

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 96B185C

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GERALDINE J. SOTELO,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
STATE BOARD FOR COMMUNITY COLLEGES AND OCCUPATIONAL EDUCATION,
FRONT RANGE COMMUNITY COLLEGE,

Respondent.

The hearing in this matter was held on June 26, 1997, before Administrative Law Judge Margot W. Jones. Complainant, Geraldine J. Sotelo, appeared at the hearing *pro se*. Respondent appeared at hearing through Robin Rossenfeld, Assistant Attorney General.

Complainant testified in her own behalf and called no other witnesses to testify at hearing. Respondent did not call witnesses to testify at hearing.

Complainant's exhibits A through C were admitted into evidence without objection. Respondent's exhibits 2, 20 through 25, 27 through 29, 36 through 38, 40 through 43, and 46 through 50 were admitted into evidence without objection. Respondent's exhibit 26 was admitted into evidence over objection.

MATTER APPEALED

Cases numbered 96B185 and 96G072 were consolidated for the purposes of hearing. Case number 96B185 pertains to Complainant's appeal of Respondent's decision to terminate her employment under Director's Procedure, P7-2-5. Complainant contends that her separation from employment was arbitrary, capricious, and contrary to rule or law.

Complainant alleges discrimination on the basis of race and disability. Complainant also alleges that she was retaliated against for a previously filed grievance alleging discrimination.

Case number 96G072 pertains to Complainant's appeal of a Step 4 grievance decision. She alleges discrimination based on race and disability.

ISSUES

The following issues were raised in this appeal:

1. whether the decision to terminate Complainant's employment under P7-2-5 was arbitrary, capricious, or contrary to rule or law;
2. whether Complainant was separated from employment under P7-2-5 in retaliation for filing a grievance alleging discrimination; and
3. whether Complainant was discriminated against on the basis of her race or disability.

PRELIMINARY MATTERS

Complainant had the burden of proof and the burden of going forward in this matter to establish that Respondent's action was arbitrary, capricious, or contrary to rule or law. At the conclusion of Complainant's case, Respondent moved to dismiss on the grounds that Complainant failed to sustain her burden of proof. Respondent's motion was granted.

FINDINGS OF FACT

1. Complainant, Geraldine Sotelo (Sotelo), began her employment with Front Range Community College (the College) in 1977 as a work study student employee. She was appointed to a position in the classified service at the College in July, 1980. She performed duties as an Administrative Clerk working in the Financial Aide Office. On May 29, 1996, when Sotelo was separated from employment, she was classified as an Accounting Technician III. Sotelo is a Hispanic female who is over 40 years of age.
2. In September, 1993, Sotelo was moved from the Accounting Office to the Fiscal Affairs Office. Sotelo was assigned to supervise Accounts Payable in the Fiscal Affairs Office. Sotelo supervised three Accounting Technicians.
3. In or around September, 1994, all the positions at the College were audited by the Department of Personnel. The audit report reflected that Sotelo's position was properly classified as an Accounting Technician IV. Following receipt of the audit results for Sotelo's position, her supervisor, Mike Kupcho, removed her supervisory duties and make Sotelo a lead worker. This resulted in Sotelo's position remaining at the Accounting Technician III level. Sotelo did not grieve this action.

4. At some time following the 1994 audit of positions at the College, Mike Kupcho assigned duties to other female employees which at some point resulted in the upgrade of their positions from Accounting Technician I to Accounting Technician II and Accounting Technician II to Accounting Technician III.

5. After the September, 1994, position audits, Sotelo was assigned duties involving the preparation of the payroll for the College. The College has campuses located in Boulder, Fort Collins, Longmont, and Westminster. Sotelo was asked to perform this task with the assistance of Anita Romero, who during this period, was Sotelo's immediate supervisor.

6. Sotelo felt overworked and undertrained in this position. On occasion when Sotelo sought help from her supervisor with the payroll, Anita Romero took the work from Sotelo and completed it at home in the evening, she referred Sotelo for assistance to a co-worker, Ms. Lankford, who was previously assigned to do payroll, or she directed Sotelo to research her questions and find the answers herself.

7. On occasion, Mike Kupcho addressed Sotelo in a harsh tone of voice and with impolite words. Sotelo did not believe that she had anyone at the College with whom she could discuss Kupcho's treatment of her.

8. Employees in Sotelo's office frequently brought their children to work. The presence of the children created a disruption in the work place. The policy pertaining to bringing children to work was unclear at the College. Sotelo brought her son and his friend to work. Sotelo was advised that she was not permitted to bring children to work.

9. In or around the latter part of 1995, Sotelo took funeral leave due to the death of her mother and mother in law. On October 12, 1995, she took leave due to carpal tunnel syndrome which resulted in her inability to perform her job duties.

