

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN DAVID SCHUTTE,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS, BUENA VISTA CORRECTIONAL FACILITY,
Respondent.

Administrative Law Judge (ALJ) Denise DeForest held the hearing in this matter on July 14, August 19, and September 30, 2011, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case commenced on the record at the start of hearing on July 14, 2011. The record was closed on November 1, 2011, upon receipt of the parties' written Closing Arguments and submissions of evidence. Assistant Attorney General Christine Wilkinson and First Assistant Attorney General Vincent Morscher represented Respondent. Respondent's advisory witness was Warden John Davis. Complainant, John David Schutte, appeared and represented himself.

MATTERS APPEALED

Complainant, a certified employee classified as a Correctional Officer (CO) I and employed by the Colorado Department of Corrections (DOC), raises claims of religious discrimination, retaliation, and hostile work environment in Buena Vista Correctional Facility (BVCF or Respondent) management's refusal to accommodate his observance of the Sabbath and other occurrences at his workplace related to his religion or his absence from work on the Sabbath. Complainant also appeals his termination from employment, along with the imposition of other lesser forms of correction, based upon his refusal to work as scheduled when his schedule included the Sabbath.

ISSUES

1. Whether Respondent unlawfully discriminated against Complainant because of his religion;
2. Whether Complainant committed the acts for which he was disciplined;
3. Whether Respondent's action was arbitrary, capricious or contrary to rule or law; and
4. Whether the discipline imposed was within the range of reasonable alternatives.

FINDINGS OF FACT

1. Complainant worked as a Correctional Officer I (CO I) for Respondent from April 1998 through June 2002.

2. Complainant re-applied with Respondent in early 2009. He was reinstated to DOC in March of 2009 and began his second term with Respondent by attending the DOC training academy. Complainant graduated from the training academy and was assigned to the Buena Vista Correctional Facility (BVCF) on or about May 1, 2009.

3. By the time that Complainant was attending the training academy in the spring of 2009, Complainant was a practicing Messianic Jew. Complainant had a *bona fide* belief that his religion requires him to avoid working on the Sabbath, with only limited exceptions to this prohibition against work.

Willingness and Ability Forms:

January 2009:

4. As a part of Respondent's hiring process, Respondent requires all potential employees to review and sign an "Examination Willingness and Ability Form."

5. The form provides the explanation: "You WILL NOT CONTINUE in the Correctional Officer Exam Process if you are not willing **AND** able, with or without reasonable accommodation to perform all duties listed below. Following are essential functions required of every Correctional Officer. If you are not willing AND able to perform every task, you will be removed from the exam process. Failure to perform these tasks (if you are hired) will be grounds for termination."

6. The form lists thirteen duties. Several of the duties listed involve physical demands, such as responding to an altercation, subduing inmates when necessary, and being able to climb 30 stairs in 15 seconds. Other listed duties address the workplace of a correctional facility, such as a willingness and ability to work in a locked facility and to work with staff and clients of all social, economic, and ethnic backgrounds.

7. Several other listed duties involved scheduling. These duties included:

- Are you willing and able to work shifts that may include schedules such as midnights to 8:00 a.m.; 8:00 a.m. to 4:00 p.m.; 4:00 p.m. to midnight; and/or a combination schedule?
- Are you willing and able to work weekends and holidays?
- Are you willing and able to work back-to-back shifts and double back shifts when necessary?
- Are you willing and able to follow prescribed procedures and policies even if they may conflict with your personal preferences, religion or philosophy?
- Are you willing and able to transfer work assignments and/or locations if necessary?

8. Complainant reviewed this form and signed it on January 12, 2009. He checked "yes" as being willing and able on each of the duties.

Start of the Training Academy:

9. Complainant was sent to the DOC training academy in March of 2009.

10. At the beginning of Complainant's attendance at the training academy, Complainant was again asked to sign another version of the willingness and ability form.

11. On March 9, 2009, Complainant reviewed and signed a form entitled "Ability Form." This version of the form included the same 13 statements describing the essential functions of a DOC Correctional Officer as the form Complainant had signed in January 2009. Complainant checked yes to each question, and made handwritten notations next to two of the questions on the "Ability Form."

12. Complainant included the statement "Friday sundown to Saturday sundown only if emergency – AR 1450-38 sub F" next to the question #2, "Are you able to work weekends and holidays?"

13. Complainant included the statement "see #2. Only in emergency" next to the question, "Are you able to follow prescribed procedures and policies even if they may conflict with your personal preference, religion or philosophy?"

Complainant's Assignment To Buena Vista Correctional Facility (BVCF):

14. At the completion of Complainant successful attendance at the DOC training academy at the end of April 2009, Complainant was assigned to BVCF.

15. Initially during Complainant's tenure at BVCF, the warden of the facility was Warden George Dunbar. While Complainant worked at BVCF, Warden Dunbar retired and Warden Steven Green served as an interim warden. Warden John Davis took over the leadership position at BVCF in 2010.

Complainant's Requests To Not Shave His Beard and to Wear a Kippah:

16. A provision in AR 1450-31 prohibits those wearing the blue uniforms of correctional officer staff from wearing beards or goatees. The regulations also prohibit unapproved headgear.

17. While Complainant was in the training academy, academy staff contacted Rick Thompkins, DOC Deputy Director of Human Resources, over concerns that Complainant was wearing a beard and a kippah. A kippah is a form of religious headgear similar to a yarmulke. Complainant told the captain in charge of the training academy, Captain Gus Argys, that both his beard and the kippah were related to his religious practices.

18. Mr. Thompkins told the training academy staff that there were often medical reasons for men not to shave their beards, and that DOC had found that a beard neatly trimmed to ¼" was acceptable under the medical exemption to the regulation. Mr. Thompkins supported Complainant's ability to maintain his beard because of the availability of that medical exemption.

19. Mr. Thompkins also authorized Complainant to wear a kippah under a DOC baseball cap. There was some confusion in communicating this decision to Complainant, and Complainant wore his kippah only when he was wearing civilian attire rather than his DOC uniform.

20. In April of 2009, Complainant also filed a request with BVCF Warden Dunbar to be permitted to not shave his beard because he was a Messianic Jew and not permitted to shave his beard as part of that religion. Warden Dunbar agreed that Complainant did not need to shave his beard. Complainant, therefore, was not required to shave his beard while he was at the training academy or at BVCF.

