provided by Dr. Kim Smith, on behalf of the administrator.

The school district discharged Ms. Q, citing unsatisfactory job performance as the reason. Ms. Q contends that her termination was caused by a disability resulting from a 2001 work injury. Because Ms. Q did not prove that her termination from the school district was due to her claimed disability, she is not eligible for disability benefits. Therefore, her application is denied.

II. Facts

V Q was employed as a custodian for the No Name City School District from October 12, 1999, until her termination on June 3, 2010.¹

On June 29, 2001, while working as a custodian at the No Name Elementary School, a pull-down attic ladder fell on Ms. Q, hitting her right shoulder and back, sliding down her leg and knocking her to the floor.² On July 9, Ms. Q was seen by D P., M.D.; she complained of back, neck and abdominal pain and was provided medication.³ Dr. P he diagnosed an arm bruise and

¹ R. 5, 336.
² R. 5, 35, 36, 114; Testimony of V. Q & M. B.
³ R. 746-749.

estimated she would be unable to return to work for one to three days.⁴ He released her to return to work on July 16.⁵ Later that month she was treated by a chiropractor, Michael Melendez, D.C., who released her to light duty work on July 23.⁶ Ms. Q missed a few days of work,⁷ but by August 1 she was back at work.⁸

After she returned to work, Ms. Q continued to visit a variety of medical practitioners, complaining of pain resulting from the work injury in various parts of her body, including her head, neck, shoulders, legs, chest, back, as well as in the abdomen and pelvis.⁹ S D, M.D., examining Ms. Q on August 1, saw “no indication for further investigation at this time.”¹⁰ To K. S, M.D., on August 23, she reported “quite a list of complaints, which encompass most every major part of her body.”¹¹ He found it “difficult to see how abdominal pains, headache, and neck pains” would have happened as a result of the ladder incident, as she described it to him,¹² and noted her history of a hysterectomy and removal of an ovarian cyst in January, 2001.¹³ Ms. Q was provided an abdominal ultrasound, which showed “no evidence of injury.”¹⁴ E B, M.D., released her to return to work without restriction on August 24, 2001.¹⁵ In September, 2001, Dr. N diagnosed polymyalgia, chronic pain syndrome, and anxiety/depression reaction.¹⁶

In December, 2001, Ms. Q filed a workers’ compensations claim, asserting that the June work injury had caused the various problems she was complaining of.¹⁷ In February, 2002, an employers’ medical panel expressed the opinion that her complaints were not related to the work injury.¹⁸ An x-ray of her lumbar spine taken in March, 2002, was negative.¹⁹ In December,

⁴ R. 746, 748.

⁵ R. 745.

⁶ R. 739-744.

⁷ Ms. Q reported to a care provider that she was off work for a few days. R. 509. Her personnel records do not show that she took any sick leave in July, 2001. R. 204. However, the school district’s records, as submitted into evidence, do not include any daily timesheets for that month, and she was provided medical releases for much of the month of July. *See* R. 215-324; *supra*, notes 4-6. In light of the releases, and the absence of any sick leave, it appears that Ms. Q was excused from work for that month, but was not charged sick leave.

⁸ R. 304.

⁹ *See, e.g.*, R. 739 (Dr. N, August 3, 2001: “low back hurts, abdominal pain, mid back pain, hurts to breathe deeply, neck pain arms numb [a]nd bruised.”).

¹⁰ R. 737.

¹¹ R. 731.

¹² R. 731.

¹³ R. 731. *See* R. 750, 753, 756-763, 790.

¹⁴ R. 728-729. *See also*, R. 705 (CT scan of abdomen and pelvis, December 4, 2001).

¹⁵ R. 725.

¹⁶ R. 708, 718.

¹⁷ *See* R. 119.

¹⁸ R. 673-688.