10. On October 20, 1995, Sotelo filed a grievance alleging race and disability discrimination. A committee of three employees from the College was formed to consider Sotelo's grievance. On December 18, 1995, the grievance committee rendered its findings that Sotelo's concerns merited consideration, but that there was no evidence of discrimination based on race or disability.

11. On January 2, 1996, Sotelo underwent surgery on her hand for carpal tunnel. Sotelo's physician directed her to remain off work

following the surgery because she was not able to perform her job duties.

12. Sotelo was dissatisfied with the committee's findings and proceeded to Step 4 of the grievance process. A meeting was held with the College's President, Tom Gonzales, on January 5, 1996, to consider Sotelo's Step 4 grievance. At Step 4, President Gonzales accepted the findings and recommendation of the grievance committee. After talking with Sotelo and the managers against whom she filed the grievance, reviewing the audio tapes of the grievance committee's interviews and reviewing the parties' position statements, President Gonzales concluded that there was no evidence of discrimination. He concluded that Sotelo's assignment in the payroll office was not in her best interest or the College's. He advised her that when she recovered from "wrist surgery" he would consider a job transfer "consistent with ADA requirements".

13. On April 16, 1996, Sotelo underwent another surgery on her hand for carpal tunnel. Dr. Parks, the physician who performed the hand surgeries, reported on April 23, 1996, that Sotelo could not use her left hand and had limited use of her right hand. With regard to Sotelo's right hand, the doctor reported that she could perform no repetitive motions and could not lift more than 5 pounds. The doctor indicated that she should continue therapy and medication.

14. On April 25, 1996, Sotelo was examined by another physician at the Medical Centers of Colorado. A report was prepared and made available to the College. This report reflected that she had no use of her left hand and that she could report for work on restricted duty on April 25, 1996. Sotelo did not report for work on this date.

15. On May 6, 1996, Dr. Parks reported that Sotelo could not use her "left upper extremity" and had restricted use of her right hand. Dr. Parks referred to his April 23, 1996, report for Sotelo's work restrictions.

16. On May 7, 1996, Dr. Parks released Sotelo to return to work. Sotelo did not report for work on this date. On May 10, 1996, the College advised Sotelo that it received information from Dr. Parks that Sotelo could return to work. Sotelo was asked to advise the College what accommodation it could make in light of her carpal tunnel. The College asked Sotelo to review her position description with the doctor to determine whether there was an accommodation which could be made.

17. On May 16, 1996, Dr. Parks reported that Sotelo was unable to resume her regular job in payroll. Dr. Parks did not indicate any accommodation which could be made for Sotelo.

18. On May 22, 1996, after being off work on leave since October, 1995, Sotelo received notice from the College that she would exhaust all available leave on June 12, 1996. Sotelo was advised that she could elect to resign or be terminated under the provisions of Director's Procedure, P7-2-5. Sotelo elected to be terminated. Her termination was effective May 29, 1996. Sotelo was compensated for the remainder of her accrued leave which covered a two week period from May 29, to June 12, 1996.

19. Following receipt of the College's May 22, 1996, letter, Sotelo reported to the College for work. However, she could not return to her previously held position in payroll and she failed to identify any other position for which she was qualified in which she could perform the duties with or without accommodation.

20. Sotelo received worker's compensation benefits due to carpal tunnel and she receives worker's compensation benefits due to psychological problems. She also receives full PERA disability retirement benefits. Sotelo reached maximum medical improvement on June 12, 1997. Her physician reported that she had 9% disability in one hand and 6% disability in the other hand. Since reaching maximum medical improvement, Sotelo has not advised the College that she is prepared to return to work.

DISCUSSION

Complainant contends that she was discriminated against on the basis of her race and disability in connection with the terms and conditions of her employment, the assignment of duties, and the opportunities for advancement and training. She further contends that because she filed a grievance alleging discrimination in 1995, she was retaliated against in 1996, when she was separate from employment under the provisions of P7-2-5. Complainant alleges that the agency's decision to terminate her employment when she exhausted all available leave and was not able to return to work due to carpal tunnel syndrome in May, 1996, was discriminatory on the basis of race and disability. Complainant alleges that the agency should have accommodated her. Complainant further alleges that it was an abuse of discretion to terminate her employment under P7-2-5. Complainant contends that she should have been placed on leave without pay.

At the conclusion of Complainant's case in chief, Respondent moved to dismiss the appeal on the grounds that Complainant failed to

establish discrimination based on race or disability. Respondent further argued that Complainant failed to establish that her separation from employment under P7-2-5 was arbitrary, capricious, or contrary to rule or law. Respondent's motion was granted.

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 to be 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 race or 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 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 need not eliminate or reallocate essential job functions in order to accommodate an employee. *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).

