

**INITIAL DECISION**

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**THOMAS R. BOUCHARD,**

Complainant,

vs.

**DEPARTMENT OF CORRECTIONS,**

Respondent.

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Hearing was held on September 24 and 25, 2001; November 13, 2001; February 25, 2002 and March 6, 2002 before Administrative Law Judge Kristin F. Rozansky at the State Personnel Board and the Division of Administrative Hearings, 1120 Lincoln, Suites 1400 and 1420, Denver, Colorado. Assistant Attorney General Joseph Q. Lynch represented Respondent. Complainant appeared and represented himself.

**MATTER APPEALED**

Complainant, Thomas R. Bouchard (“Complainant” or “Bouchard”) alleges Respondent, Department of Corrections (“Respondent” or “DOC”), constructively discharged him based upon disability discrimination, refusal to reasonably accommodate him under the ADA, harassment due to disability discrimination and a hostile work environment.

Complainant seeks reinstatement, back pay and benefits, reasonable accommodation, removal of negative performance comments, compensatory damages and punitive damages. Respondent seeks dismissal of Complainant’s claims and an award of costs and attorneys fees.

At the close of Complainant’s case-in-chief, Respondent moved to dismiss Complainant’s action pursuant to C.R.C.P. 41(b)(1). Respondent’s motion was granted with regards to Complainant’s allegations of discriminatory harassment and refusal to reasonably accommodate him under the ADA. For the reasons set forth below, Complainant’s resignation is **affirmed**.

## **ISSUES**

For purposes of the hearing, subsequent to the dismissal of Complainant's ADA and harassment claims, the following are the issues to be resolved:

1. Whether Complainant was constructively discharged;
2. Whether Complainant was subjected to a hostile work environment;
3. Whether attorney fees are warranted.

## **FINDINGS OF FACT**

### **General Background**

1. Respondent hired Complainant on May 1, 1999. After approximately one month of training at DOC's Training Academy, Complainant began working at Fremont Correctional Facility, assigned to the graveyard shift in Cellhouse 2.
2. The graveyard shift is the quietest shift and the duties assigned to that shift are repetitious and simpler than other shifts. Because of these characteristics, the graveyard shift is used to train probationary employees.
3. Complainant was provided with a list of duties he was to perform each shift, including a rotation of cleaning duties.
4. As a result of his diabetes, Complainant would bring food to work.

### **Food and Complainant's Cheesecake**

5. On occasion, Complainant stored his food in a file cabinet at his workstation. The refrigerator in which Complainant usually stored his food was located in Cellhouse 2's control room, a station to which Complainant was frequently assigned.
6. On one occasion, Officer Cortinas left Complainant a hand written note telling him that she had found mice in his food.
7. Complainant left some cheesecake at work on August 8, 1999. Upon returning to work for the graveyard shift on August 9, 1999 he found that some of the cheesecake was missing. He ate some of the remaining cheesecake, wrote a note on the label to "keep out" and stored it in the refrigerator in Cellhouse 2's control room when he left work. When he returned to work on August 10, 1999 the cheesecake was gone.
8. Complainant wrote a letter to Captain Kleinholz, his third level supervisor, explaining

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that his cheesecake was missing and asking Capt. Kleinholz to have the cheesecake replaced and put "on notice" who ever had taken it that such behavior would not be tolerated.

9. Complainant gave the memo to Sgt. Schulz, his immediate supervisor, asking her to give it to Capt. Kleinholz.
10. On August 10, 1999, Capt. Kleinholz sent a memo to the staff of Cellhouses 2 and 3, stating that a staff member, who needed food to treat his diabetes, had had his food taken from the refrigerator, that such behavior would not be tolerated and that the person(s) who took the cake were expected to contact Capt. Kleinholz and arrange for reimbursement of the cost of the food.
11. The two staff members who had eaten Complainant's cheesecake came forward in response to Capt. Kleinholz' memo and reimbursed Complainant for the cost of his cheesecake.
12. Sgt. Schulz told Complainant, after Capt. Kleinholz issued his memo to the staff regarding Complainant's cheesecake, that in the future, it would be more appropriate to report such matters, through the chain of command, to her, then Lieutenant Clayton, Complainant's second level supervisor, rather than going straight to Capt. Kleinholz.