Work Schedule Issues Generally:

21. BVCF is a correctional facility which runs 24 hour a day and seven days a week. The facility tends to place new officers on the graveyard shift. The graveyard shift runs from 9:45 PM to 6:15 AM. While it is common for new officers to be initially assigned to graveyard shift and then leave as soon as possible for other, more desirable, shifts, BVCF has at least one long-term officer, Officer Moore, who was permitted to continue to work the graveyard shift.

22. New officers at BVCF can also be placed on the swing shift, which runs from 1:45 PM to 10:15 PM, or they can be placed on the day shift, 5:45 AM to 2:15 PM, depending upon facility needs at the time of their assignment.

23. CO I officers are also typically given a schedule where they have two consecutive days off. Posts within a work area are also generally organized so that the staff in that area have varying days off. In November of 2010, for example, the swing shift in the "North Unit" consisted of four CO I's along with a sergeant (CO II). One of the CO I staff members had Tuesday and Wednesday days off. A second CO I staff member had Wednesday and Thursday days off. The third CO I staff member had Thursday and Friday days off, while the fourth CO I had Friday and Saturday days off. The sergeant of the group had Sunday and Monday days off.

24. BVCF has some CO I positions which followed a Monday through Friday schedule, rather than the more typical 24/7 shift assignments. These positions tend to be specialty positions, such as assignment to the property room.

25. In determining which staff member is going to fill a specific position, BVCF follows a staffing regulation, AR 100-37, which provides that "[i]n the assignment and scheduling of DOC employees, including days off and shift assignments, the appointing authority, or designee, has the responsibility and authority to fill position vacancies and schedule DOC employees in a manner which is responsive to facility or operational need at any given time." AR 100-31, § (IV)(A)(3). The implementation regulation for AR 100-31 which BVCF follows also places operational needs of the facility over any other system for staffing. "The operational needs of the facility will be the primary factor considered when filling all vacant positions." AR 100-37, Implementation/Adjustments, § (IV)(A)(4). This regulatory discretion permits the warden, and his or her designee, the option to determine staffing, and therefore scheduling, in whatever manner is necessary to meet facility needs. The discretion afforded by the regulations allows the warden to change specific staffing assignments to solve personnel issues, if necessary.

26. If a custody and control position is not to be filled using the discretion afforded to facility management, then a vacant position will generally be offered to others in a functional work unit and, if not filled by that process, posted so that other staff can bid on the slot. In terms of

awarding a position bid on by more than one staff member, the staff member with greater seniority will normally have priority. BVCF's implementing version of AR 100-37, however, provides that these posted vacant positions are not filled solely by seniority but "will be filled based upon operational needs of the facility, related experience, qualifications, interpersonal skills, time in current classification (rank), and state seniority time." AR 100-31, Implementation/Adjustments, § (IV)(A)(4)(b)(3).

27. The supervisory officers at BVCF who perform the daily scheduling of the CO I positions work according to the minimum staffing requirements necessary to cover the posts in each work unit. Scheduling is always a complicated process because CO I officers will be absent from their scheduled assignments for any number of reasons, including use of annual leave, the use of sick leave or Family Medical Leave, use of holiday leave, attendance at training functions, and because of other assignments as needed by the facility.

28. When a scheduling officer is determining how to fill a vacant post necessary to meet minimum staffing requirements, there is a possibility that there will be an officer available from another work unit who can be assigned to fill the vacant post. If another officer is moved to fill the vacant post, there is no cost to the facility for overtime. If no officers are available to be moved to cover a vacant post, then the department will most often have officers in the shifts prior to, or after, the vacant shift work additional hours. BVCF also has the option of calling in staff when necessary. If officers are required to work additional hours to fill a vacant post, those additional hours are likely to trigger the need to pay overtime.

Complainant's Work Schedule:

29. When Complainant was first assigned to BVCF, he was placed on the graveyard shift. Complainant had Thursday and Friday days off. Having these particular days off meant that the schedule posed no conflict with Complainant's religious obligation to observe the Sabbath.

30. Complainant was assigned to a portion of the BVCF facility called the "North Unit." The "North Unit" is a part of the facility referred to as the "west end." Captain Richard Fisher was the supervisor for the 42 staff position positions in the "west end."

31. During July of 2009, Complainant turned down a transfer to the swing shift because the days off for the position, which were Monday and Tuesday, did not permit him to maintain the Sabbath.

32. Complainant responded to the email notifying him of the proposed July 2009 change in his assignment by asking Captain Fisher to work out a different schedule with him. Complainant reminded Captain Fisher that Complainant was a practicing Messianic Jew and that he was required under his faith not to work on the Sabbath unless there was an emergency. Complainant also reminded Captain Fisher that he had offered to work split days off, or whatever can be worked out, in order to maintain his ability to observe the Sabbath. Complainant specifically proposed that he be left on swing shift but have Fridays and Mondays off.

33. BVCF's custody and control manager, Major Jason Lengerich, knew that Complainant's reason for turning down the change in schedule was because the proposed schedule interfered with Complainant's observation of the Sabbath. Major Lengerich spoke with Warden Dunbar and Associate Warden Bartroff about changes to the schedule, including Complainant's schedule, and it was decided that it was Complainant's time to come off the graveyard shift.

34. In September of 2009, Complainant was assigned to the swing shift with Thursday and Friday days off.

35. Complainant worked on swing shift from September 30, 2009, through April 2010. During this period, Complainant did not miss any assigned shifts due to his observance of the Sabbath.

36. Complainant had been advised by an attorney that he should wait until he was a certified employee before raising the scheduling issue with BVCF. Complainant was certified to his position of CO I as of March 8, 2010.

37. By email dated March 3, 2010, Complainant wrote to Major Lengerich, Captain Fisher and Lt Gregory Smethers explaining that his Sabbath was Friday night at sundown to Saturday night at sundown, and that his Sabbath was a work proscription day, "meaning no work is allowed." Complainant asked these supervisors to resolve the issue of his schedule conflicting with his Sabbath requirements.

38. Major Lengerich replied to Complainant's email with a letter dated March 18, 2010. In Major Lengerich's response, he informed Complainant that his request to not be scheduled to work on the Sabbath had been previously denied by Mr. Thompkins while Complainant was in the training academy. He informed Complainant that he was not permitted to sign the Willingness Form with any notations modifying the form. Major Lengerich also noted that Complainant's statements on the form had been addressed by the Training Academy staff and that Complainant had said at that point that he could work but that he wanted staff to know about his religious beliefs.

39. Major Lengerich concluded his letter by saying, "Your request for days off change is denied. As per IA 100-37 (employee scheduling) you may apply for a vacant position with the designated days off that you desire when they are posted the same as any other employee."

