

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RHONDA L. ELENEKI,
Complainant,

vs.

TRUSTEES OF THE STATE COLLEGES IN COLORADO, METROPOLITAN STATE COLLEGE,
Respondent.

Administrative Law Judge (ALJ) Stacy L. Worthington held the hearing in this matter on June 27, 2003, at the State Personnel Board, 1120 Lincoln, Suite 1420, Denver, Colorado. Assistant Attorney General Luis Corchado represented Respondent. Respondent's advisory witness was Dean Joan Foster, the appointing authority. Complainant appeared with her counsel, William E. Benjamin.

MATTER APPEALED

Complainant appeals her administrative discharge for exhaustion of leave.

ISSUES

1. Whether the administrative discharge was arbitrary or capricious.
2. Whether the administrative discharge was contrary to rule or law; specifically, whether the discharge violated laws prohibiting disability discrimination, and whether the discharge violated Director's Procedure P-5-10, 4 C.C.R. 801.
3. Whether complainant failed to mitigate her damages.

FINDINGS OF FACT

1. Complainant Rhonda Eleneki was employed as an Administrative Assistant III (AA III) at Metropolitan State College of Denver (MSCD) beginning August 13, 2001. She was administratively discharged for exhaustion of leave on June 7, 2002. Complainant had been a state employee since 1990.

2. Complainant's job at MSCD was assistant to the Dean of the School of Letters, Arts, and Sciences. MSCD has 19 departments and over 600 faculty members. It is organized into three Schools: the School of Business, the School of Professional Studies, and the School of Letters, Arts, and Sciences (LAS). LAS is about the size of the other two schools put together and generates 64% of the credit hours at MSCD. The Dean's Office had six staff at the time of complainant's discharge: Dean, Associate Dean, Assistant Dean, budget analyst, two administrative assistants (AAs), and a general specialist.

3. The two AAs performed receptionist duties, such as assisting students who dropped in to add or drop classes, helping students and others fill out forms, and answering questions about curriculum or other issues. The AAs also maintained files, drafted and received documents, attended meetings and took minutes, answered telephones, and communicated with the departments and other parts of the college. The phones rang nearly all the time, with some stretches of five to 10 minutes between calls. The Dean's Office is open from 8:00 a.m. to 5:00 p.m., and the AAs must be present during business hours to assist students and other people who came to the office. It would be virtually impossible for the AAs to work a two- to three-hour stretch without having to answer telephones or assist people who walk into the office.

4. When she began working for MSCD, complainant did not have any physical problems. In September 2001, she began having problems with her right hand. She did not bring those problems to anyone's attention until October 2001, when she told her supervisor, Dean Joan Foster, that she was experiencing significant pain in her right hand.

5. Complainant thought her pain might be caused by carpal tunnel syndrome. She went to a workers' compensation clinic for diagnosis and treatment. She received a hand brace and medication, which provided no relief. Complainant changed physicians and clinics, received various diagnoses, and was prescribed various medications. Her condition did not improve.

6. In early December 2001, complainant's hand condition had progressed to the point that she was unable to work without significant restrictions. She was able to spend no more than five minutes working on a keyboard, with 20 minutes off. She was restricted from lifting or pulling more than one-half pound with her hands. These restrictions could not be accommodated, so complainant went on medical leave December 4, 2001.

7. During the diagnosis and treatment of her hand condition, complainant received reports of blood tests. She had been in remission from cancer for about 10 years, but while reviewing her blood tests, she noticed that her cancer tumor marker was significantly elevated. Complainant sought a referral to an oncologist, who discovered that complainant's cancer had returned and metastasized to her sternum.

8. When complainant discovered that her cancer had returned, she called Foster and Tamy Calahan from MSCD's Human Resources department. Complainant told Foster and Calahan that she would be facing very aggressive chemotherapy and radiation therapy.

9. Complainant used all her accrued sick leave. When that was exhausted, she used her accrued annual leave. She was certified for family medical leave, and applied for short-term disability leave.