### **Performance Ratings and Grievance**

13. In July 1999, soon after starting at Fremont Correctional Facility, Complainant was given a performance plan outlining the expectations for his performance.
14. Sgt. Schulz was Complainant's immediate supervisor on the graveyard shift in Cellhouse 2 and provided input to Lt. Clayton, Complainant's second level supervisor, on Complainant's performance in Cellhouse 2.
15. Lt. Clayton prepared Complainant's performance evaluations while Complainant was working at Fremont Correctional Facility. Initially Capt. Kleinholz reviewed Lt. Clayton's rating of Complainant. When Capt. Kleinholz left Fremont Correctional Facility, Captain Donley reviewed Lt. Clayton's ratings of Complainant.
16. Lt. Clayton's contact with Complainant was limited because Lt. Clayton worked on the swing shift and Complainant worked on graveyard shift. Lt. Clayton's primary source of information regarding Complainant's performance was Sgt. Schulz who directly supervised Complainant on the graveyard shift as part of her duties.
17. Lt. Clayton discussed with Complainant his performance reviews at the time Complainant received those reviews.

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18. When Complainant initially began working in Cellhouse 2, Sgt. Schulz told him that whenever she entered the vestibule and looked at the pods, Complainant should make a notation in the log entries that she had checked on the inmates.
19. Complainant checked with Officer McCall and Sgt. Marquez as to whether this was proper procedure. When they told him it wasn't, he refused to make such notations in the log.
20. Complainant's performance rating for the time period of May 1, 1999 to July 31, 1999 was an overall rating of a low-end "competent" (the "Three Month Evaluation"). Lt. Clayton was listed on the Three Month Evaluation as Complainant's supervisor and Capt. Kleinholz was listed as Complainant's reviewer.
21. In mid-September 1999, Sgt. Schulz gave Capt. Kleinholz a memo outlining concerns she had with Complainant's performance during his first three months at Fremont Correctional Facility.
22. Sgt. Schulz' concerns covered Complainant's discussions with Sgt. Schulz regarding his time cards and his skipping of the chain of command to deal with his missing cheesecake.
23. During October 1999, Capt. Donley replaced Capt. Kleinholz as Complainant's third level supervisor.
24. During October 1999, Officer McCall observed Complainant asleep at his workstation. When Lt. Clayton learned of the incident he asked Sgt. Schulz to get a statement from Officer McCall as to what he had witnessed.
25. During the fall of 1999, Complainant would bring case law reading to work with him to review in connection with a second job he held as a litigation consultant to a labor group. Other DOC employees on the graveyard shift also read non-DOC reading material during their shifts.
26. During the fall of 1999, Complainant was assigned to work 3 or 4 days a week in Cellhouse 2 and the remaining days in Cellhouse 3.
27. When Complainant worked in Cellhouse 3 as a relief worker, Sgt. Marquez would allow Complainant, at the beginning of the shift, to retrieve food that he had left in Cellhouse 2 on a previous shift. Other relief worker employees she supervised in Cellhouse 3 were allowed to retrieve work related equipment from Cellhouse 2.
28. Lt. Clayton got complaints from some employees on swing shift that they were unable to leave from their shifts in a timely fashion when Complainant returned to Cellhouse 2 for food.

29. Three of the duties on the graveyard shift were getting inmates ready for kitchen duty at specified times, conducting inmate counts at specified times, and conducting rounds of an assigned station at random times.
30. Getting inmates ready for kitchen duty entailed waking them up and, once they were ready, releasing them to an area where they would then be escorted by security to the kitchen.
31. On occasion, Complainant would conduct his rounds at the same time that he was getting inmates ready for kitchen duty. This would sometimes result in Complainant releasing inmates late for kitchen duty.
32. In early November 1999, Complainant had an inmate, Grimes, ready and waiting in the vestibule area for kitchen duty approximately half an hour early. Sgt Schulz was startled when she came to wake up Grimes and ran into him in the vestibule.
33. Sgt. Schulz told Complainant he shouldn't have released Grimes so early nor should he have allowed Grimes to wait in the vestibule. She instructed him on the procedure for releasing inmates for kitchen duty and told him not to release them until five minutes before they were to be picked up by security.
34. Sgt. Schulz also wrote Lt. Clayton a memo regarding Complainant's early release of Grimes and her concerns about the security risk posed by the early release.
35. Complainant's performance rating for the time period of May 1, 1999 to October 31, 1999 was an overall rating of "needs improvement" (the "Six Month Evaluation"). Lt. Clayton was listed on the Six Month Evaluation as Complainant's supervisor and Capt. Donley was listed as Complainant's reviewer.
36. The Six Month Evaluation outlined a number of areas in which Complainant needed improvement, including:
  - Timeliness of having inmates ready for kitchen duty;
  - Speed and accuracy of inmate counts;
  - Utilizing the chain of command for resolution of any problems;
  - Staying awake while on duty;
  - Having food/equipment with him when he is working at a post other than Cellhouse 2, rather than delaying other workers by retrieving the items from Cellhouse 2;
  - Not bringing inappropriate reading material to work.
37. On November 18, 1999, Complainant submitted a narrative in response to his Six Month Evaluation (the "Performance Narrative").

