

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 94B093

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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DON E. ATTWATER,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,  
DIVISION OF ADULT SERVICES,  
LIMON CORRECTIONAL FACILITY,

Respondent.  
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Hearing commenced on January 11, 1995 and reconvened on March 15, 1995. The case concluded when respondent's closing argument was submitted on April 5, 1995.

Complainant appeared in person and was represented by Karen Yablonski-Toll, attorney at law. Respondent appeared through Robert Furlong, warden at the Limon Correctional Facility, and was represented by Diane Michaud, assistant attorney general.

Complainant Don Attwater testified in his own behalf. Respondent called Captain Donald Hill, Major Delayne Tornowski and Robert Furlong as witnesses.

Respondent's exhibits 1 through 13 were admitted. Complainant objected to exhibit 15, an affidavit from Dorothy Gibson, office manager for Rocky Mountain Internal Medicine, on the grounds that it was hearsay. Based on consideration of the factors set out in Industrial Claims Appeals Office v. Flowerstop Marketing, 782 P.2d 13 (Colo. 1989), including the fact that the affidavit was first presented to complainant's counsel at the time hearing commenced, the objection was sustained. Exhibit 15 was not admitted into evidence.

**MATTER APPEALED**

Complainant appeals respondent's refusal to accept the withdrawal of his resignation, alleging that the refusal was arbitrary, capricious, or contrary to rule or law. Complainant also alleges that the refusal was based on his physical disability, malignant hypertension.

**ISSUES**

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1. Whether the appointing authority's refusal to accept the complainant's withdrawal of his resignation was arbitrary, capricious, or contrary to rule or law.

2. Whether the appointing authority's refusal to accept the complainant's withdrawal of his resignation was based on complainant's physical disability, hypertension, and was, therefore, prohibited discrimination.

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

#### **FINDINGS OF FACT**

1. Complainant Don E. Attwater was first employed by the Department of Corrections ("DOC") at the Buena Vista facility in February, 1990. In April, 1991, he became a sergeant at the Limon Correctional Facility ("LCF").

2. Captain Donald Hill was Attwater's immediate supervisor at LCF. Major Delayne Tornowski was Capt. Hill's supervisor and Warden Robert J. Furlong was the appointing authority.

3. Initially Attwater worked at the LCF in Recreation. After an incident of an attempted suicide by a unit supervisor, in which Attwater reported his concern, he was transferred to Security. In November, 1992, after an incident involving inmates threatening security at the facility, he was transferred to Housing. On November 16, 1993, Major Tornowski informed Attwater that he was being transferred to Receiving.

4. None of these transfers were disciplinary in nature. The transfers involved no change in classification or pay. The last transfer involved no change in supervisor. However, even though he was informed that these transfers were not disciplinary, Attwater felt that they were taken against him because his supervisors believed that he had done something wrong.

5. Correctional officers may be, and are, transferred for a number of reasons: that inmates have made threats against a correctional officer; the staffing needs of particular locations in the facility; and, to give a correctional officer exposure to other duties and functions. During the period of Attwater's transfer to Receiving, another employee, a captain, who was the subject of a threat by inmates, was also transferred.

6. The complainant suffers from hypertension and has been on medication for high blood pressure since 1991. He never told anyone at LCF about his hypertension until he submitted the slip from Dr. Fox. Warden Furlong did not know Attwater suffered from hypertension until he received the slip from Dr. Fox dated November 17, 1993. (Exhibit 8)

7. Attwater was very upset over the transfer to Receiving. That evening, after work, he went to see Dr. Fox. After a brief examination and long discussion, Dr. Fox recommended that he take three weeks off and then have his condition

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reevaluated.

8. After consulting with Dr. Fox, Attwater called Capt. Hill at home, explained that he would be taking 3 weeks off as sick leave and indicated he would submit the doctor's slip. (Exhibit 8) The next day, November 17, his housemate, Nurse Ritter, gave Capt. Hill the slip from Attwater's doctor.

9. The complainant has no family in Colorado. For several years, he and his brother had discussed setting up a business together. Attwater decided to go to Oregon to discuss and access his options with his family there.

