

**STATE PERSONNEL BOARD, STATE OF COLORADO**

Case No. 97B121

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**  
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BENJAMIN ALIRES,

Complainant,

vs.

DEPARTMENT OF REVENUE,  
MOTOR VEHICLE DIVISION,

Respondent.

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Hearing was held on October 23-24, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Mark W. Gerganoff, Assistant Attorney General. Complainant appeared and was represented by Terry E. Lopez-Guzman, Attorney at Law.

Respondent called the following witnesses: Patricia Morrison, Driver's License Examiner; Patricia Danelek, Administrative Clerk; Rod Ruder, Driver's License Office Manager; Hal Rowe, Assistant Driver's License Office Manager; and John Duncan, Deputy Director, Department of Revenue Motor Vehicles Division.

Complainant testified on his own behalf and called the following other witnesses: Jose Medina, Driver's License Examiner; James Gregory, Driver's License Examiner; and Edward Kramer, Warehouseman.

Respondent's Exhibits 5, 6, 7 and Complainant's Exhibits A through K were stipulated into evidence. Respondent's Exhibits 4A, 4B and 4D were admitted without objection. Exhibits 1, 2, 3 and 4C were admitted over objection.

**MATTER APPEALED**

Complainant appeals a corrective action and a 30-day disciplinary suspension.

**ISSUES**

1. Whether complainant committed the acts for which respondent imposed a corrective action and a disciplinary action;

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2. Whether respondent acted arbitrarily, capriciously or contrary to rule or law;

3. Whether the disciplinary action was retaliation for the filing of a grievance;

4. Whether either party is entitled to an award of attorney fees and costs.

#### **PRELIMINARY MATTERS**

The parties agreed that the corrective action and the disciplinary action are both at issue.

The witnesses were sequestered with the exception of complainant and respondent's advisory witness, John Duncan.

#### **FINDINGS OF FACT**

1. Complainant Benjamin Alires is a Driver's License Examiner at the Aurora Driver's License Office of the Division of Motor Vehicles (DMV) within the Department of Revenue. All of the events that led to a corrective action and a disciplinary suspension took place while he was employed in the same capacity at the Thornton Driver's License Office.

2. On September 30, 1996, after asking several times if they could talk, Alires moved close to Patricia Morrison, another examiner, and asked in a soft voice, "Do you know you're good?" Several minutes later, Alires again moved close to Morrison and asked quietly, "Do you know you're real good?", rubbing against her shoulder. Morrison took these remarks to be sexual in nature.

3. On October 3, 1996, Alires brushed against Morrison's shoulder, put his arm around her and asked what she was doing. She moved out from under his arm and walked away.

4. Feeling that this type of behavior was inappropriate, and having told Alires several times in the past to not get close to her, Morrison reported the incidents to Hal Rowe, her immediate supervisor and the assistant office manager, and Rod Ruder, the office manager, whom she saw in the office together. They told her to put it in writing, which she did. (Exhibit 4A.)

5. Morrison began keeping an eye on Alires in an effort to avoid being in the same area.

6. In early October 1996, on two separate days, Alires put his hand on top of that of Patricia Danelek, an administrative clerk, whose hand was resting on the counter. He simultaneously looked at her. Made to feel uncomfortable, Danelek immediately pulled her hand away.

7. Danelek experienced uneasiness around Alires before on several occasions when he would stand very close to her or try to rub against her. She began trying to avoid him and would walk away when she saw him nearby. She was reluctant to come forward with a complaint because she did not want to cause trouble and did not think that it would do any good.

8. Because Morrison had told him that other women also felt uncomfortable around Alires, Ruder called in three others to ask if they were being caused any discomfort by anyone. Danelek responded in the affirmative, naming Alires. At Ruder's request, she wrote a statement. (Exhibit 4B.)

9. Ruder was particularly concerned over the allegations of sexual harassment against Alires because of an incident on August 14, 1996, in which Alires told a seventeen year-old female driver's license applicant to, "Say herpes," when having her picture taken.

10. John Duncan, as the DMV deputy director and delegated appointing authority for personnel matters, held a predisciplinary meeting with Alires on December 3, 1996 regarding the Morrison and Danelek complaints as well as the customer complaint about the "herpes" statement. (Exhibit B.) Alires, who was accompanied by an attorney, denied all allegations and asserted that they were totally fabricated.

