IN THE MATTER OF CHAFFEY COMMUNITY COLLEGE DISTRICT,
Respondents.

Docket No. 95-91-CR
95-504-2

Civil Rights Proceeding

INITIAL DECISION

Appearances:

Ronald C. Ruud, Esq. and Howard J. Fulfrost, Esq., San Bernardino, California, for the Respondent

L. Patricia Williams, Esq., and Paul D. Grossman, Esq., for the Office of Civil Rights, U.S. Department of Education

This is an action to terminate the continued eligibility of the Chaffey Community College District (Chaffey) to receive or apply for Federal financial assistance from the U.S. Department of Education. This action was instituted as a result of a determination by the Assistant Secretary of Education for the Office for Civil Rights (OCR) that Ms. Gloria Haney, a professor at Chaffey, was the subject of two acts of retaliation by Chaffey's Governing Board which were prohibited under the Rehabilitation Act of 1973, as amended, (29 U.S.C. § 701 et. seq.). The purported acts of retaliation -- the Governing Board's denial of Ms. Haney's request for a sabbatical leave in April 1989 and the tabling of Ms. Haney's second request for a sabbatical leave in March 1990 -- were the result of Ms. Haney's pursuit of an accommodation in her teaching duties due to a physical impairment during the spring of 1988. Based upon the findings of fact and conclusions of law, infra, the determination of the Assistant Secretary for Civil Rights is upheld in part.

I. Background

This proceeding arises as the result of events which occurred primarily in 1988 concerning Ms. Haney and her employer, Chaffey.See footnote 1 1/ Ms. Haney, a professor of English at Chaffey, was scheduled for the spring quarter of 1988 to teach three courses, including an English 90 course which met on Mondays and Thursdays (Mon/Thur) from 10:00 to 11:50 AM. Due to a clerical error, the English 90 course was originally assigned to a room which was not a classroom. This error was corrected on or about March 24, 1988, approximately one and one-half weeks before the beginning of the quarter on April 4, 1988. On this date, Ms. Haney was notified that the new location for this course was a classroom located in the gym building which was situated downhill from the Language Arts building where the English classes were generally held.

Upon notification of the new room assignment in the gym building, Ms. Haney complained to the secretary of the English Department and questioned this room assignment. Her departmental chair, Ms. Silliman, responded on the same day and dismissed Ms. Haney's objections indicating that "[e]veryone else has walked in the past [to the gym building]. Now it's your turn. It's the fair thing to do." Ms. Haney then wrote a memorandum to her departmental chair and questioned this room assignment on two grounds: her seniority and that, on Mondays, the physical exhaustion from walking uphill to the Language Arts building for her next class would have a detrimental effect on her ability to teach that class.

On the same day Ms. Haney was notified that the new room assignment was in the gym building, i.e. March 24, 1988, she was interviewed by Mr. Chaney, the chair of the Management Department at Cal State University (Cal State), for a part-time position to teach a management course.See footnote 2 2/ This position had recently and unexpectedly become available for the spring quarter which, like Chaffey, began on April 4. The management course met twice a week -- on Tuesdays and Thursdays from 10:00 to 11:50 AM. During the interview, Mr. Chaney inquired several times whether Ms. Haney had any conflict with the period assigned to this course. In response, Ms. Haney indicated that she did not have a conflict.See footnote 3 3/ At the end of the interview, Mr. Chaney made Ms. Haney an informal offer and indicated that a formal offer would be made shortly after authorization was obtained. A formal offer was made within a day or two and, despite the direct conflict in schedules, Ms. Haney accepted the Cal State assignment on March 29. She completed the application for employment on March 29 and signed the contract of employment on April 4.

Between the March 24 meeting with Mr. Chaney of Cal State and Ms. Haney's March 29 acceptance of Cal State's formal offer of employment, Ms. Haney approached Mr. Arias, another professor in the English department at Chaffey. Much earlier in March, Mr. Arias had sought an exchange of his English 91 course with Ms. Haney for one of her courses. Mr. Arias' English 91 course met on Tuesdays and Thursdays from 8:00 to 9:50 AM -- a time period which he disliked. While Ms. Haney had previously declined his offer, she now pursued an exchange of courses -- her English 90 course which met on Mon/Thurs at 10:00 AM in exchange for his English 91 course. Mr. Arias agreed to the exchange. This exchange would eliminate Ms. Haney's conflict on Thursdays when she was scheduled to teach both the management course at Cal State and her English 90 course at Chaffey at 10:00 AM.

As the quarter began at Chaffey on April 4, Ms. Haney taught Mr. Arias' course while she sought departmental approval of the course exchange with Mr. Arias on ground that such an exchange eliminated her previously voiced objections with the room assignment in the gym building for her English 90 course, i.e. that the room assignment did not consider her seniority and that, on Mondays, the uphill walk would have a detrimental effect on her ability to teach her next class. This request, made on April l, was rebuffed by the departmental chair on April 4.

Though rebuffed, Ms. Haney continued to pursue the exchange of classes with her departmental chair and the chair's superior, the academic dean of her division. On April 11, the departmental chair warned Ms. Haney that further administrative action would be pursued against her unless she ceased her unauthorized exchange of classes and performed her regular teaching assignment.

On April 12, Ms. Haney met with her departmental chair and sought a reversal of the chair's denial of Ms. Haney's proposed course exchange. For the first time, Ms. Haney raised, as a justification for the course exchange, a medical condition for which she sought a diagnosis in the emergency department at Kaiser Permanente, her health maintenance organization, on April 6. This medical condition, which she refused to disclose or detail, precluded her from walking uphill, or even driving, between classes as would be required on Mondays under her regular schedule. Ms. Haney declined to divulge any further information concerning her medical condition, even to her division's academic dean.See footnote 4 4/ At this point, the departmental chair suggested that Ms. Haney provide a written statement from her physician to Mr. Menzel, the vice-president of personnel, and that she would then authorize a course exchange. Ms. Haney was to provide this information by April 21.

According to Ms. Haney, the April 12 meeting changed the nature of the dispute. Before the meeting, she viewed the dispute as a contractual matter, that is, whether she could exchange courses with Mr. Arias. As a result of the request for a physician's statement by her departmental chair, the dispute with Chaffey now became a medical issue. As a result, Ms. Haney no longer felt, but did not disclose this to Chaffey, any obligation to exchange a course with another professor in order to satisfy her regular teaching obligation.

On April 15, Ms. Haney sought a physician's statement from Kaiser Permanente. She met with Dr. Ambrose, a general physician at the clinic. During her conference, Ms. Haney became quite emotional and Dr. Ambrose, after reviewing her file and discussing the problems she was experiencing with her supervisor at Chaffey, indicated that Ms. Haney's physical problem was more likely due to a psychological problem rather than a physical condition. Although Dr. Ambrose recommended that she see a counselor, he nonetheless provided a physician's statement at the end of the conference. In the temporary activity restrictions category in the certification of disability and/or return to work or school form, Dr. Ambrose wrote--

> Pt [patient] is advise to avoid exertion until cardiac work up is completed which will be about 2-3 mos.

Following the conference, Ms. Haney returned to Chaffey. She delivered the medical statement to Mr. Menzel without any accompanying explanation or comment and then left. Mr. Menzel, on his part, was unaware of any problem and, therefore, was surprised to receive the statement. After delivering the medical statement to Mr. Menzel, Ms. Haney delivered a memorandum to her departmental chair which requested a substitute instructor for her Mon/Thur English 90 course in the gym building--

> Per my personal physician's informed medical advice, I may not teach the class located in the gymnasium and return to teach a class located in Language Arts. As a result, I will need a substitute for that class.
>
> cc: Steve Menzel

Following the receipt of the physician's statement, Mr. Menzel sought to ascertain the nature of the problem and the purpose of the physician's statement. In this regard, he made inquiries of Ms. Haney's departmental chair and her academic dean and was duly updated on this matter. In

addition, he was informed by the departmental chair that she suspected that Ms. Haney was teaching at Cal State.

On April 22, Mr. Menzel met with Ms. Haney to discuss her physician's statement. The initial discussion centered upon the nature and degree of Ms. Haney's work load at Chaffey and elsewhere. While it was extensive, Ms. Haney disclosed all of her teaching and other activities except for her part-time position at Cal State. As the conversation turned to the physician's statement, Ms. Haney explained that, in the opinion of her physician, it was not in her best interest to teach the back-to-back classes on Mondays which required her to walk or drive from the gymnasium building to the Language Arts building. Because Ms. Haney had not informed her physician about the extent of her non-Chaffey activities, Mr. Menzel questioned whether the physician had made an informed decision when he issued the medical statement. They agreed that the physician should be so informed. Based upon these circumstances, Ms. Haney was advised that the physician's statement would not support her continued failure to meet her spring quarter teaching assignment at Chaffey and that she was to teach her original English 90 course.

Following the April 22 meeting with Mr. Menzel, Ms. Haney did not return to teach her original English 90 course. She did, however, continue to teach at Cal State.

On May 31, 1988, Mr. Menzel held another meeting with Ms. Haney to discuss her continued failure to teach her English 90 course and that, as a result, Chaffey had to hire a substitute instructor. Mr. Menzel solicited several times an explanation by Ms. Haney for her failure to teach the course in the hope that she would “fess up” and inform Chaffey of the teaching conflict created by the Cal State job. Ms. Haney, however, responded that it was due to her medical situation. Mr. Menzel indicated that her failure to teach this course constituted a willful refusal to perform approximately one-third of her regular spring quarter teaching assignment . In concluding the meeting, he directed her to return and teach the English 90 course. Under protest, Ms. Haney agreed to do so .

On June 18, 1988, the Governing Board of Chaffey recommended the suspension and termination of Ms. Haney's employment. The statement of charges by Chaffey's president alleged, in effect, that Ms. Haney failed to teach her English 90 course during the spring quarter without justification and without authorization. Moreover, he alleged that she falsely represented to the administration on several occasions that she could not teach the course due to medical reasons when, in fact, she failed to teach this course due to her teaching obligation with Cal State.

Ms. Haney was suspended without pay as of June 20, 1988. Thereafter, she filed a request for a hearing and contested her immediate suspension and the proposed termination.

In October 1988, Ms. Haney and the Governing Board reached a settlement. The terms of the settlement provided, inter alia, the reinstatement of Ms. Haney as of January 3, 1989, and a payment of $4,000 to her unless she obtained employment elsewhere which, in that case, the amount was $15,000. Ms. Haney did not secure employment elsewhere. Thus, one effect of the settlement was that Ms. Haney was not paid for approximately one quarter of the school year.

In January 1989, Ms. Haney returned to her position within the English department. Within one month, Ms. Haney submitted a request for a one-year sabbatical to commence in the fall of 1989. In April 1989, the Governing Board considered her request and denied the request.

In February 1990, Ms. Haney submitted a second request for a sabbatical leave. In March 1990, the Governing Board tabled her request pending the completion of an about-to-be concluded investigation by OCR regarding a potential civil rights violation by the Board when it denied Ms. Haney's first request for a sabbatical leave in April of 1989.

II. OPINION

An individual who pursues a right or privilege as a handicapped individual with respect to his or her employer or participates in the complaint process under which a right as a handicapped individual is asserted under Section 504 of the Rehabilitation Act of 1973 is protected from retaliation by his or her employer.See footnote 5 5/ Title VI of the Civil Rights Act of 1964, Pub. L. No. 88- 352, § 601, 78 Stat. 252 (1964)(codified as amended at 42 U.S.C. § 2000d). The protection is afforded under 34 C.F.R. § 100.7(e) (1990) which provides--

> (e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

In the instant case, OCR maintains that Chaffey, through its Governing Board, engaged in two prohibitive acts of retaliation against Ms. Haney. The first act of retaliation was the April 1989 denial by the Board of a request by Ms. Haney for a sabbatical leave to begin in the fall of 1989. This denial, according to OCR, was in retaliation for an accommodation sought by Ms. Haney in the spring quarter of 1988 due to a handicap condition.

