

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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KIMBERLY HARDESTY,  
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH CORRECTIONS, ZEBULON  
PIKE YOUTH SERVICES CENTER,  
Respondent.

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Administrative Law Judge ("ALJ") Tanya T. Light held the hearing in this matter on March 27 and 28, 2014 at the State Personnel Board ("Board") located at 1525 Sherman Street, 4<sup>th</sup> Floor, Denver, Colorado. The case commenced on the record on March 27, 2014, and the record closed on March 28, 2014. Mathew S. Shechter of McNamara Roseman & Kazmierski represented Kimberly Hardesty ("Complainant"). Assistant Attorney General Bradford C. Jones represented the Department of Human Services ("DHS"), Division of Youth Corrections ("DYC"), Zebulon Pike Youth Services Center ("Respondent" or "Zebulon Pike"). Respondent's advisory witness was Mr. Daniel Beilfuss, Zebulon Pike Director.

**MATTERS APPEALED**

Complainant appeals her April 4, 2013 termination as a probationary Social Worker/Counselor II at Zebulon Pike, claiming that her termination was in retaliation for filing a sexual harassment complaint against a co-worker. On September 18, 2013, the Board granted Complainant a discretionary hearing on claims of retaliation in violation of both the Colorado Anti-Discrimination Act ("CADA") and the State Employees' Protection Act, (the "Whistleblower Act"). Through this appeal, Complainant seeks back pay, reinstatement to a similar position within DHS, but not within the Division of Youth Corrections, or, in the alternative, an award of front pay, and an award of attorney's fees and costs.

Respondent counters that it terminated Complainant for legitimate, non-discriminatory reasons after Complainant failed to perform satisfactorily as a probationary employee, and that it would have terminated Complainant even in the absence of her complaint. Respondent requests that its termination of Complainant be affirmed and that all of Complainant's requested relief be denied.

For the reasons set forth below, Respondent's termination of Complainant is **affirmed**. Complainant's requests for back pay, reinstatement, front pay, and attorney's fees and costs are **denied**.

**ISSUES PRESENTED**

1. Whether Respondent's termination of Complainant's probationary employment was in retaliation for her protected complaint of sexual harassment, in violation of CADA.

2. Whether Respondent's termination of Complainant's probationary employment was in retaliation for her report of sexual harassment, a protected activity under the Whistleblower Act.

3. Whether Complainant is entitled to reinstatement to a similar position within DHS, but not within NYC, and an award of back pay, or in the alternative front pay, and attorney's fees and costs.

## **FINDINGS OF FACT**

### **Zebulon Pike**

1. Zebulon Pike is a residential facility within NYC for juvenile males who have committed crimes ranging from theft to first degree murder. Zebulon Pike houses approximately 36 juvenile males.

2. The youth are divided into living quarters called "pods."

3. Mr. Daniel Beilfuss has worked at Zebulon Pike since 1993, and was promoted to Director in 2008. He was Director at all times relevant to this case, and Complainant's appointing authority.

4. As Director, Mr. Beilfuss is responsible for the safety and security of staff, youth, and the community. He is also responsible for upholding all DHS and NYC policies and procedures.

5. Mr. Beilfuss receives annual training concerning discrimination, and also reviews discrimination and harassment policies as needed.

6. Zebulon Pike employs social workers who are responsible for providing therapy, counseling, and other social work services for the youth and their families. Each social worker is responsible for a caseload of approximately eight to 11 youth.

7. The social workers are supervised by the Clinical Director, who is in turn supervised by Mr. Beilfuss.

### **The NYC Audit Standards**

8. In April of 2012, NYC issued revised "audit standards" that set forth, among other things, the clinical treatment requirements for all youth living in NYC facilities, including Zebulon Pike.

9. Certain audit standards apply specifically to the social workers employed at Zebulon Pike. Those standards are referred to as "Clinical Standards" and include the following, which are relevant to this case:

- A. Clinical Standard 5.1: Juveniles shall receive a minimum of two 50-minute individual counseling sessions per month. Exceptions are justified by clear and substantiated evidence and documented in the individual treatment plan.

- B. Clinical Standard 5.3: Juveniles shall receive a minimum of one 50-minute family session per month. Exceptions are justified by clear and substantiated evidence and documented in the individual treatment plan.
- C. Clinical Standard 5.4: Juveniles shall receive a minimum of two group sessions per week, psycho-educational and/or process-oriented. Exceptions are justified by clear and substantiated evidence and documented in the individual treatment plan.
- D. Clinical Standard 5.5: All treatment services, individual, group, and family, shall be documented in the Colorado Trails database where available or hard copy . . . The documentation shall be completed within two days of service delivery.
- E. Clinical Standard 8.0: The Individualized Treatment Plan shall be completed 30 days after the date of intake into the treatment program. The Treatment Plan should be consistent with the Division of Youth Corrections' Integrated Assessment and the Discrete Case Plan goal identification, including criminogenic needs, strengths and protective factors. The Treatment Plan shall identify the types of services to be employed to attain treatment goals, such as group, individual, family, multifamily, substance abuse, milieu therapy, etc.
- F. Clinical Standard 10.0: A collaborative review team shall review the juvenile's individual treatment plan monthly. The review should reflect the level of progress/regression of treatment objectives, recommendations regarding objectives and all parties involved with the juvenile's treatment during the past month. In the event a party representing a specific discipline is not available, i.e. medical, food services, psychiatric, the signature page should denote how information was accessed or why it is not available. Documentation will be the monthly summary.

