STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2019G061**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOSHUA FISHER,
Complainant,

v.

COMMUNITY COLLEGE OF COLORADO, FRONT RANGE COMMUNITY COLLEGE, CAMPUS SECURITY & PREPAREDNESS,
Respondent.

Administrative Law Judge ("ALJ") K. McCabe held the commencement hearing on November 10, 2020, and the evidentiary hearing on March 29, and March 30, 2021, by web conference. The record closed on March 30, 2021.

Complainant appeared for the hearing. Euell Thomas, Esq., represented Complainant. Amanda Swartz, Esq., and Stacy Worthington, Esq., represented Respondent. JoAnne Wilkinson, Respondent's Executive Director of Organizational Development & Human Resources, participated as Respondent's advisory witness.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix.[1]

PROCEDURAL HISTORY

On April 12, 2019, the State Personnel Board ("Board") received Complainant's Petition for Hearing seeking review of Respondent's disciplinary termination of Complainant's probationary employment. Complainant's Petition for Hearing contained allegations of age discrimination.

On April 15, 2019, Complainant's discrimination claims were referred to the Colorado Civil Rights Division ("CCRD") for investigation. On May 2, 2019, Complainant filed a charge of discrimination with the CCRD. On March 3, 2020, the CCRD issued an Opinion of No Probable Cause. Complainant timely appealed the No Probable Cause Opinion.

This matter was set for evidentiary hearing following Complainant's appeal of the No Probable Cause Opinion.

[1] At the close of Complainant's evidence, Respondent's counsel made a motion to dismiss pursuant to Colorado Rule of Civil Procedure 41 (1)(b)(1). Respondent's motion is moot as a result of the issuance of this initial decision.

MATTERS APPEALED

In this matter, Complainant appeals Respondent's April 5, 2019 termination of his probationary employment. Complainant alleges Respondent discriminated against him on the basis of age in violation of the Colorado Anti-Discrimination Act ("CADA").

Respondent argues that Complainant failed to meet his burden of proof and that it had legitimate business reasons to terminate Complainant's probationary employment.

For the reasons discussed below, Respondent's decision to terminate Complainant's probationary employment for unsatisfactory performance is affirmed.

ISSUES

1. Did Respondent discriminate against Complainant on the basis of age in violation of CADA?

2. Is Complainant entitled to an award of attorney's fees and costs?

3. Is Respondent entitled to an award of limited attorney's fees and costs?

FINDINGS OF FACT

Background

1. Respondent employed Complainant as a Technician III. (Stipulated fact).

2. Complainant worked for Respondent from May 7, 2018 to April 5, 2019. (Stipulated fact).

3. J.T.,[2] Technician III, provided training to Complainant.

4. Craig Coleman, Assistant Director of Campus Security and Preparedness, was Complainant's direct supervisor at the time of Complainant's termination. (Stipulated fact).

5. Gordon Goldsmith, Director of Campus Security and Preparedness, was Mr. Coleman's supervisor at all times relevant to this appeal.

6. Patti Arroyo, Vice President of Finance and Administration, was Complainant's appointing authority at the time of his termination. (Stipulated fact).[3]

7. Mr. Coleman and Mr. Goldsmith interviewed Complainant prior to Complainant's hire.

8. Per Complainant's Position Description, 25% of his Job Duties were "Patrolling and Call Response." Some of the ongoing decisions for this job duty required exercising judgement and discretion. Complainant also had to make decisions to, "Mitigate potentially volatile situations."

[2] Complainant's co-workers' names are not necessary for this Initial Decision, and have been reduced to initials to protect their privacy.

[3] Patti Arroyo, Complainant's Appointing Authority, testified on March 18, 2020. Ms. Arroyo was unavailable on the dates of the evidentiary hearing.

9. Per Complainant's Position Description, 15% of his job duties were "Emergency Response." This duty required Complainant to "…provide emergency response and first aid as needed." One of the ongoing decisions for this job duty was the, "Ability to apply independent thinking to decision making within confines of established procedures."

