STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2008B040**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SHAUNA GILBERT,

Complainant,

vs.

COLORADO SCHOOL OF MINES,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on July 9, 2009. The record was closed at the close of hearing on July 9, 2009. Assistant Attorney General Brooke Meyer represented Respondent. Respondent's advisory witness was Derek Wilson, Chief Information Officer and Director of Academic Computing and Networking at the Colorado School of Mines and Complainant's appointing authority. Complainant appeared and represented herself.

MATTER APPEALED

Complainant, Shauna Gilbert (Complainant or Gilbert), appeals the disciplinary demotion by Respondent, Colorado School of Mines (CSM or Respondent). Complainant seeks reinstatement and back pay and benefits.

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

ISSUES

1. Whether Complainant committed the acts for which she was disciplined;

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

3. Whether the discipline imposed was within the range of reasonable alternatives available to the appointing authority.

PROCEDURAL BACKGROUND

Complainant filed her appeal with the State Personnel Board on November 19, 2007. Her appeal included a claim of disability discrimination. The Board referred the

matter to the Colorado Civil Rights Division (CCRD) for investigation and Complainant timely filed a discrimination charge with CCRD. On April 21, 2009, the Board received written notice that Complainant had withdrawn her charge at CCRD. On April 28, 2009, the Board set the matter for evidentiary hearing.

FINDINGS OF FACT

General Background

1. Complainant was hired in 2002 to be an Information Technology Professional (IT) II in the Division of Academic Computing and Networking at CSM.

2. Complainant was a member of the Academic Department Support (ADS) Group at all times relevant. The ADS Group provides direct computer maintenance and technical support services to all academic departments at CSM. Strong customer service skills are an essential function of ADS Group member positions, including Complainant's.

3. Throughout her tenure at CSM, Complainant has received overall performance ratings of Competent or Meets Expectations. In the category of "Interpersonal Relations," Complainant received a rating of "Needs Improvement" in 2005, 2006, and 2007.

4. In April of 2003, Complainant received a head injury to her face, resulting in a broken nose and black eyes.

June 2005 Corrective Action

5. Ed Zucker, Manager of the Division of Academic Computing and Networking, was Complainant's immediate supervisor at all times relevant. Derek Wilson, Chief Information Officer and Director of the Division of Academic Computing and Networking, was Complainant's appointing authority at all times relevant.

6. On June 29, 2005, Zucker and Wilson issued a corrective action to Complainant, citing her for misconduct on June 22, 2005. It stated that she had lost her temper and raised her voice, acting in a rude and unacceptable manner to a customer, Professor Sam Romberger. The memo said, "Your job is to provide service and support. An aspect of the job is negotiation and conflict resolution. Regardless of the provocation, it is your responsibility to work toward an amicable solution. In this case you failed to attempt to resolve the issue through negotiation, mediation and escalation through proper channels."

7. The corrective action required Complainant to take several remedial actions: resolve the situation with Dr. Romberger; meet with appropriate parties to negotiate how to accommodate the needs of that particular department; attend an Anger Education class; discuss with either Wilson or Zucker any issues that she has in

her interpersonal relations with customers and colleagues; and conduct all future interactions in a professional and courteous manner.

8. Complainant did not grieve the corrective action. She did apologize to Dr. Romberger and fulfilled all of the terms of the corrective action.

FR Incidents

9. Complainant worked with FR, hired as an IT II in 2003 in the Computer Support Department. In 2003, Complainant was very helpful to FR.1

10. In 2004, Zucker adopted a centralized computer system on campus which was more efficient. Instead of assigning one IT staff member to each academic department, Zucker implemented a shared support model. Several IT's could therefore respond to any Department in need of computer maintenance or support services.

11. Complainant was opposed to the new model. She sought to remain the sole IT assigned to the Geology Department. In 2004, FR was dispatched to the Geology Department. When he arrived, a professor was extremely upset because Complainant had stated that FR was new and would intentionally disrupt Geology's computer system.

