

State Personnel Board, State of Colorado

Case No. 98 B 131

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**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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PEARL CARLIS,

Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, WHEAT RIDGE REGIONAL CENTER,

Respondent.

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Hearing was held on April 16, 1999 before administrative law judge G. Charles Robertson at 1525 Sherman Street, Room B-65, Denver, CO 80203.

**MATTER APPEALED**

Complainant appeals her administrative termination, pursuant to Director's Procedure P7-2-5(D)(3)(c), by Respondent and claims that such action was arbitrary and capricious and discriminatory based on disability.

The action of Respondent is upheld.

**PRELIMINARY MATTERS**

Respondent, Dept. of Human Services, Wheat Ridge Regional Center ("Respondent" or "Ridge") was represented by Stacy Worthington, Assistant Attorney General. Complainant represented herself *pro se*.

**1. Motion to Amend Complainant's Notice of Appeal and Respondent's Motion for Reconsideration.**

Complainant moved to amend her Notice of Appeal ("Complainant's Motion") to include discrimination based on race via correspondence to the Board dated July 21, 1998. On August 12, 1998, the administrative law judge granted Complainant's Motion.

At the time of hearing, Respondent moved for reconsideration of the August 12, 1999 order arguing that the Board was without jurisdiction to allow the Notice of Appeal to be amended. Respondent's argument cited *Gigax v. State Personnel Board*, 632 P.2d 630 (Colo. App. 1981) and *Cunningham v. Department of Highways*, 823 P.2d 1377 (Colo. App. 1991). Those cases provide that in order for the Board to have jurisdiction over a matter, Complainant must file a timely Notice of Appeal and include the essential grounds of such an appeal. The Notice of Appeal must be filed within 10 days of the action of Respondent or after notice of appeal rights is provided to Complainant. Respondent also argued that the Board is without authority to allow the untimely amendment of a Notice of Appeal absent good cause. Board Rule R10-6-1, 4 CCR 801-1.

In this instance, Complainant moved to amend her Notice of Appeal with the Board four months subsequent to the initial filing of the Notice of Appeal. She raised the issue with the Civil Rights Division sometime during the course of the investigation regarding discrimination based on disability.

Complainant failed to provide any argument in rebuttal. She failed to argue "good cause" as to why her Notice of Appeal should be amended. She indicated that she had not conducted any discovery, either formal or informal, which would have possibly provided information leading to "good cause" to amend the Notice.

The administrative law judge granted Respondent's Motion for Reconsideration. It was determined that Complainant failed to provide "good cause" as to allow the amendment of the Notice of Appeal to include the claim of discrimination based on race.

## **2. Procedural History**

Complainant filed her Notice of Appeal on March 27, 1998. Complainant appealed her administrative termination of employment with Respondent. Complainant claimed that the actions of Respondent were arbitrary and capricious and that the action taken was the result of discrimination based on disability. As a result of Respondent's action being administrative in nature, as opposed to disciplinary, the burden of going forward and the burden of persuasion rested with Complainant. See: *Renteria v. Dept. of Personnel*, 811 P.2d 797 (Colo. 1991). Additionally, with regard to the claim of discrimination, Complainant was required to make a prima facie case of discrimination based on disability. *Colorado Civil Rights Commission v. Big O Tires*, No. 96 SC 184 (6/30/97)(Colo. 1997).

At the conclusion of Complainant's case-in-chief, Respondent moved that the action be dismissed pursuant to C.R.C.P. 41. Based on the findings made below, the motion was granted. A Motion to Dismiss, based on C.R.C.P. 41, must, in relevant part, demonstrate that there is no right to relief. The rule provides that the court, as trier of the facts, may determine the facts and render judgment against Complainant. In *Gapter v. Kocjancic*, 703 P.2d 660 (Colo.App. 1985), it was ruled that:

in ruling on such a motion, the standard is not whether the plaintiff established a prima facie case, but whether judgment in favor of defendant is justified on the evidence presented. See:

*Teodonna v. Bachman*, 158 Colo. 1, 404 P.2d 284 (1965). If reasonable persons could differ in the inferences and conclusions to be drawn from the evidence as it stood at the close of plaintiff's case, then we cannot interfere with the findings and conclusions of the trial court. *Teodonna, supra*.

