

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DAVID R. GREEN,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

Hearing was held on February 20, 21 and 26 and March 7, 2001 before Administrative Law Judge Kristin F. Rozansky at the offices of the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Respondent was represented by Assistant Attorney General Cristina Valencia. Complainant appeared and was represented by Darrell Damschen.

MATTER APPEALED

Complainant, David Raymond Green (“Complainant” or “Green”) appeals his administrative termination by the Department of Corrections (“Respondent” or “DOC”).

For the reasons set forth below, Respondent’s action is **rescinded**.

PRELIMINARY MATTERS

Respondent was represented by Cristina Valencia, Assistant Attorney General, 1525 Sherman Street, 7th Floor, Denver, Colorado. Respondent’s advisory witness for the proceedings was Brad Rockwell, Director of Legal Services, for Respondent.

Complainant was represented by Darrell Damschen, Frank & Finger, P.C. Complainant was present for the evidentiary proceedings.

The parties submitted written closing arguments. The Complainant filed his closing argument on April 6, 2001. The Respondent filed its closing argument on April 10, 2001. The Complainant filed his rebuttal closing argument on April 12, 2001. Therefore, this matter was ripe for review on April 12, 2001.

PROCEDURAL MATTERS

A. Witnesses

Respondent called the following witnesses:

1. Michael Williams, Warden and appointing authority for Centennial Correctional Facility, DOC
2. Madeline SaBell, Director of Human Resources for DOC

Complainant called the following witnesses:

3. Officer Scott Berry
4. Cherrie L. Greco, Director for the Division of Training for DOC
5. Donna Elise Green
6. Lucy McClelland, GP III in Human Resources for DOC
7. Brad Rockwell, Director of Legal Services for DOC
8. John Suthers, Executive Director of DOC
9. Brenda Van Edgeman,
10. Verna (Williams) Lawson, Employee Benefits Coordinator for DOC
11. Complainant testified on his own behalf.

A witness sequestration order was entered.

B. Exhibits

Complainant's Exhibits A; D; E; G; H; J; K; L; O; Q; R; S; U; V; X; Y; Z; A1 to L1; N1; O1; P1; Q1; S1; T1; U1; W1; X1; Y1; Z1; A2; B2; F2; G2 to N2; P2; Q2; T2; V2 to Z2; D3; F3; I3; J3; L3; N3; O3 to T3; W3; Y3; Z3; A4 to E4; G4; H4; L4; N4; O4; Q4; R4; T4; Z4; and C5 and Respondent's Exhibits 1 through 13, 15 through 17, 19, 21 and 22 and were admitted by stipulation.

Complainant's Exhibits B5, R2, A5, X3, P, B, M1, I, C2, O2, U2, H3, U3, V3, F, E3, M3, G3, and W4 and Respondent's Exhibit 20 were offered and admitted during the hearing.

The parties entered into a Confidentiality Agreement regarding certain documents exchanged during discovery. Based upon the Confidentiality Agreement, prior to the hearing, the ALJ entered an order regarding confidentiality of documents. Exhibit B-5 is the only exhibit designated as a confidential document by the parties. It will be sealed in the record in accordance with the procedure set out in the February 7, 2001 Order on confidentiality.

ISSUES

1. Whether Respondent's action of administratively terminating Complainant was arbitrary, capricious or contrary to rule or law, including:
 - a. Was Complainant denied a reasonable accommodation of his disability;
 - b. Was Complainant retaliated against for a protected activity;
 - c. Was Complainant retaliated against as a result of whistleblower activity;
2. Whether attorney fees are warranted.

In Complainant's closing rebuttal argument, he withdrew his racial discrimination claim.

FINDINGS OF FACT

Subsequent to the hearing and prior to filing written closing arguments, the parties submitted stipulated facts. Those stipulated facts are identified by the notation of "*Stipulated Fact*." Any finding of fact based upon the evidence presented at the hearing contains a parenthetical citing the testimony of the witness or exhibit upon which, at least in part, that finding of fact is based.

General Background

1. From July, 1992, through the beginning of November, 1996, Complainant worked at the Territorial Correctional Facility as a Correctional Officer. *Stipulated Fact*
2. Complainant was promoted to Sergeant in November, 1996. *Stipulated Fact*
3. On November 15, 1996, Complainant transferred to the Centennial Correctional Facility ("CCF"). *Stipulated Fact*
4. Between 1993 and 1998, Complainant received a "commendable" rating on every evaluation he received. *Stipulated Fact*
5. While working at CCF, Complainant entered into a relationship with Donna Fails, another employee at CCR. *Complainant, Fails and Stipulated Fact*
6. At the time of Complainant's termination from the DOC, his salary was \$3,381.00 per month. *Stipulated Fact*
7. Complainant seeks reinstatement with a reasonable accommodation, back pay and benefits, and attorney fees.

