

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B035

CCRD Charge No. S95DR010

EEOC Charge No. 32A940948

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FLOYD KELLEY,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER,
ANIMAL RESOURCE CENTER,

Respondent.

This matter came on for hearing on January 25 and 26, 1996, before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Daniel J. Wilkerson, Assistant University Counsel. Complainant appeared and was represented by Richard C. LaFond, Attorney at Law.

Respondent called the following witnesses: Arlene Yee, Animal Attendant I; Karol Young, Animal Caretaker; John Ward, Business Manager; Linda Chase, Program Specialist; James Hidahl, Training & Employment Relations Specialist; Rachel Henderson, Animal Health Technician; and John Moorhead, Associate Dean for Research Affairs.

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Complainant testified on his own behalf and called: Priscilla Ledbury, Accounting Technician; Floyd Hall, Animal Attendant; Steven Kelley, former Animal Caretaker; and Cleveland Wallace, Lab Attendant.

Respondent's Exhibits 1-21 and Complainant's Exhibits A-M, O, P and II were stipulated into evidence. Respondent's Exhibit 22 was admitted without objection. Complainant's Exhibits N, V and AA were admitted without objection. Exhibits JJ and KK were admitted over objection. Exhibits DD and LL were offered but not admitted.

MATTER APPEALED

Complainant appeals a permanent disciplinary demotion. For the reasons set forth herein, respondent's action is affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether there was just cause for the disciplinary demotion;
3. Whether complainant was discriminated against on the basis of race, color or gender;
4. Whether complainant was retaliated against for EEO activity.

PRELIMINARY MATTERS

In his amended prehearing statement, complainant requested that the Board uphold the Colorado Civil Rights Division's (CCRD) finding of probable cause to credit complainant's allegations.

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The administrative law judge denied the request, ruling that the hearing would be held de novo and that the initial decision would be based upon the evidence presented at hearing, where the testimony is sworn and the parties have the right to cross-examine witnesses.

Administrative notice was taken of the CCRD's March 14, 1995 Opinion of Probable Cause.

Upon respondent's motion, a sequestration order was entered excluding non-testifying witnesses from the hearing room. Excepted from this order were the complainant and respondent's advisory witness, John Moorhead.

FINDINGS OF FACT

1. Complainant, a 55 year-old black male, began his employment with respondent Health Sciences Center (HSC) as an Animal Attendant IA in June 1970. He transferred to the Animal Resource Center (ARC) in 1985, where he served as an Animal Attendant II until his disciplinary demotion to Animal Attendant I on August 8, 1994. His job performance evaluations in recent years have been in the range of Commendable or Outstanding.

2. Exhibit II was offered by the complainant to show the "cast of characters" involved in this proceeding. Eleven of the 28 members of the "cast" are black, one is Hispanic and 20 are male. One, Robert Winslow, a white male who served as acting director for the ARC, has since been replaced by a black male. Arlene Yee, Karol Young, Bobbie Jo Ochoa and Anna Bartling are all white females.

3. On July 14, 1994, at about 12:05 p.m., animal attendants

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Arlene Yee, Karol Young and Bobbie Jo Ochoa were seated together in the lunch room when complainant opened the door to the room and addressed Yee in a loud voice regarding the failure of Yee and Young to euthanize a group of rats. Yee was seated with her back to the door; Young was seated across the table facing the door. Complainant turned his attention to Young, and the two began arguing. During the argument, student worker Anna Bartling entered the room, passing by complainant to seat herself next to Young.

4. Complainant became enraged; his voice turned to yelling and screaming. He remained close to the doorway, moving back and forth, and two or three times made assertive movements toward the table. At one point he clenched his fist. During the argument, complainant directed words to Young to the effect that, if she would step out into the hall, he would slap the fucking shit out of her, and to "Shut the fuck up." There were two points during the exchange when complainant made references to slapping Young. Young responded to the effect that he was not going to touch her, and to "Go tell someone who cares." Young remained seated at the table at all times. After approximately ten minutes, complainant turned and left.

5. Complainant left the lunch room and went to the office of acting supervisor John Ward and told Ward that the rats had not been put to sleep. Complainant did not address the lunch room incident.

