

**INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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E. CLAUDIO BACA,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT,  
OFFICE OF UNEMPLOYMENT INSURANCE,

Respondent.

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Administrative Law Judge Mary S. McClatchey heard this case on February 6 and 7, 2002. First Assistant Attorney General Jill M. M. Gallet represented Respondent Department of Labor and Employment ("DOLE"). Barry D. Roseman, of Roseman & Kazmierski, represented Complainant.

**MATTER APPEALED**

Complainant appeals his termination from employment. For the reasons set forth below, Respondent's action is affirmed.

**ISSUES**

1. Whether Complainant committed the acts for which he was disciplined;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law.

**FINDINGS OF FACT**

1. E. Claudio Baca ("Complainant" or "Baca") commenced employment with DOLE in 1981. In the year 2000 he was an Administrative Assistant III in the Employer Records Unit of the Unemployment Insurance Tax Division. In October 2001 he promoted to Unemployment Insurance Technician.
2. Baca was extremely popular in the unit among his co-workers. He was fun to work with, because he kidded around a lot. He attended bible study with one or more co-workers. He and some co-workers greeted each other in the morning with hugs.
3. Regina Henry commenced employment in the Employer Records Unit on August 21, 2000. When she started, she was trained by Baca and four of his co-workers.
4. A few weeks into Henry's employment, her immediate supervisor, Ruth King, Office Manager in the unit, asked her to choose one person from among her five trainers, to work with from that point forward. Henry chose Baca because he had been very helpful to her and had taken the time to fully answer her questions.
5. For the first few months, Baca and Henry worked well together. However, some time in the late Fall of 2000, Baca's behavior took an offensive turn. Henry's job required that she spend four-hour periods, 7:00 - 11:00 a.m., at an enormous machine called a "scanner," with Baca overseeing and assisting her. While the unit was very busy during most of the day, the time between 7:00 and 9:00 a.m. was less busy.
6. Baca and Henry scanned together twice each week. While at the scanner, Baca often rubbed Henry on her back until his hands went so low that she became extremely uncomfortable. Henry always told Baca to stop.
7. Sometimes Baca came up behind Henry and grabbed her around the waist and rib area in a way that was painful. When she told him to stop it, he would stop, but would never apologize. Then, soon thereafter, he repeated the exact same type of offensive touching.
8. Two co-workers heard Henry tell Baca to "stop it" during this period.
9. Baca's inappropriate and unwelcome touching of Henry became a weekly occurrence.
10. Baca repeatedly asked Henry out on dates. She would say no, that she was engaged. Baca responded that he would rub her legs and feet and

show her a good time. When Henry repeated that she was engaged and was not interested, Baca said, "If at first you don't succeed, try, try again."

11. Baca would ask questions about what Henry had done with her fiancé last night. He said, "If you were in bed with me . . . ."
12. Baca often held a folder up to his face and blew Henry a kiss. The folder shielded his face from co-workers.
13. Baca said to Henry, "put those lips right here," and point to his lips. He said to her, "who gave you those lips, if you didn't have those lips . . . ."
14. When Henry asked Baca questions at his cubicle, and she thanked him for his assistance, he sometimes patted his lap, inviting her to sit on his lap. Or, he turned his face aside, inviting her to give him a kiss.
15. Baca's inappropriate behavior was offensive, traumatic, and embarrassing to Henry. She talked to her fiancé and other family members about it. She was fearful of coming forward to Ruth King, because Baca was so well-liked on the unit, including by King. She was the new kid on the block and did not want to be ostracized by her co-workers.
16. In February, 2001, Henry became so fed up that she had her fiancé call Baca at work to tell him to leave her alone. Her fiancé made this call, telling Baca to "leave his wife alone."
17. After receiving this call, Baca confronted Henry, stating, "You and your fiancé are both liars. You are not married. You will answer to God because you lied." Henry considers herself to be a Christian, and this statement was very upsetting to her.
18. On the same day, Henry went to King to report Baca's conduct. Henry told King about Baca touching her inappropriately, getting too close to her physically, and making inappropriate comments of a personal nature. She told King that she wanted the behavior to stop, and sought a professional working relationship with Baca. Henry requested that King not take her concerns anywhere because she wanted to remain friends with the staff and didn't want the situation to "blow up." King said she would handle it with Baca.
19. King called Baca into her office and informed him that Henry had made allegations of inappropriate touching and inappropriate statements. King warned Baca that this type of behavior at work could lead to his termination, and told him that although he was a touchy person, he was

