

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B021

CCRD Charge No. S96DR003

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CAROLYN WEATHERLY,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
AURARIA

HIGHER

EDUCATION

CENTER,

Respondent.

Hearing commenced by telephone on June 19, 1996, reconvened on February 27-28, 1997 and was continued until March 26, 1997. Respondent appeared through Rosemary Del Monte and was represented by Laurence Pendleton, Assistant Attorney General. Complainant appeared *pro se* for most of these proceedings but was represented by Michael O'Malley, Attorney at Law, at the hearing on March 26.

Complainant testified on her own behalf and called as a witness Cynthia Black Hier, Director of Human Resources, Auraria Higher Education Center.

Respondent's witnesses were: Barbara Weiske, Director of Student Union and Campus Auxiliary Services, Auraria Higher Education Center, and Julie Hughes, Director of Equal Employment Opportunity Programs for Auraria. Rosemary Del Monte appeared as respondent's advisory witness but did not testify.

Complainant's Exhibits C, D, F, G, I, J, O, M, N, P and AA were admitted into evidence without objection.

Respondent's Exhibits 1 through 32, 16A, 16B, 17A and 17B were admitted by stipulation.

MATTER APPEALED

Complainant appeals a layoff. For the reasons set forth below, respondent's action is affirmed.

96B021

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 gender, age or disability;
3. Whether the layoff was retaliation against complainant;
4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant Carolyn Weatherly transferred from the University of Colorado at Boulder (UCB) to respondent Auraria Higher Education Center (AHEC) in June 1990. She was laid off from the position of Program Assistant II on October 2, 1995. In late November 1995, she returned to UCB where she is presently employed as a Program Assistant II.

2. In addition to being certified in the position of Program Assistant II, Weatherly is certified as an Administrative Assistant III.

3. In June 1995, the Auraria Board of Directors rejected the proposed budget plan and directed the AHEC staff to devise a plan cutting \$750,000 from the operations budget. Areas to be cut included the Tivoli Student Union, Child Care Center and the Auraria Book Center.

4. Initially, it was felt by Barbara Weiske, Director of the Tivoli Student Union and Weatherly's supervisor, that Weatherly's position in the Student Services Division could be saved in the resulting reorganization by changing the command structure, *i.e.*, the person she reported to. However, the Board rejected this plan in order to prevent decreasing funding for the Child Care Center. There was also pressure from the Board to maintain a strong marketing and services segment for the Tivoli. At this point it became necessary to consider abolishing Weatherly's position. (Exhibits 16A and 16B).

5. The majority of AHEC employees were women, so it was known from the outset that women would be affected by the necessary

layoffs. Weatherly felt that there was an attempt to keep younger males rather than women, and that women were being excluded from the information cycle.

6. Weatherly felt that Cynthia Hier, Human Resources Director, was attempting to deny her retention rights. Weatherly made several requests for information pertaining to retention opportunities, including an Open Records Act request. Hier responded that she was providing all information available at the time each request was made. Weatherly was not convinced.

7. By letter dated August 17, 1995, Hier informed Weatherly that her position of Program Assistant II would be abolished on October 2, 1995 due to lack of funding. Hier advised Weatherly of her retention rights, that there were no Program Assistant II positions available for which she had retention rights, that there were no vacant positions in her current class series and that Hier was in the process of researching opportunities in the Administrative Assistant III class, in which Weatherly had previously been certified. (Exhibits 1 and C.) Hier had no say in determining which positions would be eliminated.

8. On September 12, 1995, Hier advised Weatherly by telephone of a retention offer of job #559 with saved pay. Job #559 was a new Administrative Assistant III position in the human resources office for which Hier wrote the job description and which had been discussed by staff for several months. Hier was the supervisor for the position.

9. Hier asked Weatherly to take a typing test because position #559 required a typing certificate of 50 wpm. Weatherly resented this request because she felt she was being asked to re-qualify for a position she once held. Hier's records reflected that the Administrative Assistant III position previously held by Weatherly was a non-typing position, and there was no typing certificate in Weatherly's personnel file. Hier would have accepted the results of an earlier typing test if a certificate had been provided to her.