The alleged second act of retaliation by Chaffey occurred in March 1990, the year following the denial of Ms. Haney's first sabbatical request. In this year, the Governing Board considered a second request for a sabbatical leave by Ms. Haney and tabled the motion to grant a sabbatical leave. Thus, the Board's action neither granted nor denied the request. It simply deferred action on the request until some later time. OCR maintains that this action represented a retaliatory act by the Board and was taken because Ms. Haney had filed a claim of discrimination with OCR regarding the denial of her first request for a sabbatical leave.See footnote 6 6/

As to each claim of retaliation, the parties agree that OCR bears the burden of production to establish a prima facie case which includes that (1) Ms Haney, as the employee, was engaged in a protected activity; (2) she was subjected to an adverse employment decision; and (3) a causal link exists between the protected activity and the employer's action. Thereafter, the burden of production shifts to Chaffey to establish a legitimate nondiscriminatory reason for its action. Upon this showing, the burden of production shifts back to OCR to establish that Chaffey's proffered reason is pretexual.See footnote 7 7/

A. Whether Ms. Haney was engaged in a protected activity regarding her first claim.

OCR maintains that the anti-retaliation regulation, 34 C.F.R. § 100.7(e), prohibits any retaliatory act "for the purpose of interfering with a right or privilege" secured by the Rehabilitation Act. Under 34 C.F.R. § 104.12(a), a recipient of Federal assistance is required "to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee . . . ." Accordingly, OCR maintains that the pursuit of a reasonable accommodation by an employee is a protected activity under Section 504 of the Rehabilitation Act. Chaffey does not dispute this substantive proposition.

In order to be engaged in the protected activity of pursuing a reasonable accommodation, OCR argues that it must establish that Ms. Haney (1) pursued a reasonable accommodation for a handicap, (2) had a good faith reasonable belief that she was handicapped and required a reasonable accommodation, and (3) had a handicap. Chaffey counters that there is no evidence that Ms. Haney was handicapped or required an accommodation for her alleged handicap. In its view, Ms. Haney's avoidance of teaching the English 90 course in the gym building was not related to any alleged physical disability; rather, it was due to the conflict in her teaching schedule which was created when she accepted the part-time teaching position at Cal State, i.e. she was scheduled to teach on Thursday at 10:00 AM in the Chaffey gym classroom for her English 90 class and at the same time at Cal State in a management class. Chaffey also urges that there is no basis in fact or law that Ms. Haney had a reasonable belief that she was handicapped.

1. Whether Ms. Haney pursued an accommodation.

An individual with handicaps is one who has a physical or mental impairment which substantially limits one or more of such person's major life activities. 34 C.F.R. § 104.3(j)(1) (1990). Generally, an employer must make an accommodation for an individual with handicaps which may include--

> (1) [m]aking facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

34 C.F.R. § 104.12(b).

Below, the tribunal examines, sequentially, each event involving Ms. Haney and her medical condition. As determined hereinafter based on the facts, Ms. Haney did not pursue a reasonable accommodation due to a handicap. Therefore, the retaliation regulation is not, by its terms, applicable to the Governing Board's denial of Ms. Haney's request for a sabbatical in 1989, the first claim of retaliation alleged by OCR.

On March 24, 1988, approximately one and one-half weeks before Chaffey's spring quarter began on April 4, Ms. Haney learned that her Mon/Thur 10:00 to 11:50 AM English 90 class was assigned a classroom in the gym building. The gym building was located a substantial distance downhill from the Language Arts building where the English classes were generally held. She

complained to her departmental chair about this classroom assignment in a memorandum and raised two arguments against such an assignment. First, she argued that this assignment was made without considering her seniority. Second, she complained that the physical effort of the uphill walk from the gym after her English 90 class on Mondays would adversely affect her teaching performance in her next class which was scheduled immediately thereafter.

These complaints are personal in nature. They do not seek an accommodation due to a substantially limiting, physical impairment as defined by the statute and regulations. Accordingly, this request for a change of classrooms was not a pursuit of a reasonable accommodation due to a handicap.

Ms. Haney's next request came by a memorandum of April 1 and was made after she had accepted the part-time teaching position at Cal State which created a conflict with her English 90 class at Chaffey on Thursdays at 10:00 AM. The April 1 request sought not a classroom exchange, rather a course exchange with Mr. Arias. The effect of a course exchange with Mr. Arias eliminated Ms. Haney's conflict of classes on Thursdays at 10:00 AM.See footnote 8 8/ This request was based upon the same non-medical justifications proffered in her March 24 request, i.e. her seniority and inability to effectively teach her next class on Mondays due to the physical effect caused by walking between the buildings. While a change in courses eliminates the classroom location problem and may be considered in the nature of an accommodation request, it was not made based upon her medical condition or any resulting physical impairment. As such, this April 1 request does not constitute the pursuit of an accommodation for purposes of the retaliation provision.

On April 12, Ms. Haney met with her departmental chair and sought a reversal of the chair's denial of Ms. Haney's proposed course exchange with Mr. Arias -- an exchange which she and the other professor had nonetheless implemented. For the first time, Ms. Haney raised, as a justification for the course exchange, a medical condition which rendered her, in the words of the departmental chair, “incapable of teaching two back-to-back classes and of even driving, much less walking, from the Language Arts Building to the gymnasium without 'being exhausted.'” Other than the broad generalization of a “medical condition,” Ms. Haney refused to divulge any information concerning her condition to her departmental chair or even to the academic dean of her division. At this point, the departmental chair suggested that Ms. Haney provide a written statement from her physician to Mr. Menzel, the vice-president of personnel, and that she would then authorize a course exchange. Ms. Haney was to provide this information by April 21.

In the tribunal's view, the pursuit of an accommodation requires the presentation to the employer of sufficient evidence that a significant physical impairment exists and that this impairment requires some accommodation in order for the individual to perform the duties of his or her employment. In the instant case, Chaffey was presented during the April 12 meeting with only an oral, vague suggestion that there may be a physical impairment. Hence, at this point, Ms. Haney, clearly had not pursued an accommodation due to a handicap.

Following the April 12 meeting, Ms. Haney immediately abandoned her proposed exchange of courses. The nature of the dispute was completely changed, in her view, due to the departmental chair's request for a physician's statement. Her view, which she did not disclose to Chaffey, was

that the chair's request transformed the dispute from a contractual matter dealing with her right as tenured professor to exchange a course with another professor to a medical issue. As a medical issue, Ms. Haney felt that she no longer was obligated to exchange a course with another professor in order to satisfy her regular teaching obligation at Chaffey.See footnote 9 9/ Thus, a medical statement would excuse her from teaching the English 90 course, fully one-third of her regular teaching assignment.

Objectively, Ms. Haney implemented her new position without discussion with, or the consent of, Chaffey. First, she ceased teaching Mr. Arias' course after April 12. Second, she delivered, on April 15, a physician's statement to Mr. Menzel of the personnel department, which indicated that she was "advise[d] to avoid exertion." Third, after delivering the physician's statement to Mr. Menzel, Ms. Haney presented her departmental chair with a previously prepared memorandum that requested a substitute instructor for her Mon/Thurs English 90 course in gym building--

> Per my personal physician's informed medical advice, I may not teach the class located in the gymnasium and return to teach a class located in Language Arts. As a result, I will need a substitute for that class.
>
> cc: Steve Menzel

Thereafter, Ms. Haney did not instruct her English 90 course during April and May.

It is patently clear that Ms. Haney did not pursue an accommodation in connection with her obligation to teach the English 90 course in the gym building when she presented her physician's statement. Any reasonable accommodation, such as a switch in the classroom location or special transportation or parking spaces to alleviate the walk between buildings, would have enabled her to teach the course. Yet, what she imposed on Chaffey after April 12 was the elimination of one-third of her regular teaching schedule. Such a significant, major reduction in her duties does not even arguably constitute an accommodation. It is well recognized that the elimination of an essential duty is not considered an acceptable accommodation. Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991); Hall v. United States Postal Serv., 857 F.2d 1073 (6th Cir. 1988); Jasany v. United States Postal Serv., 755 F.2d 1244, 1250 (6th Cir. 1985).

Based on the above, there is no evidence which supports the theory that Ms. Haney was pursuing an accommodation due to an existing medical condition or limitation. Therefore, under these circumstances, the retaliation provision under Section 504 is not applicable.

OCR argues that Ms. Haney pursued an accommodation--

> 1. Based on serious symptoms of cardiac distress, Ms. Haney believed that climbing the hill posed a threat to her health and, therefore, she requested a classroom exchange;
>
> 2. After the request for a classroom exchange was denied, she obtained a physician's statement which was ignored and, therefore, asked for a substitute for the English 90 course held in the gym.

This argument misrepresents the facts. First, Ms. Haney never requested a change in classrooms for her English 90 course. At best, the only possible event which may be construed as such was a request on March 24, about a week and one half prior to the beginning of the spring quarter. On that day, Ms. Haney first learned that her Mon/Thur English 90 course was scheduled to meet in the gym building and she objected to the assignment. While this could be construed as a request for a change in classrooms, this request was not based upon a physical impairment due to a known medical condition. In fact, Ms. Haney had not even visited a doctor at this point. As noted earlier, her objection was based upon her seniority and the purported effect of walking uphill upon her teaching performance, not her health.See footnote 10 10/

Second, the record is clear that Ms. Haney's request for a substitute instructor came well before the rejection of her physician's statement by Mr. Menzel, not after its rejection as OCR maintains. Ms. Haney submitted her request for a substitute instructor on the same day she delivered her physician's statement to Mr. Menzel. At this point, Mr. Menzel had not considered, let alone rejected the physician's statement. It was not until one week later, on April 22, 1988, that Mr. Menzel met with Ms. Haney to discuss the situation and rejected the statement on the basis that her physician had not issued the statement with full knowledge of Ms. Haney's overwhelming, busy teaching schedule and business activities. Thus, OCR's argument lacks factual support.

2. Whether Ms. Haney had a handicap or had a good faith, reasonable belief that she was handicapped when she pursued an accommodation.

OCR maintains, correctly, that the protection of the anti-retaliatory regulation is not limited to an individual who is, in fact, handicapped and pursues an accommodation. The legal protection extends, also, to an individual who, at the time of the pursuit of an accommodation, has a good faith, reasonable belief that he or she is handicapped. As such, OCR argues, in effect, that Ms. Haney had a handicap or, in the alternative, that she had a good faith, reasonable belief that she had a handicap which required an accommodation.

An individual with handicaps is one who--

> (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities . . . (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.See footnote 11 11/

34 C.F.R. § 104.3(j)(1) (1990).

A physical impairment is “any physiological disorder or condition . . . . affecting one or more of the following body systems: . . . cardiovascular. 34 C.F.R. § 104.3(j)(2)(i). The physical impairment must substantially limit a major life activity which “means a function such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 34 C.F.R. § 104.3(j)(2)(ii).

The parties agree that the physical impairment must be severe enough that it results in a substantial limitation of one or more major life activities and that the physical impairment must be more than just a temporary impairment. The parties disagree whether the physician's limitation of avoiding exertion such as climbing up and down hills is a substantial limitation of a major life activity and whether a limitation for a period of two or three months for purposes of diagnosis satisfies the pernancy aspect required of a physical impairment.

OCR argues that major life activities, according to the "EEOC Compliance Manual," are those basic activities that the average person in the general population can perform with little or no difficulty. In this regard, OCR maintains that, due to the physician's limitation, Ms. Haney's physical abilities deviates from the average person in that the average person can walk up hills and is not restricted to a limitation of exertion-free activities.