2002, she continued to complain of abdominal pain.²⁰ An MRI of her thoracic spine in January, 2003, showed minimal stenosis, with no significant impingement on the nerve roots,²¹ and provided no explanation for her symptoms.²² N S, D.O., examined Ms. Q in May, 2003, and concluded that she had soft tissue injuries related to the work injury, with a potential for a 100% recovery with trigger point therapy.²³ Dr. S subsequently expressed the opinion that she could have a 100% recovery with “aggressive physical therapy.”²⁴

Over the next couple of years, from September 22, 2003, through January 26, 2006, Ms. Q did not obtain medical care,²⁵ and she took no more than three or four days of sick leave each year.²⁶ Beginning in 2004 and continuing thereafter, in addition to her full-time employment with the school district,²⁷ Ms. Q operated a commercial cleaning service as a sole proprietor, under the name No Name’s Cleaning Service.²⁸ Her clients in that business included (at various times) a bank, the post office, and other commercial establishments.²⁹

Ms. Q worked for the school district at the No Name Elementary School through the 2006-2007 school year.³⁰ Throughout this time, her supervisor was K D. Mr. D gave Ms. Q highly positive work evaluations from the time she began working through the 2004-2005 school year.³¹ Mr. D’s evaluation for the 2005-2006 school year was generally positive, but expressed concerns that Ms. Q had not communicated well with him, and that her commercial cleaning service business was interfering with her school district work schedule and performance.³²

Ms. Q had gall bladder surgery in July, 2006,³³ and during the 2006-2007 school year she took a few more sick leave days than she had previously.³⁴ The school district again notified Ms. Q of its concerns about her outside employment, this time resulting in superintendent S D

¹⁹ R. 672.

²⁰ R. 699-701.

²¹ R. 665-666.

²² R. 662-663.

²³ R. 651-652.

²⁴ R. 650.

²⁵ V. Q Testimony. Ms. Q testified that during this period of time she continued to have pain, which she treated with over-the-counter medication.

²⁶ R. 200-202.

²⁷ See R. 106, 197-304.

²⁸ V. Q Testimony.

²⁹ V. Q Testimony.

³⁰ See R. 169.

³¹ R. 142-145; V. Q Testimony.

³² R. 141.

³³ See R. 633-635, 644-646.

³⁴ R. 199 (seven days of sick leave in 2006-2007).

cautioning her that failure to provide full-time service to the district would result in a reduction to part-time status or termination of her employment.³⁵ Despite these concerns, at the end of the year Mr. D gave Ms. Q a wholly positive evaluation (of 16 factors, seven rated E [exceptional] and nine rated S [satisfactory]).³⁶

Ms. Q was transferred to the No Name Middle School beginning with the 2007-2008 school year. The principal was D C; Mr. D remained Ms. Q' supervisor. During the school year Ms. Q took 18 days of sick leave, substantially more than she had in prior years.³⁷ She obtained treatment for colon problems in March and April, 2008, but otherwise did not obtain medical care during the 2007-2008 school year.³⁸ On January 24, 2008, Mr. D informed Ms. Q that he had found her absent from the premises during her scheduled work period.³⁹ At the end of the year, Mr. D gave her a highly negative performance evaluation (seven S, nine I [improvement needed]), reflecting increased concerns with her work schedule and job performance.⁴⁰ A formal, written improvement plan was imposed, extending through October, 2008, and intended to address the quality of her work and acceptance of constructive criticism.⁴¹

During the following school year, 2008-2009, Ms. Q took 20 days of sick leave.⁴² She sought treatment for abdominal pain and was examined in that regard in July and September, 2008.⁴³ Multiple abdominal conditions were noted, none of which was identified as related to the 2001 work injury.⁴⁴ In late August, Ms. Q reported encountering hostility from co-workers, and she was reminded of the need to work her entire shift and to document her hours.⁴⁵ In November, she had a confrontation with Mr. D over performance issues,⁴⁶ and Ms. Q spoke with the principal, Ms. C, about adjusting her work schedule.⁴⁷ In March, 2009, the new superintendent of schools, P M, observed that Ms. Q had been absent from school premises

³⁵ R. 174.

³⁶ R. 138-139.

³⁷ R. 198 .

³⁸ See R. 596-622. In addition, Ms. Q was provided a medical release (for unknown reasons) for three days in January, 2008, and had a bone density scan on March 7, 2007. R. 189-190, 626-627.

³⁹ R. 170.

⁴⁰ R. 160-162.

⁴¹ R. 130, 163.

⁴² R. 197.

⁴³ R. 587-593.

⁴⁴ See R. 589 (hysterectomy, diverticulosis, cholecystectomy, possible liver cyst).

⁴⁵ R. 156.

⁴⁶ R. 157-159; Testimony of V. Q.

