

**ORDER GRANTING MOTION TO DISMISS;
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

CHARLOTTE HOFER,

Complainant,

vs.

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

Respondent.

Administrative Law Judge Mary S. McClatchey heard this case on April 16, 2002. Assistant Attorney General Melissa Mequi represented Respondent Department of Higher Education ("DHE"). Randall R. Meyers, Esquire, represented Complainant. At the close of Complainant's case-in-chief, Respondent moved to dismiss this case pursuant to C.R.C.P. 41(b)(1), and submitted a Trial Brief. Complainant responded to the motion. Upon consideration of the evidence submitted by Complainant, and the relevant statutes and case law, the Administrative Law Judge granted the motion.

MATTER APPEALED

Complainant appeals her administrative discharge on grounds Respondent discriminated against her on the basis of disability. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether Respondent's action was arbitrary, capricious, or contrary to rule or law;
2. Whether Respondent discriminated against Complainant on the basis of disability.

FINDINGS OF FACT

1. In April 1999, Charlotte Hofer ("Complainant" or "Hofer") commenced employment at

Front Range Community College ("FRCC") as a part-time Lab Coordinator I.

2. In 1995, Complainant had been diagnosed with depression.
3. In the fall of 1999, Complainant's depression returned. She began to have difficulty concentrating at work, sleeping at night, and interacting with others socially. She had a strained relationship with her immediate supervisor at FRCC, Susan Brown.
4. On January 3, 2000, Complainant saw a psychiatrist, Dr. Kenneth H. Ash, who diagnosed her with major depression and prescribed medication to treat it. Complainant began to see a therapist regularly, and had monthly visits with Dr. Ash.
5. In May 2000, Respondent directed Complainant to attend a weeklong class for work. Complainant informed her immediate supervisor, Susan Brown, and department head Sashi Unnithan, Department of Natural and Applied Environmental Sciences, that she was being treated for depression and her condition made it uncomfortable for her to attend this class. Complainant presented a note to Respondent from her therapist indicating that she should be excused from attending the class because of her major depression. The exact contents of the note are unknown. Respondent did not excuse Complainant from attending the class.
6. After Complainant missed the class, Respondent sent a notice of predisciplinary meeting to Complainant for having missed it.
7. Prior to the date of the predisciplinary meeting, on July 27, 2000, Complainant went on approved Family Medical Leave due to her depression. She never returned to work.
8. Complainant remained on Family Medical Leave for the full 13-week period permitted by law. During that period, she exhausted all paid leave available to her.
9. Complainant had monthly contact with FRCC's Human Resources staff person in the Westminster office, Carol Taylor. She sent Taylor monthly updates of her medical condition, utilizing Colorado Medical Certification Forms. These forms indicated that she was unable to return to work due to "increase of symptoms of major depression where work is extremely difficult at this time & needing medical leave."
10. By letter dated August 31, 2000, Respondent informed Complainant that her FML leave would expire on October 27, 2000.
11. In September, 2000, Complainant was approved for Short Term Disability benefits.
12. On October 10, 2000, Complainant wrote a letter to Taylor stating in part, "How will the State work with me as being disabled in determining reasonable

accommodation? If there are other options available (such as transfer??, other settlement?? Etc.), please include information and State procedure on those as well.

My next doctor's appointment is Monday, Oct. 23rd. In determining my health and fitness, I'm sure the physician (and I as well) will want to know at that time the specific accommodation the State is offering me, should I be fit to return that week."

13. On October 24, 2000, Complainant faxed a State of Colorado Fitness-to-Return Certification form indicating, "The employee is unable to return for any work until . . . evaluate each month."
14. On October 27, 2000, Complainant sent Taylor a Medical Certification form signed by her physician indicating, "I recommend Char not return to work at this time because of problems with concentration and dealing with stress 2nd to depression."
15. On November 21, 2000, Complainant faxed a statement from her personal physician to Taylor, stating, "11/21/00 - depression appears improved enough to possibly try to return to work in a new setting."
16. On December 8, 2000, Taylor sent Complainant a letter, stating in part,

"Enclosed please find a copy of the college's policy concerning the ADA, Americans with Disabilities Act. In order to understand your position, we need information from your physician indicating, 1) the exact nature of your impairment, 2) the major life activities limited by your impairment, and 3) the accommodation being requested to permit you to perform the essential functions of your position. You may wish to add information regarding any requested accommodations to that provided by your physician."

Taylor enclosed a copy of Complainant's job description.

