STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2011G099

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SARAH ROUNDS,
Complainant,

vs.

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

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on January 3 and 4, 2013 at the State Personnel Board, 633 17th Street, Denver, Colorado. The record was closed on January 7, 2013 upon completion of the review of the exhibits for inclusion in the record, including the recording marked as Exhibit HH.[1] Sabrina L. Jensen, Assistant Attorney General, represented Respondent. Respondent's advisory witness was Brad Honl, Administrator of the Colorado State Veterans Nursing Home at Fitzsimons and Complainant's appointing authority. Complainant appeared and was represented by Mark A. Schwane, Esq.

MATTERS APPEALED

Complainant, a certified employee, appeals the issuance of a corrective action on April 19, 2011 the grounds that the corrective action was issued in retaliation for Complainant's complaints of racial discrimination. Complainant requests all compensatory and equitable awards to make her whole, including rescission of the corrective action, and award of front pay, an award of attorney fees and costs, and all equitable remedies including enjoining discriminatory and retaliatory processes, and training for supervisors and employees.

Respondent argues that the corrective action was put into effect to correct a legitimate performance issue. Respondent asks that the corrective action be upheld and the appeal be dismissed.

For the reasons presented below, the undersigned ALJ finds that Respondent's imposition of the corrective action was unlawful retaliation for complaints of racial discrimination. The April 19, 2011 corrective action is rescinded and is to be removed from Complainant's personnel file. The facility is ordered to adopt a detailed policy on the handling of discrimination complaints, and training is to be provided by the Department of Human Services or other qualified provider on the conduct of discrimination complaint investigations by facility management. No attorney fees or costs are awarded.

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[1] The record in this case includes a copy of a recording that was not played at hearing. Under such circumstances, the record is closed once such a recording is played to make certain that the copy entered into the record is playable, or after an order has been entered resolving the status of that exhibit. That check was performed by January 7, 2013, and the full record of the hearing was ready for closure at that point.

ISSUES

1. Whether Respondent's action constituted unlawful discrimination; and

2. Whether Complainant is entitled to attorney fees and costs.

FINDINGS OF FACT

Background:

1. The Colorado State Veterans Nursing Home at Fitzsimons (hereinafter "Respondent" or "facility") is a residential nursing home facility for veterans. The facility has 180 beds organized into four neighborhoods. At any given time in 2011, the facility housed about 170 veterans and their spouses.

2. Respondent has one hair salon that serves both female and male residents. Each one of the neighborhoods is assigned one day of the week for haircuts or other services. Residents may make appointments for services or, if space is available, walk in to obtain services. Services include haircuts and trims, as well as hair coloring. The salon does not use a razor in providing services.

3. Complainant is an African-American women licensed as a cosmetologist in the State of Colorado since 1975. Complainant was first hired by Respondent as a part-time stylist in the salon approximately eight years before the hearing in this matter. After less than a year as a part-time employee, Complainant was hired into a full-time position as a stylist. Complainant is a certified employee in the state personnel system.

4. Prior to the summer of 2011, Vanessa Carlson served for four years as Complainant's direct supervisor. Ms. Carlson also served as Respondent's volunteer coordinator as well as the supervisor at the salon. In mid- 2011, Ms. Carlson asked to be removed from the position of direct supervisor because she felt that she could not keep up with the management demands, and the stress was causing health problems. Beginning in the summer of 2011, Ms. Carlson became the team leader for the salon.

5. During all relevant times, Mindy Moskowitz served as Respondent's Assistant Director. Ms. Moskowitz was hired by the director, Brad Honl, as the Assistant Director in 2004. Prior to her promotion to assistant director, Ms. Moskowitz was an accountant for the facility. Ms. Moskowitz's employment background is in Medicare and Medicaid accounting.

6. Brad Honl is the Administrator of the facility and Complainant's appointing authority.

7. In 2011, Mr. Honl delegated authority to Ms. Moskowitz to administer corrective actions to Complainant. During a period of approximately two months in the summer of 2011, Ms. Moskowitz also served as Complainant's direct supervisor once Ms. Carlson became a team leader for the salon.

Incident Involving Heather Linn's Children and the June 2010 Meeting With Mr. Honl:

8. Heather Linn worked as a stylist in the salon with Complainant in early 2010. Complainant and Ms. Linn had worked together previously at another salon.

9. Prior to June of 2010, it was not uncommon for Complainant to bring one or more of Ms. Linn's children with her to the facility salon. The children would often interact with the residents who were present at the salon. There was nothing said by management about bringing the children into the salon.

10. Ms. Linn is white. Her children are of mixed race. Because Complainant was with the children while they were at the salon, people often assumed that the children were Complainant's family.

11. In approximately late May of 2011, Ms. Moskowitz visited the salon on a day that Ms. Linn was present and one of Ms. Linn's children was there. The child referred to Ms. Linn as her mother.

12. Ms. Moskowitz then told Complainant and Ms. Linn that children were not allowed to be at the facility while a parent was working.

13. Both Ms. Linn and Complainant considered the timing of Ms. Moskowitz's announcement to be indicative of a racial bias that surfaced when Ms. Moskowitz learned that Ms. Linn had mixed-race children.

14. Ms. Linn, Complainant, Ms. Carlson, Ms. Moskowitz and Mr. Honl held a meeting at the end of June 2010 to discuss the no-children policy and Ms. Linn's and Complainant's concerns that there was a racial animus involved in that decision.

15. During the meeting, Complainant and Ms. Linn implied that Ms. Moskowitz did not like children and that Mr. Honl was racist. Mr. Honl and Ms. Moskowitz took Complainant's and Ms. Linn's comments personally. Mr. Honl told Complainant and Ms. Linn that he was deeply offended by being considered to be a racist.

16. Neither Mr. Honl nor Ms. Moskowitz proposed any solution that would allow Ms. Linn's children to continue to visit the facility. Ms. Carlson, however, realized that the children could be brought to the facility as volunteers. After the meeting, Ms. Carlson met with Ms. Linn and Complainant to arrange for Ms. Linn's children to register in the volunteer program.

February 2011 MLK Celebration Comment:

17. Patti Ott is a white woman who was hired in 2010 as an infectious disease control nurse. Ms. Ott was within the chain of supervision for the Director of Nursing, MaryAnn Terry.