Performance Concerns During Complainant's Period of Employment

Performance at CIT Training

10. In July 2018, Complainant participated in a Crisis Intervention Team ("CIT") Training. Respondent provided the CIT Training. (Stipulated fact). The CIT Training covered how to verbally deescalate a person in crisis. The CIT Training involved an instructional portion in the morning and a role play portion in the afternoon.

11. Mr. Coleman observed Complainant's role play. Mr. Coleman stopped Complainant's role play twice to provide Complainant feedback. Mr. Coleman believed Complainant escalated, rather than deescalated, the situation. Complainant did not know what to do during the role play. Mr. Coleman ultimately ended Complainant's role play early.

12. After the role play, individuals present for Complainant's role play expressed concern to Mr. Coleman about Complainant's performance during the role play.

13. Complainant's performance during the role play concerned Mr. Coleman because the CIT Training dealt with a critical part of Complainant's position.

14. In Complainant's Mid-Year Review, Mr. Coleman informed Complainant that Complainant did not perform satisfactorily during the CIT Training. (Stipulated fact). The Mid-Year review occurred in October 2018.

15. Around the time of the Mid-Year Review, Complainant informed Mr. Coleman that Complainant was a certified instructor for the Crisis Prevention Institute ("CPI"). CPI is similar to CIT.

16. The similarities between CPI and CIT caused Mr. Coleman to have additional concerns about Complainant's poor performance during the CIT Training. It caused Mr. Coleman additional concern because Complainant could not perform skills he was certified to instruct.

Response following Auto-Pedestrian Accident

17. On December 11, 2018, an auto-pedestrian accident ("Accident") occurred. The pedestrian was a student from Respondent's campus. The Accident injured the pedestrian.

18. Complainant and E.M., Technician III, responded to the Accident with a first-aid kit. Complainant and E.M. provided assistance to the pedestrian.

19. Complainant approached the pedestrian and spoke to him. While Complainant was with the pedestrian, the pedestrian was awake and talking. The pedestrian attempted to roll onto his side and push-up. Complainant instructed the pedestrian not to move. The pedestrian kicked his leg several times. Complainant again instructed the pedestrian to stop moving. Complainant asked the pedestrian to lay back. Complainant and E.M. then assisted the

pedestrian to lay on his back. Complainant supported the pedestrian's head until emergency medical personnel arrived.

20. Complainant believed first-aid allowed for movement of an injured person to prevent further injury and to treat for shock.

21. Following the Accident response, Mr. Coleman met with each employee involved to review their response to the Accident

22. During the meeting with Complainant, Mr. Coleman asked Complainant to explain what occurred during the Accident response. Complainant informed Mr. Coleman the pedestrian told Complainant he had pain in his hip and his head. Complainant further informed Mr. Coleman the pedestrian had glass shards in the back of his head. Complainant informed Mr. Coleman he took the pedestrian from laying on his side to laying on his back. Mr. Coleman questioned Complainant about his decision to move the pedestrian on to his back, and explained the protocol would be to keep the injured person in the position they were found, keep the injured person calm, and watch for shock. Complainant informed Mr. Coleman that Complainant thought the laying position was the best for the pedestrian.

23. During the meeting, Mr. Coleman expressed concern about Respondent's liability for actions taken by Complainant. Complainant then explained the Good Samaritan Law. Complainant believed the Good Samaritan Law made Respondent not liable when Complainant rendered aid in an emergency situation.

24. During the meeting, Mr. Coleman instructed Complainant that his responsibility in the situation would be to keep the injured person calm and in the position they were in until emergency medical professionals arrived. Complainant agreed to comply with Mr. Coleman's instruction.

25. Mr. Coleman thought Complainant acted outside of the scope of his Technician III position by providing more than first-aid. Complainant's response to the Accident caused Mr. Coleman concern for Complainant's decision making abilities.

