

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF APPEAL RIGHTS

GARY D. PACHECO,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS, DENVER COMPLEX,
Respondent.

THIS MATTER is before the Administrative Law Judge ("ALJ") on Respondent's Motion for Summary Judgment ("Motion"), Complainant's Response to Respondent Request for Summary Judgment ("Response"), and Respondent's Reply to Complainant's Response to Respondent Request for Summary Judgment. Having reviewed the pleadings, the entire case file, and the applicable law, the ALJ finds and orders as follows.

Background

Respondent administratively discharged Complainant from his employment after he exhausted his available leave and was unable to return to work without restrictions. Complainant filed an appeal of his administrative discharge with the State Personnel Board ("Board") on December 14, 2019. Complainant alleged that his administrative discharge was improper and discriminatory on the basis of disability. Respondent denies that it discriminated against Complainant and asserts that the administrative discharge complied with all applicable rules.

Issues Before the Board

Did Respondent discriminate against Complainant on the basis of disability when it administratively discharged Complainant?

Did Respondent comply with Board Rule 5-6 in its administrative discharge of Complainant from employment?

Standards For Summary Judgment

A summary judgement shall be entered if, "...the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c); See *Kirkmeyer v. Dep't of Local Affairs*, 313 P.3d 562, 567 (Colo. App. 2011).

“A material fact is simply a fact that will affect the outcome of the case. The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. Summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact, and that all legal prerequisites are clearly established.” *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992) (citations omitted).

Undisputed Facts

1. Complainant began working for Respondent on November 1, 2016.
2. Complainant was a Correctional Officer I (“COI”).
3. All correctional officers have a security mission and “must be able to respond in an emergency to a multitude of issues...All Correctional Officers and staff within a correctional facility must have the physical ability to deal with assaultive behavior, and to defend themselves, facility staff, and offenders.”
4. Complainant’s essential functions as a COI were listed on his position description and required “very heavy” physical demands in the areas of “Counts, Searches, Inspections, and Emergencies” and “Facility Access.”
5. Per Complainant’s position description, Complainant’s duties included searching facilities and offenders and using “emergency protocols when responding to fights, fires, suicide attempts, hostage situations, riots, and any other emergent/critical issue; controls situations and subdues offenders by applying appropriate Use of Force techniques (verbal to physical) and prepares associated reports.”
6. Complainant’s job duties required the physical ability to control offenders.
7. In July 2019, Complainant was injured in a car accident. The injuries caused Complainant to be unable to work.
8. On October 3, 2019, Warden Long conducted a Board Rule 5-6 meeting with Complainant, because Complainant had exhausted all leave and did not provide the paperwork necessary for family medical leave. At the meeting, Complainant informed Warden Long he would be able to return to work on October 13, 2019 and would provide missing paperwork.
9. On October 13, 2019, Complainant returned to work following his release to work without restrictions by a medical provider.
10. Complainant left work on the same day he returned because he did not feel well.
11. On October 14, 2019, Complainant filed a Request for Accommodation form (“Request”). Complainant requested, “Control Center or Administrative type work, which includes not

having to walk long distances, and/or do hourly rounds. Work which does not include arrest or physical inmate control outside of self-defense in extreme circumstances.”

12. The Request was to be moved to a position where Complainant did not have to perform some of the essential functions of a COI, including the physical ability to control offenders.
13. Jennifer Murphy, Respondent’s ADA Coordinator, received the Request.
14. On October 15, 2019, Ms. Murphy sent Complainant a letter informing him of his rights under ADA, and notified him of the process for accommodation requests.
15. On October 17, 2019, Ms. Murphy received Complainant’s restrictions from his medical provider. Based upon the restrictions and Ms. Murphy’s review of Complainant’s position description, Ms. Murphy determined Complainant was unable to perform the essential functions of his position.
16. Ms. Murphy provided Complainant’s restriction information to Warden Long.
17. Ms. Murphy began a search of available positions for Complainant. Complainant requested the search be limited to positions in the Denver Metro area. Ms. Murphy requested, but Complainant did not provide, an updated list of his qualifications for the job search. Ms. Murphy used Complainant’s current application to determine his qualifications.
18. Ms. Murphy was not able to find a position for which Complainant met minimum qualifications.
19. On October 17, 2019, Warden Long provided Complainant the summary of his work restrictions.
20. Per Warden Long’s summary, Complainant’s work restrictions were:
 - No control over others: seize, hold, control, or subdue violent or assaultive persons and defend oneself or others to prevent injury
 - No complete Defensive Tactics
 - No working in situations involving assaultive behavior, physical control of another person, and/or restraint situations
 - Medical provider recommends desk work¹
21. Warden Long notified Complainant they were unable to accommodate those restrictions.

¹In his deposition, Complainant agreed these were his restrictions and that the restrictions impacted the essential functions of his job.