Fails' Lawsuit

8. While Complainant worked at CCF, Joseph Sena also worked there as a Correctional Officer. *Complainant and Stipulated Fact*
9. In November of 1997, Complainant witnessed what he believed to be an assault on an inmate by Sena. *Stipulated Fact*
10. Complainant gave his supervisor, Lt. Gaunt, a written report regarding the assault and other inappropriate conduct in which he believed Sena was engaged. *Complainant, Exhibit G and Stipulated Fact*
11. Fails also reported the alleged assault by Sena. *Stipulated Fact*
12. After reporting Sena's alleged conduct, both Complainant and Fails were required to go through 8-3-3 meetings with Superintendent Joseph Paolino. *Exhibit D and Stipulated Fact*
13. Fails was terminated on the grounds that she had made a false report, receiving a letter dated January 22, 1998 that informed her of this discipline. *Exhibit F and Stipulated Fact*
14. Complainant received a corrective action as a result of his 8-3-3 meeting, receiving a letter dated January 22, 1998. He attached a letter of explanation to his corrective action, disputing the factual allegations in the corrective action. *Exhibits E and H and Stipulated Fact*
15. After being terminated from the Department of Corrections, Fails filed EEOC charges and federal litigation against the Respondent. *Stipulated Fact*
16. Complainant and Fails entered into a common law marriage after Ms. Fails had been terminated from the DOC. *Stipulated Fact*
17. Complainant participated in the litigation filed against Respondent by Fails relating to gender discrimination, sexual harassment and retaliation, by providing an affidavit, deposition testimony and trial testimony. *Stipulated Fact*
18. Complainant attended court hearings and settlement conferences regarding Fails' litigation against the Respondent. *Stipulated Fact*
19. Brad Rockwell, Director of Legal Services for Respondent, acts as a liaison between the Attorney General's Office and the DOC with regard to the defense of lawsuits brought by DOC employees or former employees. *Stipulated Fact*

20. Rockwell attended settlement conferences in the case of Fails v. D.O.C. and knew that Complainant attended those conferences. *Stipulated Fact*
21. As early as June 1999, Verna (Williams) Lawson was aware of the pending lawsuit. *Lawson and Exhibit F-1*
22. The case of Fails v. DOC went to trial the last week of November, 1999 and the first week of December, 1999. *Stipulated Fact*
23. Rockwell attended portions of the trial of Fails v. DOC *Stipulated Fact*
24. Fails obtained a jury verdict against the DOC based on claims of sexual harassment and retaliation. *Stipulated Fact*

Complainant's Injury

25. On November 22, 1998, Complainant was involved in an altercation with inmates in which he sustained injuries to his knee and head. *Exhibit I and Stipulated Fact*
26. Complainant was not escorted from the facility to an emergency medical facility. *Stipulated Fact*
27. Complainant's shift commander filled out a Report of Injury regarding Complainant's injury on November 22, 1998. *Exhibit J and Stipulated Fact*
28. On December 30, 1998, Complainant underwent his first reconstructive knee surgery related to the injury he received at work on November 22, 1998. *Stipulated Fact*
29. Complainant underwent physical therapy through March of 1999. However, he continued to experience problems with his knee and requested a second opinion regarding his injuries. *Stipulated Fact*

Complainant's Transitional Duty

30. On March 8, 1999, Dr. Shoemaker, Complainant's worker's compensation doctor, gave his approval to a memo from Pat Jones, an Employee Benefits Coordinator for DOC, which set out the general duties of a transitional duty position to which Complainant was assigned. *Exhibit O, Lawson and Complainant*
31. Jones' memo was not provided to Complainant. *Stipulated Fact*
32. In March of 1999, Complainant was informed that he was to report to transitional duty at the Respondent's Training Academy as of March 15, 1999. *Stipulated Fact*

33. Complainant indicated to Jones that he did not think that the work at the training academy would be challenging to him. *Stipulated Fact*
34. In late March and early April, 1999, Complainant was in the process of obtaining a second opinion regarding the injuries to his knee. *Stipulated Fact*
35. On April 13, 1999, Complainant was assigned to transitional duty at the training academy beginning April 14, 1999. *Exhibit X and Stipulated Fact*
36. Complainant worked in transitional duty at the training academy on April 14, 16, and 19. *Stipulated Fact*
37. Complainant had a second surgery on his knee on April 21, 1999. *Stipulated Fact*
38. On June 14, 1999, Verna (Williams) Lawson telephoned Complainant and told him to report to work in a living unit at the CCF on June 15, 1999. *Stipulated Fact*
39. Complainant's report date to the CCF control center position was moved back from June 15th to June 21st by Lawson because Complainant had reinjured his knee while at home. *Stipulated Fact*
40. On or about June 14, 1999, Lawson sent a letter to Dr. Shoemaker, requesting approval of a transitional duty position for Complainant, in an isolated control center in the living unit of CCF. *Exhibit A-1 and Stipulated Fact*
41. On June 15, 1999, Dr. Shoemaker signed an authorization for Complainant to work at the CCF control center. *Stipulated Fact*
42. The only information Dr. Shoemaker had about the position in the control center at CCF was that provided by Lawson in her letter of June 14, 1999. *Exhibit A-1 and Stipulated Fact*
43. Lawson's letter was not provided to Complainant. *Stipulated Fact*
44. Lawson's letter stated that the transitional duty position would have elevator access, there were no lifting requirements, no kneeling or squatting and no inmate contact. *Exhibit A-1*
45. The only elevator in the Centennial Correctional Facility is in the main building; there is no elevator access to the control centers within the facility. *Stipulated Fact*
46. Individuals assigned to control centers at Centennial cannot see all of the areas for which they are responsible if they remain seated. *Stipulated Fact*

