STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2010G040(c)**

AMENDED INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ELEANOR LUCHENBURG,

Complainant,

vs.

DEPARTMENT OF LABOR AND EMPLOYMENT, INFORMATION MANGEMENT OFFICE,

AND

GOVENOR'S OFFICE OF INFORMATION TECHNOLOGY,

Respondents.

Administrative Law Judge Denise DeForest held the hearing in this matter with a commencement hearing on August 2, 1010, and evidentiary hearing on August 17 and 18, 2010, September 10, 2010, November 5 and 9, 2010, and December 10 and 21, 2010 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed by the ALJ at the conclusion of closing arguments on December 21, 2010. Assistant Attorneys General Molly Moats and Micah Payton represented Respondent. Respondent's advisory witness was Gerald Smith, Complainant's appointing authority. Complainant appeared and was represented by William S. Finger, Esq.

MATTER APPEALED

Complainant, Eleanor Luchenburg (Complainant) asserts claims of unlawful discrimination because of her sex concerning the conduct of her co-workers and supervisors in the Colorado Department of Labor and Employment (CDLE), Information Management Office (IMO or Respondent). Complainant seeks a finding that she has been subjected to gender discrimination and the creation of a hostile and improper work environment. She requests a finding that she has been improperly segregated and that she has been subjected to retaliation. Complainant requests an order that her employer must fully remediate her work environment, and to end Complainant's segregation. She requests a finding that she has been subjected to discrimination in her classification, and she seeks an order that her employer is to upgrade her position to an IT Professional IV, with an appropriate pay increase. Complainant

also requests that she be given full authority on the computer access system and programs, as well as a finding that that she has been subject to discrimination on her pay.[1] Complainant further requests an unspecified compensation amount from September 1, 2009, forward as well as an award of attorney fees and costs.

For the reasons set forth below, Complainant's claims are **affirmed in part** and **denied in part.**

ISSUES

1. Did Respondent discriminate against Complainant because of her sex by treating her in a disparate manner from her male co-workers?

2. Did Respondent unlawfully discriminate against Complainant by retaliating against her?

3. Did Respondent unlawfully discriminate against Complainant by creating a hostile work environment because of her sex?

4. Are Attorney fees and costs to be awarded?

FINDINGS OF FACT

General Background

1. Respondent hired Complainant on a temporary basis in June of 2008 as Respondent's Web Services Administrator. The Web Services Administrator is an Information Technology Professional III (IT Pro III) position. Complainant was hired to a permanent IT Pro III position in September of 2008, and certified to that class on September 1, 2009.

2. The position of the CDLE Web Services Administrator is one of the positions in the IT Pro class series. The IT Pro series of jobs range from the entry level IT Pro I through the upper-level management at IT Pro VI.

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[1] These two remedy requests are not based upon claims that were made as part of Complainant's two petitions for hearing. The issue about Complainant's access to computer systems apparently occurred after Complainant was moved into the Governor's Office of Technology (OIT) in 2010. The matter does not appear to have been grieved by Complainant and was not a part of either of the petitions for hearing presented to the Board. Complainant also did not raise a pay discrimination claim initially as a reason to grant her a hearing, did not list the issue in either of her Prehearing Statements as a legal issue to be resolved, or introduce sufficient evidence or legal argument at hearing for this to be considered as an independent issue at hearing. The pay and computer access issues, therefore will be considered for their support of the discrimination claims raised by Complainant in her petitions for hearing.

The Web Services Administrator Position

3. Prior to April of 2008, the duties for the Web Administrator were split between an IT Pro II and IT Pro IV. The IT Pro IV who ran the web systems immediately prior to April of 2008 was John Blackmore. Mr. Blackmore worked for the CDLE Information Management Office, Infrastructure Enterprise Services (IES).

4. Mr. Blackmore was interested in keeping the position of Web Services Administrator if the position was graded at the IT Pro IV level. CDLE management, however, decided to consolidate the support services for the web administration into one position, and that the new position would be an IT Pro III.

5. In April of 2008, the new position of Web Administrator at the IT Pro III level was announced for open competition.

6. The position announcement posted as of April 21, 2008, included the following description of the Web Services Administrator position:

> This position exists to be the staff authority for, and ensure proper operational parameters of, the Web Services Infrastructure of the Colorado Department of Labor and Employment (CDLE) ... This position will be responsible for planning, implementing and maintaining proper operational status of CDLE's Web Infrastructure. The position will be the point of contact for status of the Web Services Infrastructure at CDLE and its operational state ...This position will... monitor the Production Web Services operational status 24 X 7.

7. The Web Services Administrator position is an exempt position for purposes of the Fair Labor Standards Act. As a practical matter, this status meant that the Web Services Administrator would not be paid extra or overtime for any after-hours monitoring work this position was to perform on a 24 / 7 basis.

8. The position was announced with a series of educational and experience requirements, along with a listing of highly desirable skills.

Complainant's Selection and Temporary Status Hiring

9. Respondent received only two applications for the position of Web Services Administrator. Complainant 's application was one of the two received.

10. Complainant had a lengthy job history in the IT field in the private sector that had included work as a Senior Network Infrastructure Engineer, a

Project Server/ SharePoint Engineer, a SharePoint Portal manager, and a Senior Infrastructure Engineer.

11. Complainant's application demonstrated that she had extensive knowledge in many areas that would be useful to Respondent. Complainant did not meet all of the criteria in terms of expertise that Respondent expected to see in some areas, however.

12. Respondent decided to hire Complainant as a temporary employee, and to allow her to develop her expertise in all of the necessary technical areas.

13. As of June 2008, Complainant began work for Respondent as a temporary employee performing the Web Services Administrator position.

14. After working with Complainant for three months as a temporary employee, the supervisor of IES, James Chastain, recommended that Complainant be hired into a permanent position. On or about September 1, 2008, Complainant was hired by Respondent as a probationary employee performing the same job for CDLE. Complainant's pay was initially set at 10% over the minimum pay level for the IT Pro III level.

Infrastructure Enterprise Services (IES) Staff

15. Complainant's work group was located in the CDLE Information Management Office. Her specific work group within that office was within IES.

16. At the time of Complainant's hiring, the CDLE Chief Information Officer (CIO) was Joe Lambert. The supervisor of IES, Mr. Chastain, was an IT Pro V. Mr. Chastain's supervisor was Gerald Smith, the CDLE Deputy Chief Information Officer and Director of Operations and Customer Support. Mr. Smith held an IT Pro VI position, and was Complainant's delegated appointing authority.

17. At all relevant times, Mr. Blackmore, David Gestner, and Jerry Anderson held IT Pro IV positions within IES. Paul Creselius, Bob Hayes, and Kevin Tran held IT Pro III positions.[2] With the exception of Complainant, all of the staff in IES was male.

18. Prior to Complainant's hiring, the EIS staff was known to have interpersonal skill issues. CDLE Human Resources staff had attempted to work with the unit on soft skills prior to the point when the IT Professional III position was created.

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[2] Adam McCelland was also assigned to IES for the majority of the relevant time period. Mr. McClelland was transferred to another workgroup by approximately September 2009.

19. Mr. Gestner and Mr. Blackmore, in particular, had a reputation of being impatient, temperamental, abrupt, and willing to make disparaging comments about both male and female co-workers. Mr. Gestner and Mr. Blackmore were also known for their use of profane language while at work.

Complainant's Interactions with Co-Workers

Bringing In the Microsoft Team to Consult on the Web issues:

20. When Complainant first began work as the Web Services Administrator, she discovered that the state was not using the most recent web programs that were available. She also determined that there was an unsupported load balancing application that she decided should be eliminated. Complainant also recommended that there was a problem with how another program, SQL, handled the load in the database.

21. The SQL database was not part of Complainant's primary duties. Mr. Gestner handled that system. Complainant had sufficient background in SQL, however, that she could perform as a backup for Mr. Gestner on SQL issues.

22. One of Complainant's initial suggestions with regard to web services was to bring in a Microsoft network engineer to diagnose the problems that were being experienced in the web systems.

23. Mr. Blackmore and Mr. Gestner opposed this request for a Microsoft expert review on the grounds that it was not necessary to bring in outside experts to take care of any issues that may be in the system. Complainant, however, persuaded Mr. Lambert and Mr. Chastain of the need to bring in an outside Microsoft expert to evaluate her recommended changes.