It is clear that Ms. Haney did not have a physical impairment which substantially limited one or more of her major life activities. The "avoid exertion" restriction had no effect upon Ms. Haney's life style in any way except on Mondays, when she was supposed to walk uphill from the gymnasium building to the Language Arts building for her next class -- a walk which she disliked and tried to avoid even before her restriction. Such a narrow limitation does not constitute a significant restriction in her major life activities. Cf. Blanton v. Winston Printing Co., 868 F. Supp. 804 (D.N.C. 1994) (difficulties in running and ascending and descending stairs do not constitute sufficient residual effects to constitute a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 et. seq.); In re Southwestern Virginia Training Center, Dkt. No. 93-125-CR, U.S. Dep't of Education, at 5 (ALJ, June 30, 1995), aff'd by Civ. Rts. Rev. Auth. Jan. 14, 1997, appeal pending 4th Cir. (a 20 pound lifting restriction created only a minor inconvenience in daily life).

In addressing the requisite duration that a limitation must have, OCR acknowledges that a number of years satisfies the durational requirement while a transitory medical condition lasting only a few weeks, such as influenza, is insufficient. OCR argues, based upon the EEOC Manual, that a two to three month period is a sufficient duration, especially where, as here, the individual is in the midst of diagnosis for a "life-threatening" condition--

> [s]ome conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months.

EEOC Manual, Vol. 2 at 902-30 & 31.

A transitory incapacity or injury is not considered an impairment under the Rehabilitation Act as it extends only to "an impairment of a continuing nature." Southeastern Community College v. Davis, 442 U.S. 397, 405-06, n.6 (1979). Thus, for instance, a broken leg that takes 8 weeks to heal (29 C.F.R. pt 1630 App.), the pregnancy of a woman (Saffer v. Town of Whitman, 62 Fair Empl.Prac.Cas. (BNA) 1767, 2 A.D. Cases 1437, 1986 WL 14090 (D.C. Mass. 1986)), and degenerative disc syndrome requiring 6 months of rest (Paegle v. Dep't of Interior, 813 F. Supp. 61 (D.D.C. 1993)) are not considered impairments. In short, there is a difference between a transitory and a permanent or long-term condition based upon whether the injury or condition will be resolved over a reasonable period of time.

A transitory injury may develop, on occasion, into a long term or permanent condition. For example, a broken leg may heal improperly and result in a permanent limp. The broken leg is a temporary injury and the resulting limp is a permanent condition. Thus, the initial condition lacks the requisite permanency and, therefore, does not satisfy the durational requirement, while the latter condition satisfies at least the durational aspect in determining whether the improperly healed leg constitutes a physical impairment. Blanton, 868 F. Supp. at 807 (citing 29 C.F.R. pt. 1630 App.).

In the instant case, the nature of Ms. Haney's problem was not specifically diagnosed when she visited the emergency department on April 6 although life-threatening and other serious possibilities were ruled out.See footnote 12 12/ The physician's statement, issued more than a week later and at the request of Ms. Haney, allowed two to three months for a cardiac work up. The work up was neither extensive nor rushed.See footnote 13 13/ In the tribunal's view, the imposition of limitations upon Ms. Haney during the period of diagnosis is more akin to a transitory condition than a long term or permanent condition. Its duration was short -- only two or three months. The underlying problem -- the absence of a clear diagnosis -- would be resolved by the end of the period when the nature and extent, if any, of a long term or permanent condition would be known. This situation is clearly not the type of condition for which relief under the Rehabilitation Act was intended or is appropriate.

In summary, it is patently clear that Ms. Haney was not an individual with handicaps since her physical limitation did not significant affect any major life activity and was a transitory, not a long term or permanent, situation.

Next, OCR maintains that, even if Ms. Haney was not, in fact, an individual with handicaps, she had nevertheless, a good faith, reasonable belief that she was handicapped and, therefore, needed an accommodation for her handicap. Good faith encompasses sincerity and proper intentions regarding one's assertion of a potentially disabling condition. Monteiro v. Poole Silver Co., 615 F.2d 4 (1st Cir. 1980) (an individual whose accusation of discrimination was more likely raised as a “smokescreen” in challenge to the supervisor's legitimate concern rather than in opposition to perceived employer misconduct was denied the protection of a retaliatory provision under Title VII). Reasonable belief of one's condition and limitations is measured by an objective standard. Drinkwater v. Union Carbide Corp,, 904 F.2d 853, 866 (3d Cir. 1990). The good faith, reasonable belief standard protects an employer against malicious accusations and frivolous claims. Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1020 (D.C.Cir. 1981).

In the tribunal's determination, Ms. Haney lacked good faith and a reasonable belief that she was handicapped.

As determined earlier, Ms. Haney had no intention of seeking an accommodation when she submitted the physician's statement to Mr. Menzel, the vice-president of personnel, in support of her claim that she was handicapped. The purpose of the claim was to avoid teaching her Mon/Thurs 10:00 AM English 90 course at Chaffey so that she could teach the Thursday 10:00 AM management class at Cal State.See footnote 14 14/ Under this circumstance, Ms. Haney's claim was a patent attempt to avoid teaching her English 90 class rather than a means to seek an accommodation for a handicap. Therefore, her claim lacked good faith.

In determining reasonable belief, the tribunal recognizes that an individual's condition and limitation is not limited to those situations which qualify as a handicap under the statute and its regulations. An individual may hold a mistaken belief of law or fact regarding his or her health condition or entitlement to modifications in one's job duties and yet, still possess a reasonable belief. In Re Capistrano Unified School District, Dkt. No. 89-33-CR, U.S. Dep't of Education, at 34 (ALJ, July 19, 1991), aff'd by Civ. Rts. Rev. Auth. April 30, 1992). The mistaken belief concept does not, however, eliminate all inquiries and permit an individual an excessively broad, subjective, or unrealistic evaluation of his or her health problems and physical limitations. Such an approach would frustrate the purpose of the statute and the regulations. Hence, an objective standard is applied in determining whether there is a reasonable belief that an individual has a handicap.

Ms. Haney's physical restriction was "to avoid exertion." This restriction imposes no limitation of any significance. Moreover, it had virtually no impact upon Ms. Haney's major life activities. Her life was unaffected except that she could not walk uphill from the gymnasium to her next class on Mondays.

In addition, the circumstances under which the physical restriction was issued indicate that Ms. Haney's impairment was insignificant. Ms. Haney's medical records of April 6 -- the day she first sought medical assistance in the emergency department of Kaiser Permanente -- do not disclose the imposition of any physical restrictions. Yet, it is common practice for physicians to note any restrictions imposed on a patient in the patient's records. Also, Ms. Haney's treating physician did not issue a work-related medical excuse on April 6. Yet, it is common practice for physicians to issue a work-related medical excuse at the time of the examination or related incident. Hence, the facts reflect that the treating physician was not particularly concerned with significantly limiting her physical activity.

The circumstances surrounding the issuance of the physician's restrictions similarly reflect that Ms. Haney had an insignificant physical impairment. The physician's statement was issued by Dr. Ambrose on April 15 and following a conference requested by Ms. Haney. Ms. Haney was distraught and quite emotional during the meeting.See footnote 15 15/ She was "complaining apparently [of] having [a] probl[em] with" her departmental chair at work and a physician's statement was a solution for her problem. It was Ms. Haney, not Dr. Ambrose, who suggested the nature of the limitation and its duration. At the end of the meeting, Dr. Ambrose issued the medical restriction even though she was of the view that Ms. Haney's problem was more likely due to a psychological problem rather than a physical condition. These circumstances suggests quite strongly that Dr. Ambrose's vague and generalized restriction was intended to assist Ms. Haney with her vaguely described problem at work rather than to significantly limit her activity due to her medical condition.

In addition, immediately after presenting her physician's statement to Mr. Menzel on April 15 and before he could take any action in response thereto, Ms. Haney requested a substitute instructor for her English 90 class at Chaffey. This action confirms that Ms. Haney's motivation behind the issuance of the statement was to eliminate the scheduling conflict between her English 90 class at Chaffey and her management class at Cal State. Hence, the tribunal concludes that Ms. Haney did not have a reasonable belief that she was handicapped.

OCR asserts that Ms. Haney had a reasonable belief that she was handicapped. OCR argues (Main Br. at 22-23) that--

> [a]t the time Ms. Haney requested her accommodation even her physician was not sure of her condition and was initiating the diagnostic process. All Ms. Haney could do is provide the medical evidence she had for consideration under the "interactive" process. It is unrealistic to expect Ms. Haney, or any other layperson, to know the specific limitations of her medical condition.
> . . . .
> Guided by the above precedents, OCR urges that under any interpretation of the law, it must be concluded that Haney had a legally sufficient belief that she was a person with a disability and thus has engaged in a protected activity. This conclusion is compelled by
>
> numerous events documented in her pursuit of an accommodation. Any reasonable person with Ms. Haney's recurring symptoms of a heart attack and with the interim diagnosis of a heart impairment, warned by her physician to avoid exertion including limiting the major life function of walking [footnote omitted] would reasonably believe that she had a disability and needed a reasonable accommodation.

This argument misstates the facts. It is premised on the erroneous theory that, when Ms. Haney sought an appropriate accommodation, Chaffey was aware of her medical condition. This is incorrect. As determined above, Ms. Haney abandoned her request for an accommodation several days before April 15, the day on which she first presented any evidence of a medical condition to Chaffey. Thereafter, she never pursued any accommodation such as an exchange of classrooms.

B. Whether the denial of a request by Ms. Haney for a sabbatical leave constitutes an adverse employment decision

In addition to establishing that Ms. Haney engaged in a protected activity, OCR must establish, as part of its prima facie case, that Ms. Haney was subjected to an adverse employment decision and that a causal link exits between the protected activity and the employer's action.

OCR maintains that the denial of Ms. Haney's request for a sabbatical leave constitutes an adverse employment decision. In its view, an adverse action constitutes an action that affects an individual's employment status, including pay or other factors. In this regard, it cites Collins v. Illinois, 830 F.2d 692 (7th Cir. 1987), wherein the Seventh Circuit held that an adverse action was present where an employee lost her own office, phone, business cards, and title as a consultant even though there was no reduction in pay or benefits. Similarly, OCR notes that an employer's action which denied a teacher the opportunity to teach a speech/debate class and receive the accompanying stipend, constituted an adverse action. In Re Capistrano Unified School District, Dkt. No. 89-33-CR, U.S.Dep't of Education (ALJ July 19, 1991).

Chaffed maintains that an adverse action requires some negative action by the employer with respect to the employee such as a disciplinary demotion (Smith v. Columbus Metropolitan

Housing Auth., 443 F. Supp. 61 (S.D. Ohio 1977), termination of employment (EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D. N.Y. 1975), aff'd 559 F.2d 1203 (2d Cir. 1976), cert. denied 434 U.S. 920 (1977), unjustified evaluations (Mead v. U.S. Fidelity & Guar. Co., 442 F. Supp. 114 (D. Minn. 1977), or a negative statement to prospective employers (Rutherford v. American Bank of Commerce, 565 F.2d 1162 (10th Cir. 1977). Since Ms. Haney remained employed by the college and her duties and responsibilities were not affected by the denial of her sabbatical request, Chaffed argues that there was no adverse action.

It is apparent that Chaffey regards sabbatical leaves as beneficial to the college. First, it subsidizes the leave by paying each recipient a substantial percentage of his or her salary during the leave. Second, it is an unwritten prerequisite of approval that the students must benefit from such a leave. Third, the sabbatical leave process requires the approval by the faculty senate with respect to the merit of the academic project for which the leave is proposed. Fourth, each applicant is required, as a condition of a sabbatical, to teach at the school for a specified period after he or she returns.

At the same time, it is evident that a sabbatical leave benefits the professor. It provides this individual with an opportunity to research and write in an academic area which , in turn, may enhance his or her professional credentials.

In the tribunal's view, an adverse action may take one of several forms. It may deny a current perk, benefit, responsibility, or amenity. On the other hand, it may also be a present action which denies an employee in the future a perk, benefit, responsibility, or amenity. A sabbatical leave falls into the latter category. As such, the denial of a sabbatical leave constitutes an adverse action by Chaffey.