*Gapter v. Kocjancic*, 703 P.2d 660 (Colo. App. 1985) at 661. *See also: Brown v. Central City Opera House Ass'n*, 542 P.2d 86 (Colo. 1975), *mod. at* 553 P.2d 64.

In this instance, Complainant's claims involve having to make a prima facie case with regard to her claim of discrimination and introducing evidence that the actions of the appointing authority were arbitrary and capricious. In applying C.R.C.P. 41, and the precedent associated therewith, Complainant is not entitled to relief based upon the findings of fact. Judgment in favor of Respondent is justified based on the evidence presented. Complainant failed to meet a prima facie case regarding discrimination, and also introduced evidence which can only lead to a conclusion that a ruling in favor of Respondent is justified.

### **3. Witnesses**

Complainant called the following witnesses: herself. No other witnesses were disclosed in Complainant's prehearing statement and no other witnesses were called at the time of hearing.

### **4. Exhibits**

The following Complainant's exhibits were admitted into evidence: Exhibit A - Correspondence from Respondent to Colorado Civil Rights Division. Said exhibit was identical to Respondent's Exhibit 6.<sup>1</sup> In addition, subsequent to cross-examination of Complainant by Respondent, Respondent's Exhibits 1-5 were admitted with no objection.

## **ISSUES**

1. Whether the termination of Complainant was discriminatory based on disability and whether Complainant was entitled to reasonable accommodation based on a disability;
2. Whether the action of Respondent was arbitrary and capricious or contrary to rule or law;

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<sup>1</sup>At the time of hearing, Complainant only offered a portion of the cited correspondence. Respondent moved that the entire correspondence be admitted and that Respondent's Exhibit 6 was a complete copy of said correspondence. The exhibit was filed with the Board on April 16, 1999.

3. Whether the termination was within the range of reasonable alternatives available to the appointing authority; and
4. Whether Respondent is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5.

### **FINDINGS OF FACT**

1. Complainant worked for Respondent for approximately 19 years. She held the position of Developmental Disability Technician ("DDT"). DDTs provide care for developmentally disabled individuals in a number of locations throughout Denver and Colorado. In so doing, a staffing pool exists to replace DDT's who may temporarily be unable to work on any given day (i.e. annual leave, sick leave). The staffing pool primarily works as a "dispatch" for assigning DDTs to locations.
2. In the course of Complainant's employment with Respondent, she developed a medical condition such that she had to have a bone fusion of her ankle on or about March 25, 1997.
3. As a result of the bone fusion, Complainant could not return to work without limited restrictions. She was unable to lift more than 20 pounds, was unable to stand or walk more than three hours per day, and was unable to stoop. Complainant admitted that this was her maximum medical improvement.
4. On November 4, 1997, Complainant submitted a Request for Reasonable Accommodation due to Disability to Respondent. (Exhibit 1). Complainant requested that she be able to fill any vacant positions.
5. On December 31, 1997, the Respondent's Reasonable Accommodations Committee completed its evaluation of Complainant's request. (Exhibit 2). The Committee determined that there were no vacancies which could be filled by Complainant.
6. Complainant admits to having exhausted all leave with Respondent, including leave without pay pursuant to the Family Medical leave Act, all accrued sick leave, and all annual leave.
7. On March 12, 1998, Respondent notified Complainant that as a result of her exhaustion of leave, she would be separated from service pursuant to Director's Procedure P7-2-5(D)(3)(c), 4 CCR 801-1.
8. Complainant, through admission, was unable to perform the essential functions of the DDT position. She stated she was unable to stoop or lift objects, or sit or stand for long periods of time.
9. Complainant currently has a part-time job providing day care.
10. During Complainant's absence from work, a perceived vacancy opened in Respondent's

nursing pool. However, such vacancy was the result of maternity leave and the position could not be filled permanently. Complainant testified that she could fill that vacancy even for a short period of time.

