STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2015B067**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS SCHREFFLER,
Complainant,

vs.

DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES,
Respondent.

Administrative Law Judge (ALJ) Susan J. Tyburski held the commencement hearing on July 24, 2015, in this matter at the State Personnel Board, Courtroom 6, 1525 Sherman Street, Denver, Colorado. The record was closed on July 31, 2015, after the exhibits were reviewed and redacted for inclusion in the record. Complainant appeared *pro se*. Respondent was represented by Stacy Worthington, Senior Assistant Attorney General. Respondent's advisory witness was Appointing Authority Theodore Trujillo.

MATTER APPEALED

Complainant, a certified employee, appeals the termination of his employment on February 13, 2015. Complainant further claims that he was subjected to discrimination on the basis of disability and sex,[1] and to retaliation as a whistleblower. He seeks reinstatement with back pay and benefits, investigation of his allegations of fraud, cessation of bullying by employees, and maintenance of a workplace free of non-prescribed drugs and the illegal action of drugging someone else. Respondent argues that its decision to terminate Complainant's employment was not arbitrary, capricious or contrary to rule or law; was within the range of reasonable alternatives, and should be affirmed. Respondent requests that the Board affirm the termination, dismiss Complainant's appeal with prejudice, and award Respondent its attorney fees and costs incurred in defending against Complainant's frivolous appeal.

For the reasons discussed below, Respondent's decision to discipline Complainant is **affirmed**.

ISSUES

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

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

3. Whether the discipline imposed was within the range of reasonable alternatives;

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[1] Complainant also alleges that he was discriminated against due to "ownership of a gun and permit to carry a concealed weapon"; however, gun ownership is not recognized as a protected class under CADA.

4. Whether Respondent discriminated against Complainant on the basis of disability;

5. Whether Respondent discriminated against Complainant on the basis of gender;

6. Whether Respondent retaliated against Complainant as a whistleblower; and

7. Whether Respondent is entitled to an award of attorney fees.

FINDINGS OF FACT

Background

1. Complainant, a certified state employee, was employed in the Citations Department of the Division of Motor Vehicles (DMV) of the Department of Revenue (DOR) as an Administrative Assistant II. He performed data entry of traffic citations.

2. Complainant received an overall "good" rating on his performance evaluation on April 8, 2009, indicating that he "[c]onsistently met standards and expectations for the position" and "that the employee is fully competent, productive and valued." Production standards for April 2008 through March 2009 reflect that Complainant's data entry rate for various citation documents during this time period was consistently good, and often exceptional.[2]

3. On November 17, 2011, Complainant was suspended without pay for fourteen days by Appointing Authority and Director of Operations Stephen Hooper, as the result of insubordinate behavior towards Mr. Hooper, including a false claim that he recorded a meeting they had. When Mr. Hooper talked with Complainant about his behavior prior to the suspension, Complainant explained that he has been involuntarily exposed to drugs in the workplace that affected his behavior. Complainant also stated that this discipline constituted retaliation because he was a whistleblower regarding inappropriate activities with DOR records.

4. When Complainant returned to work following his suspension on December 7, 2011, he was issued a corrective action by his supervisor, Susan Woods. This corrective action required Complainant to review relevant department policies, including the Workplace Violence and Disruptive Behavior Policy and Procedures; be honest in all his work-related communications; comply with all managerial directives; and work to improve his data entry error rate.

5. Complainant received an overall "successful" rating on his performance evaluations on April 10, 2014 and October 23, 2014[3], indicating that he "[c]onsistently met standards and expectations for the position" and "that the employee is fully competent, productive and valued."

Administrative Leave

6. In December 2014, Theodore Trujillo became Appointing Authority and Operations Director of the DMV Driver Control Section, which included Complainant.

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[2] No other production standards were offered.

[3] No performance evaluations were offered for 2010 through 2013.

7. On December 15, 2014, Mr. Trujillo received an email from Yaime Ayala, DOR's Citations Unit Manager and Complainant's supervisor. In this email, Ms. Ayala stated that Complainant, who believed his co-workers were "out to get him" and were trying to drug him, told his co-workers that he had a concealed weapon permit and had purchased a gun. These statements caused concern among Complainant's co-workers.

