STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2013B026**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

KARINE CHOSVIG,
Complainant,

v.

DEPARTMENT OF REVENUE, DIVISION OF MOTOR VEHICLES,
Respondent.

Senior Administrative Law Judge (ALJ) Mary S. McClatchey held the hearing in this matter on June 24, 2013 at the State Personnel Board. The record was closed on receipt of the parties' written Closing Arguments on July 2, 2013. Assistant Attorney General Micah Payton represented Respondent Department of Revenue, Division of Motor Vehicles. Respondent's advisory witness was Laurie Benallo, Operations Manager, Drivers License Section, DOR, the appointing authority. Complainant appeared and was represented by Nora V. Kelly, Esquire.

MATTER APPEALED

Complainant, Karine Chosvig, appeals her administrative discharge by Respondent, asserting disability discrimination and violation of the Family Medical Leave Act. Complainant seeks reinstatement, back pay, and attorney fees and costs. Respondent asserts that it was entitled to separate Complainant from employment for exhaustion of leave under Director's Procedure 5-10, and seeks dismissal of this matter with prejudice. For the reasons set forth below, Respondent's action is **rescinded**.

ISSUES

1. Whether Respondent's administrative discharge of Complainant violated Director's Procedure 5-10;

2. Whether Respondent's discharge of Complainant violated the Family and Medical Leave Act;

3. Whether Respondent failed to reasonably accommodate Complainant's disability and terminated her in violation of the Colorado Anti-Discrimination Act and the Americans with Disabilities Act;

4. Whether Complainant is entitled to attorney fees and costs if she prevails.

FINDINGS OF FACT

1. Complainant was a Driver License Examiner III, Assistant Manager, in the Grand Junction Office of the Division of Motor Vehicles, Drivers License Section, at DOR, at all times relevant. The Grand Junction Office has one Office Manager, Joy Latham, a Driver License Examiner IV who is Complainant's direct supervisor. Other than Ms.

Latham and Complainant, all other staff in the Grand Junction office were examiner I's or II's.

2. Complainant has worked for Respondent since September 2001.

3. As the Assistant Manager in the Grand Junction Drivers License office, Complainant was responsible for assigning tasks, monitoring progress and workflow on a daily basis, monitoring and troubleshooting the interactions between employees and license applicants, operating as the floor manager and exercising "first-line" decision-making, opening and closing the office, preparing the office for daily business, and other daily job duties which required her to be present daily at the DOR office.

4. The Driver License Examiner III position could not be performed from home.

5. Pamela Hardwick was Region IV Manager of the Motor Vehicles Division and Ms. Latham's supervisor.

6. Since 2001, Complainant has suffered from periodic episodes of chronic fatigue and extreme joint pain. She received treatment for her condition and was tentatively diagnosed with lupus. Complainant did not disclose her physical difficulties to her employer and was able to hide her condition successfully at work until 2010, when it worsened.

7. In August 2010, Complainant visited a Rheumatologist in Denver at the University of Colorado Hospital Rheumatology/Allergy and Immunology Clinic, Dr. Jason Kolfenbach. Dr. Kolfenbach opined that Complainant had fibromyalgia, not lupus.

2011 Leave

8. Complainant was approved for job protection under the Family and Medical Leave Act (FMLA) in October 2011. Complainant's point of contact regarding FMLA in the Office of Human Resources (HR), DOR, was Tiffany Monroe, Risk Coordinator. Ms. Monroe coordinated FMLA and Workers Compensation leave for DOR.

9. On October 31, 2011, Ms. Monroe sent an email to Ms. Latham regarding Complainant's approval for FMLA leave as of October 11, 2011. The email stated that the leave was for Complainant and her child. In addition, it stated, "Based on the information received, she will need to be off for her own condition 2-3 times per year for up to 7 days when experiencing a flare-up. She will also be off at times to care for her child when she is ill or experiencing a flare up. The frequency of her flare ups may also be 2-3 times per year for up to 7 days. Any leave that she needs to submit for this can be entered under FMLA. If you have any questions, please let me know."

10. Complainant used four days of FMLA leave in October 2011; 3.5 hours in November 2011; and 30.5 hours in December 2011. In 2012, Complainant used 20.38 hours of FMLA leave in January; 6.66 hours in February 2012; and 6.66 hours in March 2012.

11. On January 25, 2012, Ms. Hardwick emailed Ms. Monroe in HR regarding Complainant's absences, copying Joi Simpson. Joi Simpson was the Operations Manager for the Drivers License Section at DOR, responsible for overseeing 56 state and county Drivers License offices. She assumed this position in early 2011 after having served as

statewide FMLA, Short Term Disability (STD), and leave coordinator for the Department of Personnel and Administration.

12. In her January 25, 2012 email, Ms. Hardwick said that Ms. Latham had notified her that Complainant had had excessive unscheduled sick leave since October 2011 and she needed to know if the pattern of absenteeism was consistent with her FML Medical Report/Fitness to Return to Work. She stated, "Please let us know if you feel it is reasonable for OHR to ask for further explanation from her physician."

Ms. Simpson Discussion with Complainant Regarding Her Medical Condition

13. In February 2012, Ms. Simpson called Complainant to discuss her absenteeism and suggested that Complainant take STD leave to determine what was wrong with her and to get better.

14. On February 28, 2012, Ms. Monroe sent a letter to Complainant stating in part, "it has been brought to my attention that you have needed to take more time off for your serious health condition than what was previously indicated on the medical certification form dated October 27, 2011. Please provide us with an updated medical certification form, which has been attached. The form must be returned to OHR by March 15, 2012, or the time off cannot be covered or approved under FMLA, and is considered unauthorized leave without pay."

March 22, 2012 Medical Certification Form

15. On March 22, 2012, Complainant's treating physician in Grand Junction, Dr. Jennifer Craig, submitted a Medical Certification Form to Respondent. The form required a "definition" describing the serious health condition under FMLA, and Dr. Craig chose, "2. Incapacity and treatment," defined as, "A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves" treatment.