18. Mr. Honl and Ms. Moskowitz were aware that Ms. Ott had a sense of humor that was not shared by others on the staff. They considered that her manner was often rude, and that her jokes were inappropriate.

19. During February 2011, the facility hosted a Martin Luther King Day celebration. The celebration involved singers and other events.

20. Mike Claborn, the Clinical Nurse Liaison, had heard that Ms. Ott was expected to sing at the event. He and another co-worker, Suzanne Busboom, approached Ms. Ott outside the event and asked her whether she was going to sing for the Martin Luther King Day celebration. Ms. Ott laughed and told them, no, she wouldn't be singing. She also told them that the only song she knew to sing at such an event was Mama's Little Baby Loves Shortnin' Bread.

21. Mr. Claborn was shocked by the comment, but did not reply.

22. Mr. Claborn spoke with Complainant about Ms. Ott's statement concerning the only song she knew to sing for the Martin Luther King Day celebration.

The March 2011 Eden Alternative Training Comment By Ms. Ott and Meetings:

23. In early March of 2011, Ms. Ott and Mr. Claborn attended a training on the Eden Alternative. The program was designed to discuss ways the facility could become more of a home atmosphere for the residents.

24. Ms. Ott and Mr. Claborn are both originally from Oklahoma and are both white.

25. At one point in the training, the speaker talked about working to make minorities feel welcome and about celebrating diversity. Ms. Ott leaned over to Mr. Claborn and said something to the effect of that was not how things were done in Oklahoma Mr. Claborn was unsure of her exact words, but he believed that Ms. Ott had said to him, "that's not how we do it," or "that's not how we do them," in Oklahoma.

26. When Mr. Claborn realized what Ms. Ott had said to him, he thought it was a racial slur. Mr. Claborn told Ms. Ott that not everyone in Oklahoma felt the way she did.

27. On or about March 8, 2011, Mr. Claborn contacted his supervisor, Ms. Moskowitz, and told her about both Ms. Ott's Martin Luther King Day celebration comment and the comment from the Eden Alternative training class. Ms. Moskowitz told Mr. Claborn she would inform Ms. Ott's supervisor, Ms. Terry.

28. On or about March 28, 2011, Mr. Claborn was contacted by Ms. Terry. Ms. Terry told Mr. Claborn that she would address the issues with Ms. Ott.

29. In about the middle of April 2011, Mr. Claborn met with Ms. Moskowitz, Ms. Terry, and Mr. Honl about Ms. Ott's comments. During this meeting, Mr. Claborn told the supervisors that he did not feel that he had taken the remarks out of context and that he still felt that the remarks had been racist remarks.

30. When Mr. Claborn was interviewed in mid-April, he told Ms. Moskowitz and Mr. Honl that he had been listening to the speaker during the Eden Alternative presentation and not paying a great deal of attention to Ms. Ott. Mr. Claborn also told Ms. Moskowitz and Mr. Honl that he was not personally offended by the remarks, but the thought others at the facility may be offended by Ms. Ott's attitude.

32. Mr. Honl and Ms. Moskowitz did not take any action in response to Mr. Claborn's report after they interviewed him. They considered his statement that he had not been personally offended by the comment as an indication that no action needed to be taken.

33. On March 30, 2011, Complainant and a co-worker, Jacquelyn Anderson, met with Mr. Honl concerning Ms. Ott's statements to Mr. Claborn, and other issues related to Ms. Ott. Complainant and Ms. Anderson argued that Ms. Ott had told Mr. Claborn, "that's not how we do them in Oklahoma." Mr. Honl disagreed that this had been what Ms. Ott said, and told Ms. Anderson and Complainant repeatedly that he was going to talk with Mr. Claborn.

34. After hearing Mr. Honl repeatedly state that he needed to talk with Mr. Claborn, Complainant and Ms. Anderson asked Mr. Honl if he needed to talk to Mr. Claborn because Mr. Claborn was a white man and Mr. Honl wouldn't take the word of two black women. Mr. Honl was aware that Complainant did not trust that he would handle the issue. Mr. Honl did not tell Complainant of any plan to involve Vern Jackson of the Department of Human Services, Center for Equal Employment and Risk Management, or propose any other specific plan to address the information discussed by Complainant.

35. During the meeting, Complainant and Ms. Anderson reminded Mr. Honl that Ms. Ott was still a probationary employee and could be released from employment prior to being certified

The March 30, 2011 Petition to Have Ms. Ott Held Accountable for Discriminatory Comments and Actions:

36. On or about March 30, 2011, a group of Respondent's employees signed a petition that read:

> We the undersigned employees at the Colorado State Veterans Home at Fitzsimons are filing this grievance against Patricia Ott claiming racial discrimination, harassment, retaliation and derogatory remarks. Patti Ott needs to be held accountable for her actions in order to create a work environment that is free from discrimination, hostility, retaliation and other illegal behavior. The CDHS has a zero tolerance for all of the above allegations as stated in Chapter VI, Policy number 3.5 of the Office of Employment and Regulatory Affairs, Employment Affairs Division.

37. There were 23 signatures on the petition. The petition was originally sent to Mr. Honl's supervisor and the Office Director of the Office of State and Veterans Nursing Homes, Viki Manley.

38. Mr. Honl received a copy of the petition on or about April 5, 2011, and he directed the petition to Ms. Terry for response as Ms. Ott's supervisor. Ms. Terry issued a letter to all of the signers that could be identified. The letter informed each recipient that the petition would be denied because it "fail[ed] to cite specific examples" and was "ambiguous and lacks requested relief."

39. Complainant had signed the petition. Ms. Terry issued a letter to Complainant dated April 11, 2011, in which she informed Complainant that the petition would be denied at the Step I level. The letter provided Complainant with instructions on how to proceed to Step II of the grievance process. Complainant was informed that she needed to appeal individually to Mr. Honl, and that she should provide specific incidents with dates and any witnesses to the claim.

40. After Mr. Honl issued Complainant the April 1, 2011 warning letter, he contacted Vern Jackson, Manger of the Colorado Department of Human Services Center for Equal Employment and Risk Management. Mr. Jackson came out to the facility to interview Complainant, Mr. Claborn, and others about the specific incidents cited by Complainant and Mr. Claborn, and the petition to remove Ms. Ott. Complainant was interviewed by Mr. Jackson on April 11, 2011.