12. When FR confronted Complainant about this, she informed FR she was trying to get Zucker fired and wanted to do anything she could to stop the centralization of the computers. She later wrote an apology to FR.

13. In December 2005, Complainant sustained her second head injury, resulting in facial contusions. This injury caused her to have migraine headaches, sleep difficulties and other symptoms.

14. In April of 2006, FR was at a weekly staff meeting, at which Complainant made a suggestion he endorsed. Zucker rejected the idea in the meeting. As FR and Complainant left the meeting, FR said in passing to Complainant that her idea had been a good one. Complainant became upset, stating that it was not her idea. She followed FR to another room, where they continued to talk.

15. The next day, Zucker informed FR that Complainant was filing a complaint against FR for creating a hostile work environment. FR was extremely upset and spent the entire weekend thinking about it.

16. FR recalled that there were video cameras in the room where Complainant had alleged he mistreated her. FR emailed Zucker regarding the video camera. Zucker obtained a video tape of the room at the time Complainant alleged the incident had occurred. The video tape demonstrated Complainant's accusations to be false.

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1 A Protective Order was issued in order to maintain confidentiality of the witnesses.

17. Zucker never followed up on the matter with FR. FR does not know if any action was taken to hold Complainant accountable for her actions.

18. FR confronted Complainant about having made a false allegation against him. He said that he hoped she had learned something from the incident, expecting an apology. Complainant responded, "Yes, I've learned there are no consequences here for anything I do." Complainant also stated that it was her goal to get Zucker fired.

19. Since 2006, Complainant has been openly hostile to FR and has made threats to him. She has stated to him, "If you mess with me I'll get you. People don't live to regret their mistakes with me."

20. Complainant refused to cooperate as a team member several times during 2006 and 2007. One time when FR was ill, Complainant responded to a work request ticket for FR. When he returned from work, he discovered some problems with the machine Complainant had worked on and asked her about it. She responded, "Yeah, I tore that out, that really messed you up. Hah, hah."

21. Complainant follows FR around at work and initiates conversations that taunt him. MH, an IT professional who works with Complainant, has witnessed a pattern of Complainant pursuing FR and initiating interactions, FR trying to avoid the contact and becoming defensive, and Complainant becoming aggressive with FR. FR feels that Complainant stalks her.

22. FR is intimidated by Complainant and views her as highly unpredictable and irrational. At hearing, FR was fearful of Complainant. FR has looked for other work because of Complainant's hostile and abusive behavior towards him.

Interactions with LS

23. LS is an IT III who serves as the technical lead worker for the IT II's. A thirteen-year CSM employee, LS is on the lab build team and works closely with SS.

24. After Complainant became alienated from the other ADS members, LS spent time talking with Complainant in order to help her personally and professionally.

25. In the fall of 2006, Complainant and a co-worker asked LS to file a discrimination complaint against Zucker based on gender. LS refused to do so. After her refusal, every time LS worked with Complainant, Complainant would yell at LS for not supporting her, for going to lunch with other people, and for other things. LS decided at that time that she had had enough of Complainant's behavior and she stopped interacting with Complainant at all unless absolutely necessary.

26. Complainant threatened LS in 2007, both with body language and verbally, stating, "You're going to be sorry" and "You're going to regret it."

27. LS often found that Complainant refused to work as part of a team. In 2007, LS asked Complainant for the appropriate forms to give to someone to perform a task. Complainant said no, that the individual had to appear in person. Eventually, another IT II, SS, walked over and retrieved the forms.

28. LS viewed the work environment in ADS in 2007 as uncomfortable and felt that the cause of the problem was Complainant's instability and hostile behavior towards coworkers.

Complainant's Traumatic Brain Injury Diagnosis and Treatment

29. In January 2007, Complainant sustained her third head injury, which involved severe facial bruising. Complainant believes that this injury resulted in a personality change, depression, hostility, incorrect perceptions of events, memory problems, increased headaches, completely destroyed sleep patterns, and loss of appetite. No findings on the results of the injury are possible based on the record.

