STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2009B036**

ORDER GRANTING SUMMARY JUDGMENT AND NOTICE OF APPEAL RIGHTS

MADIOU DIALLO,
Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, COLORADO STATE VETERANS HOME AT FITZSIMONS,
Respondent.

This matter is before the Administrative Law Judge on Respondent's Motion for Summary Judgment, filed March 20, 2009. Complainant had ten days to answer to motion or request an extension of time. Board Rule 8-57B. No response of any type has been received from Complainant as of April 7, 2009

Respondent requests summary judgment because it is undisputed that Complainant had exhausted all of his leave and that Respondent was entitled under the applicable rules to administratively discharge Complainant. Respondent also argues that it properly considered Complainant to be an individual who was not a qualified individual with a disability, as that term is used in the Americans with Disabilities Act and analogous state law, because Complainant's essential job functions as a certified nursing assistant ("CNA") included lifting 100 pounds while Complainant's back pain meant that he could not lift 20 pounds frequently or 20 – 35 lbs occasionally, and that Complainant's disability discrimination claim should be dismissed on that ground.[1]

Confession of the Motion:

Board Rule 8-57D provides that "A motion shall be deemed a confession upon failure of a party to file a response." Confession of the motion means that the party against whom the motion is filed is treated as if they have admitted that the motion is well-grounded in law and fact. By filing to respond in a timely

[1] Respondent does not submit affidavits to support its motion but replies upon the signature of counsel and C.R.C.P. Rule 11 to attest to the truthfulness of the information presented. While C.R.C.P. Rule 56 does not require the submission of affidavits in all cases, and the Board's rules apply the civil rules 'to the extent practicable", Board Rule 8-54, the stronger practice would be to use the affidavit format to offer information based upon first-hand accounts of witnesses who are willing to swear to the truthfulness of the information.

manner, of in asking for an extension of time in which to file a response, Complainant has confessed that the motion is correct under the Board rules.

Colorado law discourages using a confession under the civil rules analog to Board Rule 8-57D, C.R.C.P. Rule 121, § 1-15(3), for summary judgment and motions to dismiss. *See Hemmann Management Services v. Mediacell*, 176 P.3d 856, 857 (Colo. 2007)(holding that confession of a motion is "not applied where a drastic remedy is at stake" and holding that a C.R.C.P. Rule 12(b)(5) motion to dismiss is properly granted only when the complaint fails to meet the requirements of rule 12(b)(5)). Assuming without deciding that the same policy should apply to the Board's consideration of a summary judgment motion, we turn next to than examination of Respondent's contentions and Complainant's prior filings.

Summary Judgment Standards:

C.R.C.P. Rule 56(b) permits a defending party to "move with or without supporting affidavit for a summary judgment in the defending party's favor as to all or any part thereof." Respondent would be entitled to summary judgment if there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law on those facts. C.R.C.P. 56(c). *See also Ginter v. Palmer & Co.*, 585 P.2d 583, 584 (Colo. 1978)("Summary judgment, however, is a drastic remedy which denied litigants their right to trial and is never warranted except upon a clear showing that there is no genuine issue as to any material fact...The burden of establishing the lack of a triable issue, therefore, is upon the moving party, and all doubts must be resolved against him").

Respondent asserts, and Complainant does not contest, that he had exhausted all of his leave, including his available Family Medical Leave and short-term disability, by September 29, 2008. Respondent also asserts that Brad Hohn, Respondent's Administrator, and Complainant met to exchange information concerning Complainant's medical status on September 22, 2008. Complaint agrees in his appeal form that he was administratively terminated.

Under Director's Procedure 5-10, administrative termination is permitted once several actions have taken place:

> If an employee has exhausted all credited paid leave, unpaid leave may be granted or the employee may be administratively separated by written notice after pre-separation communication. The notice must inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement. No employee may be administratively separated if FML or short-term disability leave (includes the 30-day waiting period) apply or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an

employee has been separated under this rule and subsequently recovers, a certified employee has reinstatement privileges.

As the rule language makes clear, Complainant cannot be discharged if he still has leave, or he is still eligible for Family Medical Leave or short-term disability. Complainant also cannot be discharged until there has been a pre-separation communication with Complainant. Any notice of discharge issued to Complainant must also meet several requirements, including that there be a notice of appeal rights, and a notice of the need to contact Complainant's retirement plan. Respondent's submissions demonstrate that these requirements have been met, and Complainant's appeal form does not contest any of these factual points.