22. Warden Long denied Complainant's Request.
23. On November 15, 2019, Complainant received a Board Rule 5-6 letter from Warden Long. The letter set an information sharing meeting.
24. On November 16, 2019, following receipt of the Board Rule 5-6 letter, Complainant sent an email to Respondent's Human Resources Director Rick Thompkins, Warden Long, Ms. Murphy, and Executive Director Dean Willams. In the email, Complainant informed the recipients he was filing a discrimination claim with the EEOC and Colorado Civil Rights Division. Complainant stated that he was represented by counsel and had a meeting "setup" with the EEOC. Complainant stated he felt the denial of his Request while seeking a full-time placement was contrary to the Americans with Disabilities Act ("ADA").
25. Complainant raised an initial complaint of disability discrimination through his November 16, 2019 email.²
26. On November 25, 2019, Warden Long conducted a Board Rule 5-6 Meeting with Complainant. Warden Long provided Complainant with an opportunity to ask questions and gave him until December 2, 2019 to submit additional information.
27. Complainant did not submit additional information by December 2, 2019.
28. On December 4, 2019, Warden Long administratively discharged Complainant from employment.
29. Respondent sent a letter notifying Complainant of his administrative discharge by certified mail and email. The letter provided Complainant notice of his appeal rights with contact information for the State Personnel Board and contact information for PERA for questions about eligibility for retirement benefits.
30. On December 4, 2019, Complainant's credited paid leave, short-term disability leave, and family medical leave were exhausted.³ Respondent denied Complainant use of family medical leave beyond October 13, 2019 due to Complainant's failure to provide an updated medical certificate.
31. On December 4, 2019, Complainant had work restrictions and was not fully released to return to work without restrictions.

² The parties dispute whether Complainant's email complaint was properly dealt with pursuant to Board Rule 8-27.

³ At his deposition, Complainant agreed he had exhausted all available leave.

Respondent's Argument

In its Motion, Respondent argues that summary judgment is warranted in this matter because there are no genuine issues of material fact.

With respect to Complainant's claim that he was discriminated against on the basis of disability, Respondent argues that Complainant cannot prove that he was a qualified individual with a disability who could reasonably be accommodated by Respondent.

With respect to Complainant's claim that his administrative discharge was improper, Respondent argues that there is no dispute that Complainant exhausted his paid leave, short term disability leave, and family medical leave and that Respondent complied with Board Rule 5-6 in its administrative discharge of Complainant.

Complainant's Response

In Complainant's Response, Complainant argues his initial complaint of discrimination was not properly investigated in violation of his due process rights. Complainant also argues there is an issue as to whether or not reasonable accommodations could have been made and that Respondent could have allowed him to work in a Control Center. Complainant also stated Respondent, through Warden Long, regularly denies requests for accommodation.

Complainant attempted to raise a new issue related to the investigation of his discrimination complaint under Board Rule 8-27. This issue was not raised in Complainant's appeal and is not an issue before the Board.

Discussion

Disability Discrimination Claim

The Colorado Anti-Discrimination Act (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 disability...; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job.

Section 24-34-402(1)(a), C.R.S.

The Colorado Civil Rights Commission (CCRC) has promulgated rules to implement CADA. The rules state CADA, as related to disability, "...is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, as amended, and the Fair Housing Act

concerning disability.” 3 CCR 708-1-60.1(A).⁴ Therefore, interpretations of CADA, “...shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.” 3 CCR 708-1-10.4. Furthermore, Board Rule 9-4 provides that, “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.”

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 accommodations; and (3) he suffered discrimination because of his disability. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1037-38 (10th Cir. 2011).

For the purpose of this Order, we will assume Complainant has the ability to demonstrate he was disabled within the meaning of the law at the time of his administrative discharge.

Even if Complainant was disabled, Complainant’s disability claim fails because Complainant cannot establish that he was qualified to perform the essential functions of his job, with or without reasonable accommodations. A person with a disability, “...is ‘otherwise qualified’ if, with reasonable accommodations, he can perform the reasonable, legitimate, and necessary functions of his job.” *AT & T Technologies, Inc. v. Royston*, 772 P.2d 1182, 1185 (Colo. App. 1989). Complainant could not perform the reasonable, necessary, and legitimate functions of his job, with or without reasonable accommodations.

It is undisputed that the essential functions of Complainant’s position were the duties included in his position description.⁵ The essential functions then included the physical ability to control offenders. A Correctional Officer is necessarily charged with a security mission and is required to be physically able to deal with security issues when they arise. Further, it is undisputed that, as a result of his restrictions, Complainant could no longer perform the essential physical functions of his job, including the ability to physically control offenders.⁶ Complainant could not perform the essential functions of a COI “no matter how much accommodation” Respondent extended, because he did not have the physical ability to control offenders. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999).

⁴ The Americans with Disabilities Act was amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which went into effect on January 1, 2009. The statute will be referred to as the ADA in this Order.

⁵ Complainant testified in his deposition that the essential functions of his job were the functions listed in his position description.

⁶ Complainant testified in his deposition his restrictions impacted his ability to perform the essential functions of his position, and later testified his request for accommodation was to have a post in the Control Center where he did not have to perform physical control of offenders.