10. In June 1994, EEO Director Julie Hughes had investigated Weatherly's allegations of gender discrimination by her supervisor, Barbara Weiske, and Weatherly's allegation that Weiske was keeping information from her and was not including her in meetings. Hughes found the allegations unfounded.

11. In September 1995, Weatherly telephoned Hughes to complain about the layoff process and alleged that the layoffs were based upon age, gender and, in her case, disability. Hughes

conveyed this information to an assistant attorney general, who asked her to investigate.

12. Hughes investigated Weatherly's allegations and found no evidence of discrimination. She concluded that the layoff procedures had been properly followed and that there had been no irregularities in the area of retention rights. She conveyed her information to the Attorney General's office.

13. Weatherly believed that job #559 had been created for the sole purpose of denying her retention rights in retaliation for filing a discrimination complaint, reasoning that a layed off employee cannot bump into an encumbered position as long as there is a vacant position.

14. Hier did not know that a discrimination complaint had been registered by Weatherly when she made the retention offer. Nor did she know of Weatherly's claimed environmental illness, of which she was to subsequently learn.

15. In a telephone conversation on September 12, Hier and Weatherly agreed to meet to view the work space for position #559. Weatherly also explained that she had an environmental illness stemming from exposure to unknown chemicals. Hier requested medical documentation of the illness and of the need for any accommodations. Weatherly confirmed this telephone conversation in writing. (Exhibits 5 and M.)

16. In a "To Whom It May Concern" letter of September 15, 1995, William Reifman, a physician's assistant (P.A.) for Dr. Paul Drugul, wrote that Carolyn Weatherly had been a patient at their office since 1972 for treatment of environmental contact-type allergies, that she had previous difficulty with NCR paper, and that the room she would have to work in could be a significant detriment to her health. (Exhibits 8 and P.)

17. By letter dated September 22, 1995, Weatherly requested the following accommodations in order to perform the essential functions of job #559: increased ventilation to the work area, an additional room air filter, an ongoing supply of rubber gloves and, possibly, an ongoing supply of face masks. (Exhibit 11.)

18. On September 29, 1995, P.A. Reifman wrote to Hier recommending against position #559 and recommending the following kind of work setting for Weatherly: sufficient ventilation (cross ventilation), sufficient distance from chemically charged machinery, filtered air provided by an NSA or AirStar air filter, disposable gloves if working with chemical-laden paper and to

recognize that NCR is a problem if large volumes are worked with. (Exhibit 12.)

19. Also on September 29, Hier wrote to Weatherly saying that she would look into providing the requested accommodations, which would take approximately three weeks. In the meantime, Hier said, the planned October 2 layoff would go forward, and if the requested accommodations proved reasonable Weatherly would be placed in position #559. (Exhibit 13.)

20. On October 1, 1995, Weatherly wrote to Hier naming three incumbent Administrative Assistant IIIs she felt she could bump and saying that she believed that Hier was acting in retaliation for the filing of a civil rights complaint. She emphasized that her doctor had recommended against position #559 and that at no time had he recommended that accommodations be provided. (Exhibit 14.)

Hier testified that Weatherly stated verbally that she would have problems with the three other administrative assistant positions as well as #559.

21. Weatherly testified at hearing that she was not saying in her October 1 letter that she wanted to bump any one of the three incumbents whom she had named and that she did not consider her letter to be one declining position #559.

22. Hier acknowledged receipt of Weatherly's October 1 letter on October 12, writing that she understood Weatherly to be not requesting accommodations to position #559 and to be turning down the position. (Exhibit 15.)

23. Exhibit AA, obtained by Weatherly at the state payroll office, is a January 3, 1996 list of positions by agency by position number. Position #559 is not shown on the list, which makes Weatherly think that the position never actually existed.

24. Position #559 does not appear in Exhibit AA because it has not been processed through the system to be filled by a full-time classified employee. The job is a classified position and is available to be bumped into. It is currently being filled by students, who are not classified employees. The primary duties are maintaining personnel files and processing leave records. Weatherly was qualified for this position in all respects.