8. Mr. Trujillo forwarded Ms. Ayala's email to Andrew Gale, Director of the Office of Human Resources, who then forwarded it to Dr. Jon Richard, a licensed psychiatrist and staff supervisor with the Colorado State Employee Assistance Program (C-SEAP), for advice. Dr. Richard agreed that this email report was concerning, and recommended that additional information be obtained from Complainant's co-workers.

9. On December 16, 2014, Ms. Ayala received emails from Complainant's co-workers Leena Dwiggins and Shirley Fernandez. Ms. Dwiggins described how Complainant made her uncomfortable by asking her questions she found too personal and eavesdropping on her. Ms. Fernandez also indicated that Complainant asked her personal questions; in addition, he made "off the wall" comments about God, and asked her what she thought of Noah, Moses and Bible history. As a result, Ms. Fernandez asked to be moved away from him.

10. On December 17, 2014, Mr. Trujillo placed Complainant on paid administrative leave and advised him that he was required to undergo a Psychological Fitness for Duty (PFD) examination. This process was explained as follows:

> The PFD begins with a meeting by Jon Richard at the Colorado State Employee Assistance Program (C-SEAP). The second part of the process will be an evaluation, coordinated by C-SEAP, and conducted by an independent psychologist or psychiatrist, to determine if you are currently able to do your job in a safe and effective manner. And third, the Department of Revenue will then make a determination as to whether or not you will be able to return to work. The overall process should take approximately 3-4 weeks and there will be no cost to you.

Investigation and Rule 6-10 Meeting

11. Complainant's initial meeting with Dr. Richard was scheduled for December 22, 2014 at 3:00 p.m. On the morning of December 22, 2014, Complainant called Mr. Gale to tell him that he would not be attending this meeting. Mr. Gale encouraged Complainant to keep this appointment. Complainant sent Mr. Gale a nineteen-page fax that included some personal journal entries about becoming ill at work and things he believed his co-workers were trying to do to him, images of computer screens at work he believed had been tampered with, and correspondence concerning an apparent dispute with his former supervisor, Mr. Hooper, in 2011.

12. Despite his comments to Mr. Gale, Complainant did meet with Dr. Richard and informed him that he would not undergo a PFD.

13. On December 29, 2014, Mr. Trujillo sent Complainant a letter scheduling a Rule 6-10 meeting for January 2, 2015. For security reasons, this meeting was to be held at the Ralph C. Carr Judicial Center. Complainant was advised:

> The purpose of this meeting is to determine whether or not there is cause for administering disciplinary action based on allegations regarding failure to perform competently, by accusing co-workers and others of trying to poison you and conspiracies to drug you and change your ability to think, therefore creating a workplace environment that is threatening and disruptive to other staff members. At this meeting, we will discuss your failure to attend the scheduled meeting with the Colorado State Employee Assistance Program (C-SEAP) on December 22, 2014. This meeting is to exchange information regarding the aforementioned allegations. You will have the opportunity to present your mitigating circumstances to me.

14. Complainant did not respond to the December 29, 2014 letter or appear on January 2, 2015 for the Rule 6-10 meeting. Attempts to contact Complainant by telephone reached a number that had been disconnected. On January 8, 2015, Mr. Trujillo sent Complainant a second letter, instructing him to immediately contact him or Mr. Gale to schedule a Rule 6-10 meeting.

15. On the evening of January 14, 2015, Complainant left a message on a supervisor's phone with a telephone number where he could be reached. Attempts to contact him via this number again reached a number that had been disconnected.

16. On January 21, 2015, Mr. Trujillo sent Complainant a third letter, instructing him that a Rule 6-10 meeting was scheduled for January 30, 2015. Again, for security reasons, this meeting was to be held at the Ralph C. Carr Judicial Center.

17. On January 27, 2015, Complainant prepared a letter to Mr. Trujillo and Mr. Gale detailing perceived attempts by his coworkers to poison him, starting in October 2008, as well as comments some of his coworkers made which led him to believe there was some kind of fraud at DOR. Complainant ended this letter with a description of various poisonous plant substances and the symptoms they cause, explaining that "some people who think they have mental problems are sometimes victims of the use of these." This letter was shared with Mr. Trujillo and Mr. Gale at the Rule 6-10 meeting.