Inappropriate Comment

26. In December 2018, Complainant made an inappropriate comment to J.T. in a parking lot. Complainant was driving a patrol vehicle. E.M. was a passenger in the vehicle. Complainant saw J.T. walking in a parking lot, rolled the passenger window down, and yelled in a disguised voice, "Hey baby, you want a ride."

27. J.T. and E.M. laughed.

28. Complainant considered this to be a joke.

29. J.T. reported the inappropriate comment to Mr. Coleman on March 4, 2019.

30. On March 1, 2019, Complainant reported to Mr. Coleman that J.T. possibly engaged in misconduct.[4]

[4] In his testimony, Complainant asserted it was his report of J.T.'s conduct that led to her report of the inappropriate comment.

Question Regarding "SRP"

31. At the beginning of his employment, Complainant received training on the Standard Response Protocol.

32. Standard Response Protocol is important to Technician IIIs, because it is an important part of keeping students and staff safe.

33. In January 2019, J.T. mentioned "SRP" training to Complainant.

34. "SRP" is an acronym for Standard Response Protocol.

35. Complainant was not familiar with the acronym and asked, "What is the SRP?" Complainant then asked J.T. to refresh his memory.

36. Although he was not familiar with the acronym, Complainant was familiar with the Standard Response Protocol as a result of his earlier training.

Failure to Follow Lost and Found Procedure

37. In May or June 2018, Complainant received training on the lost and found tag procedure.

38. In February 2019, Complainant failed to follow a lost and found tag procedure. Complainant went to throw-away a tag after an item was claimed. Procedure, however, required the tag to be placed in a box.

39. J.T. observed Complainant do this and reminded him of the appropriate procedure. Complainant followed the appropriate procedure after receiving the instruction.

40. Complainant observed R.A., Technician III, and E.M. failing to place tags in the box. R.A. was a long term employee. Complainant did not report these failures to Mr. Coleman.

Failure to Follow Instructions on Reporting Vehicles Left Overnight

41. In approximately February 2019, Complainant's team began discussing a way to exchange information between shifts.

42. Mr. Coleman discussed this topic during a team meeting. Complainant attended the meeting.

43. In the meeting, Mr. Coleman provided the exchange of information could be simple and informal. Mr. Coleman specifically discussed exchanging information about vehicles left on campus overnight. Mr. Coleman instructed that the reporting employee needed to provide information about why the vehicle was parked overnight, for example if the vehicle received permission to be left overnight or had just been parked.

44. Following the meeting, Complainant sent three emails about vehicles parked overnight. Complainant did not provide an explanation of why the vehicles were parked overnight. Mr. Coleman communicated with Complainant after each of his emails. Mr. Coleman informed Complainant he needed to explain in the email why the vehicle was parked overnight.

Inappropriate Professional Development Request

45. In approximately February 2019, Mr. Coleman denied Complainant's professional development request. Mr. Coleman had previously explained to Complainant why the professional development was not appropriate for Complainant's position.

46. Another employee encouraged Complainant to appeal the denial to Human Resources.

47. Complainant took his concerns with the denial to Human Resources. Human Resources ultimately told Complainant that the issue was not within their area.

Unauthorized Attendance at a Safety Committee Meeting

48. Part of Complainant's job duties were to check fire extinguishers. During one of his checks Complainant noticed an issue with the fire extinguishers. In November 2018, Complainant reported the issue to Mr. Coleman.

49. In February 2019, Complainant arrived at work early to attend a safety committee meeting. Complainant wanted to attend the meeting to report the issue with fire extinguishers.

50. Complainant did not ask Mr. Coleman if he could attend the safety committee meeting. Mr. Coleman assigned another employee to regularly attend the safety committee meeting.

51. Complainant spoke to Bill Donahue, one of Respondent's Assistant Directors, before the meeting. Mr. Donahue asked Complainant why Complainant was early for his shift. Complainant explained he was off-the-clock. Mr. Donahue explained that if Complainant was performing work he was on-the-clock, and Complainant's schedule would have to be adjusted.