6. All four women were upset over that which had taken place. Arlene Yee went to Ward's office and advised him of the incident. Then Ward talked to Karol Young. Both Yee and Young characterized the incident as one of violence, not sexual harassment or racial intolerance.

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7. Later in the afternoon of July 14, Ward, Yee and Young went to the office of Linda Chase, who serves as the HSC affirmative action specialist, to inquire into possible courses of action. To Chase, Yee and Young appeared very upset. Chase advised Young that she could file a grievance against the complainant, to which Young responded that she was afraid to do that for fear of reprisal from complainant. Chase then advised Young that if she feared for her safety, she could file a report with the campus police.

8. Chase did not view the incident as an affirmative action matter; nothing of a racial nature had been brought up. Because the two women were so upset, Chase advised Ward that the complainant should be placed on administrative leave with pay pending an investigation.

9. Ward relayed Chase's suggestion to Bob Winslow, the HSC acting director, who then telephoned Chase for confirmation. Winslow placed complainant on administrative leave effective July 15, pending an investigation into the allegation that complainant had threatened a fellow employee with physical violence. (Exhibit 3.)

10. On the day that he was suspended, complainant went to Chase's office to inquire into "the white folks" coming to see her and to ask why he had been placed on leave. (Chase is black.) Chase informed him of the allegation and that an investigation would be conducted. Complainant responded that "white is right" and that Young had mumbled the word "nigger". Chase advised him that the best thing for him to do was to stay away from the campus and that he could file a complaint or grievance.

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11. After talking to Linda Chase, Young decided to file a formal grievance, alleging that complainant had been verbally abusive and "threatened to slap the shit out of me". (Exhibit 5.) She and Arlene Yee also filed a report at the campus police department. (Exhibit 10.)

12. Because this was the first time he had investigated a grievance, Ward contacted personnel director George Thomas for advice. Thomas told him to not get a statement from complainant, but to collect written statements from the other witnesses, to be given to the appointing authority. Ward took statements from Yee, Bartling and Ochoa. (Exhibits 6, 7, 8.)

13. Over the next few days, other people approached Ward with information of previous incidents involving complainant. Ward asked them to put it in writing, and they did. (Exhibits 18, 19, 20, 21.)

14. Ward responded in writing to Young's grievance on July 21, advising her that he would forward all of the information he had received to John Moorhead. Included in Ward's response was a letter addressed to all ARC employees stating that the rules and policies of the state personnel system, including those prohibiting unlawful discrimination and sexual harassment, must be strictly followed. (Exhibit 11.)

15. John Moorhead was appointed Associate Dean for Research Affairs on June 1, 1994. As such, he became the appointing authority for the ARC.

16. Winslow telephoned Moorhead in the afternoon of July 14 and advised him that something had happened during the noon hour and that John Ward would be following up on it because Winslow would

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be leaving either that day or the next due to his retirement and consequent limitation on the number of hours he could work.

17. Ward forwarded the information to Moorhead with a recommendation that an investigation take place to determine whether disciplinary action was appropriate. Ward did not recommend that disciplinary action be taken.

18. Having held the associate dean position for only six weeks, Moorhead had not previously conducted an employee investigation. Consequently, he sought advice from George Thomas, Personnel Director, and James Hidahl, Training & Employment Relations Specialist.

19. By letter dated July 22, 1994, Moorhead gave notice to complainant that a Rule R8-3-3 meeting would be held on July 28. (Exhibit 4.) Enclosed with the notice were copies of Young's grievance, Ward's response to the grievance and Ward's memo to all employees, and the witness statements of Yee, Bartling and Ochoa.

20. The R8-3-3 meeting was held on July 28. Present were complainant and his representative (Charles Williams), Hidahl and Moorhead. Hidahl's purpose was to ensure that the meeting was conducted in compliance with the pertinent rules and regulations and that complainant had an opportunity to provide information.

