

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2002B054**

**ORDER GRANTING SUMMARY JUDGMENT; INITIAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

LARRY K. LARA,

Complainant,

v.

**DEPARTMENT OF CORRECTIONS, COLORADO TERRITORIAL CORRECTIONAL
FACILITY,**

Respondent.

On July 17, 2003, respondent filed a Motion for Summary Judgment. This Administrative Law Judge (ALJ) conducted a telephone conference on June 2, 2003, at which Andrew Katarikawe appeared on behalf of respondent Department of Corrections (DOC) and complainant Larry K. Lara appeared *pro se*. The parties were ordered to file briefs on the motion for summary judgment, and other orders were entered.

PRELIMINARY MATTERS

The ALJ noted the following matters at the telephone conference, which control the conduct of this appeal:

1. Complainant's claim that his disciplinary termination violated the State Employees' Protection Act (Whistleblower) was dismissed on February 12, 2002.

2. On April 15, 2003, complainant was notified that the Colorado Civil Rights Division (CCRD) had found no probable cause to credit his allegations of discrimination, and that if he wished to appeal that finding, he was required to file a notice of appeal from the no probable cause decision within 10 days or waive his discrimination claims. Complainant agreed that he did not appeal the no probable cause finding. The Board therefore does not have jurisdiction to consider complainant's discrimination claim.

STANDARD OF REVIEW ON MOTION FOR SUMMARY JUDGMENT

A party against whom a claim is asserted may move, with or without supporting affidavits, for summary judgment. C.R.C.P. 56(b). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, along with affidavits, if any, show that there is no genuine issue as to any material fact so that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Powers v. Harris*, 472 P.2d 186 (Colo. App. 1970). The purpose of summary judgment is to save the time and expense of trial when, as a matter of law based on undisputed facts, one of the parties cannot prevail. *O.C. Kinney, Inc. v. Paul Hardeman, Inc.*, 379 P.2d 628 (Colo. 1963).

The non-moving party is entitled to all favorable inferences that may be drawn from the evidence, and all doubts must be resolved against the moving party. *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992). Once the moving party has met its initial burden of production, the burden shifts to the non-moving party to establish that a triable issue of fact exists. *Mancuso v. United Bank of Pueblo*, 818 P.2d 732 (Colo. 1991). A genuine issue cannot be raised simply by means of argument. *Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970). When opposing a summary judgment motion, a party must counter the moving party's statements of fact by affidavit or other evidence that sets forth specific facts demonstrating the existence of a triable issue of fact. *Artes-Roy v. City of Aspen*, 856 P.2d 823 (Colo. 1993). An affirmative showing of specific facts, uncontradicted by any counter-affidavits, leaves no alternative but to conclude that no genuine issue of material fact exists. *Terrell v. Walter E. Heller & Co.*, 165 Colo. 463, 439 P.2d 989, 991 (1968).

DOC provided exhibits that set forth complainant's admissions regarding the incident that led to his termination. Complainant's response included a copy of the termination letter, excerpts from the predisciplinary meeting, and an excerpt from former DOC Executive Director John Suthers's resignation announcement.

UNDISPUTED FACTS

1. On September 12, 2001, while complainant was on the job, he hit his co-worker, Blair Williams.
2. Complainant wrote an Incident Report Form the next day in which he stated that he was sitting in an office doorway with his feet outside the doorway; that Williams walked by and kicked complainant's leg; that complainant got up to defend himself; and that complainant "sent a right hand to [Williams's] jaw area...."
3. Complainant was charged in Fremont County Court with harassment, a violation of § 18-9-111(1)(A), C.R.S.
4. That statute states, "A person commits harassment if, with intent to harass, annoy or alarm another person, he ... strikes, shoves, kicks or otherwise touches a person or subjects him to physical contact."
5. On October 30, 2001, complainant pled guilty to the harassment charge and was fined

five hundred dollars.

6. The appointing authority, Warden Juanita Novak, conducted a predisciplinary meeting pursuant to Board Rule R-6-10 on November 19, 2001. At that meeting, complainant said that he thought an inmate had kicked him. Complainant admitted that he “threw a punch in self defense, or not self defense, but protection. Self protection.”; “I hit him in a protective manner.”

7. By letter dated November 30, 2001, Novak terminated complainant's employment, effective that date.

8. In his appeal, complainant argued that the termination was arbitrary and capricious because complainant did not admit hitting Williams twice; “I hit at his head area to stun”; Williams was not charged; and Novak did not take into account information about Williams’s character.