38. In the Performance Narrative, Complainant disputed all of the various instances cited regarding his poor performance and stated that Sgt. Schulz was engaging in workplace harassment against Complainant and/or creating a hostile work environment for Complainant through her assessments of his work performance. He gave examples of ways in which he would conduct various procedures and which Sgt. Schulz would correct. He viewed all of these corrections as inappropriate and examples of harassment by Sgt. Schulz.
39. In addition, in the Performance Narrative, he requested an accommodation for his diabetes – a locked storage container in a refrigerator in which Complainant could store his food. Attached to the Performance Narrative was a doctor's note dated June 6, 1995 stating that Complainant was diabetic and "should be allowed to check his blood sugar and take nourishment if hypoglycemia developed."
40. On November 24, 1999, Captain Donley responded, by memo, to that portion of Complainant's Performance Narrative that requested a lockable container in a refrigerator. Capt. Donley denied the request and stated that the refrigerator was intended for use by officers only while they were on duty and not for extended storage of food.
41. On those occasions when Complainant raised the issue of his diabetes with Warden Neet and/or A.J. Rose, DOC's Employee Relations Administrator, he was told by them that, under DOC AR 1450-35, in order to obtain an ADA accommodation, Complainant needed to file a written request with Brad Rockwell, DOC's ADA Coordinator.
42. Complainant did not ever file a written request directly with Rockwell, but instead sent any such request to his various supervisors at Fremont Correctional Facility.
43. After Complainant received the memo from Capt. Donley responding to the Performance Narrative, Lt. Clayton approached Complainant during the graveyard shift, gave him a copy of DOC's regulation on workplace harassment and asked if he wanted to file a claim against Sgt. Schulz. Complainant stated that he did not want to file such a claim, but wanted to resolve the matter informally.
44. On December 1, 1999, Complainant received a corrective action (the "Corrective Action") as a result of his Six Month Evaluation. The Corrective Action stated that, by December 31, 1999, all factors in his Performance Plan must be at the level of competent and that he was to do all of the following:
- Remain awake and alert at all times while on duty;
  - Not read unauthorized materials while on duty;
  - Complete the requirement of his post orders for his shift and be mindful of the duties of other staff and their assignments;

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- Handle any problems with other staff members first informally and then, if unsuccessful, to follow the chain of command to resolve any disputes;
  - Accept constructive instructions and directives from his supervisor, Sgt. Schulz.
45. On December 7, 1999, Complainant met with Major Harlan and Capt. Donley to discuss Complainant's perception that he had received an unfair review of his performance in his Six Month Evaluation. The meeting was treated as the informal step in the grievance process under State Personnel Board rules.
46. On December 8, 1999, Complainant received a memo from Capt. Donley stating that he believed Complainant's performance review to be an accurate and fair appraisal with the corrective action being a "guideline for success."
47. Sgt. Schulz inspected Complainant's workstation three times before he received the Corrective Action and three times after the Corrective Action. All but one of the inspections was done after Complainant finished his shift. Each time she made the assessment that Complainant had not adequately fulfilled his cleaning duties.
48. Complainant filed a grievance on December 13, 1999. The grievance alleged that the Corrective Action was improper and made allegations of harassment, denial of a request for a reasonable accommodation and hostile work environment.
49. As relief, Complainant requested that the corrective action, Six Month Evaluation and any documents referencing the events mentioned in those documents be removed from his file, that his request for reasonable accommodation be implemented, that DOC assure him that he would not be subjected to harassment, and that he be "made whole."
50. Complainant's grievance did not identify who his harassers were nor who was creating the hostile work environment.
51. On December 20, 1999, A.J. Rose, DOC's Employee Administrator, sent Complainant a letter requesting clarification of Complainant's grievance, including the grievance itself and the relief he was requesting.
52. On December 22, 1999, Complainant sent a memo to Capt. Donley, requesting all documents referencing him or his performance and shift logs for the graveyard shift. Complainant requested the documents in order to prepare an affirmative defense to his grievance and to investigate the basis of his performance review.