11. DMV maintains a written policy prohibiting sexual harassment, which defines sexual harassment to include sexually oriented verbal kidding or abuse, subtle pressure for sexual activity and physical contact such as patting, pinching or brushing against another's body. (Exhibit A.) Duncan provided a copy of the policy to Alires, who was aware of its existence. Alires had attended a mandatory training session on sexual harassment in 1995.

12. Duncan concluded that Alires had violated the agency's policy against sexual harassment and imposed the following six-month corrective action on January 6, 1997:

- a. You will not rub against or touch other employees or customers in any manner.
- b. You will refrain from non-business comments which

could be construed as hostile or sexually harassing.

c. You will attend at least one counseling session with Mr. Ed Kraft of the Colorado Employees Assistance Program. The agenda of the session will be to discuss the perceptions of your actions by others and topics which Mr. Kraft feels appropriate. It is your responsibility to make an appointment and meet with Mr. Kraft.

d. You will conduct your business conversations at a comfortable distance of approximately three feet when conducting business with co-workers and customers.

e. You will report to your supervisor any incident that could lead to a complaint about you of improper conduct either by co-workers or the public.

f. You will conduct yourself and your business in the most professional manner possible with the public and your fellow workers. Retaliation or confrontation with the complainants will be a violation of this provision.

(Exhibit G.)

13. Alires filed a formal grievance of the corrective action. By the time a Step 4 decision was issued, Alires had appealed the imposition of discipline for a violation of the corrective action. He incorporated his disagreement with the corrective action into his appeal of the disciplinary action.

14. On or about January 22, 1997, Denae Turner, a recently hired security guard, went to the office of Hal Rowe to register a complaint about the behavior of a co-worker, Alires. Turner stated that Alires engaged her in a conversation in the break room in which Alires made personal inquires, approximated by Turner in a subsequent written statement to be as follows:

- a. Hi. What's your name?
- b. Are you married?
- c. How old are you?
- d. Do you have any kids?
- e. How many kids do you have?

f. Are you very married?

(Exhibit 5.)

15. Turner appeared offended by the questions, feeling that they were unduly personal and inappropriate in the workplace.

16. Rowe faxed the information of the event to the agency's administrative office. He left a corresponding message for Rod Ruder. This being a Saturday, Rowe was not scheduled to work on the following Monday.

17. John Duncan was furnished a copy of Turner's written statement in February. He met with Turner to discuss her allegations in detail. Turner expressed her belief that the inquiries from Alires were sexual in nature. She claimed to have told Alires that she did not want to have the conversation.

18. Duncan believed that Turner found the conduct of Alires offensive. He scheduled a second predisciplinary meeting.

19. The second predisciplinary meeting was held on February 21, 1997. Alires stated that his conversation with Turner was a casual one and denied asking family-oriented questions.

20. Duncan concluded that Alires had violated the terms of the corrective action, as well as the agency's policy against sexual harassment, by creating a hostile work environment.

21. On February 22, 1997, Duncan imposed upon Alires a 30-day disciplinary suspension. (Exhibit H.)

22. Complainant filed a timely appeal of the disciplinary action.

## DISCUSSION

### A.

In a disciplinary proceeding, the burden is on respondent to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). It is for the administrative law judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Complainant asserts that he complied with the corrective action and that the corrective action should be rescinded in any event because the Step 4 response to his grievance was not timely. He further submits that his rights were violated when the investigation into his activities was begun without his knowledge. He denies all allegations of misconduct and alleges that the disciplinary action was retaliation for his filing a grievance of the corrective action. Finally, complainant submits that the disciplinary action should be rescinded on grounds that Denae Turner, the complaining party, did not testify at hearing.

This case involves hostile environment sexual harassment. A hostile environment case exists where a reasonable person would find the environment hostile or abusive, and the harassed party found the environment to be so. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). An employer is liable for hostile work environment sexual harassment if the employer knew or should have known of the harassment and failed to take prompt, remedial action. *Steiner v. Showboat Operating Co.*, 25 F.2d 1459 (9th Cir. 1994). The U. S. Court of Appeals for the Tenth Circuit has held that sexual harassment lawsuits against individuals will be construed as a suit against the employer, not the individual. *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993).<sup>1</sup>

For the determination of sexual harassment, State Personnel Board Rule 11-1-3(B), 4 Code Colo. Reg. 801-1, provides:

In determining whether alleged conduct constitutes sexual harassment, the board will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

There is record support for the appointing authority's determination that complainant's conduct towards Patricia Morrison and Patricia Danelek violated the agency's written sexual harassment policy. The conduct was unwelcome, sexually oriented and offensive, resulting in the women feeling uncomfortable and in creating a hostile work environment. Both witnesses gave testimony that was reasonable, heartfelt and internally and externally

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<sup>1</sup> On November 14, 1997, the U. S. Supreme Court granted *certiorari* in a case to decide when companies or other employers can be held liable for workplace sexual harassment perpetrated by one of their employees.

consistent. Their supervisor would have been remiss in his duties if he had ignored the complaints.