16. In response to the question requiring "medical facts related to the condition . . . [which may include] symptoms, diagnosis, or any regimen of continuing treatment," Dr. Craig described Complainant's serious health condition as "fever, chills, nausea, abd. pain, CP [chest pain], SOB [shortness of breath] of unclear etiology."

17. Dr. Craig indicated she had been treating Complainant from December 20, 2011 to the present, had prescribed medication, had referred Complainant to a Rheumatologist for evaluation or treatment, and that the expected duration of treatment was "life long."

18. The Medical Certification Form also indicated that the probable duration of the condition was "unknown" because no clear condition had been found, the patient was still being "worked up" for this illness whose course was "unclear," and "when pt is febrile & ill, cannot work." Dr. Craig estimated "the part-time or reduced work schedule the employee needs, if any," as 4 hours per day 0 – 3 days per week, but did not provide a duration for this potential schedule alteration.

19. On March 23, 2012, Ms. Monroe emailed Complainant to inform her she may need the unknown answers to be clarified. She said she would review it again and let her know,

adding, "I'm really sorry that you are going through this pain and trying to get all of this sorted out."

20. Complainant had been on narcotics and muscle relaxers. She responded immediately to Ms. Monroe by email that her medication had been changed to remove her from narcotics, but the new ones were not working. She expressed concern about Dr. Craig's statement about working reduced hours and no indication of the duration of her condition, said she had another electrocardiogram scheduled, and was looking for" new doctors and answers."

21. Ms. Monroe responded that by April 6, 2012, Complainant needed to have her doctor clarify the frequency and duration of the flare-ups, highlighting the portions on the Medical Certification Form that needed clarification.

22. Complainant contacted Dr. Craig to request clarification on the form. Dr. Craig responded in handwriting on the March 22 Medical Certification Form, "I cannot modify what I've written, it is accurate as there is no firm diagnosis for Karine's issues thus I cannot predict flare ups, etc."

April 20, 2012 Diagnosis of Fibromyalgia and Notice to Respondent

23. On April 20, 2012, Complainant visited Dr. Kolfenbach again in Denver. He confirmed his diagnosis of fibromyalgia, and referred Complainant back to her primary care provider, Dr. Craig, for treatment.

24. Within a day of two of receiving the diagnosis of fibromyalgia from Dr. Kolfenbach, Complainant informed Ms. Monroe and Ms. Latham that she had a diagnosis of fibromyalgia.

April 20, 2012 Rescission of FMLA for Fiscal Year (FY) 2011/2012

25. On the same day as Complainant's visit to Dr. Kolfenbach, April 20, 2012, Ms. Monroe wrote Complainant a letter indicating that FMLA had not been approved for fiscal year 2011/2012 due to "a vague and incomplete medical certification form. Your absences at this time will not be covered under FMLA, unless you are able to provide a medical certification form that is specific in detail to your condition and the time off that is needed. For return to work options, please contact your Field Operations Manager, Joi Simpson at [phone number]."

26. After receiving Complainant's report that she had fibromyalgia, neither Ms. Monroe nor Ms. Latham took action based on this new information, to modify the retroactive rescission of Complainant's FMLA for FY 2011/2012.

STD Leave for Fibromyalgia April – May 2012

27. Complainant applied for STD leave from Standard Insurance for her fibromyalgia.

28. In May 2012, Complainant was approved for three periods of STD leave for fibromyalgia: April 23 through May 20, 2012; May 21 through 31, 2012; and May 31 through June 3, 2012.

29. Ms. Monroe kept Ms. Simpson and Ms. Latham advised by email of Complainant's STD leave status.

30. Complainant did not return to work after the June 3, 2012 expiration of her STD, due to her fibromyalgia adversely affecting implants in her uterus, thus necessitating a hysterectomy. Complainant informed Ms. Monroe and others of her impending need to have a hysterectomy to remove the implants as a result of her fibromyalgia.

31. On June 14, 2012, Ms. Hardwick emailed Ms. Simpson to inform her that according to Ms. Monroe, Complainant had never qualified for FMLA in plan year 2011/2012. Ms. Hardwick informed Ms. Simpson that Ms. Monroe "instructed me [Hardwick] to request FML paperwork from OHR for plan year 2012-2013. Let me know if you approve."

32. In response to this email, Ms. Simpson called Complainant to request FML paperwork. During this conversation, Complainant informed Ms. Simpson that she was seeing several specialists. Ms. Simpson reiterated that she needed to submit the Medical Certification Form.

33. Respondent placed Complainant on LWOP from June 3 through 26, 2012. During this period of time, Complainant was required to remain in daily contact with Ms. Latham. Complainant made daily contact with the exception of a couple of days when her medication caused her to sleep all day.

34. On June 22, 2012, Complainant sent a handwritten note Ms. Monroe stating in part, "I also hope you finally received FMLA & Standard Ins. Papers. I can't lose this job! My surgery is scheduled the 26th. So keep fingers crossed it helps me back to normal. I hate being an invalid, sick person. It's amazing how we take aspects of life for granted . . . we just don't [know] how lucky we are when healthy & 'normal'! Thanks again for all the help."

June 26, 2012 Surgery

35. On June 26, 2012, Complainant had surgery as planned.

36. On July 1, 2012, the first day of the new fiscal year, Complainant was eligible for 520 hours of FMLA leave.

37. On July 18, 2012, Ms. Monroe sent two letters to Complainant, one regarding required FMLA paperwork, the other regarding required STD paperwork.

38. The first letter acknowledged that on July 17, 2012, Complainant had informed Respondent that she was requesting FMLA leave for her own serious health condition, commencing on July 2, 2012 (the new fiscal year). Ms. Monroe also informed Complainant that she was eligible for 520 hours of FMLA leave in the new fiscal year starting July 1, 2012, and: "The Medical Certification Forms must be returned no later than 08/01/2012. Failure to return the completed forms by the 15 day deadline may result in denial of your Family Medical Leave. Enclosed are forms that must be completed in order to apply for [FML]. It is your responsibility to submit all required paperwork in a timely and complete manner so that all of your entitlements are in place. . . ."

