STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2011B0063**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ARTHUR ROBINSON,
Complainant,

vs.

UNIVERSITY OF COLORADO DENVER,
Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on July 29 and August 11, 2011, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record on July 8, 2011. The record was closed on August 11, 2011, upon conclusion of the evidentiary hearing. Special Assistant Attorneys General Christopher J. Puckett and Katherine M. Goodwin represented Respondent. Respondent's advisory witnesses were Aaron Wishon, former Assistant Vice Chancellor of IT Services and Complainant's former appointing authority, and Eric Campagna, manager of the IT Services Customer Care Unit. Complainant appeared and represented himself.

MATTERS APPEALED

Complainant, a certified employee classified as an Information Technology Technician II ("IT Tech II") and employed by the University of Colorado Denver ("UCD") in the department of Information Technology Services ("Respondent" or "ITS"), appeals Respondent's decision to impose a four month disciplinary reduction in pay of $262.50 per month. Complainant asserts that the disciplinary action was imposed as a form of unlawful discrimination in violation of Title VII and the Colorado Anti-Discrimination Act ("CADA"), Complainant's First Amendment rights, and as a form of unlawful discipline under the State Employee Protection Act ("Whistleblower Act"). Complainant requests that the Board order the removal of the disciplinary action from human resources records; remove all other hearsay and unproven matters from the files; remove Complainant's immediate supervisor, Eric Campagna, and Complainant's co-worker, Yvonne Fitzpatrick, permanently; award a monetary amount of back pay calculated from 1998 at a rate comparable to the current Director of IT for the UCD Business School, Phil Smith; return Complainant to the duties that Complainant held in 2004; and award Complainant front pay, legal fees, damage awards and all other applicable relief.

ISSUES

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

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

3. Whether Respondent's action was in violation of Title VII or the Colorado Anti-Discrimination Act, Complainant's First Amendment speech rights, or the Whistleblower Act; and

4. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

1. Complainant has been employed with Respondent as an Information Technology Technician ("IT Tech") for more than 20 years. Complainant's race is African-American.

2. Prior to 2004, Complainant handled Information Technology Services (ITS) for the UCD School of Architecture and Planning at the Denver campus.

3. In the summer of 2004, Complainant was moved into the ITS Customer Care Unit at the UCD Aurora Campus. Complainant's duties in the Customer Care Unit were initially split between manning the help desk and performing desktop support. In October 2010, Complainant's duties were changed so that he was only assigned to the help desk.

4. Don Galarowicz was the Director of Operations for ITS, and a senior supervisor for Complainant once he joined the Customer Care Unit.

5. Eric Campagna was the manager of the Customer Care Unit when Complainant first transferred to the Aurora campus. Mr. Campagna has continued to be Complainant's direct supervisor from 2004 through the date of hearing.

6. Gabe Sandoval, IT Professional I, was serving as the Help Desk Lead worker for the Customer Care Unit in the fall of 2010.

October 19, 2009 Corrective Action:

7. On October 19, 2009, Mr. Campagna issued a Corrective Action to Complainant after Complainant had not successfully improved his performance levels to the point required under a previously-issued action plan. The performance issues noted in the Corrective Action included the proper use of communication protocols, such as proper notification of supervisors when sick leave was being requested, and the call-back expectations for answering pages.

8. Complainant's response to the Corrective Action included an email from Complainant on the same date in which he disagreed with the issuance of the Corrective Action by stating, "I totally disagree with our continued efforts to misrepresent my performance to our Management" and "I find your action to be a continuation of discrimination and harassment!"

9. Complainant also issued an email to his supervisors on October 22, 2009, in which he made similar accusations of unfair treatment by management and expressed his concern that management had been asking Complainant's clients for negative information to be used against Complainant.

10. At a coaching session held on November 2, 2009, between Mr. Campagna and Complainant, Mr. Campagna told Complainant that, while it was fine to explain how Complainant disagreed with a Corrective Action or other matter issued by management, it was unprofessional at best and insubordinate at worst for Complainant to make accusations of harassment and discrimination. Mr. Campagna also told Complainant that he was not

answering the questions put to him, and he suggested more professional ways to dispute information such as going to Human Resources or filing a grievance.