⁴⁷ R. 13.

during work hours.⁴⁸ Nonetheless, in response to a grievance that Ms. Q had filed, at the end of that March Mr. M set aside the 2007-2008 evaluation on the ground that Ms. Q had been singled out for evaluation.⁴⁹ By the end of the 2008-2009 school year, Mr. F had replaced Mr. D as Ms. Q' supervisor. Mr. F gave Ms. Q generally highly positive evaluation (four E, twelve S), although noting a need to improve relationships with staff.⁵⁰

In the 2009-2010 school year, H J, a neighbor of Mr. D, replaced Mr. F as Ms. Q' supervisor,⁵¹ K N replaced Ms. C as principal,⁵² and K T replaced Mr. M as superintendent.⁵³ Mr. J was not supportive of Ms. Q and it soon became apparent to her and to other non-custodial staff that he was dissatisfied with her as an employee.⁵⁴ On August 18, 2009, he noted that Ms. Q had not kept her scheduled work hours, engaged in lengthy cell phone conversations during work hours, and required excessive supervision.⁵⁵ In October, Ms. Q was seen in No Name for evaluation of the nodules in her lung that had been identified in 2008.⁵⁶ Beginning in December and continuing through the remainder of the school year, Ms. Q sought medical care for lower back and right hip and thigh pain, and MRIs of her hip lumbar spine showed bilateral sacroilitis, greater on the right than left.⁵⁷ Initially, she did not report that her 2001 work injury had caused those conditions, but by the end of the year she identified the work injury as the cause.⁵⁸ In

⁴⁸ R. 155.

⁴⁹ R. 150-152, 154.

⁵⁰ R. 164-165 (“Needs to try to develop a good/better working relationship with the staff”; “She is...very easy to talk to and takes direction well. I look forward to having V on the team for the upcoming year.”).

⁵¹ V. Q testimony.

⁵² See R. 31.

⁵³ Mr. T testified at the hearing in November, 2011, that he had been the superintendent for a two and a quarter years.

⁵⁴ Ms. Q testified that Mr. J disparaged her. In August, Mr. J reported, “In my opinion V does not like her job and takes little pride in the job and is not performing professionally or reliably.” R. 32. The record includes the affidavit of D C, principal of the middle school, that substantially supports Ms. Q' allegations regarding Mr. J's attitude towards her. R. 349-351. Ms. M (R. 361), Mr. L (R. 366) and Ms. E (R. 362) provided statements that also support Ms. Q' characterization of Mr. J's attitude, and Mr. L testified to the same effect at the hearing. Mr. T, the superintendent, testified that Ms. Q had brought her concerns about Mr. J's treatment of her to his attention, and that he had suggested to Mr. J that he “back off.”

⁵⁵ R. 32.

⁵⁶ R. 581-586.

⁵⁷ R. 575, 577, 580.

⁵⁸ On December 3, 2009, she reported the pain had gotten particularly painful about a year previously. R. 580. On December 14, 2009, she reported lower back pain resulting from a fall on the ice. R. 579. In February, 2010, she reported the pain as of several years' duration. R. 571. By the spring, she was reporting the pain was of nine years' duration, and that it was attributable to the 2001 work injury and had been constant since then. See, e.g., R. 524-526, 549, 551, 557. 533, 568 (“for a long time”). By April 16, she had reported the 2001 accident as related. R. 565. On April 29 (Dr. T) and May 4 (Dr. T), she sought medical treatment for multiple symptoms, asserting they were caused by the 2001 ladder injury. R. 556, 560.

December, 2009, and January, 2010, Mr. J noted cleaning tasks had not been performed.⁵⁹ At the end of January, and into February, 2010, Ms. Q had pneumonia.⁶⁰ In April, Mr. J noted “complaints about getting the school clean” and his own observation that cleaning tasks were not being performed, and again requested that she not use her cell phone on the job.⁶¹ On May 10, 2010, Mr. J gave Ms. Q a highly critical evaluation (six S, ten I), identifying deficiencies in attendance (Ms. Q had taken 23 days of sick leave, which was more than any other maintenance staff)⁶² and timely completion of tasks, a need for excessive supervision, and poor communication and attitude.⁶³

On May 13, the school district notified Ms. Q that she would not be retained for the following school year, with her last day of work to be June 3.⁶⁴ The school district’s stated reason for terminating her employment was unsatisfactory job performance.⁶⁵ The district’s primary concern was not the quality of her work, which was consistently evaluated as satisfactory by her supervisors⁶⁶ and was perceived as satisfactory or better by teaching staff,⁶⁷ but rather its quantity (failure to complete her assigned tasks)⁶⁸ and poor working relationships with supervisory staff (except for Mr. F) and fellow permanent custodial staff.⁶⁹

At no time prior to May 13, 2010, when the district notified her of her termination, did Ms. Q report to personnel staff, her immediate supervisor or to the superintendent that her

⁵⁹ R. 30, 31.