Complainant's Escalating Argument for an Accommodation Which Permitted Him to Observe The Sabbath:

40. Beginning on April 17, 2010, Complainant began to not appear for shifts which would require him to work on the Sabbath. Complainant also began notifying his supervisors by email on the Wednesday before he would miss work of his intention to not work the date because of the Sabbath.

41. Complainant was scheduled to work, but did not appear for work, at least on April 17 and 24, May 8 and 29, June 12, July 10 and 31, August 7, 14 and 28, September 4, 11 and 25, October 23 and 30, November 6 and 20, December 11 and 25, 2010.

42. Complainant's emails to his supervisors during this period grew increasingly insistent about the need to change Complainant's schedule to accommodate the Sabbath. His first email to his supervisors concerning his intention to observe the Sabbath on April 17, 2010, for example, includes only this text:

For scheduling purposes, I am informing you due to the fact that Saturday April 17th is the prescribed Sabbath according to my religious beliefs and there is not foreseen emergency, I will not be coming into work on that

day. I would once again appreciate that the schedule would be changed for everyone's rights and convenience. Thank you.

43. By June 2, 2010, the first two sentence of his April text are in the subject line of his email. By June 7, 2010, the subject line of Complainant's email read:

For the last time, I am informing you that I will not be coming to work on the Sabbath on June 12, 2010, the 19th, the 26th and so on as they are all the prescribed Sabbaths according to my religious beliefs and I am not able to work accordingly.

44. Complainant's emails to his supervisors notifying them of his impending absences often included references to Complainant's constitutional right to practice his religion. In Complainant's response to an e-mail concerning Complainant's plan to be absent on May 29, 2010, for example, Complainant attached a sample non-discrimination policy which defines unlawful discrimination as including religious discrimination, and which notes that unlawful discrimination can be a violation of several federal laws as well as a policy violation. Complainant concluded this email by stating:

CDOC is an equal opportunity employer. But it is becoming obvious that it is actually anti-Semitic, as I am supposed to believe that it is impossible for a practicing Messianic Jew to work for CDOC, and practice his/her religion. In fact, it constitutes threats of disciplinary action if such said person were to continue practicing his religion. As I stated, I will not be at work on May 29th, as it is against my religion. It is not impossible to accommodate my religious practice, one only needs to try. Thank you for your time.

45. When Complainant would miss work on his Sabbath, the payroll office generally treated his absence as leave without pay. The lack of hours decreased Complainant's total hours in each pay period, and affected his accrual of leave as well as his pay.

Complainant's Proposed Solutions to the Scheduling Issues:

46. Complainant proposed several potential scheduling options which would permit him to avoid working on the Sabbath. Complainant proposed that he work a shift with split days off. He submitted letters from co-workers stating that, if they were offered a shift with Friday and Saturday days off, they would not take the position so that Complainant could have his Sabbath day off. Complainant had already been successful in avoiding the Sabbath issue with his original graveyard shift assignment, although he wanted to find a way to come off graveyards if he could do so and still avoid the Sabbath scheduling issue. Complainant also applied for, but was not selected for, at least one of the specialty positions which had a Monday through Friday day schedule.

47. Complainant's supervisors, however, were concerned that if they accommodated Complainant's schedule limitations, they would need to accommodate everyone's preferences to have their desired days off in order to be fair. Complainant's supervisors were also concerned that they would be permitting an employee to dictate when he wanted to work.

48. Mr. Thompkins also provided advice to Complainant's supervisors about Complainant's scheduling concerns. Mr. Thompkins believed that DOC should not become involved in any

religious issue for an employee. Mr. Thompkins told Respondent's staff that they could not follow Complainant to see what he was doing on his Sabbath. Mr. Thompkins also told Respondent's senior staff that the scheduling issue was a purely personal one for Complainant.

49. DOC regulations contain no provision describing how a scheduling issue is to be handled so as to offer a reasonable accommodation for a religious belief.

50. As a result, Complainant's supervisors offered no accommodation to Complainant. Complainant's supervisors maintained throughout this process that Complainant only had the normal option of waiting until he had sufficient seniority to apply for a posted position with the desired days off.

51. Complainant's supervisors also treated Complainant's absences from work as misconduct. Even when notified several days in advance of Complainant's intention not to work on his Sabbath, Complainant's supervisors did not arrange for a substitute worker but instead waited to see if Complainant appeared for work before making arrangements for an employee to cover the shift, if necessary. On the days that Complainant missed, Complainant's name would sometimes be called out at roll call, while the names of employees who were out on sick or other leave would not be added to the roll call list. On the days that Complainant missed scheduled shifts, one of his supervisors would call Complainant's home in the same manner as workers who were absent without prior leave would be called at home to locate them.

52. Complainant considered his supervisor's actions in treating his absences as misconduct to be a form of harassment and religious discrimination.

Performance Documentation and Corrective Actions Issued to Complainant:

53. Complainant's supervisors issued negative performance documentation on April 21, 2010, to Complainant for missing work on April 17, 2010. Additional negative performance documentation was issued to Complainant on May 11, 2010 for missing work on May 8, 2010.

54. After Complainant missed work on May 29, 2010, Warden Green issued a corrective action to Complainant dated June 2, 2010. Warden Green recognized in the corrective action that Complainant had contacted him and others by email prior to missing work on April 17, May 8 and May 29, 2010, but found that Complainant had not requested to use sick or vacation leave on the dates that Complainant would miss work. Accordingly, Warden Green found that Complainant had not made prior arrangements with his supervisor to miss work and was, therefore, in violation of AR 1450-30, "Use of Accumulated Sick Leave and Family/Medical Leave Act". Complainant was instructed that he was to request vacation time or sick leave in an approved manner in order to request time off from his scheduled shifts.

55. Complainant was issued a corrective action dated June 18, 2010, which noted that Complainant had also missed June 5 and June 12, 2010, without having leave approved for those dates.

56. Complainant received a negative performance documentation from Lt. Greg Smethers dated July 13, 2010. This performance documentation recorded that Complainant had failed to report for work on July 10, 2010, and had not asked to take leave on that date. Lt. Smethers also noted that, given that Complainant had continued to fail to comply with the leave

regulations, Lt. Smethers was recommending that the appointing authority review Complainant for disciplinary action.

57. Complainant was also issued a third corrective action as of August 12, 2010, by Warden Green.

58. In Complainant's performance documents and corrective actions, the only performance issue identified was Complainant's refusal to obey the schedule set for him by his supervisors by Complainant's continual insistence that he was not going to work on the Sabbath. No other performance issue was identified. Additionally, the scheduled shifts that Complainant was recorded as having missed were Saturday shifts.

