

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2003G132(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

FRED REESE,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, FREMONT CORRECTIONAL FACILITY,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on June 18, 2007, at the State Personnel Board, 633 - 17th Street, Courtroom 1, Denver, Colorado. The record was closed on the record by the ALJ at the close of the hearing. Assistant Attorney General Brooke Meyer represented Respondent. Respondent's advisory witness was Warden Al Estep, the current appointing authority. Complainant appeared and was represented by Wesley D. Hassler, Esq.

MATTER APPEALED

Complainant, Lt. Fred Reese ("Complainant") appeals the contents of his 2002/2003 annual performance evaluation ("02/03 Annual Review"), issued by Respondent ("DOC" or "Respondent") in April of 2003, as a retaliatory act under C.R.S. § 24-34-402(1)(e)(IV). Complainant seeks to have his evaluation changed, be promoted to captain's rank with captain's pay, and to be awarded compensation of \$50,000 in back pay.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Did Complainant establish a *prima facie* case of retaliation?
2. Was Complainant discriminated against because he had opposed a practice made unlawful by the Colorado Anti-Discrimination Act?

FINDINGS OF FACT

General Background

1. Complainant is an African American man who started his career at DOC in 1994 as a Correctional Officer I ("CO - I"). Complainant was promoted to Lieutenant in the position of Correctional Officer III - Specialist ("CO - III") at the Fremont Correctional Facility ("FCF") in August of 1996. Complainant's specialty area was in the field of recreation. He entered DOC with experience and education in teaching, and after serving as a collegiate athletic director and a collegiate head football coach. Complainant's direct supervisor at the time of his promotion was the Programs Supervisor, which at the time was a captain - level ("CO-IV") position. The captain in recreation, in turn, reported to the Programs Manager Supervisor, which is a major-level position ("CO_V"). The Programs Manager Supervisor managed the educational, recreational, and religious activities for inmates at FCF.
2. At the time that Complainant was promoted to CO-III, Captain Manuel De Torres held the CO-IV position in recreation. Major Richard Patchen was the Programs Manager Supervisor at the time of Complainant's promotion, and Gary Neet was the Warden.
3. Capt. De Torres retired at the end of 1998. At the time that Capt. DeTorres retired, he and Complainant believed that Warden Neet had promised Complainant the CO-IV position in recreation.
4. Capt. De Torres has had at least three experiences with the DOC hierarchy where he believed that he had been passed over for promotion because he was incorrectly perceived to be of Mexican origin. In each case, he had tested well enough to be within the top rankings of candidates, but others who were ranked lower were promoted before he was offered a position. Capt. De Torres at one point had complained to the governor's office for redress of these issues.
5. Capt. DeTorres obtained his position as the FCF captain in recreation when he tested for captain in 1992 or 1993 and had ranked in the top 5. Once Capt. DeTorres realized that a candidate who had said he had ranked #8 on the list had been promoted ahead of him, Capt. De Torres complained to the DOC Executive Director's office. He was told that he would be promoted; a week later, he was assigned to FCF as the recreation captain.

Complainant's Attempts Prior to February 2003 to Obtain a Promotion:

6. Complainant was not promoted to CO-IV upon assuming the duties previously held by Capt. De Torres. Complainant was aware that, at the time, a number of other Doc correctional facilities had captains in the recreation department, including Centennial, Territorial, Buena Vista, Colorado Women's, the State Penitentiary, and

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the Denver Reception and Diagnostic Center.

7. Between 1999 and 2003, Complainant repeatedly attempted to obtain a promotion to captain. He met yearly with Warden Neet to ask why he had not been promoted to captain.
8. Complainant also made an informal complaint about the department's failure to make the recreation supervisor a captain-level position to Programs Manager Supervisor, Major Richard "Buck" Friend. Major Friend told Complainant to gather position description questionnaire ("PDQ") information from other facilities with CO-IV recreation supervisors and he would see what he could do. Complainant called other facilities, gathered information on the job descriptions for those positions, and provided it to Major Friend, but no change in his status occurred.
9. Complainant contacted Madline SaBelle of DOC's Human Resources Department on more than one occasion to ask for an audit of his position, but those contacts did not result in an audit of his position or a change in Complainant's rank and pay.