47. While working in the transitional duty position at the Centennial Correctional Facility, Complainant had contact with inmates when he went to and from the control center through the mall area. *Stipulated Fact*
48. The control centers at the Centennial Correctional Facility have metal grating in the floor to allow communication between staff in the control center and staff below. *Stipulated Fact*
49. In June of 1999, Lawson understood that Complainant could only do sedentary work. *Stipulated Fact*
50. Lawson was provided a copy of a written notes from Dr. David Walden stating that Complainant should only do sedentary work and should wear a brace. *Exhibits B-1 and D-1 and Stipulated Fact*
51. Neither Lawson nor Rockwell spoke with Dr. Walden regarding Complainant's restrictions and transitional duty positions. *Stipulated Fact*
52. On Saturday, June 19, 1999, Complainant received a certified letter dated June 17, 1999 from Lawson indicating that he was to report to Centennial Correctional Facility on June 21, 1999, to work in the control center. *Exhibit C-1 and Stipulated Fact*
53. Lawson was aware that, at the time Complainant was assigned to transitional duty at CCF, Complainant had medical appointments which required him to leave the facility during the workday. *Stipulated Fact*
54. When Complainant reported to work on June 21, 1999, he was using crutches and was still taking medication relating to his knee injury. *Stipulated Fact*
55. Tony Carcohi from the Centennial Correctional Facility telephoned Lawson and was told that Complainant did have a medical release. *Stipulated Fact*
56. Complainant was then told to report to roll call. *Stipulated Fact*
57. Complainant was on crutches when he met with Captain Gregg and Carcohi. *Stipulated Fact*
58. Complainant was assigned to work in the control center in F and G units, which are the farthest away from the entrance to the facility. *Stipulated Fact*
59. To access the control facility, Complainant was required to walk through the mall area and use a ladder to access the control center itself. *Stipulated Fact*
60. Units F and G are a combined control center; however, the individual assigned to the Unit F side of the control center cannot see the inmates being observed by the

Unit G side and similarly, the individuals working on the Unit G side cannot see the inmates being observed by the Unit F side of the control center. *Stipulated Fact*

61. Complainant reported to work at the CCF for a second day on June 22, 1999. *Stipulated Fact*

62. On June 22, 1999, Major Rossi told Complainant to go home and wait until he was called by the facility. *Stipulated Fact*

63. On June 22, 1999, Complainant called Lawson and discussed the fact that he had been sent home from the CCF due to the fact that he was on crutches and still taking narcotics, and that he could not meet the job requirements of the transitional duty position. *Stipulated Fact*

64. SaBell was told by Lawson that Complainant was sent home from the transitional duty position at the CCF due to Complainant's failure to provide a doctor's statement. *Stipulated Fact*

65. On July 21, 1999, Complainant was again assigned transitional duty at the Training Academy. *Stipulated Fact*

66. Complainant was considered a good employee by DOC's Training Academy staff. He performed all functions asked of him at the Training Academy. *Stipulated Fact*

67. The Training Academy can accommodate more than one transitional duty position at a time. *Stipulated Fact*

68. Between April 20 and July 12, 1999, Brenda Van Edgeman, from DOC's Training Academy, was not contacted about placing Complainant in a transitional duty position at the training academy. *Stipulated Fact*

69. On or about June 19, 1999, Complainant sent letter to Madeline SaBell, Director of Human Resources for Respondent, expressing frustration with, among other things, his transitional duty assignment to the control center because of the physical difficulties he was experiencing in carrying out the job duties for that position. *Complainant and Exhibit E-1*

70. Suthers received a copy of Complainant's letter to SaBell, on June 22, 1999. He wrote on it, "Give copy to Brad." *Stipulated Fact*

71. Complainant mailed two letters dated August 9, 1999, to Madeline SaBell, complaining about Lawson's lack of responsiveness to a letter he sent and complaining about his treatment from Dr. Shoemaker. *Exhibit K-1 and Stipulated Fact*

