

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B067

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROSARIO SCRIP,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,
UNIVERSITY OF COLORADO AT BOULDER,

Respondent.

Hearing was held on November 5 and 6, 1996 before Administrative Law Judge Robert W. Thompson, Jr. Respondent University of Colorado was represented by L. Louise Romero, Senior Associate University Counsel. Complainant appeared and was represented by George A. Johnson, Attorney at Law.

Complainant testified on her own behalf and called as witnesses: Jose Sanchez, Housekeeping Supervisor III; John Clark, Housekeeping Supervisor II; and Tim Shanahan, Rehabilitation Consultant. Shanahan was accepted as an expert in vocational assessment over respondent's objection.

Respondent called as witnesses: Jose Sanchez; John Clark; Carl Jardine, Director for Department of Housing; and Wanda Kucera, Manager for Personnel Payroll, Department of Housing.

Complainant's Exhibits A through K were stipulated into evidence. Exhibit L was admitted without objection. Exhibit M was not admitted. Respondent's Exhibits 1, 2, 3, 5 through 13, 15, 17, 19, 21, 23, 27, 35, 36 and 37 were admitted by stipulation. Exhibit 40 was admitted without objection.

MATTER APPEALED

Complainant appeals an administrative decision to place her on six-months leave without pay and alleges that she was discriminated against on the basis of having a disability. For the reasons set forth below, the action of the respondent is affirmed.

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 having a disability;
3. Whether complainant is entitled to an award of attorney fees and costs.

FACTUAL STIPULATIONS

1. Complainant is a good and valuable employee.
2. Other employees of respondent have been given light duty assignments in certain circumstances.

FINDINGS OF FACT

1. Complainant, Rose Scrip, has been employed by respondent University of Colorado at Boulder since October 1983. Since July 1993 she has served in the capacity of Housekeeping Supervisor I for the Department of Housing.
2. On Saturday, July 24, 1993, Scrip sustained a work-related injury to her right knee. She was examined by Dr. Schlegel at the Wardenburg Student Health Center and was released from work until Monday, July 26. On August 20, 1993, the following work limitations were imposed: no crawling, bending, stooping, climbing; needs assistance when lifting greater than ten pounds and when pushing/pulling greater than 20 pounds; must alternate sitting and standing at least every 90 minutes; no overhead work. (Exhibit B.)
3. On July 12, 1994, Dr. Schlegel reported that Scrip could work eight hours per day with stair-taking limited to six times daily and no kneeling. (Exhibit 35.)
4. On July 13, 1994, Scrip and her immediate supervisor, John Clark, entered into the following written agreement:

I, the Employee, do understand and agree to work within the restrictions placed upon me by my physician, Dr. Schlegel at Wardenburg Health Center. These restrictions are listed on the Employee Disposition Report Form (EDRF), signed by me on 7/12/94 (date EDRF). A copy of the EDRF is attached to this agreement. In the event I find working under the EDRF restrictions is aggravating my condition, I will notify my supervisor immediately.

I, the Supervisor, do understand and agree to allow this employee to work within the restrictions written on the above-mentioned EDRF. In the event that the employee feels well enough to work outside the written work restrictions, I will send the employee back to the Primary Physician at Wardenburg to obtain a new written restriction or a release to full duty prior to allowing the employee to take on more physically demanding duties. In the event the employee states continued work under the EDRF restrictions is aggravating their condition, I will send the employee home and the employee will schedule an appointment with the primary care physician for re-evaluation. (Exhibits G and 36.)

5. The agreement was based upon the restrictions listed in Dr. Schlegel's July 12, 1994

report.

6. Clark developed the above-referenced agreement for use when employees return to work with limitations resulting from an injury. It was not written specifically for Rose Scrip. Clark felt that it was necessary for the employee to monitor her own restrictions and to inform the supervisor if the employee's injury was being aggravated by work.

7. On August 1, 1994, Scrip sustained an off-the-job back injury and was physically unable to work until September 16, 1994, when she returned to work four hours per day.

8. When Scrip returned to work half-time on September 16, the work restrictions for the knee injury remained in effect. Although her job duties were not formally decreased, she was not expected by anyone to do more than four hours of work in a four-hour day. She was never criticized or reprimanded for not getting enough work done.

9. On Friday, October 21, 1994, Scrip reported to Clark that her condition was being aggravated because of excessive walking. A limitation on walking was not one of her work restrictions. Clark conferred with Wanda Kucera, the department's personnel manager, who advised him that Scrip should see a physician because the work restrictions pertaining to her knee might need modification. Clark also believed that the written agreement with Scrip required him to send her home until she could be examined by a physician. Clark did not feel that he had the option of modifying Scrip's work restrictions except upon the advice of a physician. Scrip was thus sent home and advised to schedule a medical appointment. Scrip testified that she had no intention of being relieved of her duties when she went to Clark to discuss her work restrictions.