39. The letter further stated that if her leave does qualify as FMLA leave, Complainant was required to use her available paid sick leave (11.14 hours), annual leave (20.08 hours), and then LWOP, during her FMLA absence. "This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement."

40. The letter contained several attachments, including the federal FMLA Notice of Eligibility and Rights and Responsibilities, the FMLA poster, the Medical Certification form, and the Fitness to Return Certification Form.

41. The letter did not inform Complainant that she would not be permitted to return to work unless she submitted the attached Fitness to Return (FTR) certification.

42. The second July 18, 2012 letter provided Complainant with a STD packet.

43. On July 20, 2012, Ms. Hardwick, sent an interoffice memo to Ms. Simpson regarding, "Amended Leave Requests – Karine Chosvig." The memo stated that Standard was waiting for medical certification for STD beyond June 3, 2012 and HR had not received additional medical certification from Complainant. It further stated, "There is some concern that her recent absenteeism is unrelated to her initial STD Claim. FML has not been approved for 2011-2012 or 2012-2013. STD has not been extended beyond 6/3/12."

July 23, 2012 Physician's Statement to Respondent Regarding Surgery

44. Complainant's obstetrician, Dr. James Gilham, OB/GYN, filled out a Standard Insurance Company STD Attending Physician's Statement for Complainant, stating that Complainant had Supra Cervical Hysterectomy surgery on June 26, 2012, "with 6 week recovery time." It provided the name, address, phone and fax numbers of the health care provider and type of medical practice; the diagnosis of "SupraCervical Hysterectomy," the date of the surgery, the dates Complainant would be unable to work, June 26 through August 6, 2012; and the anticipated return to work date, August 7, 2012. It was signed by Dr. Gilham.

45. On July 23, 2012, Dr. Gilham's office, the Alpine Women's Centre, Inc., faxed the Standard Insurance Company STD Attending Physician's Statement for Complainant to Ms. Monroe.

46. Ms. Monroe received this form. Ms. Latham, Ms. Simpson, Ms. Hardwick, and Ms. Benallo all understood that Complainant was out of the office from June 26, 2012 through August 6, 2012 for hysterectomy surgery.

47. After receipt of the Physician's Statement from Dr. Gilham, Respondent did not designate Complainant's surgery and recovery period as FMLA-qualifying leave.

48. Respondent did not notify Complainant that she had failed to provide medical certification qualifying her for FMLA. Respondent did not request clarification or further authentication of the medical certification from Complainant, her health care provider, or any other individual.

49. Complainant assumed that the STD application had been submitted to Standard Insurance, but it had not. If Complainant had submitted the documents, the 30-day waiting period to receive payment would have been June 26, 2012 to July 26, 2012.

50. Complainant assumed she had been qualified for FMLA and/or STD leave for the surgery and recovery period.

August 7 - 9, 2012 Return to Work Discussions

51. On August 7, 2012, a Tuesday, Ms. Hardwick emailed Ms. Latham, directing her to send Complainant home if she showed up for work.

52. The next day, August 8, 2012, Ms. Hardwick emailed Ms. Simpson, advising her of her August 7 email to Ms. Latham directing her to send Complainant home if she showed up for work. She asked Ms. Simpson if she knew anything about Complainant and whether she had been coded as being on LWOP.

53. Complainant's appointing authority, Ms. Laurie Benallo, Operations Director, Drivers License Section, Division of Motor Vehicles, consulted with Ms. Simpson at this point and they decided that Ms. Simpson should call Complainant.

54. On August 8 and 9, 2012, Complainant received several calls from several individuals at DOR. Respondent's employees advised Complainant that she was not permitted to return to work without a Fitness-to-Return certification. They also advised Complainant that if she sought to remain out of work for medical reasons, she needed to submit a new medical certification establishing a basis for her continued absence.

55. Ms. Simpson contacted Complainant by telephone and asked her when she would be released to return to work, as the unit had received new equipment she needed to be trained on. Complainant responded that she was not sure her doctor would release her, that she had an appointment with her obstetrics doctor on August 9, and that she would obtain the required forms.

56. Ms. Simpson notified Complainant that her failure to provide the appropriate medical documentation for her absence, or failure to provide Fitness to Return to Duty form (FTR), could result in administrative separation pursuant to DP 5-10.

57. Jackie Tremble Brown, from the HR office (Ms. Monroe had left the unit on August 1, 2012) also called Complainant on August 8 or 9 to advise her they had not received the FMLA paperwork from her physician, and Complainant had been on unapproved LWOP for the entire period June 26 – August 7, 2012. Complainant was surprised to hear that, and stated she would call her doctor.

58. Respondent placed Complainant on LWOP on August 8, 2012.

August 8, 2012 Post-Operation Visit with Dr. Gilham

59. Complainant saw Dr. Gilham on August 8, 2012 for a post-operation assessment. His notes state that she "is doing great, no fevers, no difficulty with gallbladder. Pain is essentially resolved. Patient is doing nicely."

60. On August 9, 2012, Ms. Latham emailed Ms. Hardwick stating she had received a text from Complainant that morning. The text is not in evidence. Ms. Latham stated in the email, "What the heck is going on? Can you or Joi or HR call her and explain to her she has not been cleared to come to work, as I am understanding it. Besides that if she is cleared, I wouldn't think this would be acceptable anyway. Her first or second or whatever day she supposedly suppose to be here and she starting this all over again. (sic) Putting a bad taste in my mouth. Not good thing. (sic) I personally do not want to deal with this again. Sorry, this really hit me the wrong way this morning."

61. Under the new medications for her fibromyalgia, Complainant was still not feeling well. She called Dr. Craig regarding her fibromyalgia medication and was informed that the doctor was out of the office on vacation for a month.