Complainant's Grievance and the OIG Investigation:

59. Complainant filed a religious discrimination complaint with the Board concerning various allegations of discrimination, harassment, and retaliation. The complaint was signed by Complainant as of May 12, 2010, and filed with the Board on May 18, 2010.

60. Complainant's May 2010 complaint described eleven incidents that Complainant argued were religious discrimination, harassment and retaliation. These incidents included in the complaint included Respondent's failure to offer a scheduling accommodation to Complainant when others had been given scheduling accommodations for other reasons; the training academy's initial insistence that Complainant could not wear a beard and kippah; Mr. Thompkins' statements to Complainant that Complainant would have to work whatever schedule the facility told him to work; that Complainant was prevented from taking his bible into BVCF; Major Lengerich's response to Complainant's request for a change in schedule; the fact that Complainant was told that Lt. Smethers had launched an investigation into whether Complainant followed the Sabbath; the fact that a shift commander had repeatedly called his name out during a roll call, to the snickers of fellow employees, on a date that Complainant was missing; the decision to not pay Complainant for April 17, 2010 and the decision to charge sick leave when Complainant missed April 24, 2010; and the negative performance documentation issued to Complainant which falsely stated that he had failed to call in.

61. The Board referred the matter back to DOC for processing as a grievance. Complainant's filing was directed to the DOC Office of the Inspector General (OIG) for a professional standards investigation.

62. On July 27, 2010, OIG received the religious discrimination complaint filed by Complainant. The OIG investigated the complaint by interviewing eleven witnesses, including complainant, Major Lengerich, Warden Greene and Mr. Thompkins, and assembling relevant emails and letters related to the events described by Complainant and others.

63. OIG issued its final report on Complainant's discrimination complaint in August of 2010.

64. As part of its discussion of the issues, the OIG report quoted from the U.S. Equal Opportunity Fact Sheet (FS #3) providing this guidance on compliance with Title VII of the Civil Rights Act:

Title VII of the Civil Rights Act of 1964 requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the

employer. A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his religion. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers are examples of accommodating an employee's religious beliefs.

... An employer can claim undue hardship when asked to accommodate an applicant's or employee's religious practices if allowing such practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employee's job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation. Undue hardship may also be shown if the request for an accommodation violates the terms of a collective bargaining agreement or job rights established through a seniority system.

65. The OIG investigation reached no conclusions as to whether there had been a violation of Title VII or other applicable regulations in the manner in which Complainant had been treated.

66. By letter dated October 25, 2010, Warden Davis provided Complainant the results of his review of Complainant's complaint of religious discrimination and the OIG investigative report. Mr. Davis concluded that Complainant's allegations were unfounded.

Termination of Employment:

67. BVCF Warden Davis held a Rule 6-10 meeting with Complainant on November 22, 2010.

68. At the Rule 6-10 meeting, Warden Davis spoke with Complainant about Complainant's lack of compliance with the requirements in Warden Green's August 12, 2010 corrective action.

69. After the Rule 6-10 meeting had concluded, Complainant did not report for his scheduled shifts on December 11 and 25, 2010.

70. Warden Davis issued a disciplinary letter to Complainant on December 29, 2010. Warden Davis decided to terminate Complainant's employment because he had willfully failed to comply with the terms of his August 12, 2010 corrective action in obeying the requirements of his scheduled shifts and requesting time off only under the terms of the applicable regulations for leave requests.

71. Warden Davis found that such actions had resulted in the need to hold day shift staff over to cover Complainant's assigned post.

72. Warden Davis concluded Complainant's actions failed to foster organizational commitment, trust, responsibility, professionalism, and confidence, and constituted willful insubordination.

73. Specifically, Warden Davis concluded that Complainant's failure to report for his scheduled shifts violated the following regulations and standards of conduct:

- a. AR 1450-01, section IV (HH)(“DOC employees...shall comply with and obey all DOC administrative regulations procedures, operational memorandums, rules, duties, legal orders, procedures, and administrative instructions”).
- b. AR 1450-01, section IV(EE)(“DOC employees ... are required to report to work at the time scheduled, unless prior arrangements are made with their supervisor”).
- c. AR 1450-01, section IV(ZZ)(“Any act or conduct on or off duty that affects job performance and that tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee... or tends to adversely affect public safety is expressly prohibited and conduct unbecoming...”).
- d. AR / IA 100-37(B)(“Vacation Scheduling / Use of Leave – 1) It is the responsibility of all DOC employees to manage and utilize their accrued annual leave and to request its use far enough in advance not to interfere with the efficient business operations of the work unit. 2) All leave not requested and approved through the vacation roster process outlined in this section must be requested and approved on the ‘State of Colorado Leave / Absence Request and Authorization form”).
- e. AT 100-18 (“Mission Statement – The mission of the Colorado Department of Corrections is to protect the public through effective management of criminal offenders in controlled environments that are efficient, safe, humane, and appropriately secure, while also providing meaningful work and self-improvement opportunities to assist offenders with community re-entry through pro-social stabilization”).
- f. AR 1450-1A – Code of Ethics (various provisions quoted, including that the “conduct of public officers.. and government employees must hold the respect and confidence of the people” and “all employees...shall demonstrate the highest standards of personal integrity, truthfulness, and honesty and shall, thorough personal conduct, inspire public confidence and trust in government”).
- g. Colorado Department of Corrections Oath of Office (“I do solemnly swear that I shall support the Constitution of the United States and the Constitution of the State of Colorado, and that I will faithfully perform the duties of my employment with the Colorado Department of Corrections”).

74. Warden Davis terminated Complainant's employment effective December 29, 2010.

75. Complainant filed a timely appeal of his termination with the Board. Complainant's appeal of his termination was consolidated with his earlier discrimination complaint for purposes of hearing.

DISCUSSION

I. Complainant's Allegations of Religious Discrimination, Retaliation, and Harassment:

Complainant's first filing with the Board raised a variety of allegations of discrimination and harassment. When an employee raises claims of discrimination before the Board, the employee bears the ultimate burden of proof at hearing. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1247 (Colo. 2001)(holding that the plaintiff bears the burden of proving discrimination).

A. Religious Discrimination Claim:

The free exercise of religion clause of the First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." See also Colo. Const. Art. II, sec. 4 ("The free exercise and enjoyment of religious professional and worship, without discrimination, shall forever hereafter be guaranteed...").¹

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides the primary federal law mechanism for employees to assert claims that employers have violated their right to the free exercise of their religious beliefs.