C. Whether there is a causal link between the protected activity and the employer's action.

The last factor of a prima facie case of retaliation addresses whether there is a causal link between the protected activity and the employer's adverse action. This element may be established through direct evidence of retaliatory motive or circumstantial evidence which raises an inference that retaliation may have occurred. East v. Ronnie. 518 F.2d 332, 338 (5th Cir. 1975). Inferences of retaliations may be determined due to the proximity in time between the protected activity and the purported retaliatory act as well as adverse, disparate treatement by the employer toward the particular employee. Hochstadt v. Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976); Grant v. Bethleham Steel Corp., 622 F.2d 43 (2nd Cir. 1980).

Assuming arguendo that Ms. Haney engaged in a protected activity, there is clearly proximity in time between her purported protected activity and the purported act of retaliation. Chaffey was informed of Ms. Haney's medical problem and physical limitation in April 1988. In all likihood, these factors were one aspect of Ms. Haney's defense in the subsequent action by Chaffey to terminate Ms. Haney's employment. Ms. Haney's sabbatical request was denied in April 1989, approximately five months after the termination action was settled by the parties and within four months after she was reinstated to her position at Chaffey.

The evidence also suggests, on the surface, that Ms. Haney was subjected to disparate treatment by Chaffey. During the April 1989 meeting, the Board granted five requests for sabbatical leave and denied only Ms. Haney's request. Over the nine year period from the academic year 1984-85 through 1995-96, the Board granted approximately 50 requests and, with the exception of Ms. Haney, did not deny any request for a sabbatical leave.

Lastly, the discussion by Chaffey's Board in April 1989 regarding Ms. Haney's sabbatical request focused, in part, on her termination action although the precise details are somewhat unclear due to the passage of time.

On the basis of this evidence, the tribunal concludes that there is a causal link between Ms. Haney's protected activity and the denial of her request for a sabbatical leave.

In summary, OCR bears the burden of production to establish a prima facie case of retaliation which includes three elements -- (1) that Ms. Haney, as the employee, was engaged in a protected activity; (2) that she was subjected to an adverse employment decision; and (3) that a causal link exists between the protected activity and the employer's action. As determined above, OCR has not established that Ms. Haney engaged in a protected activity. Therefore, OCR failed to establish a prima facie case of retaliation. Accordingly, the claim of retaliation regarding the denial of Ms. Haney's request for a sabbatical leave in April 1989 is dismissed.See footnote 16 16/

SECOND CLAIM OF RETALIATION

Approximately one year after Ms. Haney's first request for a sabbatical leave was denied, she made another request for a sabbatical leave. This second request was for the school year 1990/91 and was submitted in February 1990. At this time, OCR had almost completed its investigation of Ms. Haney's discrimination complaint regarding the denial of her first request for a sabbatical leave. Ms. Haney's second request was considered by the Board one month later in its March 1990 meeting. The Board discussed Ms. Haney's request in closed session, as was its normal practice, and voted to table her request. Thereafter, during the public session of the Board meeting, the Board announced its decision and explained the basis therefor. In its view, it was not appropriate to take any action on Ms. Haney's second sabbatical request until the resolution of current actions pending by Ms. Haney.

The question is whether Chaffey violated the participation clause under 34 C.F.R. § 100.7(e) when it tabled Ms. Haney's second request for a sabbatical leave. Protection against discrimination is extended under the participation clause when the employee has made a complaint, testified, assisted, or participated in any manner in the complaint process under the Rehabilitation Act. Unlike the opposition clause, protection under the participation clause, i.e. the complaint process, is essentially absolute and given without consideration of matters such as whether the complainant acted in good faith or was reasonable or correct as a matter of fact or

law in his or her views. There is no dispute between the parties that Ms. Haney engaged in a protected activity when she filed her discrimination complaint with OCR in June 1989.

OCR argues that Chaffey violated the participation clause when the Governing Board tabled Ms. Haney's request for a sabbatical leave. In its view, the Governing Board's explanation for its action in open session provides direct evidence of this discrimination -- the request was tabled because of Ms. Haney's pending discrimination complaint.

Chaffey responds with three arguments. First, it argues that discrimination has not occurred because Ms. Haney was not subjected to an adverse employment action. Second, it asserts that OCR misconstrues the Board's explanation in that it was not referring to Ms. Haney's pending OCR discrimination complaint when it spoke of current actions pending that have not been cleared up. Third, it maintains that the Board's action did not reflect any retaliatory animus and, therefore, there was no retaliation.

A tabling action on a motion to grant a sabbatical request is somewhat different than the denial of such a motion which the tribunal addressed earlier in that it reflects a decision not to decide the matter at that moment. Since one of its effects is, essentially, the denial of the motion for the sabbatical request, at least for the present time, the tribunal concludes that such an action should be treated no differently than a denial. Consequently, the tabling action constitutes an adverse employment action by Chaffey.

With regards to the Governing Board's explanation in open session, the tribunal determines, as a matter of fact, that the Board's reference to “current actions” refers to the discrimination complaint made by Ms. Haney regarding to the denial of her earlier request for a sabbatical. This discrimination complaint was the only active complaint being investigated in March 1990 and arrangements with the Board had just been made for interviews of its members during the latter part of the month as part of that investigation. Hence, the Board's action to table the sabbatical request was made because of the discrimination complaint made by Ms. Haney which was pending before OCR and being investigated. As such, its action constituted discrimination.

While the tribunal concludes that the Board's action was discriminatory, it is also apparent that the Board's action was not made with a retaliatory animus. Discrimination under the statute or regulation does not require, however, the showing of ill will or hatred.

Based upon the above, it is concluded that Chaffey retaliated against Ms. Haney when its Governing Board tabled Ms. Haney's second request for a sabbatical leave.

OTHER DEFENSES RAISED BY CHAFFEY

Chaffey raises two other defenses in this proceeding, the equitable doctrine of laches and equitable doctrine of unclean hands, which bars this proceeding. Under the doctrine of laches, it is incumbent for Chaffey to prove a lack of diligence or unexcusable delay by OCR and, as a result, prejudice to Chaffey. Costello v. United States, 365 U.S. 265, 282 (1961)

Both parties agree that this defense is generally not available against the Federal government. The Court held, in United States Immigration & Naturalization Serv. v. Hibi, 91 S. Ct. 19, 21 (1973) (quoting Utah Power & Light Co. v. United States, 37 S. Ct. 387, 391 (1917)) that "[a]s a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit to enforce a public right or protect a public interest." OCR also acknowledges that, in recent years, this traditional view has suffered a few inroads as noted in S.E.R. Jobs for Progress, Inc. v. United States, 759 F.2d 1 (Fed. Cir. 1985) where, for example, the defense of laches was implicitly approved against the Federal government when it was engaged in a commercial type activity.

Chaffey cites several decisions involving the Equal Employment Opportunity Commission, a Federal agency, for the proposition that the doctrine of laches is a permissible defense in discriminatory, enforcement actions brought by the agency.See footnote 17 17/ OCR distinguishes these cases on the theory that the EEOC was acting in its capacity as a representative of the complainant rather than in its capacity as a sovereign to enforce a public right or protect a public interest. United States v. Popovich, 820 F.2d 134 (5th Cir. 1987), cert. denied 484 U.S. 976 (1987). Inasmuch as OCR is acting in its sovereign capacity to enforce a public right or protect a public interest in the present case, it asserts that the general rule applies and bars the application of laches against the Federal government.

Under 34 C.F.R. § 101.23, an individual, who submits a complaint, is not a party to the present proceeding. As such, OCR is not pursuing a cause of action for a specific complainant in the matter at hand; rather, it is acting on behalf of the sovereign to protect against the use of Federal funds by a recipient who purportedly engaged in a discriminatory practice. Accordingly, the doctrine of laches is inapplicable in this action as a matter of law.

Even if the doctrine of laches were applicable, Chaffey cannot establish its second element, a showing of prejudice as the facts do not support such a determination.See footnote 18 18/ Chaffey maintains that the delay prejudiced its case because several Board members were unavailable to testify regarding the Board meetings and the passage of time faded the memories of the two members who did testify.

Of the two closed Board meetings, the second meeting in March 1990, in which the Board tabled her sabbatical, is easily addressed. Here, the Board made a public statement in open session regarding its motivations for tabling Ms. Haney's second request for a sabbatical leave. As a result, Chaffey suffered no prejudice in establishing the motivation of the Board.

Regarding the closed session of the Board in April 1989, wherein the Board denied Ms. Haney's first request for a sabbatical, Chaffey did not suffer any meaningful prejudice. First, Chaffey's attorney wrote a letter to OCR on September 13, 1989 (OCR Ex. 63) explaining the Board's motivation in denying Ms. Haney's sabbatical request. Second, four of the five Board members were interviewed in March/April 1990 by OCR during its investigation and the notes of these interviews are part of the record. Third, the two Board members, who testified, provided the tribunal with a sufficient insight into the Board's deliberation.

Chaffey also maintains that the delay prevented it from locating Dr. Ambrose, the physician who issued Ms. Haney's medical excuse. As a result, no testimony was offered concerning the circumstances surrounding the issuance of Ms. Haney's medical excuse in April 1988. This argument ignores, however, the notes of Dr. Ambrose which are part of the record. These notes reveal the circumstances under which the excuse was written and, thus, there is little merit to Chaffey's argument.

Under these circumstances, the doctrine of laches, even if applicable, would not bar OCR's action in the instant case.

Chaffey argues, also, that this proceeding is barred under the equitable doctrine of unclean hands which "closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior" of the opposing party. Cleveland Newspaper Guild, Local 1 v. Plain Dealer Publishing Co., 839 F.2d 1147, 1155 (6th Cir. 1988) citing Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945). Chaffey maintains that OCR's actions have been marred by incompetence, bad faith, and bias and then details a litany of perceived inappropriate actions by OCR.

Initially, OCR argues, citing United States v. Iron Mountain Mines, Inc., 812 F. Supp 1528 (E.D. Cal. 1992) and United States v. Stringfellow, 661 F. Supp 1053, 1062 (C.D. Cal. 1987), that this doctrine is not applicable when it is asserted against a sovereign which acts to protect the public welfare. In addition, the policy consideration behind the inapplicability of this doctrine to a civil rights agency, such as the Equal Employment Opportunity Commission, was articulated by the Ninth Circuit in EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 753-54 (1991). There, the Ninth Circuit indicated that the policy, if applied, would frustrate a substantial public interest in "eradicating unlawful employment discrimination and in vindicating the rights of victims of such illegal practice" and permit employers to continue unlawful practices and leave their victims uncompensated. Id. at 753-4. Lastly, OCR asserts that the purported misconduct must be related to the transaction in question. Since the transaction in question concerns the dealings between the school and Ms. Haney, Chaffey's complaints about OCR's actions in the subsequent investigation and hearing process are clearly not relevant concerns under the application of the doctrine of unclean hands.

The tribunal agrees with the view of the Ninth Circuit that equitable relief should be withheld if its exercise would frustrate a substantial public interest. Therefore, the unclean hands doctrine will not be applied in this matter.

III. ORDER

Based upon the foregoing findings of fact and conclusions of law, it is HEREBY ORDERED that Chaffey Community College District's continued eligibility, directly or indirectly, to receive or apply for Federal financial assistance administered by the United States Department of Education which supports the Chaffey Community College District's discriminatory program, shall be terminated. Such termination shall remain in force until the Chaffey Community College

District satisfies the Assistant Secretary of Education for Civil Rights that it has appropriately remedied its noncompliance with respect to the violation determined above and until the Chaffey Community College District satisfies the Assistant Secretary of Education for Civil Rights that it will comply in the future with all applicable requirements of Section 504 and the regulations thereunder.

_____

Allan C. Lewis
Chief Administrative Law Judge

Issued: August 21, 1997

Washington, D.C.