Complainant's Decision to File a Discrimination Complaint:

10. Complainant spoke with Warden Neet in advance of his decision to file a discrimination complaint. Warden Neet's response to Complainant's plan was negative. He told Complainant that filing such a complaint would be the career suicide. Warden Neet also told Complainant, that if he thought he needed to do so, Complainant should go head and file his complaint.
11. Complainant filed a complaint alleging that Respondent's failure to promote him to CO-IV upon his assumption of Capt. De Torres' duties was a product of racial discrimination. (Stipulated Fact) This complaint was filed at the beginning of February 2003.
12. Within a week of filing his discrimination complaint, Complainant was called to the office of Associate Warden Nard Claar. This meeting took place around February 5, 2003. Associate Warden Claar told Complainant that he was appalled that he had filed a discrimination complaint. That same week, the manager over food services, Major Tom Mallory, met Complainant in the hall and told Complainant that he could not believe that Complainant had filed a complaint.

Complainant's Performance Reviews Prior to the 02/03 Annual Review:

13. Major Friend was Complainant's supervisor at the time of the annual review for the rating period of April 1, 2000, through March 31, 2001 ("00/01 Annual Review"). The rating form at that point had a total of five categories: a "needs improvement" level, three levels of "competent", and a "peak performer" category. Major Friend evaluated Complainant's overall rating at the highest level of competent. He also

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rated Complainant's individual competency areas so that two areas were noted as mid-level competent, two areas were judged at that highest level of competent, and the competency area concerning Organizational Commitment was rated at a peak performer status.

14. Complainant's 00/01 Annual Review included three comments that described Complainant's position, and six comments praising his performance. None of the comments on the 00/01 Annual Review were negative.
15. By April 2002, Major Pam Yeo had been the FCF Programs Manager Supervisor for three months. Major Yeo conducted Complainant's annual review for the rating period from April 1, 2001, through March 31, 2002 ("01/02 Annual Review"). She utilized the previous manager's comments as a source of information for the review, and she agreed with the previous manager's assessment.
16. In the 01/02 Annual Review, the rating scale had been modified to a four-level scale of "needs improvement," "satisfactory," "commendable", and "outstanding." Complainant was given an overall "satisfactory" rating, with two commendable ratings for individual competency areas and four satisfactory ratings in other competency areas. Complainant also received at least thirty written comments. While one or two comments described Complainant's position in neutral terms, the rest of the comments were positive review of Complainant's work. Complainant was described as an "asset" to FCF, and as someone who "always goes beyond what is expected, and displays an intense involvement in performing his daily responsibilities." Complainant was praised for meeting routinely with the Programs Manager to exchange information and clarify expectations, developing a strong rapport with the staff and inmates, being cooperative and constructive, and conveying a willingness to work with the other disciplines and departments at FCF.
17. Major Yeo also provided Complainant with a mid-year review at the end of September of 2002 ("02 Mid-Year Review"). This review covered the six competency areas, and provided an overall performance rating. Major Yeo assigned Complainant an overall rating of commendable. She assigned five commendable ratings in individual competency areas, and judged Complainant's competency in Customer Service to be outstanding.
18. The 02 Mid-Year Review included approximately 21 comments. The vast majority of these comments were positive in nature. The only comment which was not entirely positive in its content was: "I encourage Fred to continue having his staff cross train in other areas to promote facility team work between the disciplines." None of the comments in the 02 Mid-Year Review are negative.

