STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2003B039

ORDER GRANTING MOTION TO DISMISS;
INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARCIA SKIDMORE,

Complainant,

vs.

REGENTS OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF COLORADO HEALTH SCIENCES CENTER,

Respondent.

Administrative Law Judge Mary S. McClatchey heard this case on March 10, 2003. Complainant ("Skidmore" or "Complainant") represented herself. Respondent University of Colorado Health Sciences Center ("HSC") was represented by Steve Zweck-Bronner, Senior Associate University Counsel. At the close of Complainant's case-in-chief, Respondent moved to dismiss the case pursuant to C.R.C.P. 41(b)(1) and submitted a Motion for Directed Verdict. Upon consideration of the evidence, relevant statutes and case law, the Administrative Law Judge granted the motion.

MATTER APPEALED

Complainant appeals her administrative discharge on grounds Respondent discriminated against her on the basis of disability. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

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

2. Whether Respondent discriminated against Complainant on the basis of disability.

FINDINGS OF FACT

1. Complainant was hired as a Police Officer I ("Officer") working in the Police Department at HSC in the mid-1990's. Essential duties of the Officer position include making arrests, patrolling the HSC campuses to ensure the safety of all persons, and physically restraining patients on 72-hour mental health holds.

2. On May 18, 2001, Skidmore sustained a knee injury while on duty, after which she was unable to return to her Officer position.

3. For the following six months, Skidmore was placed on light duty, and was paid at her full Officer salary.

4. On December 3, 2001, Skidmore had knee surgery.

5. Also on December 3, 2001, HSC Chief of Police David Rivera sent Skidmore a letter advising her of the following:

   - as of December 4, 2001, approximately 2/3 of her salary would be paid by Worker's Compensation; the remaining 1/3 would be paid by her accrued paid leave;
   - her paid leave would be exhausted on March 15, 2002;
   - after that time she would be placed on leave without pay and on Family Medical Leave ("FML"), during which time she would continue to receive Workers Compensation;
   - her return to the Officer position was contingent on receipt of a Fitness for Duty report from her doctor; and,
   - her status to return to work would need to be re-evaluated should she exhaust her FML.

6. This letter also served as implied notice to Skidmore that Chief Rivera had elected to remove her from light duty. After receipt of this letter, Skidmore questioned Rivera about removing her from light duty. He informed her that she had used it up and that he could no longer pay her at an Officer rate when she was performing at a far lower level.

7. Over the next few months, Skidmore contacted a number of individuals from Respondent's Human Resources ("HR") office, including the Americans with Disabilities Act coordinator, to discuss her future job status with the department.

8. In mid-March 2002, Skidmore was placed on FML for the requisite period of three months.

9. On June 10, 2002, Skidmore reached Maximum Medical Improvement ("MMI"). Under the parameters of the MMI, she was deemed to be permanently unable to perform the essential functions of the Officer position.

10. On July 17, 2002, at Skidmore's initiation, she attended a meeting with Chief Rivera and other HR staffers to discuss her future job status with the department. At the meeting, Rivera informed her that the only open position he could offer her was a Dispatcher position,

entitled, "Communications Technician Intern." It is an entry-level position for which the starting salary is $2150.00 monthly, and Rivera offered her a 10% increase as a credit for her law enforcement experience, bringing his offer to $2365.00. Skidmore had earned approximately $4210.00 monthly as an Officer.

11. On July 19, 2002, Chief Rivera sent Skidmore a follow-up letter on the meeting, reiterating his offer of the dispatcher position, giving her until July 31, 2002 to decide on the offer, and informing her that if she turned down the offer, he would need to initiate the termination process. He also referred her to Janice Frary from the HR office for information on other open positions, should she turn down the dispatcher position.

12. Skidmore turned down the Dispatcher position.

13. On August 13, 2002, Sam John, Director of Employee Relations for HSC, sent Skidmore a letter informing her that commencing July 1, her FML had been extended for an additional three-month period. He also clarified the discreet job duties of all HR staff with whom she had been working and could continue to work. For instance, he informed her that Julie Palmer is the Employment Specialist who fills administrative assistant positions, provided Ms. Palmer's telephone number, and indicated that Palmer could provide information on applying for positions at HSC and in other state agencies.

14. On August 28, 2002, Chief Rivera sent Skidmore another letter, referring her to Frary and Palmer for further assistance on other positions for which she could apply. He also informed her of her extended FML through September 28, 2002, and requested that she inform him if her physical restrictions improved by September 16.

15. Skidmore had over a dozen conversations with HR staff concerning her job status and job hunt.

16. Neither party presented evidence concerning attempts to accommodate Skidmore's impairment to enable her to perform the essential functions of the Officer position.

17. On October 9, 2002, Rivera sent Skidmore a letter of administrative termination under State Personnel Director's Procedure P-5-10, for exhaustion of all available leave. The letter indicated that the vacant position had to be filled, in order to meet the needs of the agency.

DISCUSSION

I. <u>Rule 41(b) Standard of Review.</u>

Rule 41(b)(1), C.R.C.P. provides, "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The standard to apply is whether, in light of all the evidence, a judgment for Respondent should be entered. *Smith v. Weindrop*, 833 P.2d 856, 857 (Colo.App. 1992).