Appendix

In addition to the factual findings in the opinion, the following supplemental findings are made:

1. The individuals below occupied the following positions:

Mr. Arias -- member of the English Department at Chaffey
Ms. Silliman -- departmental chair of the English Department at Chaffey.
Mr. Menzel -- vice-president of Personnel Department since his employment at Chaffey in 1986
Ms. Stark -- academic dean over the English Department at Chaffey
Ms. Reeves -- secretary and division assistant in the English Department at Chaffey
Mr. Chaney -- departmental chair of the Management Department at Cal State

2. Ms. Haney has been employed by Chaffey in the English Department since 1972.

3. As the chairperson for the English Department, Ms. Silliman had the responsibility to determine the courses to be offered, the time slots for the courses, and the professors to teach the courses. These responsibilities were delegated to the chairperson of each department pursuant to the faculty handbook. For the spring quarter of 1988, she prepared an overall schedule of courses in the latter part of December 1987 and presented each professor or instructor with his or her proposed schedule during a conference in January 1988.

4. In early January 1988, Ms. Silliman met with Ms. Haney to discuss her proposed schedule. As devised by Ms. Silliman, Ms. Haney's schedule had courses over a four-day period with two-hour breaks between classes rather than back-to-back classes, which Ms. Haney preferred. By scheduling her office hours during the two hour breaks, Ms. Silliman felt that Ms. Haney was less likely to leave the campus and, therefore, would be available for student conferences and appointments. In the past when Ms. Haney had back-to-back classes, students had complained that she was not present during her office hours and that she failed to keep appointments.

During the conference, Ms. Haney objected to the proposed schedule and requested, instead, a three-day teaching week with back-to-back classes. Ms. Haney proposed a schedule to which Ms. Silliman agreed. Under this schedule, Ms. Haney taught the following courses for the spring quarter of 1988 as part of her regular teaching duties:

English 90 Mon-Th 10:00 to 11:50 AM
English 91 Mon 12:00 to 1:50 PM; Th 1:00 to 2:50 PM
English 101 Wed 8:00 to 11:50 AM

Ms. Haney was also scheduled to maintain office hours for students on Tuesday from 8:00 to 9:00 AM, Wednesday from 7:30 to 8:00 AM, and Thursday from 12:00 to 1:00 PM and 3:00 to 6:00 PM.

5. In addition to her regular schedule, Ms. Haney elected to teach an additional course during the spring quarter for which she received additional compensation. This overload course was an English 90 class scheduled to meet on Thursdays from 6:00 to 9:50 PM.

6. During the spring of 1988, Ms Haney also taught a course at Cypress College on Mon/Wed from 7:00 to 10:00 PM.

7. Full-time tenured faculty at Chaffey are free to teach at other colleges and universities provided the teaching assignments do not conflict with their Chaffey teaching assignments.

8. On or about March 16, 1988, Mr. Arias, another professor in the English department, approached Ms. Haney with an offer to switch English classes. Mr. Arias was scheduled to teach an early morning English 91 class on Tuesdays and Thursdays from 8:00 to 9:50 AM -- a time period which he disliked. Mr. Arias proposed that Ms. Haney teach his English 91 course and in exchange, he would teach one of Ms. Haney's classes. Ms. Haney declined the proposal.

9. On March 24, 1988, Ms. Silliman was advised by the department's secretary, who in turn had a conversation with Ms. Haney, that Ms. Haney objected to her classroom assignment in another building for her 10:00 AM Mon/Thur English 90 course. Ms. Silliman responded to Ms. Haney in a note that, inter alia, "[e]veryone else has walked in the past. Now it's your turn. It's the fair thing to do."

10. In response to Ms. Silliman's handwritten note of March 24, 1988, Ms. Haney wrote a memorandum to her departmental chair Ms. Silliman on March 24, 1988, in which she questioned the assignment of a classroom in the gym building for her English 90 class scheduled on Mondays and Thursdays from 10:00 to 11:50 am. Ms. Haney questioned the assignment on two grounds: her seniority and that the physical effect from walking up the hill to the Language Arts building on Mondays would affect her ability to teach her next class.

11. Mr. Chaney was the chair of the management department at Cal State University at San Bernardino. He was responsible for recruiting full and part-time faculty for the management department. Shortly before the beginning of the spring 1988 quarter, an unexpected opening became available to teach Management 330 (Legal Environment of Business), a business course

which required an instructor with a law degree. This course was scheduled for Tuesdays and Thursdays from 10:00 to 11:50 AM.

Mr. Chaney spoke with other members of the faculty regarding recommendations for possible candidates. Mr. Patterson, one of his associates in the department, recommended a friend, Ms. Haney. Thereafter, Mr. Patterson called Ms. Haney and arranged an interview over lunch for Thursday, March 24, 1988, to be attended by Ms. Haney, Mr. Chaney, and himself.

The primary purpose of the March 24, 1988 lunch was to interview Ms. Haney for the opening in the spring quarter. During the interview, Mr. Chaney inquired several times whether Ms. Haney had any scheduling conflicts at Chaffey with the Cal State Management 330 course and Ms. Haney consistently indicated that she had no conflict. During the course of the meeting, Mr. Chaney made the best offer of employment that was possible to Ms. Haney, that is, though he was not authorized to make a formal offer, it was almost certain that Ms. Haney would be hired when the authorization was obtained.

A formal offer was made to Ms. Haney within a day or two and Ms. Haney orally accepted the position. On Tuesday, March 29, 1988, Ms. Haney completed the application form for employment at Cal State and signed the contract of employment on April 4, 1988.

In her application for the Cal State position, Ms. Haney indicated that her principal teaching fields included business law, evidence, torts, contracts, criminal, corporations, agency and partnership law. She did not disclose any condition or physical impairment which would impair her performance as an instructor.

12. On April 1, 1988, Ms. Haney wrote a memorandum to Ms. Silliman to request approval of a change in courses between Mr. Arias and Ms. Haney. Ms. Haney indicated that Mr. Arias had agreed to exchange his English 91 course which met on Tues/Thurs at 8:00 to 9:50 AM with Ms. Haney's English 90 course which met on Mon/Thurs at 10:00 to 11:50 AM. In support of her request, Ms. Haney cited the two factors advanced in her March 24 memorandum, i.e. seniority and physical exhaustion. She also added that this change would benefit her students because it means that she will not only have classes five day a week at Chaffey but will also be available to meet with her students five days a week with or without appointments.

13. On April 4, 1988, Ms. Silliman wrote to Ms. Haney and denied her April 1 request for a change in schedule on the grounds that the request did not put the students' needs first, i.e. students may select certain courses based upon preferences for certain teachers, and that the request was made too late.

14. By memorandum dated April 11, 1988, Ms. Silliman informed Ms. Haney as follows:

> This is to inform you that by your persistence in teaching Arnold Arias' 8-10 a.m. Tuesday/Friday class and his continued teaching of her 10 a.m. Monday/Thursday class in spite of written notification furnished both of you on April 4th to cease and desist from such unauthorized exchange, you are knowingly and wilfully refusing to perform a

> regular assignment without reasonable cause, as prescribed by reasonable rules and regulations of the employing district . . . .
>
> Therefore, unless you adhere to your original assignment, as printed in the Spring Schedule of classes, further administrative action will be pursued.

15. On April 11, 1988, Ms. Haney wrote Ms. Reeves a memorandum--

> As of last Thursday, I decided to no longer send copies of the memos to you. . . Now the issue has come full circle--either I will or will not be given approval to teach [Arias'] Tuesday/Thursday class.

16. On April 12, 1988, Ms. Haney and Ms. Silliman had a meeting. According to Ms. Silliman, Ms. Haney sought approval of the proposed exchange of classes with Mr. Arias because of a medical condition, diagnosed on April 6, which renders her incapable of teaching back-to-back classes and of even driving, much less walking, from the Language Arts Building to the gymnasium without "being exhausted."

Ms. Haney refused to disclose any details regarding the medical condition and, consequently, in order to give her the benefit of the doubt, Ms. Silliman proposed that she deliver a physician's statement to the vice-president of personnel, Mr. Menzel, and a schedule change between Mr. Arias and Ms. Haney would be authorized.

Ms. Haney was informed to obtain the physician's statement by April 21 and, otherwise, to go back to her original schedule or further administrative action would be taken for wilful disregard of her teaching schedule.

This memorandum was copied to Mr. Menzel and Mr. Arias.

17. In Ms. Haney's view, her initial request for an exchange of classes with Mr. Arias was a contractual matter. When Ms. Silliman requested a physician's note on April 12, the dispute changed from a contractual matter to a medical issue. Therefore, she was relieved of any obligation to find somebody to exchange classes. A medical excuse would, in her view, relieve her of any obligation to teach the English 90 class or any substitute class.

18. Mr. Arias returned to his scheduled 8:00 AM English 91 course during the latter part of the second or the beginning of the third week of the spring quarter. During the period in which Ms. Haney taught Mr. Arias' English 91 course, she frequently left the Tuesday 8:00 to 9:50 AM class early in order to drive to Cal State to teach her 10:00 AM class in Management 330.

19. On a certification of disability and/or return to work or school form dated April 15, 1988, Dr. Ambrose of Kaiser Permanente wrote in the category regarding temporary activity restrictions regarding Ms. Haney--

> Pt [patient] is advise to avoid exertion until cardiac work up is completed which will be about 2-3 mos.See footnote 19 19/

20. On April 15, 1988, Ms. Haney delivered her physician's statement to Mr. Menzel, who was not aware that it coming. Thereafter, Ms. Haney immediately left and, thus, Mr. Menzel had no opportunity to discuss the content of the statement with her.

21. By memorandum dated April 15, 1988, Ms. Haney wrote Ms. Silliman as follows:

> Per my personal physician's informed medical advice, I may not teach the class located in the gymnasium and return to teach a class located in Language Arts. As a result, I will need a substitute for that class.

This memorandum was copied to Ms. Stark and Mr. Menzel. It was delivered personally by Ms. Haney to Ms. Silliman on April 15. At that time, Ms. Haney did not amplify upon the nature of her condition and did not provide Ms. Silliman with a copy of the doctor's certificate of disability.

22. On Monday, April 18, 1988, a substitute instructor began teaching Ms. Haney's Mon/Thur English 90 class on a day-to-day basis. Ultimately, the instructor taught the course through the first class of the first week in June.

23. After receiving Ms. Haney's physician's statement on April 15, 1988, Mr. Menzel made inquiries of Ms. Stark and Ms. Silliman in order to become apprised of the situation. Ms. Silliman informed him of the circumstances -- that Ms. Haney had initially raised the issue that she did not want to teach in the gymnasium building, that Ms. Haney had switched courses without her approval, and that Ms. Haney had an active schedule. She was teaching an overload class at Chaffey and at one or two other schools and doing some professional consulting work. In addition, Ms. Silliman indicated that she had heard from a student and part-time instructor that Ms. Haney was teaching at Cal State on Tuesdays and Thursdays.

24. On April 21, 1988, Ms. Haney wrote Ms. Reeves, the division assistant in the English Department, as follows:

> I thought I would clarify why I have not returned the absence forms (as I customarily do, promptly) Rachel Silliman instructed you to place in my box. I question their validity for several reasons. For example, as you know, in the past when I or others have had an overload and did not teach a regularly scheduled class, the overload/load was adjusted. The evening class then became a part of the regular load, and the District, as a result, saved money.
>
> I am now in the process of going through a grievance procedure, and this is one of the issues I am addressing. Whether I sign them or not depends on the outcome of the proceeding. I hope that this will not and/or does not cause you any problems.

25. On Friday, April 22, 1988, Mr. Menzel met with Ms. Haney to discuss the physician's statement. The initial conversation addressed the nature and extent of Ms. Haney's current professional activities. Ms. Haney indicated that she was assigned three courses as part of her

regular teaching activities and was teaching one overload class at Chaffey; was teaching a night course at Cypress; and was performing outside consulting. Ms. Haney did not disclose her teaching commitment at Cal State at 10:00 AM on Tuesdays and Thursdays.

Ms. Haney indicated that it was extremely difficult for her on Mondays to walk or drive from her English 90 class located in the gym building to her English 91 class located uphill in the Language Arts building. She related that, in the opinion of her physician, it was not in her best interest to teach these back-to-back classes as scheduled.