30. In April 2007, at the urging of her family, Complainant sought medical treatment for her head injuries and obtained a diagnosis of Traumatic Brain Injury. She began to seek treatment for her condition, including medication.

July 2007 Corrective Action

31. On July 31, 2007, Zucker and Wilson issued Complainant a second corrective action, the result of an interaction between Complainant and Zucker during a July 25, 2007 planning meeting. In the meeting to address a new project Complainant would be working on, Zucker informed her that the work would be best performed in her assigned office in the Computer Commons building. Complainant suggested that she should work instead in a room in Berthoud Hall. Zucker rejected this suggestion.

32. According to the corrective action, Complainant "became agitated and argued with" Zucker about where she should be allowed to work, told Zucker he had no right to deny her the right to work where she desired, accused Zucker of treating her differently and unfairly, and spoke sarcastically toward Zucker.

33. The memo noted that most of the argument was conducted with raised voices which were overheard by several employees outside the closed door of Zucker's office. It cited Complainant for insubordination and stated, "Becoming argumentative, accusatory, loud and sarcastic is not professional or courteous and this type of behavior in the workplace is unacceptable." The corrective action required Complainant to behave in a professional manner at work and to speak in a tone that was neither sarcastic nor hostile at work. It warned Complainant that failure to comply with the corrective action might result in further corrective and/or disciplinary action, up to and including termination.

34. Complainant did not appeal the corrective action.

Interactions with Other Coworkers

35. SS has been an IT II at CSM since August 2006. SS serves on the "lab team," a group of four IT staff who build computer labs for use by students at CSM.

36. When SS started at CSM, she worked with Complainant in the Geology building. In early 2007, they moved to a new building. SS moved her desk away from Complainant's desk in order to perform different work. She did not move away from her in order to avoid Complainant.

37. After SS moved her desk, Complainant's interactions with her changed. Complainant behaved as though she was angry with SS for having done something wrong. Complainant would not talk to SS.

38. When SS would walk past Complainant at work, Complainant would leave the area in an angry and hostile manner.

39. SS felt intimidated by Complainant's behavior towards her at work.

40. In March 2007, the lab team avoided scheduling the "rebuild" of the Geology labs in order to avoid any conflict with Complainant.

41. Complainant stated to coworker MH that the Geology lab "would be rebuilt by the lab team over her dead body and the lab team's dead bodies."

42. LS witnessed Complainant state to MH that the Geology department was the best running academic department on campus and that MH and others had "wrecked it."

43. In June 2007, SS passed Complainant and KM, a CSM employee, in the hall. SS did not acknowledge or say hello to Complainant or KM because she was focused on something else. Soon thereafter, KM informed SS that Complainant had asked whether SS was being rude by not talking to either of them and that perhaps Complainant should document SS's rude conduct.

44. By July 2007, SS dreaded coming to work because of the hostility she experienced from Complainant.

SS Complaint

45. On July 5, 2007, SS went to Mr. Wilson to discuss her experiences with Complainant, informing him that she was having difficulty coming to work because of her negative interactions with Complainant.

46. Wilson asked SS to write down her concerns. On July 8, 2007, SS wrote a memo to Wilson, detailing the behaviors by Complainant that she found troubling. She requested that Complainant be removed from the ADS group to "eliminate what I feel is a hostile work environment." She stated, "I have recently had mornings that I questioned if I wanted to go to work and 'deal with the stress of a possible interaction with Shauna.' I feel the work environment right now is a pressure cooker waiting to explode . . ."

47. After Wilson received SS's memo, he consulted with CSM's Human Resources Director, Mike Dougherty. Dougherty showed Wilson Executive Order D0010 96, "Workplace Violence," signed by former Governor Roy Romer on August 13, 1996.