not to touch Henry or anyone else and must keep the relationship professional. King also reminded Baca that he had been given a letter of counseling regarding alleged sexual harassment of another female employee.

20. At the time King counseled Baca about his conduct towards Henry, she had previously counseled him about the same or similar conduct towards three other female employees in the past year.
21. Baca denies having engaged in any inappropriate conduct toward Henry. This testimony lacks credibility for a number of reasons. First, the testimony of one of Baca's own witnesses, Maureen Stinemeyer, corroborates Henry's testimony. Stinemeyer's office was close to Henry's. She testified that early on in Henry's employment in the unit, on two separate occasions she heard Henry say to Baca, "I wish you'd leave me alone." Second, the fact that Henry went to far as to have her fiancé call Baca at work to tell him to leave her alone corroborates the fact that Baca's conduct was offensive to her.
22. King ordered Baca to stop having any contact with Henry at work, and left it at that.
23. Approximately one month later, in March 2001, King asked Henry if Baca had left her alone. Henry said that he had. King sought to improve office morale, and felt that Henry and Baca should be able to have contact with each other regarding work-related issues.
24. King therefore had separate meetings with both Baca and Henry, informing them that it was now ok for Henry to go to Baca with questions she may have concerning her job. Henry resumed contact with Baca on work questions.
25. Within a month or thereabouts, Baca reassumed much of his offensive behavior towards Henry.
26. On Baca's June 9, 2001 birthday card, Henry wrote, "Claudio, I just want you to leave me alone."
27. During the week of July 9, Henry told Baca that she wanted to get out of the unit because of him.
28. On July 18, 2001, Baca, Stinemeyer, and Henry were joking around. Baca and Stinemeyer were teasing Henry about being the facilitator that week in the unit. They started to discuss the issue of going to church, and

Baca asked Henry if she went with her husband. Henry was not interested in discussing her personal life with Baca, so she turned her chair around, with her back to Baca and Stinemeyer, and went back to work.

29. Baca then approached Henry from behind and grabbed her hard around her mid-section in a way that hurt her. Stinemeyer was not looking at Henry but was close to them both. She heard Henry say in a "high pitched" voice, "Claudio!"
30. King was out of the office that day. Baca went to the supervisor of the adjoining unit and informed her that Henry had not done the mail yet and should have as facilitator that day. The supervisor then approached Henry about the mail, and Henry reported that she hadn't gotten to it because Baca was harassing her.
31. The next day, Henry went to the Human Resources office to file a harrasment complaint against Baca. She was very distraught about the situation with Baca.
32. Baca denies having grabbed Henry at all on July 18. This testimony is found not to be credible because Stinemeyer, Baca's own witness, corroborated Henry's testimony. Henry had turned around and returned to her work, assuming Baca and Stinemeyer would also go back to work. Henry had no reason to call out, "Claudio," at that point unless she had been physically accosted.
33. Baca also avers that Henry went to the HR office to report harassment in order to make up a defense for her having failed to process the mail on July 18. This argument is rejected, because Complainant offered no evidence demonstrating that Henry had any performance problems on the job or any reason to fear imminent counseling or corrective action. Henry's general credibility regarding Baca's continued harassment in the Spring of 2001 is corroborated by her note to him in June to leave her alone.
34. JoAnna Miller is the Equal Employment Opportunity administrator at DOLE. She has investigated allegations of discrimination in this position for four years, and performed the same duties as appeals processor for the Department of Personnel for the previous fifteen years. Miller performed a professional, objective investigation of Henry's complaint.
35. When Miller interviewed Baca about Henry's allegations, he denied almost all of them. However, he admitted that he had told Henry she had

beautiful lips and that she was beautiful.