Complainant's Interactions With Major Yeo:

19. During the time that Major Yeo held command of Programs, the atmosphere in the recreation section changed considerably for the worse. There was growing hostility among staff members, and the recreation staff withdrew.
20. Major Yeo noticed that Complainant seemed to have a good relationship with Warden Neet and some of the others in the recreation section , but not with others within the facility.
21. By the period of time immediately prior to the 02/03 Annual Review, Major Yeo felt that she was being shut out of discussions by Complainant, and that he was not sufficiently keeping her informed of on-going management issues within the recreation section. She felt that he was angry much of time and was withdrawing from communication with her and with the rest of the facility. She was concerned that Complainant had not been attending monthly staff meetings, and that he had attended only one of the promotional test taking and mentoring classes that were being held.
22. Major Yeo initially adopted an informal counseling/mentoring approach when she told Complainant that he and the recreation staff were isolating themselves and needed to become more active the Programs area. At the time Major Yeo completed Complainant's 02/03 Annual Review, she believed that her informal methods of attempting to modify Complainant's performance had not been successful and that it was time for more formal steps to resolve the performance issues she had observed.
23. Major Yeo did not know that Complainant had filed a complaint of race discrimination until after she had completed his 02/03 Annual Evaluation.

Complainant's Performance Evaluation for the 02/03 Review Period and Grievance of that Review:

24. Complainant's performance was reviewed by Major Yeo for the purpose of the annual review covering March 31, 2002, through April 1, 2003 (the "02/03 Annual Review"). The contents of the 02/03 Annual Review reflect Major Yeo's assessment of Complainant's performance. Major Yeo had prepared Complainant's 02/03 Annual Review by April 17, 2003.
25. Major Yeo rated Complainant as "satisfactory" overall, with five satisfactory ratings in the six competency areas, and a commendable rating in the competency area of Job Knowledge.
26. In the comment section for the 02/03 Annual Review, Major Yeo prefaced the comments with a statement that "Fred has met or exceeded all expectations in his assigned IPO's."

27. Major Yeo listed between three and five comments about Complainant's performance under each of the six individual competency areas. In the competency area of Customer Service, Major Yeo provided three comments and all of the comments were positive.
28. On the remaining five competency areas, Major Yeo was complimentary of Complainant's performance and skills in the first several comments. At least one of the comments in each of these five areas, however, had a more negative tone.
29. Under the area of Job Knowledge, Major Yeo noted "Fred will benefit from receiving additional leadership and supervisory training." The Communication section included the comment, "Fred has not communicated with the Programs Manager, unless the communication was initiated by the Program Manager. It is my expectation that Fred would communicate all pertinent issues and concerns to me (The Programs Manager) to include: staff issues, inmate issues, security breaches, equipment malfunctions, and progress of the program." Under Interpersonal Skills, Major Yeo noted, "Fred would benefit from becoming part of the Programs' team, and not isolating himself and his staff." Under the category of Performance Management, Major Yeo stated, "Fred will benefit from becoming more familiar with administrative regulations, procedures and policies that deal with staff." Finally, under the Accountability/Organizational Commitment section, the Major noted "In Organizational Commitment, recreational staff will benefit from cross training with other disciplines, learning the team concept includes all disciplines and mentoring his staff to be [sic] learn all they can from the other disciplines."
30. Annual reviews are utilized in several ways with DOC. The reviews are a method of communicating performance comments to individual employees, and can include both positive reinforcement and criticism. The overall performance level is also utilized in calculating performance for the purpose of ranking employees within a seniority time-band. In a layoff process, such as the layoff process that DOC underwent in 2003, employees with a lower performance review average are laid off prior to the employees with higher performance averages within a seniority time band. Finally, the entirety of the last annual evaluation, along with time records, are generally reviewed by a hiring panel in making decisions concerning which referred candidates to promote or hire.
31. Complainant grieved his 02/03 Annual Review on May 1, 2003. He filed a detailed objection to the evaluation, and requested that his evaluation be changed from an overall of satisfactory to outstanding.
32. Warden Neet had enough of a social relationship with Complainant that he declined to handle Complainant's grievance. Assistant Director of Prisons Gene Atherton investigated the grievance and issued the final decision.