41. By letter dated April 15, 2011, Complainant sent a Step II grievance appeal to Mr. Honl. In this appeal, Complainant, recounted an incident where Ms. Ott had shaken her index finger

directly in the face of a certified nursing assistant, Cherryl McMillion, as an incident that Complainant had personally witnessed of Ms. Ott's harassing behavior. Ms. McMillion is a white woman.

42. By letter dated April 29, 2011, Mr. Honl denied Complainant relief on her grievance appeal concerning the petition. Mr. Honl found that the policies against discrimination were not violated by Ms. Ott's actions with respect to Ms. McMillion. Mr. Honl also reported to Complainant that he had previously addressed the issue with Ms. Ott's supervisor when the incident was first reported to him by Complainant in December of 2010.

The April 1, 2011 Warning Letter to Complainant and Ms. Anderson:

43. Mr. Honl addressed similar letters to both Complainant and Ms. Anderson in response to their meeting with him on March 30, 2011.

44. By letter dated April 1, 2011, Mr. Honl informed Complainant that her complaint was about Ms. Ott saying "[t]hat's not how we do them in Oklahoma," while Mr. Honl had heard from the Director of Nursing that the statement by Ms. Ott was "[t]hat's not how we do it in Oklahoma."

45. Mr. Honl informed Complainant that he understood that she was threatening to take the issue of discrimination to others outside the facility.

46. Mr. Honl objected to Complainant's willingness to call a meeting on the basis on something she had heard from another employee, and to comments made by Complainant in the march 30, 2011 meeting, as well as during prior meetings:

> I am disturbed by comments you made during the meeting on Tuesday as well as in the past. First, and foremost, I am concerned that you would set a meeting to discuss hearsay comments made by another staff member who was not present at the time of the meeting. You did not hear the comments first hand and you did not even discuss the alleged comment with Mr. Claborn. This does not allow for thoughtful investigation of complaints to be held.
>
> In response to the hearsay comment during our meeting, I assured you I would speak with the parties to verify what was actually said. You asked me "[A]re you going to talk to Mike because he is a white man?" This comment was unwarranted, unacceptable, and extremely inappropriate. The standard for any complaint investigation is the same for any staff member. Unfortunately, this is not the first time that you have made comments calling either my character or the character of others into question. Please note the following examples:
>
> In June 2010 at a meeting with you, and co-worker, and your supervisor you implied that I was a racist, although you declined to pursue a discrimination investigation by the Office of Civil Rights, when I explained your rights.
>
> ...
>
> Your remarks, comments and statement made without fact are both disturbing and inconsistent with our Code of Conduct. In the future you are expected to uphold this code and will work to keep our fine facility one of the best in the state.

It is also expected that I will not hear from you or anyone else in this facility the false statements you made during the meeting. Hearing from others outside of this meeting will confirm that you do not support the facility or the department.

47. By letter dated April 7, 2011, Complainant responded to various points in Mr. Honl's April 1, 2011 letter.

48. By the period of April of 2011, Complainant had been involved in enough heated discussions about racial discrimination issues with both Mr. Honl and Ms. Moskowitz that both Mr. Honl and Ms. Moskowitz considered Complainant to be making trouble for the facility with her complaints.

The April 14, 2011, Investigation Into Haircut Issues:

49. Complainant's general practice in the salon was to ask a resident what he or she wanted to have done at the start of an appointment, and then to provide the resident with a mirror to review the trim or the haircut at the conclusion of the appointment.

50. As a general practice at the salon, if a resident asked for a trim, then the bottom of the resident's hair would be cut so that it was even. If the resident asked for a haircut, then all of the resident's hair would be included in a cut. When a resident would ask for an all-over trim, such a request would result in a haircut.

51. Resident P.M. was known as a man who kept his hair meticulously styled, and was usually sharply dressed. He was also known to struggle with some health issues that meant he had good days and bad days.

52. Resident P.M. had been to the salon for a trim on March 31, 2011. The trim was completed by Complainant. P.M. then returned to the salon on April 12, 2011, and had a haircut performed by Complainant.

53. During facility rounds on or about April 14, 2011, Resident P.M. complained to Ms. Moskowitz that Complainant has cut the sides of his hair too short to comb the sides into place as he wished to do.

54. When Ms. Moskowitz learned of the complaint, she instructed Ms. Carlson to interview Resident P.M. Ms. Carlson conducted the interview on the same date. Ms. Carlson completed a Complaint/Concern/Compliment Report form including the details of her interview with Resident P.M. Ms. Carlson sent the completed form to Ms. Moskowitz.

55. Resident P.M. told Ms. Carlson that, at his last visit to the salon, he had told Complainant that he wanted a little off the sides and a little off of the top. P.M. summarized the situation by telling Ms. Carlson that Complainant had basically said that she would do what she wanted, and that she cut the sides too short to allow the hair to be combed into place.

56. Resident P.M. also complained to Ms. Carlson that, at the time before his latest visit to the salon, he had told Complainant that he had wanted a trim and Complainant did not do anything to the sides or the top at all. Resident P.M. also told Ms. Carlson that, during the prior visit, he had asked for a trim all over, and that Complainant had done nothing to the sides or the back.

57. Ms. Carlson also spoke with Complainant on the same date concerning Resident P.M.'s complainant. Complainant told Ms. Carlson that Resident P.M. had come into the salon on March 31, 2011, for a trim, and that Complainant had provided him with a trim. Complainant also told Ms. Carlson that P.M. had returned to the salon on April 10 or 11, and had asked for a haircut. Complainant reported that she had told P.M. that he could not get his hair cut every ten days because she had so many residents to serve. Complainant reported that she had provided Resident P.M. with a haircut and told him that she would see him in a month.

58. The logs kept in the salon reflect that Resident P.M. received a trim from Complainant on March 31, 2011, and a haircut from Complainant on April 12, 2011.

59. On or about April 14, 2011, Ms. Carlson sent Ms. Moskowitz an email that included a summary of Complainant's response to the issue raised by Resident P.M.

60. When Ms. Moskowitz and Ms. Carlson interviewed Resident P.M., neither woman noted any apparent flaw in P.M.'s haircut. Resident P.M.'s haircut looked like the other haircuts he had received from Complainant and the salon.

61. On April 14, 2011, Ms. Moskowitz also interviewed Resident R.B. R.B. complained that the salon had provided him with the worst haircut he had had in 75 years, and that he now had an aide cut his hair. R.B. also complained that, during the haircut, the salon had used a razor on his hair rather than scissors.