24. The technical expert from Microsoft was brought in for two or three days. During that time, Mr. Gestner and Complainant disagreed about a technical issue related to the SQL system. Mr. Gestner treated Complainant rudely in the way he addressed the technical issue, and he did so in front of the Microsoft staff.

Conflict with Mr. Blackmore and Others Began Early:

25. Shortly after Complainant arrived at CDLE, Mr. Chastain assigned Mr. Blackmore to provide guidance and training to Complainant about her new position. Mr. Blackmore was not impressed with Complainant's response to the information he offered her. He reported back to Mr. Chastain that Complainant appeared to be uninterested in what he was prepared to show her about the CDLE web systems.

26. Mr. Blackmore also began discussing with co-workers that he

believed that Complainant was missing areas of technical expertise, and he at times declined to provide Complainant with information that would be helpful or necessary for her success. At least one other co-worker, Paul Creselius, failed to provide Complainant with necessary information because he followed Mr. Blackmore's lead in dealing with Complainant.

27. By February 2009, Complainant had begun communicating with CDLE HR staff regarding her unpleasant interactions with some of the EIS staff. Complainant had found that she had good working relationships with non-IES staff, such as the developers in other workgroups and the CDLE executive management and customer staff. Her relationship with the IES staff, however, was not of the same caliber. Most troubling was the fact that her relationship with Mr. Gestner and Mr. Blackmore was moving from bad to worse.

28. By February 2009, Mr. Blackmore and others had issued enough complaints with Mr. Chastain concerning Complainant that Mr. Chastain sat down with Complainant to discuss the issues. Mr. Chastain decided to approach Complainant with these issues on the day that she returned from a week of medical leave due to a heart issue.

29. Mr. Chastain's meeting with Complainant took place February 17, 2009. The co-worker complaints discussed at the meeting revolved around allegations that Complainant was condescending toward them, that she did not take direction or follow procedures, that she had not learned what they had attempted to teach her, that she was not managing the web services as she should, and that she thought she was the expert among them.

30. By February 2009, Complainant also had numerous complaints about how her co-workers were interacting with her, particularly Mr. Blackmore and Mr. Gestner. Complainant told Mr. Chastain that Mr. Blackmore conducted only an hour of training when she first arrived, and that if Adolph Valdez hadn't taken the time to help her extensively when she arrived, she would have been lost. She told Mr. Chastain that several of the team members had little interaction with Complainant because they weren't speaking to her. She complained to Mr. Chastain that EIS staff were not helpful to her and did not pass along information to her. She also told Mr. Chastain of the observations made by the Microsoft engineer who had consulted on the web issues with her that Mr. Gestner had been unprofessional and mean to her in front of him. Complainant also told Mr. Chastain that she knew that Mr. Blackmore had been written up for unprofessional behavior, and that the problem in communication could not be all hers.

31. Mr. Chastain's message for Complainant was that Mr. Blackmore and Mr. Gestner were part of the agency's senior staff and that she needed to accept their guidance and input.

32. Complainant struggled with Mr. Chastain's description of the levels of authority in the office. As she explained later that day in an email to Kathy Duffin of the CDLE HR department:

> Basically, I was left holding the bag, so to speak. James made it clear that I did not know my "place". He explained that John and Dave were "senior" staff, that I should look to their expertise. I explained that this was difficult when these senior staff tell me that I have to just sink or swim, look it up on the Internet, and yell at me in front of a vendor and a developer. Please tell me why I would want to go to these "senior" people?
>
> James would like to have all of us meet to see if we can iron out these problems, it is blatantly apparent, though, that James is siding with his staff, that his staff, my team, is lying about training me and consulting (communicating) with me. I am hoping that things will die down; however, if it doesn't, then I do not think this would be a fair meeting and would then request mediation with HR involved.
>
> I am not sure what this will accomplish. You already told me that HR tried to work with my team and improving their soft skills last year, that the team has known issues with people skills (or lack thereof), that I walked into a land mine when taking this position.
>
> I was gone a week; none of my team members asked me how I was feeling. How can I expect a workable situation when they cannot even be compassionate? My boss called me into his office first thing, after being out for a week with heart condition, only to inform me that my team mates couldn't work with me, that I was the one that had to change. Business acumen is not the first thing that comes to mind in this situation.

33. Mr. Chastain did not set up the mediation meeting that he had discussed with Complainant in the February 17, 2009, meeting.

Complainant's Training Opportunities

34. In 2009, Complainant was provided with training in several technical skill areas. She took a course which was a review of the Dreamweaver program, a course on mastering SharePoint 2007, a course on implementing Microsoft Office SharePointServer 2007, and course on Configuring and Troubleshooting Internet Information Services.

35. Complainant objected to the scope of the training which was offered to her on the grounds that much of it consisted of refresher courses rather than a course that enhanced her skills in new technical areas. In her positions prior to her state employment, Complainant had even taught some of the SharePoint classes.

36. Mr. Chastain approved these training classes for Complainant because he believed that Complainant would benefit from some refresher courses. Additionally, much of the coursework was on versions of programs that the state had yet to deploy; as a result, while the material may not have been entirely new to Complainant, the programs were new to the state.

37. Complainant also objected to the fact that she had been pulled out of a SQL course in early 2010 because there was an emergency on the SharePoint system.

Complainant's Complaints of Swearing

38. Prior to April 2009, Complainant had complained to the CDLE HR department that she could hear a considerable amount of profanity from co-workers and that she found the profanity upsetting. HR notified Mr. Chastain of the complaint.

39. Mr. Chastain held a team meeting on or about April 16, 2009, to address the on-going communication issues for the team, as well as other items. This was the first team meeting that Mr. Chastain had called in approximately two years.

40. During the April 16, 2009 meeting, Mr. Chastain told the team that the use of obscene language was unacceptable, and that it needed to be kept behind closed doors because it could be a condition that creates a hostile work environment.

41. Mr. Chastain also had individual meetings with three IES staff members to address the profanity issue with each of them.

42. By email dated April 21, 2009, Complainant reported to Mike Dawson in the CDLE HR department, that Mr. Chastain was out of the office on that date and that she continued to hear profanities from her co-workers as she worked in her cubicle.

43. Complainant's April 21, 2009, email was routed to JoAnna Miller, the CDLE risk management officer, for handling. Ms. Miller and Mr. Smith agreed that Mr. Chastain was responsible for continuing to monitor the cursing

situation and to take whatever action was necessary to eliminate the issue for Complainant.

After-Hours Assignments:

44. Complainant's main function for IES was to maintain the CDLE web sites. Complainant's job description provided that she was responsible for after-hours support for web issues, if necessary. Other IES staff members were assigned to other IT areas, and would be the first to be called if there were after-hours problems with those systems. Because of her job assignment, Complainant was the first to be called if a web issue arose after normal working hours.

45. Prior to Complainant taking the web support position, web issues had required Mr. Blackmore and others to work after-hours to correct web issues. Mr. Blackmore had previously complained about the volume of after-hours calls.

46. After Complainant took over the web support duties, Complainant also worked numerous after-hours calls on web issues. Complainant worked more after-hours support than any other IES employee.

47. In 2009, Complainant's job became even more involved because CDLE began administering increasing volumes of unemployment benefit claims. These claims depended upon claimants having access to the CDLE web site. As the usage of the CDLE web site increased, Complainant also had more work, including after-hours work, to keep the systems running.

48. Complainant was expected to keep her supervisors informed of when she would not be available after hours to handle web support issues.

49. On or about June 26, 2009, Complainant took a trip to the mountains over the weekend. Prior to leaving for the weekend, Complainant did not inform Mr. Chastain, or the individual who was acting in Mr. Chastain's behalf that weekend, Mr. Blackmore, that she would be unreachable, although she had informed the CDLE Chief Information Officer, Joe Lambert, and others of her trip Once Complainant had returned from the weekend, Mr. Chastain issued a written warning to Complainant dated July 5, 2009, informing her that her unannounced absence had caused a problem for the coverage of a web outage. The written warning addressed Complainant's failure to notify him or Mr. Blackmore of her unavailability over the weekend. The issue for Mr. Chastain was not that Complainant had taken a weekend vacation, but that she had not told her direct supervisor so that coverage could have been arranged, even though she had announced her planned absence to others.

