STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B113

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA J. CARABELLO,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD OF AGRICULTURE,
COLORADO STATE UNIVERSITY,

Respondent.

Hearing commenced on April 1, 1997 and concluded on August 7, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Hollie R. Stevenson, Assistant Attorney General. Complainant appeared and was represented by Richard K. Blundell, Attorney at Law.

Complainant testified in her own behalf and called as an adverse witness Pam Zimdahl, Associate Director for Administrative Services, Colorado State University. Respondent's witnesses were Betty Holcomb, Lead Worker; Sharon Randazzo, Records Administrator; and William Liley, Director of Human Resources, Colorado State University.

Complainant's Exhibits A and B were admitted into evidence over objection. Exhibit C was admitted without objection. Respondent's Exhibits 1 through 6 were admitted by stipulation.

MATTER APPEALED

Complainant appeals an administrative termination under Rule R9-1-4 and alleges that she was discriminated against on the basis of disability. For the reasons set forth below, the action of the respondent is reversed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether complainant was discriminated against on the basis of disability;

3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

On August 5, 1997, two days before the hearing was to reconvene, complainant filed a motion to continue the hearing on grounds that witness Stephen Dunn would not be available to testify. Respondent filed a written objection. The motion was denied on August 6. At hearing on August 7, complainant renewed her motion to continue, stating that not only was witness Dunn not available, but also that she did not have the address or telephone number of another witness whom she might call to testify. Respondent again objected. The administrative law judge denied the renewed motion to continue, noting that complainant possessed knowledge of the hearing date for four months, witness Dunn had not been subpoenaed and consequently was not under a legal obligation to appear, and insufficient efforts had been made to attempt to contact the other potential witness.

On March 4, 1997, respondent filed a motion to limit the issues at hearing. Fifteen days later, on March 19, the motion was granted without a response having been filed by complainant, who was represented by counsel. Complainant moved to reconsider the order at hearing on August 7, and the motion was denied.

Complainant's motion to sequester the witnesses was granted, excepting complainant and respondent's advisory witness, Pam Zimdahl. The witnesses were instructed to not discuss the case with anyone except counsel.

FINDINGS OF FACT

1. Complainant Barbara Carabello, n/k/a Barbara Lopez, began employment with respondent Colorado State University (CSU) as a clerical assistant in the accounts receivable department on April 1, 1990. She subsequently transferred to the health insurance office and, in July 1995, transferred to the reception area in the student health center as an Administrative Assistant II.

2. Carabello's duties at the reception desk were to greet and direct students, retrieve records and answer the telephone. Her direct supervisor was Sharon Randazzo, although Betty Holcomb performed some supervisory-like functions.

3. Carabello used sick leave for her first day of work in the reception area and had frequent absences thereafter. She sometimes reported to work late or left early. She had medical appointments during the day, apparently consulting a psychiatrist. She would occasionally leave her work station for as long as twenty minutes to go to the restroom. She was known to have mood swings. Other employees complained about their jobs being made more difficult by Carabello's absences.

4. Randazzo and Holcomb were aware that Carabello was experiencing some problems in her personal life.

5. In September 1995, Randazzo and Holcomb met with Carabello to discuss her job performance in light of complaints from other employees. The meeting was called because Randazzo and Holcomb felt that Carabello was not performing her job satisfactorily. Carabello told them that she liked her job and wanted to keep it. She said she was fine and gave assurance that she was capable of performing the job.

6. On Saturday, October 21, 1995, Carabello was arrested for driving under the influence of alcohol (DUI).

7. On Monday, October 23, Carabello advised Holcomb by telephone that she had been arrested for DUI and would be in late. That day, Holcomb received a telephone call from Steven Broman, M.D., who said that Carabello was being put on medication and that it would be better if she did not come in for the rest of the day. Holcomb reported this information to Randazzo, who is Holcomb's immediate supervisor.