33. Associate Director Atherton reviewed Complainant's contentions and called Major Yeo to discuss the grounds for her evaluation. He also received information from Warden Neet. In his letter to Complainant of May 16, 2003, Associate Director Atherton discussed the results of his analysis of seven points specifically raised by Complainant.
34. As part of his analysis, Associate Director Atherton addressed Complainant's contention that being described as an isolationist was simply a form of retaliation for his filing a complaint of racial discrimination. He found, for example, that Complainant's overall demeanor had been argumentative and combative as a matter of routine. He also concluded that Complainant had decided not to attend trainings and meetings and that his non-attendance at such events was not the product of Complainant being isolated or deprived of professional development opportunities. Associate Director Atherton concluded this section by finding that "[i]t is reasonable to conclude that in the second half of the performance year you have been withdrawn and caused a similar effect among your staff."
35. At the conclusion of his analysis, Associate Director Atherton declined to modify Complainant's 02/03 Annual Review.

2003 Layoff Process:

36. In 2003, DOC underwent a significant layoff procedure due to state budget shortfalls. The layoff process affected hundreds of DOC employees.
37. By letter dated May 8, 2003, Complainant was notified that his CO_III specialist position, position #32026, was due to be abolished as of June 30, 2003, due to lack of funding.
38. That abolishment decision was reversed later in the month, and Complainant was notified that his position was not to be abolished because Respondent had been provided with extra funding. By letter dated July 11, 2003, Director of Prisons Nolin Renfrow notified Complainant that the General Assembly had provided additional funding intended to support functions associated with custody and control. Complainant was told that his assignment would be revised to directly support custody and control.
39. Complainant's assignment was changed to a CO-III custody and control position.

2004 Interview Process for the CO-III Specialist Position in Recreation:

40. In 2004, Associate Warden Gloria Masterson began evaluating transfer candidates for a CO-III position in recreation at FCF. Complainant indicated his interest in the position. By e-mail dated July 2, 2004, Associate Warden Masterson told Complainant that "Before I begin to set up interviews, I want to ensure that each

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candidate understands the work hours." She then outlined that the position was required to work at least some swing shift and weekends, and to work during major recreational events, which often included holiday periods. These hours represented a change from the day shift schedule that Complainant had worked previously as a CO-III recreation specialist.

41. Complainant responded by e-mail on July 9, 2004, and said that he was still very much interested in the position. By memo dated July 13, 2004, however, Complainant withdrew his application for the position. He told Associate Warden Masterson that "I sense that there is a little too much political anger and animosity in my being placed back into this position."

Complainant's Other Efforts at Promotion to CO-IV and CO-V Positions:

42. Complainant has tested at least two times for a CO-IV position and two times for a Manager position during the period of February '99 through September '04. In each case, Complainant passed the test but received a ranking no higher than #24 in any of these testing processes. Complainant was not referred for an interview for any of the available positions during that time period.

DISCUSSION

I. GENERAL

The Colorado Anti-Discrimination Act, C.R.S. §24-34-401 *et seq.*, bars retaliation against individuals because they had opposed acts made unlawful by the statute:

It shall be a discriminatory or unfair employment practice... [f]or any person... [t]o discriminate against any person because such person has opposed any practice made a discriminatory or unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding or hearing conducted pursuant to parts 3 and 4 of this article...

C.R.S. §24-34-402(1)(e)(IV). 1

1 Federal law also defines retaliation as unlawful employment discrimination with very similar language within Title VII. See 42 U.S.C. § 2000e-3. The purpose of this retaliation provision is to "maintain[] unfettered access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), and to "secure that primary objective [of Title VII] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington Northern and Santa Fe Ry. Co. v. White*, --- U.S. ---, 126 S.Ct. 2405, 2412, 165 L.Ed.2d 345 (2006). Given the similarity in language and goals between the state and federal statutes, federal cases interpreting this portion of Title VII provide guidance as to how the anti-retaliation provision is to be interpreted. See *Colorado Civil Rights Com'n v. Big O Tires*, 940 P.2d 397, 399 (Colo. 1997)(holding

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Complainant bears the burden of proof that he was the subject of intentional discrimination under this statute. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 298 (Colo. 2000)(holding "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff")(internal quotation omitted).