21. The meeting lasted for about two hours. Complainant presented a written statement of his account of events. (Exhibit 12.) Complainant denied using vulgar language, denied yelling and screaming, denied making threatening gestures and alleged that Young called him a "damn nigger". Because complainant's account was so different from the written witness statements he had read, and because there had been no previous indication of a racial

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slur, Moorhead decided that it was necessary for he, himself, to interview the witnesses. (Exhibit 13.)

22. Moorhead separately interviewed Young, Yee, Bartling and Ochoa. (Exhibits 14, 15, 16, 17.) Young denied making a racial slur, and the others agreed that the word "nigger" had never been used during the argument.

23. Moorhead also interviewed John Ward to inquire as to the origin of the non-witness statements (Exhibits 18, 19, 20, 21). Ward told him that the statements were generated by individuals who voluntarily approached him with the information. Moorhead then put those documents in a separate file and disregarded them because he considered them peripheral to the incident of July 14. He did not take the statements into account in making his decision and did not reach a determination of the truth or falsity of the statements. (The administrative law judge did not read the statements.)

24. Moorhead also interviewed Linda Chase, who told him that in her July 15 conversation with complainant, complainant did not deny Young's allegations but rather defended his conduct because of Young's use of the word "nigger".

25. Moorhead concluded that complainant had used vulgar language, i.e., the words "shit" and "fuck", that complainant had made a threat of violence towards a co-worker, that there was yelling and shouting by complainant, and that the racial slur "damn nigger" had not been used.

26. Moorhead also concluded, based upon complainant's comments at the predisciplinary meeting and his interviews with the four women involved, that the work environment at the ARC was a tense one

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which included racial comments and innuendos. (Complainant had stated that there was favoritism towards the white women, and the women said that blacks were favored.)

27. At the time of his decision, Moorhead was not aware that complainant had been disciplined in 1983 for allegedly striking a co-worker (Exhibit 22) and consequently did not consider the prior action. His decision was based solely on the July 14 incident.

28. On August 8, 1994, Moorhead demoted Floyd Kelley from Research Animal Attendant II, grade 70, step 7, salary \$2,409.00 per month to Research Animal Assistant I, grade 64, step 7, salary \$2,081.00 per month. (Exhibit 1.) Kelley received the written notice of disciplinary action on August 11 and filed a timely appeal on August 19, 1994.

DISCUSSION

A.

In this de novo disciplinary proceeding, the burden is on the agency to prove by a preponderance of the evidence that the acts or omissions on which the discipline was based occurred and that just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Complainant bears the burden to prove by preponderant evidence that he was discriminated against on the basis of race, color or gender, and that he was retaliated against for engaging in protected activity. The credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes V. Lobato, 743 P.2d 27 (Colo. 1987).

It is the role of the administrative law judge to weigh the

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evidence and from the evidence reach a conclusion. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight is not quantifiable in the absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard that applies in this administrative setting is "by a preponderance". This standard of proof has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder, both the presiding officer and any administrative appeal authority, must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985) (emphasis supplied).

The weight of the credible evidence leads to a finding that complainant committed the alleged acts. The evidence presented is sufficient to sustain the conclusions reached by the appointing authority.

Even if a racial slur had been directed at the complainant, provocation is not a defense to assault.¹ Whether complainant's

¹ "Assault" is defined as follows:

Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability so to do, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault.

acts are characterized as an assault or a threat, his conduct of July 14, 1994 was without justification, short of self-defense, which is not alleged,

The appointing authority carried out the investigation with clean hands and fairly and candidly considered all available information, as is required of a reasonable and prudent administrator.² He did not abuse his discretion in imposing a discipline which was within the realm of available alternatives. Rule R8-3-3(A), 4 Code Colo. Reg. 801-1. Complainant's conduct was so flagrant or serious as to warrant immediate disciplinary action. Rule R8-3-1, 4 Code Colo. Reg. 801-1.

The administrative law judge is convinced that the appointing authority was at all times willing to find in favor of the complainant, if the credible evidence with reasonable inferences pointed to that result. Complainant was afforded a full opportunity to be heard before a final decision was made. The

An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another.

Black's Law Dictionary at 114 (6th ed. 1990).