⁶⁰ According to Mr. J, Ms. Q called in sick on January 29, which, unfortunately, was the date 140 out of town wrestlers were at the middle school for a wrestling tournament. R. 29. However, Ms. Q’ timesheet shows that she worked a full day on January 29, was off work February 1-3, and returned to work on February 4. R. 219-220. *See also* R. 572 (February 12: “She is just getting over a bout of pneumonia.”); Testimony of V. Q. According to Ms. Q, “her boss made her come back to work despite being sick.” R. 573.

⁶¹ R. 28 (April 21), R. 27 (April 27).

⁶² R. 146, 214.

⁶³ R. 146-148. The evaluation, dated May 13, was delivered to Ms. Q and was discussed with her on May 10. *See* R. 25.

⁶⁴ R. 23, 24-32, 146-147.

⁶⁵ R. 16, 107.

⁶⁶ Ms. Q was provided an “E” (excellent) evaluation for quality of work in 2000, 2005, and 2006, and “S+” (satisfactory +) in 2007, by Mr. D. He followed these ratings with “I” (needs improvement) in 2008, but both Mr. F in 2009 and Mr. J in 2010 provided a rating of “S”. R. 138-148, 160-161, 164-165.

⁶⁷ R. 110 (D C, principal); R. 111 (E M, counselor); R. 112 (C T, teacher); R. 113 (L C); R. 169 (Margaret E, speech pathologist).

⁶⁸ As noted, Mr. J on a number of occasions notified Ms. Q that cleaning tasks had not been performed. *See* notes 59, 61, 63, *supra*.

⁶⁹ N L, who substituted for Ms. Q when she was absent, believed that Ms. Q was doing a good job. *See* R. 365. However, the record indicates that Ms. Q’ working relationship with the other custodial staff was not good. *See* R. 156 (Ms. Q reports leaving premises after encountering hostility from fellow custodial staff); R. 25 (Ms. Q asserts that “N” was give favorable treatment by Mr. J); R. 361 (Ms Q reportedly “was upset by the attitude of her supervisor and another custodian.”).

physical condition was making it difficult for her to perform her duties, nor did she ask any of them for an accommodations for a disability or a change in work assignment (such as transfer back to the elementary school).⁷⁰ Following her termination, Ms. Q applied for disability benefits from the Public Employees' Retirement System.⁷¹

II. Discussion

Ms. Q asserts that she was terminated in 2010 due to disabling chronic pain resulting from the 2001 work injury. Ms. Q asserts that she continued to work for a lengthy period of time despite the existence of the disabling pain and that her employer terminated her in part due to absenteeism related to the disabling chronic pain, and in part to avoid potential liability for her claimed disability. The administrator responds that the school district terminated Ms. Q for unsatisfactory job performance that was unrelated to her claimed disability.⁷² The administrator adds that even if Ms. Q' termination was related to the claimed disability, she is barred by the doctrine of collateral estoppel from claiming an occupational disability because she has been denied workers' compensation benefits,⁷³ and that even if she is not barred, she has not shown that the claimed disability was caused by the work injury.⁷⁴ Lastly, the administrator argues that Ms. Q has not shown that she has a presumably permanent disability.⁷⁵

The parties' arguments raise three issues. The first issue is (1) whether Ms. Q' termination was caused by the claimed disability. If her termination was not caused by the claimed disability, it is not necessary to address any further issues. If her termination was caused by the claimed disability, a second issue must be determined: (2) whether Ms. Q is presumably permanently disabled. If she is not presumably permanently disabled, it is not necessary to address any further issues. If Ms. Q is disabled, a third issue must be determined: (3) whether the disability was caused by the work injury. If it the disability was not caused by the work

⁷⁰ R. 106; Testimony of J. T, K. J. Ms. Q has asserted that she spoke with the principal at the elementary school in 2007-2009, Ms. C, about her inability to complete her work assignments due to health conditions, and that Ms. C altered her work assignments. R. 10-11, 13. There is no evidence, however, that Ms. Q' supervisor was informed of those arrangements or gave permission for them. Ms. Q also testified that after she received notice of termination, she informed the school district that she was would be unable to continue working through the stated date of termination, and that she therefore took sick leave for the final three days of her employment.