II. HEARING ISSUES

A. Complainant presented a *prima facie* case of retaliation:

1. Rule 41(b) Motion To Dismiss:

At the close of Complainant's evidence, Respondent moved under C.R.C.P. Rule 41(b) to dismiss the matter for failure to present sufficient evidence. C.R.C.P. Rule 41(b)(1) provides that: "[a]fter a 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 fact and the law the plaintiff has shown no right to relief." The undersigned reserved ruling on the motion until after the case law provided by counsel could be reviewed.

The procedure and standards to be applied under the rule vary according to the type of claim to be tried.

The question to be decided under the general application of Rule 41(b) is not whether plaintiff made a *prima facie* showing but whether a judgment in favor of the defendant was justified on the plaintiffs' evidence. *Rocky Mountain Rhino Lining, Inc. v. Rhino Linings USA, Inc.*, 37 P.3d 458, 461 (Colo.App. 2002), *rev'd on other grounds*, 62 P.3d 142 (Colo. 2003). The court is not to make any special inference in the plaintiff's favor nor concern itself with whether the plaintiff has made out a *prima facie* case. Instead, it is to weigh the evidence, resolve any conflicts in it and decide for itself where the preponderance lies. *Public Service Co. of Colorado v. Board of Water Works of Pueblo, CO*, 831 P.2d 470, 479 (Colo. 1992).

In a case with a shifting burden of production, however, the rule varies. In such cases, a plaintiff is required to make a *prima facie* showing in order to withstand a Rule 41(b) motion to dismiss. See *Public Service Co.*, 831 P.2d at 479-80 (holding that Rule 41(b) allows a case to proceed upon a *prima facie* showing applied to water right charge of augmentation claims, where the burden of production shifts to an objector to show injury once the water rights applicant has made a *prima facie* showing of an absence of injurious effect, but that an applicant in a conditional water rights case without a shifting burden of production must demonstrate more than a *prima facie* showing to survive a motion for

that federal law is "helpful in developing a thorough approach for proving intentional discrimination in state employment discrimination cases").

dismissal under Rule 41(b)). A burden shifting analysis applies to claims under Colorado's anti-discrimination statute. *Bodaghi*, 995 P.2d at 297 – 98 (describing the burden shifting analysis under C.R.S. § 24-34-402). The issue to be decided for a Rule 41(b) motion, accordingly, is whether Complainant has produced a *prima facie* showing of retaliation under C.R.S. §24-34-402.

2. Complainant produced a *prima facie* case of retaliation:

In order to establish a *prima facie* case of retaliation by an employer, an employee must demonstrate: 1) that he engaged in protected opposition to discrimination; 2) that a reasonable employee would have found the challenged action materially adverse; and 3) that a causal connection existed between the protected activity and the materially adverse action. *Jencks v. Modern Woodmen of America*, 479 F.3d 1261, 1265 note 3 (10th Cir. 207)(applying the new definition of adverse action based upon the U.S. Supreme Court opinion in *Burlington Northern and Santa Fe Ry. Co. v. White*, -- U.S. --, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)).

Respondent was willing to stipulate that Complainant had filed a claim of race discrimination; Complainant also testified that he had filed his claim of race discrimination in February 2003 because he had not received any positive response to his efforts to demonstrate that the recreation supervisor position was CO-IV work while he had only a CO-III rank and pay. The first element of retaliation, therefore, was undisputed at hearing.

Respondent argues that Complainant failed to demonstrate that the second element, that is, that he was subject to an adverse action, because Complainant had not been subjected to a sufficiently serious action. By the time Complainant closed his case-in-chief, Complainant had presented evidence that he had been given a "satisfactory" rating, along with negative comments, in his 02/03 Annual Review, and that these comments were a surprise because he had no prior warning of any the listed problems. Complainant also disagreed with these negative evaluations.

