

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KAREN LANGFIELD,

Complainant,

vs.

**DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS,
PHILLIP P. GILLIAM YOUTH SERVICES CENTER,**

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 1 and 13, 2002. Complainant represented herself. Assistant Attorney General Luis A. Corchado represented Respondent.

MATTER APPEALED

Karen Langfield ("Complainant" or "Langfield") appeals her administrative discharge from employment.

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 and race.

FINDINGS OF FACT

1. Complainant commenced employment as a Cook I with the Lookout Mountain facility, Division of Youth Services, Department of Human Services ("DHS") on September 1, 1983. She transferred to Gilliam Youth Services Center ("Gilliam"), a youth residential detention center, on September 10, 1990. Prior to the events of this case, Complainant's position title was modified to Dining Services III.

2. Cooks in the Gilliam kitchen prepare and serve three meals and one snack a day to seventy-eight residents. The job also requires food preparation for upcoming days.

Complainant's Injury and Work Restrictions

3. On September 3, 1999, Langfield sustained a work-related injury while attempting to lift a trash bag into a dumpster. On September 15, 1999, Dr. Joyce Wallace treated her for right shoulder strain and released Langfield back to work with the following restrictions:

No repetitive lifting over 25 lbs.
No pushing and/or pulling over 25 lbs of force
No reaching above shoulders

4. On February 18, 2000, Dr. E. Amick discharged Langfield from care with permanent work restrictions. Her restrictions were no lifting, pushing, or pulling more than 40 pounds and to avoid activity requiring overhead reaching.
5. On April 25, 2000, Langfield requested an Independent Medical Exam to determine if she was actually at Maximum Medical Improvement ("MMI"). Dr. J. Scott Bainbridge, M.D. examined her on May 11, 2000, and opined that Dr. Amick's MMI date of February 18, 2000, was an accurate assessment. He also agreed with Langfield's work restrictions.
6. Colorado Department of Human Services policy VI-3.6 allows for a modified duty assignment of up to 180 days.
7. By April 2000, Langfield had exhausted her modified duty assignment time period.
8. During the time Langfield worked with her injury, she was often assigned to work with another staff person with an arm injury.
9. On July 6, 2000, Langfield's personal provider at Kaiser Permanente added more restrictions to include: no repetitive arm motion, 60 minutes of rest for the right arm after every 60 minutes of work; and no lifting of more than 10 lbs. with right arm for four weeks.
10. Langfield was unable to work with these restrictions.
11. On July 6, 2000, Langfield exhausted her sick leave.
12. July 12, 2000 was Langfield's last day of work at Gilliam. On July 26, 2000, she exhausted her annual leave.
13. Langfield was next placed on Family Medical Leave until that expired on October 11, 2000.
14. Langfield also received short-term disability ("STD") leave and benefits through January 3,

2001. (See Stipulation of Fact #5).¹

15. On December 26, 2000, fifteen months after her injury, Complainant had surgery on her right arm to address a bicep tear near the shoulder blade area.

Complainant's Permanent Work Restriction

16. On January 12, 2001, Langfield's surgeon, Dr. Richard A. Hathaway, issued the following final, permanent work restrictions for Langfield:

No overhead lifting
No lifting over 20 pounds.

17. In his memo, Dr. Hathaway noted, "In terms of overhead lifting this is going to be a permanent disability. She will have permanent no overhead lifting. In terms of more than 20 pounds, I would say that that is going to be a permanent disability as well. I feel if we have her do a lot more lifting then she is going to have more problems with that shoulder. I will see her back here on February 22 for follow up."

Complainant's Position

18. Gilliam cooks such as Complainant must handle food items that arrive at the facility in excess of 20 pounds. In order to save money, the DHS procurement office bids out some food in very large containers and sizes. Much of it is government issued, so that Gilliam has no control over weight amounts. Items typically used in the Gilliam kitchen exceeding 20 pounds include: 50-pound bags of potatoes, 40-pound containers of ground beef, 25-pound bags of flour, 25-pound bags of sugar, roast beefs exceeding 20 pounds, bags of fruit and vegetables exceeding 20 pounds, and cases of vegetables (at 42 pounds). Cooks are responsible for unloading these items.
19. Cooking food on the stove requires lifting and handling pots exceeding twenty pounds.
20. Langfield could at times overcome the 20-pound restriction when cooking on the stove by dividing up the weight into a number of pans. However, sometimes the cooking demands of the current day in addition to upcoming days made this impossible.
21. When the cooks at Gilliam wash the floor, they fill the bucket with over twenty pounds of water to do so.