10. Complainant began chemotherapy in February 2002. The course of treatment was planned for 8 to 10 treatments, to be administered every three weeks. Complainant was closely monitored to see if she was able to withstand the treatments. Complainant might have been able to work part-time during the chemotherapy, but she would not have been able to work full-time. Complainant told Calahan that she did not want to work part-time because she wanted to concentrate on her treatment and healing.

11. On May 8, 2002, MSCD Human Resources Director Linda Daubers wrote complainant a letter scheduling a meeting to discuss her employment status. That letter informed complainant that she had exhausted her family medical leave, sick leave, and annual leave. Her short-term disability benefits would conclude on June 1, 2002. The letter instructed complainant to have her health care provider(s) complete a fitness-to-return-to-work certificate and to bring the certificate to the meeting on May 29, 2002.

12. Complainant's oncologist and rheumatology provider completed fitness to return certificates.

13. The oncologist certified that complainant was released to return to work on June 10, 2002, with restrictions. The oncologist described those restrictions as "[patient] can work as tolerated mainly she will be unable to work during her week of chemotherapy."

14. The fitness to return certificate completed by the rheumatology practitioner described complainant's diagnosis as "Inflammatory Arthritis," which required various restrictions. One of the restrictions was "no typing, keyboarding, or entering data for more than 2-4 hours each day as tolerated," for "a reduced schedule for 4-6 hours per day if tolerated from 6/10/02 through indefinite." The practitioner wrote, "I am unsure how much activity she can tolerate. She would like to perform her job as tolerated. I could probably be more specific once she has been able to return to work."

15. Complainant believed that her arthritis was resolved and would not limit her ability to return to work, because the medication she received for her arthritis made her virtually pain-free.

16. Complainant had exhausted her annual and sick leave on December 20, 2001; her family medical leave on March 4, 2002; and her short-term disability benefits on June 3, 2002.

17. Complainant, Daubers, and Calahan attended the May 29, 2002 meeting. Complainant explained that she was a little more than halfway through her chemotherapy treatments. She received chemotherapy every third week, with her final treatment scheduled for July 15, 2002. Complainant was unable to perform any work for one week after each chemotherapy treatment. Her recovery time increased with each treatment, so that by the time of her last chemotherapy treatment,

it might take one or two additional days to recover.

18. Complainant stated that when she completed chemotherapy, she would have a one or two week break, then would begin radiation therapy. She would receive radiation treatment every day for eight to ten weeks. Complainant stated that she did not know how the radiation therapy would affect her because she had not had it before. However, she said she would be receiving very aggressive treatment, that it could cause nausea, and that it would almost certainly cause exhaustion.

19. Complainant asked to be allowed to work a reduced work schedule from her home until she completed her treatments. She told Daubers and Calahan that she was exhausted, and working at home would allow her to rest as needed when she was tired or when her hands bothered her. She thought she would be able to work 20 hours a week at home, except for the weeks when she had chemotherapy, when she would be unable to work at all.

20. Complainant said she could stuff envelopes for mass mailings, do typing, and do some telephone work from her home. She suggested having other staff in the office pick up the other duties of her job, and having her do typing and mailing for the other staff. Complainant also suggested that the temporary employee who had been covering her desk during her absence could job-share with her. However, the temporary employee's six-month appointment was ending and could not be renewed.

21. Complainant also suggested that, if this proposal was not feasible, MSCD could find her another position where she could work at home and/or on a reduced schedule.

22. The essential functions of complainant's position, as described in the Position Description Questionnaire, included: organizing and implementing major annual school events; serving as the official Dean's Liaison to the Communications Office for public relations, publicity, and school publications; scheduling meetings; arranging meeting rooms and catering; distributing notices; negotiating with vendors; responding to internal and external requests for information; explaining policies and procedures; meeting with the Dean, Associate Dean, and Assistant Dean; overseeing the collection and distribution of data from various sources; advising Deans, chairs, and directors of impending deadlines; interpreting and explaining information requests for chairs and staff; prioritizing and forwarding the Dean's mail; being responsible for the flow of paperwork and organization of all office procedures and records; designing and maintaining confidential department files; controlling the petty cash account; gathering information for Chairs' meetings, attending the meetings, and recording, typing, and distributing minutes from those meetings; following up on questions and requests for information from those meetings; ordering supplies; maintaining inventory; and supervising up to five student workers.