10. "TRAILS" is the name of the computer database system used throughout DHS. When the clinical standards require documentation of a particular service provided to a youth, that documentation is to be made in the TRAILS database. It is the official tracking system of all of the youths' progress within DYC.

11. Documenting services in TRAILS is the only way in which Zebulon Pike is able to demonstrate to auditors that the correct services are being provided for the requisite number of times monthly.

12. If a Zebulon Pike social worker fails to enter documentation into TRAILS, that failure impacts the entire facility. If auditors do not see the required documentation, they may scrutinize the facility more closely.

13. Other facilities and agencies also access TRAILS when making decisions about youth. This fact means it is important to update TRAILS because, for example, in a worst case scenario, if a youth's progress has not been documented, other entities that rely on TRAILS' data, such as a parole board, would not see the youth's progress and that individual's discharge date could be delayed.

14. Finally, it is important for the social workers to update TRAILS because if a clinician leaves state employment, or if a youth's social worker changes, the new clinician would not know the status of that youth's treatment or where the previous social worker was in terms of a youth's treatment.

### Complainant's Employment at Zebulon Pike

15. Complainant received a Master's Degree in Community Counseling and Clinical/Mental Health from Adams State University in 2009.

16. Prior to working at Zebulon Pike, Complainant worked at therapeutic residential youth centers where she provided individual and family counseling services. She also worked as an independent contractor from 2010 through 2013 providing family preservation services to families whose children were at risk of being placed outside of the home.

17. On or about April 27, 2012, Mr. Beilfuss hired Complainant as a Social Worker/Counselor II. Complainant worked Tuesdays through Fridays. When she was hired she was not required to work Saturdays.

18. At all times that Complainant was employed by Zebulon Pike, she was a probationary state employee.

19. During Complainant's first week of employment at Zebulon Pike, Mr. Beilfuss called her into his office and read to her the Board rules about probationary employment. He explained to her how important performance is the first year, and he told her that the first year of state employment is like an extension of the interview. Mr. Beilfuss has this same discussion with all new employees.

20. Mr. Beilfuss thought he had been clear with Complainant about what probationary status meant.

21. Complainant was the assigned counselor for the "Explorer" pod.

22. Complainant's Position Description Questionnaire ("PDQ") described her job duties in part as "provid[ing] mental health and case management services for juveniles committed to the Division of Youth Corrections . . . individual treatment development and progress summaries."

23. Complainant's PDQ described her job duties as adhering to clinical standards and providing individual and family sessions if appropriate; reviewing cases with residents; and composing and updating treatment plans.

24. The PDQ further stated that Complainant was to "Document and assess the effectiveness of specific interventions...Document in TRAILS a treatment note for all individual and group sessions in DAP format."

25. Complainant was responsible for a weekly process group where residents could discuss any concerns they had. She also conducted a moral processing group, and weekly groups in cognitive and behavioral therapy.

26. At the time Complainant was hired, the position of Clinical Director was vacant. The Clinical Director would have been Complainant's immediate supervisor.

27. Complainant received very little training when she began working at Zebulon Pike. She received no training concerning the audit and clinical standards until July of 2012, when the Clinical Director position was filled.

### The Employment of Carey Boelter as Clinical Director

28. Mr. Beilfuss hired Carey Boelter as Zebulon Pike's Clinical Director, and she began working on or about July 9, 2012.

29. Ms. Boelter has a Bachelor's Degree in Psychology, and a Master's Degree in Forensic Psychology.

30. Since being hired, Ms. Boelter has completed supervisory training, including training concerning harassment, discrimination, and retaliation.

31. In the Clinical Director position, Ms. Boelter was the immediate supervisor of Complainant as well as three other social workers. She was Complainant's supervisor from her hire date until Complainant's termination in April of 2013. Ms. Boelter reported directly to Mr. Beilfuss.

32. Ms. Boelter requested Complainant to begin working one Saturday per month due to the fact that the other three social workers worked at least one Saturday monthly. Complainant had not agreed to that schedule when she was hired, but agreed to do so when requested by Ms. Boelter.

33. The three other social workers were L.P., J.R., and M.T.<sup>1</sup>

34. L.P., J.R., and M.T.'s job duties were identical to Complainant's job duties, except for the fact that M.T. worked a part-time schedule, whereas Complainant, L.P., and J.R. worked full time.

35. L.P., J.R., and M.T. were held to the same clinical standards as Complainant.

36. L.P., J.R., and M.T. had each been employed by the state for several years, and as such were all certified state employees at all times relevant to this case.

37. In addition to supervising the social work staff, Ms. Boelter was responsible for ensuring Zebulon Pike's compliance with the clinical standards issued in April 2012.

38. Beginning in July 2012, Ms. Boelter started discussing the clinical standards at weekly "Behavioral Health Meetings," also known as the "BHMT"<sup>2</sup> meetings. The social workers attended these weekly meetings. They took turns taking notes of the topics discussed, and the meeting notes were emailed to all the social workers after the meetings.

39. The first BHMT meeting in which the clinical standards were discussed was held on July 18, 2012. The notes from that meeting, which Complainant received, stated in part: "Clinical Services will require either 2 individual sessions, 1 family session, and 1 case

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<sup>1</sup> None of these three social workers are parties to this case, and given that some of the findings of fact reflect negatively upon their work performance, their initials will be used to protect their identities.