11. During his November 2, 2009, and at other coaching sessions, Complainant was told that he could not use certain words in his reply to, or dispute, management actions. The words which were placed off-limits were words such as "discriminatory," "disparate," and "hostile."

12. Complainant continued to voice his frustration with having management inquire as to his work and whether he was meeting various performance standards. Complainant also considered the change of his work assignment in which he only staffed the help desk to be less desirable work and another form of discrimination against him. He often avoided using the words that had been placed off-limits in his complaints, but the overall tenor of Complainant's complaints did not change.

June 8, 2010 Corrective Action:

13. Complainant received an annual evaluation on April 20, 2010. Complainant's overall evaluation was rated at level 1, which meant that he had scored below expectations overall. The rating was due to Complainant's performance for his Average Efficiency Ratio and the core competencies of accountability and communication.

14. Complainant's Average Efficiency Rating had been calculated at 77.5%, while the performance standard had been set to at least 94%. The rating was based upon a program that tracked the calls that Complainant had worked on, and Complainant had been failing to log his workstation support center hours. The lack of hours logged into the system resulted in an unacceptable percentage calculation.

15. Complainant's rating on communication had been affected by several written and verbal communications. Complainant's rating was downgraded for raising his voice to his supervisor during a meeting. Complainant was also marked down for continuing to raise his arguments that management's actions had been unfair to him, and for failing to use what management considered to be more appropriate avenues to address his complaints of harassment and discrimination. Complainant's arguments concerning discrimination were evaluated as being below standard because the arguments were viewed as inappropriate, and because Complainant would make these arguments rather than answering the issue or issues raised by his supervisors.

16. Complainant's score on accountability was lowered because Complainant had not consistently followed established work rules and had not met deadlines.

17. Mr. Galarowicz issued Complainant a Corrective Action dated June 8, 2010, based upon the performance deficiencies noted in the April 2010 annual review. The June 2010 Corrective Action included, among other requirements, that all of Complainant's communications with managers, supervisors, co-workers, and others be professional and respectful at all times, and any disagreement that he needed to express was to be conveyed in a professional manner.

Complainant's statements concerning sleeping at his desk:

18. Yvonne Fitzpatrick transferred to the Help Desk as of June 1, 2010. Her desk

was located in a cubicle which adjoined Complainant's cubicle.

19. Ms. Fitzpatrick noticed that Complainant at times appeared to be asleep at his desk. She reported her observations to Mr. Sandoval.

20. Mr. Sandoval, as lead worker, was tasked with monitoring which of the help desk workers were engaged on help desk calls, and which workers could take additional calls. Help desk personnel could log themselves in "work mode", which was time not spent directly on a help desk call but doing support work for such an issue. While a help desk employee's status was listed as "work mode", the employee would not be given additional help desk requests. Employees were expected to clear whatever matter they were working upon as efficiently as possible. When employees were logged into "work mode" for more than about 15 minutes, management would generally make an inquiry into the employee's status.

21. On or about September 27, 2010, Mr. Sandoval noticed that Complainant had been logged into "work mode" for over 15 minutes, so he walked over to Complainant's cubicle area. Mr. Sandoval found that Complainant was lying back in his chair with his headphones on and his eyes closed. Complainant was sleeping. Mr. Sandoval called out Complainant's name, but Complainant did not respond. Mr. Sandoval touched Complainant on the shoulder and said Complainant's name. Once Mr. Sandoval touched Complainant, Complainant woke up.

22. On October 8, 2010, Complainant met with Mr. Campagna and Mr. Sandoval to talk about the fact that he appeared to be asleep at his desk. During this meeting, Complainant initially admitted that he had been sleeping. He explained that his desk was located under a vent, and that the air from that vent affected him, and that he had not been aware that he was sleeping and had no explanation why he was sleeping. Complainant additionally told Mr. Campagna and Mr. Sandoval that the air from the vent irritated his eyes and that he would often close his eyes while at his desk.

23. In later discussions, however, Complainant argued either that he was not sleeping or that he couldn't recall if he was sleeping or not. In Complainant's email to Mr. Sandoval on October 8, 2010, which summarized the meeting earlier in the day, for example, Complainant reported that he didn't feel as if he had been sleeping. During the Rule 6-10 meeting which was held on November 23, 2010, Complainant took the position that he could not recall if he had been asleep or not. At hearing, Complainant denied that he had been sleeping. Complainant's later statements in which he denied sleeping in his office on or about September 27, 2010, were not truthful statements.