72. On or about August 11, 1999, Lawson sent Madeline SaBell a chronological report of Complainant's transitional duty. *Exhibit L-1 and Stipulated Fact*
73. Lawson prepared the chronological report of Complainant's transitional duty and provided it to SaBell as her representation of the history of Complainant's transitional duty assignments. *Stipulated Fact*
74. John Suthers became the Executive Director of the Department of Corrections effective January 12, 1999. *Stipulated Fact*
75. Cherie Greco is the Director for DOC's Training Academy. (*Greco*)
76. On or about October 13, 1999, Lawson sent Complainant a letter telling him he needed to contact his supervisor at CCF weekly, transitional duty is designed to last for ninety days (which could be extended to 180 days with the approval of Suthers), and that his ninety days would be exhausted on November 9, 1999. *Exhibit B-2*
77. Suthers received a copy of Lawson's October 13, 1999 letter. He wrote the handwritten note at the top to Lawson stating in part, "Let me know if there is any reason I shouldn't approve that," referring to Cherie Greco's handwritten request on the same letter that Complainant's transitional duty be extended to 180 days. *Exhibit B-2 and Stipulated Fact*
78. Suthers does not typically conduct any independent investigation regarding requests for extension of transitional duty. *Stipulated Fact*
79. Suthers generally accepts the recommendations made to him by others regarding transitional duty extensions. *Stipulated Fact*
80. Suthers understood Greco's note on the letter to be an indication that she desired to have Complainant's transitional time extended. *Stipulated Fact*
81. Suthers received Lawson's written recommendation and followed her recommendation not to extend Complainant's transitional duty. *Exhibit H-2 and Stipulated Fact*
82. Suthers cannot recall any time when he has not followed Lawson's recommendation regarding whether or not to extend an employee's transitional duty time. *Stipulated Fact*
83. Suthers accepted Lawson's recommendation at face value. *Stipulated Fact*
84. Complainant was not provided a copy of Lawson's recommendation to Suthers. *Stipulated Fact*

85. Complainant did not have an opportunity to respond to Lawson's statements contained in her recommendation. *Stipulated Fact*
86. Complainant was not at maximum medical improvement when his transitional duty ended on November 9, 1999. *Stipulated Fact*
87. On November 22, 1999, Complainant filed an appeal with the State Personnel Board regarding what he understood to be his termination from the DOC as of November 9, 1999. *Stipulated Fact*
88. Complainant's appeal was dismissed with prejudice on the grounds that the Board was without jurisdiction because Complainant had not been terminated. *Exhibit R-4*

Complainant's ADA Accommodation Requests

89. Rockwell is the DOC's ADA Coordinator and is in charge of management of litigation against the DOC by employees. *Stipulated Fact*
90. On or about March 31, 1999, Rockwell mailed to Complainant a request for information regarding Complainant's request for accommodation under the ADA. *Exhibit S and Stipulated Fact*
91. On or about April 3, 1999, Complainant responded to that request, providing Rockwell with an authorization for release of medical information and explaining that he was in the process of obtaining a second medical opinion, had scheduled an MRI on his knee and that his surgical doctor, Patterson, had written that he would have a significant permanent partial impairment. *Exhibit U and Stipulated Fact*
92. Rockwell sent no further correspondence to Complainant for approximately nine months, until January 5, 2000. *Stipulated Fact*
93. On or about January 5, 2000, Rockwell mailed a request for information in response to a request for accommodation to Complainant. *Exhibit Q-2 and Stipulated Fact*
94. On or about January 12, 2000, Complainant sent a response to Rockwell's letter of January 5, 2000. *Exhibit T-2 and Stipulated Fact*
95. Along with the letter of January 12, 2000, Complainant provided Rockwell a release allowing him to obtain all information in Lawson's possession. *Stipulated Fact*
96. On or about February 5, 2000, Rockwell sent a letter to Complainant stating that Complainant had not responded to Rockwell's March 1999 and January 2000 requests for information regarding Complainant's request for accommodation. *Exhibit V-2 and Stipulated Fact*