Ms. Haney indicated that her physician was not aware of the nature and extent of her professional activities outside her regular teaching duties at Chaffey. She agreed that her physician should be so informed in order to permit him to make an informed assessment. Based upon these circumstances, Mr. Menzel advised that the medical statement would not support her continued failure to meet her spring quarter teaching assignment at Chaffey. In addition, Mr. Menzel indicated that he expected Ms. Haney to return and teach her assigned English 90 course.

26. At some point after the meeting, Ms. Haney recalled that she had informed one of the cardiologists of her teaching and other activities; however, she saw no need to inform Mr. Menzel of this fact or to apprise Dr. Ambrose of the extent of her various activities and obtain another doctor's statement.

27. After the April 22, 1988 meeting, Mr. Menzel advised Ms. Stark that Ms. Haney's medical statement was not acceptable. In addition, Mr. Menzel was suspicious of Ms. Haney's statement that she was incapable of driving between classes in light of her extensive schedule. As a result, Mr. Menzel inquired of Cal State as to whether Ms. Haney was teaching there. By April 28, 1988, Mr. Menzel had received confirmation of Ms. Haney's employment and the class hours of her course.

28. On April 25, 1988, Ms. Silliman wrote Ms. Haney a memorandum which provided that--

> [t]he Personnel Office has neither formally or informally authorized you to relinquish your English 90 class (10 a.m., MTH). Therefore, per section 6.1.2 of the Faculty Handbook, you are required to turn in an absence report for a half day for every 10 a.m. MTH class that is taught by a substitute teacher instead of by you.
>
> The English 90 class is still part of your Spring Quarter assignment. Therefore, you have indeed been absent from this class and your absence must be documented by the absence reports.

29. Even though Ms. Haney received a memorandum from Ms. Silliman dated April 25, 1988, indicating that the personnel office had not authorized her, informally or formally, to relinquish her English 90 course, she continued not to instruct this course. Her explanation, at the hearing, was that she had filed a grievance requesting that her overload course be treated as part of her regular schedule. The grievance process was apparently resolved against Ms. Haney sometime before May 12, 1988, because, on that date, she sought information regarding the proper amount

of sick leave to claim for her absences on Mondays and Thursdays and sought to correct the amount claimed on past sick leave forms.

30. In May 1988, Mr. Menzel was informed by Ms. Silliman that Ms. Haney was not instructing her English 90 course.

31. Mr. Menzel then arranged for a meeting on Tuesday, May 31, 1988, with Ms. Haney and attended by Ms. Silliman and Ms. Vaszil, the secretary of Mr. Menzel.

Mr. Menzel advised Ms. Haney that he had been just informed that she was not teaching the 10:00 AM Thursday class of her English 90 course as well as the 10:00 AM Monday class. This failure to teach the English 90 course had required Chaffey to hire a substitute instructor.

Mr. Menzel inquired several times why Ms. Haney had not taught these classes on Mondays and Thursdays. Ms. Haney responded, in effect, that her failure to teach the Monday class was due to medical reasons. As to her failure to teach the Thursday class, Ms. Haney attributed this to medical reasons. As another explanation, she also indicated that she made a decision, not previously disclosed to the administration, that it was unfair and confusing to the students to have two instructors, a substitute instructor on Monday and Ms. Haney on Thursday. Therefore, she let the substitute instructor teach the entire course.

Ms. Haney was informed by Mr. Menzel that her failure to teach this course constituted a willful refusal to perform approximately one-third of her regular spring quarter teaching assignment without reasonable cause. Ms. Haney was again directed to return to the classroom and teach the next scheduled class on Thursday, June 2, 1988, and to complete this teaching assignment. Ms. Haney agreed to return to the teaching assignment.

32. At the May 31, 1988 meeting with Mr. Menzel, Ms. Haney did not disclose her teaching conflict. In her words, it wasn't an issue. In Ms. Haney's mind, Mr. Menzel's directive to return to teach her English 90 course was an effort to exercise his authority to make her teach despite her doctor's statement.

33. Throughout the spring quarter and until the June 17, 1988 meeting with Mr. Menzel, Ms. Haney never informed or admitted to the Chaffey administration, including Mr. Menzel, that she had a teaching conflict at Chaffey due to the Cal State management course.

34. On June 2, 1988, Mr. Menzel had a copy of his memorandum dated June 2, 1988, delivered to Ms. Haney. The memorandum outlined his understanding of the two meetings held with Ms. Haney on April 22, 1988, and May 31, 1988. It indicated, also, that it would be placed in Ms. Haney's personnel file in twenty days and that Ms. Haney had the right to respond thereto.

35. While Ms. Haney taught her English 90 course during the last two weeks of the quarter, the actual class time ranged between 30 minutes and 90 minutes. On these occasions, Ms. Haney testified that she could not locate a parking space at the gymnasium and parked illegally.

36. Mr. Patterson taught Ms. Haney's last several classes at Cal State.

37. On Friday, June 17, 1988, a meeting was held by Mr. Menzel with Ms. Haney. Ms. Vaszil was present to take notes. The purpose of the meeting was to present Ms. Haney with a statement of charges relating to a proposed suspension and termination of employment which Mr. Menzel did. In addition, Ms. Haney was given a packet of information which contained the backup information on which the charges were based. After the charges were presented, a brief discussion ensued and the meeting was adjourned.

38. The Statement of Charges against Ms. Haney were signed by the President of Chaffey on June 17, 1988.

39. On June 18, 1988, Mr. Menzel briefed the Governing Board in closed session regarding the proposed action to suspend and terminate Ms. Haney. Prior to the meeting, each Board member was presented with a packet of information which included the statement of charges prepared by legal counsel, a draft letter by President Young to Ms. Haney, and approximately 60 memorandums and reports authored by Ms. Haney, Ms. Silliman, and others regarding the events of the spring of 1988. Mr. Menzel outlined briefly the nature of the accusations and the termination process, if the resolution was passed. After a 30 minute discussion, the Board voted unanimously to suspend Ms. Haney and proceed with a termination action. On June 18, 1988, Ms. Haney was suspended effective June 20, 1988, and informed that the Board intended to dismiss her in 30 days based upon the statement of charges

40. The statement of charges by the President of Chaffey provided seven specific acts or omissions which warranted suspension and termination--

1. Ms. Haney's failure to teach the English 90 class on Mon/Thur from April 4 to June 17, 1988, without justification and without authorization.
2. This failure to teach required the college to hire and pay for a substitute instructor .
3. Ms. Haney failed to teach her English 90 class after she was specifically directed to teach this class on May 31, 1988, by Mr. Menzel, the Executive Director.
4. On April 4, 1988, Ms. Haney falsely represented to the administration -- Ms. Silliman, her division chair -- that she could not teach the English 90 course due to medical reasons when, in fact, Ms. Haney failed to teach this course because of a teaching obligation with Cal State.
5-7. On three other occasions, Ms. Haney falsely represented to the administration (Ms. Silliman on April 15, 1988, and Mr. Menzel on April 22 and May 31, 1988) that she could not teach the English 90 course due to medical reasons.

These actions or omissions reflect prohibitive immoral conduct, dishonesty, evident unfitness for service, willful refusal to perform regular assignment without reasonable cause and persistent refusal to obey the school laws of the State of California.

41. On June 18, 1988, Chaffey notified Ms. Haney that she was suspended as of June 20, 1988, and that the Governing Board intended to dismiss her in 30 days based upon the Statement of Charges. Thereafter, Ms. Haney filed, as permitted by California law, a request for an administrative hearing regarding Chaffey's action to suspend and terminate her employment.

42. Within the 30 day period, Ms. Haney filed a request for a hearing to contest Chaffey's action to suspend and terminate her employment.

43. On October 28, 1988, Chaffey and Ms. Haney entered into an agreement which resolved the suspension and termination action by Chaffey through a settlement. The agreement provided, in pertinent part, that Ms. Haney shall be reinstated on January 3, 1989, with no break in service by virtue of her June 1988 suspension and that she receive the sum of $4,000 unless she obtained employment elsewhere which, in that case, she would receive $15,000. Ms. Haney released any claims she may have at this time against the school including any claims relating to her employment and under state or federal civil rights laws. The parties agreed that neither party admitted to the truth or merit of the position asserted by the other party or the falsity or lack of merit of the position asserted by it. The parties further agreed that the statement of charges, notice of suspension and all documents relevant to the proceedings would be sealed by Chaffey and not released to any party except upon receipt of a subpoena.

44. Between 1984 and 1995, the Governing Board authorized termination actions against employees only three times.

45. On January 3, 1989, Ms. Haney returned to her position of English instructor for Chaffey.

46. On February 1, 1989, Ms. Haney submitted a request for a sabbatical leave for the fall of 1989. Subsequently, her division chairperson recommended the request be granted; the Personnel Office Administrator certified that Ms. Haney had served the required number of years, and the faculty senate approved the objectives of her request.

47. On April 27, 1989, the executive vice-president and the president of Chaffey Community College signed a District Governing Board Agenda item which recommended that the Chaffey Community College District Governing Board approve Ms. Haney's request for a sabbatical leave for the academic year 1989-90.

48. The estimated fiscal effect of Ms. Haney's proposed sabbatical leave for the 1989-90 school year was a net savings of $1,000; that is, $1,000 is the difference between the cost of a replacement teacher and Chaffey's payment of 70% of her salary and benefits to Ms. Haney during the sabbatical leave.

49. Ms. Haney's 1989 request for a sabbatical leave was presented to the Governing Board and considered at its April 27, 1989 meeting. The Governing Board denied Ms. Haney's request for a sabbatical leave. At the same meeting, the Governing Board approved the requests for sabbatical leave for five other individuals.

50. Between the 1984-85 school year and the 1995-96 school year, Chaffey's Governing Board approved the approximately 50 requests for sabbatical leave made by faculty members. All requests other than Ms. Haney's requests were approved. None of these applicants had been the subject of a disciplinary proceeding.

51. The Governing Board meets monthly. Approximately one week prior to a meeting, the

members are provided with reports and packages of materials regarding matters for consideration at the forthcoming meeting. The meetings are short and cover many topics.

52. The Governing Board posses the sole discretionary authority to authorize sabbatical leaves. It considers sabbatical leave requests for the following school year in March or April of the current year. Before the sabbatical leave request is presented to the Board, a member of the faculty must prepare a sabbatical leave request which outlines the need for the sabbatical and the objectives of the sabbatical. The requested leave must be recommended by the chairperson of the applicant's division In addition, the Personnel Office Administrator must certify that the individual has served the required number of years and is otherwise eligible and the Faculty Senate must certify, by a majority vote, that the objectives of the requested sabbatical leave request will enhance the professional development of the applicant and the educational program of the school.

Materials compiled for review regarding sabbatical leave requests were provided to the Board approximately one week prior to the board meeting. The record does not reflect the nature of materials provided to the Board in this case. During this period in issue, there were no specific guidelines employed by the Board to determine whether a sabbatical request should be granted. Though there was some discussion in closed session regarding the merits of each applicant by the Board before a vote was taken on a motion to grant a sabbatical leave request, each Board member used his or her standards in evaluating the request and, ultimately, voting upon the merits of an applicant's request.

53. During the 1989-90 and 1990-91 school years, the Governing Board included Mr. Barton, Mr. Treadway, Ms. Scully, Mr. Edmonson, and Dr. Bascoby.

54. Mr. Barton became a trustee during 1984 and had served as a trustee continuously through the hearing held in March 1996. He held the position of the president of the Board during the years in issue.

Mr. Barton testified as follows. The Board was in a state of shock that Ms. Haney submitted a sabbatical request some four weeks after she returned to work and so soon after the conclusion of her disciplinary proceeding.