10. The LCF administration, including Tornowski and Furlong, considered a period of three weeks as extensive sick leave. Attwater did not have a record of abusing sick leave. (Exhibit 2) However, in order to determine the extent and degree of the condition, as well as the need to cover staffing and overtime costs, DOC required Attwater to obtain a second opinion. (See, DOC regulation 1450 - 30 IV. E, exhibit 11.) On or about November 19, 1993, Major Tornowski sent a certified letter to complainant's house, stating that LCF wanted to obtain a second opinion on his condition and asking him to schedule an appointment with Dr. William Soloman. (Exhibit 7) Attwater was in Oregon at this time; however, he had his housemate read the letter to him over the phone.

11. Although Attwater was upset at this request, he did make an appointment with Dr. Soloman for a few days after he was scheduled to return to Colorado.

12. Upon his return to Colorado, Attwater contacted Capt. Hill who told him that Warden Furlong had denied his request for three weeks of sick leave. Furlong did grant one week of sick leave. The remaining two weeks were to be taken from annual leave. Attwater became very upset at this news and told Hill that he was going to resign. Attwater then canceled the appointment with Dr. Soloman.

13. On December 7, Attwater tendered his resignation, dated December 8, 1993, to Capt. Hill at Hill's home and asked him to submit it for him. (Exhibit 6) The resignation had an effective date of December 22, 1993. Hill submitted the resignation the next day.

14. On December 17, Attwater changed his mind and delivered a letter to Capt. Hill at his house withdrawing the December 8 resignation. (Exhibit 5) Hill submitted the withdrawal the next day, December 18, 1993.

15. Department of Correction's policy is to require at least two weeks or 10 working days notice prior to the effective date of resignation. (Exhibit 12, DOC regulation 1450- 8 IV. B.) The departmental policy provides that failure to provide such notice may result in an employee being deemed "not eligible for rehire." It is not uncommon for DOC employees to tender their resignation while on leave and use a two week period while on leave for the two weeks notice. It is not clear if such employees are considered to be eligible for rehire.

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16. When an employee is absent, i.e., taking leave which has not been previously scheduled, DOC must make arrangements to cover shifts. The department's experience is that for each week an employee is on previously unscheduled leave, it costs 2 days of overtime pay to cover an absent employee's shift for a week period.

17. In a letter dated December 21, 1993 Furlong decided not to accept the withdrawal of the resignation because Attwater had not withdrawn the resignation at least 7 full working days prior to the effective date of resignation as set forth in Rule 9-1-2. (Exhibit 4) In addition, Furlong believed that because Attwater was not at work during the two week notice period which was to proceed the effective date of a resignation he had not complied with DOC regulations. Furlong believed that the manner in which Attwater left his employment did not warrant special consideration and it would not be in the best interest of staff to allow him to withdraw his resignation.

18. In a letter dated December 23, 1993, Furlong notified the complainant that he had decided to allow the use of sick leave for the three week period from November 18 through December 4, the use of approximately 3 hours of overtime compensation and approximately 58 hours of annual leave. (Exhibits 3 and 9)

#### DISCUSSION

This is an appeal of an administrative action, not a disciplinary one. The burden of proof, therefore, is upon the complainant to prove by a preponderance of the 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); cf., Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Complainant also bears the burden of proof to establish that the administrative termination was based on discrimination under the federal Americans With Disabilities Act ("ADA") and state law, sections 24-34-402 and 24-59-125.3, C.R.S. (1988 Repl. Vols. 10A & B).

Complainant argues that rule R9-1-2 does not allow an appointing authority discretion to refuse to accept a withdrawal of resignation. Rather, he argues that the parties must try to reach a mutual agreement. Rule R9-1-2 states:

An employee shall have the right to withdraw his/her resignation at any time prior to 7 full working days before the set resignation date. After that time, a resignation may be withdrawn only if the employee and the appointing authority mutually agree.

4 CCR 801-1.

The first sentence of the rule gives an employee who meets the conditions precedent - withdrawal of a resignation at least 7 full working days prior to the set resignation date - unilateral discretion to rescind his resignation. Once that time passes, an appointing authority must also agree before a

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resignation is rescinded. Don Attwater indicated his intention to withdraw his December 8 resignation and Warden Furlong indicated his refusal to accept the withdrawal. There was no mutual agreement.

In order for a withdrawal of a resignation to be effective, it either must be submitted at least seven working days prior to the effective date of resignation, or both the employer and the employee must agree to the withdrawal. Swat Nio Souw v. University of Colorado Health Sciences Center, 890-B-14.