62. Resident R.B. did not tell Ms. Moskowitz that the haircut to which he was referring had occurred months, if not years, prior to the interview. Resident R.B.'s wheelchair was too large to enter the salon. Complainant had cut Resident R.B.'s hair once while he was out in the hallway. After that, R.B.'s aide would generally borrow the clippers and provide R.B. with a trim while R.B. was in his room.

The April 19, 2011 Corrective Action:

63. By letter dated April 19, 2011, Ms. Moskowitz issued a corrective action to Complainant. Mr. Honl had delegated the authority to Ms. Moskowitz to issue a corrective action to Complainant. Mr. Honl knew of the corrective action before it was issued, but he had not instructed Ms. Moskowitz to issue it.

64. In the corrective action, Ms. Moskowitz determined that Resident P.M. had asked Complainant for a trim, and that Complainant had provided P.M. with a haircut. Ms. Moskowitz also based her decision to issue the corrective action on the allegation that P.M. had reported that this was not the first time that Complainant had ignored his request.

65. Ms. Moskowitz also found that Resident R.B. had asked Complainant for a trim, and that Complainant had given him a whole head cut using the razor and not scissors.

66. Ms. Moskowitz considered the issue of haircuts to implicate the federal performance standards that apply to the facility, known informally as "F Tags." In particular, Ms. Moskowitz cited to F Tag 241, Dignity, which requires that "the facility must promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality." One of the specific examples provided in the guidance for F Tag 241 is that the activities are to include, "[g]rooming residents as they wish to be groomed (e.g., hair combed and styled, beards shaved / trimmed, nails clean and clipped.)"

67. Ms. Moskowitz concluded in the corrective action that, "[b]y ignoring resident requests during appointment at the barbershop, Sarah Rounds has violated F Tag 241, Dignity."

68. Ms. Moskowitz required Complainant to write a letter of apology to P.M., be tested on her knowledge of F Tag 241, and was required to ask residents what type of service they wanted before proceeding with hair care or any other type of service in the salon.

69. Ms. Moskowitz did not interview Complainant before issuing the corrective action.

70. The April 19, 2011 corrective action was the only corrective action issued by Ms. Moskowitz concerning the procedure used for a haircut. It was also the only corrective action that Ms. Carlson had knowledge of concerning a haircut.

Complainant's Grievance of the Corrective Action:

Step I -

71. Complainant filed a grievance concerning the issuance of the April 19, 2011 corrective action. Step I was completed with Ms. Moskowitz during a meeting on April 28, 2011.

72. When Ms. Moskowitz received notice of Complainant's grievance of the corrective action, Ms. Moskowitz decided to locate other complaints concerning salon services. Ms. Moskowitz spoke with some of the facility social workers and asked them to tell her the names of residents who had complained about salon services.

73. As a result of her inquiry, Ms. Moskowitz identified three additional residents who had previously complained of a haircut provided by Complainant. Ms. Moskowitz included these allegations as evidence that supported her conclusion that Complainant was not providing the services as requested by residents.

74. Ms. Moskowitz attempted to interview Resident R.B. She found however, that Resident R.B. was in ill health and was confused. Ms. Moskowitz could not confirm that Complainant had ever cut his hair. Ms. Moskowitz dropped the allegation concerning Resident R.B.

75. By letter dated May 4, 2011, Ms. Moskowitz denied Complainant's grievance and upheld the issuance of the corrective action based upon Complainant's interaction with Resident P.M. Ms. Moskowitz offered to remove the corrective action from Complainant's file if there were no further dignity issues arising in the next year.

Step II -

76. By letter dated May 9, 2011, Complainant appealed her grievance to the Step II level. Complainant objected, in part, to the corrective action on the grounds that it was "part of a retaliation and punishment for my being part of a larger community of staff using process to voice a concern about unprofessional treatment of staff" by Ms. Ott. Complainant also objected to Ms. Moskowitz's determination that there was no industry standard for the timing of haircuts, and she objected to being held to a standard that was not a written standard.

77. By letter dated June 1, 2011, Mr. Honl responded to Complainant's Step II grievance request.

78. Mr. Honl rejected Complainant's argument that the corrective action was in retaliation for the March 30, 2011 petition concerning Ms. Ott. He noted that the petition concerning Ms. Ott had been handled by Ms. Terry and by him, and that Ms. Moskowitz was not involved in either step of processing that grievance. He also noted that none of the other parties involved in the grievance received a corrective action other than Complainant.

79. Mr. Honl rejected Complainant's argument that it was an industry standard to allow for about six to eight weeks between haircuts. Mr. Honl determined from his own internet research that there was no specific standard for time between haircuts. He pointed out to Complainant that she had stated that the facility allowed for about four weeks between haircuts. He also determined that it was appropriate for residents to drop by the salon to have their hair taken care of, and that Complainant had been sufficiently instructed on the need to provide walk-in customers with that service.

80. Mr. Honl acknowledged that that the haircut the Complainant had provided to Resident P.M. appeared to be a satisfactory haircut. Mr. Honl determined, however, that the fact that the resident complained about the haircut was the important point. Mr. Honl found that a failure to provide a resident with the haircut as he or she desired implicated federal tag F-241, and could have an impact on a related federal tag, F-312 (Activities of Daily Living).

81. Mr. Honl's decision on the grievance was that the corrective action of April 19, 2011 was appropriate because Complainant's "failure to assure that residents receiving hair care services form the salon maintained their personal preferences is a violation of the resident's dignity."

82. Mr. Honl did not meet with Complainant prior to issuing his Step II grievance decision.

83. Complainant filed a timely petition for hearing with the Board asking for review of Mr. Honl's step II decision on Complainant's grievance of the corrective action, as well as of other issues related to Complainant's claims of racial harassment.

August 2011 Meeting Called By Mr. Honl:

84. In August of 2011, Ms. Anderson reported that she had been outside of Ms. Ott's office when Ms. Ott came back to her office in an angry manner. Ms. Anderson reported that she saw Ms. Terry go into Ms. Ott's office and heard Ms. Ott refer to "those coons" in an angry manner. Ms. Anderson also reported that she heard Ms. Terry tell Ms. Ott that she needed to stop saying things like that. Ms. Terry came out of Ms. Ott's office and apologized to Ms. Anderson for Ms. Ott being so angry.