62. Complainant called Ms. Simpson to inform her that her doctor was on vacation for a month. Ms. Simpson responded that Complainant still needed to obtain and submit either a FTR certificate or Medical Certification form.

63. Complainant did not inform Ms. Simpson or anyone else at DOR of a date she planned to return to work.

August 9, 2012 Letter to Dr. Kolfenbach

64. On August 9, 2012, Complainant wrote a letter to Dr. Kolfenbach, enclosing the FMLA Medical Certification Form:

> "Sur (sic), you had told me when I was over there I could have you fill out my FMLA papers. My position with the state is in jeopardy right now and I would appreciate your help with this. I also ask for a 'detailed letter stating due to the distance and the clinic being so busy that you have referred me back to my general physician Dr. Craig. Also that under the medications I should not or am not able to perform my very detailed and highly demanding position. Dr. Craig has me working with a pain management doctor in Grand Junction. (Fibromyalgia) Any help would be greatly appreciated."

65. On August 10, 2012, Complainant spoke to Dr. Kolfenback by telephone. She informed him that she needed to have a doctor's verification of a medical condition that would excuse her absence from work, and explained that some of her duties would be difficult to perform and would need to be excused occasionally for treatment and medical care.

August 10, 2012 Letter and August 11, 2012 Medical Certification Form by Dr. Kolfenbach

66. On August 11, 2012, Dr. Kolfenbach signed a Medical Certification Form for Complainant, containing the diagnosis of "severe fatigue, muscle and joint pain secondary to fibromyalgia." He stated that she would be unable to perform some of her job functions due to the level of pain she would experience, specifically, when restocking shelves, during prolonged standing, and that cleaning of the facilities would be very difficult for her. The form indicated Complainant would not be incapacitated for a single continuous period of time.

67. Dr. Kolfenbach also wrote a letter dated August 10, 2012, "To Whom It May Concern". The letter stated that his colleagues in the Rheumatology Clinic had seen her in 2002, and since that time she had been plagued by diffuse joint and muscle pains, severe fatigue, and intermittent rashes. He noted initially his Clinic had been concerned about possible lupus, but in April 2012 he performed repeat testing on Complainant which did not identify lupus. Instead, he diagnosed fibromyalgia and made some suggestions for treatment to her local primary care provider, Dr. Craig. He indicated he did not follow up with Complainant after this point because the volume of patients necessitated that fibromyalgia be referred to and managed by primary care physicians.

68. He stated, "She feels significantly disabled secondary to her underlying fibromyalgia, and will undoubtedly require frequent clinic visits and monitoring for progress by not only her local physician but likely a team of providers from physical therapy, psychiatry, pain management, and other related fields."

69. It was the customary practice for Dr. Kolfenbach's office to send correspondence to the patient within a week.

August 10, 2012 Letter from Ms. Benallo to Complainant Regarding Impending Discharge

70. Ms. Benallo consulted Ms. Simpson to advise her on the direction they should take with Complainant. Ms. Benallo also checked with HR to assure that Complainant's leave had been exhausted.

71. Ms. Benallo knew that Complainant had either lupus or fibromyalgia during the period April through August 2012.

72. On August 10, 2012, Ms. Benallo sent a letter via certified mail to Complainant. Ms. Simpson drafted the letter. The August 10, 2012 letter stated:

> It is my understanding that you have exhausted all credited paid leave, including sick, annual, and FMLA job protection. To date, you are not approved for Short-Term disability benefits and therefore you are not eligible for Short-Term Disability leave job protection.
>
> You were required to provide a medical certificate indicating the need for you to continue to be out on medical leave. This information was due to OHR on August 8, 2012. In addition, you are required to provide a Fitness to Return (RTW) Certificate that indicates your ability to return [to] the job and indicate any restrictions. This information has not been received as of today. Therefore, I am providing you notice per State Personnel Rule (sic) 5-10 that we may invoke administrative discharge for exhaustion of leave.
>
> You are to provide a RTW certificate or provide documentation that indicates a medical necessity for you to continue to be out on leave. this information must be provided to me by no later than Thursday, August 16, 2012. Once I receive this information, I will determine if further action is warranted or may invoke Rule 5-10. Please contact me if you need additional information or if you have questions."

73. Respondent attempted delivery on August 11 and 13, 2012.

74. Complainant received the August 10 letter on August 20, 2012.

75. Respondent did not request to contact any of Complainant's medical providers in August 2012 or at any other time during her employment.

Ms. Benallo Decision to Terminate

76. Prior to sending the letter terminating Complainant's employment, Ms. Benallo reviewed the monthly employee leave report on her computer, then contacted HR to check her leave status.

77. On August 22, 2012, Ms. Benallo sent Complainant a letter administratively discharging her based on exhaustion of leave, effective August 24, 2012. The letter noted that the August 10, 2012 letter had been sent via certified mail and delivery was attempted twice. It also noted that Joi Simpson "contacted you on August 8 notifying you that this documentation was due and to expect a letter from me. That documentation was due on August 16th and has not been received. With no additional information about your current circumstances, I have decided to implement administrative discharge in accordance with" Director's Procedure 5-10.

78. The letter notified Complainant that all of her sick and annual leave and FML benefits had been exhausted, and that she was not approved for STD.

79. Ms. Benallo provided Complainant her appeal rights and noted that Complainant was entitled to be considered for reinstatement when she was able to return to work.

Complainant's Medical Treatment

80. At the time of discharge, Complainant felt that she was unable to return to work until she stabilized on her new medication regime for her fibromyalgia.

81. Complainant was ultimately approved for STD for June 26, 2012 through August 7, 2012 in October 2012.

82. Complainant did not apply for and was not approved for a continuance of STD benefits after August 6, 2012.

83. Complainant filed an appeal with the Board on September 7, 2012. She stated on her appeal form in part, "My doctor had also not released me for work at this time due to a new medicine regime that we are trying to gain on my condition. I am not able to work in such a detailed job when I am on high doses of medication that affect my thought process and inability to focus. And the strain and stress of this particular job has on my condition would complicate the results of treatment until a permanent regime has been found."