52. Complainant worked in a position where he could not perform work duties off the clock. Adjusting Complainant's schedule is a significant issue, because there must be employees working at certain times.

53. The next day, Mr. Coleman addressed Complainant's attendance at the safety committee meeting with Complainant. Mr. Coleman informed Complainant he could not attend the safety committee meetings without approval.

Unnecessary Disclosure of a Tax Issue

54. On March 4, 2019, Complainant asked Mr. Coleman if he could go to Human Resources. Complainant then explained a tax issue he had to Mr. Coleman.

55. Respondent did not require Complainant to report the type of tax issue explained to his supervisor.

56. Mr. Coleman questioned Complainant's judgment because Complainant unnecessarily reported the tax issue to him.

<u>Respondent's Decision to Terminate Complainant's Probationary Employment</u>

57. On March 4, 2019, Mr. Coleman initiated a conversation with J.T. about Complainant's performance. J.T. reported Complainant's failure to follow the lost and found procedure,

Complainant's question about "SRP," and the incident where Complainant made an inappropriate comment to her.

58. Mr. Coleman considered the inappropriate comment to be sexual harassment. Mr. Coleman asked E.M. about the inappropriate comment reported by J.T. E.M. confirmed that it occurred. Mr. Coleman counseled E.M. about the necessity of reporting this type of incident.

59. After learning of the inappropriate comment, Mr. Coleman determined he needed to discuss Complainant's performance with Mr. Goldsmith.

60. Mr. Coleman met with Mr. Goldsmith about Complainant's performance. Mr. Goldsmith requested that Mr. Coleman prepare a memorandum regarding Complainant's performance.

61. On or about March 5, 2019, Mr. Coleman completed the memorandum and provided it to Mr. Goldsmith.[5] Mr. Coleman recommended Complainant's termination to Mr. Goldsmith. (Stipulated fact). In the memorandum, Mr. Coleman provided a summary of performance concerns. The performance concerns were Complainant's performance at the CIT Training, Complainant's response following the Accident, Complainant's inappropriate comment, Complainant's question regarding "SRP," Complainant's failure to follow the lost and found procedure, Complainant's failure to follow instructions on reporting vehicles left overnight, Complainant's inappropriate professional development request,[6] Complainant's unauthorized attendance at a safety committee meeting, and Complainant's unnecessary disclosure of a tax issue.

62. Mr. Coleman concluded the memorandum as follows:

> Fisher is not performing at the level expected with his training and tenure. I have struggled with this for more than a few months now, and just cannot see Fisher being successful in his position with FRCC. The most disturbing is the CIT training. He failed so miserably in an area he has supposedly instructed in previously. He was not able to de-escalate the training scenario, and I have serious reservations about his performance should a real incident occur. Josh Fisher is not satisfactorily performing the duties and responsibilities, and should be released from employment with FRCC.

63. Mr. Coleman and Mr. Goldsmith reviewed the memorandum together. Mr. Goldsmith added bullet point comments to the memorandum.

64. On March 19, 2019, Mr. Goldsmith provided Ms. Arroyo the memorandum.

65. Ms. Arroyo and Mr. Goldsmith discussed the termination of Complainant's probationary employment. After review of the memorandum and discussion with Mr. Goldsmith, Ms. Arroyo determined termination of Complainant's probationary employment was appropriate. Based

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[5] Sometime after Mr. Coleman wrote the memorandum, Complainant conducted a blood borne pathogen training. Complainant attempted to use an exposed hypodermic needle in a practical exercise during the training. Mr. Coleman observed this and stopped Complainant from using the exposed needle. Complainant complied with Mr. Coleman's instruction.

[6] The memorandum did not reference Complainant's elevation of the professional development request to Human Resources.

upon the information provided to her, Ms. Arroyo did not feel Complainant was competent to perform his job duties.