Complainant acknowledged that his Request for accommodation, a post that did not involve physical interaction with offenders, would remove an essential function of his COI position.⁷ “Although job restructuring is a possible accommodation under the Disabilities Act, [a]n accommodation that eliminates the essential function of the job is not reasonable.” *Frazier v. Simmons*, 254 F.3d 1247, 1261 (10th Cir. 2001)(citations omitted). The accommodation requested was, as a matter of law, not reasonable, because it would eliminate an essential function of Complainant’s position.

Reasonable accommodation also requires the employer to engage in an interactive process with an individual to determine if reassignment is a possibility. See *Smith* at 1161 and 1171-72. Respondent engaged in an interactive process with Complainant following notice of Complainant’s disability.

[O]nce the employee has provided the employer with appropriate notice, “both parties have an obligation to proceed in a reasonably interactive manner to determine whether the employee would be qualified, with or without reasonable accommodations, for another job within the company and, if so, to identify an appropriate reassignment opportunity if any is reasonably available.”

Frazier at 1261 (citation omitted). After Complainant’s Request, Ms. Murphy initiated the interactive process through her October 15, 2019 letter. In addition to reviewing the restrictions provided by Complainant, Ms. Murphy attempted to get updated qualifications for Complainant and began a search for open positions which complied with Complainant’s restrictions. Ms. Murphy was not able to find a position for which Complainant met the minimum qualifications and that also met Complainant’s requested geographic limitation to the Denver Metro area.

“To survive summary judgment” Complainant “must show ‘that a reasonable accommodation was possible and would have led to a reassignment position.’” *Id.* at 1262. (citation omitted). Respondent could not have reasonably accommodated Complainant in a COI position, because Complainant could not with or without accommodation performed the essential functions of the position. Complainant did not identify any open positions that he could have been reassigned to, nor does he argue that Ms. Murphy’s attempt to search for positions he could transition into was somehow deficient. See *Id.* at 1262-64.

Because Complainant is unable to establish a *prima facie* case of disability discrimination, Respondent is entitled to summary judgment on Complainant’s disability discrimination claim.

⁷ Complainant testified in his deposition that his request for accommodation removed some of the essential functions of his position.

Complainant’s Response supports his testimony that he was asking for a post that would not require him to perform some of his essential job functions, as Complainant argues that pregnant individuals who could not have offender contact have been placed into control room posts. Complainant does not argue he could perform the essential functions of his job with a reasonable accommodation.

Improper Administrative Discharge Claim

Board Rule 5-6, establishes the procedures for administrative discharge in the state personnel system:

If an employee has exhausted all credited paid leave and is unable to return to work, unpaid leave may be granted or the employee may be administratively discharged by written notice following a good faith effort to communicate with the employee. Administrative discharge applies only to exhaustion of leave.

A. The notice of administrative discharge must inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.

B. An employee cannot be administratively discharged if FML, state family medical leave, or short-term disability leave (includes the 30-day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.

C. A certified employee who has been discharged under this rule and subsequently recovers has reinstatement privileges.

Respondent complied with Board Rule 5-6 in the administrative discharge of Complainant. The undisputed facts establish that Complainant had exhausted his leave⁸ at the time of his administrative separation and Complainant was not able to return to full-time work without restrictions. Respondent could not reasonably accommodate Complainant as Complainant could not perform the essential functions of his position with or without accommodation and Respondent did not have a reassignment position for which Complainant met the minimum qualifications.

Respondent made a good faith effort to communicate with Complainant by conducting the Board Rule 5-6 meeting and providing Complainant an opportunity to submit additional information. Complainant did not submit additional information following the meeting. Further, prior to the Board Rule 5-6 meeting, Respondent reviewed medical documentation provided by Complainant, communicated with Complainant about the restrictions based upon that medical documentation, and informed him that they would not be able to accommodate those restrictions. Respondent gave Complainant written notice of administrative discharge. The notice of administrative discharge provided Complainant with required information regarding appeal and required contact information for Complainant to determine eligibility for retirement benefits. The ALJ concludes the Respondent's actions were not contrary to rule or law.

Because the undisputed facts demonstrate Respondent complied with Board Rule 5-6 in the administrative discharge of Complainant, Respondent is entitled to summary judgment on Complainant's claim of improper administrative discharge.

⁸ Director's Procedure 5-29(B) states, "Failure to provide the medical certification shall result in denial of leave and possible corrective/disciplinary action." In this case, family medical leave did not apply to Complainant. Based upon Complainant's testimony at his deposition, this fact is not in dispute.

ORDER

Respondent's motion for summary judgment is **granted**. Complainant's appeal is **dismissed from the Board with prejudice**.

DATED this **4th** day
of May, 2020,
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 ^{4th} day of ^{May} [REDACTED] 2020, I electronically served a true and correct copy of the foregoing **ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT; NOTICE OF APPEAL RIGHTS** as follows:

Gary Pacheco

[REDACTED]

Vincent Morscher, Esq.
Senior Assistant Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Vincent.Morscher@coag.gov

[REDACTED]

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 Rule 8-63, 4 CCR 801.

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 8-67, 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 of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding 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.