DISCUSSION

A. Burden of Proof

Complainant bears the burden of proof in this appeal of her administrative separation. *Valesquez v. Department of Higher Education*, 93 P. 3d 540, 542 (Colo. App. 2004). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

Complainant asserts that her termination from employment was in violation of the Americans with Disabilities Act, the Family Medical Leave Act, and Director's Procedure 5-10, 4 CCR 801.

B. Respondent Violated the Family Medical Leave Act

The FMLA provides that an eligible employee shall be granted up to 12 weeks of leave in a one-year period where the employee has a serious health condition that renders her unable to perform the functions of her position. 29 U.S.C. § 2612(a)(1)(D); *Tate v. Farmland Industries, Inc.*, 268 F.3d 989, 996 (10th Cir. 2001). Under the FMLA, it is unlawful for an employer to interfere with an employee's attempt to exercise the rights established by the FMLA. *Id.*

To prevail on an FMLA interference claim, an employee must show that her employer deprived her of an FMLA entitlement. *Ridings v. Riverside Medical Center*, 537 F.3d 755, 761 (7th Cir. 2008). The employee must establish that: (1) she was eligible for the FMLA's protections; (2) her employer was covered by the FMLA; (3) she was entitled to leave under the FMLA; (4) she provided sufficient notice of her intent to take leave; and (5) her employer denied her FMLA benefits to which she was entitled. *Id.*

I. Complainant was eligible for FMLA leave for her surgery and recovery therefrom

The FMLA provides in relevant part:

> an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: . . .
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1)(D).

A "serious health condition" includes "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider." *Id.* at § 2611(11)(B); 29 C.F.R. § 825.112-114.

A "*serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in 825.114 or continuing treatment by a health care provider as defined in 825.115." 29 C.F.R. § 825.113(a)(emphasis in original). "Inpatient care" is defined as "an overnight stay at a hospital, including any period of incapacity as defined in 825.113(b), or any subsequent treatment in connection with such inpatient care." 29 C.F.R. § 825.114.

The term "incapacity" means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." 29 C.F.R. § 825.113(b). The term treatment includes but is not limited to "examinations to determine if a serious health condition exists and evaluations of the condition. . . a regimen of continuing treatment includes, for example, a course of prescription medication . . . ."

Complainant's surgery and recovery therefrom constituted a serious medical condition as defined by FMLA and its implementing regulations that rendered her unable to perform the functions of her position from June 26, 2012 through August 7, 2012.

II. Complainant properly requested FMLA Leave in June and July 2012

To invoke the protection of the FMLA, the employee need not specifically assert his or her rights under the FMLA or even mention the FMLA. Rather, he or she may simply inform the employer that leave is needed, and the employer must then determine whether that time off is covered by the FMLA. If an employee sufficiently describes as the basis for the request for leave any circumstance identified by the FMLA, the employer is obligated to inquire further to determine if FMLA leave is being requested. 29 C.F.R. §§ 825.302(c) and 825.303(b); *Tate*, 268 F.3d at 997.

Complainant requested FMLA leave for her surgery in June 2012 during her discussions of her impending surgery with Ms. Monroe. In a handwritten June 22, 2012 note to Ms. Monroe, Complainant stated that she hoped Ms. Monroe had received her FMLA and STD paperwork. In her July 18, 2012 letter to Complainant. Ms. Monroe acknowledged that Complainant had requested FMLA leave "on July 17, 2012."

III. Complainant met the medical certification requirement for FMLA

Under the FMLA regulations, "an employer may require that an employee's leave due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position be supported by a certification issued by the health care provider of the employee or the employee's family member." 29 C.F.R. § 825.305(a). The employee must provide the requested certification to the employer "within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification." 29 C.F.R. § 825.305(b).

Under 29 CFR § 825.306(a), the medical certification from a health care provider must set forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;
(2) The approximate date on which the serious health condition commenced, and its probable duration;
(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed,

any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability. . . ."

29 CFR § 825.306(a)(1)-(4).

The Physician's Statement signed by Dr. Gilham and provided to Ms. Monroe on July 23, 2012 comported with the medical certification requirements contained in 29 CFR § 825.306. *Ridings*, 537 F.3d at 768 ("medical certification is sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider regarding the condition, and a statement that the employee is unable to perform the functions of the employee's position"). It provided the name, address, phone and fax numbers of the health care provider and type of medical practice; the diagnosis of "SupraCervical Hysterectomy," the date of the surgery, the dates Complainant would be unable to work, June 26 through August 6, 2012; and the anticipated return to work date, August 7, 2012.

Respondent does not contest receipt of this medical certification. Respondent contends instead, in its closing argument, that "Transposing the Complainant's STD benefit application as complying with FML documentation requirements is not permitted under Board Rule 5-6 (sic)." Director's Procedure 5-6 requires employees to "provide a State of Colorado Medical Certificate form." This argument is unavailing. Acceptance of Respondent's argument would permit employers to circumvent FMLA by erecting beaurocratic hurdles. FMLA prohibits an employer from requesting additional information after receiving medical certification comporting with 29 CFR § 825.306(a)(1)-(4).

Under 29 CFR 825.307(a), "[i]f an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider."

Respondent has provided no evidence or legal authority demonstrating that the July 23, 2012 medical certification was legally defective or deficient as a basis for qualifying Complainant for FMLA job protection. Further, as Complainant noted in her closing argument, 29 CFR 825.207(d) states that disability leave is to be considered FMLA leave for a serious health condition if it meets the criteria under subsection 112 through 115, which it did in this case. This provision states:

> Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112 through 825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for

two-thirds of an employee's salary.