50. Complainant was called at home by her supervisor, Mr. Chastain or whoever was acting for Mr. Chastain, whenever there was a web issue. Mr.

Chastain felt free to call Complainant on the weekend after Complainant had taken a week of medical leave for a heart issue. Mr. Chastain believed that calling Complainant on that weekend was reasonable because she was scheduled to return to work on the following Monday and she had provided no notice that she would still be unavailable during the weekend before her return to work. When Mr. Chastain called on the weekend after Complainant's medical leave, Complainant did not tell Mr. Chastain that she was not available, and she completed the support assignment.

The IES System of After-Hours Coverage:

51. Complainant was also skilled in programs and functions, such as SQL, which were the main focus of others in her section. When an after-hours issue arose involving these other systems, and the IES employee who held primary responsibility for that system was not available, Complainant would often be called to fill in as the back-up technical support for these other systems where she possessed expertise.

52. The EIS unit used a system of after-hours coverage which focused on having the individual with primary responsibility for the system as the first line of support for after-hours problems. Mr. Chastain and Mr. Smith, however, would not require EIS employees to always be available to correct problem. If, when contacted, the employee said that he or she is not available to address the matter, then Mr. Chastain would contact another employee with appropriate skills, or otherwise handle the problem.

53. The EIS system of after-hours coverage, therefore, depended in large part on an employee's willingness to decline after-hours work if it was interfering with anything. Complainant did not decline after-hours assignments. Complainant's co-workers, who were certified employees during the relevant time period, did make use of their ability to decline assignments.

Grievance

54. In July 2009, Complainant filed an internal grievance alleging gender discrimination and seeking remediation. (Stipulated Fact)

55. Complainant's grievance covered issues related to Mr. Chastain's written warning to Complainant of July 5, 2009, warning her to keep her direct supervisors informed of her unavailability:

a. Complainant grieved the July 5, 2009, written warning received from Mr. Chastain concerning Complainant's failure to inform her direct supervisor of her weekend vacation plans.

b. Complainant grieved the web services on call policy, which she defined as: "I am on call as the web person and will, therefore, be called first. If I am not available, I only need to say so when James calls, and he will then find someone else to take care of the outage." Complainant argued that she was not comfortable with this policy because "the past has shown a clear pattern of my team members not being available."

c. Complainant argued that Mr. Chastain's email of July 5, 2009, ignored the fact that he did not instruct the team members to let him know of their availability. Complainant also argues that the email ignored the avenues that Complainant used to notify others of her plans to be gone over the weekend, including posting herself as out-of-town on the white board used by the team, changing the message on her voice and email mail, checking with the developer staff for rush jobs to be done before she left, and speaking with the Help Desk. Complainant also presented an email exchange that demonstrated that, after she had placed her email on Out Of Office AutoReply with a message that she would be not reachable from June 26, 2009 until June 29, 2009, the CEDLE Chief Information Officer, Joe Lambert, had emailed to thank her and to tell her to have a wonderful weekend.

d. Complainant also objected to Mr. Chastain having advised Complainant to apologize to Mr. Blackmore for having not kept him informed of her unavailability in order to smooth things over with Mr. Blackmore, and in having that apology thrown back at her in Mr. Chastain's July 5, 2009, email when Mr. Chastain told her "that that future communications failure of this nature will result in a formal disciplinary action in the form of a Corrective Action Letter being written."

Complainant's requested remedies also covered 13 actions and decisions she was requesting as a response to her grievance. None of these requested actions directly addressed the July 5, 2009, email. Instead, Complainant asked for a commitment that she was to be treated in a equal, non-discriminatory manner as the other members of her team were treated, and to be certified to her position as of September 1, 2009. Complainant also asked for changes to various on call and backup policies, a change in her schedule so that she could make use of the FlexPlace option on Fridays, an upgrade in her PDQ to reflect

the backup work that she performed on different systems along with a promotion to a IT Pro IV level, the continued monitoring of the IES staff cursing, monthly staff meetings, and the provision of soft skill training to the entire team. Complainant also included a request for a CSEAP team mediation.

Investigation of the Grievance:

56. Joanna Miller hired Madeline SaBell to conduct an investigation into Complainant's contention that she was the victim of unlawful discrimination based upon her sex.

57. Ms. SaBell's investigation was underway by late August of 2009. The investigative process would eventually require Ms. SaBell to interview fourteen individuals with knowledge of how Complainant was being treated in the IES unit. All of the interviews were to be confidential, with each interviewed participate agreeing not to discuss the investigation with others in the unit.

August 2009 Furlough Exempt Status

58. By August of 2009, CDLE had created a list of employees who were to be exempt from the mandatory furloughs that were to take place for the majority of state workers. In the EIS workgroup, only Mr. Chastain and Complainant were initially declared to be exempt from furloughs. Complainant was placed on the exempt list because it was critical to maintain web services, and Complainant had developed a reputation for excellent customer service and a willingness to work long hours.

59. After the list was announced, Complainant overheard complaints by other IES staff that neither she nor Mr. Chastain were worthy of being furlough exempt. Co-workers questioned why she would be on the list when she had the least seniority within the group. Complainant also overheard remarks by co-workers that her skill set and qualifications were not as she claimed.

60. On or about August 5, 2009, Mr. Chastain held a staff meeting to inform staff that disparaging remarks and comments regarding capabilities or skills sets should not be made.

September 9, 2009 Incident

61. In the afternoon of September 9, 2009, Complainant was waiting in Ralph Price's cubicle. Mr. Price's cubicle was near Adolph Valdez's cubicle. Complainant could hear four individuals talking in Mr. Valdez's cubicle: Mr. Valdez, Mr. McCelland, Mr. Blackmore, and Mr. Gestner.

62. The employees of IES had just been interviewed by Ms. SaBell as part of Respondent's investigation into Complainant's discrimination complaint.

63. Complainant heard Mr. Blackmore saying that he hoped that Complainant would leave, either out of frustration or because her heart problems or cancer would take her. He told the group that he knew that Complainant had lied on her application for the position and that she didn't have the background that she claimed. Mr. Gestner said that he was willing to take his "fat ass to another agency" to get away from that "back-stabbing bitch." Mr. Valdez told the group that Complainant had a concealed carry permit and perhaps they could call her hostile.

64. Complainant was angered and upset at the conversation. She left work early that day. On September 10, 2009, Complainant told Mr. Chastain about the conversation; Mr. Chastain referred the matter to Mr. Smith.

65. Mr. Smith arranged for Rule 6-10 meetings with three of the four individuals in the conversation: Mr. Blackmore, Mr. Gestner and Mr. McCelland. Mr. Smith was concerned that they may have been breaching confidentiality with regard to Ms. SaBell's investigation, and he was concerned with the mean-spirited comments concerning Complainant.

66. Mr. Smith asked each of the three individuals in Mr. Valdez's cubicle if he had said anything disparaging about Complainant. All three denied that they had said anything disparaging.

67. Mr. Smith decided that there had been no breach of confidentiality concerning Ms. SaBell's investigation but that Mr. Blackmore, Mr. Gestner, and Mr. Valdez had all violated CDLE policy requiring that employee's treat each other with courtesy, consideration and professionalism. Mr. Smith issued a written warning to each of the individuals which required each of them to participate in a CSEAP mediation process to resolve the differences on the team.

Continued Complaints about Complainant's Qualifications and Performance

68. Complainant and Mr. Blackmore again ran into conflict when Mr. Blackmore was to serve as Complainant's backup while Complainant went on vacation in early September 2009.

69. While Complainant was gone on vacation, several security certificates were to be replaced so that the system remained up to date. Complainant asked that Mr. Blackmore replace all of the security certificates that were set to expire in September 2009. Mr. Blackmore spoke with Mr. Chastain, and they decided that Mr. Blackmore should replace the security certificates that expired while Complainant was on leave. Mr. Blackmore did not replace the certificates that were set to expire within a few weeks of Complainant's return from vacation.

70. When Complainant returned from vacation, she did not check on the status of the certificates, and neither Mr. Blackmore nor Mr. Chastain told her that not all of the certificates had been replaced. When the certificates expired near the end of September 2009, the web system was affected for a period of time while Complainant took the steps necessary to import new certificates.