The corrective action was appropriate in all respects. Complainant was specifically put on notice that his behavior was under scrutiny. He knew or should have known that some women found his behavior offensive, even if he did not think so himself.

The significance of the incident with Denae Turner is that it violated the extant corrective action, particularly the provision instructing complainant to refrain from non-business comments that could be construed as hostile or sexually harassing. In the absence of the corrective action, the conduct would not have warranted discipline. But given the existing scenario, the need to guard against such conduct should have been at the forefront of complainant's mind.

In view of the evidence in its entirety, I find that complainant's questions of Turner were not innocent chit-chat, but rather contained a sexually oriented intent. They were offensive and unwelcome. Complainant was not uninformed; he had been thoroughly advised of the elements and nature of sexual harassment and was expected to demonstrate his awareness.

B.

Respondent subpoenaed Turner to appear and give testimony on the first day of hearing, placing her under a legal obligation. She failed to appear. Upon her absence, respondent moved for a continuance of the hearing in order to seek enforcement of the subpoena in the district court. The motion was granted. On the second day of hearing, counsel for respondent represented that he had talked to Turner and she explained her reasons for not appearing. He then waived her appearance.

Turner endured detailed questioning by her supervisor and the appointing authority, both of whom testified at hearing and were subject to cross-examination. She gave a signed, written statement. She was a recent hire who had no prior knowledge of complainant. She was a disinterested witness. No motive for fabrication was suggested. Complainant had access to Turner's statement and an opportunity to subpoena the declarant. Under these circumstances, the evidence was admissible. *Industrial Claim Appeals Office v. Flower Stop Marketing Corp.*, 782 P.2d 13 (Colo. 1989). See also *Colorado Department of Revenue v. Kirke*, 743 P.2d 16 (Colo. 1987) (hearsay evidence may be the sole evidence relied on by the trier of fact).

C.

The agency's sexual harassment policy requires that an investigation commence within 30 days of allegations being made. This was done. Neither the policy nor constitutional due process mandate that the accused be notified that an investigation will be undertaken.

Complainant's argument that the corrective action should be rescinded as an outcome of the untimeliness of the written responses to his grievance is without merit, especially in light of testimony that the time frames were mutually waived.

There was no evidence to bolster complainant's theory that the disciplinary action was mere retaliation for the filing of a grievance. This argument is a grasp at a straw in the wind.

D.

Complainant has a constitutional right to an evidentiary hearing to make respondent prove just cause for the discipline. § 24-50-125.5 of the State Personnel System Act does not automatically award attorney fees and costs to the prevailing party. As the Board ruled, "To read section 125.5 as a prevailing party statute is incorrect. Such a reading would unduly inhibit disciplined employees from asserting a constitutional right." *Sena v. Department of Institutions*, Case No. 93B029, Order of the State Personnel Board, May 20, 1994.

#### CONCLUSIONS OF LAW

1. Complainant committed the acts for which respondent imposed a corrective action and a disciplinary action.

2. Respondent did not act arbitrarily, capriciously or contrary to rule or law.

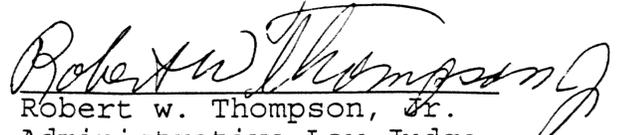
3. The disciplinary action was not retaliation for the filing of a grievance.

4. Neither party is entitled to an award of attorney fees and costs.

**ORDER**

Respondent's actions are affirmed. Complainant's appeal is dismissed with prejudice.

DATED this 8<sup>th</sup> day of  
December, 1997, at  
Denver, Colorado.

  
Robert w. Thompson, Jr.  
Administrative Law Judge

**CERTIFICATE OF MAILING**

This is to certify that on the 8<sup>th</sup> day of December, 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:

Terry E. Lopez-Guzman  
Attorney at Law  
2675 West 38th Avenue  
Denver, CO 80211-2103

and in the interagency mail, addressed as follows:

Mark W. Gerganoff  
Assistant Attorney General  
State Services Section  
1525 Sherman Street, 5th Floor  
Denver, CO 80203



## 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 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.