23. During complainant's absence, a temporary employee worked her desk. A temporary employee cannot adequately substitute for a permanent Dean's Office employee. The temporary employee has to learn who everyone is, including the 19 department chairs and their administrative assistants, the Provost and Vice Provost and their assistants; be oriented to the College; learn how to deal with students, where to refer them, how to answer questions; learn the relationship between the

Dean's Office and other offices; and generally learn the job. Event planning was a significant part of complainant's job, such as planning the student award functions at the end of each semester. The temporary employee did not know how the functions had been done before, the budget for the functions, or even what caterer to use. The other AA in the Dean's Office had to assist the temporary employee with these duties. During complainant's absence, the Dean's Office performed its functions, but not as well as it would have done with a permanent employee.

24. Foster was not able to restructure complainant's duties to allow her to work a reduced schedule or to work from home. Many of complainant's essential functions could only be performed in the office. The Dean relied upon face-to-face contact with the AAs to discuss issues, ask and answer questions, obtain information, and follow up on other conversations. The AAs also have to be able to respond to requests from the President or Provost, who may request information in a short time. The AAs have to be able to go through files and find information in response to those requests. If all the in-office duties were taken away, it would not have been possible to assign complainant 20 hours of work a week to do at home.

25. The Dean's Office is responsible to serve the faculty, students, and the public. During 2002, Foster did not allow any staff to work from home.

26. After the May 29, 2002 meeting, Daubers met with MSCD's ADA coordinator, Helen Fleming. Daubers and Fleming reviewed complainant's PDQ. They concluded that there was no way to accommodate complainant's work restrictions. Daubers asked Foster if it would be possible for complainant to job-share with another employee, but Foster said that would be impossible due to budget constraints.

27. On June 3, 2002, Daubers wrote a letter administratively discharging complainant for exhaustion of leave pursuant to Director's Procedure P-5-10, 4 C.C.R. 801. The discharge was effective June 7, 2002. Daubers stated that she had reviewed vacant positions at complainant's current level and other classifications, but was not able to identify any positions that would accommodate a part-time schedule with limited use of hands, and that did not require daily attendance. Daubers explained that MSCD had allowed complainant's position to be filled with temporary and hourly workers during her absence, which had proven to be a hardship, but that its business needs necessitated that the position be filled by a permanent full-time employee by the start of the fall semester. Daubers pointed out that the discharge was not a disciplinary action, and that when complainant was able to return to work, she would have reinstatement privileges.

28. Daubers's letter did not specifically inform complainant of the need to contact the Public Employees Retirement Association (PERA) for information about retirement. The letter did say, "I am enclosing information regarding COBRA that describes your ability to continue your health insurance benefits for up to 18 months, or 29 months if determined to be disabled according to Social Security, Standard Insurance Co., or PERA standards." Complainant did call PERA after her discharge to discuss her account and was told she was not eligible for retirement benefits. She did not lose any PERA benefits as a result of the language in the discharge letter.

29. Complainant did not work again until May 8, 2003, when she took a position as an administrative assistant with Hospital Shared Services. She was able to return to work in September 2002, when she completed her chemotherapy and radiation therapy. She sent out resumes but could not find an administrative position. She reviewed the state's web site and saw that there were openings with the state, but she did not apply for any because there were no administrative positions that suited her. She knew that she would not have to re-test for an administrative position with the state.

30. The Dean's Office hired a permanent AA III to replace complainant. That AA III started on August 19, 2002, which was approximately one month before complainant completed her treatment and was able to return to work.

DISCUSSION

Disability Discrimination

The State Personnel Board (Board) has jurisdiction pursuant to § 24-50-125.3, C.R.S. (2002), to hear allegations of discrimination in violation of the Colorado Anti-Discrimination Act, § 24-34-402, C.R.S. (2002). That Act prohibits an employer from discharging an employee who is "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." § 24-34-402(1)(a).