In his view, a sabbatical was a reward, not an entitlement, for an instructor. There were two criteria for consideration -- whether it was right for the school and whether it was right for the students. Whether a sabbatical would benefit the teacher individually was not a consideration. In his view, Ms. Haney was not deserving of a sabbatical. The recent termination and suspension proceeding resulted, in effect, in a suspension of Ms. Haney for one quarter without pay. Ms. Haney had a history of pursing complaints against the College which, in turn, had required the school to expend considerable sums to defend itself. In his judgment, he had considerable doubt whether Ms. Haney would fulfill her commitments set forth in her sabbatical request and whether she would return to the school after her sabbatical leave -- all requirements of a sabbatical leave.

In addition, Mr. Barton testified that, at the time of the Board discussion of Ms. Haney's first request, he was aware of the disciplinary charges only in a general sense and had only a vague recollection of some medical problem that Ms. Haney had. Other members of the Board were apparently of the view that Ms. Haney was not an outstanding teacher and, therefore, not deserving of a sabbatical.

55. Mr. Treadway has been a member of the Governing Board since 1984. Mr. Treadway was interviewed by OCR in April 1990 and testified at the hearing. In reviewing sabbatical requests for Board approval, he considers, generally, the subject matter of the sabbatical study, whether it is relevant to the applicant's classes and the extent to which it will benefit the students and the school. In his view, there was questionable behavior on Ms. Haney's part when she used sick leave at Chaffey to avoid her teaching her English 90 course. As a result, Ms. Haney collected her salary at Chaffey and caused Chaffey to incur the expense of a substitute instructor while Ms. Haney also taught and was paid for teaching a class at Cal State during the time slot for her English 90 class. In his opinion, this circumstance cast considerable doubt upon whether Ms. Haney would fulfill the commitments in her sabbatical request.

56. Ms. Scully was a member of the Board for eight years when she was interviewed by OCR in March 1990. In her view, the Board examines each sabbatical request to determine whether the leave will benefit the school or its students. She voted against a sabbatical leave for Ms. Haney due to her disciplinary record; however, she could not recall the details of Ms. Haney's disciplinary record during the interview.See footnote 20 20/

57. Mr. Edmonson had been a member of the Board since 1981. He was interviewed by OCR in March 1990 and indicated that he voted against the sabbatical request by Ms. Haney because she was not ethically qualified. In his view, Ms. Haney's actions regarding the Cal State matter involved misconduct and dishonestly on her part.

58. For several years prior to 1988, the Governing Board had voiced concern regarding the sabbatical leave policy, including the need for better criteria, better cost data, better evaluation process of applicants, and whether sabbaticals should be given at all. The Board held the view, generally, that the approval of Ms. Haney's request for a sabbatical leave would communicate the wrong message to the faculty, that is, sabbaticals are not meritorious awards and are available to members who have been disciplinary problems.

59. The policy of the Governing Board is to announce publicly only those requests for sabbatical leave which are granted. Moreover, it is also the practice of the Governing Board of Chaffey not to disclose discussions relating to matters deliberated in closed session. In conformance with this practice, the Board did not inform Ms. Haney of its basis for not granting her request for a sabbatical leave made during the 1989-90 school year.

60. In response to a request by California's Department of Fair Employment and Housing. legal counsel to Chaffey wrote on September 13, 1989, that--

> [t]he reason the board decided not to grant Gloria Haney's request for sabbatical leave related to a disciplinary action against her which resulted in her suspension without pay

> for approximately one quarter. This occurred during the period from June, 1988 through December, 1988. Under these circumstances, the governing board, in exercising its discretion under the collective bargaining agreement, determined that the best course of action was to not grant the sabbatical leave request. This decision not to grant Ms. Haney's request had absolutely nothing to do with her race or any complaints she may have previously filed against the District.

61. Legal counsel indicated on September 20, 1989, that the basis for the denial of Ms. Haney's sabbatical request by the Board was that "Dr. Haney agreed to a quarter suspension without pay, essentially admitting guilt regarding her immoral conduct - she lied. The Board did not have to or want to reward her for this behavior."

62. In February 1990, Ms. Haney submitted another request for a sabbatical leave. Subsequently, her division chairperson recommended the request be granted; the Personnel Office Administrator certified that Ms. Haney had served the required number of years, and the faculty senate approved the objectives of her request.

63. The estimated fiscal effect of Ms. Haney's proposed sabbatical leave for the 1990-91 school year was a net savings of $300; that is, $300 is the difference between the cost of a replacement teacher and Chaffey's payment of 70% of her salary and benefits to Ms. Haney during the sabbatical leave.

64. On March 22, 1990, the Governing Board tabled the consideration of Ms. Haney's request for a sabbatical leave. The Board's action was grounded upon its belief that any action on Ms. Haney's second sabbatical request, whether to grant or deny, was not appropriate until the resolution of Ms. Haney's discrimination complaint against Chaffey regarding the denial of her first request for a sabbatical leave in the preceding year.

65. On May 6, 1990, Ms. Haney wrote Ms. Fernandez--

> During our April meeting, you asked me to wait until the next Board meeting to see if, in fact, my sabbatical would, subsequently, be approved. During the next Board meeting in May/1990 [sic], my sabbatical was not approved.
>
> As a result, I am, once again, requesting that a grievance is [sic] filed against the District and that I have access to a CTA attorney so that this matter can be resolved.

66. The Governing Board of Chaffey approved approximately 50 faculty requests for sabbatical leave over the nine year period from academic year 1984-85 through the academic year 1995-96. Other than the two requests by Ms. Haney, the Governing Board approved the applications. Other than Ms. Haney, the requests were submitted by faculty members who had not been the subject of a disciplinary matter.

67. In March 1979, Ms. Haney was approximately four months pregnant and suffered abdominal pains while walking on the hill at Chaffey. She was taken to the hospital and had suffered a miscarriage. She blames the hill for the miscarriage.

68. On March 22, 1988, Ms. Haney called the urgent care nurse at her medical care provider, Kaiser Permanente, and notified the nurse that she was experiencing sharp like electrical shocks in her left chest area every three seconds or so. She also reported shortness of breath, light headedness, fatigue and palpitations. The nurse instructed her on the urgency of being seen for an evaluation but Ms. Haney indicated she could not go to the emergency room at the present time and would go as soon as possible. Subsequently, Ms. Haney did not go to the emergency room.

69. On April 6, 1988, Ms. Haney experienced severe chest pains while walking on the hill at Chaffey. Thereafter, she drove herself home. While at home, she began to vomit and, thereafter, she call the emergency room at Kaiser Permante and was told to come in for an examination.

Ms. Haney presented herself in the emergency department in the late afternoon and complained of acute chest pain (anxiety) which had recurred over the years. She described the pain as radiating into her left armpit and hurts when she takes a deepen breath. She complained of shortness of breath, diaphoresis, and edema of the extremities to the nursing assistant. Upon examination by the doctor, Ms. Haney indicated that she suffered a worse episode today which lasted approximately 3 minutes. She was given an echocardiogram. The doctor's impression was possible chest wall syndrome or esophageal reflex anxiety. Subsequently, she was discharged to go home. There was no mention in the reports and notes by the medical providers that physical restrictions were placed on Ms. Haney.

70. On April 15, 1988, Ms. Haney returned to Kaiser Permanente and sought a physician's statement. During her conference with Dr. Ambrose, the attending physician, Ms. Haney became quite emotional and Dr. Ambrose, after a discussion with her, indicated that Ms. Haney's physical problem was more likely due to a psychological problem rather than a physical condition. Dr. Ambrose recommended that Ms. Haney see a counselor. Dr. Ambrose's notes of the conference are as follows:

> Complained of chest pain. Pt [patient] seen 4/6/88 . . . no recurrent chest discomfort. Pt seems distraught complaining apparently [of] having probl[em] with supervisor at the university she works at. She is being scheduled for . . . medical and cardiac work up. Wants slip saying that she should not exert (like from walking) until work up is done. Pt crying aloud in . . . . Heart and lungs ok. Group psycho-. . . . Rule out cardiac pathology. Excuse slip given

71. On April 29, 1988, Ms. Haney underwent an echocardiogram which was normal. This test result was not disclosed to Chaffey.

72. On June 23, 1988, a medical secretary of Kaiser Permanente issued a “To Whom It May Concern Letter” which reflected the medical attention provided Ms. Haney during 1988. Following the April 15 meeting with Dr. Ambrose, Ms. Haney had under gone only an echocardiogram. Ms. Haney was to be notified in the future of the date for a treadmill test.

73. On August 3, 1988, Ms. Haney was evaluated by Dr. Whittaker. Dr. Whittaker interviewed Ms. Haney regarding her problems, performed a regular physical examination, and reviewed the laboratory tests which consisted of an EKG of August 3 and a treadmill stress test of August 2.

Dr. Whittaker's impressions were that the chest pain in the form of electric shock was noncardiac and that epigastric and subcostal pain was possibly due to mitral valve prolapse and the palpitations were easily controlled on a low dosage of beta blocker. Dr. Whittaker's plan was to provide Ms. Haney, who was anxious and intermittently crying during the examination, with reassurance; advise the application of moist heat to her chest and advil for the next week; and recommend that she return in one month. Ms. Haney was not prescribed therapy in the form of a beta blocker.

74. According to the medical literature on mitral valve prolapse, the palpitations associated therewith are frequently harmless and treatment is not needed. More serious arrhythmias may be treated with standard antiarrhythmic drugs.

75. On March 19, 1990, legal counsel of Chaffey wrote to OCR and confirmed that interviews of the board members will conducted by investigators representing OCR and California's FEHA beginning March 22, 1990.

76. OCR interviewed the members of Chaffey's Board and Chaffey employees as follows:

1. President Young on September 19, 1989
2. Mr. Menzel on September 18, 1989
3. Mr. Barton on April 5, 1990
4. Ms. Scully on March 22, 1990
5. Mr. Treadway on April 5, 1990
6. Mr. Edmonson on April 24, 1990

77. Ms. Haney filed the following complaints with state or federal agencies:

1. Suspension/termination matters -- on August 4, 1988, with the California Department of Fair Employment and Housing. Complaint also forwarded to OCR.
2. Denial of first sabbatical request -- on June 2, 1989 with OCR.
3. Denial of first sabbatical request -- on July 18, 1989 with California Department of Fair Employment & Housing.
4. Denial of second sabbatical request -- on December 13, 1990 with California Department of Fair Employment and Housing and EEOC.

78. On August 4, 1988, Ms. Haney filed a complaint against Chaffey based upon race discrimination with the California Department of Fair Employment and Housing. Ms. Haney alleged several instances of discrimination including the most instance in which she was suspended on June 17, 1988, because she provided the college with a “forged doctors note” and that “[o]ther non-Black instructors have never had their doctors notes questioned as mine was.”

Pursuant to the settlement agreement between Ms. Haney and Chaffey, Ms. Haney requested, on November 22, 1988, the Department of Fair Employment and Housing and the federal agency (EEOC or HUD) to cease any further proceeding with regard to her complaint in light of her October 28, 1988 settlement with Chaffey. Because OCR represents the interest of the United States, this settlement did not affect its investigation or enforcement of the law.

79. On August 17, 1988, OCR wrote Chaffey that an individual [Ms. Haney] had lodged a complaint on August 4, 1988 which alleges a pattern or practice of discrimination against minority staff in general and Black staff in particular which results in an adverse impact on the minority/Black students of the College.

OCR indicated that the complainant describes several instances of racial discrimination, one of which was the College's denial of due process to the complainant in personnel matters such as a matter relating to her class relocation, her performance evaluation, the requirement that she submit sick forms, and her supervisor's refusal to switch classes between her and a coworker because of her race and because she refused to join other College staff in attacking an employee who had filed charges of discrimination against the College.

OCR noted that it will investigate the complaint and will attempt to determine within 90 days of the initiation of the investigation whether or not the College has violated Titles VI or IX.

80. By form letter dated June 16, 1989, OCR informed Chaffey that it had received a complaint on June 2, 1989, alleging discrimination by the school in violation of Title VI and Section 504 of the Rehabilitation Act of 1973.

