

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 96B116

CCRD Charge No. S96CS004

EEOC Charge No. 32A960509

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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JAMES LEE JOHNSON,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.  
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This matter came on for hearing on April 1, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Mark McKinna and was represented by Assistant Attorney General Thomas S. Parchman. Complainant represented himself.

Respondent's witnesses were Gary Aldredge, Deputy Sheriff for Fremont County, and Mark McKinna, Superintendent, Colorado Territorial Correctional Facility.

Complainant testified on his own behalf and called the following employees of the Department of Corrections: Richard Genck, Robert Eggert, Jr., Wesley Connett, Guy Doubleday.

Respondent's Exhibits 1 through 9 were stipulated into evidence. Respondent objected to certain documents discussed by complainant, but not marked as exhibits, on grounds of absence of notice and hearsay. Respondent's objection to the admission of these documents into evidence was sustained.

**MATTER APPEALED**

Complainant appeals the disciplinary termination of his employment. For the reasons set forth below, respondent's action is affirmed.

## **ISSUES**

1. Whether complainant committed the acts for which discipline was imposed;
2. Whether complainant was discriminated against on the basis of having a disability;
3. Whether complainant was treated differently from similarly situated employees;
4. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
5. Whether respondent is entitled to an award of attorney fees and costs.

## **FINDINGS OF FACT**

1. Complainant James Lee Johnson was employed as a Correctional Officer I by respondent Department of Corrections (DOC) at the Colorado Territorial Correctional Facility (CTCF) for seven years.
2. On February 3, 1996, at around 7:00 p.m., Fremont County Deputy Sheriff Gary Aldredge was dispatched to Johnson's residence on a domestic violence call. It was a cold night; the temperature was below zero.
3. Upon his arrival at the Johnson residence, Deputy Aldredge found Mrs. Johnson lying on the ground just outside of the house. Mrs. Johnson was in a semi-conscious state and had difficulty talking. She was wearing jeans and a t-shirt and did not have shoes on. Her face was swollen, and she exhibited pain.
4. Mrs. Johnson told Aldredge that her husband got drunk and tried to kill her, that he had hit her on the face and head, sat on her and choked her. She thought she had crawled to the location where the deputy found her.
5. Several other officers arrived on the scene. Mrs. Johnson was taken to the hospital by ambulance.
6. Deputy Aldredge also talked to the Johnson's eleven year-old daughter, who came walking across the yard toward him. She had been in the shower, and her hair was frozen. The daughter stated

that her parents had gotten into a fight, and that her dad had grabbed her by the shirt and pushed her against the wall.

7. Johnson, who remained in the house, agreed to talk to Sgt. Adler, who was let into the house for about an hour.

8. Sgt. Adler returned and reported to Deputy Aldredge that Johnson appeared to be intoxicated, was waiving a revolver around and pointed a shotgun at him. Adler told Aldredge to leave the scene because Johnson had asked if he was there and threatened to kill him.

9. Several shots were fired, apparently by Johnson. The area was cleared to prevent anyone from getting hurt. Sixteen or seventeen hours later, Johnson gave himself up to the sheriff and was taken to jail. The incident was covered by the local news media.

10. On the evening of his arrest, February 4, Johnson was visited in jail by his DOC chain of command: Sgt. Wesley Connet, Lt. Guy Doubleday and Capt. Joe Giganti. Johnson told them that he would not be able to come to work for awhile and requested sick leave. They basically agreed to not worry about the leave issue for the moment. They were there to provide moral support, according to Doubleday. Johnson was left with the impression that he would be allowed to use sick leave for his time spent in jail. No formal leave request was ever submitted or approved.

11. Johnson was charged with committing two felonies and three misdemeanors: second degree assault, felony menacing, prohibited use of a weapon, reckless endangerment, and child abuse. He was held by Fremont County on a \$200,000 bond.

12. Capt. Giganti advised CTCF Superintendent Mark McKinna of Johnson's arrest and that Johnson was being held in jail on a large bond and was unable to report to work. McKinna then contacted the DOC criminal investigations unit to request copies of all police reports filed in the case together with a synopsis of events. Investigator William Bell subsequently provided McKinna with a report. (Exhibit 5.)

13. In his capacity as the delegated appointing authority, McKinna notified Johnson on February 7 that a Rule R8-3-3 meeting would be held at the jail on February 12.

14. The R8-3-3 meeting was held on February 12, 1996 at the Fremont County Detention Center. In attendance were the complainant, his attorney Jeff Manning, McKinna and Giganti.

Johnson did not comment on the incident of February 3 on the advice of his attorney. Manning stated that Johnson had no recall of the incident and consequently could not rebut any of the accusations against him.

15. At the R8-3-3 meeting, Johnson asked to use sick leave to cover his absence from work. McKinna responded that this would not be a proper use of sick leave because confinement in jail did not constitute an illness or injury. Johnson next requested the use of annual and holiday leave, which was granted by McKinna until such leave was exhausted on February 13.

16. Following a review of the investigative and police reports and Johnson's past performance appraisals, McKinna decided to take immediate disciplinary action based upon the egregiousness of the alleged conduct, which McKinna believed to be true, and because Johnson had exhausted his leave and was still unable to report to duty. He concluded that Johnson had violated the DOC Staff Code of Conduct, Administrative Regulation 1450-32, which requires staff members to conduct themselves on and off duty in a manner that will not bring discredit or criticism to DOC and to avoid any on or off duty conduct that might compromise the integrity of, or undercut the public confidence in, DOC. (Exhibit 8.)