48. Dougherty informed Wilson that the policy required Wilson to investigate SS's allegations.

Executive Order Governing Workplace Violence

49. Wilson reviewed the Executive Order before commencing his investigation. This policy states, in part,

- The state will not tolerate violent behavior or the threat of violent behavior directed by anyone toward state employees, customers, clients, state property or facilities. Such behavior may result in corrective and/or disciplinary action if it is committed by a state employee, and/or criminal charges when appropriate; . . .

- Violent behavior is defined as any act or threat of physical, verbal or psychological aggression or the destruction or abuse of property by any individual. Threats may include veiled, conditional or direct threats in verbal or written form, resulting in intimidation, harassment, harm or endangerment to the safety of another person or property; . . .

- Employees who believe they have been subjected to behavior prohibited by this policy, or who have observed any such behavior should report the incident to their supervisor or other appropriate authority. The supervisor or other appropriate authority will investigate and take appropriate action;

- Agency managers are directed to evaluate their organization and take appropriate steps to address potential workplace violence situations.

Wilson Investigation

50. Wilson wrote a series of open-ended questions to ask the interviewees, such as, "Do you feel you work in a hostile work environment?", "What do you believe is the biggest cause of stress in the ADS unit?", "Do you feel safe at work?", and "Have

you ever felt threatened, either directly or indirectly, by anyone in your work group?" None of his questions referred to any individual by name.

51. In late July 2007, Wilson interviewed all of the staff in the ADS Group, including but not limited to SS, LS, FR, MH, and Complainant.

52. LS informed Wilson, "I do not interact with her on a face-to-face basis unless I absolutely can't avoid it."

53. Wilson asked LS if she felt reasonably safe in the workplace. SS stated that she did, as long as Complainant was nowhere near her. She stated, "I just don't know what she's going to do next. Her behavior has become so bizarre that I wouldn't be surprised if she came in and shot somebody some day. There is discussion among her coworkers that that is a possibility. Lots of apprehension."

54. Wilson asked DL if he believed a hostile work environment exists within ADS. DL indicated that there "are high tensions." He stated there had been confrontations between Complainant and MH, Complainant and FR, Complainant and SS, and Complainant and Zucker.

55. DL indicated he gets along with Complainant quite well, that he could talk with her and had tried to give her input at work. DL stated he felt safe in the workplace.

56. When Wilson asked DL if there was anything else he wanted to tell him, DL stated that Complainant's primary goal over the past five years had been to get Zucker fired or show him up as being incompetent. Complainant had directly informed DL of this on several occasions. He stated that Complainant feels her co-workers have all turned on her.

57. FR informed Wilson of Complainant's hostile behavior and her threats against him. He stated that he felt a hostile work environment exists within ADS, caused by Complainant. He informed Wilson of the time in April 2006 when Complainant falsely accused him of being verbally abusive towards her.

58. Wilson asked FR, "Do you feel reasonably safe in the workplace? If no, why not?" FR responded, "No. I have told my loved ones that if anything happens to me, here is where to look. I feel Complainant is unstable. I am afraid of her and afraid to file a complaint because of her possible behavior. I don't believe it is out of the question that if she were terminated that she would come back with a weapon and try to hurt people. I have never felt this way before. I am uncomfortable telling you these things but it seems so out of hand that something needs to be done."

59. MH described Complainant to Wilson as being confrontational, even when he doesn't think she means to be. He stated that she is defensive about her own skills and perceives suggestions from others as being an insult. MH stated that Complainant said directly to him that the Geology lab "would be rebuilt by the lab team over her dead

body and the lab team's dead bodies." MH interpreted this as an ultimatum, not necessarily as a threat.

60. Wilson interviewed SM. SM indicated he did not feel the work environment was hostile but it was uncomfortable. He said that he never knew which Complainant he was going to run into. He indicated that generally his interactions with her were fine and he did not feel threatened or unsafe in the workplace.