Title VII provides that it is an unlawful employment practice for an employer:

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment, because of such individual's ... religion... or (2) to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's... religion...

42 U.S.C. § 2000e-2.

Religion, in turn, is defined as "all aspects of religious observance and practice, as well as belief ..." 42 U.S.C. § 2000e(j). There is no requirement for the employee to belong to a set church or to be practicing a widely-held interpretation of the religious practice. A belief is "religious" for Title VII purposes if it is "religious in the person's own scheme of things," and "sincerely held." *Redmond v. GAF Corp.*, 574 F.2d 897, 901 at n. 12 (7th Cir. 1978). In other words, a belief is religious if it is a "moral or ethical belief as to what is right and wrong which are sincerely held with the strength or traditional religious views." 29 C.R.S. §1605.1. Cf. *Thomas v. Review Bd. of Indiana Employment Sec. Div.* 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)(holding that determining whether a belief is religious is "more often than not a difficult and delicate task," one to which the courts are ill-suited).

¹ Complainant uses the terms "free exercise" and "freedom of religion" at numerous points in his briefs and arguments. In his written closing argument, however, Complainant focused his arguments on Title VII. The Board's analysis, therefore, focuses upon this provision of law as well.

Under Title VII, it is necessary that an employer "reasonably accommodate [the practice or belief] ... without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).

Read together, these provisions of the statute "imply that acting to the detriment of an applicant or employee because of his religion before attempting accommodation is illegal." *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1487-88 (10th Cir. 1989). "This reading comports with the Supreme Court's conclusion that the effect of the accommodation requirement "was to make it an unlawful employment practice ... for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Id.* (quoting *Trans World Airways v. Hardison*, 432 U.S. 63, 74, 97 S.Ct. 2264, 2271, 53 L.Ed.2d 113 (1977)).

Prima Facie Showing:

An employee who raises a religious discrimination claim under Title VI, therefore, initially bears the burden of production with respect to a *prima facie* case. An employee can assert a claim of disparate treatment under Title VII, or can raise the issue of a failure to accommodate a religious belief. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1017 (4th Cir. 1996)(noting the two different theories in asserting religious discrimination claims under Title VII). In a disparate treatment claim, an employee argues that the employer treated the employee differently than other employees because of the employee's religious beliefs. See *id.* at 1017. Under a failure to accommodate theory, the employee argues that that the employer discriminated against him by failing to accommodate his religious conduct. *Id.* at 1018. In this case, Complainant does not argue that he was treated differently from other employees but that his religious beliefs should have been taken into account in setting his schedule. As a result, Complainant is raising a failure to accommodate claim and must be present sufficient evidence to satisfy the legal requirements for such a claim in order to prevail.

A *prima facie* showing of a failure to accommodate claim requires evidence that : (1) the employee had a *bona fide* religious belief that conflicts with an employment requirement; (2) he or she informed his employer of this belief; and (3) he or she was fired for failure to comply with the conflicting employment requirement. *Thomas v. Nat'l Ass'n Letter Carriers*, 225 F.3d 1149, 1155-56 (10th Cir. 2000).

In this matter, Complainant has easily carried his *prima facie* case burden.

Complainant demonstrated through credible testimony, as well as through the history of his actions, that he holds a sincere religious belief that he is to follow the biblical proscription that he is not to work on the Sabbath. That religious belief was also shown to be in direct conflict with Respondent's requirement that Complainant make himself available to work any shift at any time.

At hearing, Respondent argued that Complainant's belief should not be held to be a genuine or sincere belief, given that Complainant waited to assert his request for accommodation until he was certified as a CO I. Respondent presents no authority, however, for the proposition that an employee waives his or her right to ask for an accommodation if that accommodation is not requested immediately. To the extent that Complainant delayed his request, such a delay is evaluated in the context of determining whether the belief is a sincerely held religious belief. See e.g., *EEOC v. Union Independiente De La Autoridad De Acueductos*,

279 F.3d 49, 57 and n. 9 (1st Cir. 2002)(noting that evidence of noncompliance with stated beliefs might call into question the sincerity of plaintiff's beliefs or "might simply reflect an evolution in plaintiff's religious views toward a more steadfast" belief). In this case, Complainant's given reason for delaying his request was understandable and credible, and not a reason to find that he did not have a genuine and sincere belief that he should not work on the Sabbath. See *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997)(holding that a Jewish employee's request to observe Yom Kippur was based upon a sincerely held religious belief, even though the employee had not raised the issue in her eight-year tenure on the job; noting that the employee had explained the lapse in time by explaining how her religious beliefs had strengthened over the years).

Respondent argues that Complainant's belief that he should work for six days and then not work on the Sabbath, or cause others to work on the Sabbath was, in essence, internally inconsistent or inconsistently applied, and therefore not a *bona fide* religious belief. Respondent noted that, by failing to work on Friday nights or Saturdays, Complainant was causing others to work in his place, thereby violating the belief that he should not cause anyone else to work on that day. In a similar vein, Respondent argues that Complainant's actions in failing to report to work on one of his five scheduled days each week meant that he was not working for six days, as his stated belief would appear to require. These objections to the logic or legitimacy of the belief are not persuasive arguments to disregard Complainant's belief. Title VII protection applies when there is a belief of the type which should be defined as a religious belief, and when the belief is sincerely held by Complainant. *Redmond*, 574 F.2d at n. 12. See also *id.* at 900 ("We conclude that conduct which is religiously motivated, i.e., all forms and aspects of religion, however eccentric is protected")(internal citation and quotation omitted); *United States v. Meyers*, 906 F.Supp. 1494, 1501 (D. Wyo. 1995)(holding that the threshold for establishing the religious nature of a belief is low). Complainant presented sufficiently credible evidence at hearing to establish that his belief that he should not work on the Sabbath was based upon his religious belief,² and that his belief was sincere and genuine.

Complainant also demonstrated that he had repeatedly informed his employer of his belief that he could not work on the Sabbath, and his need for a scheduling accommodation. Complainant presented sufficient evidence to meet the second prong of his *prima facie* showing.