¹ Complainant's attorney signed the Stipulations of Fact prior to hearing. At hearing, Complainant, appearing pro se, attempted to prove through Exhibit G that she was still on STD leave well past the date of administrative termination. However, Exhibit G refers to Public Employees Retirement Account ("PERA") STD benefits, not STD leave.

22. The only overhead lifting in the Gilliam kitchen involves taking items from and placing items on the top shelves in the cooler and freezer. Complainant is able to use a stool to accomplish these tasks without doing overhead lifting.
23. Gilliam uses an overhead utensil rack. While there is very little extra space to move this rack to, the evidence did not demonstrate that there was no alternative location that was not overhead.
24. Complainant was one of three full-time cooks at Gilliam. She worked the 11 a.m. to 7 p.m. shift. There were also two part-time cooks.
25. It was the norm to assign two cooks at a time to work in the Gilliam kitchen.
26. During the period September 1999 through Spring of 2000, the Gilliam kitchen was often short-staffed, due to the high number of injuries on the job and called-in absences. Therefore, Complainant often had to work alone.
27. If Complainant's co-worker was present during her shift, she could receive the assistance necessary to accommodate her disability. If her co-worker was absent, it was impossible to accommodate Complainant's 20-pound restriction. While there are numerous other staff at any given time at Gilliam, these employees work on the secure units with youth offenders, who must be monitored at all times. Security requirements preclude other Gilliam staff from assisting Complainant in the kitchen.
28. In the Spring of 2000 (exact date unknown), Linda Bolden, Food Manager at Gilliam and Complainant's direct supervisor, hired a Lead Cook in the kitchen. The Lead Cook's duties were to relieve other cooks, to supervise kitchen staff, to be the lead person in the kitchen, and to order the food. The Lead Cook's role was partially supervisory and partially to work.
29. The Lead Cook was not assigned to a specific shift.
30. The record does not reveal whether the Lead Cook replaced one of the three full-time cooks in the kitchen, or whether he was an additional fourth full-time staff member in the kitchen.

Reasonable Accommodation

31. On December 26, 2000, due to exhaustion of leave, Respondent sent Langfield a letter inquiring as to whether she would be seeking accommodations under the Americans with Disabilities Act. This letter was sent on the same day as Complainant's shoulder surgery. The letter stated in part,

"Our records indicate that you are unable to work for medical reasons. Consequently, you may be entitled to a reasonable accommodation under the Americans with

Disabilities Act. Enclosed is the form that you would need to complete to request an accommodation. If you are interested in making this request, please return the form by January 10, 2001 to the attention of Vernon Jackson at the above address. As part of the reasonable accommodation process, there is the potential that you may be placed in a vacant position for which you are otherwise qualified. To assist us in that regard, please complete the enclosed Employment Application Form B and return it signed and dated with your request for accommodation."

32. On January 30, 2001, Langfield signed and submitted a Request for Reasonable Accommodation Due to Disability form. She requested the following, "There is no definite permanent disability diagnosis until February 22, 2001. Speak with Dr. by March 1, 2001 for disability. Requesting leave without pay until March from job." This request was based on the February 22, 2001 follow-up examination referenced in Findings of Fact #16 and #17, above. Dr. Hathaway did not modify his permanent work restrictions for Langfield on or after the February 22, 2001 follow-up exam.
33. On January 30, 2001, Respondent held an Employee Status Meeting with Complainant. In attendance were: Nick Dekrell, district Human Resources Administrator for DHS; Linda Boldin, Food Manager at Gilliam, Complainant's direct supervisor; Vel Garner, Director of Gilliam, Complainant's appointing authority; and a civil rights specialist for DHS. At the meeting, they addressed alternate positions as the only possible means of providing a reasonable accommodation for Complainant's permanent disability. They discussed all of Complainant's job qualifications in any field of employment, and established that in addition to some food service worker positions, Complainant met the minimum qualifications for administrative assistant entry-level positions. At that meeting, they performed searches of all available food service worker and administrative assistant positions in the state. One food service position was available at Fort Logan, but it required heavy and overhead lifting. In addition, an Administrative Assistant I position had been posted at Grand Junction Regional Center, but the position had been pulled back for vacancy savings purposes.
34. The search for available positions for Complainant at the Employee Status Meeting resulted in a determination that there was no position available for which she qualified at that time.
35. From the date of the January 30, 2001 meeting through Complainant's administrative termination on March 6, 2001, Respondent continued to search statewide for available positions for Complainant. None were available.
36. There is no evidence that Complainant requested to be assigned to the same shift as the Lead Cook as a reasonable accommodation
37. On February 16, 2001, DHS ADA Coordinator, Vernon Jackson, held a Reasonable Accommodation Panel. The panel determined that Langfield could not be accommodated in her current Dining Services III position. The evidence does not reveal what information was considered at this meeting.