Complainant failed to establish a *prima facie* case. She presented no evidence that she is a qualified individual with a disability. On May 22, 1996, the date the College advised Complainant of its plan to separate her from employment upon her exhaustion of all accrued leave, Complainant's physician released her to return to work, but she could not perform essential functions of the Accounting Technician III position with or without accommodation. She failed to identify another position for which she was qualified which was vacant at the College to which she could be appointed as an accommodation. Complainant's evidence at hearing was that the College accommodated everyone else and she wanted them to figure out a way to accommodate her too.

Complainant alleges retaliation for filing a grievance alleging discrimination in 1995. In order to establish retaliation, Complainant must first establish a *prima facie* case. To do so, Complainant must show that she was engaged in a protected activity, that she suffered an adverse employment action, and that there is a causal connection between the protected activity and the adverse action. *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170 (10th Cir. 1996); *Meredith v. Beech Aircraft Corp.* 18 F.3d 890,896 (10th Cir. 1994); See, *McDonnell Douglas Corp. v. Green*, *supra*.

Complainant failed to establish this connection. Complainant's grievance alleging discrimination was addressed thoroughly by a grievance committee at Step 2 and by the College's president at Step 4. Subsequently, after Complainant was absent from her position for approximately eight months and had exhausted all accrued leave, she was terminate.

Circumstantial evidence may be adequate to establish a *prima facie* case of retaliation. *Dey v. Colt Const. & Development Co.*, 28 F.3d 1446,1458 (7th Cir. 1994). Circumstantial evidence of the causal connection between the protected activity and the adverse employment action may be inferred where a short period of time has elapsed between the protected activity and the adverse employment

action. *Ramirez v. Oklahoma Department of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994); *Smith v. Maschner*, 899 F.2d 940, 948-49 (10th Cir. 1990). Where the causal connection cannot be inferred, such as in a case where a substantial amount of time has expired between the protected activity and the adverse employment action, the causal connection must be established through direct evidence.

Although the question whether an employee has presented direct evidence is not always entirely clear, direct evidence relates to actions or statements of an employer reflecting a retaliatory attitude correlating to the retaliation complained of by the employee. *Dunning v. National Industries, Inc.* 720 F. Supp. 924, 929 (M.D. Ala. 1989). Complainant presented no direct evidence that the College's action was retaliatory. During the Step 4 grievance response, the College's president evidenced a willingness to work with Complainant to permit her to transfer her to a more suitable position within the College upon her return to work.

In connection with the allegations contained in Complainant's grievance concerning the terms and conditions of her employment, she alleges discrimination based on race. Policy 11-1, 4 Code Colo. Reg. 801-1, prohibits discrimination. It provides:

Discrimination Prohibited. Discrimination for or against any person is prohibited, except for bona fide occupational reasons, in recruitment, examination, hiring, classification and compensation, training, promotion, retention, assignment of duties, granting of rights and benefits, or any other personnel action because of race, creed, color, sex (including sexual harassment), sexual orientation, national origin or ancestry,

Complainant bears the burden of proof to establish a *prima facie* case of race discrimination. A *prima facie* case of employment discrimination is established through the following facts: 1) that the Complainant belongs to a protected class; 2) that she was qualified for and applied for a position for which the agency was seeking applicants; 3) that Complainant was rejected for the position; 4) that the agency filled the position with an applicant not a member of the protected group. *McDonnell Douglas Corp. v. Green, supra*.

Complainant made vague and sweeping allegations of discrimination based on race. She also attempted at hearing to raise claims related to age discrimination. Complainant presented no evidence that employees under the age of 40 were given preferential treatment. She alleged that "white females" were preferred by Mike Kupcho over herself. However, the allegations were stated in vague terms concerning employees' opportunities to bring their children to work and with regard to an agency wide job classification review. Without specificity, Complainant contended that her position was sustained at the Accounting Technician III position,

while "white females" were given additional duties and upgraded. It was not possible to determine from Complainant's testimony where the "white females" worked within the agency, what duties they performed, when they were assigned additional duties, and who their supervisors were such that a comparison could be made.

Finally, the decision to terminate Complainant when she exhausted all leave and could not return to work to perform her job duties was not arbitrary or capricious action. Complainant had been absent from work for approximately eight months. Certainly, the College could have elected to place Complainant on leave without pay and hold her position open. However, the failure to elect this option was not in and of itself evidence of illegal action.

CONCLUSIONS OF LAW

1. Complainant failed to establish that her separation from employment under Director's Procedure, P7-2-5, was arbitrary, capricious, or contrary to rule or law.
2. Complainant failed to establish that any adverse employment action was taken against her for the filing of a grievance alleging discrimination.
3. Complainant failed to present evidence that she was discriminated against on the basis of race or disability.

ORDER

The action of the agency is affirmed. The appeal is dismissed with prejudice.

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

Margot W. Jones
Administrative Law Judge

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 fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). 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.

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 ½ 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.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of July, 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:

Geraldine J. Sotelo
8951 Hickory Place
Thornton, CO 80229

and to the respondent's representative in the interagency mail, addressed as follows:

Robin Rossenfeld
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203