36. Notably, Baca denied to Miller that he had ever been counseled on behavior towards other staff. Miller pointed out in her report that King informed her she had counseled Baca repeatedly, in June 2000, July 2000, December 2000 or January 2001, and February 2001, about his in appropriate behavior towards other three other female staff members.
37. The majority of the results of Miller's investigative report are contained in the Findings of Fact above.
38. Two of the unit staff interviewed by Miller corroborated Henry's statements. Stinemeyer informed Miller that she heard Henry tell Claudio to "knock it off" one or two times. [This statement was consistent with her testimony.] She also stated that Baca likes to hug people around the shoulders and is a "huggy" person.
39. Sandy Brown, a UI Tech in the unit, informed Miller, "Once in a while she's observed Baca or Bennett grabbing at employees," but never saw Baca grab Henry. She reported having overheard Henry say, "Claudio stop it" on a couple of occasions. She further reported that there may be issues with Claudio, he has attempted to hug her a couple of times, and that it bothers her sometimes, depending on her mood.
40. At hearing, Brown testified that she had never heard Henry say, "Claudio stop it," and that his hugging did not bother her. It is found that Brown's statements to the investigator are far more credible than her testimony at hearing, for a number of reasons. When Brown made her statements to Miller, it was closer to the events. Further, Brown had no reason to lie to Miller. Lastly, Brown had privacy when she was interviewed by Miller, and Baca was not present.
41. Complainant's appointing authority was Donald Peitersen, Director of the Unemployment Insurance Division at DOLE since April of 1990. Peitersen read Miller's report of investigation. He interviewed King, who reported to him that there had been three similar incidents between Baca and other female employees in the last year, after which she had counseled Baca about behaviors similar to those Henry had alleged.
42. King referred Peitersen to a counseling letter in Baca's official personnel file dated June 19, 2000. Peitersen reviewed the letter, from Chief of Tax Olivia Chambers to Baca and Jennifer Zeman. Attached to the letter was a June 13, 2000 note from Zeman relating that Baca had come by her

desk to chat, had picked up her necklace to admire it, and had rubbed the back of his hand repeatedly against her chest between her breasts. She wrote, "It made me feel sick inside." After discussing it with a friend, she came forward to King. She also wrote, "I have talked about my boyfriends with Cladio. [sic] He has implied that he would treat me right."

43. The letter Chambers letter indicates that Baca and Zeman also had an inappropriate conversation in which Zeman lowered her pants to show Baca a tattoo on her hip and informed Baca she had pierced her breast. Baca said he would like to see it.

44. The letter concludes,

"Based on the information provided by both parties, I am requesting both of you to immediately cease inappropriate behavior in the office. You both are requested to refrain from personal conversations in the office. Your conversations should be work related discussions only. I expect both of you to work together and provide a positive professional environment in the workplace.

This is a warning letter that sexual harassment of any kind will not be tolerated. Any further action of this nature may result in corrective and/or disciplinary action."

45. Baca had received this letter two months prior to Henry's arrival on the unit.
46. Peitersen noticed a pre-disciplinary meeting with Baca, held on September 21, 2002. In this meeting, he stated he hugged Henry in greeting her, because they were both believers in Christ. He said he had acted in a way to try to lift her up and make her feel better when she was not happy in the unit. He admitted that after receiving the call from her fiancé, he had said "You and your fiancé are both liars. You are not married. You will answer to God because you lied," and, "You're not married until you have those papers." He denied having rubbed her back and any other physical contact other than hugging. He denied asking her out on a date, blowing her a kiss, and making comments about what he would do with her on a date or in bed.
47. During the pre-disciplinary meeting, Baca also admitted having been counseled regarding inappropriate behavior toward Carol McGee and Jennifer Zeman. He first denied, then admitted, that King talked to him about inappropriateness of touching in relation to a complaint made against him in 2000 by another co-worker, Ms. Hawkins.