The Colorado Civil Rights Commission (CCRC) has promulgated rules to implement this provision. Those rules state that the Colorado Act is substantially equivalent to the federal Americans with Disabilities Act (ADA), and that the Colorado law shall, where possible, follow federal regulations and case law. CCRC Rule 60.1(B) and (C), 3 C.C.R. 708-1.

The Colorado regulations define "qualified disabled person" as "a person with a disability who, with reasonable accommodation, can perform the essential functions of the job in question." Rule 60.2(B).

A disability is a physical or mental impairment that substantially limits a major life activity. § 24-34-301(2.5)(a), C.R.S. (2002); CCRC Rule 60.1(D)(1); *see also* 42 U.S.C. § 12102(2); *Poindexter v. Atchison, Topeka and Santa Fe Rwy Co.*, 168 F.3d 1228, 1230 (10th Cir. 1999).

Major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, touching, learning, and working." Rule 60.1(D)(1)(c).

Colorado regulations define "substantially limits" as "unable to perform a major life activity that the average person in the general population can perform or is significantly restricted as to the

condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” Rule 60.1(D)(1)(f).

Under the Colorado regulations, a reasonable accommodation may include “job restructuring, part-time or modified work schedules ... and other similar action.” Rule 60.2(C)(2)(b).

The Colorado Supreme Court requires complainant to demonstrate each of the following elements to prove a *prima facie* case of disability discrimination under the ADA:

(1) that she is a disabled person within the meaning of the statute; (2) that she was otherwise qualified for her current position; (3) that she was terminated from that position because of her disability; (4) that she requested reasonable accommodation either within her current position or through transfer to a vacant position for which she was qualified; and (5) that, despite her request for reasonable accommodation by transfer to a vacant position, the employer continued to seek applicants for the vacant position or hired persons who possessed the disabled employee’s qualifications. Once this showing has been made, the burden shifts to the employer to prove either undue hardship or that it made an offer of reasonable accommodation. At all times, the employee bears the ultimate burden of persuading the trier of fact that she has been the victim of illegal discrimination.

Community Hospital v. Fail, 969 P.2d 667, 672 (Colo. 1998). The Colorado Act and its implementing regulations differ from the ADA in that they do not require an employer to consider reassignment as a reasonable accommodation. The Colorado Act and regulations only require the employer to offer or consider reasonable accommodations that would allow the employee to perform the job she holds. However, for reasons discussed below, this distinction is not pertinent in this case because MSCD considered accommodating complainant by reassigning her to another position.

The first element of a *prima facie* case is whether complainant was a “disabled person.” This required complainant to prove (1) that she had a physical or mental impairment; (2) that substantially limited; (3) one or more major life activities. MSCD argues that complainant was not disabled because she did not provide clear evidence of the effect of her illnesses or disability.

There is no dispute that complainant suffered from two physical impairments. The first impairment, which initially made her unable to perform her job, was a condition that was eventually diagnosed as inflammatory arthritis of her hands. The second impairment was cancer and the treatment she was undergoing for her cancer.

The more difficult question is whether complainant presented evidence that her impairments substantially limited one or more major life activities, as defined by Colorado and federal statutes, regulations, and case law.

First, complainant did not specifically identify the major life activity she claims was substantially limited. An employee who alleges disability discrimination “must articulate with precision the impairment alleged and the major life activity affected by that impairment.” *Poindexter v. Atchison, Topeka and Santa Fe Rwy Co.*, 168 F.3d 1228, 1232 (10th Cir. 1999). Complainant did not precisely articulate the major life activity that she contends was substantially limited by her impairments. Of the activities described in the definition of “major life activity,” the only one that seems to apply to complainant is “working.”

To demonstrate a substantial limitation in the major life activity of working, complainant must show that she is significantly restricted in her “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.” *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997), quoting *Bolton v. Scrivner*, 36 F.3d 939, 942 (10th Cir. 1994), cert. denied, 513 U.S. 1152 (1995); 29 C.F.R. 1630.2(j)(3)(i). Complainant did demonstrate that she was limited in the major life activity of working because she was not able to work away from her home, nor was she able to work a full day even in the weeks she was not receiving chemotherapy. The average person would be able to perform jobs requiring full-time work and work outside the home, so complainant was restricted in her ability to work compared to the average person. Moreover, complainant's arthritis restricted her from working full-time and restricted her ability to perform keyboarding duties more than two to four hours in a workday. These restrictions, which were expected to continue indefinitely, also restricted complainant's ability to work.