² In a Title VII claim, there is no need for an employee to demonstrate that his or her religious belief has been adopted by the governing principles of any organized religion before it will be protected by that statute. Cf. *Peister v. State of Colo., Dept. of Social Services, Office of Appeals*, 849 P.2d 894, (Colo.App. 1992)(holding in a free exercise of religion analysis that "we are aware that religious beliefs are intensely personal and do not have to be acceptable, logical, consistent, clearly articulated, comprehensible to others, or even shared by other members of one's own religious sect in order to be entitled to constitutional protection"). The observance of the Sabbath as a day without work, however, has been accepted as a valid religious belief in numerous reported Title VII legal decisions. See e.g. *Thomas v. Nat'l Ass'n Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (accepting that plaintiff had sufficiently established that he had a *bona fide* religious belief, as a member of the Church of God, of strict adherence of the Sabbath on Saturdays); *Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011)(accepting that a scheduling request to have every Saturday off was a sincere religious belief raised by a member of the Seventh-day Adventist church); *Brown v. General Motors Corp.*, 601 F.2d 956, 958 (8th Cir. 1979)(holding that a hypothetical cost of accommodation, along with speculation of the impact of increased future demands for accommodation, were not sufficient to show undue hardship in the accommodation of the Sabbath scheduling conflict for a member of the Worldwide Church of God). The primary question raised in Complainant's *prima facie* case concerned the factual question of whether Complainant sincerely held this belief; that question has been answered in the affirmative.

Complainant has also amply demonstrated that he was terminated from employment because he repeatedly refused to comply with the scheduling requirement imposed by Respondent when that schedule required Complainant to work on his Sabbath. Complainant has, accordingly, carried his burden of production to present a *prima facie* case of religious discrimination under Title VII.

Employer's Burden:

Once the employee has met his burden of production, the burden then shifts to the employer to "(1) conclusively rebut one or more elements of the plaintiff's *prima facie* case; (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship." *Thomas*, 225 F.3d at 1156.

In this case, Respondent has not rebutted any of the elements of Complainant's *prima facie* case. Additionally, Respondent did not offer an accommodation to Complainant. Respondent has instead argued that it would create an undue hardship to offer any scheduling accommodation to Complainant.

The concept of undue hardship is not subject to a precise definition, and will depend upon the facts of each case. *Toledo*, 892 F.2d at 1490. "Accordingly, we hold that an employer who has made no efforts to accommodate the religious beliefs of an employee or applicant before taking action against him may only prevail if it shows that no accommodation could have been made without undue hardship." *Id.* "Absent this showing, failure to attempt some reasonable accommodation would breach the employer's duty to initiate accommodation of religious practices." *Id.*

"Undue hardship" exists, as a matter of law, when an employer is required to bear more than a *de minimus* cost. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S.Ct. 2264, 2277, 53 L.Ed.2d 113 (1977). Title VII also does not require an employer to violate the contractual rights of employees in order to accommodate the religious needs of another employee. *Hardison*, 432 U.S. at 82. To prove undue hardship, therefore, an employer will need to demonstrate how much cost or disruption proposed accommodations would involve.

An employer cannot rely on potential or hypothetical hardship, particularly speculation based upon the reactions of co-workers, to demonstrate undue hardship. *See Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979)(holding that undue hardship "must mean present, undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level").

Respondent is correct under the law that some options, such as routinely paying overtime for staff to cover Complainant's Friday night or Saturday shift, are likely to constitute undue hardship. *See Hardison*, 432 U.S. at 84 (rejecting the lower court's argument that TWA should pay another worker premium pay to replace plaintiff on Saturdays, and concluding that such a requirement would create an undue hardship on the employer). There was no evidence, however, that Respondent looked past that solution to other, no-cost possibilities.

Respondent apparently ignored, for example, an obvious no-cost accommodation for Complainant's schedule – to leave him on the graveyard shift with Thursday and Friday days off

until he was senior enough to bid into more desirable shifts. Respondent's decision to move Complainant off graveyards was made because BVCF management thought it was Complainant's time to rotate off that shift. Respondent did not build any persuasive case at hearing for why there would be any hardship to Respondent's operation to leave Complainant on his initial shift assignment. It was not Complainant's preference to remain on graveyards, and none of Complainant's proposed alternatives included such an option. The measure of the accommodation, however, does not depend upon whether the accommodation is within the employee's list of alternative accommodations, but whether the accommodation is a reasonable one that does not create undue hardship on the conduct of the employer's business. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 68 - 69, 107 S.Ct. 367, 372, 93 L.Ed.2d 305 (1986).

At hearing, Respondent also did not persuasively address other potential no-cost solutions, such as voluntary shift swaps or assignment to specialty positions for which Complainant might be qualified. See, e.g. *United States v. City of Albuquerque*, 545 F.2d 110, 114 (10th Cir. 1976)(noting that a reasonable accommodation may be to allow an employee to take leave without pay or to trade shifts with co-workers); *Thomas*, 225 F.3d at 1156 (finding that the employer had made a reasonable accommodation by remaining sympathetic to the employee's religious requirements, approving all voluntary schedule swaps that the employee was able to arrange, and imposing no restrictions or impediments on the employee's ability to attempt to arrange further voluntary schedule swaps with other employees). Respondent depended instead upon a blanket refusal to even consider options not suggested by Complainant and to instead steadfastly insist that no change would be made. Cf. *City of Albuquerque*, 545 F.2d at 114 (finding the employer made reasonable efforts to accommodate the plaintiff's scheduling request because, in part, "the employer did not stubbornly insist that [plaintiff] work on his Sabbath, come what may").

Respondent argued at hearing that its system of awarding shifts according to seniority meant that it had no ability to offer a reasonable accommodation to Complainant without violating that seniority system and that, accordingly, it could not meet Complainant's accommodation requests without undue hardship. Respondent is correct that Title VII does not require that employers violate collective bargaining agreements, or *bona fide* seniority or merit systems. See *Hardison*, 432 U.S. at 81 – 82 (holding that "absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences"). Respondent ignores, however, that its regulations do not impose a seniority-only condition on job placement. As the evidence at hearing amply demonstrated, BVCF management always retains the authority to place qualified DOC employees wherever management determines that such placement should be made. Complainant's assignment to swing shift in 2009, for example, was the product of a management decision and not a product of any bidding process. Unlike the employer who has a collective bargaining agreement in place which strictly controls job placements, BVCF management is always directly in control job placement. Under the BVCF regulations, employee seniority is involved in filling a custody and control position only if management decides to allow the position to be filled through the employee bidding process. As a result, Complainant's request for a scheduling accommodation does not offend the governing administrative regulations or any rights held by BVCF employees under those regulations.

Ultimately, Respondent has failed to persuasively demonstrate that "no accommodation could have been made without undue hardship." *Toledo*, 892 F.2d at 1490.

Interactive Process Requirement:

The core issue in this case was that Respondent refused to engage in an interactive dialogue with Complainant about the possibilities which could solve the scheduling issue.