97. Complainant sent a response to this letter, stating that he had responded to Rockwell's requests, providing a KEY functional assessment dated October 4, 1999 which set out his work restrictions and requesting an accommodation which fit within the functional assessment. *Exhibit W-2 and Stipulated Fact*
98. Between February 5 and April 3, 2000, Rockwell did not have any contact or communication with Complainant. *Stipulated Fact*
99. Rockwell did not communicate directly with any of Complainant's treating physicians. *Stipulated Fact*
100. On or about April 11, 2000, Complainant sent a letter to Dr. Dallenbach, his worker's compensation doctor, requesting specific information for himself and DOC's ADA Coordinator. *Exhibit H-3 and Stipulated Fact*
101. On or about April 14, 2000, Complainant provided a letter to Rockwell, attaching a letter from Dr. Dallenbach. *Exhibit J-3 and Stipulated Fact*
102. Dr. Dallenbach's letter stated that the functional capacity evaluation set forth the necessary accommodations for Complainant, "in lay terms and it should pose no problem for any one dealing with ADA affairs to understand." *Exhibit J-3*
103. Rockwell did not contact Dr. Dallenbach regarding Complainant's limitations or restrictions. *Stipulated Fact*
104. On April 20, 2000, a pre-separation meeting was held with David Green. This meeting was attended by Mike Williams, Verna (Williams) Lawson, Madeline SaBell, Brad Rockwell, and David Green. *Stipulated Fact*
105. On April 20, 2000, Complainant was provided a list of vacancies in DOC. *Exhibit L-3 and Stipulated Fact*
106. The list of vacancies provides the position number, the title of the position and the amount of FTE allocated to the position. *Exhibit L-3*
107. The list of vacancies does not state the essential functions of each particular job. *Exhibit L-3 and Stipulated Fact*
108. Each separate position in the DOC has its own position description setting forth the essential functions and duties of the position. *Stipulated Fact*
109. Complainant did not go through the list of vacancies at the April 20, 2000 meeting. *Stipulated Fact*

110. Complainant met with Lucy McClelland at DOC headquarters on May 5, 2000.
111. On May 10, 2000, Rockwell mailed Complainant a letter indicating there was a vacant Administrative Assistant I position for which he may be qualified and for which he may be able to perform the essential functions. *Exhibit Q-3 and Stipulated Fact*
112. Complainant responded to Rockwell's letter dated May 31, 2000, requesting information as to the location of the job, starting salary and a copy of the PDQ and stating that he could not respond to the job offer based upon the information he had been given. *Exhibit R-3 and Stipulated Fact*
113. Mike Williams, Warden for CCF and Complainant's appointing authority, was not provided a copy of Complainant's May 31, 2000 response to Rockwell. *Stipulated Fact*

Complainant's Termination of Employment by Williams

114. On or about June 23, 2000, Rockwell sent a memo to Mike Williams recommending that Complainant could not perform the essential functions of his job, with or without accommodation and he had been offered, but not accepted, another vacant position. *Exhibit S-3 and Stipulated Fact*
115. In his memo to Mike Williams, Rockwell stated that he did not believe "the law requires us to continue juggling Mr. Green's complaints and reticent behavior." *Exhibit S-3*
116. Mike Williams did not contact Rockwell to clarify what "complaints and reticent behavior" Rockwell referenced in his June 23, 2000, letter. *Stipulated Fact*
117. After Rockwell's memo, Mike Williams terminated Complainant's employment. *Stipulated Fact*
118. At the time Mike Williams terminated Complainant, it was his understanding that Complainant had been offered more than one position and that he had declined each. *Stipulated Fact*
119. Mike Williams discussed Complainant's request accommodation only with Rockwell. *Stipulated Fact*
120. Mike Williams did not talk to Complainant at any time after the April 20, 2000 pre-separation meeting. *Stipulated Fact*

121. Mike Williams was informed by Rockwell that, prior to April 20, 2000, Complainant had been offered jobs to accommodate his disability. *Stipulated Fact*
122. Mike Williams was informed by Rockwell that Complainant declined all offers of jobs to accommodate his disability. *Stipulated Fact*
123. Mike Williams understood Complainant's letter of February 5, 2000, to be a request for accommodation to be placed in another job in the Canon City area. *Exhibit W-2 and Stipulated Fact*

Post Termination Job Offer

124. On July 28, 2000, after Complainant was terminated from the DOC, Rockwell sent him a letter indicating an administrative assistant position was open in Clinical Services at the Fremont Correctional Facility. *Exhibit T-3 and Stipulated Fact*
125. Along with Rockwell's July 28, 2000 letter, Complainant was provided a PDQ for the position. *Stipulated Fact*
126. In response to Rockwell's letter, Complainant wrote a letter dated August 7, 2000, stating that he had no medical training that would enable him to perform the job requirements. *Exhibit V-3 and Stipulated Fact*
127. Rockwell's responded to Complainant's letter, stating that notwithstanding the PDQ language referenced by Complainant, the DOC would have been willing to work with him and that no further efforts would be made by DOC. *Exhibit W-3 and Stipulated Fact*

Complainant's EEOC Charges

128. Complainant filed EEOC Charge No. 320A00059 on October 14, 1999. *Stipulated Fact*
129. On January 6, 2000, the DOC filed its Position Statement in response to Complainant's EEOC Charge No. 320A00059. *Stipulated Fact*
130. On August 4, 2000, Complainant filed EEOC Charge No.320A01363. *Exhibit U-3 and Stipulated Fact*
131. The DOC provided a Position Statement in response to EEOC Charge No. 320A01363 on September 20, 2000. *Exhibit X-3 and Stipulated Fact*

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be terminated for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rules R-6-9, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) willful failure or inability to perform duties assigned; and
- (4) final conviction of a felony or any other offense involving moral turpitude.