The U.S. Supreme Court recently examined the scope of actions which could be considered to be retaliatory under Title VII. "The anti-retaliation provision protects an individual not from all retaliation but from retaliation that produced an injury or harm... In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *White*, 126 S.Ct. at 2415 (holding also that the purpose of the anti-retaliation provision is to prohibit employer actions that are likely to deter victims of discrimination from complaining, and that "normally petty slights, minor annoyances, and simple lack of good manners" will not deter victims).

The question, therefore, is whether receiving an annual evaluation which has been modified by retaliatory motives is the type of effect which would dissuade a reasonable worker from filing or supporting a discrimination complaint.

Under the Board's rules, overall annual ratings are used for the purpose of calculating the ranking list of employees within a three-year seniority time band who are to be subject to layoff. See Board Rule 7-17, 4 CCR 801. Dropping an employee into a lower overall rating could also result in a substantial drop in rank within that employee's seniority time band because it would lower the performance average, thus making it more likely that an employee would be eligible for layoff earlier than others in that seniority time band. Such an effect would be of particular concern in early 2003 because DOC had not been fully funded by the General Assembly for the upcoming fiscal year and was about to embark on a significant layoff process.

Complainant also produced evidence that DOC policy on promotions was to use the last annual evaluation in the evaluation of a potential promotional candidate. Lowered individual skill area evaluations, as well as negative comments in such evaluations, would discourage promotional possibilities.

These effects are sufficient to create a material adverse difference to employee and are not merely a petty slight or annoyance to an employee. Under the Board's rules and the specific circumstances of this case, an effect on the annual evaluation overall and individual competency ratings, as well as negative comments within the associated comments, constitute an adverse action and satisfy the requirement for the second prong of a *prima facie* showing. See *Cooper v. Cobe Labs, Inc.*, 743 F. Supp. 1422, 1433 (D.Colo.1990)(noting that examples of adverse actions have included unjustified evaluations and reports).

Complainant has also established, for purposes of evaluating the *prima facie* showing at the time of Respondent's motion, that the filing of his discrimination charge was casually related to an adverse employment action. "The causal-connection element of a *prima facie* retaliation claim requires the employee to show that the employer's motive for taking adverse action was its desire to retaliate for the protected activity." *Wells v. Colorado Department of Transportation*, 325 F.3d 1205, 1218 (10th Cir. 2003).

Temporal proximity between the filing of a complaint (or other protected action) and the adverse employment action can be sufficient to show causation. See *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999)("[W]e have held that a one and one-half month period between protected activity and adverse action may, by itself, establish causation"); *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339, 343 (10th Cir. 1982)(holding that causal connection may be demonstrated by "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action"). See also *Clark County School District v. Breeden*, 5323 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)(acknowledging that case law supports that temporal proximity between an employer's knowledge of protected activity and an adverse employment action can establish a *prima facie* showing of causality in a Title VII retaliation claim, but noting that when only proximity is offered, the connection must be

"very close").

In this case, the evidence produced by Complainant by the end of his case-in-chief was that he had been warned by Warden Neet that the filing of a discrimination complaint would be career suicide; that he filed his complaint of race discrimination at the beginning of February, 2003; that by February 5, 2003, Associated Warden Claar had learned of the complaint and had called him into the office to express his dismay at the situation; that information about his complaint had traveled at least to another major who knew of the filing within about a week of the filing; and that within six weeks of the filing of his complaint, Major Yeo was finalizing his 02/03 Annual Evaluation with a "satisfactory" overall rating, fewer commendable ratings in individual skill areas than she had previously noted and, for the first time, offering negative comments.

Such evidence is sufficient to create a *prima facie* showing of causality, particularly given the close temporal proximity between the filing of the complaint and the 02/03 Annual Review.

Respondent's Motion To Dismiss under C.R.C.P. Rule 41(b) is, therefore, denied.