61. Wilson interviewed DF, who indicated he had no problems personally with Complainant and had acted as a liaison between her and others in the group. He stated that most in the group had given up completely on any attempt to work with Complainant. DF also informed Wilson that Complainant had served Geology well for a long time, that she prefers her way rather than best practices or group practices, and that she is a better solitary worker than team worker.

62. Wilson interviewed KM on July 27, 2007. KM confirmed SS's report about Complainant asking if she should file a complaint against SS for being rude when she failed to acknowledge them in the hall. KM also informed Wilson that Complainant had asked KM if she, Complainant, had overreacted to SS not acknowledging them. KM had said yes, that SS was probably just focused on something else.

Wilson Interview of Complainant

63. After completing his interviews of ADS staff, Wilson interviewed Complainant on August 1, 2007. She stated she did not believe a hostile work environment exists within ADS. When asked how she gets along with coworkers in her group, she stated, "My coworkers have actively and intentionally isolated me for the entire calendar year. I have passable, comfortable relationships with Yuri, DM, and SM. I avoid interacting with all of the others including Ed – I always walk away from interacting with them. I have had no conversations with FR in over a year and none with SS since approximately February. I actively avoid interacting with FR, SS, LS, and MH."

64. Wilson asked Complainant what she felt the greatest cause of stress within the ADS group was. She stated, "For me it is the fact that some of my coworkers are allowed to actively refuse to be in the same building as me. . . I have tried interacting with them but they ignore me. I believe I have been put in a position where it makes me look like I'm groveling." Complainant denied having had any hostile interactions with anyone in the group except Zucker the previous Wednesday, July 25.

65. Wilson asked Complainant if she had observed any hostile interactions between others in the group. She stated, "No, I isolate myself from my group."

66. Complainant admitted to having said that the group would take over the Geology department "over my dead body." She denied having said, "over their dead bodies."

67. Complainant denied having stated she wanted to get Zucker fired or having asked a coworker to file a discrimination lawsuit against him. She stated that a coworker had asked her to join a class action suit against Zucker.

68. At the completion of his first set of interviews, and after meeting with Complainant, Wilson drafted several follow-up questions for many of those he had previously interviewed. He conducted a second round of short interviews to confirm or refute the accuracy of the information he had received. The information he obtained confirmed the results of his investigation.

Pre-disciplinary Meeting

69. Wilson scheduled a pre-disciplinary meeting with Complainant on September 6, 2007. Complainant attended without a representative. At the meeting, Wilson gave a detailed summary of the information his investigation revealed. Complainant requested additional time to provide written materials for Wilson to consider. Wilson agreed. Wilson also gave Complainant a copy of the audio recording of the meeting, which she utilized to draft her response.

70. On October 11, 2007, after several extensions of time were granted, Complainant submitted her response to the information presented at the pre-disciplinary meeting. The document contained a narrative of thirty-two pages, including copies of emails between Complainant and others. In addition, Complainant provided over thirty pages of attachments.

71. Complainant did not deny that her working relationships with SS, LS, and FR had been completely severed. While she contested the reasons for the end of those relationships, Complainant stated that she was "quite content to remain isolated from them out of respect for the wishes of everyone involved."

72. Complainant denied disliking or disrespecting Zucker. She indicated that it was the office tradition in the ADS group to criticize Zucker and that everyone did it on a routine basis. Complainant stated that she disliked the manner in which Zucker at times treated her, and provided a lot of information on his conduct during the exchange on July 25, 2007, which led to the second corrective action.

73. Complainant included several email exchanges between herself and Zucker which she characterized as evidencing hostility towards her by Zucker. The emails do not demonstrate hostility by Zucker towards Complainant and are appropriate communications between a supervisor and his employee.

74. Complainant stated that the reason for her negative interactions with coworkers was her Traumatic Brain Injury. She said that over the past four years she had sustained four serious head injuries. In April of 2003, Complainant received a head injury to her face, including a broken nose and black eyes. In December 2005, she

sustained her second head injury, including facial contusions and a broken hand. This injury caused her to have migraine headaches, sleep difficulties and other symptoms. In January 2007, she sustained her third head injury, which involved severe facial bruising, personality change, depression, hostility, incorrect perceptions of events, memory problems, increased headaches, completely destroyed sleep patterns, and loss of appetite.