71. This incident was mentioned in Complainant's mid-term review for the 2009 – 2010 period as an example of Complainant not performing well.

Mr. Smith's Decision on the July 2009 Grievance

72. On or about November 30, 2009, Complainant received Mr. Smith's formal written response to her grievance.

73. Mr. Smith's response began with a quotation from the conclusion of Ms. SaBell's investigative report, in which she found the following:

> The totality of the investigation did not uncover illegal discrimination based on Complainant's gender. There is no evidence that her co-workers or Respondent treated Complainant in a disparaging manner due to her gender. The investigation did not reveal a violation of SPP-0047. However, it seems more likely than not that three members of the IES team failed to treat Complainant with courtesy, consideration and professionalism in violation of SPP-0048.

74. Mr. Smith used the thirteen items of relief requested by Complainant in her grievance in order to discuss the remedies he was willing, and not willing, to provide to Complainant.

a. Mr. Smith agreed that Complainant should be treated in an equal, non-discriminatory manner. He also noted that Complainant had been certified as of September 1, 2009.

b. Mr. Smith decided that Complainant and Mr. Chastain should work out Complainant's scheduling request for a 5/9s schedule with two Fridays as Flex Place. He also agreed that training would be provided in existing (or possibly new) technology, so long as the training met the need of the unit and department, and the training enhanced the duties assigned to Complainant's position. Mr. Smith reminded Complainant that the budget issues meant that the department would be extremely prudent in spending training dollars.

c. Mr. Smith noted that the desk audit of Complainant's PDQ was underway with the revised PDQ submitted to Human Resources for review. As part of his comments on this portion of Complainant's grievance, Mr. Smith told Complainant that "the additional duties you describe are not permanent, and all team members from time to time may be required to handle other responsibilities."

d. In response to Complainant's concerns with the performance evaluation process, Mr. Smith reminded Complainant that she had always been, and continued to be, a Staff Authority and the her performance had been rated at a Level 2, which was satisfactory rating. Mr. Smith also declined to change the process by which other team members offered input into Complainant's review. His position was that "team members may from time to time provide input to the manager", and that "the manger has the responsibility to balance input from all appropriate people."

e. Mr. Smith addressed Complainant's requests to change the on-call and back-up policies by declining to modify the system in place and by defining an employee's obligations under the system. Mr. Smith noted, with regard to the on-call policy, that "team members are expected to be reasonably available to handle issues off-hours if they involve their particularly areas of responsibility. If someone is called and is not available, then management must evaluate the circumstances." Mr. Smith also noted that there was a plan for back-up coverage when Complainant was out of the office, and noted that Mr. Blackmore had covered for Complainant while she was on vacation in September.

f. As for the grievance requests focused on improving team interactions, Mr. Smith decided that Mr. Chastain would schedule soft skill training for team members on an individual basis, and that staff meetings would be held on a regular basis. He noted that his understanding was that cursing by co-workers was no longer an issue and that Mr. Chastain would monitor that behavior. Mr. Smith also noted that "the mediation by C-SEAP has been scheduled, and is now underway."

First Petition For Hearing

75. On December 7, 2009, Complainant filed a timely petition for hearing with the Board based upon the grievance decision she had received on November 30, 2009. The petition alleged that Complainant was facing a hostile,

abusive, and discriminatory work environment, and the response to Complainant's grievance was a failure of management to remediate the issues.

Mediation Efforts

76. A mediation effort hosted by an outside entity had been discussed by Mr. Chastain and Complainant for months as a way to potentially resolved the hostility in the IES workgroup. There were no plans made for such an effort until after Mr. Smith had conducted Rule 6-10 meetings with Mr. Blackmore and Mr. Gestner and had decided that they should cooperate in such an effort.

77. Mr. Smith also agreed that CSEAP mediation should occur as part of the resolution of Complainant's grievance. A mediation plan was announced by Mr. Chastain on or about November 13, 2009. The first plan was to conduct individual meetings on November 19 and 20, 2009, with a group meeting conducted on November 25, 2009.

78. Yvonne Graber from CSEAP hosted individual meetings for Mr. Gestner, Mr. Blackmore, and Complainant. She also hosted a meeting with Mr. Blackmore and Complainant.

79. By early December, 2009, Ms. Graber had to postpone additional planned sessions because of staffing issues within CSEAP.

80. When Mr. Smith was informed of the delay in the CSEAP mediation sessions, Mr. Smith decided not to complete the mediation process. Mr. Smith knew that the imminent reorganization of IES would separate Complainant from the rest of the group. Mr. Smith also decided that he did not need to go forward with mediation once Complainant filed her gender discrimination appeal with the Board.

81. Ms. Smith testified at hearing that he was an experienced appointing authority, and that he believed that the litigation before the Board would provide a mediation opportunity that would mean that the CSEAP mediation would not be necessary.

82. Mr. Smith decided to stop only the mediation portion of his grievance decision once Complainant filed with the Board. Other aspects of the grievance, such as the desk audit for Complainant's positions, continued forward.

Complainant's Performance Reviews

First Review:

83. Complainant's first performance review covered the period from Complainant's hiring as a temporary employee in June of 2008 through October

31, 2008. Complainant received a total point score of 247, which placed her squarely in the acceptable level 2 performance range. Complainant's first performance review noted that Complainant had received praise and positive feedback from her customers and the IMO top management with respect to many of the projects and work orders that she completed. The review also noted that "Eleanor did have some issues with the members of the IES Team, with regard to her not initiating the proper communications and coordination that should have been involved related to tasks that need to be coordinated with other staff as the Leads of their technical areas of responsibility."

Second Review:

84. Complainant's second performance review covered the 2008 – 2009 performance rating period. Complainant initially received a 210 score, which equated to an acceptable Level 2 overall rating. The drop in score from the first review was related to the fact that Mr. Chastain had downgraded Complainant's subject matter expert rating from a score of 2 to a 1, noting that Complainant "has not demonstrated that these expectations are being met above 85% of the time for the knowledge and experience level needed as the Web Services Administrator and Staff Authority in this technical area."

85. Mr. Chastain also downgraded Complainant's score from a 2 to a 1 in the competency area of "Job Knowledge," noting the Complainant's efficiency "is affected by Eleanor needing to enlist assistance from others in order to complete some tasks."

86. In Complainant's second review, Mr. Chastain also noted, as part of the IMO teamwork objective, that Complainant "works as a team player with those outside IES; but is not perceived as being a team player from some staff in IES." Complainant's ranking in this objective was an acceptable level 2.

87. Complainant used the CDLE dispute resolution system for performance reviews to challenge her second review. At the conclusion of that process, Complainant's revised performance review for the 2008 – 2009 performance review period raised her total score to 231, which was still an acceptable Level 2 overall performance rating. The rise in the total score was due primarily to the fact that Mr. Chastain moved Complainant's subject matter expert rating from a 1 to a 2, with the comment:

> There are some technical areas that Eleanor has needed to solicit assistance from in order to accomplish some tasks. She has not fully demonstrated that the expectations of a Staff Authority position are being met consistently. It is estimated that she has demonstrated between 85% - 90% in the rating criteria based upon documented e-mails and verbal communications relating to the expected knowledge

> and experience level that is required as the Staff Authority in the Web Services Infrastructure technical areas.

88. Complainant's score in the "Job Knowledge" competency area was also changed from a 1 to an acceptable 2 level. Mr. Chastain included this expanded comment in support of the rating in this competency:

> Efficiency on some assignments is affected by Eleanor needing to enlist assistance from others in other to complete some tasks. A Staff Authority position requires an independence and ability to solve issues without intervention. Understanding the complexity of any new IT environment requires time and a fair amount of knowledge transfer. Eleanor completes most assignments accurately and in a timely efficient manner; however, there are occasions in which she must enlist assistance from others. To be rated at a three (3) in this area, she must work toward more independence.

89. Mr. Chastain also maintained Complainant's score on IMO Teamwork at an acceptable 2 level, with the following expanded comment: "Eleanor has met expectations in this area between 90% - 97% of the time. She works well as a team player with those outside EIS; but is not perceived as being a team player from some staff in IES. Known issues existed within IES prior to Eleanor's arrival. These issues are being addressed from a team perspective to insure that team dynamics are improved for everyone."