Finally, complainant was required to demonstrate that this restriction constituted a substantial limitation in the major life activity of working. Complainant's limitations were certainly severe: she could not work at all one week out of every three, and during the other two weeks, she would only have been able to work approximately four hours per day. However, the duration of these limitations must also be taken into account in determining whether a limitation is substantial. That determination requires consideration not just of the nature and severity of the impairment, but also the duration and permanent or long-term effect of the impairment.

Complainant argued that her limitations were not permanent, that at the time she was discharged she believed that she would only be impaired through the conclusion of her chemotherapy and radiation treatments. Her final chemotherapy treatment was scheduled for July 15, 2002. After a one- or two-week break, she would undergo eight to ten weeks of daily radiation therapy. Her treatments would thus conclude somewhere between September 16 and October 7, 2002.

Although “temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities,” 29 C.F.R. pt. 1630 app., § 1630.2(j), ... “an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months. Such conditions, if severe, may constitute disabilities.”

Aldrich v. Boeing Co., 146 F.3d 1265, 1271 (10th Cir. 1998), quoting EEOC, *Interpretive Manual* (1995).

When she was discharged, complainant's limitations were expected to continue for at least three months or as long as four months. Given the severity of her condition, this duration constituted a substantial limitation. Moreover, complainant's rheumatology practitioner certified that her arthritis restricted her ability to use a keyboard more than two to four hours a day, and restricted her ability to work at all more than four to six hours per day. These restrictions were expected to continue indefinitely. Complainant therefore met her burden of proving that she was disabled under the Colorado and federal definitions.

However, complainant did not meet the second element of the *prima facie* case because she did not prove that she was "otherwise qualified" for her position. Complainant was required to demonstrate that she could perform the essential functions of her job, with or without reasonable accommodation. *Siemon*, 117 F.3d at 1175; 42 U.S.C. § 12111(8). However, the evidence clearly showed that complainant was not able to perform the essential functions of her job, and the accommodations she requested would not have made her able to perform those essential functions.

A job requirement is essential if the "employer actually requires all employees in the particular position to perform the allegedly essential function." *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995), citing 29 C.F.R. pt. 1630, app. § 1630.2(n).

The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job. It is the employer's province to establish what a job is and what functions are required to perform it. The ADA simply requires that an individual with a disability's qualifications for a job are evaluated in relation to its essential functions.

Milton, 53 F.3d at 1124, quoting EEOC Technical Assistance Manual at II-18 (1992). In *Milton*, the plaintiffs were warehouse workers who requested accommodations that would have changed or reduced the production standard for their positions, or would have provided them a lighter workload. The court held that those accommodations were not reasonable. 53 F.3d at 1124. "An employer is not required by the ADA to reallocate job duties in order to change the essential function of a job.... An accommodation that would result in other employees having to work harder or longer hours is not required." *Id.* (citations omitted). The law does not require an employer to "fundamentally alter the nature of" the job in order to accommodate a disabled employee. *Id.* at 1125.

Complainant testified that, for the duration of her chemotherapy, she would be completely unable to work one week out of every three, and that during the other two weeks she would only be able to work half-time. She also testified that she did not have any idea how she would react to the radiation treatments, but that effects such as nausea and exhaustion were common and expected during the treatments. The radiation treatments were to be administered daily for eight to 10 weeks. At the time of her discharge, it appeared unlikely that complainant would be able to return to work full-time until her radiation treatments were completed. Complainant testified that she was not able

to return to work until those treatments were completed in September 2002.

