

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOE ANN BROWN,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION,
REGENTS OF THE UNIVERSITY OF COLORADO,
UNIVERSITY OF COLORADO SYSTEM,
PROCUREMENT SERVICE CENTER,

Respondent.

This matter was heard on November 5-6, 2001, by Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by L. Louise Romero, Managing Senior Associate University Counsel. Complainant appeared in-person and was represented by Edwin S. Kahn, Attorney at Law.

MATTER APPEALED

Complainant appeals the disciplinary termination of her employment on June 14, 2001. For reasons set forth below, a suspension is substituted for the termination.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether complainant was retaliated against for the filing of, or giving information in connection with, race or gender discrimination charges;
3. Whether complainant was discriminated against on the basis of race or gender;
4. Whether complainant was sexually harassed;
5. Whether either party is entitled to an award of attorney fees and costs.

STIPULATED FACT

No University employee has ever been disciplined or terminated for “intentionally filing a charge or for reporting facts relating to a charge of sexual or racial harassment.”

FINDINGS OF FACT

The Administrative Law Judge considered the exhibits and the testimony, assessed the credibility of the witnesses and made the following findings of fact, which were established by a preponderance of the evidence.

1. In April 1999, complainant Joe Ann Brown, an African-American female, was hired by the University of Colorado at Boulder as an Accounting Technician III. On June 1, 1999, she was transferred to the Health Sciences Center on the Fitzsimons campus in Aurora to work in the newly created Procurement Service Center (PSC).
2. At the PSC, Barbara Palmer was complainant’s supervisor until October 1999, when Maria Buerman became her supervisor.

3. Steven Webb is Director and the appointing authority for the PSC, which was created on July 1, 1999. Ashok Sharma is Manager of Accounts Payable, the department in which complainant was employed.
4. As the PSC commenced operations, the work environment was stressful and chaotic for everyone. There were more temporary than permanent employees. Many accounting errors were made. During the April-May 2000 period, the atmosphere became calmer as more full-time staff came on board.
5. For some reason, there had been a failure to do annual performance appraisals of the PSC employees. Consequently, all PSC employees were instructed to perform a self-evaluation. Complainant rated herself a Peak Performer. In her evaluation for the period March 1, 2000 to February 28, 2001, her supervisor rated her in the low range of Fully Competent.
6. At the beginning of PSC operations, there were no noticeable problems with complainant's performance. As time went on, both the number and severity of her accounting errors increased.
7. It is a policy of the CSP for management to send e-mails to the accounting technicians pointing out and explaining errors they made. All employees received this kind of e-mail from time to time, some more than others. A supervisor might also talk to an employee in-person about a particular job performance problem. Complainant received performance-related e-mails detailing specific errors. Her supervisor and the manager of the department also talked to her in-person about some of these errors. She was never issued a corrective or disciplinary action as a result of making accounting errors.

8. On November 1, 2000, complainant received a “letter of expectation” from Webb, the appointing authority, for sleeping at her desk and snoring lightly at her workstation during office hours on October 26, 2000. She was advised that sleeping in her work area or in work-related rooms was unacceptable behavior, even if she was on her break. A letter of expectation does not rise to the level of a corrective action.
9. On November 27, 2000, complainant was issued a corrective action for intentionally and impermissibly viewing a database that was intended for management use only and was not accessible unless browsed through the file structure on November 16, 2000. On November 17, she had deleted this file, albeit “accidentally” in her words, causing a backlog of reconciling the daily production of all accounts payable staff for three days until the deleted folder could be restored and updated. The corrective action admonished her to refrain from viewing, modifying, or deleting data that was maintained on the network by PSC management.
10. Continuing into 2001, complainant made accounting errors. She was made aware of her mistakes through e-mails and conversations with her supervisor and with the accounts payable manager, Sharma. She began to fear that her job was in jeopardy, even though she had never received a corrective or disciplinary action for making accounting errors.
11. Complainant accused Sharma of racial and gender discrimination. Sharma offered her administrative leave so she could go to the Boulder campus and file a discrimination complaint. He did not in any way try to discourage her from doing so.