<u>October 11, 2010 Letter of Instruction</u>:

24. On or about June 29, 2010, Ms. Fitzpatrick engaged in a conversation with Complainant during which Complainant expressed his frustration that the management for ITS was a bunch of Jews. This comment made Ms. Fitzpatrick uncomfortable, and she reported it to Mr. Campagna.

25. Mr. Campagna reported the comment to his supervisors, including Mr. Wishon. Mr. Wishon initiated an investigation into the allegations by Human Resources.

26. During the investigation, three of Complainant's co-workers in addition to Ms. Fitzpatrick reported that they had heard Complainant say at various times that his ITS

supervisors were Jewish and add negative Jewish stereotypes, such as that Jews were tight with money, or other derogatory comments. Maureen Christensen, an IT Tech, reported that she had heard Complainant use such terms as Jews, bullies, communists, and discrimination during many discussions in the previous months. Mr. Sandoval had heard Complainant say that during the previous spring that management would not pay for his training because Jews were tight with money. Roland Gabeler, another IT Tech, reported that he had heard Complainant refer to ITS management as all Jews on multiple occasions. Several of these co-workers knew that Complainant had been frustrated and upset with his new assignments and had taken the statements as Complainant expressing his frustrations. No one had reported the statements prior to Ms. Fitzpatrick's report.

27. At the conclusion of the investigation, Mr. Campagna and Mr. Sandoval issued a Letter of Instruction to Complainant dated October 11, 2010. The Letter of Instruction was based primarily upon Ms. Fitzpatrick's complaint that Complainant had referred to his ITS managers as Jewish in a derogatory manner. The letter informed Complainant that Complainant was expected to always use professional written and verbal communication. "Discussions pertaining to the religious practices or the cultural backgrounds of any employee are not acceptable in a professional work environment."

28. The Letter of Instruction also informed Complainant that "[e]ffective immediately and on a consistent and sustained basis, you must improve your communications with managers, supervisors, co-workers, faculty, staff, etc. and your communication must be professional and respectful." The letter specifically informed Complainant that he had to refrain from discussions pertaining to an individual's religious preferences, religious backgrounds, and religious practices because such discussions could offend some and should not be discussed in the work environment. The letter warned Complainant that "if your verbal communication is not corrected on an immediate and sustained basis, additional corrective and/or disciplinary action may be administered for any deviation."

29. Even though the letter was denoted as a Letter of Instruction, the letter contained all of the usual components of a Corrective Action in that the letter was in writing, it identified specific performance deficits, and it created a set of requirements for Complainant's future performance that were to be enforced through additional corrective actions or disciplinary actions.

30. At the time that the Letter of Instruction was issued to Complainant, Complainant disputed the findings of the investigation by arguing that the investigation was based on hearsay and by untruthfully asserting that he had never made the demeaning comments ascribed to him by co-workers.

Comments to Yvonne Fitzpatrick:

31. During the morning of the November 17, 2010, Ms. Fitzpatrick spoke with her second-level supervisor, Mr. Galarowicz, about a request to change her office location away from Complainant because of the comments he had made to her.

32. Ms. Fitzpatrick decided to ask for a change in office location because, on November 16, 2010, Complainant had told her that she had a nice "booty." He told Ms. Fitzpatrick that she looked great that morning. Complainant also told Ms. Fitzpatrick that he missed her when she was not in the office because he didn't get to look over and see a good looking woman. Complainant had previously complimented her on her beautiful skin

and body structure, and had commented on her perfume.

33. When Ms. Fitzpatrick went back to the office during the day on November 17, 2010, she sent an email to Mr. Galarowicz in which she described some of what Complainant had said to her on the previous day and prior to that day. She couched her request in these terms:

> My concern is that this is an ongoing behavior that he does not understand is unacceptable in today's work place. I sincerely did not want to escalate this issue, but I am uncomfortable knowing that my cube mate is looking at me in a way that I do not find complementary or contemporary. As I mentioned to you with the training going on and next week being a [h]oliday I don't think that this is an immediate issue. If I discover otherwise I will notify you immediately.

34. Mr. Galarowicz passed the information from Ms. Fitzpatrick to Mr. Wishon, and made the arrangements to move Ms. Fitzpatrick's work desk. Mr. Wishon arranged for human resources to conduct an investigation into the circumstances.