29 CFR 825.207(d).

The STD Physician Statement met the medical certification for leave requirements under FMLA. Respondent had no lawful basis to ignore or refute the medical paperwork it received on July 23, 2012, or to request additional information from Complainant.

IV. Respondent violated the FMLA by failing to designate Complainant's leave for surgery and recovery as FMLA-qualifying within five business days of receiving the certification.

Respondent failed to designate Complainant's FMLA-qualifying leave within five days of receipt of the medical certification on July 23, 2012. Upon receipt of information that leave qualifies for FMLA, the employer must provide a designation notice to the employee within five days. 29 CFR 825.300(d)(1)("When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.,* after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave.")

Significantly, in its closing argument, Respondent does not attempt to assert that Complainant's surgery and recovery were not FMLA-qualifying conditions. Rather, Respondent's entire defense rests on its mischaracterization of the July 23 STD document as noncompliant with FMLA because it wasn't the correct form. Again, this argument is unavailing.

As is illustrated below, this failure in July 2012 to designate Complainant's surgery and recovery period as FMLA-qualifying ultimately led directly to Respondent's premature decision to discharge Complainant in August 2012.

V. Respondent violated its duty to notify Complainant of her right to cure any purportedly incomplete medical certification

Additionally, assuming for the sake of argument Respondent determined that Complainant's leave was not FMLA-qualifying, it had a duty to promptly notify Complainant of that decision. 29 CFR 825.300(d)(1)("If the employer determines that the leave will not be designated as FMLA-qualifying (*e.g.,* if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination". *Ridings*, 537 F.3d at 768 (Where medical certification is incomplete, the employer must advise the employee of the information's insufficiency and provide the employee a reasonable opportunity to cure the deficiency"). *Accord*, Director's Procedure 5-7, 4 CCR 801, which states, "When an incomplete medical certificate is submitted, the employee must be allowed seven days to obtain complete information, absent reasonable extenuating circumstances."

Respondent never notified Complainant that her July 23 medical certification had been found to be incomplete, in violation of federal and state rules. Instead, Respondent disregarded the July 23 certification, and on August 10, notified Complainant that she had failed to provide any medical certification at all, activating what it believed at that time to be the seven-day right to cure period.

VI. Respondent violated its duty at the time it should have designated her leave as FMLA-qualifying to notify Complainant of the obligation to submit a Return-toWork certification to be restored to employment.

The FMLA regulations require employers to provide employees advance notice of the requirement to submit a fitness-to-return certification to be restored to employment. 29 CFR 825.300(d)(3). When, as here, a written procedure requires an FTR certification, that notice may be given orally. (DP 5-9 requires an FTR certification if an absence exceeds 30 days for the employee's own condition). The federal regulation states:

> (3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.*, by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

29 CFR 825.300(d)(3)(emphasis added).

Respondent never sent a designation notice to Complainant because it erroneously failed to designate her for FMLA leave. Nonetheless, Respondent had a concurrent duty within five days of receiving the medical certification, at the time it should have designated her leave as FMLA-qualifying, to advise Complainant orally of the written policy requiring her to submit a fitness-for-duty certification in order to be restored to employment. It never did so.

In her July 18, 2012 letter to Complainant, Ms. Monroe had informed Complainant only of her obligation to submit the medical certification forms. The letter did not mention the requirement that prior to being restored to employment, Complainant would have to submit a FTR certification. The letter did include the FTR form as an attachment, however.

The weight of the evidence demonstrates that the first time Complainant had any awareness of a requirement to submit the RTW form was on August 7 or 8, 2012.

VII. Respondent was permitted to request recertification of Complainant's medical condition on August 7, 2012, but was required to provide Complainant fifteen days to do so

Employers must provide written notice to employees of the fifteen-day deadline to file medical certification. *Rager v. Dade Behring, Inc.*, 210 F.3d 776, 777 (7th Cir. 2000). Respondent was fully justified in requiring Complainant to submit a new medical certification following her surgery. The FMLA regulations permit an employer to request recertification of a medical condition when FMLA leave has exceeded forty days, as here (June 26 – August 6 exceeds forty days). 29 CFR 825.308(b). When this occurs, the employee must provide the

requested recertification to the employer within the time frame requested by the employer so long as it allows at least 15 calendar days after the employer's request, "unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts." 29 CFR 825.308(d).

On August 10, 2012, Ms. Benallo wrote Complainant and advised her, "You were required to provide a medical certificate indicating the need for you to continue to be out on medical leave. This information was due to OHR on August 8, 2012." The letter gave Complainant until August 16, 2012 to provide the medical certification. However, in this August 10 letter, Respondent was required to give Complainant fifteen days to recertify her FMLA-qualifying condition, through August 25, 2012.

Respondent failed to give Complainant the required written fifteen-day notice of the requirement to recertify her condition as FMLA-qualifying after August 7, 2012. Instead, Respondent treated Complainant as though she had never complied with the medical certification requirement for the surgery and recovery period, providing her with several premature deadlines.

Complainant did not receive the August 10 letter until August 20, 2012, which was four days after the deadline provided, and five days prior to the deadline that should have been provided. CFR 825.308(d); *Rager*, 210 F.3d at 777. Under these circumstances, it was impossible for Complainant to provide the new medical certification by August 16, and she was deprived of notice of the proper deadline of August 25, 2012. 29 CFR 825.308(d).

Complainant did make diligent, good faith efforts to provide the requested medical certification for Respondent. On August 9 she wrote a letter to Dr. Kolfenbach and on August 10 she spoke with him by phone. He filled out the FMLA medical certification form and wrote a letter, both of which were sent to Complainant within approximately one week. She was discharged on August 24, prior to the fifteen day deadline to recertify her condition, and without the requisite seven-day cure period.

In summary, Respondent violated FMLA twice. The first time was by failing to designate Complainant's surgery and recovery leave as FMLA-qualifying within five days of the July 23 medical certification. The second time was by failing to provide Complainant written notice of the fifteen-day deadline to recertify her condition as FMLA-qualifying, and then providing her the seven-day right to cure. The second violation resulted in Complainant's loss of the job protection guaranteed by FMLA.