II. Respondent did not discriminate against Complainant on the basis of disability.

The State Personnel Board has jurisdiction over actions brought under the Colorado Anti-Discrimination Act, Section 24-34-301 *et seq*, C.R.S. ("the Act" or "the Colorado Act"), under Section 24-50-125.3, C.R.S. Complainant bears the burden of proving Respondent discriminated against her on the basis of disability. *Colorado Civil Rights Division v. Big O Tires, Inc*., 940 P.2d 397 (Colo. 1997).

To determine whether a disability discrimination claim has merit, a two-part threshold inquiry must occur: "*first*, does the claimant have a disability within the meaning of the act, and *second*, is the person 'otherwise qualified' for the [position]." *Gonzagowski v. Widnall*, 115 F.3d 744, 747 (10th Cir. 1997).

Respondent concedes that Complainant has a record of impairment that constitutes a disability under the Act, in its Motion for Directed Verdict. It argues that Complainant is not a "qualified person with a disability" because she is unable to perform the essential functions of the Officer position with or without reasonable accommodation. This argument prevails.

Under the Colorado Act, a "qualified disabled person" is an individual who, with or without reasonable accommodation, can perform the essential functions of the job he or she currently holds. The Act states in part,

> "It shall be a discriminatory or unfair employment practice: (a) For an employer to . . . discharge . . . any person otherwise qualified because of disability . . . ; but, with regard to a disability, it is not a discriminatory or an unfair employment practice . . . [to discharge] if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from *the job*, and the disability has a significant impact on *the job*." Section 24-34-402(1)(a), C.R.S. (emphasis added).

Colorado Civil Rights Commission Rule 60.2B defines "qualified disabled person" as "a person with a disability who, with reasonable accommodation, can perform the essential functions of the *job in question*." Rule 60.2B, 3 CCR 708-1 (emphasis added).

At hearing, Skidmore conceded that she was unable to perform the essential functions of the Officer position, with or without accommodation. Therefore, she is not a qualified disabled person under the Colorado Act, and has failed to prove her claim of disability discrimination.1

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1 Federal law is different on this issue. The Americans with Disabilities Act ("ADA") defines a "qualified

Respondent did attempt to accommodate Skidmore by offering her the Dispatcher position, albeit at almost half of her Officer salary. Respondent also repeatedly offered her the services of its HR department, in an effort to assist her in finding a suitable alternative position anywhere in state government. Complainant has failed to prove that Respondent discriminated against her on the basis of disability.

III. 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 asserts that Chief Rivera should have allowed her to remain on light duty for a period longer than six months. HSC's light duty policy, assuming one exists, was not introduced into evidence. Therefore, it is impossible to determine whether such a policy was followed. Rivera's decision to limit Skidmore's light duty to a period of six months is not, in and of itself, arbitrary and capricious.

Skidmore further argues that Rivera's offer of the Dispatcher position was at far too low a salary. Skidmore had earned over $4200.00 per month at the time she was injured in the line of duty as a campus police officer. Skidmore's performance as an Officer and her loyalty to HSC have never been questioned. Further, she presented herself as a highly professional and intelligent individual at hearing. Skidmore's belief that she deserved a much better offer, after so many years of service to HSC, and after being injured on the job, is completely understandable. Her situation is extremely regrettable. However, in the absence of evidence that a position for which she qualified, at a higher salary, was vacant and not made available to her, there is no evidence upon which to find

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individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual *holds or desires*." 42 U.S.C. Section 12111(8) (emphasis added). In addition, the ADA defines "reasonable accommodation" to include "reassignment to a vacant position." 42 U.S.C. Section 12111(9)(B). Citing these specific ADA provisions, the Tenth Circuit Court of Appeals, and other circuits, have held, a "qualified individual with a disability" under the ADA is one who can perform the essential functions of either his or her own, or of another, available position, with or without reasonable accommodation. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1161-62 (10th Cir. 1999). Because the ADA is not "substantially similar" to the Colorado Act on this issue, federal law does not carry persuasive authority regarding same. Commission Rule 60.1C.

Respondent's action arbitrary and capricious.

Lastly, Respondent fully complied with Director's Procedure P-5-10. This rule states in part, "If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave without pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. . . No employee may be administratively discharged if FML and/or short-term disability leave apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship." Once Complainant had exhausted all of her sick and annual leave, Respondent placed her on two consecutive FML leaves, for a total of six months. At that point, the Officer position had been vacant for over a year and a half, and there was no possibility of Skidmore improving to a point where she could resume the position, even with an accommodation. Administrative termination under P-5-10 was therefore proper.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious, or contrary to rule or law.

2. Respondent did not discriminate against Complainant on the basis of disability.

INITIAL DECISION

For the reasons set forth above, Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this ___ day of
April, 2003, at
Denver, Colorado.

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 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 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 _____, **2003**, I served true copies of the foregoing **ORDER GRANTING MOTION TO DISMISS; INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE; NOTICE OF APPEAL RIGHTS** by placing same in the United States mail, postage prepaid, addressed as follows:

Marcia Skidmore
2677 Hudson Street
Denver, Colorado 80207

and by courier pickup to:

Stephen Zweck-Bronner
Senior Assistant University Counsel
University of Colorado Health Science Center
Campus Box A-77
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Denver, Colorado 80262

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