85. Once Mr. Honl heard about Ms. Anderson's report, he believed that that the appropriate next step would be to call everyone together into a meeting. Complainant, Ms. Anderson, Mr. Honl, Ms. Ott, Ms. Carlson, and Ms. Terry met to discuss Ms. Anderson's information. The meeting became tense, hostile, and angry after Ms. Anderson reported her allegations and Ms. Ott and Ms. Terry denied that the word "coons" had been said by Ms. Ott or that the other details reported by Ms. Anderson were correct.

November 2011 Incident with Ms. Ott:

86. In November of 2011, Ms. Terry, Ms. Ott and two other employees were in a meeting.

87. During the meeting, Ms. Ott slapped another employee hard in the face as a joke. Ms. Terry sent Ms. Ott home and reported the incident. Mr. Honl did not consider Ms. Ott's action to be a violation of Respondent's workplace violence policy because there was no intent to harm. Ms. Ott, however, did not return to the facility after this incident. She resigned her position after taking medical leave for a period of time.

88. By early 2012, Respondent had hired Mountain States Employer's Council to perform an investigation on the discrimination issues and Ms. Ott's conduct. At the conclusion of this investigation, Mr. Honl learned that staff members had accused Ms. Ott of a variety of acts of misconduct, including inappropriately touching staff members. Prior to the investigation, Mr. Honl had not been aware of many of these allegations.

Board Hearing Order:

89. By Order of July 18, 2012, the Board granted Complainant a hearing on the issue of retaliation and denied Complainant's petition for hearing on the issue of racial harassment.

DISCUSSION

I. GENERAL

A. Burden of Proof

In a case in which an employee presents non-disciplinary claims, the employee will bear the burden of proof in a Board hearing. *See e.g., Renteria v. Dept. Of Personnel*, 811 P.2d 797, 803 (Colo. 1991)(holding that an employee who was attempting to reverse a reallocation decision was the proponent of the order under C.R.S. § 24-4-105(7) and bore the burden of proof). *Compare Department of Institutions v. Kinchen*, 886 P.2d 700, 706 (Colo. 1994)(holding that, when a certified state employee is "dismissed, suspended, or otherwise disciplined" then the constitutional protections for such employees require that the state be considered to bear the burden of proof as the "proponent of the order" under C.R.S. § 24-4-105(7)).

The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Unlawful Discrimination Based Upon Retaliation:

Complainant contends that the corrective action was issued in retaliation for her multiple complaints of racial discrimination, in violation of the Colorado Anti-Discrimination Act (CADA), C.R.S. § 24-34-402 and Title VII, 42 U.S.C. § 2000e-3(a).

In addition to prohibiting acts of unlawful discrimination, CADA also prohibits retaliation against an employee who has opposed a discriminatory practice:

> It shall be a discriminatory or unfair employment practice...[f]or any person, whether or not an employer...or the employees... thereof...[t]o discriminate against any person because such persona has opposed any practice made a discriminatory or unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has testified, assisted, or

participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article.

C.R.S. § 24-34-402(1)(e)(IV).

CADA's inclusion of an anti-retaliation provision substantially tracks the federal analogue statute, Title VII. *Compare* 42 U.S.C. §2000e-3(a)(making it unlawful "for an employer to discrimination against any of his employees ... because he has opposed any practice made unlawful employment practice by [Title VII]"). Tenth Circuit precedent for retaliation claims under Title VII, accordingly, is also a persuasive guide to the analysis of a CADA retaliation claim.

(1) **Methods for proving retaliation**:

A claimant bringing a retaliation claim "must establish that retaliation played a part in the employment decision and may choose to satisfy this burden in two ways." *Fye v. Okla. Corp. Comm'n,* 516 F.3d 1217, 1224-25 (10th Cir. 2008). These two methods are referred to as a "mixed-motive" theory, or the *McDonnell Douglas* / pretext evidence theory.

Although the "mixed-motive" approach and the *McDonnell Douglas* / pretext approach represent distinct methods of proving retaliation, a plaintiff may allege that her evidence demonstrates retaliation under either or both frameworks. *See Fye,* 516 F.3d at 1225-26. Additionally, a claimant need not characterize her case as a mixed motive or a pretext case from the outset. *Fye*, 516 F.3d at 1225. "At some point, however, the plaintiff must persuade the factfinder either that the evidence shows retaliation was a 'motivating factor' (in which case the evidence is analyzed within the mixed-motive framework) or that it shows the employer's reason is unworthy of belief (in which case it is analyzed within the pretext framework)." *Id.* at 1225.

(a) Mixed-Motive Theory:

Under the "mixed-motive" approach, "the [claimant] may directly show that retaliatory animus played a 'motivating part' in the employment decision." *Fye*, 516 F.3d at 1225.[2] A mixed motive case exists "where the evidence is sufficient to allow a trier [of fact] to find both forbidden and permissible motives." *Medlock v. Ortho Biotech*, Inc., 164 F.3d 545, 553 (10th Cir. 1999). "A plaintiff will be entitled to the burden-shifting analysis set out in Price Waterhouse upon presenting evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged retaliatory attitude." *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997)(internal citations and quotation omitted)

If the plaintiff can prove that retaliatory animus was a motivating factor in the challenged personnel action, the burden shifts to the employer to demonstrate that it would have taken the same action irrespective of the retaliatory motive. *Id.* at 1225. *See also Price Waterhouse v, Hopkins*, 490 U.S. 228, 244-45, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)(holding that "once a plaintiff... shows that [an improper motive] played a motivating part in an employment decision,

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[2] The Tenth Circuit has clarified that the reference to a mixed-motive theory as a "direct method" of proving retaliation is not intended to limit the evidence to only direct evidence. *See Fye*, 516 F.3d at 1226 ("[W]e emphasize that... we do not require 'direct' evidence in its sense as antonym of circumstantial"). *See also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99, 23 S.Ct. 2148, 156 L.Ed.2d 84 (2003)(noting that Title VII is silent "with respect to the type of evidence required in mixed-motive cases" and that a plaintiff may use either direct or circumstantial evidence).

the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the improper motive] to play such a role").

If the defense does not carry its burden, the claimant prevails. *Medlock*, 164 F.3d at 550-51(holding that the employer bears the burden of showing that the same action would be taken by a preponderance of the evidence). *See also Price Waterhouse*, 490 U.S. at 248 (holding that 'if an employer allows [an improper motive] to affect its decisionmaking process, then it must carry the burden of justifying its ultimate decision").