Twigg v. Hawker Beechcraft Corporation, 659 F.3d 987 (10th Cir. 2011) does not compel a contrary result. In that case, an employee was disciplinarily terminated for cause because, after her approved FMLA leave expired, she failed to call in to or report for work, in violation of the employer's absence policy. *Id.* at 1008. In this case, by contrast, Respondent failed to properly designate Complainant for an FMLA-qualifying condition, prohibited her from returning to the office, and prematurely discharged her for failing to recertify her condition. It discharged Complainant for exhaustion of leave, not for cause. Therefore, *Twigg* does not apply.

C. <u>Respondent discriminated against Complainant on the basis of disability</u>

Complainant asserts that Respondent discharged her in violation of the Colorado Anti-discrimination Act's (CADA) prohibition on discrimination on the basis of disability. § 24-34-402(1), C.R.S. State Personnel Board Rule 9-4, 4 CCR 801, provides that " [s]tandards 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." Wherever possible, the CADA should be interpreted consistently with the ADA. *Ward v. Department of Natural Resources*, 216 P.3d 84, 92 (Colo.App. 2008). *Accord*, Colorado Civil Rights Commission Rule 60.1C, 3 CCR 708-1 ("Whenever possible, the interpretation of [CADA] concerning disability shall follow the interpretations established in Federal regulations adopted to implement the Americans with Disabilities Act . . . , and such interpretations shall be given weight and found to be persuasive in any administrative proceedings").

To establish a prima facie case of disability discrimination under the ADA, a plaintiff must demonstrate A) she is a disabled person as defined by the ADA; B) is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and C) suffered discrimination by an employer or prospective employer because of that disability. *EEOC v. C.R. England., Inc.*, 644 F.3d 1028, 1037-38 (10th Cir. 2011). If a plaintiff offers no direct evidence of discrimination, which is often the case, the court applies the burden-shifting analysis articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* at 1038. Once this initial burden of establishing a prima facie case of disability discrimination is met, the burden shifts to the employer to prove either undue hardship or that it made an offer of reasonable accommodation. *Id.*

I. Complainant was disabled.

The CADA and the ADA define disability as, "a physical [or mental] impairment which substantially limits one or more of a person's major life activities and includes a record of such an impairment and being regarded as having such an impairment." § § 24-34-301(2.5)(a) and (b), C.R.S.; 42 U.S.C. § 12102(2). The ADA was significantly amended by the Americans with Disabilities Amendments Act of 2008 (ADAA). *Hennigir v. Utah Dept. of Corr.*, 587 F.3d 1255 (10th Cir. 2009).

The ADAA expands the definition of major life activities, listing examples to include, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." 42 U.S.C. § 12102(2)(A). Major life activities now include the operation of a major bodily function, including but not limited to functions of the immune systems, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. § 12102(3)(A).

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. 42 U.S.C. § 12102(4)(D). The impairment, however, cannot be something that is both transitory and minor. 42 U.S.C. § 12102(3)(B).

Complainant claims that the hysterectomy surgery and her fibromyalgia rendered her disabled under the Act.

Complainant had fully recovered from surgery on August 8, 2012 based on her doctor's report. She was not permanently disabled from it. The hysterectomy does not qualify as an impairment which substantially limits a major life activity.

Regarding Complainant's fibromyalgia, the March 22, 2012 FMLA medical certification form submitted to Respondent described Complainant's symptoms as "fever, chills, nausea,

abdominal pain, chest pain, shortness of breath of unclear etiology." The form indicated that the expected duration of treatment was "lifelong" and that Complainant had been referred to a Rheumatologist for evaluation or treatment. Complainant's symptoms included severe fatigue and extreme joint pain.

After Complainant received the fibromyalgia diagnosis from Dr. Kolfenbach in April 2012, Complainant informed Ms. Monroe, the ADA coordinator, and Ms. Latham, her immediate supervisor, that she had a diagnosis of fibromyalgia. Ms. Benallo, Complainant's appointing authority, was aware that Complainant had either fibromyalgia or lupus and had taken STD leave for the condition.

On August 9 and 10, 2012, Complainant and Dr. Kolfenbach considered Complainant to be permanently unable to perform the essential functions of her position without reasonable accommodation, due to her fibromyalgia.

Complainant's fibromyalgia is a permanent, episodic impairment that substantially limits her in several major life activities, including breathing and concentrating. Therefore, she has met the first element of the prima facie case of disability discrimination by demonstrating she is a disabled person.

II. Respondent Failed to Engage in the Interactive Process

Under the ADA, an employer can discriminate against an employee by failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. 42 U.S.C. 12112(b)(5)(A); *England*, 644 F.3d at 1048; *Ward v. Dept. of Natural Resources*, 216 P.3d at 94-95 (failure to reasonably accommodate constitutes disability discrimination under the Act unless the employer can demonstrate that the accommodation imposes an undue hardship on the employer).

Respondent argues that because Complainant was unable to return to work at the time of her discharge, she cannot establish the second element of the prima facie case, i.e., that she was "qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired." The problem with this argument is that it skips the required step of engaging in the interactive process with the disabled employee to determine what, if any, reasonable accommodations might be appropriate. Only then can the employer determine whether such reasonable accommodations pose an undue hardship on the employer, thereby warranting either discharge or transfer. *England*, 644 F.3d at 1049 (before duty to reasonably accommodate is triggered, the employee must make an adequate request, thereby triggering the interactive process); *Ward*, 216 P.3d at 94-95.

It is undisputed in this case that no interactive process to discuss possible reasonable accommodations occurred. The question posed is whether the interactive process was appropriately triggered.