⁷¹ See R. 327.

⁷² Administrator's Prehearing Brief at 32-34.

⁷³ Administrator's Prehearing Brief at 36-39.

⁷⁴ Administrator's Prehearing Brief at 39-40.

⁷⁵ Administrator's Prehearing Brief at 34-36.

injury, then Ms. Q is not eligible for occupational disability benefits, but she is eligible for non-occupational disability benefits.

A. Legal Standards

(1) Cause of Termination

An employee is eligible for disability benefits if the employee's "employment is terminated because of a total and apparently permanent...disability...before the employee's normal retirement date."⁷⁶ An employee is terminated "because of" a claimed disability if the claimed disability is a legal cause of termination.⁷⁷ A claimed disability is a legal cause of termination if (1) the termination would not have occurred but for the claimed disability (actual cause), and (2) the claimed disability was a significant and important cause of termination (proximate cause).⁷⁸

(2) Existence of Disability

A disability is "a physical or mental condition that...presumably permanently prevents an employee from satisfactorily performing [her] usual duties...or the duties of another position or job that the employer makes available and for which the employee is qualified by training and education."⁷⁹ A disabling physical condition can include disabling chronic pain.⁸⁰

(3) Cause of Disability

A disability is an occupational disability if "the proximate cause of the condition [is] a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties."⁸¹ A work injury is the proximate cause of a disabling condition if it is a substantial factor in the condition.⁸² The work injury is a substantial factor in the disability if (1)

⁷⁶ AS 39.35.400(a) (non-occupational disability benefits); AS 39.35.410(a) (occupational disability benefits)

⁷⁷ Stalaker v. M.L.D., 939 P.2d 407, 412 (Alaska 1997).

⁷⁸ *Id.* See Rhines v. State, 30 P.3d 621, 627 (Alaska 2001) (legal cause as to termination requires showing of actual cause and proximate cause).

⁷⁹ AS 39.35.680(24) (non-occupational disability), (27) (occupational disability).

⁸⁰ See Shea v. State, Department of Administration, Division of Retirement and Benefits, 267 P.3d 624 (Alaska 2011) ("It is undisputed that Shea is disabled and had to leave her job due to debilitating pain."); Hester v. State, Public Employees' Retirement Board, 817 P.2d 472, 476 n. 7 (Alaska 1991).

⁸¹ AS 39.35.680(27).

⁸² State, Public Employees' Retirement Board v. Cacioppo, 813 P.2d 679, 683 (Alaska 1991). See generally, Shea v. State, Department of Administration, Division of Retirement and Benefits, 267 P.3d 624, 631-634 (Alaska 2011) [hereinafter, "Shea"].

the disability would not exist but for the injury (actual cause), and (2) a reasonable person would regard the work injury as a cause and attach responsibility to it (proximate cause).⁸³

B. Analysis

The threshold dispute between the parties concerns the cause of Ms. Q' termination. If Ms. Q was not terminated "because of" the claimed disability, then she is ineligible for disability benefits under AS 39.35. As previously stated, to be eligible for disability benefits, the employee must prove that (1) the termination would not have occurred but for the claimed disability (actual cause, or cause-in-fact), and (2) the claimed disability was a significant and important cause of termination (proximate cause). Thus, in this case, Ms. Q must prove that (1) if not for her claimed disability, she would not have been terminated on June 3, 2010, and (2) her claimed disability was a significant and important cause of termination.

With respect to the first issue, Ms. Q asserted that the school district conspired to terminate her employment because it did not want to be exposed to liability for her claimed disability. A discharge motivated solely by a desire to avoid potential liability for a claimed disability is by definition one that would not have occurred but for the claimed disability.⁸⁴ Both Ms. Q and Mr. L testified, without rebuttal, that they heard Mr. J disparage Ms. Q for claiming to be disabled, and their testimony was supported by the statements of several members of the district's professional staff, including a school principal. That Ms. Q did not, prior to termination, notify the district's personnel office that her physical condition was an impediment to the satisfactory performance of her duties and request a workplace accommodation or change in her work assignment (such as reassignment to the elementary school),⁸⁵ does not mean that her immediate supervisor was unaware of her complaints. The preponderance of the evidence is that Mr. J, at the least, was aware of Ms. Q' claimed disability, and that but for the claimed disability, he would not have sought to have her terminated. Because the school district's

⁸³ Shea, 267 P.3d at 633. The test for proximate cause in this context is slightly different from the test for proximate cause in the context of termination. *See* note 78, *supra*.