35. At the end of the day on November 17, 2010, Complainant again told Ms. Fitzpatrick that she looked good, and he had looked Ms. Fitzpatrick up and down with a sexual look that made Ms. Fitzpatrick very uncomfortable. Ms. Fitzpatrick reported this interaction to Mr. Galarowicz in the evening of November 17, 2010.

36. Complainant was pulled from the training session that he and Ms. Fitzpatrick were attending the next day in order to be interviewed by Human Resources about the incident. Complainant was placed on administrative leave for two days following Ms. Fitzpatrick's report.

Rule 6-10 Meeting:

37. By letter dated November 18, 2010, Complainant's properly designated appointing authority, Aaron Wishon, notified Complainant of his intent to hold a Rule 6-10 meeting with Complainant on November 23, 2010. In the notice letter, Mr. Wishon informed Complainant that they would discuss "alleged unprofessional and inappropriate communications" and comments allegedly made to a co-worker on November 16 and 17, 2010 which were sexual in nature and caused the employee discomfort. Complainant was informed in the letter that he could bring a representative with him to the meeting.

38. Complainant met with Mr. Wishon on November 23, 2010. Mr. Wishon's representative at the meeting was Shelly Crowley from the UCD Human Resources office. Complainant appeared at the meeting with his father.

39. Mr. Wishon clarified at the start of the meeting that he was considering the allegations of the comments to Ms. Fitzpatrick in terms of whether Complainant's statements and actions constituted unprofessional communications.

40. During the Rule 6-10 meeting, Complainant described that he and Ms. Fitzpatrick had a conversation where she said that her husband did not like blacks and minorities, and that Ms. Fitzpatrick had fabricated the information she had provided regarding Complainant's statements to her.

41. Complainant also stated that he could not recall if he had been asleep at his desk, and he denied having provided conflicting statements regarding that incident to his supervisors during the October 8, 2010, meeting.

Disciplinary Decision:

42. By letter dated December 21, 2010, Mr. Wishon decided to discipline Complainant for three performance issues related to unprofessional statements made by Complainant: 1) for denying that he was asleep on October 8, 2010; 2) for making the derogatory references to ITS management as "Jews" which prompted the October 11, 2010 Letter of Instruction; and 3) for making inappropriate comments of a sexual nature on November 16 and 17, 2010.

43. Mr. Wishon determined that the unprofessional statements made by Complainant were sufficiently related to the unprofessional statements that were the subject of prior corrective actions to warrant the imposition of discipline. Mr. Wishon disciplined Complainant by docking his pay at a rate of $262.50 per month for four months.

44. Complainant filed a timely appeal of the disciplinary action with the Board.

DISCUSSION

I. GENERAL

A. Burden of Proof

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

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

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

II. HEARING ISSUES

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

Respondent has proven by a preponderance of the evidence that Complainant committed the acts for which he was disciplined.

Respondent's disciplinary action was based upon three allegations of unprofessional communications by Complainant: 1) that Complainant had made derogatory references to the religion he perceived that members of ITS management held; 2) that Complainant made unprofessional comments of an uncomfortably sexual nature to Ms. Fitzpatrick; and 3) that Complainant was not consistently telling the truth about when he fell asleep at his desk.

At hearing, Complainant denied making any sexual comments to Ms. Fitzpatrick, using the word "Jew" or "Jewish" with regard to ITS management in the manner described by other witnesses, and sleeping on the job or having previously admitted that he had been sleeping. Complainant's credibility, however, was severely undermined by his prior statements and by his demeanor and testimony at hearing, particularly as it conflicted with the credible testimony of his co-workers, and has been given no weight in the findings of fact. *See Sanchez v. State*, 730 P.2d 328, 333 (Colo. 1986) (finding that "the agency officer who heard the testimony" of the witnesses "is in the best position to make the credibility assessments inherent in any resolution" of contested factual issues).

Additionally, the three statements at issue are sufficiently unprofessional so as to constitute a failure to comply with the standards of efficient service or competence under Colo. Const. Art. 12, sec. 13(8), and Board Rule 6-12, and serve as proper factual grounds for the imposition of discipline.

B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law with regard to two of the three allegations.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education,* 36 P.3d 1239, 1252 (Colo. 2001).