48. Baca informed Peitersen that he was aware of the department's policy on sexual harassment. When Peitersen asked Baca to define sexual harassment, he defined it as "don't touch women, don't talk about anything offensive."
49. Peitersen determined that Baca had committed the acts alleged by Henry, and that those actions constituted hostile workplace sexual harassment. He considered what type of disciplinary penalty to impose, and concluded that because Baca had been counseled at least three other times in the past year regarding the same or similar behavior, any discipline, such as suspension, that allowed him ultimately to return to the workplace would not stop the conduct.
50. Peitersen concluded that the only solution was to terminate Baca.
51. The Department's sexual harassment policy, which Baca received in 1993, defines sexual harassment as:
- "unwelcome and repeated sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when one or more of the following conditions are met:
- . . . (3) The harassment has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment . . .
- Each employee must exercise his or her own good judgement to avoid engaging in conduct that may be perceived by others as harassment. Forms of harassment include, but are not limited to:
- sex-oriented verbal teasing or abuse.
  - Unwelcome propositions or requests for social dates or sexual activity.
  - Outright demand for sexual favors, accompanied by implied or overt promises of preferential treatment or threats concerning an individual's employment status. . . ."
52. Peitersen's termination letter cited Baca for violating the department's sexual harassment policy. The letter noted that "on numerous occasions, management has counseled you as to your inappropriate behavior towards Ms. Henry and other co-workers. . . Also, the testimony shows that Ms. Henry repeatedly told you that your actions towards her were unacceptable." Peitersen further stated, "After reviewing all of the information available to me, I find that you did act in violation of

Department policy on sexual harassment by repeatedly making inappropriate physical contact with Ms. Henry, inquiring as to her personal life with her boyfriend and commenting on various parts of her anatomy. Therefore, it is my decision that your employment . . . is terminated. . . ."

53. Henry is found to be credible. Complainant avers that as time has passed, Henry's "story" has grown, and that she has manufactured additional allegations about Baca's misconduct. This ALJ disagrees. The fact that Henry's story has acquired further detail as time has passed makes sense. When Henry first came to King, she sought to keep the issue low profile, in order to maintain her friendship with peers at work. It is likely she used broad terms to describe Baca's conduct, and King did not engage in a detailed fact finding interview at that time. The purpose of that meeting was simply to have King talk to Baca and have the behavior cease. Most importantly, Henry's reports of the harassment to King, Miller, and Peitersen are consistent. The fact that, upon detailed questioning at deposition and hearing, further details have emerged, does not detract from Henry's credibility.
54. Complainant avers that Henry's inconsistency in recalling numbers and locations of offensive incidents damages her credibility. This ALJ disagrees. Given the long period of time over which Baca's offensive conduct occurred, it would be impossible for any reasonable person to have a consistent recollection of the exact number and location of every offensive incident, and to recall the exact same information in the same manner every time she discusses it. While Complainant's attorney was able to catch Henry in some inconsistencies in her statements to Miller, in deposition, and at hearing, this does not undermine the overall credibility of her report regarding Baca's offensive behaviors.
55. Baca is found to lack credibility. First, he lied to Miller in the investigation about not having been counseled about behavior toward staff. He testified that he was "surprised" when King counseled him to stay away from Henry, and that he had felt they were close friends. At this time, February of 2001, Henry had told Baca to stop it and stay away from him repeatedly. Further, King had already counseled him three times not to touch or engage in personal conversations with women at work. Baca knew that his behavior was prohibited and offensive to Henry, and he could not have been surprised when Henry, the fourth woman, complained to King about it.

## DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The Board may reverse or modify Respondent's decision only if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

### **A. Complainant Committed the Acts for Which He was Disciplined**

As the Findings of Fact above demonstrate, Complainant committed the acts for which he was disciplined. While Complainant denies Henry's allegations, the preponderance of evidence demonstrates that he sexually harassed Henry in violation of the department's policy. Specifically, he repeatedly asked her out on dates ("unwelcome propositions or requests for social dates"), discussed what he would do with her on dates ("sex-oriented teasing"), and he repeatedly touched her in a manner she made clear she found offensive and unwelcome ("physical conduct of a sexual nature" which had the effect of "creating an intimidating, hostile, or offensive working environment" for Henry.