A significant percentage of complainant's job consisted of duties that could only be performed at the Dean's Office. Complainant's duties included acting as a receptionist: greeting students, faculty, and the public; answering questions; assisting in completing forms; and similar duties. Complainant's duties also included arranging meetings, attending those meetings, following up on questions and requests for information that came up during those meetings, and drafting the minutes for the meetings. Complainant was also required to answer telephones, to file and retrieve documents, and to receive and respond to requests for information from MSCD administrators. She was required to set up major events, arrange catering, negotiate with vendors, and similar duties. In short, the bulk of her job duties required her to be present for face-to-face interactions with the Dean, other college administrators, faculty, students, and the public.

Complainant did not dispute that these were essential functions of her job, nor did she argue that she would be able to perform these duties while working a drastically reduced schedule or working from her home. None of these duties could be performed adequately from her home. The accommodation complainant sought "is really not an accommodation at all. The accommodation she requests [would] not allow her to perform an essential function – that is, show up for work on a regular and predictable basis – but rather [would] relieve her of the duty to perform that essential function." *Keoughan v. Delta Airlines, Inc.*, 113 F.3d 1246 (Table of Unpublished Decisions), 1997 WL 290961 (10th Cir. 1997).

The only duties complainant described that she could perform from her home were some telephone work and typing. The testimony and exhibits established that typing was an essential function of complainant's job, but it was only a fraction of the essential functions that were required in complainant's job. Moreover, complainant's rheumatology practitioner stated that complainant was substantially restricted in her ability to type: she could only type two to four hours per day, as tolerated. Complainant testified that, at the time she was discharged, her hands were virtually free of pain and she believed she could perform typing and keyboarding duties for up to 20 hours a week. However, at the time of her discharge, complainant had been off work for six months and had not been performing the type of tasks that initially caused her severe pain. Her rheumatology practitioner documented that complainant's arthritis was not resolved, and that it caused significant restrictions in her ability to type and perform similar duties. Complainant's subjective belief about her abilities are contradicted by the medical judgment of her health care provider, and MSCD is entitled to rely upon the professional judgment of a health care professional in determining whether complainant was able to perform the essential duties of her position. *See Martin v. State of Kansas*, 996 F. Supp. 1282, 1292-93 (D. Kan. 1998).

Complainant cited *Spielman v. Blue Cross and Blue Shield*, 33 Fed. Appx. 439, 2002 WL 524549 (10th Cir. 2002), for the proposition that working at home is a reasonable accommodation. However, that case and those cited therein hold that working at home is a reasonable accommodation only when the essential functions of the job can be performed at home. In this case, a majority of the essential functions of complainant's position could not be performed at home.

Complainant argues that extending her leave for three to four months until her cancer treatments were completed is a reasonable accommodation. In *Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998), the court held that allowing an employee “time for medical care or treatment may constitute a reasonable accommodation,” but that “an indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment.” In that case, the employer had a generous leave policy that permitted up to six months’ unpaid disability leave with guaranteed reinstatement, an unpaid personal leave of absence up to 12 months with no reinstatement guarantee, and a disability plan that would have paid full or partial salary for up to 52 weeks. The court found that US West did not reasonably accommodate the employee because it failed to provide leave that was available under its policy.

In this case, MSCD provided six months’ leave to complainant, until she had exhausted her accrued sick leave, annual leave, family medical leave, and short-term disability leave. There was no evidence that MSCD’s policy provided for any additional leave under these circumstances, nor was there evidence that MSCD had provided additional leave to other employees with disabilities. MSCD complied with its leave policy and offered complainant the leave to which she was entitled. MSCD notified complainant that she was eligible for reinstatement as soon as she was recovered enough to return to work. Unfortunately, complainant never availed herself of that privilege.

There was no evidence that allowing complainant additional leave to complete her cancer treatment would result in her return to her full-time position. The Tenth Circuit has held that reasonable accommodation “refers to those accommodations which presently, or in the near future, enable the employee to perform the essential functions of his job.” *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996). Complainant was not scheduled to complete her cancer treatment for three to four months after she was discharged. Furthermore, the medical certificates complainant provided to MSCD showed that she would not necessarily be able to return to full duty after she completed her cancer treatment. Complainant's rheumatology professional certified that complainant was unable to work more than four to six hours a day, that she was unable to use a keyboard for more than two to four hours a day, and that these restrictions were likely to continue indefinitely. While typing was not the only essential function of complainant's job, it was still an essential function, and complainant provided no evidence that extended leave for cancer treatment would have permitted her to return to work able to perform all the essential functions of her job.