11. For an individual to staff the staffing pool, the individual must meet the individual essential job functions of a DDT because of the potential need for a member of the pool to fill a DDT vacant position as a substitute.

12. Director's Procedure P7-2-5(D)(3)(c) provides, in part:

When an employee has exhausted all accrued sick leave and is still unable to return to work, the appointing authority. . . :

(3) If the employee is unable to return to work after all accrued leave is used or after six months of continuous absence from work, whichever occurs first, and family/medical leave and/or short-term disability leave is inapplicable, the appointing authority may: (a) grant any remaining accrued leave; (b) grant leave without pay if all paid leave is exhausted; (c) or terminate the employee. Termination will in no way affect continuation of payments under the Worker's Compensation Act, if applicable. The name of a certified employee who is terminated under this provision shall be placed on the departmental reemployment list upon recovery.

13. Board Policy 11-1, 4 CCR 801-1 (1998) provides, in part:

Discrimination for or against any person is prohibited, except for bona fide occupational reason, in ...retention ... because of race, ...being a person with a disability where accommodation can reasonably be made or who does not require any accommodation....

14. Board Rule R11-1-4, 4 CCR 801-1 (1998) provides, in part:

All employing agencies in the State Personnel System shall make reasonable accommodation to the known physical or mental limitations of a qualified applicant or employee who has a disability. An accommodation is reasonable if it facilitates or allows the utilization of the skills of persons in the workplace, unless the agency demonstrates that the accommodations would impose an undue hardship on the operation of its program....

A person with a disability is defined under Rule R11-1-4(D) as: any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

## **DISCUSSION**

## I. INTRODUCTION

In *Renteria v. Colorado State Dept. of Personnel*, 811 P.2d 797 (Colo. 1991), it was determined that in issues involving reallocation of a position, the proponent of such an order in an administrative hearing is Complainant. In other words, the burden of proof falls upon Complainant. This holding was reinforced in *Dept. of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994) in which it was determined that in a disciplinary matter, the burden of proof lies with Respondent but that in matters associated with administrative action the burden of proof lies with Complainant. In part, the rationale for the basis for allocating the burden of proof on Complainant in administrative, non-disciplinary matters, is that issues involving difficult judgments about credibility are not involved.

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

A witness' means of knowledge;  
A witness' strength of memory;  
A witness' opportunity for observation;  
The reasonableness or unreasonableness of a witness' testimony;  
A witness' motives, if any;  
Any contradiction in testimony or evidence;  
A witness' bias, prejudice or interest, if any;  
A witness' demeanor during testimony;  
All other facts and circumstance shown by the evidence which affect the credibility of a witness.

## II. PARTIES' ARGUMENTS

Complainant argues that Respondent should have located another position within state government for her. She maintains that such a position does not need to be with Respondent. Complainant argues that Respondent has the duty to reasonably accommodate her by either hiring her into the staffing pool, or by locating another job for her within the state.

Respondent argues Complainant has failed to meet her burden of going forward and burden of persuasion with regard to the claim of discrimination and arbitrary and capricious action.

### III. ISSUES BEFORE THE BOARD

A. *Whether the termination of Complainant was discriminatory based on disability and whether Complainant was entitled to reasonable accommodation based on a disability.*

Complainant holds the initial burden of meeting a prima facie case of discrimination. As outlined in *Big O Tires*, supra, there are primarily four elements which must be met by Complainant to meet the prima facie test. First, Complainant must show she belongs to a protected class. Second, Complainant must show she was qualified for the job at issue. Third, Complainant must have suffered an adverse employment action/decision. Finally, Complainant must show that circumstances give rise to an inference of unlawful discrimination. Once Complainant satisfies these four elements, the burden of production shifts to Respondent to articulate some legitimate, nondiscriminatory reason for the employment decision. Once the employer meets this burden, Complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decisions were in fact a pretext for discrimination.