### **B. The Discipline Imposed Was Within the Range of Alternatives Available to the Appointing Authority.**

Complainant's own witnesses corroborated Henry's testimony that early on in his harassment of her, she repeatedly told him to "stop it" and to "knock it off." Henry told Baca repeatedly to stop touching and rubbing her, and that she did not want to discuss her personal life with him. Henry even went so far as to write on his June 2001 birthday card that she just wanted him to leave her alone. (Finding of Fact Number 26).

Baca knew Henry opposed his touching of her and his discussion of personal matters with her. He knew that King had warned him repeatedly in the past year to stop touching female employees and having inappropriate conversations with them. He knew that the letter of counseling in his file from King's supervisor directed him to refrain from any behavior that could be construed as sexual harassment.

Baca willfully and flagrantly violated the sexual harassment policy and the direct orders of King and Chambers by sexually harassing Henry. On July 18, 2000, he approached Henry from behind and grabbed her hard enough to hurt her. Under these circumstances, Peitersen exercised the best of judgment in removing him permanently from the work environment.

### **C. Respondent's Action was Not Arbitrary, Capricious or Contrary to**

## **Rule or Law.**

In Colorado, arbitrary and capricious agency action is defined as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions.

*Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001), citing *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703, 705 (Colo. 1936).

Complainant avers that Respondent failed to consider mitigating information, and that the decision to terminate him was therefore arbitrary and capricious. Specifically, he avers that Peitersen ignored mitigating "red flags" such as inconsistencies in Henry's account of events and Zeman's participation in the sexual harassment. This argument is rejected on grounds that Henry's report to Peitersen was consistent with her reports to Miller and King. Further, while Zeman shared culpability in the June 2000 encounter with Baca, she was only one of four women that complained about Baca's conduct in a yearlong period. This pattern of aggravating evidence far outweighs any mitigation cited by Complainant.

Complainant further avers that termination was arbitrary and capricious, and that he should have been given intensive training and a suspension without pay. Again, the ALJ disagrees. Baca was warned repeatedly by King to stop touching female co-workers and cease having inappropriate personal conversations. The fact that she failed to progressively discipline Baca does not render Peitersen's decision to terminate arbitrary and capricious. Baca's conduct was flagrant and serious. Under State Personnel Board Rule R-6-2 he was fully justified to go to termination. 4 CCR 801. Moreover, the purpose of progressive discipline was served in this case: to provide the employee with clear notice that the behavior was wrong and not to be tolerated.

The criteria to be considered by the appointing authority in imposing discipline are "the nature, extent, seriousness, and effect of the act, . . . type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous evaluations, and mitigating circumstances. Information provided by the employee must also be considered." State Personnel Board Rule R-6-6.

The nature and extent of Baca's harassment of Henry were significant. He

harassed her verbally and physically over a long period, and, even after being counseled by his supervisor, resumed the conduct. The "frequency of previous unsatisfactory behavior" and "period of time since a prior offense" constitute aggravating factors in this case. Baca had been warned three times in the past year to stop offensive conduct towards three other female employees. Under these circumstances, Complainant's conduct subjected the agency to liability. Accordingly, it was reasonable for the appointing authority to choose termination.

### CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined;
2. The discipline imposed was within the range of available alternatives;
3. Respondent's action was not arbitrary, capricious or contrary to rule or law.

### ORDER

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

DATED this \_\_\_\_\_ day of  
April, 2002, at  
Denver, Colorado.

\_\_\_\_\_  
Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420  
Denver, Colorado 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. 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 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 MAILING**

This is to certify that on the \_\_\_\_ day of April, 2002, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Barry D. Roseman  
899 Logan Street, Suite 203  
Denver, Colorado 80203

and in the interagency mail, addressed as follows:

Jill M. M. Gallet  
First Assistant Attorney General  
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1525 Sherman Street, Fifth Floor  
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