8. Also on October 23, Carabello's husband telephoned Randazzo and stated that Carabello might be hospitalized and gone from work for a month. Randazzo explained to him that a doctor's statement would be required if the absence extended for longer than four days. Randazzo engaged in several subsequent telephone conversations with the husband.

9. Pam Zimdahl, Associate Director for Administrative Services and the appointing authority in this matter, was advised by Sharon Randazzo that Carabello would be gone for at least a month. Zimdahl consulted Human Resources Director William Liley, who suggested that Zimdahl communicate with Carabello regarding her absences and the need for medical documentation of her illness or condition.

10. By letter dated October 27, 1995, Zimdahl advised Carabello that she was placed on leave without pay (LWOP) effective

October 17, 1995, because she, Zimdahl, had heard from Randazzo that Carabello would be absent from work for at least 30 days and Carabello's accrued annual leave and sick leave were exhausted. Zimdahl requested a written statement from a medical doctor explaining Carabello's illness. (Exhibit 3.)

11. Carabello was never hospitalized.

12. Receiving no response to her October 27 letter, Zimdahl again sought the advise of William Liley. Liley suggested that another letter be sent setting forth the consequences of a failure to respond.

13. By letter dated November 11, 1995, Zimdahl advised Carabello that she had been on unauthorized leave since October 17 and a physician's statement must be received by November 15 in order for Carabello to retain her current employment status. (Exhibit 4.)

14. Zimdahl wrote a third letter to Carabello on November 17 terminating her employment under R9-1-4 as having abandoned her position, effective November 15, 1997. (Exhibit 5.)

15. Carabello's last day at work was October 20, 1995.

16. Carabello does not recall receiving Zimdahl's letters. There was testimony that the latter two letters were sent by certified mail, which is not reflected on the letters, themselves. The return receipts were not offered into evidence.

17. The "Leave/Termination Action Data" form signed by Zimdahl and Randazzo reflects that Carabello was terminated, not that she resigned, and that her last day at work was October 20, 1995. (Exhibit 6.)

18. Carabello received a memo dated November 13, 1995 from the Human Resource Services Department indicating that she would be placed on LWOP. She filled out the forms requesting short-term disability leave (STD) but did not turn the forms in because she found out that there was a 30-day waiting period for STD leave to take effect and she intended to return to work within 30 days. (Exhibit A.)

19. Carabello then filled out the required form for participation in the Annual Leave Bank Program. She had been administratively terminated by the time the form was turned into the human resources office. (Exhibit B.)

20. By letter dated November 29, 1995, Dr. Broman responded to the October 27 letter that Zimdahl had written to Carabello. This response was received by Zimdahl in early December. Dr. Broman explained that Carabello had presented medical forms to his office in October and that he may have been remiss in returning them to Zimdahl. He enclosed the completed forms and apologized for the inconvenience. Dr. Broman diagnosed Carabello as suffering from emotional Distress and anxiety. (Exhibit C.)

DISCUSSION

In this appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of proving by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. *Renteria v. Department of Personnel,* 811 P.2d 797 Colo. 1991); *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. §24-50-103(6), C.R.S.

Complainant also bears the burden to prove that she was discriminated against on the basis of disability. Complainant originally raised the issue of whether she was discriminated against on the basis of national origin, but she withdrew that issue following her case-in-chief.

A. Discrimination

Complainant submits that she did all she could do to keep her job. She argues that respondent should have considered whether she was a disabled person due to her mental condition and whether the condition could have been reasonably accommodated. She alleges that she was discriminated against in violation of the Americans with Disabilities Act (ADA).

The ADA requires state and local governmental entities to make all programs, services and employment accessible to disabled persons. The ADA defines a person with a disability as: 1) a person with a physical or mental impairment that substantially limits a major life activity; 2) a person with a record of such physical or mental impairment; or 3) a person who is regarded as having such an impairment. 42 U.S.C. §12102(2). "Substantially limits" means that a person is unable to perform, or is significantly restricted in performing, a major life activity that an average person can perform. 29 C.F.R. 1630.3(j)(1).