38. On February 20, 2001, a certified letter was sent to Langfield informing her that the analysis for a reasonable accommodation had been unsuccessful. The letter informed her of her right to file a grievance of that determination.
39. Langfield did not notify Respondent of any updated or different permanent disability diagnosis after February 22, 2001.
40. On February 26, 2001, Langfield submitted an updated Employment Application Form B.
41. On March 6, 2001, Respondent administratively terminated Complainant. She had been on leave without pay until that time. The letter informed her that she was discharged pursuant to P-5-10 for exhaustion of all available leave, and that if she later resumed her ability to perform the essential functions of her position, she had reinstatement rights.
42. At the time of her discharge, Complainant was receiving STD benefits through Public Employees Retirement Account ("PERA"). She was no longer on STD leave, which had been exhausted on January 3, 2001.

DISCUSSION

I. Respondent did not discriminate against Complainant on the basis of Disability.

In this de novo proceeding, the burden is on Complainant to prove by preponderant evidence that Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). 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).

The Board is governed by the Act and any interpretative rules adopted pursuant thereto by the Colorado Civil Rights Commission ("Commission").

The Act states,

"It shall be a discriminatory or unfair employment practice . . . 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 for an employer to act as provided in this paragraph (a) 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.

The Commission has promulgated rules implementing the Act at 3 CCR 708-1 (2002). Noting that the 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 occurs: "*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).

Respondent concedes that Complainant has a disability under the Act. The next inquiry is whether she is "otherwise qualified" for her position. Complainant is "otherwise qualified" for her position if she can perform the essential functions of the position with or without reasonable accommodation. Section 24-34-402(1)(a), C.R.S.

"The term essential functions means the fundamental job duties of the employment position" 29 Code of Federal Regulations, Section 1630.2(n).² Lifting items exceeding twenty pounds constitutes an essential function of the cook position at Gilliam. If an individual cannot handle the food being prepared, the individual cannot perform the fundamental job duty of the position: cooking. Overhead lifting is also an essential function of the position, but is easily accommodated by use of a step ladder.

Can Complainant perform the essential functions of her position with a reasonable accommodation? Colorado Civil Rights Commission Rule 60-2(C) addresses reasonable accommodation as follows:

"(1)A person subject to [the Act] shall make reasonable accommodation to the known physical limitations of an otherwise qualified disabled . . . employee unless the person can demonstrate the accommodation would impose an undue hardship or that it would require any additional expense that would not otherwise be incurred."

"(2) Reasonable accommodation may include: (b) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions." Commission Rule 60-2(C), 3 CCR 708-1. *See also* 29 CFR Section 1630.2(o)(2)(ii).

2 The Colorado Act and regulations do not define "essential functions."

Federal regulations further provide, "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 CFR Section 1630.2(o)(3).

Respondent initiated this interactive process by sending Complainant the letter in December 2000, informing her of her right to request a reasonable accommodation, and enclosing the form necessary to do so. In addition, Respondent held an employee status meeting with Complainant on January 30, 2000, after her surgery and after her permanent restrictions were known.

The only accommodation Complainant requested from Respondent was an unpaid leave of absence until after her February 12 follow-up exam with her surgeon, through the end of February, 2000. The purpose of this leave was to enable her to confirm her permanent disability status. Respondent allowed Complainant to remain on unpaid leave until a week past this requested deadline, waiting to administratively discharge her until March 6, 2001. Complainant's permanent disability status never changed prior to that date.