Director's Procedure 5-10 also provides one final limitation; that is, that there can be no discharge of a qualified individual with a disability who can reasonably be accommodated without undue hardship. Complainant's only specific statement of complaint about the administrative termination process was that he alleged in his appeal form that "[m]y application for a reasonable accommodation was denied after I provided all the supporting documents regarding my medical condition."

This provision in Director's Procedure 5-10 tracks the language of the federal Americans with Disabilities Act ("ADA"), which provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to... [the] terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). The analogous state provision under Colorado Anti-Discrimination Act ("CADA") provides that an employer may not discharge "any person otherwise qualified because of disability." C.R.S. § 24-34-402(1). We interpret the requirements of CADA whenever possible in a consistent manner with the ADA. *Tesmer v. Colorado High School Activities Association*, 140 P.3d 249, 253 (Colo.App. 2006). *See also* Board Rule 9-4 ("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 ADA defines a qualified 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 such individual holds or desires." 42 U.S.C. § 12112(b)(8).

Respondent asserts that it is undisputed that Complainant could not perform the essential lifting function of his job as a CNA, that Complainant had failed to provide documentation to Respondent which would clarify his limitations in response to multiple attempts at contact by ADA Coordinator

Rose Estrada, that Complainant failed to participate in the reasonable accommodation analysis conducted by Respondent, that Complainant provided no additional information for use in the accommodation process even after he met with Mr. Honl concerning his status, and that no reasonable accommodation was identified by Respondent which would permit Complainant to perform the essential functions of his position.

Complainant's lone statement that his request for a reasonable accommodation had been denied after he had provided medical information is not sufficient to contest the factual allegations made by Respondent as to the process that was followed in this case. In Exhibit B, Respondent submits a form that had been submitted by Complainant at the beginning of the ADA process titled "Request For Reasonable Accommodation Due to Mental/Physical Disability" and stamped as received by Respondent on April 21, 2008. This form provides a space for Complainant to "state specifically what your accommodation request is (changes that would enable you to perform your current job)." Complainant, however, left that important portion of the form blank. Respondent specifically alleges, and the supporting documentation bears out, that there were multiple attempts made to discuss Complainant's physical limitations and accommodation with Complainant, but that Complainant's submissions were limited to the one page of medical information submitted as Exhibit B and were otherwise met by silence from Complainant. Given that Complainant has not provided any information which clarifies, adds to, or contests such information about the process, Respondent's allegations as to the nature of Complainant's physical limitations as to lifting, the nature of Complainant's job as a CNA, and the process which was followed in this case are sufficient to establish that Respondent was entitled to consider Complainant as not qualified for his CNA position.

Once it is determined that Complainant is not a qualified individual with a disability on the record currently before the Board, Respondent appears to have met the requirements under Director's Procedure 5-10 for a lawful administrative separation. On this record, Complainant would also not be able to establish that he has been unlawfully discriminated against on the basis of disability.[2]

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[2] ADA and CADA disability discrimination arguments are generally more complicated than the foregoing analysis includes. *See e.g.*, *Community Hospital v. Fail*, 969 P.2d 667, 67-5 (Colo. 1998)(discussing the requirement that an employer provide a reasonable accommodation and the actions that an employee and the employer must take in finding a reasonable accommodation). Without the addition of as number of details to Complainant's appeal as to what he asked to be done and what he proposed (if anything) as a reasonable accommodation, however, the record currently before the Board supports that Complainant would not be found to be a qualified individual with a disability.

Under such circumstances, Respondent's request for summary judgment should be granted and this matter is **DISMISSED with prejudice**.

The hearing date scheduled for April 22, 2009 is vacated.

DATED this 8th day
of **April 2009** at
Denver, Colorado.

Denise DeForest, Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202

CERTIFICATE OF MAILING

This is to certify that on the 9th day of **April 2009**, I placed true copies of the foregoing **ORDER GRANTING SUMMARY JUDGMENT and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Madiou Diallo
[redacted]

And by interoffice mail to:

Brooke Meyer
[redacted]

[redacted]
Andrea C. Woods

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.