53. On December 27, 1999, Capt. Donley responded to Complainant's 12/22/99 memo stating that he was unaware of any grievance and the documents requested were only available to DOC investigators, not Complainant.
54. On January 3, 2000, Complainant responded to Rose's request for clarification of his grievance. With the possible exception of Sgt. Schulz, his response does not identify any one person as a harasser.
55. On January 18, 2000, Complainant sent a letter to Madeline SaBell in DOC's Human Resources department, reiterating his request for documents to investigate his grievance and prepare an affirmative defense. In addition, he noted that the failure to provide the documents was a violation of Colorado's Open Records Act, 24-72-201, *et seq.*, C.R.S.
56. On January 20, 2000, Maj. Harlan sent out a memo stating that, effective January 27, 2000, there would be changes in assignments, including moving Complainant from Cellhouse 2 to Cellhouse 3, where he would continue to work on the graveyard shift. Officer Cortinas was moved from Cellhouse 2 to Cellhouse 8.
57. Complainant's direct supervisor when he worked at Cellhouse 3 in late January and February 2000 was Sgt. Marquez. His second level supervisor was Lt. Clayton and his third level supervisor and reviewer for purposes of performance evaluations was Capt. Donley.
58. Complainant's reassignment to Cellhouse 3 was made in response to his allegations of harassment.
59. On February 4, 2000, Complainant presented his grievance to a panel convened for the purpose of considering that grievance.
60. On February 11, 2000, SaBell responded to Complainant's request for documents, stating that his "request" had been forwarded to Brad Rockwell, DOC's ADA Coordinator and that a panel was reviewing his grievance.
61. On February 14, 2000, Maj. Harlan sent out a memo stating that effective March 4, 2000, there would be changes in assignments, including moving Complainant from Cellhouse 2 and the graveyard shift to Cellhouse 3, where he would work on the swing shift.
62. The grievance panel conducted its own independent investigation, interviewing a number of witnesses, and, on February 16, 2000, made recommendations to Warden Neet regarding Complainant's grievance.

63. On February 21, 2000, Neet issued the final agency decision with regards to Complainant's grievance. Neet relied solely on the grievance panel's investigation and recommendations in arriving at his decision.
64. Neet's decision denied Complainant's grievance, stating that Complainant's performance review and the corrective action would stand as written, with the exception that Complainant would be given more clear performance expectations.
65. Neet's decision also noted that Complainant had been moved to another unit but would remain under the supervision of Lt. Clayton and Capt. Donley. Finally, he stated that Complainant had not complied with DOC regulations regarding his ADA request, that his request had been reviewed and denied and that any future ADA requests must comply with DOC regulations.
66. A few days after Neet's grievance decision, Lt. Clayton approached Complainant and told him he wanted to discuss Complainant's performance. During that discussion he gave Complainant a memo setting forth his concerns regarding Complainant's lack of progress in numerous performance areas during the rating period from November 1999 to January 2000.
67. Two days after meeting with Lt. Clayton, Complainant got his written evaluation for the time period of May 1999 to January 31, 2000 (the "Nine Month Evaluation"). He received an overall rating of "needs improvement." The Nine Month Evaluation listed Lt. Clayton as Complainant's supervisor and Capt. Donley as Complainant's reviewer.
68. The Nine Month Evaluation outlined various areas in which Complainant's performance needed improvement, including:
- Timeliness of having inmates ready for kitchen duty;
  - Incomplete inmate counts on seven different dates;
  - Following the chain of command to request leave; and
  - Contacting fellow officers and other supervisors when he had a problem, rather than contacting his own supervisors.
69. From the time of the Corrective Action until the Nine Month Evaluation, Lt. Clayton did not give Complainant any written performance reviews. However, he would on occasion stay after his swing shift to discuss informally with Complainant, as Complainant was arriving for the graveyard shift, his performance and that it was not up to par.
70. Throughout his time as Complainant's third level supervisor, Capt. Donley had several meetings with Complainant. In the meetings, they discussed the hours

reflected in Complainant's paycheck, his performance reviews and his complaints about Sgt. Schulz and Officer Cortinas.