18. On January 30, 2015, a Rule 6-10 meeting was held between Complainant, Mr. Trujillo and Mr. Gale. During this meeting, Complainant described what he perceived to be attempts by his coworkers to poison him, beginning some time in 2008. He explained: "I think that there's some fraud going on and I think that some people actually know about the fraud and they know I know. That's one of the reasons why they want me out of there." Complainant collected items that demonstrated these poisoning attempts at work, including a shirt with oil stains on the back, a "moon cake" with a red dot, bottled water, and stool samples containing different colors, all from 2008. Complainant also believed employees were spraying substances into the air at work, putting substances in his coffee, sitting in his chair and going onto his computer at work when he was not there. Complainant described co-workers belittling him and giving him dirty looks. He stated he no longer attended his church because he believed church members were drugging him. He also concluded that a female room-mate was trying to drug him. Complainant suggested that these attempts to drug him were coming down from above, possibly even the Governor's office. Complainant has maintained a journal for a number of years, including notes he would email to himself, about all of these perceived slights and injuries. He ordered nasal shields to protect himself from airborne substances, and has had a number of blood tests done, all of which have been "inconclusive."

19. During the Rule 6-10 meeting, Complainant told Mr. Trujillo that he had an "introductory meeting" with Dr. Richard, but "felt no need" to see a psychiatrist. He stated that he suffered from depression, and was on medication to increase his serotonin levels. Complainant stated that "legally" he could not be forced to undergo a psychological evaluation, and did not believe he needed a fitness for duty examination because he just sits in front of a computer and does data entry all day. He's been performing competently and doesn't threaten anyone at work. Complainant explained:

> Even with all this stuff going on that I feel has been going on, I have been sitting there taking it and taking it and taking it. And, you know, I think that shows a lot of patience, you know, if I'm not – you know, this stuff is not real, then I guess maybe I would need it. But I feel that it is real and it has been going on for years.

20. During the Rule 6-10 meeting, Complainant admitted that he owned a concealed weapon, which he obtained "to protect myself, if anything should happen. Especially after being drugged and people doing this..." Complainant denied ever bringing his concealed weapon to work, and stated that he knew he was not even allowed to bring it into the parking lot. When Mr. Trujillo asked him if he felt he had to protect himself at work, Complainant provided a long explanation about how he might die and others who have died at work, including the following comments:

> To me, I don't have to worry about dying, you know, because I know where I'm going and I know what's going to happen when I die. ... Now, if I die, you know, I only gain, because I'm with the Lord ... if I do die, it's only gain. So I gain, they don't, you know.

Termination Decision

21. Following the Rule 6-10 meeting, Mr. Trujillo concluded that Complainant's disturbing behavior was escalating, that this escalating behavior constituted a serious disruption of the workplace, and that Complainant constituted a significant risk to his co-workers.

22. Complainant's employment was terminated effective February 13, 2015.

DISCUSSION

I. BURDEN OF PROOF

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; § 24-50-101, *et seq.*, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and includes, in pertinent part:

1. failure to perform competently;
2. willful misconduct or violation of these or department rules or law that affect the ability to perform the job;
3. false statements of fact during the application process for a state position;
4. willful failure to perform including failure to plan or evaluate performance in a timely manner, or inability to perform; and
5. final conviction of a felony or any other offense involving moral turpitude that

adversely affects the employee's ability to perform or may have an adverse effect on the department if the employment is continued.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 705 (Colo. 1994). The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

II. COMPLAINANT COMMITTED THE ACTS FOR WHICH HE WAS DISCIPLINED.

Complainant does not dispute, and in fact provided ample additional evidence, that he sincerely believes that his co-workers have been trying to poison him for years because he knew about suspected fraud at the DOR. Complainant testified how this plot to poison him went as far as the Governor's office, and included the members of his church and a former room-mate. Since at least 2008, Complainant has been collecting evidence of this poisoning, including items of food and beverages offered to him by co-workers, a shirt containing mysterious stains, and stool samples. The evidence further establishes that Complainant purchased a gun and obtained a concealed carry permit so that he could defend himself, at least in part, from these attempts to poison him. When he was asked about this gun during his January 30, 2015 Rule 6-10 meeting, Complainant stated that he wasn't worried about dying because, unlike his co-workers, he would "be with the Lord" and thus dying would only be "a gain." Therefore, Respondent has proven by preponderant evidence that Complainant committed the acts for which he was disciplined.