90. Complainant signed her revised review for the 2008 – 2009 performance period on May 4, 2009.

Third Review:

91. Complainant's third review was her mid-year review for the period of April 1, 2009 through October 31, 2009.

Respondent's Second Investigation into Complainant's Complaint of Continued Discrimination

92. Complainant's third review was generally a favorable review, with Complainant receiving an overall rating with a satisfactory performance. The review included two statements, however, with which Complainant disagreed. First, it referenced the expiration of the security certificates in September of 2009. Complainant blamed Mr. Blackmore for not replacing the certificates, and felt that Mr. Chastain's inclusion of the incident reflected Mr. Chastain's continued support of Mr. Blackmore even when Mr. Blackmore was harassing

her. Mr. Chastain had also included in her review that there were continuing interpersonal problems on the IES team.

93. Mr. Chastain's comments on the mid-year performance evaluation concerning Complainant's responsibility for expired security certificates was a reasonable criticism. Complainant had asked Mr. Blackmore to replace the expiring certificates while she was on vacation in September of 2009. Mr. Blackmore and Mr. Chastain talked about the jobs and decided to replace only those certificates that were expiring while Complainant was on vacation. Mr. Blackmore did not replace the certificates that were set to expire a few weeks after Complainant returned from vacation. Upon her return from vacation, Complainant did not check the status of the certificates and she allowed the certificates that had not been replaced to expire. The resulting disruption of the web system was significant.

94. Mr. Chastain's comment on Complainant's mid-year review concerning Complainant's involvement in the interpersonal issues affecting the team was also a true statement and a reasonable observation, given that the difficulties in communication continued on the IES team.

95. On December 11, 2009, Complainant again emailed Mike Dawson in the CDLE HR department in which she disagreed with her mid-year performance review. Complaint's email told Mr. Dawson that she continued to be the target of unlawful discrimination, and that her supervisor was failing to address the issues.

96. Mr. Dawson routed the email to JoAnna Miller. Ms. Miller assigned Pat Romero as the investigator to perform an investigation into Complainant's contentions of continuing gender discrimination in her mid-term review. Ms. Romero interviewed three individuals as part of her investigation: Complainant, Mr. Chastain, and Mr. Smith. Ms. Romero did not interview Complainant's IES co-workers as part of her investigation.

97. When Ms. Romero interviewed Complainant, she complained that her review had been unfair, told Ms. Romero about the September 9, 2009 incident in Mr. Valdez's cubicle, and told Ms. Romero what Mr. Blackmore had said during the last CSEAP mediation meeting between Complainant and Mr. Blackmore.

98. Ms. Romero addressed Complainant's concerns that her co-workers were discussing in her a rude and unkind manner while in Mr. Valdez's cubicle but decided that this incident did not have any bearing on Complainant's third review. Ms. Romero also concluded that Mr. Chastain was correct in assessing the blame for the failure of the security certificates because the certificates expired after Complainant had returned from vacation and the status

of the certificate should have been reviewed by Complaint and corrected before there was a problem.

99. Ms. Romero also concluded that, while the individuals in Mr. Valdez's cubicle were acting in a rude and unprofessional manner toward Complainant, there was no credible evidence that the conduct was based upon Complainant's gender.

100. Ms. Romero issued her report as of March 3, 2010.

The Revision of Complainant's PDQ and Desk Audit

101. Prior to November 2009, Complainant had spoken with CDLE HR about how she could have her PDQ revised to reflect duties that she was performing related to the back-up of the IES IT Pro IV staff, and the fact that she had been working with upper-level management on IT issues. Complainant's goal was to have her position upgraded to an IT Pro IV position.

102. The CDLE HR staff informed Complainant that she could ask for a desk audit review, and that the first step in that process was to create a revised PDQ that her supervisors would review.

103. By early November, 2009, Complainant had completed work on a revised PDQ for her position. Complainant took the position that she did not intend to have Mr. Chastain review and comment on her proposed revisions, but the agency policy required her to submit the revisions to her supervisor for review.

104. Mr. Chastain agreed with many of the items listed in Complainant's revised PDQ. He objected to some language that he believed was imprecise.

105. Ms. Chastain's primary area of disagreement with Complainant's revised PDQ was in her assertions that she was performing the work of an IT Pro IV. Mr. Chastain pointed out that the occasional back up of the systems handled by the IT Pro IV staff did not equate to handling the full breadth of the IT Pro IV assignments because IT Pro IV positions have greater responsibilities as Senior Authority Staff members than do the Staff Authority IT Pro III positions.

106. As a result of the differences between a Staff Authority and a Senior Staff Authority, one of the primary substantive difference between the description of an Information Professional III and an Information Professional IV is that the IV level must be responsible for a breadth of technical expertise, including the architecting of systems, in addition to the technical expertise required at a III level.

107. Complainant's revised PDQ did not demonstrate that she had any architecting duties or other duties that required her to work on the types of issues which distinguish IT Pro IV from the IT Pro III level. Complainant presented information that she performed as a back up to the IT Pro IV staff in her workgroup, and that she was providing advice to executive management concerning enterprise-wide solutions. These functions, however, do not establish that Complainant was performing at an IT Pro IV level.

108. Mr. Smith routed the revised PDQ to the CDLE Human Resources (HR) department for evaluation. HR utilized a team of four evaluators for the revised PDQ. The evaluation team consisted of one man and three women.

109. The CDLE HR staff unanimously decided that Complainant's revised job duties description did not warrant the IT Pro IV level. By memo dated February 8, 2010, HR communicated the result to Complainant.

Second Petition With The Board

110. On February 17, 2010, Complainant filed a second petition for hearing with the Board. Her petition referenced the formal decision of February 8, 2010, which informed Complainant that her position would remain as an Information Professional III.

111. Complainant argued in her appeal form that she has been assigned and performs duties at a higher level than Information Technology Professional III, and that her duties are at the same as her male co-workers who are at an Information Technology Professional IV level. Complainant also argued that she has been routinely and regularly required to serve as the on-call person for her work unit because of her knowledge and skill level, and that such duties created an added responsibility for her.

Reorganization

112. In early 2010, a re-organization of information technology (IT) services occurred. The IT staff at CDLE was, for the most part, transferred to the Governor's Office of Information Technology (OIT).

113. As part of that reorganization, Mr. Chastain's assignment was changed so that he was no longer the supervisor of the IES workgroup. Mr. Blackmore and Mr. Gestner were assigned to a different group and supervisor than was Complainant. Mr. Smith is no longer the appointing authority for the group.

114. Complainant was placed under the supervision of an OIT supervisor, Jim Yuhas. Mr. Yuhas runs a group called the Government

Services Unit. Mr. Yuhas has no technical experience with web services. His group is limited to himself and Complainant.

115. Complainant still must work on a day-to-day level with Mr. Blackmore and Mr. Gestner, as well as many of the others from the CDLE group because the reorganization did not change her work assignments. The primary effect of the reorganization on Complainant was to change her supervisor.

116. As of the time of hearing, Complainant has a good working relationship with Mr. Yuhas. Complainant believes the change in supervisor, however, has effectively exiled her from her old work group.

Board Consolidation of the Petitions and Decision to Grant a Hearing

117. The Board consolidated Complainant's two petitions. ALJ Farrell filed a Preliminary Recommendation on April 7, 2010 that recommended the grant of a hearing on Complainant's claims of unlawful discrimination based upon her sex. The Board granted Complainant's petitions for hearing as of April 20, 2010.

DISCUSSION

I. GENERAL

Complainant raises claims of unlawful discrimination on the basis of sex under the Colorado Anti-Discrimination Act, C.R.S. §§ 24-34-401, *et. seq.* (CADA). The specific legal standards for the determination of Complainant's various CADA claims are discussed, *infra*, in section II.

II. HEARING ISSUES

A. Respondent did not commit unlawful discrimination through disparate treatment of Complainant because of her sex:

1. Introduction:

Complainant asserts that she was treated differently her male co-workers in four main ways: her work load (particularly the after-hours work); her evaluations and the process used for those evaluations; the training she was offered; and her request to reallocate her position to an IT Pro IV level (which would place her at the same level as Mr. Blackmore and Mr. Gestner). Complainant presents no direct evidence of discrimination to support her arguments, but depends upon the circumstances surrounding these actions and the inference of discrimination that she wishes the Board to draw.