Complainant had also requested the accommodation of reassignment into a different position where she could have performed the essential functions, through part-time work and/or work at home. As discussed above, the Colorado Act does not require reassignment as a reasonable accommodation. However, the evidence in the record shows that MSCD did conduct an investigation into this suggestion, but there were no vacant positions to which complainant could be reassigned. MSCD therefore was unable to accommodate complainant in this way.

In conclusion, while complainant did prove that she was disabled, she did not demonstrate that she was otherwise qualified for her position because at the time of her discharge, she was not

able to perform the essential functions of that position, and there was no accommodation that would have enabled her to perform those duties. Complainant therefore has not proven a *prima facie* case of disability discrimination.

Director's Procedure P-5-10

Director's Procedure P-5-10, 4 C.C.R. 801, states:

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. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively discharged if FML and/or short-term disability leave (includes the 30-day waiting period) apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an employee has been terminated under this procedure and subsequently recovers, a certified employee has reinstatement privileges.

Complainant argued that she is entitled to reinstatement because MSCD committed two violations of P-5-10. First, complainant argued that she was a qualified individual with a disability, and thus should not have been discharged. For the reasons discussed above, that argument is without merit.

Second, complainant argues that MSCD did not inform her of "the need to contact PERA on eligibility for retirement." This argument falls for two reasons: First, though the letter notifying complainant of her administrative discharge did not specifically instruct complainant to contact PERA, it did mention the possibility of a disability determination by PERA. That reference, while not containing the desired specificity, was nonetheless sufficient to put complainant on notice that PERA provided some sort of disability determination or benefit. Second, complainant testified that she did in fact contact PERA to determine whether she was entitled to any benefits. PERA informed her that she was not entitled to benefits, and complainant testified that she did not lose any right or benefit to which she was entitled because of the language of the discharge letter. Therefore, to the extent that the language of the letter erroneously failed to provide the specific language contained in P-5-10, that error was harmless.

Finally, complainant mentioned that she must not have exhausted all her available leave because when she was discharged, she received payment for approximately 10 hours of annual leave. There was no other testimony concerning this payment, but there was evidence that complainant was on leave without pay for at least several days after she had exhausted all of her accrued leave, family medical leave, and short term disability leave. If complainant had been allowed to use the 10 hours of annual leave, that would have been exhausted and there still would have been a period of leave without pay before the administrative discharge took effect. There thus is insufficient evidence to show that complainant had any unused leave that should have been used up before the administrative

discharge.

Arbitrary or capricious

An agency action may be arbitrary or capricious in any of three ways: The agency may neglect or refuse “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”; the agency may fail “to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion”; or the agency may exercise “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), quoting *Van deVegt v. Bd of County Comm’rs*, 98 Colo. 161, 55 P.2d 703, 705 (Colo. 1936).

MSCD did not act arbitrarily or capriciously. MSCD used reasonable diligence and care in requesting and receiving information concerning complainant's conditions and limitations, and in investigating the possibility of the accommodations she requested. MSCD’s conclusions that complainant had exhausted her leave, was unable to return to work, and was unable to perform the essential functions of her job with or without reasonable accommodation were reasonable and supported by the evidence.

CONCLUSIONS OF LAW

1. The decision to discharge complainant was not arbitrary or capricious.
2. The decision to discharge complainant did not violate laws that prohibit discrimination on the basis of disability.
3. Complainant’s discharge did not violate Director’s Procedure P-5-10, 4 C.C.R. 801.
4. Because complainant is not entitled to any relief, there is no need to determine whether she failed to mitigate her damages.

ORDER

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

DATED this ____ day of
September, 2003, at
Denver, Colorado.

Stacy L. Worthington
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the _____ day of **September, 2003**, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

William E. Benjamin, Esq.
5350 Manhattan Circle, Suite 105
Boulder, Colorado 80303

And in the interagency mail to:

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

Andrea C. Woods