66. Ms. Arroyo did not perform any independent investigation or personally observe Complainant's performance issues.

67. Ms. Arroyo was not aware of Complainant's age when she decided to terminate his employment.

68. Ms. Arroyo and Mr. Goldsmith discussed the logistics of terminating Complainant's employment. They decided Mr. Goldsmith would setup a meeting with Complainant and terminate Complainant's probationary employment, providing him with a letter prepared by Ms. Arroyo. They determined Ms. Arroyo would not be present for the meeting.

69. On April 5, 2019, Complainant met with Mr. Goldsmith to discuss Respondent's concerns with Complainant's job performance. (Stipulated fact).

70. On April 5, 2019, Respondent provided Complainant a letter terminating his employment. (Stipulated fact). Respondent terminated Complainant for unsatisfactory performance. Ms. Arroyo prepared and signed the letter provided to Complainant.

71. Complainant was a probationary employee at the time Respondent terminated his employment. (Stipulated fact).

72. Complainant received no formal corrective actions, action plans, or performance improvement plans during his period of employment. (Stipulated fact).

73. Complainant timely appealed the termination of his employment. (Stipulated fact).

Age Information

74. Complainant was 47 at the time of his termination. (Stipulated fact).

75. Most of the individuals employed as Technician IIIs are under the age 40. Per an age data sheet, 11 out of 12 individuals in the position are under the age of 40. The individuals range in age from 26 to 34. The individual over the age of 40 is 55.

76. After his termination, Respondent filled Complainant's position with an employee younger than Complainant. There was a Technician III position open at the time of Respondent's termination of Complainant's probationary employment. After Complainant's employment ended, Respondent hired two Technician IIIs. Respondent hired a Technician III in June 2019. That individual was 31. The other individual hired was between the ages of 27 and 30.

DISCUSSION

A. RESPONDENT DID NOT DISCRIMINATE AGAINST COMPLAINANT ON THE BASIS OF AGE IN VIOLATION OF CADA.

A probationary employee lacks a legally protected interest in continued state employment. *Lucero v. Dep't of Institutions,* 942 P.2d 1246, 1248 (Colo. App. 1996). Under Colo. Const. art. XII, § 13(10), unsatisfactory performance is grounds for termination without the right of appeal

when one is a probationary employee. Section 24-50-125(1) and (5), C.R.S., further clarifies that a probationary employee who is disciplined for "failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority" is not entitled a hearing. Therefore, Complainant is not entitled to a hearing to review his discharge for unsatisfactory performance.

While probationary employees are not entitled to hearings when they are discharged for unsatisfactory performance, they are otherwise "entitled to all the same rights to a hearing as a certified employee." § 24-50-125(5), C.R.S. Claims of unlawful discrimination fall within the Board's jurisdiction under § 24-50-125.3, C.R.S. Pursuant to that statute, the type of discrimination claims the Board may hear are those enumerated in CADA, which includes discrimination based on age. § 24-34-402(1)(a), C.R.S. Complainant, then, may request the Board to review of his claims that Respondent discriminated against him in violation of CADA.

Complainant claims Respondent discriminated against him in violation of CADA on the basis of age. Complainant has the burden to prove by a preponderance of the evidence that Respondent discriminated against him on the basis of his age. *Colorado Civil Rights Com'n v. Big O Tires, Inc*., 940 P.2d 397, 400-01 (Colo. 1997). CADA provides that it is a discriminatory or unfair employment practice to, "discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of" age. § 24-34-402(1)(a), C.R.S. Age is defined as a "chronological age of at least forty years." § 24-34-301(1), C.R.S.

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes:

> First, an employee must show that he belongs to a protected class. Second, the employee must prove that he was qualified for the job at issue. Third, the employee must show that he suffered an adverse employment decision despite his qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination.