Complainant's arguments raise the issue of disparate treatment due to her sex. We first turn, therefore, to the law governing the resolution of disparate treatment claims.

2. Disparate Treatment Claims under CADA:

Disparate treatment "is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment..." *International Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)(citations omitted).

Complainant's disparate treatment claim arises under the Colorado Anti-Discrimination Act (CADA). Section 24-34-402(1)(a), C.R.S., provides, in relevant part:

> It shall be a discriminatory or unfair employment practice . . . [f]or an employer to refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation against any person otherwise qualified because of...sex...

In most cases, a claimant lacks direct evidence of an employer's discriminatory motivation and must prove the necessary discriminatory intent indirectly by way of inference. Colorado has adopted the following approach, modeled on the Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), for proving an inference of discriminatory intent.

Initially, the plaintiff must establish a *prima facie* case of discrimination by showing (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination. *Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1987).

If the plaintiff establishes a *prima facie* case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. If the employer produces such an explanation, the plaintiff must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination. *Id.* at 401.

Intentional discrimination is presumed if a plaintiff proves a *prima facie* case unrebutted by an employer's offer of a nondiscriminatory reason for an adverse job action. *See Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A nondiscriminatory reason is one that is not prohibited by CADA, namely, a reason that is not based on factors such as disability, race, creed, color, sex, age, national origin, or ancestry. *See Equal Employment Opportunity Comm'n v. Flasher Co.,* 986 F.2d 1312, 1316 n. 4 (10th Cir.1992); *Bodaghi v. Dep't of Natural Res.,* 995 P.2d 288, 307 (Colo. 2000).

Once such a reason is provided by an employer, however, the presumption of discrimination "drops out of the picture"; at that point, the trier of fact must decide the ultimate question of whether the employer intentionally discriminated against the plaintiff. *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). The burden of proving intentional discrimination always remains with the plaintiff. *Lawley v. Dep't of Higher Educ.,* 36 P.3d 1239, 1248 (Colo.2001); *Bodaghi,* 995 P.2d at 298.

Plaintiffs typically demonstrate pretext in one of three ways: (1) with evidence that the defendant's stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff. *Kendrick v. Penske Transp. Servs.,* 220 F.3d 1220 (10th Cir. 2000). *See also Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1136 (10th Cir. 2005)(noting that a plaintiff will generally meet her burden of demonstrating pretext of she demonstrates such weaknesses, implausibilities, inconsistencies, or contradictions in her employer's proffered reason that a reasonable fact finder would find them unworthy of credence)(internal citations and quotations omitted).

3. <u>Application of These Principles To The Allegedly Discriminatory Acts</u>:

Complainant has been able to establish a *prima facie* claim of unlawful discrimination because she has demonstrated (1) that as a woman she belongs to a protected class; (2) that she was qualified for the IT Pro III position at issue; and (3) that she has suffered a workload imbalance, negative comments in her performance reviews, a refusal to reallocate her position to an IT Pro IV, and other adverse employment decisions. Additionally, the fact that Complainant is the only woman in the IES group, and that the individuals who are involved in these adverse actions are all male, is sufficient to give rise to an inference of unlawful discrimination. *Big O Tires,* 940 P.2d at 400.

The issue, therefore, is to evaluate whether the nondiscriminatory reasons offered by Respondent for these employment decisions have been shown by Complainant to be mere pretexts for unlawful discrimination against her.

a. Complaints of workload issues are not with the ambit of CADA, and are not the product of unlawful discrimination:

Complainant has not presented a *prima facie* case of disparate treatment discrimination with her claims of unequal workload because a workload issue does not fit within the prohibited employment decisions under C.R.S. § 24-34-402(1)(a); that is, to "refuse to hire, to discharge, to promote or demote, to harass during the course of employment, or to discriminate in matters of compensation."

Even if the workload issues were considered to be an adverse employment decision under CADA, however, Complainant's claim cannot withstand the remainder of the analysis. The legitimate reason presented by Respondent for Complainant's workload assignments is that the job was designed as the position to perform the work that Complainant is performing, and that Complainant has agreed to accept other assignments on occasion.

These reasons are not merely a pretext for discrimination. The job description, which was written before anyone had applied for the position, showed that the IT Pro III position was to be a 24/7 support for web issues. Whether it is a wise or fair idea to assign one person to be the backup for web system is not the question. The question is whether Respondent's justification for asking Complainant to work so many after-hours calls – that is, the job was designed to be the primary source of after-hours support, and that Complainant could decline an assignment so long as she was otherwise reasonably available for such work -- is a pretext for discrimination.

The evidence at hearing established that the need for after-hours support by Complainant grew in 2009 because of the sharp increase in web issues brought about by the increase in unemployment benefits applications.

The evidence also persuasively demonstrated that the system in place for all IES employees required them to be reasonably available to handle after-hours support issues concerning their primary systems. The fact that Complainant held the primary responsibility for the web support issues, rather than any of the other systems, accounts for the much of the difference between her after-hours workload and her co-worker's after-hours workloads.

Additionally, Complainant possesses the skills to be a backup on other systems. The IES backup policy placed the burden on an employee to say "no" to after-hours assignments. Complainant's co-workers apparently took advantage of this policy far more than Complainant did. Such a result is not

surprising, given that Complainant was either a temporary worker or a probationary employee during much of the relevant time period, and under such circumstances would not be in a position to say '"no" as much as certified employees. When this backup policy is combined with Complainant's obligation to provide web support, it is not surprising that Complainant's after-hours workload was significantly higher than her co-workers. This effect, however, is not because of Complainant's sex. It is because of Complainant's specific job, her status as a temporary or probationary employee, and the IES backup policy that was in place.

b. Complainant's desk audit results do not reflect unlawful discrimination:

CADA applies its prohibitions to the failure to promote an employee because of sex. *See* C.R.S. § 24-34-402(1)(a). In this case, Complainant underwent a desk audit in an attempt to be promoted to an IT Pro IV level, and the result was to deny her a change in her job level. The decision not to upgrade her position to a level IV, however, does not demonstrate unlawful discrimination based upon Complainant's sex.

Complainant's claim is based in large part on the fact that she was qualified to be the backup for the systems that other IT Pro IV staff handled. Complainant apparently does have a broad skill range, and she has been called upon to backup her higher-ranking co-workers. Complainant argued at hearing that her skills were better than her co-workers, and this may or may not be true. The problem for Complainant's argument is that her technical skills involved in backup functions are not the skills that distinguish an IT Pro IV level worker from an IT Pro III level employee. The required level IV expertise is wider and deeper than backup functions.

More importantly, there was no persuasive evidence presented at hearing that Respondent's evaluation of the revised PDQ as Complainant submitted it would or should have qualified for the IT Pro IV level if it had been evaluated properly. The evidence demonstrated the opposite; that is, that even when Complainant's description of her duties was taken into account <u>without</u> Mr. Chastain's disagreements with portions of her descriptions, the descriptions still did not match the level of work for an IT Pro IV.

Complainant, therefore, has not demonstrated that Respondent handling of her request to be promoted to the IT Pro IV level was a form of unlawful discrimination based upon her sex.

c. Complainant's performance evaluations and evaluation process were not shown to be a pretext for discrimination:

Complainant has objected that Mr. Blackmore and Mr. Gestner, as well as other team members, had the ability to comment to Mr. Chastain about her perceived competencies, and to have those comments appear as part of her reviews. Complainant objected to this practice as unfair to her because Mr. Blackmore and Mr. Gestner were biased against her.

While it is clear that the IES team had an unhealthy amount of interpersonal issues, Mr. Chastain's reliance of the team leads, such as Mr. Blackmore and Mr. Gestner, for feedback is not an unreasonable review strategy. Complainant did not persuasively show that Mr. Chastain was not simply providing necessary and useful feedback as to Complainant's strengths and weaknesses as an IT Pro III, or that the comments included in the final versions of Complainant's reviews were actually incorrect. As a result, Complainant has not persuasively demonstrated that the comments that Mr. Chastain placed into her performance reviews were added to her reviews as a product of unlawful discrimination because of her sex.

d. The training opportunities offered to Complainant were not a pretext for unlawful discrimination:

Complainant has argued that she is being unfairly limited by the training that Respondent has been willing to provide for her. Complainant's probative evidence at hearing, however, was limited to testimony about her discontent with the choices made. Complainant did not present persuasive evidence that she had been singled out for special treatment in any way in her training, or that male co-workers who were similarly situated to her had been treated differently in this regard.