III. THE DECISION TO DISCIPLINE COMPLAINANT WAS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO RULE OR LAW.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; or 3) exercised its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001). A court must determine whether a reasonable person, upon consideration of the entire record, would honestly and fairly be compelled to reach a different conclusion. *McPeak v. Colorado Dept. of Social Services*, 919 P.2d 942 (Colo. App. 1996).

Respondent's actions in this case were neither arbitrary nor capricious, as those terms are defined in *Lawley*. Before reaching the decision to terminate Complainant's employment, Mr. Trujillo made every effort to understand Complainant's perspective, offered him an opportunity to avail himself of the counseling services offered by C-SEAP, demonstrated patience when Complainant originally failed to respond to his requests for a Rule 6-10 meeting, and rescheduled this meeting to encourage Complainant to attend. When this meeting finally occurred on January 30, 2015, Mr. Trujillo and Mr. Gale allowed Complainant an opportunity to explain his suspicions about his co-workers, and considered the documents and information Complainant shared with them. Despite their efforts to encourage Complainant to undergo a PFD, Complainant refused. In considering the evidence, Mr. Trujillo reasonably determined that

Complainant's disturbing behavior in the workplace was escalating, and that he posed a serious potential threat to his co-workers. Thus, under *Lawley*, Respondent did not act arbitrarily or capriciously, or contrary to rule or law, in deciding to terminate Complainant's employment on February 13, 2015.

IV. THE DISCIPLINE IMPOSED WAS WITHIN THE RANGE OF REASONABLE ALTERNATIVES.

In reviewing the decision to impose discipline, the Board must determine not only whether discipline is warranted, but must also decide whether the discipline imposed was within a range of reasonable alternatives. In deciding to take disciplinary action, Respondent is required to consider "the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." Board Rule 6-9.

Mr. Trujillo testified that, in determining the level of discipline to impose, he did not consider Complainant's work record because it was outweighed by the disturbing behavior Complainant displayed in the workplace, the disturbing comments he made in the Rule 6-10 meeting, and the potential threat he posed to his co-workers as a gun owner with a concealed carry permit. Under these difficult and serious circumstances, and faced with Complainant's refusal to undergo a PFD examination, the decision to terminate Complainant's employment was within the range of reasonable alternatives.

V. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF DISABILITY.

Complainant asserts that Respondent discriminated against him on the basis of disability when it asked him to undergo a psychological fitness-for-duty examination and, after he refused, terminated his employment. To establish a *prima facie* case of disability discrimination, Complainant must establish that (1) he is a disabled person within the meaning of the ADA; (2) he is qualified to perform the essential functions of his job, with or without reasonable accommodation; and (3) he suffered discrimination because of his disability. *EEOC v. C.R. England, Inc.,* 644 F.3d 1028, 1037-38 (10th Cir. 2011). At all times, the employee bears the ultimate burden of persuading the trier of fact that he has been discriminated against because of his disability. *Id.* Under Board Rule 9-4, "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

The ADA defines disability as, *inter alia*, "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." 42 U.S.C. § 12102(1)(A). The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) instructs that this definition "shall be construed in favor of broad coverage," 42 U.S.C. § 12102(4)(A), and states that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. §12102(2)(A). The Colorado Anti-Discrimination Act (CADA) adopts this definition of disability. §24-34-301(2.5), C.R.S.

Complainant testified that he suffered from, and was under treatment for, depression, but did not proffer any evidence that this condition substantially limits one or more major life activities. Complainant also failed to establish that he was qualified to perform the essential functions of his job. While Complainant's performance evaluations reflect that he was very competent at his assigned data entry work, an employee's ability to work reasonably well with others is an essential function of any position. *Williams v. Motorola, Inc.*, 303 F.3d 1284, 1290-1 (11th Cir. 2002). An employee whose unacceptable behavior threatens the safety of others is not qualified to perform the essential functions of his job. *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 809 (6th Cir. 1999); *Palmer v. Circuit Court*, 117 F.3d 351, 352 (7th Cir. 1997).