The ADA prohibits discrimination against "qualified individuals with disabilities." Employees are qualified for protection if they: 1) satisfy the prerequisites of the position by possessing the appropriate education, employment experience, skills, licenses and the like; and 2) they can perform the essential functions of the position, with or without reasonable accommodation. 42 U.S.C. §12111(8); 29 C.F.R. 1630.2(m). The determination regarding the employee's qualifications should be based on the persons's capabilities at the time the employment decision is made. *See Chiari v. City of League City*, 920 F. 2d 311 (5th Cir. 1991).

Employers must provide reasonable accommodation to qualified individuals with a disability. 29 C.F.R. 1630.9. Reasonable accommodation is a "change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. 1630.2(o). Employers are obligated to make reasonable accommodation only to employees with known disabilities. *Id.* The disabled individual must inform the employer that an accommodation is necessary, unless such is obvious, and the employer may require documentation of the need for an accommodation. *Id.* Employers need not eliminate or reallocate essential job functions. *Id.* Employers need only provide an accommodation which enables the employee to perform the essential duties of the job, not necessarily the accommodation of the employee's choice. 29 C.F.R. 1630.9(d).

Complainant's initial burden is to establish a *prima facie* case of discrimination by showing by a preponderance of the evidence: 1) that she belongs to the protected class (person with a disability); 2) that she was otherwise qualified to perform the duties of the position; and 3) that an adverse action was taken against her because of the disability. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Once the complainant meets her initial burden, the respondent must rebut the presumption of discrimination by setting forth nondiscriminatory justifications for the allegedly discriminatory practice. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Then, complainant is afforded the opportunity to show by preponderant evidence that respondent's asserted business reason is a mere pretext for unlawful discrimination. *McDonnell Douglas, supra*. Ultimately, complainant must prove that respondent's action was the result of intentional discrimination. *St. Mary's Honor Center, et al. v. Hicks*, 509 U.S. 502 (1993).

In the present matter, complainant did not establish that she

is a person with a disability under the ADA. She failed to demonstrate a *prima facie* case of discrimination or that she is entitled to the protections of the ADA. She did not sufficiently establish that her alleged condition of depression rose to the level of an impairment substantially limiting a major life activity. The agency never regarded her as a disabled person. She was not perceived as a person with a disability. She did not establish a record of a mental disability. The act of consulting a psychiatrist is not, by itself, enough to qualify as ADA eligible.

Complainant does not allege that her condition of depression was permanent. She intended to return to work within 30 days.

There is a difference between "impairment" and "disability." Impairment is a medical term. Disability explains a legal conclusion. An impairment is not considered a disability unless it is severe enough to cause a substantial limitation on a major life activity, including caring for oneself, walking, seeing, hearing, speaking, breathing, learning and working. A person is substantially limited if she cannot perform, or is limited in her ability to perform, a major life activity. An employer's concern is whether the employee is substantially limited as to the major life activity of working. Except for her testimony that she was too depressed to leave her home during the subject period, complainant did not present any evidence that she had a disability. *See Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S.Ct. 1104 (1995). There also was no evidence that respondent intentionally discriminated against her. *St. Mary's Honor Center, supra*.

Even if a condition can be reasonably accommodated does not lead to the conclusion that an individual is entitled to prevail under the ADA. A physical or mental impairment is not necessarily a disability as contemplated by the ADA. *Dutcher v. Ingalls Shipbuilding*, 53 F.3rd 723 (5th Cir. 1995); *Patrick v. Southern Co. Serv.*, 910 F. Supp. 566 (N.D. Ala. 1996). An employer is not required to provide a reasonable accommodation for an employee unless the employee has a disability pursuant to the ADA. In this case, the question of complainant's disability was not raised during the course of her employment. She did not advise the employer that she was a person with a disability, and such was not obvious. She did not request an accommodation which would enable her to perform the essential functions of her job. In that regard, she testified that she was too depressed to leave the home, in which event she would fail to meet the ADA requirement of being able to perform the essential functions of the position with or without accommodation.