DISCUSSION

The Board must affirm a disciplinary action unless that action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. In this case, there is no dispute that complainant hit his co-worker. The only issue, therefore, is whether the appointing authority’s decision to terminate complainant for hitting his co-worker was arbitrary, capricious, or contrary to rule or law.

Complainant first argues that he did not hit Williams with an intent to harass him. In support of this argument, he notes a portion of the termination letter, which stated, “Lara said that he couldn’t help himself and he had no time to plan when he stood and confronted his attacker.” Complainant argues that this statement “relieves [him] of the ‘intent’ to harass” Williams. Complainant is attempting to rebut the intent element of the harassment charge. However, when he pled guilty to that charge, he admitted that he was guilty of every element of harassment, including intent.

The final decision of a court on any issue that was actually litigated and decided is dispositive of that issue in any later suit. *Umberfield v. School Dist. No. 11*, 522 P.2d 730 (Colo. 1974). The doctrine of collateral estoppel precludes a party from attempting to relitigate that issue in any subsequent action. The doctrine is applicable in administrative proceedings. *Industrial Comm’n v. Moffat County School Dist.*, 732 P.2d 616 (Colo. 1987).

The elements of collateral estoppel are: (1) the issue sought to be precluded is identical to an issue actually decided in the prior proceeding; (2) the party sought to be estopped was a party in the prior proceeding; (3) there was a final decision on the merits in the prior proceeding; and (4) the party sought to be estopped had a full and fair opportunity to litigate the issue in the prior proceeding. *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44 (Colo. 2001). All of these elements are met in this case. The issue, whether complainant struck his co-worker with intent to harass, annoy or alarm him, was identical to the issue whether complainant committed harassment. Complainant was the defendant in the criminal proceeding, his guilty plea was a final decision on the merits, and complainant had a full and fair opportunity to litigate the issue of his guilt in his criminal case.

Complainant is therefore estopped from arguing that he did not strike Williams with an intent to harass him.

Complainant's second argument is that Novak did not give appropriate consideration to information complainant had provided to her: that complainant hit Williams without malice or forethought in order to apprehend an inmate; that DOC sought to cover up a more serious act, namely introduction of contraband by Williams; and that the termination letter wrongly stated that complainant hit Williams twice.

An appointing authority's decision may be arbitrary or capricious in one of three ways: if the appointing authority fails to use reasonable diligence and care to procure evidence that she is authorized by law to consider in exercising her discretion; if the appointing authority fails to give candid and honest consideration to such evidence; or if the appointing authority exercises her discretion in such a way that reasonable people, fairly and honestly considering the evidence, must reach contrary conclusions. *Lawley v. Dep't of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001), quoting *Van deVegt v. Bd. of County Comm'rs*, 98 Colo. 161, 55 P.2d 703, 705 (Colo. 1936).

Complainant's arguments do not support the conclusion that the appointing authority was arbitrary or capricious when she decided to terminate complainant. Complainant's guilty plea to harassment disposed of his argument that the appointing authority erred by failing to consider his statement that he did not hit Williams with malice or forethought, or that he thought he was attempting to apprehend an inmate. Complainant's allegations that Williams introduced contraband are irrelevant to the appointing authority's decision to terminate complainant for his own admitted conduct. Finally, complainant has not presented any authority or argument to explain why the appointing authority was arbitrary and capricious for terminating complainant when he only hit Williams once. To the extent that there may be a factual dispute about the number of times complainant hit Williams, that is not a material fact because the appointing authority was justified to terminate complainant for hitting his co-worker once.

CONCLUSION OF LAW

There are no genuine issues of material fact, and DOC is entitled to judgment as a matter of law.

ORDER

The disciplinary action is affirmed. Complainant's appeal is dismissed with prejudice.

Dated this **3rd** day
of **October, 2003**, at
Denver, Colorado

Stacy L. Worthington, Administrative Law Judge
State Personnel Board
1120 Lincoln, Suite 1420
Denver CO 80203; 303-764-1474

CERTIFICATE OF MAILING

This is to certify that on the ____ day of **October, 2003**, I placed true and correct copies of the foregoing **ORDER GRANTING SUMMARY JUDGMENT; INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Larry K. Lara
2001 East 3rd Street
Pueblo, Colorado 81001

and in the interagency mail, to:

Andrew Katarikawe
Assistant Attorney General
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Andrea C. Woods