Bodaghi v. Dep't of Natural Resources, 995 P.2d 288, 297 (Colo. 2000).[7]

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[7] Both parties made arguments citing *prima facie* elements for age discrimination under federal law. Pursuant to 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 Court in *George* provided:

> [T]he federal counterpart to the Colorado Anti-Discrimination Act is the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, et seq., (1987). ADEA, as does § 24-34-402, prohibits the discharge of an individual based on age.
>
> Under ADEA, the elements of a prima facie case are: (1) the complainant was within the protected age group; (2) the complainant was doing satisfactory work; (3) the complainant was discharged despite the adequacy of this work; and (4) a younger person replaced the complainant. (citation omitted).

As to the first element of a *prima facie* case of discrimination, Complainant is over the age of 40 and belongs to a protected class on the basis of age.

As to the second element of a *prima facie* case of discrimination, Respondent hired Complainant for, and Complainant worked in, the job at issue and is, therefore, qualified for the job at issue.

As to the third element of a *prima facie* case of discrimination, Complainant suffered an adverse employment action when Respondent terminated his probationary employment.

As to the fourth element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297. Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *See George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). "Direct evidence is '[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.' (citations omitted)." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. "[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis." *Id*. Complainant may rely on, "existing conditions from which a fair inference of such discrimination could legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant failed to present direct evidence or indirect evidence of age discrimination. There was no evidence presented that indicated anyone made derogatory statements related to Complainant's age or otherwise openly treated Complainant differently on the basis of his age. Therefore, there is no direct evidence of discrimination.

As to indirect evidence of discrimination, Complainant asserted J.T., a person who reported some of the concerns about Complainant's performance to Mr. Coleman, was biased against Complainant. Complainant asserted the bias was based upon Complainant's report of J.T.'s alleged misconduct. Complainant did not assert J.T.'s bias was related to Complainant's age. Additionally, although there is dispute about the assessment of the incidents, there is no dispute that the incidents that J.T. reported occurred. Therefore, J.T.'s alleged bias does not support an inference of age discrimination.

Complainant testified he was not expecting to be terminated on April 5, 2019. It is undisputed that Respondent did not provide Complainant, "formal corrective actions, action plans, or performance improvement plans during his period of employment." As a probationary employee, Complainant was not entitled to be given time to improve performance or a pre-

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George v. Ute Water Conservancy Dist., 950 P.2d 1195, 1197 (Colo. App. 1997).

The elements of a *prima facie* case of discrimination under CADA are not the same as under the ADEA. "Although the elements are not identical, a prima facie case under § 24-34-402, as under ADEA, requires evidence of circumstances from which discrimination may reasonably be inferred." *George,* 950 P.2d at 1198.

If analyzing Complainant's claim under the ADEA standard for a *prima facie* case of age discrimination, Complainant failed demonstrate the second and third elements of a *prima facie* case of age discrimination. Complainant could establish the fourth element, as he was replaced by an employee that was more than ten years younger than Complainant.

disciplinary meeting prior to his termination. *See* Board Rule 4-41(A). Respondent then was not required to provide Complainant a formal corrective action or warning about performance prior to termination. The lack of formal corrective action and the unexpectedness of the termination of Complainant's probationary employment does not support an inference of age discrimination.

Complainant asserted that experience and thought processes are "loaded terms" that refer to age. Mr. Coleman considered Complainant's experience and thought processes (decision making ability) in recommending Complainant's termination. This does not raise an inference of age discrimination. First, while getting experience is necessarily associated with some passage of time, it is not necessarily associated with age. For example, a 37-year-old, a 47-year-old, and a 57-year-old could have similar certifications and experience accumulated over a 10-year period. Second, Mr. Coleman's most significant concern related to experience was Complainant's performance in the CIT Training. Mr. Coleman wrote in the memorandum, "The most disturbing is the CIT training. He failed so miserably in an area he has supposedly instructed in previously." Mr. Coleman had concern about Complainant's inability to perform skills that Complainant's job duties required, and that Complainant conveyed he was certified to instruct. Mr. Coleman's concern has no apparent correlation to age. Third, Complainant's job duties required Complainant to exercise discretion and independent judgment. Consideration of Complainant's thought processes (decision making ability) is then a consideration of whether or not Complainant can perform his job duties, including how Complainant might make decisions and act in a crisis situation. In this case, Mr. Coleman's consideration of past experience and Complainant's thought process was a consideration of if Complainant was capable of successfully performing his job duties as a Technician III. This does not raise an inference of age discrimination.