B. Complainant has failed to prove that Respondent's nondiscriminatory reason was merely pretext or that he was the victim of retaliation:

Once a *prima facie* case of retaliation is established, the plaintiff in a discrimination action has "created a rebuttable presumption that the employer unlawfully discriminated against him." *United States Postal Service Board of Governors v. Aikins*, 460 U.S. 711, 514, 103 S.Ct. 1478, 1481, 75 L.Ed.2d 403 (1983)(citing the discussion of the sliding burden of persuasion from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981)). The burden of production shifts then to the employer to produce a legitimate, nondiscriminatory reason for the adverse action. *Id.*

1. Respondent offered a legitimate, nondiscriminatory justification for the 02/03 Annual Evaluation:

In response to Complainant's evidence, Respondent produced evidence that Major Yeo had been experiencing problems with Complainant's willingness to report to her and interact with her. Respondent's evidence was that Major Yeo had tired a variety of more informal advisements about Complainant's performance, but that he had grown increasing resistant and withdrawn during the 02/03 rating period. Finally, Major Yeo had incorporated her critiques into the comments within Complainant's annual performance review. Under Respondent's evidence, it was a simple coincidence that the annual review came out approximately six weeks after Complainant filed his complaint of discrimination because Major Yeo was not even aware of the complaint until after the review was completed.

Such performance-based issues raise a legitimate, non-discriminatory justification for the content of Complainant's 02/03 Annual Review.

2. Complainant did not prove that Respondent's justification was merely pretext or that he was the victim of retaliation for filing a race discrimination complaint:

After a tribunal declines to dismiss the claim for failure to make a *prima facie* showing, and a defendant proceeds to present evidence of a legitimate business reason, the tribunal "must decide the ultimate fact issue – 'which party's explanation of the employer's motivation it believes.'" *Love v. Re/Max*, 738 F.2d 383, 386 (10th Cir. 1984)(quoting *Aikins*, 460 U.S. at 716, 103 S.Ct. at 1482). At this stage, the *McDonnell-Burdine* presumption drops from the case and "the factual inquiry proceeds to a new level of specificity." *Aikins*, 460 U.S. at 715, 103 S.Ct. at 1482.

Complainant has two methods by which he could prevail now that the presumption of discrimination has dropped from the case:

The plaintiff retains the burden of persuasion. He may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 253. See also *Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397, 401 (Colo. 1997)(holding that once the non-discriminatory justification has been offered, a complainant then is to be given "a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the adverse employment decision were in fact a pretext for discrimination").

There could be no demonstration that the motivation for the 02/03 Annual Review was to retaliate against Complainant, however, unless there was sufficient evidence to demonstrate that the decision-maker knew of the protected activity. Major Yeo was the author and decision-maker for the 02/03 Annual Review, and Major Yeo did not know that Complainant had filed the discrimination complaint prior to authoring Complainant's review. There was, in fact, evidence that Complainant was not communicating much of anything to Major Yeo by the time of the 02/03 Annual Review. Once it is established that Major Yeo was in the dark as to Complainant's discrimination complaint until after the 02/03 Annual Review, there can be no factual connection between the filing of the discrimination complaint and the adverse employment action in this case. See *Williams v. Rice*, 983 F.2d 177, 181 (10th Cir. 1993) (affirming dismissal of a Title VII retaliation claim and holding that "that to establish a 'causal connection,' plaintiff must show that the individual who took adverse action against him knew of the employee's protected activity").²

² This result may appear to contradict the previous finding that Complainant had presented a *prima facie* case of retaliation, including a demonstration of the causal link between the 02/03 Annual Review and

Additionally, Major Yeo's credible testimony at hearing was that she was motivated to include the comments and ratings in the 02/03 Annual Review because she attempting in to address Complainant's increasingly hostile and withdrawn behavior. This version of events was at least partially corroborated by Officer Jerry Leal. Officer Leal placed the blame for the increasing hostility and isolation within the recreation section squarely at Major Yeo's feet, but his acknowledgement of the increasing strife within the section made Major Yeo's version of events more credible than Complainant's flat denial that there had been any problems.