In this instance, Complainant has failed to demonstrate that she belongs to a protected class. She provided no evidence, besides her own testimony, that she was a person with a disability. Complainant testified that she had an impairment. Yet, she failed to show that such an impairment substantially limits one or more major life activities. Major life activities include walking and working. She failed to offer any evidence that the impairment impacted these functions. In fact, her testimony supported the fact that she had obtained another job. Thus, she was able to work and Complainant failed to demonstrate how her impairment affected her general ability to work in a broad class of jobs. *Young v. U.S. West Communications*, 1998 WL 849523 (10th Cir. 12/9/98). Complainant cannot be considered disabled under the Board rules.

Second, Complainant failed to show that she was qualified for the job at issue, with or without a reasonable accommodation. Complainant admitted that she was unable to perform the job of DDT subsequent to her surgery and bone fusion. She was unable to lift, stoop, sit or stand for prolonged periods. She stated that this will never improve. However, an essential function of the DDT position is to be able to complete these types of tasks in caring for developmentally disabled individuals. Complainant did not proffer any evidence to suggest any reasonable accommodation besides filling a vacant position.

Complainant did suffer an adverse employment action. However, she failed to show circumstances which gave rise to an inference of unlawful discrimination. She admitted that

she had exhausted all of her leave options.

Given the above, it is clear that Complainant failed to meet a prima facie case of discrimination. One could argue that because Respondent engaged in an analysis of what reasonable accommodation could be made to Complainant, that Respondent acknowledged Complainant as having a disability. This argument fails for two reasons. First, in *Templeton v. Neodata Services, Inc.*, WL 852516 (10th Cir. 12/10/98), it was held that the employer has the right to investigate whether the employee has a disability and, if so, whether the disability can be reasonably accommodated. Second, policy dictates that in order to proactively address such issues, Respondent can examine options available to facilitate Complainant's return to work.

B. *Whether the action of Respondent was arbitrary and capricious or contrary to rule or law.*

Complainant failed to offer any evidence to demonstrate that Respondent acted arbitrarily, capriciously, or contrary to rule or law. Respondent appropriately notified Complainant of her appeal rights. (Exhibit 5). Complainant's only argument on this issue is that another individual was temporarily hired into a position at the staffing pool during Complainant's absence. However, Complainant indicated in the course of her testimony that the temporary position could have been the result of the permanent employee being on maternity leave. Given this circumstance, it would have been inappropriate to place Complainant in the position. First, Respondent was required to keep the position for the returning permanent staff member after completion of maternity leave. Second, given that individuals in the staffing pool had to meet the eligibility requirements of a DDT, Complainant could not fill the temporary position, or any position in the staffing pool, because she had an impairment, not a disability, and could not perform the essential job functions.

C. *Whether the termination was within the range of reasonable alternatives available to the appointing authority.*

Respondent allowed Complainant to utilize all of her leave during her absence pursuant to Director's Procedure. The separation from service was a reasonable alternative contemplated by the procedure.

D. *Whether Respondent is entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5.*

Respondent argues for attorney fees. However, given that Respondent did not present its case-in-chief, no record was made as to this issue.

### **CONCLUSIONS OF LAW**

1. The termination of Complainant was NOT discriminatory based on disability and Complainant was NOT entitled to reasonable accommodation based on a disability.
2. Respondent's actions were NOT arbitrary and capricious or contrary to rule or law.
3. The termination or separation from service was within the range of reasonable alternatives available to the appointing authority.
4. Respondent is NOT entitled to an award of attorney fees pursuant to C.R.S. 24-50-125.5.

**ORDER**

41. The actions of Respondent are UPHeld and this matter is dismissed pursuant to C.R.C.P.

Dated this \_\_\_\_ day  
of April, 1999.

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G. Charles Robertson  
Administrative Law Judge

## **CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_ day of April, 1999, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE, in the United States mail, postage prepaid, addressed as follows:

Pearl Carlis  
2941 Poplar Street  
Denver, CO 80207

and in the interagency mail, to:

Stacy Worthington  
Assistant Attorney General  
1525 Sherman Street, 5th Floor  
Denver, CO 80203