In addition, although Complainant never requested a transfer to a vacant position as a reasonable accommodation, Respondent initiated and aggressively pursued this option. DHS dedicated significant time and energy to its state-wide search for a transfer position for Complainant, from January through March 6, 2001.

At hearing, Complainant introduced evidence, through cross-examination of Boldin, that a Lead Worker was hired in the Gilliam kitchen in the Spring of 2000. One of the Lead Worker's primary responsibilities was to provide back-up in the kitchen. The record does not reveal whether this Lead Worker was an extra full-time staff person, who worked in addition to the two cooks normally scheduled in the kitchen, or whether he was just another second cook assigned to the kitchen. If he had indeed had been a third full-time staffer in the kitchen, it would appear that Respondent may have been able to accommodate Complainant by assigning the Lead Cook to the same shifts she worked.³ The only evidence in the record regarding the agency's inability to accommodate Complainant's disability was Boldin's testimony: namely, that only when Complainant was unaccompanied by another kitchen staff member was the agency unable to accommodate her.

Unfortunately, the evidence raised more questions than it answered with respect to this issue. Why didn't Complainant request to be scheduled with the Lead Worker as a reasonable accommodation? Why didn't Respondent consider this scheduling remedy as a reasonable accommodation? One thing is clear from the evidence: neither Complainant nor Respondent believed, in January or February of 2001, that scheduling the Lead Worker with Complainant could provide the reasonable accommodation necessary to retain Complainant in the cook position at Gilliam. Complainant has failed to meet her burden of proving that Respondent could have reasonably accommodated her.

³ As the regulations cited above make clear, making scheduling changes is a common form of reasonable accommodation.

Langfield argued that it would have taken her nine months to fully recover from her December 2000 surgery, and that Respondent should have provided her with additional time to improve. In order for a leave of absence to constitute a reasonable accommodation under the ADA, the employee must provide an expected duration of the impairment. *Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000). The evidence demonstrated that Complainant's final work restrictions were permanent. See Findings of Fact #16 and #17. Further, Complainant never made an additional request for a leave of absence with a specific expected duration. Therefore, Respondent did not discriminate against Complainant by failing to provide her with an extended leave of absence.

Complainant also argued that Respondent violated State Personnel Director's Procedure P-5-10, 4 CCR 801 (2001), because it terminated her prior to the time her short term disability benefits were exhausted. Procedure P-5-10 states in part,

"If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. . . . No employee may be administratively discharged if FML and/or short-term disability leave . . . apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship." (Emphasis added.)

Director's Procedure P-5-23 states in part,

"A. Short-term disability (STD) leave is a type of unpaid leave of up to six months while either state or PERA STD benefit payments are being made."

Complainant received state STD leave and benefits accorded all state employees up to and including January 3, 2001. See Finding of Fact #14. At some time, she also began to receive additional STD benefit payments that are only available through Public Employees Retirement Account ("PERA") for vested employees. These benefits do not constitute any type of leave, however.

Procedure P-5-10 allows state agencies to administratively terminate employees that have exhausted all leave. The procedure clarifies that this leave includes STD leave. However, nothing in P-5-10 prohibits an agency from administratively terminating an employee who is collecting STD benefits. That was the case for Complainant: on the date of her administrative termination, she was no longer on STD leave, but was still collecting PERA STD benefits. P-5-10 ensures no job protection for employees collecting benefits but who have exhausted all leave.

Lastly, Complainant argued in pre-hearing disclosure statements that Boldin discriminated against her on the basis of race, and that she was treated differently than African American employees. Boldin is African American. At hearing, Complainant introduced no evidence that would even hint at race discrimination, and she effectively withdrew that claim.

CONCLUSIONS OF LAW

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 or race.

INITIAL DECISION

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this _____ day of September 2002.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln Street, Suite 1420
Denver, CO 80203
303-894-1236

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 1/4 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 SERVICE

This is to certify that on the _____ day of September, 2002, 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:

Karen Langfield
6110 Lee Street
Arvada, Colorado 80004

and in the interagency mail, to:

Luis A. Corchado
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