Although complainant did not assert that she was discriminated against under state law, the outcome would be the same under state law as well as federal law. Employment discrimination on the basis of a disability is prohibited by the Colorado Unfair Employment Practices Act, §24-34-401, et. seq., C.R.S. Under this statute, in order to establish a case of discrimination because of a disability, complainant has the burden to show that she is disabled, that she is otherwise qualified for the job, and that she was terminated or otherwise suffered an adverse employment action as a result of her disability. *Colorado Civil Rights Commission v. North Washington Fire Protection District*, 772 P.2d 70 (Colo. 1989). If complainant makes this showing, then the employer must demonstrate that there is no reasonable accommodation that can be made, that the disability actually disqualifies the individual from the job, and that the disability has a significant impact on the job. If the employer offers credible evidence that a reasonable accommodation is not possible, complainant must next show that her particular capabilities allow her to perform the job and other possible accommodations exist. *Civil Rights Commission v. North Washington Fire Protection District, supra*. To be "otherwise qualified" means that the person is able to meet all of the requirements of the job in spite of a disability. *Id*. A disabled person is otherwise qualified if, with reasonable accommodation, she can perform the essential functions of the job. *See* Civil Rights Division Rule 60.2 Sec. B, 3 Code Colo. Reg. 708.1. A disabled person must meet those requirements that are reasonable, legitimate and necessary. *AT&T Technologies, Inc. v. Royston*, 772 P.2d 1182 (Colo. App. 1989). *See also Coski v. City and County of Denver*, 795 P.2d 1364 (Colo. App. 1990).

For an analysis of employment discrimination under Colorado law, *see Colorado Civil Rights Commission v. Big O Tires, Inc.*, 26 *Colo. L.* 260 (Aug. 1997).

The record compels a conclusion that there is an absence of disability discrimination in this case.

B. Arbitrary and Capricious

In addition to arguing that she was discriminated against, complainant contends that her employment was wrongfully terminated under Rule R9-1-4. Respondent counters that it had to do something, and R9-1-4 was properly implemented.

Complainant was deemed by the appointing authority to have resigned her position pursuant to Rule R9-1-4, 4 Code Colo. Reg. 801-1, which provides in full:

> Absence Without Approved Leave. A full-time employee who is absent without approved leave for a period of 5 or more consecutive working days may, at the discretion of the appointing authority, be deemed to have resigned with prejudice.

This administrative law judge adopts the following analysis with respect to the proper use of R9-1-4:

> Rule 9-1-5 [now R9-1-4] was intended to be available to appointing authorities when all the facts and circumstances of a case indicate an abandonment of the job by the employee. This rule does not apply to those cases where the appointing authority has actual or constructive knowledge of the whereabouts of an absent employee, and the predisposing valid reason, medical or otherwise, that the employee has not appeared for duty. The cited rule is not a substitute for disciplinary action for abuse of leave, in appropriate cases.

Drury v. Colorado Division of Employment, Case No. 75-308 (Molnar, Initial Decision, Sept. 1975).

The Colorado Court of Appeals approved of this construction of R9-1-4 in *Ornelas v. Department of Institutions*, 804 P.2d 235 (Colo. App. 1990), holding that this rule is applicable "only to situations involving the abandonment of a job by an employee in which the appointing authority is aware of no apparent reason for the employee's absence."

The appointing authority testified that complainant "was terminated for failure to provide information." The appointing authority further testified that she would not have instituted the termination action if she had received the November 29 letter from Dr. Broman prior to doing so. LWOP had already been authorized for Carabello. Complainant's leave became unauthorized only when the requested medical statement was not forthcoming.