(b) *McDonnell Douglas* / Pretext Theory:

If a claimant cannot directly establish that retaliation played a motivating part in the employment decision, she may instead rely on the three-part framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), to prove retaliation indirectly. *Fye,* 516 F.3d at 1225 and 1227.

Under the *McDonnell Douglas* approach, the plaintiff must first make out a *prima facie* case of retaliation by showing "(1) that [s]he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Somoza v. Univ. of Denver,* 513 F.3d 1206, 1212 (10th Cir.2008) (internal quotation marks omitted). A *prima facie* showing is not intended to be an onerous or ritualistic task for a claimant. *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1470 (10th Cir. 1992). Establishment of a *prima facie* case creates a presumption of unlawful discrimination by the employer. *Kenworthy*, 979 F.2d at 1469.

If the claimant establishes a *prima facie* case of retaliation, the employer must offer a legitimate, non-retaliatory reason for its decision. *Somoza*, 513 F.3d at 1211.

Once the employer produces its reason, the employee must be given a full and fair opportunity to demonstrate that the employer's reason is merely a pretext for retaliation. *Id.* To establish pretext, the claimant must demonstrate that the defendant's "proffered non-discriminatory reason is unworthy of belief." *Randal v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). A claimant may meet this standard by producing evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action" to warrant a finding that the proffered reasons are unworthy of credence. *Fye*, 516 F.3d at 1228.

(2) **Complainant's Mixed Motive Evidence of Retaliation**:

Complainant has successfully shown that there is direct evidence of a retaliatory motive in operation in this matter.

First, there was the explicit reference to Complainant's discrimination complaints concerning Patti Ott being considered to be violation of departmental policies, and Mr. Honl's reference to the complaints by Complainant and Ms. Anderson as being "both disturbing and inconsistent with our Code of Conduct." These instructions capture Mr. Honl's understanding of Complainant's willingness to raise claims of unlawful discrimination as a significant problem with Complainant's performance in the weeks immediately preceding the issuance of the April 19, 2011 corrective action.

Second, the evidence at hearing firmly established that both Ms. Moskowitz and Mr. Honl viewed Complainant as personally offensive in her claims and as making trouble for them and the facility by continuing to raise discrimination issues. This impression was in effect during the period that the April 19, 2011 corrective action was issued.

Finally, there was the very subjective and subtle nature of the primary articulated reason for issuing the corrective action: that Resident P.M. had been upset that his hair was trimmed too short on the sides to comb into place, although neither Ms. Carlson nor Ms. Moskowitz saw anything odd or unusual about the haircut when they visited with Resident P.M.[3] A dispute over whether hair has been cut short enough to constitute a potential disciplinary issue, or whether the resident's subjective feelings about the length of his hair may be affected more by his health and mood issues, was not something that Ms. Moskowitz took into account in deciding to pursue this issue. Moreover, Ms. Moskowitz was not able to persuasively explain at hearing why she had fully accepted Resident P.M's statement that he has asked for a trim and been given haircut when the salon log and Complainant provided evidence that Resident P.M. had asked for, and received, a haircut. Additionally, in the statement that Resident P.M. provided to Ms. Carlson, he said that he had wanted a little off the sides and off the top. Such a request would not be described as a request for a trim but as a request for a haircut. Ms. Moskowitz, however, did not resolve these fundamental factual issues in her decision to move forward with the April 19, 2011 corrective action. This type of management reaction to such a subjective and ambiguous issue provides additional circumstantial evidence that there was a retaliatory motive in play in this case and not just a concern for resident dignity.

Complainant, therefore, has directly established that the April 19, 2011 corrective action was issued to her, at least in part, as a reaction to her prior claims of unlawful discrimination. Complainant has successfully demonstrated that the issuance of the April 19, 2011 corrective action was unlawful retaliation, in violation of CADA and Title VII.

The only remaining question, therefore, is whether Respondent has proven by a preponderance of the evidence that its decision would be the same even if the retaliatory motive was not present. The evidence at hearing, however, demonstrated that the issuance of a corrective action for a dignity F Tag violation was not well-founded in fact, and was an unusual, if not unprecedented, response to a resident complaint over whether the length of the resident's hair on the side was cut too short to be brushed back. Respondent has not proven by a preponderance of the evidence that the April 19, 2011 corrective action would have been issued under these circumstances even if Complainant had not also been embroiled in informal and formal complaints about unlawful discrimination.

(3) **Complainant's Pretext Evidence of Retaliation**:

Complainant also has the option of proving her retaliation claim using the *McDonald Douglas* / pretext theory of retaliation.

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[3] At hearing, Ms. Moskowitz also testified about her concern that Complainant was not properly asking Resident P.M. for his approval at the conclusion of the haircut. This explanation was neither the focus of the corrective action nor something investigated by Ms. Moskowitz at the time of the issuance of the corrective action. The testimony appears to be a post-hoc rationalization of the issue, and not an issue contemplated at the time the corrective action was issued. For that reason, this testimony has not been incorporated into findings of fact in this case.

(a) Complainant's *prima facie* showing of retaliation -

1. Protected Opposition –

Protected opposition to discriminatory practices by an employee "can range from filing formal charges to voicing informal complaints to superiors." *Fye*, 516 F.3d at 1228.

The record of this case demonstrates that Complainant was involved in at least two complaints involving unlawful discrimination at the time that the corrective action was issued, and had been involved in a similar discussion with Mr. Honl and Ms. Moskowitz in the previous year.

The record in this case demonstrates that Respondent did not believe that Complainant was making legitimate claims of discrimination because Complainant was often reporting only what others had said, and because the incidents that she was complaining about did not appear to Mr. Honl or Ms. Moskowitz to implicate racial discrimination.

For a protected opposition to exist, however, it is not necessary to show that Complainant's interpretation of events was observed only first-hand, was factually correct, or that the incident constituted actual racial discrimination. It is also not required that the complaint be filed through the formal channels for discrimination claims. Statutory protection extends to "those ... who informally voice complaints to their superiors or who use them employer's internal grievance procedures. Furthermore, a plaintiff does not have to prove the validity of the grievance she was allegedly punished for lodging; opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated." *Robbins v. Jefferson County School District R-1*, 186 F.3d 1253, 1258 (1999)(internal quotes and citations omitted). *See also Love v. Re/Max of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984)). It is also important to remember that Title VII and CADA protect against the creation of hostile work environments, in addition to making specific discriminatory acts unlawful. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)(holding that conduct which would be reasonably perceived, and is perceived, as hostile or abusive violates Title VII protections).