75. Complainant stated that in March 2007 she had sought the advice of professional counselors. In April 2007 she had obtained her first diagnosis of Traumatic Brain Injury, and began initial treatment. On August 8, 2007, Complainant had submitted a request for Family Medical Leave in order to obtain treatment for her condition.

76. Complainant's submission to Wilson stated, in part, "being perceived as hostile, angry or violent is wholly and completely a symptom of my illness: Traumatic Brain Injury, for which I am being treated by a neurologist and neurological psychologist. Further, I am responding quite well to treatment and feel more like the 'me' I used to be every day. I've been chronically sleep deprived for several years due to my condition and am improving with every good night's sleep I've been able to achieve in the past 6 months."

77. With regard to the issue of Complainant having made a false allegation against FR, she stated in her defense that she had never seen the video tape which purportedly demonstrated her allegations to be untrue. In addition, she stated that Zucker had given her a "needs improvement" rating in two categories on her annual performance review that year. She also stated, "I've offered so many apologies to so many people in the past few years that I cannot say for certain if I ever did apologize to FR, though I surely intended to. I can say for certain that my apologies have lost their allure over time; I don't think my co-workers believe my apologies anymore."

78. Complainant indicated that she had made several attempts to reconcile with coworkers in recent months. She attached a copy of a February 1, 2007 email she had sent to her peers at work, acknowledging concern about her "isolative behavior" and rumors that people were afraid to approach her because of her yelling at people. In the email she stated, "I honestly don't remember yelling at anybody but K. Okay, MH a little bit, too. I do, however, remember having conversations with both MH and K regarding those incidents and have felt that they have been resolved satisfactorily. If this is not the case or you have had a different experience lately, let's talk about it." In the email, Complainant also informed her peers that her isolation was due entirely to a personal matter, and she invited them to call her or visit her at home, providing all contact information.

79. Complainant also stated that on the evening of February 1, 2007, she had had a 159-minute telephone conversation with LS in an attempt to reconcile. Summarizing that conversation, Complainant stated that it had been "unfruitful."

80. Gilbert also informed Wilson that on February 14, 2007, she had invited SS to breakfast, SS had accepted, but that for scheduling reasons it had not worked out. However, later that day Complainant had been excluded by her peers at a restaurant as she waited in line with a friend, and LS, SS and others waited together in a separate group in the same line. Complainant felt that LS had pretended not to see her. Complainant had taken offense and later that day asked to speak with LS in private. In that conversation, she explained to LS that she was very hurt. In her response document, Complainant stated, "I did issue her an ultimatum related to her behavior in the context of our friendship, I stand by that ultimatum and don't regret its issuance even after reading Mr. Wilson's feeling regarding the conversation. I would say the same thing in the same circumstance today, though with a lot more effort to moderate my tone."

81. Complainant provided several documents to Wilson which she indicated were proof that she had not engaged in hostile behavior towards coworkers. The documents do not refute any of the information from coworkers upon which Wilson relied in deciding to demote Complainant.

82. Complainant concluded with a quotation from the Americans with Disabilities Act that references working from home as a form of reasonable accommodation. Complainant stated, "It would be illegal for my coworker to have filed this complaint against me if s/he were aware of my medical condition and failed to take it into account."

Decision to Demote Complainant

83. Complainant's conduct towards FR, SS and LS created a hostile work environment for each of them.

84. Wilson reviewed Complainant's submissions closely and made several pages of notes analyzing her comments and the documents. He concluded that while Complainant contested some of the underlying facts that led to her negative interactions with her peers at work, none of the information she supplied changed his conclusions.

85. Wilson determined that Complainant's behavior caused her coworkers to experience a hostile work environment. In addition, he concluded that her behavior caused coworkers to experience, or to fear the threat of, workplace violence.