Complainant asserted that younger employees received different treatment than Complainant. Complainant failed to demonstrate younger employees were treated differently than Complainant. Complainant did not clearly delineate the age of the younger employees treated differently, R.A. and E.M. Had Complainant established the age of the younger employees, Complainant did not establish Respondent was aware of their conduct, that they exhibited the same performance issues, or were otherwise similarly situated to Complainant.

Complainant asserted his position was filled by younger employees. Complainant demonstrated he was replaced by a younger employee. This, however, does not raise an inference of discrimination. In this case, Complainant was not a long term employee performing satisfactorily, who was replaced with someone significantly younger. Complainant was a probationary employee experiencing performance issues. "All the evidence in the record" does not support or permit an inference that Respondent's termination of Complainant's employment was based on his age. *Bodaghi*, 995 P.2d at 297.

Had Complainant established a *prima facie* case of age discrimination, Respondent articulated legitimate, nondiscriminatory reasons for terminating Complainant's probationary employment. Complainant did not demonstrate those reasons were pretextual. "When the plaintiff has proved a prima facie case of discrimination, the defendant bears only the burden of explaining clearly the nondiscriminatory reasons for its actions." *Texas Dept. of Comty. Affairs v. Burdine*, 450 US 248, 260 (1981). Once an employer meets its burden of proffering a legitimate, non-discriminatory reason for an adverse employment decision, Complainant must "demonstrate by competent evidence" that this articulated reason is "a pretext for discrimination." *Big O Tires,* 940 P.2d at 401. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the

employer did not act for the asserted non-discriminatory reasons.' (citation omitted)." *Morgan v. Hilti, Inc*., 108 F. 3d 1319, 1323 (10th Cir. 1997).

Respondent presented legitimate non-discriminatory reasons for ending Complainant's probationary employment. Respondent clearly explained its non-discriminatory reasons for terminating Complainant's employment. Performance at CIT Training – Complainant was unable to perform a skill required for his position and that he was certified to instruct. Response Following Auto-Pedestrian Accident – Complainant decided to move an awake and talking injured person, with glass shards in the back of his head, to lay on his back. Mr. Coleman believed in doing this Complainant exceeded the scope of his Technician III position. Inappropriate Comment – Complainant made an inappropriate comment to J.T. Question Regarding "SRP" – Complainant asked what "SRP" was. Failure to Follow Lost and Found Procedure – Complainant failed to follow a procedure on which he received training. Failure to Follow Instructions on Reporting Vehicles Left Overnight – Complainant failed to follow Mr. Coleman's instruction about reporting vehicles left overnight.[8] Inappropriate Professional Development Request – Complainant continued to request training professional development that was not appropriate for his position. Unauthorized Attendance at a Safety Committee Meeting– Complainant did not receive authorization to go to a safety committee meeting. Unnecessary Disclosure of a Tax Issue – Complainant unnecessarily shared information related to a tax issue with Mr. Coleman. Respondent had legitimate non-discriminatory reasons for ending Complainant's probationary employment.

Complainant did not demonstrate those reasons were pretextual. First, in this case, it was the recommendation of Mr. Coleman and Mr. Goldsmith that resulted in the termination of Complainant's employment. "We take this opportunity to join our sister circuits and announce that in cases where 'the employee was hired and fired by the same person within a relatively short time span,' there is 'a strong inference that the employer's stated reason for acting against the employee is not pretextual.' (citation omitted)." *Antonio v. The Sygma Network, Inc.*, 458 F. 3d 1177, 1183 (10th Cir. 2006). In *Antonio*, the court considered ten months to be a "relatively short time span." *Id.* In this case, Mr. Coleman's recommendation for termination occurred within approximately ten months of Complainant's hire. Respondent's termination of Complainant's employment occurred within a year of Complainant's hire. Mr. Goldsmith and Mr. Coleman participated in the interview and hiring of Complainant less than a year prior to his termination. For that reason, there is a strong inference that the stated reasons for discharge are not pretextual.