The question, then, is whether Complainant's opposition to Ms. Ott's referencing "Mama's Little Baby Loves Shortnin' Bread" as her contribution to the Martin Luther King Day celebration was a good faith opposition to discrimination. Mr. Honl testified that he did not believe that the song had any racial implications because he knew that the song was on a CD of children's songs. Mr. Honl's impression, however, is only one possible interpretation of the song. The popular history of the song also includes that it has been associated as a plantation song. The specific context of Ms. Ott's own connection of that song to a Martin Luther King Day celebration brings the history of the song as a plantation song to the forefront. Mr. Claborn's, Ms. Anderson's, and Complainant's alarm that this reference was at least racially offensive is a reasonable interpretation of the situation. Complainant's complaint to Mr. Honl that Ms. Ott was saying racially offensive and hostile things, based in part on this incident, was a reasonable and good faith objection to this type of behavior.

Complainant also objected to Ms. Ott's comment to Mr. Claborn during the Eden Alternative. Mr. Honl believed that the statement made during the presentation was, "that isn't how we do it in Oklahoma." Complainant believed that the statement was, "that isn't how we do them in Oklahoma." The difference between the two statements does not change the outcome

of the analysis of whether a complaint about such a statement is protected opposition. Mr. Claborn was not sure of the precise wording of the statement, but it would not change the outcome even if Complainant made a good faith mistake about what was said. *See Love*, 738 F.2d at 385. Even assuming that the statement was as Mr. Honl believed it to be, however, the statement and the context of the statement may well represent a disagreement that minorities should be made to feel welcome. Mr. Claborn's first impression of the statement was that it was racist. Complainant's concern that the statement represented a potentially racially offensive position was also not unreasonable, and constituted a good faith opposition to that statement and the attitude that it may have represented.

This case, therefore, presents multiple incidents where Complainant used both formal and informal methods to raise issues of potential racial harassment or discrimination with management. These issues were raised in good faith by Complainant, and constituted protected opposition by Complainant.

2. Adverse Action -

The requirement for a showing of a materially adverse action means that the claimant must demonstrate that "a reasonable employee would have found the challenge action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Somoza*, 513 F.3d at 1212 (quoting *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 52, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345 (2006)). The test is an objective one. *Id.*

In this case, the challenged action is the issuance of a corrective action to Complainant. Corrective actions are the first formal step toward the imposition of discipline. *See* Board Rule 6-2, 4 CCR 801 (requiring that, under most circumstances, a corrective action is to be issued to an employee prior to the imposition of discipline). The effect of issuing a corrective action to Complainant is to put her on notice that she may be subject to discipline in the future should another resident complain about a highly subjective aspect concerning an otherwise good-looking haircut. An objectively reasonable employee would be likely to be silenced by the issuance of such a corrective action. Complainant has, accordingly, shown that she has met the second element of a *prima facie* case of retaliation.

3. Causal Connection –

Under the proper conditions, the temporal proximity between the protected opposition and the adverse action may establish the causation element of a *prima facie* case of retaliation. "[U]nless the [adverse action] is very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond mere temporal proximity to establish causation... A six-week period between protected activity and adverse action may be sufficient, standing alone, to show causation, but a three-month period, is insufficient." *Meiners v. University of Kansas*, 359 F.3d 1222, 1231 (10th Cir. 2004). *See also Marx v. Schunck Mkts., Inc.*, 76 F.3d 324, 329 (10th Cir. 1996)(holding that the close temporal proximity requirement should not be read too restrictively where a pattern of discrimination begins soon after protected activity and only culminates later in actual discharge).

Complainant has also been able to demonstrate a causal connection between her complaints of unlawful discrimination and the April 19, 2011 corrective action. In the month prior to the issuance of the corrective action, Complainant had met with Mr. Honl concerning an allegation of discrimination, and had received a warning letter from Mr. Honl about making what

he considered to be false statements concerning discrimination and warning Complainant not to continue to talk about discrimination issues with others. Complainant had also been a signatory on a formal petition filed with Respondent addressing the issue of racial discrimination and Ms. Ott within three weeks of receiving a corrective action over a haircut. The temporal proximity of the discrimination complaints and the corrective action is sufficient to demonstrate the third and final element of a *prima facie* case of retaliation.

(b) Respondent's legitimate, non-retaliatory reason for its decision –

At hearing, Ms. Moskowitz provided testimony that the April 19, 2011 corrective action was issued because Complainant's haircut for Resident P.M. represented a dignity issue for the facility residents and that the dignity F Tab was a significant issue for the facility.

Such testimony was sufficient to present Respondent's statement of a legitimate, non-discriminatory reason for the decision.

(c) Complainant's showing of pretext –

Complainant has presented evidence that the corrective action was issued not because of a denial of service by Complainant, or even a visually bad haircut by Complainant. The issue with Resident P.M.'s haircut was that his hair was cut too short on the side to be combed back into place without the use of some hair product, and he was not happy about that fact. Complainant argues that the nature of the alleged problem itself supports that the corrective action was merely a pretext to take a punitive action toward an employee that Respondent believed to be creating trouble through her complaints of unlawful discrimination.

Complainant also produced evidence that Ms. Moskowitz accepted statements from residents without checking or investigating whether those statements were, in fact, true, such as the complaint by Resident R.B., who had not been at the salon for some time and whose complaint that a razor had been used on his hair could not have been correct. The evidence also supported that Ms. Moskowitz misconstrued what had been reported to her as Resident P.M.'s complaint; while the corrective action says that P.M. asked for a trim, Ms. Carlson's report states that P.M. told Complainant he wanted a little off the top and a little off the sides, which would not be a trim but a haircut. It would also appear to be consistent with what Complainant did with P.M.'s hair. Complainant also produced evidence that, when the corrective action was grieved, one of Ms. Moskowitz's reactions to that challenge was to go to the facility social workers to gather more information on other potential complaints about Complainant's haircuts because the social workers generally knew which of the residents were happy and which were unhappy. Such an unusual process to gather information suggests that Ms. Moskowitz was actively searching for reasons to fault Complainant's performance.