Ms. Haney filed a similar complaint of discrimination on July 18, 1989, with the California Department of Fair Employment & Housing. In her opinion, her request for sabbatical leave was denied in April 1989 due to her race and in retaliation for opposing unlawful racial discrimination. More particularly, Ms. Haney stated that the Board granted sabbatical leave for several non-Black teachers when she was denied in April and that she was relegated to teaching in the gym while other tenured professors with less seniority and part-time instructors were given priority over the location of their classes.

81. On December 10, 1990, OCR wrote Chaffey to inform it that OCR's preliminary assessment of the evidence indicates that the reason for the denial of the sabbatical requested by Dr. Gloria Haney was not, as she alleged, in retaliation for her filing a complaint with OCR. There is substantial evidence that the reason her request for a sabbatical was denied was directly related to attempts made in Spring 1988 by the administration to discipline, suspend or dismiss her. This is of concern to OCR because our files contain documents which strongly suggest that the adverse action taken against Dr. Haney in Spring 1988 was due, at least in part, to efforts on the part of Dr. Haney to obtain reasonable accommodation from her employer for a handicap.

82. OCR interviewed Ms. Haney during its investigation and notes were taken during the interview. These notes, however, were not made available to Chaffey, as best the tribunal can determine, and they were not proffered as an exhibit by OCR.

83. On July 13, 1994, counsel for OCR and Chaffey met to discuss voluntary resolution of this matter. On August 25, 1994, OCR informed Chaffey of its intent to recommend to the Assistant Secretary for Civil Rights that an enforcement proceeding against Chaffey be instituted.

84. On December 13, 1990, Ms. Haney filed another complaint with the California Department of Fair Employment and Housing and EEOC. Ms. Haney alleged that she was denied a sabbatical leave on April 2, 1990, and maintained that the denial was due to her race (Black) and in retaliation for filing a prior complaint with the Department of Fair Employment and Housing. Her belief was based on the fact that she was the only Black professor who applied for sabbatical leave and the only applicant denied. After filing two previous complaints with California's DFEH (August 4, 1988 and July 18, 1989), she adds that she continues to be denied a sabbatical.

85. Chaffey Community College District is an institution of public higher education organized and existing under the laws of California and is vested with responsibility for the general management and control of Chaffey Community College.

86. Chaffey received during Federal fiscal years 1988 through 1995 and receives or has applied for Federal financial assistance administered by the U.S. Department of Education, either directly from the U.S. Department of Education, or indirectly from the California State Department or California College Agency.

87. College District has submitted to the U.S. Department of Education, an Assurance of Compliance with Section 504 and the regulation thereunder.

88. Chaffey Community College District receives or has applied for Federal financial assistance administered by the U.S. Department of Education, either directly from the U.S. Department of Education, or indirectly from the California State Department of Education or the California Community Colleges Agency.See footnote 21 21/

Footnote: 11/ The initial decision includes findings of fact relevant to the disposition of this matter. There are supplemental findings of fact in the Appendix, infra. The findings of fact set forth by the parties in their briefs have been considered fully. Except to the extent that such findings have been expressly or impliedly affirmed in the supplemental findings of fact or the decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts or because they are immaterial to the decision in this case.

Footnote: 22/ The record is not clear whether the interview took place before or after Ms. Haney learned of the assignment of a classroom in the gym building for her English 90 course.

Footnote: 33/ In point of fact, Ms. Haney had a direct conflict. The Thursday management class at Cal State was scheduled to meet at the same time as Ms. Haney's Thursday English 90 class at Chaffey which was scheduled to meet in the gym building.

Footnote: 44/ Ms. Haney had, on occasion over the years, experienced mild chest pain of very short duration which radiated into her left arm and for which she had never sought any medical

treatment. The pain was more acute on April 6 and of longer duration -- approximately three minutes. Upon examination at the clinic, her doctors ruled out any significant heart problem, advised that further work up in the near future was appropriate, and discharged her.

Footnote: 5/ The term handicap is used throughout this opinion and was the statutory term of art during the period in issue. The statute was subsequently amended and the current term of art is an individual with a disability.

Section 504 of the Rehabilitation Act of 1973, as amended, provides that--

> *No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in . . . or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.*

29 U.S.C. § 794.

Footnote: 6/ In June 1989, Ms. Haney filed a claim with OCR alleging that Chaffey retaliated against her by denying her request for a sabbatical leave during the 1989-90 school year. The basis of Ms. Haney's claim was that Chaffey discriminated against her on the basis of race. After an investigation, OCR declined to pursue the racial discrimination claim; however, in the course of its investigation, OCR determined that the denial of the sabbatical request reflected an act of retaliation against Ms. Haney by virtue of her earlier pursuit of an accommodation for a physical disability.

Footnote: 7/ This approach was sanctioned by the Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Footnote: 8/ Under the exchange, Mr. Arias would teach Ms. Haney's English 90 course on Mon/Thur at 10:00 AM and Ms. Haney would teach Mr. Arias' English 91 course on Tues/Thur at 8:00 AM. This would leave Ms. Haney free to teach at Cal State on Thursdays at 10:00 AM.

Footnote: 9/ As she testified in a deposition, with a medical reason, "I no longer had to exchange classes with anyone." Chaffey Ex. 24 at 36.

Footnote: 10/ At the hearing, Ms. Haney testified that, on several occasions, she requested an exchange of classrooms for her English 90 course and that none of her actions were taken in order to eliminate the conflict on Thursdays when she was also scheduled to teach Management 330 at Cal State.

I find that Ms. Haney's testimony lacked candor and credibility. For example, Ms. Haney testified that she did not request a course exchange with Mr. Arias in order to teach at Cal State. The record reflects otherwise. She represented, falsely, to Mr. Chaney of Cal State that she had

no conflict with the Thursday 10:00 AM management class when, in fact, she had a conflict with her English 90 course. After this representation, she immediately approached Mr. Arias to arrange a course exchange at Chaffey which would eliminate her conflict. Hence, it is evident that the Arias course exchange was engineered by her in order to teach at Cal State.

Ms. Haney also testified that the purpose of the April 15 physician's statement and her April 15 request for a substitute instructor for her English 90 course was to obtain an accommodation in the form of a classroom exchange. At this point, Ms. Haney had been teaching almost two weeks at Cal State and was teaching Mr. Arias' course at Chaffey. On deposition , Ms. Haney testified that, once she produced the physician's statement , she was no longer obligated to teach the English 90 course. Hence, the physician's statement was not related to a request for a different classroom. Moreover, Ms. Haney's request for a substitute instructor does not constitute a request for a different classroom. Unlike a request for a different classroom, the request for a substitute instructor infers that the assigned instructor will no longer teach the course . Such a request is, however, fully consistent with Ms. Haney's intent to continue to teach at Cal State on Thursdays.

Lastly, Ms. Haney testified that, during the April 22 meeting with Mr. Menzel, she informed him that she wanted to teach the English 90 course, but in a different classroom. There is nothing in the record that suggests this was true and every action by Ms. Haney, as noted above, is entirely inconsistent with such a statement.

Footnote: 1111/ While OCR proffers arguments under subsections (ii) and (iii), these arguments do not merit serious discussion. Ms. Haney's prior medical history does not even remotely establish a record of the physical impairment as required by subsection (ii). As for subsection (iii), Chaffey did not regard Ms. Haney as having a physical impairment. In fact, Chaffey was unwilling to accept her physician's statement -- a statement which failed to even indicate the nature of her condition. Further, any suggestion by Mr. Menzel, the vice-president of personnel, that Ms. Haney drive, on Mondays, from the gymnasium building to the Language Arts building for her next class, does not alter the situation. The Seventh Circuit held, in Burne v. Board of Educ., 979 F.2d 560, 566 (1992), that an employer's decision to attempt to accommodate an employee who defines herself as impaired is not sufficient to support a finding that the employer regards the employee as handicapped.

Footnote: 1212/ OCR clearly exaggerates Ms. Haney's condition as "life-threatening." The limited medical evidence and appropriate inferences therefrom indicate otherwise. The treating physician ruled out, obviously, various diagnoses such as a heart attack, during her examination at the emergency room in April since she was not kept overnight for observation or further testing. Moreover, the absence of an immediate scheduling of additional testing reflects a judgment by the physician that the problem was not particularly significant. It is also apparent that a diagnosis of anything akin to a "life-threatening" problem would have resulted in an immediate and persistent request by Ms. Haney for the required diagnostic testing and treatment.

Footnote: 1313/ See supplemental findings 71-73.

Footnote: 14 14/ Any accommodation, such as a change in classroom location or special parking privileges at the gymnasium and the Language Arts building, was not acceptable to Ms. Haney because such accommodations would not affect the assigned teaching hour and thereby not eliminate her conflict. This conclusion is apparent based upon Ms. Haney's action. Immediately after presenting Mr. Menzel with the physician's statement, Ms. Haney sought a substitute instructor for her English 90 course rather than some form of an accommodation which would enable her to teach the course.

Footnote: 15 15/ Dr. Ambrose was not called as a witness by either party and apparently could not be located. The matters described herein are taken from her treating notes.

Footnote: 16 16/ In light of this determination, it is not necessary to address the two remaining questions, i.e. whether Chaffey satisfied its burden of production to establish a legitimate nondiscriminatory reason for the Board's denial of Ms. Haney's request for a sabbatical leave and OCR's burden to then establish that Chaffey's nondiscriminatory reason is pretexual.

Footnote: 17 17/ EEOC v. Dresser Indus., 668 F.2d 1199 (11th Cir. 1982); EEOC v. Alioto Fish Co., 623 F.2d 86 (9th Cir. 1980); EEOC v. Liberty Loan Corp., 584 F.2d 853 (8th Cir. 1978); EEOC v. Peterson, Howell & Heather, Inc., 702 F. Supp. 1213 (D. Md. 1989); EEOC v. Star Tool & Die Works, 699 F. Supp. 120 (E.D. Mich. 1987); EEOC v. National City Bank, 694 F. Supp. 1287 (N.D. Ohio 1987), remanded 865 F.2d 1267 (6th Cir. 1988); EEOC v. CW Transp., 658 F. Supp. 1278 (W.D. Wis. 1987); EEOC v. Firestone Tire & Rubber Co., 626 F. Supp. 90 (M.D. Ga. 1985); EEOC v. Martin Processing, Inc., 533 F. Supp. 227 (W.D. Va. 1982); EEOC v. Bray Lumber Co., 478 F. Supp. 993 (M.D. Ga. 1979).

Footnote: 18 18/ The first element, the lack of diligence by OCR, is supported by the record. OCR estimated that three months was necessary for its investigation and determination. The actual investigative process took slightly less than two years and included at least seven months of apparent inactivity. More importantly, however, the findings were not issued until some three years after the investigative process was completed. After the settlement efforts were concluded, an additional eight months elapsed before OCR issued its Notice of Opportunity for Hearing. Thus, there was a cumulative total of more than four years of unexplained delay in this case.

Footnote: 19 19/ On November 1, 1988, Dr. Ambrose issued a "To Whom It May Concern Letter" which amended the disability certification of April 15, 1988, in that the term "exertion" was intended to include "the avoidance of climbing up and down hills."

Footnote: 20 20/ It should be noted that, under the terms of the settlement of the suspension/termination matter, the matters related thereto were to be sealed by Chaffey. Thus, there may be some question whether the Board properly considered these matters in its deliberation of Ms. Haney's request. This issue is not, however, within the jurisdiction of this tribunal.

Footnote: 21 21/ The record reflects the following disposition of the exhibits proposed by the parties:

Court Exs. 1- 6: received into evidence.

ED Exs. received into evidence: 1 - 52, 55 - 70, 72 - 82, 85, 87 - 90, 93 - 95, 97 - 102, 104, 105 -110.

ED Exs. excluded or withdrawn: 53 - 54, 71, 83 - 84, 86, 91 - 92, 96, 103

R (Chaffey) Exs. 1 - 30, 32, 34.
R (Chaffey) Exs. withdrawn or excluded: 31, 33.