10. Scrip was paid for injury leave on Monday, October 24. From October 24 through December 1994 she used all of her compensable leave. She received workers' compensation benefits for four hours per day until December 15.

11. By letter dated November 9, 1994, from Kristen Ziliak, Claims Reviewer for the Office of Risk Management, Scrip was advised that, in an effort to clarify her work restrictions and to evaluate her physical capacity for performing the essential functions of her position, she was being scheduled for a Functional Capacity Evaluation (FCE). (Exhibit 5.)

12. The FCE was conducted by Chantal McDonald, M.S., on November 17, 1994. McDonald reported that Scrip complained of pain in her right knee and did not complete all of the evaluation activities. McDonald suggested that Scrip made “submaximal efforts” in performing certain functions and was not fully cooperative. (Exhibits D and 6.)

13. According to the report of Dr. Schlegel, Scrip reached Maximum Medical Improvement with respect to the knee injury on December 16, 1994. The work limitations were listed as occasional crawling, bending, stooping and climbing. Next to the word “occasionally,” which Dr. Schlegel penned in the margin, he wrote, “See Below.” Below, under the category of “Other,” he wrote: “Up to 6 to 7 flights of stairs maximum - up to three times daily -” (Exhibit B.)

14. Joe Sanchez, Housekeeping Supervisor III, is the Director of Housekeeping and Grounds Services. He supervises three Supervisor IIs, including John Clark.

15. Scrip telephoned Sanchez to state her disagreement with the work restrictions imposed by Dr. Schlegel; she felt they were too stringent. Sanchez reviewed Dr. Schlegel’s report and was confused by the word “occasionally” in that it was not clear to him whether it applied solely to stair climbing or included crawling, bending, stooping and climbing. This was significant to him because limited stair climbing could be accommodated by transferring Scrip to buildings with elevators; otherwise, it was a more difficult decision.

16. Sanchez asked Wanda Kucera to obtain clarification from Dr. Schlegel regarding the extent of Scrip’s work restrictions, which she did. Dr. Schlegel responded that the restrictions applied to all of the listed activities.

17. Sanchez advised Kucera that the tasks of bending, stooping, crawling, climbing and lifting were essential to the position of Housekeeping Supervisor I and could not be performed only on an occasional basis without fundamentally changing the nature of the position. Sanchez suggested that a search be conducted to find another position for which Scrip was qualified and able to perform within her work restrictions.

18. Kucera attempted to find another position for Scrip within the Department of Housing but was unsuccessful.

19. Scrip was placed on leave without pay (LWOP) status on January 3, 1995. A formal personnel action was not executed at that time (but was later) because of the expectation that Scrip would return to work during January and Kucera wanted to insure that Scrip would receive a paycheck for that month. As it turned out, she did not return to work until July 3, 1995. She was not compensated during this six-month period.

20. Scrip retained counsel in January 1995, who wrote a letter to Joe Sanchez requesting that Scrip be allowed to return to work full-time and be accommodated by assignment to buildings with elevators and having a lead custodian assigned to assist with her duties. (Exhibits H and 13.)

21. On January 16, 1995, Scrip's attorney wrote a letter to Kristen Ziliak of Risk Management advising Ziliak that he had scheduled a medical evaluation of Scrip for February 22, 1995 and asking that no final decisions be made pending the completion of this evaluation and a report submitted. (Exhibits I and 15.)

22. On February 9, 1995, Wanda Kucera, Joe Sanchez, Kristen Ziliak and Nancy Kornblum, a University attorney, met to discuss Scrip's situation. The group was concerned about McDonald's November 17 evaluation because submaximal efforts could have been a reason for the stringent work restrictions imposed by Dr. Schlegel, who had reviewed McDonald's report.

The decision was made to grant the request of Scrip's attorney to await the results of a second FCE.

23. The second evaluation was conducted by Dr. Christopher Centeno on February 22, 1995, the results of which were received by the agency on March 13.

24. On April 13, 1995, a meeting was held involving Housing Director Carl Jardine, Garnett Tatum of the University's affirmative action office, Kucera, Ziliak, Kornblum, Sanchez, Sanchez's supervisor, and one or two others. The purpose of the meeting was to discuss Scrip's circumstances and arrive at a final resolution. This was not to be. Dr. Centeno's report indicated that the employee could perform her duties with fewer restrictions than Dr. Schlegel had recommended, which the meeting participants viewed as an inconsistency. They felt that more was required of Scrip's job than she had indicated to Dr. Centeno, since she had apparently stated to the doctor that kneeling, crawling and climbing were not a big part of her job. The conclusion was reached that the issue was still confused and confusing with respect to Scrip's work restrictions and that a third evaluation should be done in order to clarify and determine the true limitations, at the University's expense.

25 The third evaluation was conducted on May 17, 1995 by Dr. Franklin Shih, who reported that Scrip was capable of performing all of her job duties with little or no accommodation. Dr. Shih recommended that Scrip be limited to climbing no more than five flights of stairs at any one time.