Evidence submitted by both parties demonstrates that Complainant had long-standing difficulties with his co-workers, who he believed were trying to poison him. These difficulties were exacerbated in December 2014, when Complainant made comments in the workplace about owning a gun and having a concealed carry permit. When Mr. Trujillo questioned Complainant about these comments, Complainant explained that he felt a need to defend himself in the workplace, that he was not afraid to die, and that dying would only be "a gain" to him but not to his co-workers. As a result of these statements, Mr. Trujillo placed Complainant on paid administrative leave and advised him that he was required to undergo a Psychological Fitness for Duty (PFD) examination, and referred him to C-SEAP to begin the PFD process.

The ADA allows an employer to require a medical examination of an employee when "such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. §1211(d)(4)(A). An employee's disturbing behavior in the workplace and potential threats to co-workers constitute legal grounds for requiring an employee to undergo a fitness-for-duty examination. *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1312 (11th Cir. 2013), citing *Krocka v. City of Chicago*, 203 F.3d 507, 515 (7th Cir. 2000). Such disruptive behavior can justify the requirement of a fitness-for-duty examination even when an employee's job performance is otherwise satisfactory. *Brownfield v. City of Yakima*, 612 F.3d 1140, 11454 (9th Cir. 2010), citing *Watson v. City of Miami Beach*, 177 F.3d 932, 934 (11th Cir. 1999). Complainant's escalating attempts to defend himself from what he perceived to be his co-workers' attempts to poison him, culminating in his purchase of a weapon, procurement of a concealed carry permit and making disturbing comments to his co-workers, as well as to Mr. Gale and Mr. Trujillo, legally justified Respondent's request for a fitness-for-duty examination.

Complainant's refusal to obtain a PFD, and his failure to acknowledge that his behavior at work was disruptive, left Mr. Trujillo with no choice but to remove him from the workplace. It is a defense to a charge of discrimination under the ADA if an employee poses a direct threat to the health or safety of himself or others. *EEOC v. Beverage Distributors Co.*, 780 F.3d 1018, 1021 (10th Cir. 2015). See also *Justice v. Crown Cork and Seal Company, Inc.*, 527 F.3d 1080, 1091 (10th Cir. 2008), citing *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1290-1 (10th Cir. 2000); *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076, 1088 (10th Cir. 1997). A "direct threat" is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12111(3). An employer's "determination that an individual poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job" and must "be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." 29 C.F.R. §1630.2(r). The EEOC's Interpretive Guidance on this section of the ADA explains: "If no accommodation exists that would either eliminate or reduce the risk, the employer may refuse to

hire an applicant or may discharge an employee who poses a direct threat." 29 C.F.R. §1630.2(r) Direct Threat.

Mr. Trujillo's assessment of the threat posed by Complainant was based on the best available objective evidence he was able to gather in light of Complainant's refusal to undergo a PFD examination. Complainant's long-standing belief that his co-workers, as well as the members of his church and his former room-mate, were attempting to poison him, combined with Complainant's expressed need to defend himself in the workplace and that dying would only be "a gain" to him, constitute an objectively reasonable basis for Mr. Trujillo's conclusion that Complainant posed a significant risk of substantial harm to the health or safety of himself or his co-workers. Where an employer's determination that an employee poses a direct threat is objectively reasonable, proof of an actual threat is not necessary. *EEOC v. Beverage Distributors Co.*, *supra*, 1021-22, citing *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007). Further, the law does not require an employer to wait for a serious injury before eliminating such a threat. *Id.* Under these circumstances, Respondent did not discriminate against Complainant on the basis of an actual or perceived disability.

VI. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF SEX.

Complainant's notice of appeal identified discrimination on the basis of sex as one of the grounds for his appeal. Claims of discrimination under the Colorado Anti-Discrimination Act ("CADA") are within the Board's statutory authority under § 24-50-125.3, C.R.S. CADA prohibits harassment "during the course of employment" or discrimination "in matters of terms, conditions or privileges of employment against any person otherwise qualified" due to, *inter alia*, that person's sex, age, national origin or ancestry. § 24-34-402(1)(a), C.R.S.