In view of the evidence as a whole, it is found that termination of complainant's employment under R9-1-4 was improper.

The appointing authority at all times possessed actual or constructive knowledge of complainant's whereabouts together with the purported reason for her absence. There is no evidence that complainant at any time intended to abandon her position. No such intent was ever conveyed to the employer. In fact, the agency had knowledge of complainant's intent to return. No mail was ever returned to the agency as undeliverable at complainant's address.

This case is distinguishable from *Zagar v. Colorado Department of Revenue*, 718 P. 2d 546 (Colo. App. 1986), where the court ruled that the appointing authority did not abuse the exercise of discretion by construing written notice of the employee's refusal to accept a geographical transfer, together with an unapproved absence of five consecutive days, as a resignation under R9-1-4. In *Zagar*, there was substantial evidence to find that the employee had intentionally abandoned his position. *See also Costa v. Department of Regulatory Agencies*, Case No. 94B036 (Thompson, Initial Decision 1993).

It is thus found that administrative action was inappropriately used as a substitute for disciplinary action. Respondent knew or should have known that complainant did not intend to resign her position. The agency did not attempt to make telephone contact with her. While complainant did not, herself, call the agency after October 23, there was telephone communication between the agency and complainant's husband.

When disciplinary action is taken against a certified state employee, certain due process rights attach. Due process entails notice and opportunity to be heard. A predisciplinary meeting should have been held here. Complainant should have received written notice of the specific charges. The final decision of the appointing authority should have been governed by the factors set forth in Rule R8-3-1, 4 Code Colo. Reg. 801-1 and R8-3-2, 4 Code Colo. Reg. 801-1.

Complainant was denied rights that have their foundation in the United States and Colorado Constitutions. If the disciplinary process had been employed, complainant would have received written notice of the charges against her, and a predisciplinary meeting would have taken place, providing the opportunity to clear up any misunderstandings or missed communications. Factors of mitigation would have been considered by the appointing authority before making a final decision. A corrective action may have been deemed appropriate instead of a disciplinary action. This is the purpose of the predisciplinary process. *See* Rule R-3-3(D), 4 Code Colo. Reg. 801-1.

R9-1-4 should be invoked only in the clearest cases of job abandonment, such as where the employee states that she will not return to work and does not, or where the employee skips town. When an employee has exhausted all accrued leave and is still unable to return to work, the agency should rely on Policy P7-2-5(D)(4), 4 Code Colo. Reg. 801-2. Otherwise, the steps of the disciplinary process should be followed.

For other decisions in which the administrative law judge

rescinded a personnel action taken pursuant to R9-1-4, *see Ozawald v. Department of Institutions*, Case No. 94B052 (Thompson, Initial Decision 1993); *Hotchiss v. Department of Corrections*, Case No. 94B062 (Thompson, Initial Decision 1995).

An award of attorney fees and costs is not warranted under §24-50-125.5 of the State Personnel System Act. While the disciplinary process should have been implemented instead of the administrative process, respondent did not act in bad faith. The appointing authority sought the guidance of the human resources director before acting. The action was not groundless or frivolous. *See Western United Realty, Inc. V. Isaacs*, 679 P.2d 1063 (Colo. 1984).

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious or contrary to rule or law.

2. Complainant was not discriminated against on the basis of having a disability.

3. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent's action is rescinded. Complainant is reinstated to her former position with back pay and benefits, less the appropriate offset for unemployment compensation or earned income, from November 23, 1995 to the present. Complainant is not entitled to an award of back pay for the period that she did not intend to work, *i.e.*, October 23 - November 23, 1995.

DATED this _____ day of September, 1997, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of September, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Richard K. Blundell
Attorney at Law
800 Eighth Avenue, Suite 202
Greeley, CO 80631

and in the interagency mail, addressed as follows:

Hollie R. Stevenson
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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