12. On February 19, 2001, complainant changed a voucher after an account had already been balanced, contrary to PSC policy. Sharma notified Webb that this had occurred.
13. On February 21, 2001, complainant initiated a sexual harassment complaint against Sharma, alleging not only sexual harassment, but harassment on the basis of race, African-American, as well. She also alleged disparate treatment discrimination on the basis of gender, female, and race.
14. Paul Perales, Director of Human Relations for the University of Colorado, Boulder campus, spends 50% of his time conducting investigations of allegations of discrimination and sexual harassment, with the goal of ensuring that the University's policies are upheld.
15. Perales received complainant's complaint from the Director of the Office of Sexual Harassment, along with the Director's notes and tape-recorded interview of complainant. After reviewing these materials, he interviewed a dozen or more witnesses, including all the witnesses listed by complainant, and reviewed other pertinent documentation. He met three times each with complainant and Sharma.
16. On February 23, 2001, Perales notified Steven Webb of the investigation. This was Webb's first knowledge that complainant had filed her complaint. Sharma was first informed of the allegations on February 26, when Perales interviewed him.
17. Perales concluded that the allegation that Sharma physically shook complainant with both hands in the hallway after she left a bathroom on February 23, 2000, was knowingly false. There was no mention of

the alleged incident in a chronicle submitted by complainant of incidents of being treated unfairly from January to June 2000, and two witnesses she listed failed to corroborate her story. She did not file a report of the alleged incident.

18. The vast majority of complainant's fourteen allegations had little to do with her race or gender. None of her factual allegations of sexual harassment or racial discrimination was fully substantiated. Her charge that Sharma had pushed her seven times in her shoulder while she was seated at her desk on November 16, 2000, was unsubstantiated.
19. On April 19, 2001, Perales issued his investigation report, concluding that the University's policies prohibiting unlawful discrimination and sexual harassment had not been violated. He further concluded that complainant had violated the Policy on Sexual Harassment by making an intentionally false accusation and providing intentionally false information regarding her complaint. Under the terms of the University's Sexual Harassment Policy, it is a violation of the policy for any person to make an intentionally false complaint or to provide intentionally false information regarding a complaint. (See Exh. 6.)
20. Webb was concerned by the finding that complainant had filed false information, which he believed required him to issue either a corrective or disciplinary action. He felt he had to do something. He conducted a predisciplinary meeting with complainant and her attorney on May 22, 2001.
21. Following the R-6-10 meeting, Webb talked to five of the same people Perales had interviewed and two who had not been interviewed but who reported directly to Sharma. He also discussed the situation with

Sharma. He concluded that complainant had not been singled out for mistreatment as she had alleged. The witnesses provided information that supported the findings of Perales' report but did not offer additional relevant information. He did not believe any of the allegations against Sharma, based upon his favorable working relationship with Sharma and because Sharma had been exonerated.

22. Webb is Sharma's direct supervisor and considers him an outstanding employee.
23. By letter dated June 14, 2001, the appointing authority terminated the employment of Joe Ann Brown for providing intentionally false information in her complaint of sexual harassment and racial or gender discrimination, in violation of the University's Policy on Sexual Harassment. While complainant's poor job performance was an aggravating factor in determining that dismissal was the appropriate sanction, the termination was based upon intentionally providing false information. The two instances of false information, according to Webb, were the shaking allegation of February 23, 2000 and the alleged pushing incident of November 16, 2000. (See Exh. 2.)
24. Complainant filed a timely appeal of her disciplinary termination on June 18, 2001.

DISCUSSION

I. Arbitrary and Capricious

Board Rule R-6-9(B), 4 CCR 801, provides that, "If the Board or hearing officer reverses a dismissal, but finds valid justification for the imposition of disciplinary action, a suspension may be substituted for a period of time up to the time of the

decision.” This rule is in accord with the Board’s statutory authority to modify, as well as to reverse, an action of an appointing authority. See §24-50-103(6), C.R.S. R-6-9(B) provides for the appropriate sanction in this case.

While the appointing authority found two instances of complainant intentionally giving false information, in violation of the Policy on Sexual Harassment, the investigator concluded that there was only one—the allegation that Sharma shook complainant with both hands in the hallway. The investigator found the allegation that Sharma pushed complainant seven times in her shoulder to be unsubstantiated. The other twelve allegations were found to be either not factually substantiated or not fully substantiated. Webb’s disbelief that the alleged pushing incident occurred does not translate into a finding that complainant provided false information. Substantial evidence supports the findings and conclusions of the investigator’s report.

To falsely accuse another person of wrongdoing is a serious matter and is reasonably covered in the University’s Policy on Sexual Harassment, permitting corrective or disciplinary action. The appointing authority was rightfully concerned that this had transpired. But it is also a serious matter to cast a chilling effect upon the exercise of a statutory or constitutional right. It is respondent’s burden to prove by a preponderance of the evidence that complainant intentionally gave false information regarding her complaint. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). This burden was not satisfied with respect to the pushing allegation. The allegation was found unsubstantiated by the investigator, but not found to be intentionally false. Although complainant might have embellished her complaint with two false accusations, it was not proven that she did so. An individual filing a sexual harassment complaint should not be saddled with the proposition that if her claims are not substantiated she will lose her job. This is a line that must be carefully drawn.