17. By letter dated February 14, 1996, McKinna terminated Johnson's employment for "failure to comply with standards of efficient service or competence" and for "willful failure or inability to perform duties assigned." (Exhibit 4.)

18. Johnson testified at hearing that he experienced severe headaches when he left work on February 3, 1996, that beer alleviated the pain, that he suffered a head injury at work about a year earlier and was under a doctor's care, and that he has suffered from post traumatic stress disorder (PTSD) since the Vietnam War. He could not say anything at the R8-3-3 meeting because his statements might be held against him and because he could not remember what happened.

19. Johnson has never requested job accommodations due to any medical condition. His personnel file does not reflect that his job performance was adversely affected by a medical condition.

20. In 1996, a DOC lieutenant received a deferred judgment on a misdemeanor charge of menacing. No gun shots were fired in that incident, and there was not a direct confrontation with police. He is still employed by DOC.

21. Richard Genck, a fifteen-year DOC correctional officer, was once arrested for driving while his ability was impaired by alcohol (DWAI). He also served 90 days in jail after pleading guilty to misdemeanor harassment. He served the jail sentence on his days off and was able to work his regular shift as well as overtime.

22. Johnson was arraigned on the criminal charges on February 16, 1996. On July 3, 1996, he entered a plea of guilty to the charge of menacing, a class 5 felony. All other charges were dismissed pursuant to a plea agreement.

23. A felony conviction undercuts a correctional officer's authority vis-a-vis inmates and is a disqualifier from employment with the Department of Corrections.

24. James Lee Johnson filed a timely appeal of his disciplinary termination on February 22, 1996.

#### **DISCUSSION**

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions upon 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).

Respondent asserts that complainant was dismissed for the reasons of his egregious conduct of February 3, 1996 and his inability to report for work. Respondent contends that complainant's alleged disability was not a factor in any decision made by the appointing authority and that there is no competent evidence that complainant is a person with a disability entitled to protection under the Americans with Disabilities Act (ADA). Additionally, respondent submits that the doctrine of after acquired evidence sustains a disciplinary termination because complainant would have been dismissed upon his felony conviction of July 3, 1996.

Although he testified to a lack of memory, complainant denies beating his wife and asserts that the newspaper "blew everything out of proportion." He points out that he has never been late for work and has never had any problems on the job. He alleges that the appointing authority failed to investigate the subject incident, apparently on the basis that he was dismissed from employment prior to his arraignment on the criminal charges. Complainant seems also to be contending that he should have been

granted sick leave because he has a disability, either a previous head injury or PTSD or both.

Substantial evidence supports the conclusions of the appointing authority. Complainant's conduct was so flagrant and serious as to warrant immediate disciplinary action under DOC Administrative Regulation 1450-32 and Board Rule R8-3-3(C)(1), 4 Code Colo. Reg. 801-1.

The denial of sick leave was an act within the discretion of the appointing authority and was not an abuse of that discretion. Nor was it an abuse of discretion for the appointing authority to conclude that complainant was unable to perform his duties. Rule R8-3-3(C)(3), 4 Code Colo. Reg. 801-1. No evidence was presented to suggest that the appointing authority had reason to believe that complainant would be out of jail and available for work in the near future. An appointing authority has the discretion to grant or deny leave without pay when compensable leave is exhausted.

In an effort to show that he was treated differently from similarly situated employees, complainant proffered evidence of two other DOC employees who committed crimes but were not terminated from employment. Yet neither of the other employees was convicted of a felony, both were able to attend work and, based upon the evidence, the acts of the other two were far less severe than the conduct of this complainant. Thus, the other employees were not similarly situated.

Complainant failed to present sufficient evidence to demonstrate that he is a person with a disability under the ADA, *i.e.*, 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). He failed to present persuasive evidence that he is a person entitled to protection pursuant to the ADA under the circumstances of this case or that any decision of the appointing authority was made improperly on the basis of disability.

The after acquired evidence doctrine may bar reinstatement and/or may reduce and limit damages. *Weissman v. Crawford Rehab. Services, Inc.*, 914 P.2d 380 (Colo. App. 1995), *cert. granted* (1996). Proving that the same termination decision would have been justified is not the same as proving that the same termination decision would have been made. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. \_\_\_\_ , 115 S.Ct. 879 (1995).

There is substantial evidence in this record to conclude that

James Lee Johnson would have been dismissed under Board Rule R8-3-3(C)(4), 4 Code Colo. Reg. 801-1, following his felony conviction of July 3, 1996, and that the disciplinary termination would have been upheld on appeal. Thus, if respondent's termination action of February 14, 1996 were overturned, complainant would be entitled to reinstatement only to the date of his felony conviction. However, it is found that there was just cause for the present disciplinary action, and that dismissal was within the realm of alternatives available to the appointing authority.

C.R.S. §24-50-125.5 of the State Personnel System Act mandates an award of attorney fees and costs only if the personnel action or defense thereof was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. Substantial evidence does not support such a finding in this case. See Order of the State Personnel Board, *Sena v. Department of Institutions*, Case No. 93B029 (May 20, 1994).

#### CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed.
2. Complainant was not discriminated against on the basis of having a disability.
3. Complainant was not treated differently from similarly situated employees.
4. The discipline imposed was within the range of alternatives available to the appointing authority.
5. Respondent is not 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  
May, 1997, at  
Denver, Colorado.

\_\_\_\_\_  
Robert W. Thompson, Jr.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the \_\_\_\_ day of May, 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:

James Lee Johnson  
5000 County Road 28  
Cotopaxi, CO 81223

and in the interagency mail, addressed as follows:

Thomas S. Parchman  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203

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