17. On January 12, 2000, Complainant sent Taylor a letter response, stating that referring to her physician's medical certification, her impairment is depression; that the major life activity limited by the impairment is "concentration and dealing with stress;" and that the accommodation her physician recommends is "a new setting (reassignment)." She further stated, "According to my therapist, a new setting as a reassignment should preferably offer good communication, flexibility and an encouraging environment."
18. On January 18, 2000, Taylor responded by letter, stating, "The information you provided is not sufficient to determine your disability or the accommodation requested. I have enclosed a form for your physician to complete to provide the requested information to the College. As you know, your maximum 180 day eligibility for short term disability ends on January 22, 2001. If you do not return to work on January 23, 2001, the college will continue you on leave without pay (without benefits contribution) until further notice."

19. On February 8, 2001, Complainant's physician submitted the form to Respondent. Under "exact nature of Charlotte Hofer's impairment" he wrote, "major depression." Under "major life activities limited by this impairment" he wrote, "work." The last two questions on the form were, "Is Charlotte Hofer able to return to her current position as Laboratory Coordinator I at Front Range Community College as of January 23, 2001?" and "Yes. Ms. Hofer can return to work on January 23, 2001 with the following accommodation (please be specific)." Complainant's physician wrote,

"Ms. Hofer does not believe that she is able to return to her present position. This is because of the difficulties with concentration which is a symptom of depression. I will not get into a position of deciding whether or not my patient is able to return to work. I feel that this will be something that will need to be between you and her."
20. After receipt of this letter, Respondent sent Complainant a letter scheduling a meeting on February 14 at which it would consider its options under Director's Procedure P-5-10 due to exhaustion of leave, which included either granting additional leave without pay or administrative discharge. Respondent enclosed a copy of P-5-10.
21. Complainant received the letter but did not attend the February 14 meeting. She did not contact Respondent to attempt to reschedule the meeting or make alternate arrangements.
22. On February 20, 2001, Respondent administratively terminated Complainant pursuant to P-5-10 based on exhaustion of all leave. At that time, Complainant had exhausted all leave. Respondent further advised Complainant that based on the information she had provided, namely, that her physician had declined to certify that she was able to return to work in any position at that time, "the College does not find that you are a qualified individual with a disability who can reasonably be accommodated without undue hardship."

DISCUSSION

I. Rule 41(b) Standard of Review

Rule 41(b)(1), C.R.C.P. provides, "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The standard to apply is whether, in light of all the evidence, a judgment for

respondent should be entered. *Smith v. Weindrop*, 833 P.2d 856, 857 (Colo.App. 1992).

II. Respondent did not discriminate against Complainant on the basis of disability

The Board has jurisdiction over actions brought under the Colorado Anti-Discrimination Act, Section 24-34-301 *et seq*, C.R.S. ("the Act" or "the Colorado Act"), under Section 24-50-125.3, C.R.S. Complainant bears the burden of proving Respondent discriminated against her on the basis of disability. *Colorado Civil Rights Division v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997).

Both parties rely on the federal Americans with Disabilities Act ("ADA"). The Board is governed by the Colorado Act and any interpretative rules adopted by the Colorado Civil Rights Commission ("Commission"). The Commission has promulgated such rules at 3 CCR 708-1. Noting that the state Act is "substantially equivalent" to the ADA, the Commission promulgated Rule 60.1C, which states in part,

"Whenever possible, the interpretation of [the state Act] concerning disability shall follow the interpretations established in Federal regulations adopted to implement the Americans with Disabilities Act . . . , and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." Colorado Civil Rights Commission Rule 60.1C, 3 CCR 708-1.

To determine whether a disability discrimination claim has merit, a two-part threshold inquiry must occur: "*first*, does the claimant have a disability within the meaning of the act, and *second*, is the person 'otherwise qualified' for the [position]." *Gonzagowski v. Widnall*, 115 F.3d 744, 747 (10th Cir. 1997).

Complainant is not Disabled under the Act.

The Act defines disability as, "a physical [or mental] impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." Sections 24-34-301(2.5)(a) and (b), C.R.S. *See also* 42 U.S.C. Section 12102(2). The Act defines "mental impairment" as "any mental or psychological disorder such as developmental disability, organic brain syndrome, mental illness, or specific learning disabilities." Section 24-34-301(2.5)(b)(III), C.R.S.

Complainant's impairment is major depression, which for purposes of this opinion is recognized as a mental illness covered by the Act. Complainant alleges that her major depression substantially limits her in the major life activity of "working." Federal regulations and case law interpreting the ADA require,

"With respect to the major life activity of working - (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a

broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. Section 1630.2(j)(3)(i); *Gonzagowski, supra*; *Kuehl v. Wal-Mart Stores, Inc.*, 909 F.Supp. 794, 800 (D.Colo. 1995).