A. Burden of Proof

In this appeal of Complainant's administrative termination for exhaustion of leave, the Complainant has the burden to prove by preponderant evidence that his administrative termination was arbitrary, capricious or contrary to rule or law. See Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); § 24-50-103(6), C.R.S. In determining whether an agency's decision is arbitrary or capricious, a court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. If not, the agency has not abused its discretion. McPeck v. Colorado Department of Social Services, 919 P.2d 942 (Colo. App. 1996).

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).

B. Credibility

This case rests in part on credibility determinations. When there is conflicting testimony, as here, the credibility of the witnesses and the weight to be given their testimony are within the province of the administrative law judge. Charnes v. Lobato, 743 P.2d 27 (Colo. 1987). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;

8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence that affect the credibility of a witness.

II. HEARING ISSUES

- A. Was the Appointing Authority's action of administratively terminating Complainant arbitrary, capricious, or contrary to rule or law?

1. The Complainant was discriminated against on the basis of his disability because he was denied a reasonable accommodation of his disability.

The dispute in this matter centers not on whether the Complainant is a qualified individual with a disability but rather whether or not Respondent offered Complainant reasonable accommodation of his request to a vacant job. The burden is on the Respondent to show either undue hardship or that it offered Complainant reasonable accommodation. Community Hospital v. Erika Fail, 969 P.2d 667, 675 (Colo. 1998). However, at all times, the Complainant bears the ultimate burden of persuasion that he has been the victim of illegal discrimination. Community Hospital, 969 P.2d at 675.

The Colorado Civil Rights Commission ("CCRC") has the statutory authority to promulgate rules to implement the Act. CCRC has ruled that the Act "is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12117 (1994) (the "ADA"). CCRC Rule 60.1(A), 3 CCR 708-1. Under both the Act and the ADA, a reasonable accommodation may include a reassignment from an employee's current job to one that he desires and for which he is qualified. Community Hospital, 969 P.2d at 676; 42 U.S.C. § 12111(9); Smith v. Midland Brake, 180 F.3d 1154, 1161 (10th Cir. 1999). Therefore, an analysis of whether Complainant's request for a transfer to a vacant job was reasonably accommodated may be, in part, governed by federal case law.

Implementation of the reasonable accommodation aspect of the ADA is an interactive process that requires participation by both parties. Templeton v. Neodata Services, Inc., 162 F.3d 617, 619 (10th Cir. 1998). The interactive process begins with the employee providing enough information about his limitations and desires to convey the employee's desire to remain with the employer despite his disability and limitations. Smith, 180 F.3d at 1172. Once the employer's responsibilities to engage in the interactive process are triggered, both the parties are obligated to engage in good-faith communications with each other. *Id.* It follows that a party that obstructs or delays this interactive process is not acting in good faith. *Id.*

The interactive process was triggered by Complainant as shown by Rockwell's letter dated March 31, 1999 requesting information from Complainant regarding Complainant's request for accommodation. Complainant responded to this letter within three days of it being sent. In his response he provides a signed release for all medical records. He also explained that he was obtaining a second medical opinion and that his

surgeon had stated that he would have a permanent partial impairment and he (the surgeon) would not be able to rate Complainant for at least three months.

Almost nine months later, Rockwell sends an almost identical letter to Complainant requesting information from Complainant regarding Complainant's request for accommodation. The only difference between the two letters is that Rockwell provides a medical release for Complainant's signature so that he may obtain Complainant's medical records from Lawson. Complainant responds to this letter within six days and attaches the signed medical release requested by Rockwell.

Three weeks later Rockwell sends Complainant a letter stating that Complainant has not responded to any of Rockwell's requests. Complainant again responds, telling Rockwell that a functional assessment done in October 1999 and provided to both Rockwell and Lawson, sets forth his restrictions. He states that the accommodation must fit within the assessment's parameters. He closes by stating that he wants a job with DOC in the Canyon City area. Complainant has by this point, at least, conveyed his desire to remain with the Respondent, as required under Smith.

Two and a half months later, a pre-termination meeting is held between Complainant and various representatives for Respondent. This is the first time that Complainant is provided with a list of all vacancies within DOC. The list is computer-generated, twenty-two pages and completely inadequate. On each page there are approximately twenty-eight lines, each divided into six columns. A sample entry from page 1, complete with column headings, is as follows:

ORGUNIT	POSN	NAME	TITLE	FTEAMT	LINE
0100	03535	vacant (VELLAR)	AD ASSTIII	1.00	CBA

The list does not provide basic information that any reasonable person would want to know about a job for which he was applying. It does not provide location of the jobs within Colorado; starting pay; or the basic job duties or essential job functions. Two weeks after receiving the list, Complainant met with McClelland to review the list and try to narrow down the jobs to which he wanted to be reassigned. Five days later, as a result of that meeting, Rockwell sent him a letter offering to place him, if he was qualified, in a vacant Administrative Assistant I position. The letter does not contain any information beyond the title of the position – it does not state where the job is located, the starting pay or the essential functions of the job. Complainant sent a letter strongly objecting to the lack of information. Three weeks later Rockwell informed Complainant's appointing authority that Complainant had been offered a vacant position for which he may be qualified, but Complainant had not accepted the position.