<sup>2</sup> It was unclear from the evidence at hearing what the "T" stands for in "BHMT."

review/staffing per month or 3 individual sessions and 1 case review/staffing per month on youth where family therapy is counterproductive or not applicable.”

40. There was a BHMT meeting on August 8, 2012, after which meeting notes were sent to the social workers, including Complainant, which stated in part: “2012-2013 Clinical Audit Standards: 1. Monthly requirements: 2-50 min individual sessions + 1-family session (or another individual session if family sessions are not appropriate) + 1-Case Review . . . 4. Ask Carey for a copy of the new Trails documentation guidelines if did not receive it via e-mail.”

41. Complainant drafted the notes for the August 8, 2013 BHMT meeting.

42. At least as of the August 8, 2012 BHMT meeting, Complainant understood that she was required to document all of her counseling sessions in TRAILS.

43. As of August 2012, none of the social workers were meeting the clinical standards governing youth therapy services, nor were they properly documenting their services in TRAILS.

#### The August 20, 2012 Texts From Ivory Rounds to Complainant

44. Ivory Rounds was employed at Zebulon Pike as a “YSCO I” in the “Challenger” pod, and was a shift supervisor at the time Complainant was hired. Complainant had some contact with Mr. Rounds because he supervised all of the pods.

45. On or around August 20, 2012, Mr. Rounds sent Complainant 31 texts, to which she responded 24 times. These texts were exchanged when both employees were off-duty.

46. Mr. Rounds’ texts were sexually explicit. Complainant made it clear to him by text that she did not appreciate his messages and did not want to receive them. After Complainant’s last text to Mr. Rounds informing him that she did not want to receive these kinds of messages, he stopped texting her, and never texted her again.

#### The September 2012 Audit and Ms. Boelter’s Emphasis on Compliance with Clinical Standards

47. In September of 2012, Zebulon Pike was audited, and the audit results were received in October of 2012. The results indicated that the clinical standards were not being met.

48. Ensuring compliance with the clinical standards was a priority for Ms. Boelter. In October of 2012, she began having the IT department pull data from TRAILS in order to create spreadsheets she could use to show the social workers the hours they had documented in TRAILS. IT pulled the data on the last day of the month to ensure all of the month’s hours were captured. Ms. Boelter brought these spreadsheets to the weekly BHMT meetings.

49. Ms. Boelter first began having concerns with Complainant’s performance in October of 2012, when she had the IT department pull Complainant’s numbers from TRAILS for the first time.

50. The audit standards do not require the social workers to meet a certain number of direct counseling hours with youth, but Ms. Boelter wanted the social workers to aim for 30%

of their work hours spent in direct contact services to youth and families. This percentage equals approximately 48 hours per month for the full time social workers.

51. BHMT meeting notes from October 3, 2012 state: "We need to get better at documenting services, especially required services, at least: 50 minute individual sessions (2 per month or 3 per month if no family); 50 minute family session (1 per month if appropriate); ITP/DCP/MDT review (1 per month); Transitions services; All group sessions."

52. Complainant was not present at the October 3, 2012 BHMT meeting, but the notes were emailed to her.

53. The auditor, Mr. Gary Nitta, was present at the October 24, 2012 BHMT meeting. The notes from that meeting reflect that he stated: "All treatment notes must be entered within 2 days of service. All services need to be documented, including transition."

54. Complainant was present at the October 24, 2012 BHMT meeting.

55. From July through October of 2012, none of the social workers, including Complainant, were adequately documenting their services in TRAILS.

56. From July through October of 2012, social worker J.R.'s TRAILS documentation was as bad, if not worse, than Complainant's.

57. In October of 2012, social worker M.T. failed to comply with the clinical standards.

58. In October of 2012, Ms. Boelter added the clinical standards to all of the social worker's mid-year Performance Management and Pay ("PMAP") documents.

59. She also added Individual Performance Objectives ("IPOs") concerning the need to provide and document the required services in TRAILS to the social worker's PMAPs.

60. Complainant received her mid-year PMAP on October 17, 2012. The following IPOs were issued to her on that date:

- A. "Kim will provide her schedule in advance to her supervisor via email to the administrative assistant on a bi-monthly basis."
- B. "Kim will email/call her supervisor asap to make changes to her schedule."
- C. "Kim will complete all required documentation to include individual, family, ITPs and summaries, MDT/ITP review, and group sessions as well as treatment team meetings."
- D. "Kim will participate in supervision with her supervisor at a minimum of once per month."
- E. "Kim will review/implement current and updated DYC policies, ZP procedures, practices, and standards to ensure individual and agency compliance."

- F. "Kim will conduct at minimum two individual sessions and 1 family session per month (unless contraindicated, then replaced with a 3<sup>rd</sup> individual session) with each youth on her caseload. She will document each session in TRAILS as indicated per clinical documentation cheat sheet."
- G. "Kim will complete an ITP in TRAILS within 30 days of youth's admittance to the program. ITPs will be completed in an individualized manner."
- H. "Kim will at minimum participate in one IT/MDT review staffing per month with each youth on her caseload. She will document this staffing in TRAILS as indicated per clinical documenting cheat sheet."
- I. "Kim will offer family therapy sessions to all youth and families for which this treatment is applicable. She will note why youth are not engaging in family sessions in TRAILS and on the treatment plan."
- J. "Kim will enter all TRAILS notes (for direct care services as indicated in the clinical services documenting cheat sheet) in DAP format."