Complainant's position is that she was unable to perform her particular job. Her physician's response to Respondent's request for information regarding ADA status and accommodation indicated, "Ms. Hofer does not believe that she is able to return to her present position. This is because of the difficulties with concentration which is a symptom of depression. I will not get into a position of deciding whether or not my patient is able to return to work. I feel that this will be something that will need to be between you and her." Finding of Fact Number 19.

Complainant has never demonstrated that she is restricted from performing a class of jobs or a broad range of jobs in various classes. She and her physician have consistently stated only that she has difficulty concentrating and dealing with stress. This is so vast a restriction as to elude job classification. All work requires some level of concentration and stress. Complainant has failed to establish that her impairment substantially limits her in the major life activity of working. Therefore, she is not "disabled" under the Act.

Complainant is not "otherwise qualified" for her position and therefore has not presented a valid disability discrimination claim.

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual *holds or desires*." 42 U.S.C. Section 12111(8) (emphasis added). In addition, the ADA defines "reasonable accommodation" to include "reassignment to a vacant position." 42 U.S.C. Section 12111(9)(B) (emphasis added.) Relying on these specific provisions, the Tenth Circuit, and other circuits, have held that to be a "qualified individual with a disability" under the ADA, one need not be able to perform the essential functions of one's present position, but must be able to perform the essential functions of a different, available position, with or without reasonable accommodation. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161-62 (10th Cir. 1999).

The language of the Colorado Act is not substantially similar to that of the ADA with respect to being a "qualified individual with a disability." Therefore, federal case law and regulations do not have persuasive authority in interpreting the Colorado Act on this issue.

The Colorado Act states in part,

"It shall be a discriminatory or unfair employment practice: (a) For an employer to . . . to discharge . . . any person otherwise qualified because of disability . . . ; but, with

regard to a disability, it is not a discriminatory or an unfair employment practice . . . [to discharge] if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from *the job*, and the disability has a significant impact on *the job*." Section 24-34-402(1)(a), C.R.S. (emphasis added).

This provision creates an affirmative defense for employers.¹ If there is no reasonable accommodation and the disability actually disqualifies the person from "the job" and significantly impacts "the job," the individual is not "otherwise qualified" under the Act and has no claim. The Colorado Civil Rights Commission rules are consistent with this provision; Rule 60.2B defines "qualified disabled person" as "a person with a disability who, with reasonable accommodation, can perform the essential functions of the *job in question*." Rule 60.2B, 3 CCR 708-1 (emphasis added). The Commission's rules regarding reasonable accommodation do not include reassignment.

In interpreting the Colorado Act, therefore, it must be concluded that a "qualified disabled person" is one who, with or without reasonable accommodation, can perform the essential functions of the job he or she currently holds. Complainant is not a qualified disabled person under the Colorado Act because she cannot perform the essential functions of her current position.²

Even if Colorado law did define "qualified disabled person" as one capable of performing another, vacant job, Complainant failed to meet this burden. The evidence demonstrates that her physician was unable to certify that she was capable of returning to work in any position.

In conclusion, Complainant was not disabled under the Act because her impairment did not substantially limit her in the major life activity of working. Further, Complainant has failed to meet her burden of proving that she was "otherwise qualified" to perform the essential functions of "the job in question," namely, her present position. Lastly, Complainant's physician could not certify she was ready to return to work in any position. Therefore, Complainant has not stated a valid disability discrimination claim against Respondent.

CONCLUSIONS OF LAW

¹ There is no analogous provision in the ADA. The only general defenses listed in the ADA are lack of reasonable accommodation and situations in which the disability "has been shown to be job-related." 42 U.S.C. Section 12113(a).

² This conclusion does not foreclose reassignment as a reasonable accommodation for a qualified disabled person under the Colorado Act. For instance, if a qualified disabled person is better suited to a different, vacant position that better matches the disabled person's skills and strengths, and if a transfer to that position does not pose an undue hardship on the agency, then the duty to reasonably accommodate could require the transfer. Each case must be examined based on its individual facts.

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
2. Respondent did not discriminate against Complainant on the basis of disability.

INITIAL DECISION

For the reasons set forth above, Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this 21st day of
May, 2002, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the _____ day of _____, **2002**, I served true copies of the foregoing **ORDER GRANTING MOTION TO DISMISS; INITIAL DECISION** by placing same in the United States mail, postage prepaid, addressed as follows:

Randall R. Meyers
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