71. On March 1, 2000, Complainant sent John Suthers, Executive Director for DOC, a letter complaining of harassment, hostile work environment and the Nine Month Evaluation.
72. On March 3, 2000, Complainant submitted his written resignation to Lt. Clayton, in person. After Lt. Clayton accepted the resignation, he asked Complainant if he wanted to withdraw the resignation. When Complainant said no, Lt. Clayton handed Complainant a memo dated March 3, 2000 evaluating Complainant's performance during his tenure with DOC.
73. In his March 3, 2000 memo, Lt. Clayton, after reviewing the history of Complainant's performance ratings, the Corrective Action and Complainant's grievance, stated that Complainant would be moving to the swing shift, he should use the opportunity to improve his performance and, based upon his past performance, Lt. Clayton would not be recommending Complainant for certification at the end of his probationary period.
74. On Complainant's resignation form he states that he is voluntarily resigning from his position and that the reasons for his resignation include the denial of his ADA request, his disparate treatment, workplace harassment and hostile work environment.
75. Complainant's exit evaluation, dated March 17, 2000, rates him overall as a low end competent with Lt. Clayton listed as his supervisor and Capt. Donley as his reviewer.

## **DISCUSSION**

### **I. GENERAL**

#### **A. Burden of Proof**

In this appeal of his resignation, Complainant bears the burden of proof for his allegations of hostile work environment and constructive discharge. *See Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994), *Renteria v. Department of Personnel*, 811 P.2d 797 (Colo. 1991), *Harris v. State Board of Agriculture*, 968 P.2d 148 (Colo. App. 1998) and *White v. York Int'l Corp.*, 45 F.2d 357, 361 (10<sup>th</sup> Cir. 1995).

## II. HEARING ISSUES

### A. Complainant was not subjected to a hostile work environment.

Complainant has alleged that he was subjected to a hostile work environment. To support this claim he has argued that he was harassed and that he is protected from such harassment because of his disability (diabetes) and because he reported or refused to participate in illegal activities – his missing cheesecake and the log entries of Sgt. Schulz’ inspections which he believed were illegal.

In order to prove a claim of hostile work environment, Complainant must show, objectively and subjectively, “that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (10<sup>th</sup> Cir. 1998) (emphasis added). Complainant must show that he was the object of harassment because of discrimination. *Penry v. Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (10<sup>th</sup> Cir. 1998).

To show discrimination, Complainant must establish, by a preponderance of the evidence, a *prima facie* case of discrimination. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397 (Colo. 1997). To establish a *prima facie* case of employment discrimination, Complainant must show, in part, that he belongs a protected class. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397 (Colo. 1997) citing *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248 253 (1981). The only recognized protected class to which Complainant has laid claim is that of disabled persons. Complainant’s hostile work environment claim with regards to his refusal to make certain log entries and reporting his missing cheesecake does not make him a member of a protected class in a discrimination analysis.

Complainant must show that he has a disability under either federal law, the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (1994) (the “ADA”), or state law, §24-34-401, *et seq.* C.R.S. A “disability” may be shown by meeting one of three standards: (1) having an impairment that substantially limits a major life activity; (2) having a record of an impairment that substantially limits a major life activity; or (3) being regarded as having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2) and CCRC Rule 60.1(C), 3 CCR 708-1 (Colorado Civil Rights Commission regulation on looking to federal law for interpretations of Colorado’s disability discrimination law, § 24-34-401, *et seq.*, C.R.S.) The key term in these standards, for purposes of this action, is “impairment.”