61. In the Narrative/Comments sections of Complainant's October 17, 2012 mid-year PMAP, Ms. Boelter made the following notations:

- A. "Kim has been informed of the expectations of documentation to include TRAILS notes, ITPs, monthly updates, and final summaries/recommendations. Documentation, treatment team notes, and email communication that Kim has completed has been appropriate, detailed and goal oriented."
- B. "Kim has been informed of and will become compliant with documentation requirements."
- C. "Kim needs to focus on consistently completing the required documentation [that] follows the treatment services she delivers."

62. Complainant was provided a copy of her mid-year PMAP.

63. A BHMT meeting was held on December 19, 2012. Ms. Boelter wrote in the meeting notes that "the team has made HUGE improvements. Bought up numbers of all services in November from October. We are getting closer to actually reflecting the services we are providing in TRAILS. Room for improvement: continue to document all services, specifically focusing on required services of individual, family, groups, and ITP/MDT review."

64. Ms. Boelter started looking more closely at Complainant's TRAILS numbers in December of 2012. She did so because she knew that as a probationary employee, Complainant did not have as much time to improve her performance as the certified social workers did, because those employees were subject to progressive discipline whereas Complainant was not.

65. Complainant's TRAILS documentation did not improve following her mid-year review, PMAP, and IPOs given in October of 2012. The following data was accessed by Ms. Boelter when she was reviewing Complainant's numbers in December of 2012:

- A. November 2012: Complainant had eight youth in her caseload.

- Two youth did not receive the required number of individual or family sessions.
  - Four youth did not receive the minimum number of group sessions.
  - TRAILS reflects that Complainant documented 19.67 hours of direct services with youth for the month.
- B. December 2012: Complainant had nine youth in her caseload.
- Nine youth did not receive the minimum number of group sessions.
  - TRAILS reflects that Complainant documented 44.42 hours of direct services with youth for the month.

66. During the same months that Complainant's hours were reviewed, social worker J.R.'s direct youth services hours were also less than the 48 hour goal. They were as follows:

- A. October 2012: 24 hours.
- B. November 2012: 14.92 hours.
- C. December 2012: 22.75 hours.

67. Ms. Boelter was more immediately concerned about Complainant's performance than J.R.'s because J.R. had the right to receive progressive discipline as a certified state employee.

68. Ms. Boelter raised her concerns about all the social workers' performance and documentation deficiencies with Mr. Beilfuss in December of 2012.

69. Ms. Boelter raised concerns specifically about Complainant's performance deficiencies with Mr. Beilfuss in January of 2013. He instructed Ms. Boelter to meet with Complainant that month and remind her that she was a probationary employee, and as such, needed to improve her performance immediately.

70. Complainant admits that she did not document the services she provided in TRAILS as required by the clinical standards. She prioritized providing actual services to the youth in her caseload over documenting those services.

71. Complainant did not believe that failure to document services could be grounds for termination, given the fact that all the other social workers were similarly failing to adhere to the clinical standards.

72. Complainant's belief was bolstered by an email Ms. Boelter sent to the "BHMS Team" that stated in pertinent part: "Our program (and audit) knows that we were without a full clinical staff for some time and that paperwork is sometimes the last priority. Now that we are fully staffed, we need to continue to focus on those little things, like getting our treatment plans/updates signed in the staffing and getting them into the file. Please let me know if there is a way I can help us meet this requirement."

73. Complainant interpreted that email as meaning paperwork was an unimportant "little thing," and a "last priority."

74. A BHMT meeting was held on January 16, 2013. The meeting notes from Ms. Boelter stated: "According to TRAILS documentation, our youth are not receiving the minimum required family and group services. All services need to be documented in TRAILS. Notes do

not need to be lengthy, but rather described the service, youth and plan.” Complainant received these meeting notes.

75. A supervision meeting was scheduled between Ms. Boelter and Complainant in mid-January 2013. Complainant missed that meeting because she was in the middle of a situation with one of the residents that required her attention.

#### The January 31, 2013 Meeting Between Ms. Boelter and Complainant

76. In January of 2013, Ms. Boelter received complaints regarding Complainant's interpersonal skills from Mr. Rounds and from the on-premises school principal. Mr. Rounds' complaint concerned two interactions he had had with Complainant in which he felt she acted unprofessionally toward him.

77. On January 31, 2013, Ms. Boelter and Complainant met for a supervision meeting, the meeting that had been previously scheduled for mid-January.

78. The first topic of discussion at the meeting concerned a youth, T.F., in Complainant's caseload, and issues concerning his family visits.

79. Next, Ms. Boelter raised the issues concerning Complainant's interpersonal skills that both Mr. Rounds and the school principal had reported.

80. Immediately after that discussion, Ms. Boelter reminded Complainant that she was still a probationary employee, and as such she needed to improve her performance.

81. At the mention of Complainant's probationary status, Complainant became visibly upset. It was at this point in the meeting that Complainant first informed Ms. Boelter about Mr. Rounds' sexually explicit text messages sent the previous August. Complainant told Ms. Boelter that she had set a personal boundary with Mr. Rounds after he sent the texts, and that he was complaining about her interpersonal skills only because he was upset that she had set the boundary.