86. Wilson considered as mitigation Complainant's illness and the fact that she was seeking medical advice and undergoing treatment for Traumatic Brain Injury.

87. Wilson reviewed all of Complainant's performance evaluations during her tenure at CSM. He then made a chart containing the overall rating, each subcategory, and Individual Performance Measures.

88. Wilson was struck by the fact that in each of the prior three years, Complainant had received a rating of "Needs Improvement" in the area of Interpersonal Relations. In the area of "Communication," Complainant had received an "Exceeds Expectations" in 2003, "Competent" in 2004, 2005, and 2006, and "Needs Improvement" in 2007. Complainant's performance had been deteriorating in the most recent period.

89. Wilson read the prior corrective actions issued to Complainant and determined that there was a pattern of inappropriate, hostile conduct towards others at work.

90. Wilson's first inclination was to terminate Complainant's employment. He believed that absent mitigating circumstances, termination was warranted because the behaviors had recurred and escalated over an extended period of time. However, he gave significant weight to Complainant's consistently Competent overall performance ratings. He considered Complainant to be a smart individual who was capable of working well when not in a group setting.

91. Wilson concluded that Complainant was unable to function successfully in her current position because she could not effectively interact with, and had alienated, most of her coworkers. In addition, he concluded she was unable to effectively interact with many customers. His analysis of his investigative findings led him to conclude that Complainant needed a level of supervision that was higher than her IT Professional II position warranted.

92. Wilson did not believe that there was any way to accommodate Complainant's medical condition in her current position.

93. Wilson decided that a demotion to a position that involved little or no contact with clients and peers was the best solution to the situation. He had been developing exactly such a position at the IT Professional I level for some time as part of a reorganization. The position involved department documentation and web support, and possible web-based help desk support. The work would not be performed as part of a team. The position would receive a higher level of supervision, appropriate to the level Complainant needed.

94. On November 7, 2007, Wilson sent Complainant a letter demoting her to the new IT Professional I position, with a 5% reduction in base pay. The letter cited Complainant's two prior corrective actions and concluded that her behavior and interactions with coworkers constituted a threat of violent behavior as defined by the Executive Order governing workplace violence.

95. Complainant timely appealed.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

(1) failure to perform competently;
(2) willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
(3) false statements of fact during the application process for a state position;
(4) willful failure to perform, including failure to plan or evaluate performance in a timely manner, or inability to perform; and
(5) final conviction of a felony or any other offense involving moral turpitude that adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

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

II. HEARING ISSUES

A. Complainant committed the acts for which she was disciplined.

Respondent has proven by preponderant evidence that Complainant committed the acts for which she was disciplined. Complainant engaged in a long pattern of hostile conduct towards coworkers. She made direct threats against at least two of them, causing them to fear for their physical safety at work and to avoid her entirely. Complainant's nonverbal conduct also constituted an indirect threat to several coworkers. Complainant's actions created a hostile work environment for a number of individuals on the ADS team. Her conduct was a violation of Executive Order D0010 96, "Workplace Violence." In addition, Respondent proved by preponderant evidence that Complainant was unable or unwilling to function appropriately as a team member with peers in her IT II position.

Complainant did not call any witnesses in her defense at hearing. Her testimony consisted primarily of detailed reasons why she was justified in becoming angry or frustrated with coworkers or her supervisor. However, none of the evidence she introduced disproved Respondent's case-in-chief, namely, that she committed the actions upon which the demotion was based.