In determining whether Complainant has an “impairment,” one must look at the impairment in light of corrective measures being taken by the Complainant. *Sutton v. United Air Lines*, 527 U.S. 471 (1999). If the impairment is corrected by the mitigating

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measures, it is not considered a disability. *Id.* It is not the diagnosis of an impairment itself that leads to the conclusion that a person is impaired, but rather the effect of the impairment on the person in light of the mitigating measures taken by that person. *Id.* Such an inquiry is an individualized inquiry, requiring a case-by-case analysis. *Id.* While the Supreme Court in *Sutton* did not specifically address diabetes, it did use diabetes as an example of an impairment that may or may not be considered a disability.

In this case, Complainant has presented a note from his doctor stating that Complainant is diabetic and should be allowed to check his blood sugar and take nourishment if hypoglycemic. This is a diagnosis of diabetes. However, under *Sutton*, a diagnosis alone is not enough to support a determination that Complainant is disabled. There was no testimony or written evidence of any of Complainant's major life activities being affected by his diabetes, whether or not he takes the mitigating measure of eating. Due to his diabetes, Complainant needs to, on occasion, check his blood sugar and eat if he is hypoglycemic. There was no evidence that once he has done this that he suffers from any impairment. Therefore, Complainant is not disabled.

Because Complainant is not disabled, he does not belong to a protected class. Therefore, he is unable to make a *prima facie* case of discrimination. Without a discriminatory basis, Complainant's claim of hostile work environment fails.

#### **B. Complainant was not constructively discharged;**

In claiming constructive discharge the Complainant bears the burden of proof. *Harris v. State Board of Agriculture*, 968 P.2d 148, 152 (Colo. App. 1998). Constructive discharge occurs if the Respondent took deliberate action that made or allowed Complainant's working conditions to become so difficult or intolerable that the Complainant had no reasonable choice but to resign and Complainant resigned because of those conditions. *Wilson v. Board of County Comm'rs*, 703 P.2d 1257, 1259 (Colo. 1985). A constructive discharge depends on whether a reasonable person under the same or similar circumstances would view the conditions as intolerable, not upon the subjective view of the Complainant. *Boulder Valley School District R-2 v. Price*, 805 P.2d 1085, 1088 (Colo. 1991); *Wilson* at 1259; *Christie v. San Miguel Cty. School Dist.*, 759 P.2d 779, 782 (Colo. App. 1988).

This is not a case about constructive discharge; there was no credible evidence presented to demonstrate that Complainant's working conditions were so difficult or intolerable that he was forced to resign. It was Complainant's own actions that lead to his resignation and the circumstances leading to that resignation, not the actions of the Respondent.

Complainant is alleging that his working conditions were intolerable because he was not provided with a lockbox in which to store his food on a long-term basis; his cheesecake

was consumed without permission by two co-workers; and co-workers, including Sgt. Schulz, Lt. Clayton and Officer Cortinas, created difficult or intolerable working conditions.

Complainant's concern about the lack of storage for his food is that because he is not provided a lock box for his food in the common refrigerator he is unable to store food. It can only, at best, be assumed that if Complainant is unable to take the mitigating measure of consuming food in order to correct his diabetes, then Complainant may suffer adverse side effects. If that were the situation, Complainant may have been forced to resign. However, that is not the case in this matter.

The evidence did show that Complainant was allowed to have access to his food, within reasonable constraints. He was permitted to bring food to work for consumption during his assigned shift. He was provided a refrigerator in which to store that food during his assigned shift. If Complainant's food was stored in a refrigerator than any of his health concerns about mice would be alleviated. Given the potential number of employees on a daily basis in each cellhouse, it is a reasonable policy to only allow those employees who are on duty to put their food in the refrigerator and not to allow employees to store food over a number of shifts.

It is reasonable to require Complainant to report, at the beginning of his assigned shift, with any personal effects, including food, which he may require or need during that shift. Even if the Respondent had a refrigerator with the capacity to store food for an extended period of time, it would be reasonable to require Complainant to report to his assigned station at the beginning of his shift with such personal effects. In such a case, Complainant would simply need to arrive at work early enough to retrieve any stored items in another cellhouse. Complainant argues that other employees were allowed to retrieve items from other cellhouses in which they worked. However, there was no evidence as to whether or not this affected those employees' performance evaluations. None of these policies are unreasonable nor do they create difficult or intolerable work conditions for Complainant.