Complainant has failed to establish that the appointing authority's refusal to accept the withdrawal was arbitrary, capricious or contrary to rule or law.

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. sec. 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) (1992).

Complainant's initial burden is to establish a prima facie case of discrimination by showing by a preponderance of the evidence:

1) that he belongs to the protected class (person with a disability); 2) that he was otherwise qualified to perform the duties of the position; and 3) that an adverse action was taken against him because of the disability. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Once complainant meets his initial burden, respondent must rebut the presumption of discrimination by setting forth non-discriminatory justifications for the allegedly discriminatory practice. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Complainant is then 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, the complainant must prove that Respondent's action was the result of intentional discrimination rather than being personally motivated. St. Mary's Honor Center, et al. v. Hicks, 113 S.Ct. 2742 (1993).

A review of the evidence as a whole leads to the conclusion that the complainant did not make a prima facie showing of discrimination with respect to the element of "disability." There is no evidence that Mr. Attwater has a present impairment that substantially affects any major life activity, e.g., working. Nor, is there any evidence that the respondent treated him as though he had such an impairment. Complainant failed to establish that the refusal to accept his withdrawal of resignation was based on any present, past or perceived disability.

In addition to complainant's failure to establish a prima facie case, respondent put forth a legitimate business reason for the refusal to accept the resignation, that is: the warden's belief complainant had not complied with

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rule 9-1-2; that Attwater's leave status during the two week notice period which was to proceed the effective date of a resignation did not comply with DOC regulations; and, that it would not be in the best interest of staff to accept the withdrawal. Complainant failed to rebut respondent's purported business reason and did not show that respondent's action was pretextual. Ultimately, there is an absence of evidence to suggest that respondent's action was the result of intentional discrimination. St. Mary's Honor Center, supra.

The outcome of this case is the same under state law as it is under federal law. Employment discrimination on the basis of physical disability is prohibited by the Colorado Unfair Employment Practices Act, sec. 24-34-401, et. seq., C.R.S. (1994 Cum Supp.). Under this statute, in order to establish a case of discrimination because of a disability, complainant has the burden to show that he is disabled, that he is otherwise qualified for the job, and that he was terminated or otherwise suffered an adverse employment action as a result of his disability. Colorado Civil Rights Commission v. North Washington Fire Protection District, 772 P.2d 70 (Colo. 1989).

#### CONCLUSIONS OF LAW

1. Respondent did not act arbitrarily, capriciously or contrary to rule or law.
2. Complainant did not establish by a preponderance of the evidence that the respondent's refusal to accept the withdrawal of resignation was discrimination based on a physical disability.
3. Neither side is entitled to an award of attorney fees or costs.

#### ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this \_\_\_ day of  
April, 1995, at  
Denver, Colorado.

\_\_\_\_\_  
Mary Ann Whiteside  
Administrative Law Judge

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**NOTICE OF APPEAL RIGHTS**

**EACH PARTY HAS THE FOLLOWING RIGHTS**

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties and advance the cost therefor. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

**RECORD ON APPEAL**

The party appealing the decision of the ALJ - APPELLANT - must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **\$50.00**. The estimated cost to prepare the record on appeal in this case with a transcript is **\$618.00**. Payment of the estimated cost for the type of record requested on appeal must accompany the notice of appeal. If payment is not received at the time the notice of appeal is filed then no record will be issued. Payment may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. If the actual cost of preparing the record on appeal is more than the estimated cost paid by the appealing party, then the additional cost must be paid by the appealing party prior to the date the record on appeal is to be issued by the Board. If the actual cost of preparing the record on appeal is less than the estimated cost paid by the appealing party, then the difference will be refunded.

**BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 Code of Colo. Reg. 801-1.

**ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 Code of Colo. Reg. 801-1. Requests for oral argument are seldom granted.

**PETITION FOR RECONSIDERATION**

***A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 Code of Colo. Reg. 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.***

**CERTIFICATE OF MAILING**

***This is to certify that on the \_\_\_ day of April, 1995, I sent true copies of the foregoing INITIAL DEICSION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:***

***Karen L. Yablonski-Toll  
3773 Cherry Creek North Drive  
Suite 940  
Denver, CO 80209-3819***

***and in the interagency mail, addressed as follows:***

***Diane M. Michaud  
Department of Law  
1525 Sherman St., 5th Floor  
Denver, CO 80203***

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