B. The Appointing Authority's action of demoting Complainant was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised 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. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Complainant does not argue that Respondent's action was arbitrary or capricious. The evidence demonstrated that Wilson conducted an extremely thorough and objective investigation. He interviewed the entire ADS team, including Complainant. At the completion of his first set of interviews, and after meeting with Complainant, he drafted several follow-up questions and sought additional information in order to assure the accuracy of the information he had received. Wilson closely considered all of the evidence available to him, and gave particular attention to the mitigating factors in this case. His exercise of discretion was reasonable and fair. *Lawley, supra.*

Complainant asserts that Respondent violated Board Rule 6-8, 4 CCR 801, which states, "An employee may only be corrected or disciplined once for a single incident." She contends that Wilson relied on the two incidents that led to her prior corrective actions in imposing discipline. The evidence demonstrates that Wilson did not base his decision on Complainant's conduct underlying the corrective actions. None of the information provided to Wilson by Complainant's peers related to the incident between her and Zucker on July 25, 2007. The information Wilson received concerning the June 2005 incident was an extremely minor part of the results of his investigation. Wilson appropriately viewed the two corrective actions as part Gilbert's employment history; based on that history, he saw a pattern of conduct necessitating disciplinary action.

Complainant also argues that the April 2006 incident involving FR should not have been used as a basis for imposing disciplinary action, due to the amount of time that has passed since the incident occurred. This argument is rejected. Complainant's false accusation against FR severed their relationship and was a relevant part of their history as coworkers.

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

Complainant asserts that Respondent discriminated against her on the basis of disability. The Colorado Anti-Discrimination Act states,

> "It shall be a discriminatory or unfair employment practice . . . 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 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), C.R.S.

Under State Personnel Board Rule 9-4, 4 CCR 801, "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

The Act defines disability as, "a physical [or mental] impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." §§ 24-34-301(2.5)(a) and (b), C.R.S.

In determining whether an individual is substantially limited in a major life activity, "three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. Section 1630.2(j)(2)." *Pack v. Kmart Corp.*, 166 F.3d 1300, 1306 (10th Cir. 1999).

Complainant offered no evidence that her Traumatic Brain Injury substantially limits her in a major life activity. She has not indicated what major life activity it limits.

Assuming that the major life activity at issue herein is the ability to get along with coworkers, the preponderance of evidence demonstrates that Complainant can get along with certain others. She maintains good working relationships with DL and SM.

Complainant has not met her burden of proving that she has a disability as defined under the Colorado Anti-Discrimination Act. A diagnosis of an injury is not, by itself, sufficient to establish a disability under the Act. Nor did she present any evidence that others at CSM considered her to have a disability. Therefore, she has not stated a claim for disability discrimination.

Assuming arguendo that Complainant does have a disability, Complainant must

next prove that she is a "qualified disabled person" under the Act. This is a disabled employee who, with or without reasonable accommodation, can perform the essential functions of the job. § 24-34-402(1)(a), C.R.S. Working effectively as part of a team with coworkers, and treating peers and customers professionally, are essential functions of Complainant's IT II position. Therefore, Complainant is not a qualified person with a disability.

Lastly, Complainant indirectly requested an accommodation from Wilson of working from home. Such an accommodation would not have been reasonable and would have imposed an undue hardship on CSM. *Id.* Complainant's job required that she be at the college working on the computers located at the various academic departments.

D. Respondent's decision was within the range of reasonable alternatives.

The credible evidence demonstrates that the appointing authority pursued his decision thoughtfully and with due regard for the circumstances of the situation, as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Wilson demonstrated unique insight and problem solving skills by creating a new position for Complainant that would minimize the areas in which she was weak, and would maximize areas in which she had demonstrated strength. In view of the seriousness of Complainant's misconduct, the widespread nature of the damage she caused to the work environment, and the two previous corrective actions she received for similar conduct, demotion was well within the range of reasonable alternatives.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.

2. Respondent's decision was not arbitrary, capricious, or contrary to rule or law.

3. The discipline imposed was within the range of reasonable alternatives.

ORDER

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

Dated this 20th day of August, 2009.

[redacted]

Mary S. McClatchey
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 21st day of August, 2009, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS**, addressed as follows:

Shauna Gilbert

[redacted]

and in the interagency mail, to:

Brooke Meyer

[redacted]

[redacted]

Andrea C. Woods