Mr. Wishon reasonably investigated the allegations concerning Complainant's statements about sleeping, as well as his statements to Ms. Fitzpatrick. There was no indication at hearing that he had failed to give candid and honest consideration to the evidence before him or that he reached an unreasonable conclusion from that evidence. With the exception of the arguments to be examined separately below, Complainant also presented no persuasive argument that Mr. Wishon's actions with regard to these two claims violated any Board rule or procedure.

The situation, however, is not the same for the allegations that Complainant had referred to his ITS supervisors as Jews and used derogatory stereotypes. Mr. Wishon again conducted a reasonable investigation into the circumstances, gave candid and honest consideration of the evidence, and reached reasonable conclusions as to the evidence. The legal issue with his action, however, arises from the fact that Complainant was issued a corrective action in the form of a Letter of Instruction in October 2010, and then was issued disciplinary action based upon that same incident in December 2010. Board Rule 6-8, 4 CCR 801, states that "[a]n employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature." If Respondent intended to impose disciplinary action against Complainant for his statements, Board rules permit an employer to impose both corrective and disciplinary action at the same time. *See* Board Rule 6-8. What the rules do not permit is for an employer to handle an incident one way, and then re-visit the very same incident with a different form of correction or disciplinary action at a later point. Once the decision was made to issue the Letter of Instruction to Complainant in October of 2010, the question of what form of discipline or corrective action should be issued had been answered. Mr. Wishon was not free to use the same incident as a basis for discipline at a later date.

Because Mr. Wishon's inclusion of Complainant's Jewish references in the December 21, 2010, disciplinary action was contrary to Board Rule 6-8, that particular basis for discipline must be disregarded as contrary to rule.

C. Respondent's disciplinary action was not taken in violation of Title VII or CADA, the state Whistleblower Act, or Complainant's First Amendment rights.

1. CADA and Title VII Claims:

Complainant raised two separate legal arguments at hearing concerning unlawful discrimination. The bulk of Complainant's arguments involved his contention that Respondent has been discriminating against him because he has raised the issue of discrimination. This argument is a form of retaliation claim. Complainant additionally argued that the decision to discipline him was a product of unlawful discrimination, which is an argument that he was subject to disparate treatment based upon his race. Complainant bears the burden of proof on both of these unlawful discrimination claims. *See Lawley*, 36 P.3d at 1248.

Complainant also repeatedly referred to both the federal law prohibiting unlawful discrimination on the basis of race, Title VII, as well as the analogous state law, CADA. For the Board's purposes, CADA is generally interpreted using Title VII precedent as a guide. *Colo. Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 399 (Colo. 1987). As a result, the analysis for both Title VII and CADA is nearly identical and the claims may be considered together.

(a) Retaliation:

Under CADA, it is a "discriminatory or unfair employment practice ... [f]or any person...[t]o discriminate against any person because such person has opposed any practice made a discriminatory or 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]").

A *prima facie* case of retaliation under these statutes is established when (1) an employee engaged in a protected activity; (2) there is an adverse action subsequent to or contemporaneous to the adverse action; and 3) there is a causal connection between the protected activity and the employer's action. *Smith v. Bd. of Education, School Dist. Fremont RE-1*, 83 P.3d 1157, 1162 (Colo. App. 2003). An adverse action sufficient to meet this test requires that a "reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 52, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006).

In this case, there is no question that Complainant repeatedly raised his claims of discrimination to his supervisors, and that Complainant was subsequently the subject of a disciplinary action which would qualify as an adverse action under the *Burlington Northern & Santa Fe Railway* test. The question remaining is whether Complainant produced sufficient evidence demonstrating a causal connection between his claims of discrimination and the subsequent adverse action.

The evidence at hearing established that Complainant's supervisors reacted to Complainant's repeated arguments concerning discrimination by chastising Complainant for raising them in his responses to their questions. It does not appear that Complainant's supervisors referred such claims to Human Resources for processing as discrimination claims. Instead, the supervisory response was to tell Complainant that his complaints were unprofessional, to ban Complainant from using words such as discrimination or harassment, to downgrade Complainant's annual review in part for such statements, and to issue Complainant a Corrective Action at least in part based upon Complainant's arguments of discrimination. Such responses do not address the essential question raised by Complainant. Instead, such supervisory responses tend to fan the flames of discontent rather than to quench the fires. The record in this case clearly, and not surprisingly, demonstrates that the conflict between Complainant and his supervisors increased as such measures were imposed.