It is reasonable for Complainant to want to know the location of the jobs on the vacancy list. The Respondent is an agency with facilities across the state. Complainant did not wish to work outside of Canyon City and clearly stated this to Rockwell by February 2000, at the latest. It is reasonable for Complainant to wish to know the

starting pay for the various positions. It gives him information as to whether or not he will be able to support his family. Finally, it is reasonable for Complainant to wish to know the essential functions of the various positions. Without that knowledge, he is unable to determine whether or not he is physically able to perform the job duties or whether he has the necessary skills to perform those duties. All of this is information that a majority of applicants for any job wish to know prior to obtaining a job. Rockwell was not being asked to create a new job for Complainant or bump another employee from a position to accommodate Complainant. He was simply being asked, as part of the interactive process mandated by the ADA, for information to assist Complainant in making a decision as to whether there was a vacant position within DOC that he desired. If Rockwell had made an effort to provide this information to Complainant the issue of whether or not Complainant could be reasonably accommodated by reassignment would have been easily resolved.

Complainant requested the reasonable accommodation of a transfer to a vacant position and provided Respondent with his work restrictions. However, Rockwell, acting as Respondent's ADA Coordinator, did not engage in the interactive process with Complainant. In fact, under Smith, his delay in responding to Complainant's request can only be construed as not engaging in the interactive process in good faith. Therefore, Respondent acted contrary to law, discriminating against Complainant on the basis of his disability by denying him a reasonable accommodation of his disability.

2. Was Complainant retaliated against for a protected activity?;

Complainant alleged in his Notice of Appeal and his Prehearing Statement that he was subjected to retaliation and referred to his testimonial support of his wife in her action against DOC and his filing of charges with the EEOC. Such retaliation would be in violation of Title VII, which provides, in part:

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

42 U.S.C. §2000e-3.

To establish a prima facie case of retaliation under Title VII, Complainant must establish: (1) he was engaged in protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the Respondent subsequent to or contemporaneous with Complainant's activity; and (3) a causal connection between such activity and the employer's adverse action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996). Once the Complainant establishes a prima facie case, the burden of production shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the adverse action. Berry, 74 F.3d at 986. The

Complainant must then show that the Respondent's offered reasons are an excuse or pretext for retaliation.

Complainant has established the first element of a prima facie case in that he engaged in protected conduct. He actively participated as a witness in Fails v. DOC. He filed two different charges with the EEOC. However, because the Complainant was terminated prior to filing his second EEOC charge, only the first EEOC charge is considered with regards to this allegation. As to the second element of a prima facie case, Complainant has shown he suffered an adverse action by Respondent, in that his employment with DOC was terminated.

The final element of establishing a prima facie case is showing a causal connection between such activity and the employer's action. A retaliatory motive may be inferred when an adverse action closely follows protected activity. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. Marx v. Schnuck Markets, Inc., 76 F.3d 324, 329 (10th Cir. 1996).

Prior to Complainant's injury and for a majority of his remaining time with Respondent, the Fails v. DOC case was ongoing. Throughout that case, Complainant attended court hearings and settlement conferences and provided an affidavit, deposition testimony and trial testimony in support of Fails' claims. After Complainant was injured (and while the Fails v. DOC case was ongoing), his ADA requests and the coordination of his worker's compensation benefits were poorly handled by both Rockwell and Lawson. Rockwell, in his position as Director of Legal Services, was personally aware of the nature of Complainant's involvement in the Fails v. DOC case. Lawson was also aware of the nature of Complainant's involvement in Fails v. DOC. As reflected below, throughout the ongoing Fails v. DOC case and the initial EEOC filing, Rockwell and Lawson frustrated Complainant's attempts to work with Respondent in finding an accommodation and in utilizing Respondent's transitional duty program:

- Less than a month prior to the Fails matter going to trial and just three weeks after filing an EEOC charge, Complainant was terminated from transitional duty, on Lawson's recommendation;
- During the eight months directly proceeding the Fails trial, Rockwell did not make any attempt to reasonably accommodate Complainant (despite being provided with an authorization to obtain a release of any and all medical information) nor, if the information he had was unclear for purposes of providing an accommodation, did he attempt to clarify what was still needed from Complainant in order to provide an accommodation under the ADA;
- Just over two months after a jury verdict was entered in the Fails case against Respondent and one month after Respondent filed its response in

Complainant's EEOC action, Rockwell sent Complainant a letter stating that Complainant had not responded to Rockwell's March 1999 and January 2000 requests for information regarding Complainant's request for accommodation. Rockwell made this statement despite evidence and testimony in the record to the contrary of Complainant providing a medical release and a functional assessment;

- Lawson arranged for Complainant to work in various transitional duty positions but disregarded Complainant's surgery schedule, the work restrictions placed upon him by his doctor and the physical requirements of at least one transitional duty position. Such arrangements made it difficult, at best, for Complainant to perform his transitional duty assignments.