82. During the January 31, 2013 meeting, Mr. Rounds' name was therefore brought up twice: the first time was when Ms. Boelter informed Complainant that Mr. Rounds and the school principal had complained about Complainant's interpersonal skills. The text messages between Mr. Rounds and Complainant were not discussed during this first mention of Mr. Rounds' name. That conversation occurred only after Ms. Boelter reminded Complainant that she was a probationary employee, and was the second time Mr. Rounds' name was brought into the discussion.

83. The day after the meeting, on February 1, 2013, Complainant sent Ms. Boelter an email asking about the process for filing a formal complaint. Ms. Boelter emailed her back and instructed her to contact Eugene Moore, Zebulon Pike's Assistant Director. Ms. Boelter then asked Mr. Moore to provide Complainant with information about filing a complaint

84. Mr. Moore emailed Complainant later that day and asked her to provide him with a signed, written statement detailing what occurred, or email him a detailed description of what occurred. He also told Complainant that if she had urgent safety concerns she could come speak with him then or call him or Mr. Beilfuss on their cell phones. He provided their cell phone numbers.

85. On February 4, 2013, Ms. Boelter sent a memorandum to Complainant summarizing the points that were discussed at the January 31, 2013 meeting.

86. On February 7, 2013, Complainant wrote her own summary of the meeting in response to Ms. Boelter's memorandum. Complainant titled her memorandum "Response to Memo Re: Supervision Agreements dated February 4, 2013."

87. Complainant's summary reflects that her probationary status was discussed prior to her disclosure of Mr. Rounds' texts. Her memorandum demonstrates that the following issues were discussed in the following order:

On 1/31/13, you and I met with intentions of discussing your observations regarding the interactions between Resident TF, baby, baby's mother, and baby's grandmother . . . .

Near the beginning of our meeting on 1/31/13, you referenced my interactions with YSCI Rounds which we had discussed in a recent supervision meeting when you stated I needed to talk to YSCI Rounds. You then stated to me I have not even been here one year and you asked when my probationary year was complete. I stated I think my PMAP says 3/31/13 but I began work on 4/16/12. You stated there are certain rights I do not have without having completed one year with the State. You then, in a general fashion, referenced my interactions with staff, teachers, and residents. At this time, I felt my body go into panic. I verbalized to you how hard my heart was beating and that I needed a moment to be able to discuss the aforementioned matters, which I identified as mainly my interactions with YSCI Rounds, CYSOII Burke, and Principal Lassota. This was only my speculation as we had only discussed my interaction with YSCI Rounds.

I verbalized my discomfort to you in relaying information about YSCI Rounds as I know the severity of my allegations. You stated I have to let you know what is going on or you cannot help me or 'have my back' if you do not have the information and my side of the story. **I then explained a series of personal text messages YSCI Rounds and I exchanged, particularly on 8/20/12, when YSCI Rounds became extremely inappropriate in his content.** I set a boundary with him and, as you stated in your memo, the working relationship took a negative turn after setting this personal boundary with YSCI Rounds. (Emphasis added).

#### The Investigation Into Complainant's Sexual Harassment Complaint

88. After the January 31 meeting, Ms. Boelter informed Mr. Beilfuss about Complainant's allegations against Mr. Rounds. Mr. Beilfuss discussed the matter with his supervisor, Ms. Diane Skufca, numerous times. He also contacted DHS's human resources department and DHS's Manager of the Center for Equal Opportunity and Risk Management ("CEORM"), Mr. Vernon Jackson.

89. Mr. Jackson instructed Mr. Beilfuss to conduct an informal investigation, which he did by interviewing Complainant and Mr. Rounds separately.

90. Afterwards, Complainant sent Mr. Beilfuss an email thanking him for how he handled the informal investigation.

91. Complainant filed a formal complaint of sexual harassment on or around February 25, 2013. In her complaint she alleged that after she set personal boundaries with Mr. Rounds, he purposely told Ms. Boelter that Complainant had treated him in an unprofessional manner. She further alleged that Ms. Boelter "then tied" Complainant's interactions with Mr. Rounds into her job performance. Complainant also alleged that her complaint was not handled properly by management.

92. CEORM Investigator Don Benavidez conducted the formal investigation. He interviewed Complainant and Mr. Rounds, as well as several other Zebulon Pike employees.

93. During a portion of the investigation, Mr. Rounds was assigned to a different NYC facility in Pueblo.

94. Mr. Benavidez's investigation was prolonged due to a death in his family. In April of 2013, at the end of his investigation, he made the following conclusions:

- A. "The evidence established that the first time management was made aware that Mr. Rounds had sent Ms. Hardesty inappropriate comments and had made inappropriate comments to her was on January 31, 2013."
- B. "The evidence established that by the time management was made aware of Ms. Hardesty's allegations, the inappropriate behavior had already stopped in August 2012."
- C. "The evidence established that when management was made aware of Ms. Hardesty's allegations, an informal investigation was conducted."
- D. "The evidence established that after Ms. Hardesty raised her allegations about Mr. Rounds, management did not tie Ms. Hardesty's interactions with Mr. Rounds into Ms. Hardesty's job performance. The record revealed that Ms. Hardesty's supervisor met with Ms. Hardesty on a regular basis and discussed with Ms. Hardesty [her] job performance, and areas she needed to improve. The record revealed that Ms. Hardesty had attendance issues in that she called in sick numerous times. The record revealed that Ms. Hardesty consistently failed to document the services she was providing to her residents. The record revealed that Ms. Hardesty failed to provide an adequate amount of time with her residents."
- E. "The evidence established that Mr. Rounds did on one occasion (January 2013, months after Ms. Hardesty raised her allegations about Mr. Rounds) express his concern to Ms. Hardesty's supervisor that Ms. Hardesty had treated him in an unprofessional manner."
- F. "The evidence established that Ms. Hardesty was afforded her right to file a complaint of discrimination. The record revealed that Ms. Hardesty filed a complaint of discrimination on February 25, 2013."