The issue on appeal in this case, however, involves the question of whether the discipline imposed on December 21, 2010, was a product, in whole or in part, of unlawful discrimination.[1] A close examination of the evidence reveals that the discipline imposed in this case is well-grounded in fact and, except as noted above, well-grounded in the law. The statements that were the subject of disciplinary action in this case are the types of statements that reasonably warrant a disciplinary response from Respondent under any circumstances. No causal connection between Complainant's claims of discrimination and the adverse action taken by Respondent has been demonstrated here. Complainant's claim of retaliation, therefore, has failed for lack of persuasive evidence of a causal relationship between the disciplinary action taken and his prior claims of harassment and discrimination.

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[1] Complainant filed a timely appeal of the December 21, 2010, disciplinary action asserting that the disciplinary action was a product of unlawful discrimination. The hearing in this case was limited to the evidence relevant to that disciplinary action. Evidence of the other actions that Complainant contends were also the product of unlawful discrimination, such as the changes to Complainant's work assignments in 2010 and the corrective action referencing unprofessional communications, were introduced at hearing as evidence supporting Complainant's contention that the December 21, 2010 disciplinary action constituted unlawful discrimination, and not as separate causes of action.

(b) Disparate Treatment on the Basis of Race:

Complainant also raises a more general claim of unlawful discrimination based upon his race. CADA 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 disability, race, creed, color, sex, age, national origin, or ancestry.

C.R.S. 24-34-402(1)(a). Federal law includes similar language in Title VII.

In this case, Complainant lacks direct evidence of his employer's discriminatory motivation and must prove 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). 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).

If Complainant has established a *prima facie* case of discrimination, the burden of production shifts to Respondent to articulate some legitimate, nondiscriminatory reason for the employment decision. 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, 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,* 36 P.3d at 1248; *Bodaghi,* 995 P.2d at 298. If Respondent produces evidence of a legitimate, nondiscriminatory reason for taking the action against Complainant, Complainant 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. *Big O Tires*, 940 P.2 *at* 401.

In this case, Complainant has met the first three prongs of a *prima facie* showing. Complainant is in a protected class as an African-American; he is qualified for his job; and he has suffered an adverse action in the form of a disciplinary reduction in his pay. The fourth prong, however, poses far more of a challenge for Complainant. Complainant did not produce any evidence from which it can be reasonably inferred that Complainant's race was a factor in the decision-making process. Complainant's evidence on this point was limited to argument that Mr. Wishon's prior disciplinary action taken against an employee with a Hispanic surname, Paul Rodriguez, and which was eventually overturned by the Board, was evidence that Mr. Wishon has had problems with racial minorities. This evidence was vague and speculative at best, and cannot form the basis of a *prima facie* showing of unlawful discrimination.

Assuming, however, that Complainant has been successful in presenting a *prima facie* case of discrimination, Respondent has presented persuasive evidence that it imposed discipline in this case because Complainant had made unprofessional statements requiring a response by Respondent. The imposition of discipline for such statements constitutes a legitimate, nondiscriminatory reason for taking action against Complainant.

The burden of persuasion then moves back to Complainant to show that the reasons offered by Respondent were merely a pretext, in whole or in part, for a discriminatory animus. 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).

Complainant has not been able to demonstrate that there was any pretext in the reasons offered by Respondent for assessing discipline. The credible and persuasive evidence at hearing showed that Respondent's disciplinary action was motivated by a need to respond to unprofessional statements made by Complainant. Complainant's CADA and Title VII arguments are, accordingly, rejected as unpersuasive on the facts of this appeal.

2. State Employee Protection Act Claim:

Complainant argued at hearing that the Colorado State Employee Protection Act, C.R.S. § 24-50.5-101, *et seq.*, ("Whistleblower Act") protected his actions in this case.

The Whistleblower Act protects state employees from retaliation by their appointing authorities or supervisors because of employee disclosures of information concerning state agencies' actions which are not in the public interest. C.R.S. § 24-50.5-103; *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985). Specifically, the Whistleblower Act provides that, except as noted in the Act, "no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information..." C.R.S. § 24-50.5-103(1).