To establish a *prima facie* case of discrimination on the basis of sex in employment, Complainant must demonstrate that: (1) he belongs to a protected class, (2) he was qualified for the job at issue, (3) he suffered an adverse employment decision despite her qualifications, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi v. Dept. of Natural Resources*, 995 P.2d 288, 297 (2000), citing *Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397, 400-01 (1997). While Complainant was a member of a protected class (male), received satisfactory performance evaluations, and suffered an adverse employment decision, Complainant presented no evidence of disparate treatment as a male. Because Complainant failed to provide any evidence supporting or permitting an inference of unlawful discrimination, he failed to establish a *prima facie* case of discrimination on the basis of sex.

VII. COMPLAINANT DID NOT ESTABLISH THAT HE WAS SUBJECTED TO RETALIATION AS A WHISTLEBLOWER.

The purpose of the Whistleblower Act, set forth in the legislative declaration, is to encourage "state employees . . . to disclose information on actions of state agencies that are not in the public interest." § 24-50.5-101, C.R.S.; *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo. App. 1987). The Whistleblower Act "protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest." *Ward v. Industrial Commission*, 699 P.2d 960, 966 (Colo. 1985). The Act prohibits the initiation or administration of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S.

For the first prong of a whistleblower claim, Complainant must show that he made a "disclosure of information," defined 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. To warrant protection under the Whistleblower Act, the disclosure of information must involve a matter of public concern. *Ferrell v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007). In addition, Complainant must demonstrate that he made "a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." § 24-50.5-103(2), C.R.S. If Complainant makes a disclosure about a matter of public concern to one of these persons or entities, a single disclosure is sufficient to satisfy the requirements of the Whistleblower Act. *Gansert v. Colorado*, 348 F. Supp.2d 1215, 1226-28 (D.Colo. 2004).

Complainant provided a copy of an email he sent to the Office of the Attorney General on October 4, 2011, describing his belief that various kinds of "fraud" were occurring at DOR. While this email may constitute a protected disclosure, Complainant failed to demonstrate that this disclosure was "a substantial or motivating factor" in the termination of his employment by Respondent. To establish a *prima facie* whistleblower claim, Complainant needed to produce evidence establishing a causal connection or link between his October 4, 2011 email and the termination of his employment approximately 3½ years later, on February 13, 2015. *Ward v. Industrial Commission*, 699 P.2d 960, 966 (Colo. 1985); *Maestas v. Segura*, 416 F.2d 1182, 1188-89 (2005). Complainant did not establish any such causal connection or link; therefore, Complainant has failed to establish that he was subjected to retaliation as a whistleblower.

VIII. RESPONDENT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Attorney fees are warranted if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S.; Board Rule 8-33, 4 CCR 801. Board Rule 8-33 provides the following additional guidance:

A. Frivolous means that no rational argument based on the evidence or law was presented;
B. In bad faith, malicious, or as a means of harassment means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth;
C. Groundless means despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such action or defense.

As the party seeking an award of attorney fees and costs, Respondent bears the burden of proof as to whether Complainant's appeal is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3). While Complainant has not prevailed in his appeal, Respondent has not demonstrated that this appeal was frivolous, groundless, or done in bad faith, maliciously or as a means of harassment. Therefore, Respondent is not entitled to an award of attorney fees and costs.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which he was disciplined.
2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
3. The discipline imposed was within the range of reasonable alternatives.
4. Respondent did not discriminate against Complainant on the basis of disability.
5. Respondent did not discriminate against Complainant on the basis of sex.
6. Complainant did not establish that he was subjected to retaliation as a whistleblower.
7. Respondent is not entitled to attorney fees.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 11th day of August, 2015.

[redacted]

Susan J. Tyburski
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 12th day of August, 2015, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** addressed as follows:

Douglas Schreffler
[redacted]

Stacy L. Worthington
Senior Assistant Attorney General
[redacted]

[redacted]

Andrea C. Woods

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-62, 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.

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.