Complainant's other evidence of a pattern of post-filing events which he considers to be discriminatory does not change the essential problem with Complainant's case.

Complainant expressed his suspicions that the initial abolishment of his position, the change of his position to a security assignment, and the 2004 recruitment process for the revised CO-III position in recreation are all further indicators of retaliation against him. From the evidence presented, however, these actions appear to be unexceptional.

Respondent underwent a substantial layoff process in 2003, and it is not surprising that non-security positions would often be chosen for abolishment. It is also not surprising, at least on its face, that any extra money provided to DOC would be spent supporting security issues, and that employees who could be shifted into custody and control work would be performing that type of work. Without persuasive evidence that there was more to these decisions than would be proper for a layoff process, there is insufficient evidence concerning the 2003 layoff process to establish a pattern of unlawful retaliation.

The evidence presented concerning the 2004 recruitment process for the revised CO-III recreation position shares a similar problem. Complainant expressed his concern that the e-mail he received from Associate Warden Masterson was directed only to him, and he sees in that fact that he was being told that the schedule for the CO-III position would be changed in order to discourage him from applying for the position. On its face, however, the e-mail referenced that all of the transfer candidates were being informed of the schedule,

the filing of his discrimination complaint. At the close of Complainant's case-in-chief, he had presented evidence that there was only about a 6 week gap between the filing of his complaint and the 02/03 Annual Review. Additionally, Complainant presented evidence that other upper-level managers, including the major in charge of food services, knew of the complaint shortly after it was filed. This evidence of temporal proximity and reasonable inferences from knowledge of the filing among the upper-level managers was sufficient for a *prima facie* showing of retaliation.

Once the inquiry broadened to include consideration of Respondent's evidence, however, the persuasive evidence related to causation changed significantly. Major Yeo's testimony was credible as to why she issued the evaluation as she did, and as to her lack of knowledge of any discrimination claim until after the review. Given that the review was her personal evaluation and that there was no evidence presented that she was adopting anyone else's plan or opinion in that review, her lack of knowledge precludes a finding that the decision-maker acted with the requisite "desire to retaliate," *Wells*, 325 F.3d at 1218, even in a case which also presents a temporal proximity.

and there was no competent evidence presented from which to determine whether that assertion was true or false. Moreover, changing the schedule of the CO-III position is not so unusual as to warrant an inference of unlawful retaliation based simply upon the change of schedule.

The competent evidence presented at hearing that DOC has previously not obeyed the hiring and promotion rules and had taken discriminatory actions against other employees does not change the analysis. Capt. De Torres' problems with racial discrimination within DOC are not sufficiently connected to Complainant's issue to warrant an inference of discriminatory or retaliatory motive in Complainant's case. See *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999)(holding that, in order to admit evidence from other employee as to their treatment by employer in a case requiring proof of discriminatory intent, "the plaintiff must show the circumstances involving the other employees are such that their statements can logically or reasonably be tied" to the decision in plaintiff's case).

In final analysis, Complainant has not demonstrated through credible, persuasive evidence either that the reasons provided by Major Yeo for the contents of his 02/03 Annual Review were merely pretext for retaliation, or that a retaliatory reason more likely motivated Respondent in issuing his 02/03 Annual Review.

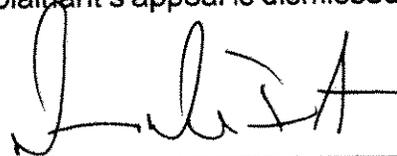
CONCLUSIONS OF LAW

1. Complainant presented a *prima facie* case of retaliation.
2. Complainant was not discriminated against in his 02/03 Annual Review because he had opposed a practice made unlawful by the Colorado Anti-Discrimination Act.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 2nd day of August, 2007.



Denise DeForest
Administrative Law Judge
633 - 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. *Vendetti v. University of Southern Colorado*, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of August, 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Wesley Hassler
Losavio & Wilson
616 West Abriendo Ave.
Pueblo, CO 81004

and in the interagency mail, to:

Brooke Meyer
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203


Andrea C. Woods