(a) Disclosure of Information:

In order to trigger the protection of the Whistleblower Act, a disclosure of information has to be made; such disclosure is "the provision of evidence to any person... regarding any action,

policy, regulation, practice, or procedure, including but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." C.R.S. § 24-50.5-102(2). A disclosure of information must be of public concern to warrant protection under the Act. *Ferrel v. Colorado Dept. of Corrections*, 179 F.3d 178, 186 (Colo.App. 2007). The disclosure may be in writing or provided orally. *Ward*, 699 P.2d at 969.

In order to maintain a Whistleblower Act violation complaint, the Act also requires that the employee demonstrate the "reasonable communication to the employee's supervisor, appointing authority, or member of the general assembly has occurred in regard to the alleged violation." C.R.S. § 24-50.5-104(1). This requirement restates the requirement in C.R.S. § 24-50.5-103 that "it shall be the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." C.R.S. § 24-50.5-103(2). It is not always necessary that an employee make two separate disclosures of information. The provision of a disclosure to a supervisor under subsection 104(1) will also meet the requirement for a disclosure of information to "any person" for purposes of meeting the requirements of subsection 102(2). *See Gansert v. Colorado*, 348 F. Supp. 1215, 1226-28 (D. Colo. 2004)(holding that the good-faith notification requirement in C.R.S. § 24-50.5-103(2) would be met when the disclosed information was taken to someone with supervisory authority in the agency, and that there was no requirement that an additional disclosure be made to a non-supervisor before a "disclosure of information" had taken place, triggering the protection of the Whistleblower Act).

In this case, Complainant has objected repeatedly to his supervisors about racial discrimination and harassment in a variety of supervisory decisions and inquiries. Complainant has therefore met the statutory requirements that he provide a disclosure of information to any person, and to provide such information to his supervisor. The question of whether the supervisors of any program are operating with an unlawful discriminatory animus is also a question of public concern concerning agency actions or policies. Complainant's evidence is sufficient to meet the first element of his *prima facie* showing.

(b) Disciplinary Action:

The Whistleblower Act prohibits the imposition of a disciplinary action by a supervisor or appointing authority against an employee who has made a disclosure of information. *See* C.R.S. § 24-50-5-103(1). The term disciplinary action is defined broadly by the Act to include "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty." C.R.S. § 24-50.5-102(1).

In this case, Complainant has been disciplined through the imposition of a reduction in pay. Such an action meets the broad test for disciplinary action under the Whistleblower Act.

(c) Causal Connection:

The Whistleblower Act proscribes the imposition of discipline or penalty "on account of" an employee's disclosure of information. This requirement does not mean that the only reason for the imposition of the penalty or discipline must be retaliatory; the Act is violated even if the employer has both legitimate and retaliatory motives. *See Taylor v. Regents of the University of Colorado*, 179 P.3d 246, 249-50 (Colo. 2007)(noting that the Whistleblower Act could be

violated in cases in which the employer had dual motives in imposing the discipline or penalty); *Ward*, 699 P.2d at 966(holding that the question to be resolved in a dual motive case is whether a particular act on the part of the employee played a substantial or motivating factor in the imposition of the disciplinary action).

For the reasons previously discussed in the claim of unlawful retaliation, Complainant has not been able to prove that the complaints of discrimination that he has previously filed with his supervisors were a substantial or motivating cause of the discipline imposed in this case. Complainant's Whistleblower Act claim, therefore, fails in this case.

3. First Amendment Analysis:

Complainant has also raised First Amendment concerns in his appeal. The foundation of Complainant's argument is that he is being punished for making his claims of discrimination known to his supervisors.

The record supports that Complainant's supervisors have repeatedly objected to Complainant's arguments that he is being unfairly harassed and discriminated against. Simply objecting to an employee's speech, however, is not enough to describe a violation of an employee's First Amendment rights.

"[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). However, the interests of public employees in commenting on matters of public concern must be balanced with the employer's interests "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

In balancing these concerns, courts apply the five-part *Garcetti/Pickering* test, which requires consideration of the following inquiries:

(1) Whether the speech was made pursuant to an employee's official duties;
(2) Whether the speech was on a matter of public concern;
(3) Whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests;
(4) Whether the protected speech was a motivating factor in the adverse employment action; and
(5) Whether the defendant would have reached the same employment decision in the absence of the protected conduct.