All of these actions took place throughout the course of the Fails v. DOC case and Complainant's initial EEOC filing. Given their temporal proximity to the adverse action and Complainant's protected conduct, Complainant has shown a causal connection between his eventual termination and his participation in the Fails lawsuit and the filing of the EEOC charges.

Because Complainant has presented a prima facie case of retaliation, the burden of production shifts to the Respondent to provide a legitimate, nondiscriminatory reason for the adverse action. Respondent states that it tried to accommodate Complainant, however, Complainant refused the offered accommodation. In addition, Respondent states that Complainant had exhausted all of his annual and sick leave and, therefore, was administratively terminated. These are legitimate, nondiscriminatory reasons, therefore the burden of production shifts to Complainant to demonstrate that they are a pretext for discrimination.

Pretext may be shown through an assessment of credibility. Bodaghi v. Dept. of Nat'l Resources, 995 P.2d 288, 298 (Colo. 2000). While Respondent's reasons are legitimate, nondiscriminatory reasons on their face, an assessment of credibility demonstrates that they are a pretext for discrimination. As set forth above Complainant was never offered a reasonable accommodation. In addition, the record is replete with instances of Lawson stymieing Complainant's attempts to participate productively in the transitional duty program. It is clear that Rockwell and Lawson's non-cooperative behavior resulted in Complainant using up all of his annual and sick leave while trying to obtain a reasonable accommodation and participate in the transitional duty program.

Respondent retaliated against Complainant for engaging in a protected conduct. Such retaliation is contrary to law as set forth above.

3. Was Complainant retaliated against as a result of whistleblower activity?

In determining whether the protection provided by the Whistleblower Act has been violated, the Complainant must establish that his disclosure fell within the

protection of the statute and that the disclosure was a substantial motivating factor in the Respondent's decision to terminate his employment. Ward v. Industrial Commission, 699 P.2d 960 (Colo. 1985) The employee who is making the disclosure of information must make a good faith effort to provide to his supervisor, appointing authority or a member of the general assembly the information to be disclosed prior to the time of its disclosure. §24-50.5-103, C.R.S. Complainant has failed to show that he has provided the information to the appropriate persons, prior to the information's disclosure.

B. Remedy

Complainant is entitled to back pay and benefits because he has been retaliated against and has not been reasonably accommodated. However, because he is unable to perform the essential functions of his former position, he may not be reinstated to his former position.

When an employee is wrongfully terminated, he or she is entitled to a remedy which will make him whole. Lanes v. O'Brien, 746 P.2d 1366, 1373 (Colo. App. 1987). The remedy should be equal to the wrong sustained by the employee. Dept. of Health v. Donahue, 690 P.2d 243, 250 (Colo. 1984). Such an employee is not entitled to any windfall. *Id.* Likewise, however, the remedy crafted by the fact finder should not in any way reward the employer for its wrongful conduct. Carr v. Fort Morgan School Dist., 4 F. Supp. 2d 989 (D. Colo. 1998).

Here, it would provide Complainant with a windfall if he were reinstated to a job in which he is unable to perform the essential functions. On the other hand, for at least four months, from February 2000 to June 2000, at least, the Respondent engaged in wrongful conduct by not participating in good faith in the interactive process of finding Complainant a vacant position. Therefore, Complainant is awarded back pay and benefits and, for a period of four months, forward pay and benefits. In addition, for a period of four months the Respondent and Complainant are to engage, in good faith, in the interactive process of looking for a vacant job within DOC for which Complainant is qualified.

C. Attorney fees are not warranted in this action.

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.

Given the above findings of fact an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious, or contrary to rule or law.
2. Attorney's fees are not warranted.

ORDER

Respondent's action is **rescinded**. Complainant is reinstated with full back pay and benefits and, for a period of four months, forward pay and benefits. Because Complainant is not able to perform the essential functions of his position at the time of his termination from DOC, Respondent and Complainant are ordered to engage in the interactive process of reasonably accommodating Complainant in a vacant position. Such process shall take place for a four month period during which time Complainant shall continue to receive his full pay and benefits. Attorney fees and costs are not awarded.

Dated this 29th day of May, 2001.

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-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.

CERTIFICATE OF MAILING

This is to certify that on the _____ day of May, 2001, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Darrell D. B. Damschen
Frank & Finger
29025D Upper Bear Creek Road
P.O. Box 1477
Evergreen, Colorado 80437-1477

and in the interagency mail, to:

Stacy L. Worthington
First Assistant Attorney General
Employment Law Section
1525 Sherman Street, 7th Floor
Denver, Colorado 80203