When co-workers ate Complainant's cheesecake without permission, Capt. Kleinholz promptly addressed the matter, making it clear that such behavior was not appropriate. The two co-workers came forward, admitted what they had done and reimbursed Complainant for the cost of the cake. Complainant's concern regarding theft of his food was promptly addressed. In addition, Complainant presented no evidence that he suffered an adverse physical response because of the missing cheesecake, beyond the irritation that legions of workers experience when their food is eaten, without permission, by nameless co-workers. Finally, there was no credible evidence that since then Complainant's food was ever taken by anyone else.

DOC reasonably dealt with complainant's allegations concerning the various people that he viewed as his harassers. Those he identified as his harassers were, alternately and at different times during the grievance process and throughout the hearing on this matter, Officer Cortinas, Sgt. Schulz and Lt. Clayton. His concerns in this area were being addressed within six weeks of Complainant filing his grievance, prior to the issuance of Neet's grievance decision. He was reassigned from Cellhouse 2 to Cellhouse 3. Sgt. Marquez

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testified that during late January and February 2000 she was Complainant's direct supervisor. Officer Cortinas was assigned to Cellhouse 7, with no apparent contact with Complainant after her reassignment. After the corrective action, while Lt. Clayton continued to be Complainant's supervisor, Complainant continued to work on a different shift from him. Complainant provided no credible evidence that Lt. Clayton harassed him in anyway after Complainant filed his grievance. In fact, Complainant provided no credible evidence that Officer Cortinas, Sgt. Schulz or Lt. Clayton created the type of working conditions which a reasonable person would find to be difficult or intolerable. However, DOC, throughout Complainant's reassignment, responded reasonably to Complainant's statement of what he perceived to be difficult or intolerable working conditions.

Complainant argues that he engaged in a protected activity, was retaliated against for engaging in that activity and was, therefore, forced to resign. Complainant argues that the protected activity in which he engaged was the report of theft of his food. However, Complainant provides no legal authority, either statutory or case law, which supports such a claim or defines "protected activity" as the reporting of a theft. This argument has no basis in law and, therefore, is not considered in support of Complainant's claim of constructive discharge or any other claim made by Complainant.

Complainant did not perform his duties adequately while working for DOC. This was consistently conveyed to him throughout all three of his performance evaluations. His Three Month Evaluation was low end competent. On his Six Month Evaluation it was noted that his performance had deteriorated. Complainant proffered no evidence that his evaluations were false. He only presented reasons why he should not have to follow the procedures followed by his fellow employees. He was provided with a performance plan outlining his performance expectations, a list of those duties he needed to perform during his shift and performance evaluations outlining those areas in which his performance needed to improve. Complainant's performance evaluations reflected his refusal to comply with any of those guidelines or acknowledge when he had failed to meet performance expectations.

Respondent addressed Complainant's concerns in a reasonable manner. However, Complainant did not address the concerns of Respondent regarding his work performance. Complainant's own actions lead to those concerns and created some friction between him and his supervisors when he did not address the concerns. Such friction does not result in a work environment that a reasonable person would deem difficult or intolerable due to Respondent's deliberate actions, leaving Complainant with no reasonable choice but to resign. Complainant has not met his burden of proof on his claim of constructive discharge.

### **C. Attorney fees are not warranted.**

Respondent has requested attorney fees. Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The evidence in this action does not lead to a determination that Complainant instituted this action frivolously, in bad faith, maliciously, or as a means harassment.

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Therefore, an award of attorney fees is not warranted.

**CONCLUSIONS OF LAW**

1. Complainant was not constructively discharged.
2. Complainant was not subjected to a hostile work environment;
3. Attorney's fees and costs are not warranted.

**ORDER**

Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 29<sup>th</sup> day of May, 2002.

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Kristin F. Rozansky  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
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), C.R.S. 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), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If the Board does not receive a written notice of appeal 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).

### **PETITION FOR RECONSIDERATION**

A petition for reconsideration of the decision of the ALJ may 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. 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.

### **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 is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

### **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 R-8-64, 4 CCR 801.

### **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 R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

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**CERTIFICATE OF SERVICE**

This is to certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 2002, I placed true copies of the foregoing **INITIAL DECISION and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Thomas R. Bouchard  
P.O. Box 1142  
Canon City, Colorado 81215-1142

and in the interagency mail, to:

Joseph Q. Lynch  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, Colorado 80203

\_\_\_\_\_  
Andrea C. Woods