⁸⁴ *Cf. Rhines*, 30 P.3d at 627, note 28 ("Although the facts of this case might lend themselves to the argument, Rhines has not challenged her employer's decision to reorganize as merely a pretext for the actual motivation to get rid of her because of her disability.").

⁸⁵ An employee is ineligible for disability benefits if the employer makes available a comparable position or job that is within the employee's ability "and for which the employee is qualified by training or education." *See* AS 39.35.680(24), (27). Ms. Q testified that the job duties at the middle school were more demanding than at the elementary school where she worked prior to 2007, when she began to have conflicts with her supervisor and when her evaluations plummeted.

decision was based on his recommendation, the preponderance of the evidence is thus that the termination would not have occurred but for the claimed disability.

But Ms. Q did not prove that the school district's sole motivation was to avoid potential liability, and in fact she admitted that other factors, such as personal animus and allegedly excessive absences, also played a role. In that light, regardless of the school district's motivation, the more important issue is whether her claimed disability was a significant and important cause of her termination.⁸⁶

From the 1999-2000 school year through the 2006-2007 school year, Ms. Parson worked at the elementary school, where she was supervised by Mr. D. Throughout that time, Mr. D routinely gave her favorable evaluations. However, after Ms. Q started her independent cleaning business in 2004, she was notified on multiple occasions of concerns that her outside employment was interfering with her job performance, both by Mr. D and by the school superintendent, who warned her that a failure to provide full-time service could result in her termination. After Ms. Q was transferred to the middle school in 2007-2008, Ms. Q testified (without rebuttal) that her work duties had increased. Her performance evaluation that year plummeted, and Mr. D became more assertive about the impact of her outside employment on her work. From the time Mr. J became her supervisor in 2009, he believed that Ms. Q was an unsatisfactory employee and he was openly critical of her job performance. Notwithstanding Mr. D's and Mr. J's criticisms, Ms. Q provided substantial evidence that her job performance was satisfactory, and that the school district's asserted reason for discharging her ("poor job performance") was pretextual.⁸⁷ Indeed, even Mr. J gave Ms. Q a satisfactory rating with respect to the quality of her work and her technical skills.⁸⁸ But at the same time, Ms. Q received highly unsatisfactory ratings from Mr. J from his perspective as a manager.⁸⁹ These ratings appear to be unrelated to her physical condition, and they concern matters that had previously been

⁸⁶ See Stalnaker v. M.L.D., 939 P.2d at 413 ("[T]he emphasis in a PERS disability claim should not be the employer's motive in terminating an employee, but whether the termination was caused by a disability.").

⁸⁷ In this regard, there is a stark contrast between Mr. F's highly favorable evaluation in 2009, and Mr. J's highly negative evaluation in 2010.

⁸⁸ R. 146.

⁸⁹ R. 146-147 ("V will not accomplish her assigned tasks consistently without frequent inspections and recommendations, instructions and supervision"; "If I point out deficiencies in her performance I am accused of harassment or of not liking her personally"; "Does not follow channels"; "Does not accept criticism or recommendations well").

identified as problematic by Mr. D (although not, notably, by Mr. F).⁹⁰ Also, entirely unrelated to her physical condition, Ms. Q was given multiple warnings regarding spending undue amounts of time on personal calls and her own private business (including during hours that she was on the school district's payroll). In addition, Ms. Q's own perception of hostility from other custodial staff was not shown to be related to her claimed disability.

As can be seen, the evidence regarding Ms. Q's job performance as presented by Ms. Q is in direct conflict with the evidence on the same issue as presented by the administrator. It may be that, as Ms. Q contends, Mr. J's criticisms regarding her performance in 2009-2010 were made up, overstated, or insufficient to warrant termination,⁹¹ and it is certainly plausible, based on the record, that Ms. Q's job performance was satisfactory and that the school district did not have adequate grounds for terminating her employment. But this is not the forum for resolution of employment-related disputes. The school district is not a party to this case, and Ms. Parson's task was to show that her alleged disability was a substantial and important cause of her termination, not that the school district's stated reasons for terminating her were unfounded or pretextual.⁹² In that regard, the evidence submitted by Ms. Q to show that notwithstanding chronic pain she continued to perform her job in a satisfactory manner does not tend to prove that her claimed disability was a substantial and important contributing factor in her termination. Rather, to the contrary, the more persuasive the evidence that Ms. Q was performing satisfactorily, the less likely it is that her disability was a substantial and important factor in her termination, particularly in the absence of a specific request to her supervisor, the personnel office, or the superintendent for a change in her work duties based on her claimed disability.⁹³ In short, that the school district might be liable for wrongful discharge does not mean that Ms. Q is eligible for disability benefits.