26. A meeting on Scrip's condition was held on June 20, 1995 and was attended by approximately the same people who attended the April 13 meeting. Sanchez was still concerned about Scrip's ability to climb stairs, so the decision was made to assign her to work in buildings with either an elevator or very few stairs. The other previous work restrictions were no longer a concern. The meeting participants were now satisfied that Scrip could return to work without risk of violating her work restrictions.

27. Scrip returned to work full-time on July 3, 1995. She was assigned to a facility with an elevator and a lead custodian, although she subsequently decided that she did not need a lead custodian. (An earlier hiring freeze had prevented the filling of a lead custodian vacancy.)

28. The policy of the University is to provide employees with thirteen weeks (not twelve) of leave under the Family Medical Leave Act. The policy was not implemented in the case of Rose Scrip, so this leave would still be available for use if Scrip met the necessary requirements. She was placed on LWOP because she had exhausted all compensable leave. The idea of terminating her employment was never considered.

29. Scrip qualified for a six percent workers' compensation disability on the basis of her knee injury.

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.

The Americans With Disabilities Act (ADA) requires state and local governmental entities to make all programs, services and employment accessible to disabled persons. The Act 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 complainant meets her initial burden, 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.____, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

In the present matter, complainant did not establish that she is a person with a disability under the ADA. While she has a record of a knee injury dating to July 1993, she did not establish that this injury rises to the level of an impairment substantially limiting a major life activity. The agency never regarded Scrip as a disabled person. Complainant was perceived as a person with an injury, not a person with a disability.

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. Complainant did not produce sufficient evidence to show this to be the case. See Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), cert. denied, 115 S.Ct. 1104 (1995). Complainant also failed to prove that respondent intentionally discriminated against her on the basis of a disability. St. Mary's Honor Center, supra.

A person who has a disability under workers' compensation law does not necessarily have a disability under the ADA. Nor does the filing of a workers' compensation claim necessarily constitute a record of a disability. An employee with an occupational injury is not automatically regarded as having a disability.

The employer, not the employee, bears the ultimate responsibility for deciding when the employee is ready to return to work. In this context, respondent rightly relied upon medical advice over contrary statements by complainant. The decision makers might be accused of being overly cautious, but the evidence suggests that they were attempting to act in the best interest of the employee by assuring that her work restrictions were clear and understandable in

order to avoid violating the restrictions or aggravating the injury. It is undisputed that Scrip was, and is, a valuable employee. The expectation always was that she would return to full duty, perhaps as early as January 1995.

The fact that an injury or condition can be reasonably accommodated does not lead to the conclusion that an individual is entitled to prevail under the ADA. A physical impairment, by itself, 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 injured on the job unless the employee has a disability pursuant to the ADA.

All of respondent's witnesses testified that they did not regard complainant as having a disability, but rather they were trying to accommodate a work-related injury. Tim Shanahan, who was accepted at hearing as an expert in vocational assessment, offered his view that respondent perceived complainant as having an impairment, yet he testified on cross-examination that he defined disability in the generic sense and not in terms relative to the ADA. Shanahan was not accepted as an expert on the ADA, and his testimony was not persuasive in reaching a conclusion that complainant has a disability as defined by the federal act.

The outcome of this case is the same under state law as it is under 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 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).

Although the standards are less clear under state law than under federal law, it is found that this complainant is not a person with a disability under either statute. The record, as a whole, sustains a conclusion that there is an absence of disability discrimination in this case.

In addition to arguing that she was discriminated against, complainant contends that respondent's action was arbitrary and capricious because she was not given written notice of her appeal rights and the eight-month time period in which she was not allowed to work is unreasonable.

Written notice of appeal rights is not required under these circumstances. Moreover, complainant was afforded full due process at an evidentiary hearing before a neutral third party and, consequently, suffered no unfair prejudice by the lack of written notice.

In the absolute sense, eight months seems like a long time to make a decision. Nevertheless, this is not a case where the agency sat on its hands. Three formal management meetings were held in an attempt to reach a resolution. Housing Director Jardine testified that he personally met with Wanda Kucera seven to ten times regarding Rose Scrip. Complainant, herself, requested a delay in order for a second evaluation to be performed because she disagreed with the original doctor. Then, with the issues still not resolved, it was not unreasonable for the agency to request, and pay for, a third and final functional evaluation. Respondent did not benefit from these delays. The intent was to clarify complainant's work limitations so she could return to work without risk

of aggravating her injury. This is an employer's responsibility. This employer may have chosen to err on the side of caution, but its actions were not without a factual basis.

An award of attorney fees and costs is not warranted under § 24-50-125.5 of the State Personnel System Act or any other statute.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.
2. Complainant was not discriminated against on the basis of having a disability.
3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

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

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

Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of December 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:

George A. Johnson
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and in the interagency mail, addressed as follows:

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