Respondent has provided evidence that the training was chosen in large part because the programs that were the subject of the trainings were new programs to the state. The fact that the courses were refreshers for Complainant does not show that these courses were chosen for her, or her opportunities limited, s a pretext for discrimination. Moreover, Respondent provided evidence that training dollars were in exceptionally sort supply in 2008 – 2010, and that training would not be approved in order to expand Complainant's expertise beyond the systems that she was hired to run. These are reasonable explanations that were not shown to be mere pretexts for unlawful discrimination.

e. Complainant's pay level is not indicative of unlawful discrimination:

Complainant did not present much evidence concerning the pay of her co-workers, and the information conceding pay presented by Respondent was limited in scope. The evidence at hearing established that Complainant's pay was set at 10% above the minimum for an IT Pro IV when she was hired.

Complainant did not establish, however, that there was any reason to believe that such a pay rate reflected disparate treatment of her pay versus the pay of male team members, or that the setting of her pay rate was any different than exists for any new employee. The state pay scales are generally designed to permit workers to increase pay as they gain seniority. It is not unusual in the state system for the newest employees to have the lowest base pay, and the more experienced employees to be on the higher end of the pay scale.

The information presented by Complainant was insufficient to establish that her rate of pay was affected by unlawful discrimination because of her sex.

f. Complainant's GOIT assignment is not a pretext for discrimination:

Complainant also argues that her placement in Mr. Yuhas' group constitutes a form of discrimination by, in essence, exiling her from her workgroup.

Complainant has not demonstrated, however, that this assignment in any way harms her or reflects a discriminatory animus against her. The record is quite clear that Complainant was not well-served by having Mr. Chastain as her supervisor. A change of supervisor appears to be a helpful modification of her job, and not an action which reflects some type of discrimination. Complainant has not demonstrated that this decision to have Mr. Yuhas as her supervisor in merely a pretext for discrimination.

As a result, Complainant's claim of disparate treatment fails because she has not been able to demonstrate that the reasons provided by Respondent for the challenged actions are merely pretexts for unlawful discrimination.

B. Respondent unlawfully retaliated against Complainant by deciding to end the mediation process:

Complainant also argued that Mr. Smith's decision to allow mediation to end once Complainant filed her discrimination petition for hearing with the Board was unlawful retaliation.

Under CADA, it is a "discriminatory or unfair employment practice ... [f]or any person, whether or not an employer...[t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado civil rights] 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).

On the federal level, Title VII also includes a similar anti-retaliation provision. *See* 42 U.S.C. § 2000e-3(a)(declaring it to be unlawful "for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by [Title VII]"). The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1962. Under such circumstances, federal Title VII law serves as a guide to CADA. *See Big O Tires*, 940 P.2d at 399; *St. Croix v. University of Colorado Health Sciences Center*, 166 P.3d 230, 236 (Colo.App. 2007).

Unlawful retaliation can be proven two separate ways: under a mixed motive theory or as a pretext case.

1. Mixed Motive Analysis:

Under what is often characterized as a "mixed-motive" theory of discrimination, a claimant may "directly show that retaliatory animus played a motivating part in the employment decision." *Fye v. Oklahoma Corp. Com'n*, 516 F.3d 1217, 1225(10th Cir. 2008)(quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). A mixed motive theory is appropriate "in any case where the evidence is sufficient to allow a trier to find both forbidden and permissible motives" behind the alleged retaliatory action. *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 553 (10th Cir. 1999).

The direct method, for purposes of the proving a mixed motive theory of retaliation, does not require a claimant to use only direct (as opposed to circumstantial) evidence. A claimant "can establish retaliation 'directly' under *Price Waterhouse* through the use of direct or circumstantial evidence." *Fye*, 516 F.3d at 1226. The crux of the issue is whether a claimant can demonstrate "that the alleged retaliatory motive actually related to the question of discrimination in the *particular* employment decision." *Id.* (internal quotation and citation omitted)(emphasis in original). *See also Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997)(defining the proof of the direct method as requiring "evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged [retaliatory] attitude"); *Medlock*, 164 F.3d at 553(approving a jury instruction which requires plaintiff "to demonstrate that retaliatory animus was a 'motivating factor'" in the employment decision).

"Once the plaintiff proves that retaliatory animus was a motivating factor, the burden of persuasion shifts to the defendant to prove that it would have taken the same action absent the retaliatory motive." *Fye,* 516 F.3d at 1225 (internal quotations and citations omitted).

2. Application of the Mixed Motive Analysis To The Facts:

A mixed motive analysis is permissible on these facts. The decision to end the CSEAP mediation process was motivated, at least in part, by logistical problems for CSEAP and the knowledge that Complainant's work structure was about to change as the CDLE staff was absorbed into GOIT. These are legitimate reasons for the cessation of the CSEAP mediation process.

On the other hand, Mr. Smith also testified that he allowed the mediation process to end because Complainant had filed her sex discrimination complaint with the Board. This testimony ties the stoppage of the mediation process directly to Complainant's decision to "oppose any practice made a discriminatory or an unfair employment practice" by filing a discrimination complaint with the Board. C.R.S. § 24-34-402(1)(3)(IV).

An employment action may constitute retaliation if "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." *Burlington Northern & Santa Fe RR v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)(defining the scope of retaliatory actions under Title VII)(internal quotation and citation omitted). In this case, there is sufficient evidence in the record to conclude that the premature end of the mediation process was the type of action which might has dissuaded a reasonable employee from filing a claim of discrimination with the Board. Complainant had been talking to her supervisors about the need for some type of mediation process for more than a year, and Mr. Smith's grievance decision in November of 2009 was the first time that request had been implemented. Of all of Mr. Smith's responses to Complainant's grievance, the only response which offered the possibility of imminent relief to Complainant was the promise to institute a mediation process. A reasonable employee faced with the realization that, should he or she move forward with a complaint of discrimination, the only real progress toward eliminating the hostile behavior of co-workers would be eliminated in the process might well be dissuaded from filing the claim of unlawful discrimination. Under the circumstances of this case, a decision to terminate mediation meets the test for a retaliatory act under *White*.

Mr. Smith's testimony that he decided to terminate the mediation because of Complainant's filing with the Board constitutes direct evidence of a retaliatory motive. *See Thomas v. Denny's*, 111 F.3d 1506, 1512 (10th Cir, 1997)(holding that a mixed motive analysis is appropriate when a plaintiff has "presented evidence of conduct or statements by persons involved in the decision making process that may be viewed as directly reflecting the alleged retaliatory attitude")(internal quotations and citations omitted).

Under *Fye*, therefore, the next question is whether Respondent has offered sufficient evidence to show that it would have taken the same action absent the retaliatory motive.

There was no indication in the testimony that Mr. Smith would have terminated mediation effort altogether in the absence of the start of litigation before the Board. Mr. Smith did not terminate any of the other on-going efforts which were part of his response to Complainant's July 2009 grievance. Mr. Smith had promised mediation as a solution to Complainant as part of his response to her grievance, and he had assigned participation in mediation to Mr. Blackmore and Mr. Gestner as his solution for their participation in the September 9, 2009, gossip session in Mr. Valdez's cubicle. The evidence at hearing supports that, prior to Complainant's filing with the Board, Mr. Smith was committed to moving forward with mediation, and not that he had any plans to terminate the process.

Complainant, therefore, has successfully proven unlawful retaliation in Mr. Smith's decision to terminate the mediation processes under a mixed motive theory of liability.

3. *Prima Facie* case of Retaliation:

Even if Mr. Smith's statements are not considered as direct evidence of a retaliatory motive, Complainant also prevails on her retaliation claim under the test for circumstantial evidence of retaliation.

A *prima facie* case of unlawful retaliation is established when (1) an employee 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." *Pinkerton v. Colorado Dept. of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009).

In this case, Complaint's filing of her discrimination complaint with the Board is an activity protected by state law, *see* C.R.S. § 24-50-125.3, and constitutes a protected opposition to discrimination. Mr. Smith's decision not to pursue CSEAP mediation, or a similar service, deprived Complainant of the one serious attempt to resolve her interpersonal issues with Mr. Blackmore and Mr. Gestner. Its loss meets the test for a materially adverse action under *White,* 548 U.S. at 68. Additionally, as has been discussed above, the causal connection between the filing of the complaint with the Board and the decision not to pursue mediation is clear, given Mr. Smith's decision-making process.