25. Following her layoff, Weatherly received unemployment compensation in the amount of \$1,088 per month.

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 gender, age or disability.

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). As the fact finder, the judge is entitled to accept parts of a witness's testimony and reject other parts. *United States v. Cueto*, 628 F.2d 273, 1275 (10th Cir. 1980). The judge can believe all, part, or none of a witness's testimony, even if uncontroverted. *In re Marriage of Bowles*, 916 P.2d 615, 617 (Colo. App. 1995).

Complainant submits that the main issue in this case is job #559, arguing that the position was not a real job but was created in order to deny her retention rights. According to complainant, she was not given an honest chance to exercise her retention rights, and this is what makes the layoff action arbitrary and capricious.

The rules governing layoffs are found in article 3, chapter 9 of the Board rules. The order of retention rights is found at R9-3-7, 4 Code Colo. Reg. 801-1. Complainant has not pointed to a single rule violation by respondent. Respondent has shown a rational basis for its layoff actions. See, *Hughes v. Department of Higher Education*, Colorado Court of Appeals Case No. 95CA1348, 26 *The Colorado Lawyer* 139 (April 1997).

This record does not support complainant's contention that position #559 was a bogus attempt to prevent her from exercising her retention rights, or that she was layed off as a form of retaliation. Substantial evidence supports a conclusion that Cynthia Hier fulfilled her responsibilities as human resources manager for the agency in carrying out the personnel rules effecting layoffs.

By the day of the planned layoff, October 2, 1995, complainant

had not formally accepted or declined the offer of #559. She did not want accommodations that would enable her to perform the job's essential functions. It is apparent that she wished for the job offer to be withdrawn. The evidence suggests that she did not want any other Administrative Assistant III position, either. Under these circumstances, it was not unreasonable to conclude that she had declined the retention offer. There were no Program Assistant II positions for her to bump into, and it was reasonable for the agency to proceed with the layoff, placing complainant on the reemployment list pursuant to rule.

Complainant's allegations of discrimination on the basis of age, gender and disability, which she did not argue in her closing arguments, also are unsupported by the evidence. With respect to age discrimination, she did not prove that she is over the age of 40. In fact, she did not offer evidence of anybody's age. She merely testified in general terms of older women versus younger males. See, Age Discrimination in Employment Act, 29 U.S.C. §§621-634 (1988). She failed to demonstrate that age was a factor in any of the layoff decisions made by the agency.

Complainant also failed to meet her burden of proof in regard to disability discrimination. She did not present sufficient evidence to show that she is a person with a disability under the Americans With Disabilities Act (ADA), that is, a person with a physical or mental impairment that substantially limits a major life activity. 29 C.F.R. 1630.3(j)(I); *Bolton v. Scrivner, Inc.* 36 F.3d 939 (10th Cir. 1994), cert. denied, 115 S.Ct. 1104 (1995). She failed to present persuasive evidence that she is a person entitled to protection under the ADA or that any layoff decisions were improperly made on the basis of her alleged disability.

With respect to gender discrimination, complainant showed that she is a member of the protected group, was qualified for the position she held and suffered an adverse employment consequence (layoff). However, respondent successfully rebutted any prima facie case by putting forth legitimate business reasons for its layoff decisions. *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 (1973).

Ultimately, complainant failed to prove by preponderant evidence that her layoff was the result of intentional discrimination by respondent on the basis of age, disability or gender. *St. Mary's Honor Center, et al. V. Hicks*, 509 U.S._____, 113 S.Ct. 2742 (1993).

This is not a proper case for the award of attorney fees and costs under §24-50-125.5 of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Respondent's action of laying off complainant was not arbitrary, capricious or contrary to rule or law.
2. Complainant was not discriminated against on the basis of gender, age or disability.
3. The layoff was not retaliation against complainant.
4. Neither party is entitled to an award of attorney fees and costs.

ORDER

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

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

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 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:

Michael O'Malley
Attorney at Law
1444 Stuart Street
Denver, CO 80204

and in the interagency mail, addressed as follows:

Laurence Pendleton
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