Second, while Complainant disputes Mr. Coleman's assessment of the incidents leading to termination, Complainant does not dispute that the incidents that caused Mr. Coleman's performance concerns occurred. The final piece of information that led Mr. Coleman to recommend termination was Complainant's inappropriate comment to J.T. Whether or not made as a joke, the comment was inappropriate for the workplace. Mr. Coleman could have recommended termination of Complainant's probationary employment for the inappropriate comment alone. Mr. Coleman did not choose to recommend termination for the inappropriate comment alone, but for a series of incidents that undisputedly occurred throughout Complainant's period of probationary employment. Even Complainant's question about "SRP," which does

[8] Mr. Coleman credibly testified he addressed including additional information with Complainant after each email. Complainant testified Mr. Coleman only addressed the issue with him on one occasion. Mr. Coleman's memorandum, written close in time to the incident, includes that Mr. Coleman addressed each email with Complainant and supports Mr. Coleman's testimony. Complainant did not dispute sending the emails.

appear to be a misunderstanding about what Complainant was asking, occurred. Complainant failed to demonstrate "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in Respondent's reasons for termination of Complainant's probationary employment and failed to demonstrate those reasons were "unworthy of credence." *Morgan*, 108 F. 3d at 1323. The evidence in the record and the facts of this case do not support a finding a pretext.

B. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Section 24-50-125.5(1), C.R.S., provides, in pertinent part:

> Upon final resolution of any proceeding related to the provisions of this article, 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, the employee bringing the appeal or the department, agency, board, or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate.

A frivolous action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). A groundless personnel action is one in which it is found that "a party fails to offer or produce any competent evidence to support such an action…". Board Rule 8-33(C).

Respondent's personnel action was not frivolous, done in bad faith, or groundless. As analyzed above, Respondent did not discriminate against Complainant in violation of CADA. Respondent discharged Complainant for unsatisfactory performance during his probationary period of employment. Complainant is not entitled to an award of attorney fees.

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

The evidence in the record does not support Complainant's claim was "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless." § 24-50-125.5(1), C.R.S. Complainant testified at the time he filed his petition for hearing he believed he was being replaced by a younger employee. The evidence in the record supports that Complainant later received information that Respondent, in fact, replaced Complainant with a younger employee. Although his arguments were not successful, Complainant raised a rational argument at hearing as to the possibility of age discrimination and this was not a frivolous action. *See* Board Rule 8-33(A). The evidence in the record also does not support that Complainant raised his claims to annoy Respondent or that he was disrespectful of the truth. *See* Board Rule 8-33(B). Complainant viewed the reasons for his termination differently from Respondent, and generally disagreed with Mr. Coleman's assessment of his performance. Finally, Complainant did not fail to produce "any competent evidence" and it does not appear his action was groundless. Board Rule 8-33(C).

CONCLUSIONS OF LAW

1. Respondent did not discriminate against Complainant on the basis of age in violation of CADA.

2. Because Respondent's personnel action was not frivolous, done in bad faith, or groundless, Complainant is not entitled to an award of attorney fees and costs.

3. Because Complainant's appeal was not frivolous, done in bad faith, or groundless, Respondent is not entitled to an award of limited attorney fees and costs.

ORDER

Respondent's decision to terminate Complainant's probationary employment is affirmed.

Dated this 29th day, of
April, 2021, at
Denver, Colorado.

/s/ K. McCabe

K. McCabe, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of **April, 2021**, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

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Andrea Woods

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits B, C, D, E, F, I, and J.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits 1, 2, 4, 6, 7, 8, 9, 10, and 12.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Patti Arroyo

Craig Coleman

Joshua Fisher

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 served 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 served 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.