#### The Termination of Complainant's Probationary Employment

95. Complainant's TRAILS documentation did not improve following the January 31, 2013 supervision meeting with Ms. Boelter.

96. Ms. Boelter provided a summary of Complainant's performance issues to Mr. Beilfuss in early February of 2013 at his request.

97. Ms. Boelter continued to provide summaries of Complainant's performance deficiencies to Mr. Beilfuss during February, March, and April of 2013.

98. Ms. Boelter used information from TRAILS and from the youths' paper files to document Complainant's performance. Ms. Boelter provided the following information to Mr. Beilfuss concerning Complainant's performance:

- A. January 2013: Complainant had eight youth in her caseload.
  - Five youth did not receive the required number of individual or family therapy sessions.
  - Five youth did not receive the required treatment plan review staffings.
  - One youth did not receive the minimum number of group counseling sessions.
  - TRAILS reflects that Complainant documented 27.42 hours of direct services with youth for the month.
  
- B. February 2013: Complainant had eight youth in her caseload.
  - Four youth did not receive the required number of individual or family therapy sessions.
  - Three youth did not receive the required treatment plan review staffings.
  - Eight youth did not receive the minimum number of group counseling sessions.
  - TRAILS reflects that Complainant documented 19.10 hours of direct services with youth for the month.
  
- C. March 2013: Complainant had nine youth in her caseload.
  - Seven youth did not receive the required number of individual therapy sessions.
  - Four youth received no individual counseling sessions for the month.
  - Five youth did not receive the required number of family therapy sessions.
  - Nine youth did not receive the required treatment plan review staffings.
  - Nine youth did not receive the minimum number of group session.
  - TRAILS reflects that Complainant documented 10.82 hours of direct services with youth for the month.

99. Ms. Boelter also provided Mr. Beilfuss documentation of Complainant's use of sick time. Ms. Boelter used Complainant's timesheets to compile the data. Mr. Beilfuss was concerned with Complainant's use of sick time because it appeared to him that there was a pattern of Complainant calling in sick in conjunction with her weekends.

100. Based on Mr. Beilfuss's experience as an appointing authority, he believed that when he saw a probationary employee using sick leave in conjunction with weekends, it was a "red flag" indicating that the employee would have future performance issues.

101. Complainant's use of sick time in conjunction with her weekends, as summarized by Ms. Boelter, was as follows:

- A. November 2012: Complainant used nine hours of sick leave on Friday, November 19, 2012. This day was in conjunction with her weekend.
- B. Complainant used four hours of sick leave on Friday, November 16, 2012. This day was in conjunction with her weekend.
- C. December 2012: Complainant used ten hours of sick leave on Friday, December 7, 2012. This day was in conjunction with her weekend.
- D. February 2013: Complainant called in sick on the workday following her receipt of a supervisory summary regarding her performance and interpersonal issues. This sick time was in conjunction with her weekend, Tuesday through Thursday, February 5, 2013 through February 7, 2013.
- E. March 2013: Complainant failed to come in to work and failed to call anyone to let them know she would not be coming in to work for her scheduled shift on Saturday March 9, 2013. This day was in conjunction with her weekend.

102. The other three social workers did not have a pattern of calling in sick in conjunction with their weekends.

103. Mr. Beilfuss wanted to terminate Complainant's employment in February of 2013, based on her failure to improve her performance.

104. At that time, however, Mr. Jackson advised Mr. Beilfuss not to take any formal action against Complainant while the formal investigation into her sexual harassment complaint was ongoing.

105. Mr. Beilfuss received Mr. Benavidez's final report and conclusions concerning Complainant's sexual harassment complaint on April 3, 2014.

106. Mr. Beilfuss terminated Complainant's probationary employment the next day, on April 4, 2013, for unsatisfactory performance. Prior to terminating Complainant's employment, Mr. Beilfuss reviewed the summaries concerning Complainant's TRAILS documentation and her use of sick time, as well as Complainant's personnel file.

107. Ms. Boelter supported Mr. Beilfuss's decision to terminate Complainant's employment due to Complainant's failure to improve her performance after her mid-year review and the January 31, 2013 meeting.

108. Mr. Beilfuss would have terminated Complainant's employment even if she had not filed a formal complaint of sexual harassment.

109. Mr. Beilfuss cited Complainant's failure to meet clinical standards 5.1, 5.3, 5.4, and 10.0 in his termination letter, as well as her use of sick time in conjunction with weekends. He ended the letter by explaining "[t]o conclude, you have not satisfactorily performed as a member of the clinical team at Zebulon Pike Youth Services Center. You have failed to follow your PMAP IPOs and Clinical Services Audit Standards and although you were given an opportunity to improve in these areas following Carey Boelter's letter dated February 4, 2013, your performance in these areas has not improved and remains unsatisfactory."