One a *prima facie* case of discrimination is established, the next step is to evaluate whether there is a legitimate reason offered by the Respondent, and if so, to evaluate whether Complaint has demonstrated that this reason is pretext.

Pinkerton, 563 F.3d at 1064.

In this case, Mr. Smith testified that he believed that the negotiations in the litigation process before the Board would be a good substitute for the mediation process proposed by CSEAP. This explanation does not make sense. The CSEAP process was designed to bring the workgroup members together, and to talk about their individual issues with each other. The only negotiation during a Board litigation process involves the negotiation between the employee and the appointing authority over the terms necessary to settle the litigation. The Board's settlement process is in no way a substitute for the CSEAP process. Mr. Smith's explanation, therefore, is not logical or persuasive, and it supports that the reason offered by Respondent to end the CESAP mediation process was nothing more than a pretext for retaliation. *See Pinkerton*, 563 F.3d at 1065 (pretext can be showed by producing evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence and hence infer that ht employer did not act for the asserted non-discriminatory reasons").

C. Respondent did not create a hostile work environment for Complainant based upon her sex:

CADA also prohibits employers from harassing employees because of sex. "It shall be a discriminatory or unfair employment practice...[f]or an employer...to harass during the course of employment .. because of ....sex..."" C.R.S. § 24-34-402(1)(a). CADA defines "harass" to mean that the employer "create[s] a hostile work environment based upon an individual's ... sex." *Id.* The act requires an employee who believes that he or she is being harassed to file a complaint of such with the workplace. "Harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate." *Id.*

To establish the existence of a hostile work environment, a claimant must show: (1) that she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms of conditions of her employment and created an abusive working environment. *Medina v. Income Support Div.*, New Mexico, 413 F.3d 1131, 1134 (10th Cir. 2005).

In this matter, Complainant's claim that she was subjected to a hostile work environment fails because Complainant has not been able to demonstrate that Respondent failed to initiate a reasonable investigation, and that she has failed to persuasively demonstrate that the rude and hostile behavior she experienced from co-workers, particularly from Mr. Blackmore and Mr. Gestner, occurred in whole or in part because of her sex.

1. Report and Unreasonable Investigation Requirement:

CADA defines harassment so as to add two important elements that any claimant must hurdle before having a legitimate harassment claim. The statute defines harassment so that "is not an illegal act [of harassment] unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate." C.R.S. § 24-34-402(1)(a). This definition places the burden of proving additional elements upon Complainant: that of proving that she filed complaints with the appropriate persons in her organization, and that Respondent

Complainant did present sufficient evidence that she had filed two complaints alleging that she was subject to unlawful discrimination on the basis of her sex and subject to a hostile work environment. Complainant also showed that she had filed these complaints with the appropriate persons with CDLE.

The evidence also demonstrated that each of these complaints prompted an investigation by HR into Complainant's contention that she was subject to a hostile work environment. Complainant did not successfully prove, however, that these investigations were unreasonable. Given this lack of proof, Complainant's hostile work environment fails.

2. Complainant Has Not Demonstrated That The Hostility In Her Workplace Was Because Of Her Sex:

Assuming that Complainant has demonstrated that Respondent failed to initiate a reasonable investigation, the inquiry turns next to the question of whether Complainant has demonstrated by a preponderance of the evidence that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of .. employment and create an abusive working environment." *St. Croix*, 166 P.3d at 242. A plaintiff must also show, as part of this standard, that the harassment stemmed from gender animus. *Id.* at 243.

The evidence at hearing established that there was a personality conflict which erupted almost immediately between Mr. Blackmore and Mr. Gestner on one hand, and Complainant on the other. Complainant critiqued the programs being used for web services and brought in a Microsoft expert to fix the problems in Mr. Blackmore's previously assigned system, as well as with Mr. Gestner's SQL database. Mr. Blackmore, in turn, perceived Complainant as unwilling to allow him to teach her anything. The hostile behavior continued until Mr. Blackmore was questioning whether Complainant had told the truth on her application and Complainant was unwilling to recognize Mr. Blackmore and Mr. Gestner as the Senior Staff Authorities that she should be listening to and

consulting.

What is striking about this hostility, however, is that it does not require a male-female gender dynamic to exist. At first blush, the fact that there are men on one side of this issue and a lone woman on the other side suggests that gender must have played a role here. This suspicion that gender must somehow be involved is also supported by the fact that Mr. Gestner used the phrase "back-stabbing bitch" in describing Complainant in September 2009.

The history of this ongoing dispute, however, shows that Mr. Blackmore and Mr. Gestner had been willing to be abusive toward other co-workers prior to Complainant's arrival, and that they continued to be abusive once she was present. Mr. Valdez was a credible witness on this point at hearing, and his observation is supported by Ms. SaBell's conclusions after her interviews of 14 employees in this case, and Mr. Chastain's revised comments in Complainant's second performance review. Complainant's own comments in her February 17, 2009 e-mail demonstrate that she understood that she had been placed into a work group that had a history of treating co-workers badly. One event of using the word "bitch" to refer to Complainant after she had been in the workplace for more than a year does not change the essential nature of the interpersonal relationship problems within IES. The hostility experienced by Complainant has much to do with the personalities of the people involved, and with the power dynamics inherent in a hierarchy where some employees are Senior Staff Authorities and others are Staff Authorities. This type of problem, as difficult and intractable as it was for Complainant, was not shown to have been because of her sex, either in whole or in part.

Under such circumstances, Complainant's hostile work environment claim fails. *See Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10th Cir. 1994)(holding that "[i]f the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment").

D. Attorney fees are warranted in this action for a portion of the litigation.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

Complainant did not prevail on her disparate treatment claims and her hostile work environment. The personnel actions underlying those claims are not a proper grounds for an award of attorney fees because Complainant has not

shown that those personnel actions were sufficiently groundless or frivolous to warrant an award of fees.

Complainant has prevailed on her claim of retaliation in this matter relating to the failure to continue mediation once Complainant had filed her appeal to the Board. The next question, therefore, is whether Respondent's decision to terminate mediation is a permissible basis for an award of attorney fees.

In this case, Respondent had received an investigation report that supported that Complainant's co-workers were harassing her in violation of agency policy (although not on the basis of gender). Complainant's second level supervisor, Mr. Smith, had established to his satisfaction that at least some of Complainant's co-workers had been disparaging her using rather harsh language. The fact that this disparagement had been a long-standing issue for Complainant and was making Complainant's life miserable was also well known to Mr. Smith; Mr. Smith had even promised a CSEAP mediation would occur as part of his response to Complainant's grievance. For Mr. Smith to then decide that he would stop the only mechanism used to correct the situation –the mediation by CSEAP -- because the parties were then in litigation before the Board was a decision made to allow the harassment of Complainant to continue unchecked during the course of the litigation. This action constitutes the use of supervisory authority to harass or annoy Complainant. *See* Board Rule 8-38(A)(2) (defining a proper grounds for the award of attorney fees and costs to be "an action or defense in which is found that the personnel action was pursued to annoy or harass....").

Given the above findings of fact, an award of attorney fees is warranted in this matter for the attorney fees and costs made necessary to litigate the retaliation claim based upon Mr. Smith's decision to end mediation.

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant because of her sex by treating her in a disparate manner from her male co-workers;

2. Respondent did unlawfully discriminate against Complainant by retaliating against her;

3. Respondent did not unlawfully discriminate against Complainant by creating a hostile work environment;

4. Attorney fees and costs are awarded for the litigation of the retaliation issue.

ORDER

Complainant's claims of discrimination are, therefore **affirmed in part** and **denied in part**. Respondent OIT, as Complainant's current employer, is ORDERED to re-start the facilitated conversations begun by CSEAP in order to mediate the relations among the members of the former IES group. Attorney fees and costs are awarded for the litigation of the retaliation issue.

Dated this 4th day of March, 2011.

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

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of March, 2011, I electronically served true copies of the foregoing **AMENDED INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** as follows:

William S. Finger
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and in the interagency mail, to:

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Andrea C. Woods