"This statutory and regulatory framework, like the statutory and regulatory framework of the Americans with Disabilities Act (ADA), involves the interactive process that requires participation by both the employer and the employee." *Thomas*, 225 F.3d at 1155. *See also Ansonia Bd. Of Educ.*, 479 U.S. at 69 (noting that, consistent with the goals expressed in the legislative history of the religious accommodation provision, "courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business"). *See also Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 401 (9th Cir. 1978)(holding that "[t]he burden was upon the [employer], not [the employee], to undertake initial steps toward accommodation. [The employer] cannot excuse [its] failure to accommodate by pointing to deficiencies ... in [the employee's] suggested accommodations").

Complainant asked repeatedly for such a dialogue, and Complainant offered several proposals for review by his supervisors. His supervisors, however, only found reason to reject the proposed accommodations and proposed no other potential solutions. In this case, Respondent failed to meet its obligation to engage in an interactive process with Complainant once the scheduling issue was clearly raised by Complainant.

As a result, Complainant has prevailed on his claim of religious discrimination under Title VII, 42 § 2000e-2.³

B. Retaliation:

Title VII provides, *inter alia*, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] has opposed any practice made an unlawful employment practice by this subchapter...." 42 U.S.C. § 2000e-3(a). The elements of a *prima facie* case of retaliation are: (1) protected opposition to Title VII discrimination or participation in a Title VII proceeding; (2) adverse action by the employer

³ Colorado state law includes an analogous anti-discrimination statute, the Colorado Anti-Discrimination Act (CADA) at C.R.S. § 24-34-401, *et seq.* CADA also prohibits discrimination because of religion. C.R.S. § 24-34-402(1)(a). The Board routinely applies the standards and guidelines adopted by the Colorado Civil Rights Commission (CCRD), as well as federal law, in interpreting CADA. 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"), 8 CCR 401. CCRD has applied the reasonable accommodation requirement found in Title VII to CADA claims of religious accommodation. *See* CCRD Rule 50.3 ("The commission believes that the duty not to discriminate on the grounds of creed, required by the law, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees, where such accommodations can be made without undue hardship on the conduct of the employer's business"), 3 CCR 708-1. While Complainant directed the vast majority of his argument at hearing and in his written closing statement on federal law and federal claims, Complainant also referenced CADA in a small section of his written closing statement. Given the adoption of federal standards for religious discrimination claims under CADA, however, there is no need to perform an entirely separate legal analysis of a CADA failure to accommodate claim. The result of a failure to accommodate analysis would be the same under CADA as has been reached under Title VII.

subsequent to or contemporaneous with such employee activity; and (3) a causal connection between such activity and the employer's action. *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984).

If the employee presents a *prima facie* showing of retaliation, then the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. *Love*, 738 F.2d at 385. If evidence of a legitimate reason is produced, an employee may still prevail if he demonstrates the articulated reason was a mere pretext for discrimination. The overall burden of persuasion remains on the plaintiff. *Id.* Once the employer has presented a legitimate, non-discriminatory reason for the decision, the court then must decide the ultimate fact issue – that is, "which party's explanation of the employer's motivation it believes." *Id.* at 386.

The preponderance of the evidence at hearing amply demonstrated that Complainant repeatedly, clearly, and strenuously objected to Respondent's position that no accommodation would be offered to him to avoid the conflict with Complainant's observance of the Sabbath. Complainant's comments, particularly those from the time Complainant was certified to his CO I position in March of 2010 until the time he was terminated from employment in December 2010, constituted Complainant's good faith opposition to what he believed was religious discrimination. See *Smith v. Board of Educ. of School Dist. Fremont RE-1*, 83 P.3d 1157, 1162 (Colo.App. 2003)(holding that "[t]he first prong of a retaliation claim is met if the plaintiff shows that [he] had a good faith belief that [he] was engaging in protected activity"). Complainant has met the first element of the *prima facie* showing of retaliation.

The second prong of a *prima facie* showing requires that Complainant demonstrate an adverse action was taken against him. In this case, there is no dispute that Complainant was issued multiple negative performance documentation forms, along with corrective actions, based upon his failure to maintain his scheduled work dates on the Sabbath. Complainant was also terminated from employment based upon this issue as well. The requirement for a showing of adverse action is met in this case.

The third prong of a *prima facie* showing of retaliation requires that Complainant demonstrate the causal nexus between his protected opposition and the adverse action taken against him. The motivating factor test is equivalent to the "but for cause" test, so that the discharge is unlawful only if it would not have occurred but for the retaliatory intent. *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 & n. 4 (10th Cir.1992).

The evidence at hearing, however, established by a preponderance of the evidence that Complainant's supervisors were reluctant to recognize his claim of religious accommodation because they were unwilling to allow an employee to set his own schedule, they had concerns that fairness would require that DOC offer everyone their preferred dates off if they granted Complainant's request, and they had concerns over becoming involved in a religious question. These concerns were evident at least by the time that Major Lengerich wrote his letter in answer to Complainant's first documented formal request for accommodation of his schedule in March of 2010. There was no persuasive demonstration by Complainant that these stated concerns were merely pretext for a retaliatory motive. The evidence at hearing established that the stated concerns led to Complainant's supervisors' treating Complainant's subsequent absences as misconduct, and in treating Complainant's repeated disobedience to their instructions to complete leave forms as willful insubordination. There was no persuasive reason, on the record created at hearing, to conclude that Complainant's vocal and repeated opposition to discrimination contributed, in whole or in part, to the adverse actions implemented in this case.

Therefore, Complainant has not presented a *prima facie* case of retaliation because of the lack of causation between his complaints of discrimination and the actions taken by Respondent. Moreover, even if a *prima facie* case of retaliation has been demonstrated, the evidence at hearing supported that Respondent's actions in this case were motivated by the concerns expressed by Respondent's witnesses, and were not motivated in whole or in part on Complainant's assertion of his religious discrimination claims. Complainant's claim of retaliation must, therefore, fail.

C. Hostile Work Environment:

Complainant has also argued that he was subject to a hostile work environment. Assuming, without deciding, that hostile work environment based upon religion would follow the same requirements for a hostile work environment claim based upon sexual harassment or racial harassment, we turn to the standards for a federal hostile work environment claim. See CCRD Rule 85 (rule of the Colorado Civil Rights Commission extending workplace harassment prohibitions to include creed and religion cases), 3 CCR 708-1.

In order for a hostile work environment sexual harassment claim to withstand judgment as a matter of law, the plaintiff must show a rational jury could find that "[t]he workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of... employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993)(quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65, 67, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49 (1986)).