The only direct connection that Ms. Q drew between her claimed disability (apart from the school district's motivation) and her termination involved the amount of time Ms. Q was

⁹⁰ R. 165 (Mr. F comments: "She is...very easy to talk to and takes direction well. I look forward to having V on the team for the upcoming year.").

⁹¹ In this regard, it is noteworthy that Mr. F, who supervised Ms. Q after Mr. D and before Mr. J, gave her a highly positive evaluation.

⁹² See Stalnaker v. M.L.D., 939 P.2d at 412-413 ("The statutes establishing PERS disability benefits...are not intended to prevent employers from firing individuals because of their disabilities. Rather, they are designed to compensate PERS members who, unlike the individuals protected by anti-discrimination statutes, are no longer able to perform their jobs.").

⁹³ Cf. In Re J.A.A., at 16, note 124, OAH No. 05-0631 (Office of Administrative Hearings 2006) (evidence that employer "had bad feelings" about employee weakens causal link between claimed disability and termination).

absent from work due to her claimed disability. In the last three years of her employment, Ms. Q was absent for substantially more days than she had been previously. Mr. J noted excessive absenteeism in the space provided for that factor in the evaluation form for 2009-2010, and thus to the extent that Ms. Q' absences in 2009-2010 were due to her claimed disability, there was a causal relationship between her disability and her termination.

Ms. Q testified that her absences were due to medical appointments relating to her claimed disability. Ms. Q was able to make medical appointments in No Name outside of her regular work hours, and thus those appointments did not interfere with her work. However, medical appointments in No Name could cause a full day absence (or more), due to travel requirements. Ms. Q visited medical providers in No Name with concerns relating to her claimed disability in February (3 days) and April (2 days) prior to being notified of termination on May 13, 2010,⁹⁴ but she did not establish that she was absent at any other times due to her claimed disability.⁹⁵ While this absenteeism may have been a factor considered by Mr. J in his evaluation, excessive absenteeism was only one of the factors listed on the evaluation sheet, and in light of her non-disability-related absences, and the other factors that Mr. J identified as problematic, it does not appear that excessive absence due to her claimed disability was a significant and important factor in his evaluation. Rather, the clear focus of the evaluation was on management concerns unrelated to the absenteeism or any other consequence of the claimed disability. In light of the well-established record of concerns by more than one supervisor over a lengthy period regarding Ms. Q' outside employment and her work habits, the clear evidence of a difficult working relationship with Mr. D and Mr. J, and Ms. Q' own perception of a hostility from other custodial staff, and the absence of any direct request to her immediate supervisor, the personnel office, or the superintendent for a workplace accommodation or change of work assignment, Ms. Q has not shown that her claimed disability played a significant and important role in her termination.

IV. Conclusion

⁹⁴ R. 185, 211. Ms. Q also travelled to No Name in August, 2009, for a dental appointment (1 day) and in October, 2009, for examination of a nodule in her left lung that has no apparent relationship to her claimed disability (2 days). See R. 187, 196, 209, 213, 581, 585-586.

⁹⁵ Ms. Q was excused from work on various occasions due to a physical condition, rather than for treatment. For example, she was apparently off work for three days in February, 2010, due to pneumonia. See R. 219, 572. However, Ms. Q she did not identify any specific occasions on which she was absent due to her claimed disability other than for medical treatment.

Ms. Q was performing satisfactorily while working at the elementary school, but was unable to maintain an effective working relationship with her supervisors after her assignment to the middle school. The working relationship deteriorated to the point that she was terminated. Ms. Q did not prove that her claimed disability was the proximate cause of her termination, and she therefore is not entitled to occupational or non-occupational disability benefits.⁹⁶

DATED July 19, 2012.

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 22nd day of August, 2012.

By: Signed
Signature
Andrew M. Hemenway
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication.]

⁹⁶ Because Ms. Q did not show that her claimed disability was the proximate cause of termination, it is not necessary to determine whether she is presumably permanently disabled, or whether the 2001 work injury is the cause of her claimed disability.