110. Mr. Beilfuss did not terminate social worker J.R.'s employment for his performance deficiencies because J.R. was a certified state employee, and as such was subject to progressive discipline. J. R. subsequently received a Performance Improvement Plan and a Corrective Action as a result of his performance issues.

111. Complainant timely appealed her termination, and was granted a discretionary hearing by the Board on September 18, 2013 on her claims of CADA retaliation and Whistleblower Act violation.

## DISCUSSION

### I. GENERAL

Under the Colorado Civil Service Amendment and the State Personnel Systems Act, probationary employees generally do not have the right to a hearing to challenge a termination for unsatisfactory performance. Colo. Const. art. XII, Sections 13(8) and (10); § 24-50-125(5), C.R.S. However, probationary employees are entitled to a hearing on statutory and constitutional claims. *Id.* ("A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that such probationary employee shall not have the right to a hearing to review any disciplinary action taken pursuant to subsection (1) of this section while a probationary employee.").

Complainant raises claims of retaliation under the Colorado Anti-Discrimination Act ("CADA") and the Whistleblower Act (the "Act"). These claims are properly before the Board.

Probationary employees are further governed by State Personnel Board Rule 8-41(A), which states:

Probationary employees do not have a right to a pre-disciplinary meeting, to a mandatory hearing to review discipline for unsatisfactory performance, to be granted a period of time to improve performance, to be placed on a reemployment list, or to the privilege of reinstatement. However, probationary employees may petition the Board for a discretionary hearing on non-disciplinary matters.

The Board may grant a discretionary hearing to probationary state employees where, as here, the employee alleges unlawful retaliation in violation of CADA, and violation of the Whistleblower Act. Board Rule 8-41, 4 CCR 801.

### II. HEARING ISSUES

- A. Whether Respondent's termination of Complainant's probationary employment was in retaliation for her protected complaint of sexual harassment, in violation of CADA.

Under CADA, it is a discriminatory or unfair employment practice to "discriminate against any person because such person has opposed any practice made a discriminatory or an 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." § 24-34-

402(1)(e)(IV), C.R.S. This language is identical to the language in the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. section 2000e-3(a). In interpreting CADA, the Board applies the standards and guidelines adopted by the Colorado Civil Rights Commission, the federal government, and Colorado and federal case law. Board Rule 9-4, 4 CCR 801. Therefore, federal case law interpreting this provision is given persuasive authority by the Board. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997).

Complainant has the burden of proof in a retaliation claim, which is by preponderance of the evidence. To establish a *prima facie* case of retaliation, Complainant must establish that she engaged in protected activity of opposing discriminatory conduct; that she was subjected to an adverse employment action; and that a causal connection exists between the protected activity and the adverse action. *Berry v. Stevinson Chevrolet*, 74 F.2d 980, 985 (10<sup>th</sup> Cir. 1996).

Opposition activity is broadly defined. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10<sup>th</sup> Cir. 1984). Here, Complainant's informal complaint of sexual harassment with Ms. Boelter during their January 31, 2013 meeting, and her filing of the formal complaint on February 25, 2013, meet the first element of a retaliation claim.

Adverse action under Title VII and CADA is defined as an action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 - 70 (2006). Complainant was terminated from her employment subsequent to her filing the complaint. Termination qualifies as an adverse employment action. *Aquilino v. Univ. of Kansas*, 268 F.3d 930, 934 (10<sup>th</sup> Cir. 2001) (stating that adverse action must be a "significant change in employment status, such as . . . firing"). Complainant has met the second element of a retaliation claim.

The last element requires the employee to show that a causal connection exists between the protected activity and the adverse action. Prior to 2013, the causal connection was often demonstrated by a "close temporal proximity" between the protected activity and the subsequent adverse action. *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10<sup>th</sup> Cir. 1996). In 1999, the Tenth Circuit held that "two months and one week" was sufficient to support an inference of causation. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10<sup>th</sup> Cir. 1999). However, in June of 2013, the U.S. Supreme Court announced a new standard of proof for the causation element in retaliation claims under Title VII, and hence under CADA. *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2534 (2013). Under *Nassar*, a plaintiff must prove that "his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* "A plaintiff making a retaliation claim . . . must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Id.* The but-for causation standard requires proof that the adverse action would not have occurred in the absence of the retaliatory motive. *Id.* The plaintiff, or here, the Complainant, has the burden of proof in a retaliation claim, which is by preponderance of the evidence. *Id.*

Complainant has failed to prove by a preponderance of the evidence that her termination would not have occurred but for her complaint of sexual harassment. Ms. Boelter was credible when she testified that she was concerned with Complainant's continued lack of TRAILS documentation even after that performance deficiency had been discussed with her during her mid-year review, was the subject of multiple IPOs, and was discussed at numerous BHMT meetings. The evidence at hearing established that one of Ms. Boelter's primary goals when she began working as Zebulon Pike's Clinical Director was to ensure that all of the social workers were complying with the clinical standards. To that end, Ms. Boelter tracked all of the social workers' TRAILS data, and brought that data to the weekly BHMT meetings to share with

them. Many of the BHMT meeting notes reflect that Ms. Boelter frequently discussed the importance of meeting the clinical standards, as well as the importance of documenting that the standards were met through TRAILS.