Complainant produced evidence that Ms. Moskowitz considered Complainant to be a "pot stirrer" because of Complainant's willingness to complain about racial discrimination, and that both Mr. Honl and Ms. Moskowitz had been personally offended by Complainant's statements to them.

Complainant additionally produced evidence that the issuance of a corrective action for such a problem was without known precedent.

All of this evidence persuasively supports that Respondent was not attempting to avoid an F Tag violation with the issuance of a corrective action but was instead attempting to exert

pressure on an employee who was viewed as troublesome because she had been complaining of racial discrimination.

As a result, Complainant has also been successful in showing that the haircut as a dignity issue was asserted as a pretext for retaliation. Complainant has, therefore, carried her burden of proof in demonstrating that, using the *McDonnell Douglas* / pretext framework, the April 19, 2011 corrective action was issued in retaliation for Complainant's prior acts of protected opposition to acts that Complainant believed were acts of unlawful discrimination.

(4) **Remedy**:

The Board's general authority allows it to award equitable remedies. *See Department of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984)(holding that, "[a]ny remedy fashioned ... should equal, to the extent practicable, the wrong actually sustained" by the employee).

Board Rule 9-6, 4 CCR 801, also provides that:

> If the Board finds that discrimination has occurred, it may order: cease and desist orders; hiring, reinstatement, or upgrading of employees, with or without back pay and compensation; referral of applicants for employment; admission or continuation of enrollment in on-the-job training; posting of notices and issuing orders as to the manner of compliance and corrective and/or disciplinary actions, as required; and, altering terms and conditions of employment as appropriate.

In construing this type of grant of remedial authority, "it is only to the extent that the board's remedial order may be justified by the violations found to have occurred that it may be approved." *Cunningham v. State Department of Highways*, 823 P.2d 1377, 1383 (Colo.App. 1991).

In this case, Complainant has requested a wide range of remedies, including all compensatory and equitable awards. Specifically, Complainant asks for rescission of the corrective action, injunctive relief, training for supervisors, and front pay.

The removal of the April 19, 2011 corrective action from Complainant's personnel file is the most obvious remedy for the circumstances of this case.

The need for at least some injunctive relief and training are also implicated by the procedures that were used in this case. The evidence in this case established persuasively that Mr. Honl and Ms. Moskowitz's background and experiences did not prepare them to effectively handle divisive allegations of staff racism or the creation of a racially hostile environment.

The inexperience of management was visible at several points in this process. At hearing, for example, Mr. Honl explained that he would need to talk with Mr. Clamore about what Mr. Clamore had heard Ms. Ott say at the Eden Alternative training session, rather than simply accept the second-hand versions offered by Complainant and Ms. Anderson. Mr. Honl explained that this was because Mr. Claymore was the first-hand witness. Nothing in the testimony, however, persuasively established that Mr. Honl ever had, or explained, an investigative plan to Complainant and Ms. Anderson during the meeting. In the absence of such a plan or explanation, it is not surprising that Complainant and Ms. Anderson would interpret Mr. Honl's statement to indicate that he was going to do nothing about what two black women told him unless a white man confirmed it.

Mr. Honl's plan to pull all of the witnesses together in a meeting concerning whether Ms. Ott had used the term "coons" in front of Ms. Terry constituted another example of an inexperienced management reaction to information suggesting a racially inappropriate action by other staff. Rather than investigate the matter immediately while the information was relatively fresh, Mr. Honl held a meeting with all of the potential witnesses that quickly, and not surprisingly, evolved into nothing more than a series of hostile accusations.

A requirement for a clear investigation policy concerning how discrimination complaints are to be handled, as well as detailed training on how to conduct those investigations at the facility, appears to be well-warranted by the facts of this case.

An award of front pay, however, constitutes a different form of remedy. Front pay is an award of future wages, and it is a form of equitable relief potentially available to discrimination claimants. *Pitre v. Western Electric Co., Inc.*, 843 F.2d 1262 (10th Cir 1988)(holding that front pay "[i]s intended to compensate victims of discrimination for the continuing future effects of discrimination until the victim can be made whole"). *See also Medlock*, 164 F.3d at 556 (holding that front pay is an equitable remedy under a section 1981 claim, and not a form of compensatory damages). Front pay, however, is an appropriate remedy in lieu of reinstatement. *See Bruno v. Western Electric Co.*, 829 F.2d 957, 966 (10th Cir. 1987)(holding that front pay is merely a substitute for reinstatement when reinstatement is not feasible). In this case, Complainant's employment was not affected by the corrective action, and she was still employed by Respondent at the time of hearing. Front pay is not an available equitable award in this case.

While Complainant also presented testimony at hearing that she had recently gone on short-term disability, she did not present testimony that persuasively established that she had been economically harmed by the issuance of the April 19, 2011 corrective action. No other economic awards are justified on such a record.

B. An award of attorney fees and costs is not warranted.

Attorney fees are warranted in a personnel action has been 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 who requests the award bears the burden of proof. Board Rule 8-38(B)(3).

The record in this case persuasively demonstrated that management was attempting to handle a highly divisive issue in the facility. The record also reflects that this issue was beyond management's training and experience, and that the personnel action at issue in this case was generated as an unwise attempt to bring the issue under control. While the method chosen was, in itself, an unlawful employment practice, Complainant did not present persuasive evidence that either Mr. Honl or Ms. Moskowitz acted frivolously or groundlessly in relation to the April 19, 2011 corrective action. Complainant also did not present persuasive evidence that the corrective action was issued in bad faith, maliciously or as a means to harass Complainant. *See* Board Rule 8-38(A)(2)(defining bad faith, malicious, or harassing personnel actions as one where the "personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth").

Under such circumstances, an award of attorney fees and costs is not warranted.

CONCLUSIONS OF LAW

1. Respondent's action in issuing the April 19, 2011 corrective action violated CADA and Title VII; and

2. Complainant is not entitled to an award of attorney fees and costs.

ORDER

The April 19, 2011 corrective action is rescinded and is to be removed from Complainant's personnel file. Respondent is ordered to adopt a detailed policy on the handling of discrimination complaints, and training is to be provided by the Department of Human Services or other qualified provider on the conduct of discrimination complaint investigations by facility management. No attorney fees or costs are awarded.

Dated this 21st day of February, 2013 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 22nd day of February, 2013, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Mark A. Schwane, Esq.

[redacted]

Sabrina L. Jensen

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

RECORD ON APPEAL

The cost to prepare the 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.