"Threat" is defined as follows:

A communicated intent to inflict physical or other harm on any person or on property. A declaration of an intention to injure another or his property by some unlawful act.

Black's Law Dictionary at 1480 (6th ed. 1990).

² Cleveland Wallace testified at hearing that he was standing outside the lunch room during a portion of the argument. This information was not previously communicated to the appointing authority, so Wallace was not interviewed during the investigation. Wallace's testimony did not shed new light on the facts of the incident.

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decision was invoked independently and upon due reflection. The actions of the appointing authority were not arbitrary, capricious or contrary to rule or law.

B.

Complainant submits that he was unlawfully discriminated against on theories of both disparate treatment and disparate impact. He argues that disparate impact does not require a showing of intentional discrimination, and that the impact can be found in how the discipline was applied. Yet no credible evidence was presented that would tend to show that disciplinary actions are, or were, applied unevenly by respondent with respect to blacks as compared to whites. There is no evidence of procedural irregularities or improprieties in this proceeding. The administrative law judge rejects complainant's suggestion that the proceedings were irregular and racially based due to complainant not having been interviewed prior to the predisciplinary meeting.

Complainant's claim of gender discrimination was not argued but apparently stems from his belief that women at the ARC are favored over men, or that the appointing authority chose to believe the statements of the women involved in this matter instead of those of complainant. There is no evidence from which to draw the conclusion that complainant was discriminated against for being male.

Complainant established a prima facie case of race and color discrimination by showing that he is a member of a protected group (black), was qualified for the position of Animal Attendant II and suffered an adverse employment consequence, demotion. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Respondent successfully rebutted this presumption of discrimination by

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articulating a non-discriminatory justification, use of abusive language in the workplace and threatening a co-worker, for the allegedly discriminatory act. McDonnell Douglas, 411 U.S. at 802. Complainant did not prove by preponderant evidence that respondent's asserted reason for the termination was a mere pretext for discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Complainant failed to carry his ultimate burden to prove that respondent's action was the result of intentional discrimination. St. Mary's Honor Center v. Hicks, 509 U.S.____, 113 S.Ct.____, 125 L.Ed.2d 407 (1993).

While it appears true that an attitude of animosity exists between the black men and white women who are employed as animal attendants at the ARC, there is a dearth of evidence in this record to demonstrate that race, color or gender were motivating factors in the appointing authority's decision to demote the complainant. Nor is there any evidence of record to support a finding that the appointing authority's decision to impose a disciplinary demotion was made in retaliation for complainant's engagement in a protected activity.³

C.

A threat of physical violence in the workplace can constitute just cause for a disciplinary termination. In view of the appointing authority's decision to not terminate complainant's employment, however, an adjustment of pay to a lower step in the assigned pay grade for a specified period, or a suspension, would seem more fitting penalties than a permanent demotion. Complainant has successfully performed his duties at the level of Animal Attendant II for many years. The appointing authority concedes that this is

³ Complainant filed a grievance, but subsequent to the action under review here.

not a case of unsatisfactory job performance. The disciplinary action was founded upon a single incident, for which complainant has incurred a salary decrease since August 1994. Although this is not a case where the administrative law judge is at liberty to substitute his judgment for that of the appropriate decisionmaker, respondent is nevertheless urged to consider instituting a personnel action that would allow complainant to once again become an Animal Attendant II. It is quite possible that the imposed discipline has served its purpose, and it may be in the best interests of both parties for complainant to be reinstated to his former position.

Neither party is entitled to an award of attorney's fees.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. There was just cause for the disciplinary demotion.
3. Complainant was not discriminated against on the basis of race, color or gender.
4. Complainant was not retaliated against for EEO activity.

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ORDER

The action of the respondent is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ____ day of
March, 1996, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of March, 1996, 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 C. LaFond
Attorney at Law
1756 Gilpin Street
Denver, CO 80218

and in the interagency mail, addressed as follows:

Daniel J. Wilkerson
Assistant University Counsel
University of Colorado - HSC
4200 East Ninth Avenue, Box A-077
Denver, CO 80262

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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. 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 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. Payment of the preparation fee 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.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

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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 CCR 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 CCR 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 CCR 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.