Ms. Boelter was further credible when she testified about her January 31, 2013 meeting with Complainant. It was clear from her testimony that during that meeting she attempted to convey to Complainant a sense of urgency in improving her performance because she was a probationary employee. It was evident that Ms. Boelter raised Complainant's probationary status with Complainant prior to Complainant's disclosure of Mr. Rounds' texts because Ms. Boelter clearly remembered her reaction when she first learned of the text messages. She testified that the disclosure greatly unnerved her, to the point where she was not able to concentrate on any other topics of discussion. Hence, she remembers that the text message disclosure was the last thing she and Complainant discussed, and her testimony was credible on that point.

Despite Ms. Boelter's January 31, 2013 meeting with Complainant, Complainant's TRAILS documentation continued to be deficient in February and March of 2013. Ms. Boelter failed to see any improvement in Complainant's performance.

Mr. Beilfuss was likewise credible when he testified that he terminated Complainant because of her sub-standard performance in failing to meet the clinical standards. He was also credible when he testified that he would have terminated Complainant's probationary employment even if she had not filed a complaint of sexual harassment due to both her performance issues and her use of sick time in conjunction with her weekends. Complainant's counsel argued that the fact that Mr. Beilfuss wanted to terminate Complainant in February of 2013, but was prevented from doing so by Mr. Jackson, was proof that his motive was retaliatory. At hearing, however, it was evident that Mr. Beilfuss's desire to terminate Complainant's employment in February stemmed from his honestly held belief that her performance was sub-standard, was not improving, and that he was ready at that point to move on. His desire to terminate her employment in February supports the conclusion that he would have fired her even if she had not filed a harassment complaint.

Finally, Mr. Beilfuss and Ms. Boelter were both credible when they testified that they did not terminate social worker J.R.'s employment despite his similar performance deficiencies because he was a certified state employee, and therefore subject to progressive discipline prior to termination, unlike Complainant.

Complainant has failed to prove the third element of a CADA retaliation claim by a preponderance of the evidence, and her claim fails.

**B. Whether Respondent's termination of Complainant's probationary employment was in retaliation for her protected complaint of sexual harassment, in violation of the Whistleblower Act.**

The State Employee Protection Act, also known as the "Whistleblower Act," ("Act") protects state employees from retaliation by their appointing authorities because of disclosures of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Com'n*, 699 P.2d 960, 966 (Colo. 1985). To establish a *prima facie* case of Whistleblower retaliation, the state employee must demonstrate that her disclosures fell within the protection of the Act, and that the disclosures were a substantial or motivating factor in the employer's adverse action. *Id.* at 964.

The Act defines "disclosure of information" as the "written provision of evidence to any person or the testimony before any committee of the general assembly, 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." § 24-50.5-102(2), C.R.S. Under *Ward, supra*, the disclosure may be oral. Complaints of sexual harassment by co-workers are matters of public concern. *Wren v. Spurlock*, 798 F.2d 1313, 1317 (10<sup>th</sup> Cir. 1986).

Complainant's January 31, 2013 verbal disclosure of sexual harassment to Ms. Boelter, and her February 25, 2013 written complaint, both meet the Act's definition of "disclosures of information," and Complainant has met the first element of a Whistleblower retaliation claim.

The Act prohibits "disciplinary action" in retaliation for protected activity. It defines "disciplinary action" broadly to include "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal ..." § 24-50.5-102(1), C.R.S. Complainant's employment was terminated, meeting the second element.

Once it is established that protected disclosures and a resulting adverse action has occurred, the employee must demonstrate that the disclosures were "a substantial or motivating factor" in the agency's adverse action. *Ward*, 699 P.2d at 968; § 24-50-103(1), C.R.S. This element requires a showing that the employer knew about the disclosure, and a causal connection between the disclosure and the adverse action.

Here, the appointing authority, Mr. Beilfuss, knew about Complainant's sexual harassment complaint. The only issue, therefore, is whether Complainant has demonstrated that her sexual harassment complaint was a substantial or motivating factor in Mr. Beilfuss's decision to terminate her employment. For the reasons discussed above concerning the third element of the CADA retaliation claim, Complainant has not proven this element by a preponderance of the evidence, and her Whistleblower retaliation claim fails.

### **ORDER**

Respondent's termination of Complainant's probationary employment is **affirmed**. Complainant's requests for back pay, reinstatement, front pay, and attorney's fees and costs are **denied**.

DATED this 12<sup>th</sup> day  
of **May 2014**, at  
Denver, Colorado.



Tanya T. Light  
Administrative Law Judge  
State Personnel Board  
1525 Sherman Street, 4<sup>th</sup> Floor  
Denver, Colorado 80203

## **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 8-60, 4 CCR 801.

## 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 8-62, 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 8-65, 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 Rules 8-62 and 8-63, 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 8-64, 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 8-66, 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 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

**CERTIFICATE OF MAILING**

This is to certify that on the 13<sup>th</sup> day of May, 2014, I electronically served a true copy of the foregoing **INITIAL DECISION** as follows:

Mathew S. Shechter

[REDACTED]

Bradford C. Jones A.A.G.

[REDACTED]

[REDACTED]

Andrea Woods