(a) Official Duties:

As *Garcetti* recognized, "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419. "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* In reaching this balance, the court recognized the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic

discussion. *Id.*

Accordingly, the *Garcetti* court held that the controlling factor in evaluating whether the speech may be protected under the First Amendment was not whether the speech occurred in the workplace, and not whether the speech concerned the subject matter of the employee's public employment. *Id.* at 421 (citing to *Givhan v. Western Line Consold. School Dist.*, 439 U.S. 410 (1979) and *Pickering*, 391 U.S. 563 (1968) as examples of First Amendment protection for speech occurring inside the workplace and concerning the subject matter of public employment). Instead, the controlling factor is whether the speech was "made pursuant to [the employee's] duties." *Id.* "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.*

Complainant's repeated comments to his supervisors that he believed them to be harassing him were not made as a citizen commenting upon matters of public interest, but as an employee addressing the internal workings of his agency. Complainant's comments were made as a part of the process of his supervisors conducting oversight into Complainant's work. Under such circumstances, Complainant's contention that his First Amendment rights have been abridged in this case does not survive the *Garcetti* analysis because the issues were raised as part of Complainant's job duties.

(b) Respondent would have taken the same action:

Even if it is assumed that Complainant's claim can pass the *Garcetti* test, the persuasive evidence at hearing fully and persuasively demonstrated that Respondent's disciplinary action was substantially unconnected to the claims of discrimination previously filed by Complainant. The evidence at hearing, therefore, demonstrated that Respondent would have taken the same action, even if Complainant had not filed his claims of discrimination.

Complainant's argument that there has been a First Amendment violation in this case, therefore, is rejected.

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

The final question posed by this case is whether the two sustainable violations of the standards of conduct which apply to Complainant warrant the imposition of a disciplinary action in the form of a reduction in pay in the total of amount of $1,050.00.

Board Rule 6-2, 4 CCR 801, requires that a "certified employee shall be subject to corrective action before discipline unless the act is so flagrant or serious that immediate discipline is proper." In this case, Complainant had been given repeated corrective actions regarding his choice of language. He was on notice that his communication style had previously been unprofessional. Moreover, the two statements at issue in this case are obviously improper, and could warrant discipline even without a prior corrective action. It is not a violation of Board Rule 6-2 for Complainant to be disciplined rather than corrected under such circumstances for his untruthful and misleading statements concerning whether he had been asleep at his desk, and for his statements to Ms. Fitzpatrick.

The level of discipline chosen is also appropriate, under the circumstances of this case. The record demonstrated that Complainant and his supervisors had engaged in a long history of coaching meetings and discussions concerning Complainant's communication style. A

monetary form of discipline is appropriate when, as here, there appears to a need to gain an employee's attention to an on-going problem that has not been successfully resolved by lesser means. The monetary amount chosen, while certainly noticeable in Complainant's paycheck, is not an extreme amount. The level of the pay reduction is commensurate with Complainant's long history as a successful employee and with the fact that this is Complainant's first disciplinary action.

As a result, the discipline imposed by Mr. Wishon was within the range of reasonable alternatives available to him as a response to Complainant's statements concerning his sleeping on the job and his comments to Ms. Fitzpatrick.

CONCLUSIONS OF LAW

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

2. Respondent's action was not arbitrary, capricious, or contrary to rule or law, except as it pertains to Respondent's imposition of discipline for an action which had already been handled through corrective action.

3. Respondent did not violate Title VII or CADA, the Whistleblower Act, or Complainant's First Amendment rights in imposing the discipline.

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

ORDER

Respondent's action is **affirmed in part and rescinded in part.** Respondent is to remove the reference to the imposition of discipline on the basis of Complainant's derogatory comments concerning his ITS supervisors. The remainder of the disciplinary action can stand as written. Complainant's appeal is dismissed with prejudice.

Dated this 26th day
Of September, 2011 at
Denver, Colorado.

[redacted]

Denise DeForest
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 27th day of Sept., 2011, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Arthur Robinson
[redacted]

and

Christopher J. Puckett
[redacted]

[redacted]

Andrea Woods

NOTICE OF APPEAL RIGHTS
EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
1. 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.
2. 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 electronic record on appeal in this case is $5.00. 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.