Under the circumstances of this case, the appropriate disciplinary action was a 30-day suspension, the maximum suspension allowed by R-6-9. Such a disciplinary action is imposed by this Initial Decision under R-6-9(B). Respondent did not prove just cause for the discipline of termination. See *Kinchen, supra*. Termination was not mandated by the University's Policy on Sexual Harassment. Rejecting the conclusion of the investigator, with no additional relevant evidence, the appointing authority decided there were two incidents of providing false information, apparently enough in his eyes to warrant termination and to bypass the other possible sanctions available to him under R-6-9. The sanction of dismissal was so excessive under the found facts as to be arbitrary and capricious. A reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. See *Wildwood Child & Adult Care Program, Inc. v. Colorado Department of Public Health & Environment*, 985 P. 2d 654 (Colo. App. 1999). See also *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

II. Retaliation

For complainant to establish a *prima facie* case of retaliation by respondent, she must demonstrate by preponderant evidence that (1) she engaged in protected opposition to discrimination or participated in proceedings arising out of discrimination, that (2) adverse action by the employer occurred subsequent to the protected activity, and that (3) there exists a causal connection between complainant's activity and the adverse action. *Molla v. Colorado Serum Co.*, 929 P.2d 1, 3 (Colo. App. 1996), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Complainant argues that she was retaliated against for filing a charge of discrimination. However, there is no credible evidence of record to support this argument. Complainant was, in fact, offered paid time-off to file her complaint.

There is a dearth of evidence showing that she suffered an adverse consequence because of the filing. Substantial evidence sustains the appointing authority's assertion that complainant's employment was terminated for providing false information in her complaint, not for the filing of it. There is no evidence of animosity on anyone's part for the filing of the complaint. Thus, complainant failed to establish the causal connection element of a *prima facie* case. See *Molla, supra*.

III. Discrimination

In order to prove a *prima facie* case of intentional discrimination under Colorado law, complainant must demonstrate by preponderant evidence that (1) she belongs to a protected class, that (2) she was qualified for the position, that (3) she suffered an adverse employment decision, and that (4) the circumstances give rise to an inference of unlawful discrimination. *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997), citing *Texas Dep't of Cmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In this instance, complainant did not meet the required standard of proving a *prima facie* case of intentional discrimination. The fourth element is missing. The circumstances of this case do not give rise to an inference of unlawful discrimination. The evidence does not show that complainant was targeted in any manner because of her race or gender. Rather, her job performance was the issue. She was treated the same as everyone else, treatment which she may not have liked. All accounting technicians, for example, received e-mails informing them of errors they made. The e-mails documented a particular mistake. There is no evidence that complainant was wrongly accused of committing an error, either via e-mail or through discussions with her supervisors. In a like manner, there is no evidence tending to show that she was the victim of sexual harassment.

IV. Attorney Fees

Section 24-50-125.5, C.R.S., provides that an award of attorney fees and costs is mandatory if it is found that the personnel action from which the proceeding arose “was instituted frivolously, in bad faith, maliciously or as a means of harassment or was otherwise groundless.” This record does not support any of those findings. Therefore, this is not a proper case for a fee award.

CONCLUSIONS OF LAW

1. Respondent’s action of terminating complainant’s employment was arbitrary, capricious or contrary to rule or law.
2. Complainant was not retaliated against for the filing of, or giving information in connection with, race or gender discrimination charges.
3. Complainant was not discriminated against on the basis of race or gender.
4. Complainant was not sexually harassed.
5. Neither party is entitled to an award of attorney fees and costs.

ORDER

Respondent’s termination action is reversed. A 30-day suspension is substituted for the termination. Complainant shall be reinstated to her former position with back pay and benefits, offset by the period of suspension and any income complainant earned but would not have earned if she had not been dismissed by respondent.

DATED this ____ day
of December, 2001, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

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. The notice of appeal must be received by the Board no later than the 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 a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by

check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

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

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of December, 2001, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Edwin S. Kahn, Esquire
Kelly, Haglund, Garnsey & Kahn, LLC.
1441-18th Street, Suite 300
Denver, CO 80202-1255

And by courier pick-up, to:

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