Under the *Meritor-Harris* standard, the plaintiff must show the environment was both subjectively and objectively hostile or abusive. *Davis v. United States Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998). An objectively hostile working environment is one that a reasonable person would find hostile or abusive; a subjectively hostile workplace is one the plaintiff-employee perceives as hostile. *Harris v. Forklift Sys., Inc.*, 510 U.S. at 21-22, 114 S.Ct. at 370-71. To determine whether a workplace is hostile or abusive, a court considers the totality of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; . . . whether it unreasonably interferes with an employee's work performance"; and the context of the conduct. *Harris v. Forklift Sys., Inc.*, 510 U.S. at 23, 114 S.Ct. at 371.

Complainant argued in his petition for hearing that there were multiple incidents which support that his workplace was a hostile work environment. At hearing, however, Complainant presented sufficient evidence to sustain only a few of those issues.

Specifically, Complainant was able to demonstrate by a preponderance of evidence that his supervisors continued to treat his request for accommodation as a form of misconduct and to issue him negative performance documentation and corrective actions, that his name was sometimes called in roll call when he had given prior notice that he would not be working, that supervisors would call his home on days when he was absent to check on him in the same manner as they did for employees who were absent without leave, and that questions were raised while Complainant was in the training academy concerning his beard and kippah. While these incidents are sufficient to demonstrate that Complainant was having significant difficulty in convincing his supervisors to recognize his need for a different schedule to accommodate his observation of the Sabbath, these incidents do not establish that Complainant was subject to

"discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. at 21. See also *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1539 (10th Cir. 1995)(a plaintiff claiming a hostile work environment must demonstrate more than a few isolated instances of sexual or racial enmity and must instead prove that she was subjected to a "steady barrage" of sexual or racial comments and conduct). Complainant's contention that his workplace constituted a hostile work environment is not supported on the record established at hearing. This claim must therefore be denied.

II. Respondent's Disciplinary Case:

A. 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.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in Board Rule 6-12, 4 CCR 801, and generally includes:

- (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. *Kinchen*, 886 P.2d at 708. The Board may reverse or modify Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

B. Complainant Committed the Acts for which He was Disciplined.

The parties are in agreement that Complainant was terminated solely because he repeatedly refused to work on scheduled days, and did so without obtaining permission of his supervisors for his absences. The record also reflects that the dates that Complainant refused to work were dates during which Complainant observed his Sabbath.

C. The Appointing Authority's Actions were Arbitrary, Capricious, or Contrary to Rule or Law.

- (1) **Respondent's termination of Complainant's employment was contrary to law:**

As discussed as part of Complainant's religious discrimination claims, Respondent has committed unlawful discrimination on the basis of Complainant's religion under 42 U.S.C. §

2000e-2 by failing to offer a reasonable accommodation to Complainant after engaging in the interactive process required by that statute.

Complainant's termination from employment, as well as the issuance of performance documentation and corrective actions to him, were based on the fact that Complainant repeatedly refused to follow Respondent's scheduling directive. The record is also clear that Complainant refused to follow the scheduling directive because of his religious belief that he should not work on the Sabbath. Under such circumstances and for the reasons discussed previously, the performance documentation issued to Complainant, the corrective actions issued to Complainant, and Complainant's termination from employment were contrary to law.

(2) Respondent's termination of Complainant's employment was arbitrary and capricious:

In determining whether an agency's decision 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 after a consideration of 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).

In this case, Respondent adopted a hard-line position that it had no obligation to attempt to find an accommodation for Complainant's scheduling conflict. Respondent took this position, in part, because it interpreted Complainant's request to set a precedent that would permit DOC employees to generally set their own schedules, and would constitute precedent of a DOC employee telling management when he preferred to work.

Title VII obligations, however, do not permit employees to generally demand their own preferred days off. The reasonable accommodation provisions of Title VII apply to religious discrimination issues. It was unreasonable and unfair for Respondent to use such reasoning to block Complainant's attempt to obtain a reasonable accommodation to his schedule in order to eliminate the conflict between Complainant's observance of the Sabbath and his work schedule.

Respondent also decided to refuse Complainant's requests for a reasonable accommodation because it was wary of becoming involved in a religious issue, and preferred to treat religious issues as purely personal issues. While it is generally a reasonable position for a government agency to stay out of religious affairs, Title VII does not permit Respondent to simply insist that Complainant's scheduling problem due to religious beliefs is only a personal problem. Title VII makes it Respondent's concern once an employee places the agency on notice of the conflict with a *bona fide* religious belief. This obligation was specifically discussed in the OIG report concerning Complainant's claim of religious discrimination. Reasonable persons fairly and honestly considering the evidence and the applicable law would not reach the conclusion that Respondent had no obligation to assist Complainant in finding a reasonable accommodation for his religious beliefs, or that Respondent had only to option of terminating Complainant's employment because of the conflict. Treating Complainant's scheduling conflicts as misconduct, and terminating his employment because he failed to work on the Sabbath, constitute arbitrary and capricious decisions under the facts of this case.

Accordingly, Respondent's decisions to issue Complainant performance documentation and corrective actions, and in terminating Complainant's employment, constitute arbitrary and capricious decisions.

D. The Discipline Imposed was not within the Range of Reasonable Alternatives.

Respondent issued a series of performance documentation forms and corrective actions to Complainant prior to bringing a termination action against him. If Complainant had repeatedly refused to appear for scheduled shifts without having a religious belief conflict to support his actions, Respondent would have been acting reasonably in terminating Complainant's employment

The problem posed by these circumstances, however, is that Respondent terminated Complainant's employment for choosing to obey a *bona fide* religious belief about the Sabbath over his work schedule. Moreover, Respondent has failed to engage in the interactive process with Complainant to find a reasonable accommodation for that scheduling issue. Under such circumstances, termination of employment is beyond the range of reasonable alternatives available to Respondent.

CONCLUSIONS OF LAW

1. Respondent unlawfully discriminated against Complainant because of his religion.
2. Complainant committed the acts for which he was disciplined.
3. Respondent's action was arbitrary, capricious, or contrary to rule or law.
4. The discipline imposed was not within the range of reasonable alternatives..

ORDER

Respondent's actions in terminating Complainant's employment and in issuing performance documentation and corrective actions to Complainant from April 2010 until December 29, 2010, are **RESCINDED and REVERSED**. Complainant is to be reinstated to his former CO I position or an equivalent position. Complainant is to be awarded full back pay and benefits, with statutory interest.

Dated this 16th day
of December, 2011 at
Denver, Colorado.



Denise DeForest
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 19th day of Dec., 2011, I electronically served true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

John David Schutte



Christine K. Wilkinson



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

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.