For the interactive process to be triggered, "either by direct communication nor other appropriate means, the employee must make clear that [he or she] wants assistance for his or her disability." *England*, 644 F.3d at 1048-49. An employee is not required to use any particular language when requesting an accommodation but need only inform the employer of the need for an adjustment due to a medical condition. *Id.* No "magic words are necessary. But the employee must convey to the employer a desire to remain with the employer despite his or her disability and limitations." *Ward*, 216 P.23 at 94-95.

Complainant relies on *Albert v. Smith's Food and Drug Centers, Inc.*, 356 F.3d 1242, 1252 (10th Cir. 2004). In *Albert*, the Tenth Circuit Court of Appeals reversed summary judgment for the employer, holding, "Neither party may create or destroy liability by causing a breakdown of the interactive process. [internal citation omitted] After October 14, when Albert triggered the interactive process by delivering a note from her health provider, Smith's had a duty to work with Albert to identify the type of position that would reasonably accommodate her limitations. [internal citation omitted." *Id.* at 1253.

Here, much like in *Albert*, Respondent had written notice from Complainant's medical provider in March 2012 of a serious medical condition causing her to have extreme pain, fever, problems breathing, and other serious symptoms. That form notified Respondent of the referral to a specialist. Complainant advised Respondent in April 2012 of her fibromyalgia diagnosis. In June 2012, Complainant informed Ms. Simpson she was seeing several specialists for her condition. In her August 7 and 8, 2012 discussions with Ms. Simpson, Complainant stated her intent and wish to return to work, but that she was not sure she would be released for return by her doctor. Complainant immediately contacted her doctor, Dr. Kolfenbach, to request FML medical certification and a letter requesting accommodations of her fibromyalgia.

Complainant never provided those forms or that request to Respondent. Moreover, Complainant never stated to Ms. Simpson specifically that because of problems with her new fibromyalgia medication regime, she was requesting an accommodation at work.

This case presents a close call on the question of whether Complainant adequately triggered the interactive process with Respondent in August 2012. However, a close review of the record leads to the conclusion that she did. Complainant's medical conditions from March 2012 forward, the medical certification received in March, the notice of her fibromyalgia in April, the notice Complainant was seeing a specialist in June, and Complainant's August notice of her intent to return to work, together constitute an adequate record to trigger a duty for Respondent to inquire whether Complainant needed accommodations in order for her to return to her position. Instead of asking this question in response to the knowledge it had, it discharged Complainant. *England, supra; Albert, supra; Ward, supra.* In electing to discharge without undertaking that interactive process, Respondent violed the ADA.

D. <u>Respondent violated DP 5-10</u>

Director's Procedure (DP) 5-10, 4 CCR 801, states as follows:

> "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 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."

It is uncontested that Complainant had exhausted all credited paid sick and annual leave at the time of her discharge. She had not yet applied for STD and had no remaining sick or annual leave.

Also undisputed is the fact that Respondent met its obligation to make a good faith effort to communicate with Complainant prior to implementing DP 5-10. Respondent communicated with Complainant by telephone on August 7 and 8, 2012 and by letter on August 10, 2012. In these communications, Respondent made it clear to Complainant that unless she could return to work or provide medical verification of her continued need to be absent, it would initiate administrative separation.

As the discussion of FMLA above demonstrates, FMLA applied at the time Complainant was discharged; therefore, it was in violation of DP 5-10(B). Complainant was entitled to 520 hours of job protection for any serious illness that rendered her unable to perform her position. 29 U.S.C. § 2612(a)(1)(D). Complainant had used less than 65% of her leave at the time of premature discharge. Further, Complainant was a disabled employee for whom the interactive process was necessary to determine whether reasonable accommodations were appropriate.

DP 5-10(B) also prohibits state agencies from discharging employees "if short-term disability leave" applies. Respondent received notice on July 23, 2012 that Complainant had sought STD leave for her surgery and recovery through August 6, 2012. However, Complainant had neither sought nor advised Respondent that she sought STD leave protection after August 6, 2012. Therefore, STD leave did not apply at the time of her discharge.

E. Attorney Fees are Not Warranted

Complainant requests an award of attorney fees and costs. The Board's enabling act provides for an award of attorney fees and costs upon certain findings. § 24-50-125.5, C.R.S. It states in part,

> "Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ."

The Board has implemented the attorney fee statute in Rule 8-38, 4 CCR 801.[1] The party seeking an award of attorney fees and costs bears the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Rule 8-38(B). Under the Rule, "A frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented." A groundless personnel action is defined as one in which "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense." Board Rule 8-38(A).

[1] In effect at the time of discharge.

Respondent's actions in this case do not rise to the level of being frivolous, groundless, or bad faith. Respondent had an employee in an important supervisory position out of the office for several months, due to an episodic illness with amorphous symptoms that was difficult to define. Respondent urged Complainant to take disability leave. When she did not get better, it gave Complainant leave without pay.

Under these circumstances, its premature separation of Complainant based on exhaustion of leave does not rise to the level of egregiousness to warrant an award of attorney fees and costs.

F. Remedy

Relief authorized under the CADA includes: orders requiring the employer to cease and desist from the discriminatory practice or conduct; orders requiring the employer to take action regarding hiring, reinstating, or upgrading of employees, with or without back pay, orders concerning on-the-job training programs, the posting of notices, the making of reports regarding compliance with the Act, etc. *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1174 (Colo. 2000); § 24-34-405; Board Rule 9-6, 4 CCR 801. The CADA expands the remedies otherwise available to the Board. *Ward v. Department of Natural Resources*, 216 P.3d 84, 96-97 (Colo.App. 2008).

Where a legal injury is of an economic character, as here, legal redress in the form of compensation should be equal to the injury. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984). The equitable "purpose of placing a person in the wage and employment position they would have been in but for the discriminatory conduct is to make the person 'whole' in the employment setting." *City of Colorado Springs,* 993 P.2d at 1175, citing *Albemarle Paper v. Moody*, 422 U.S. 405, 418-19 (1975). A Board remedy must make the employee whole only and may not result in a windfall. *Donahue*, 690 P.2d at 250.

Complainant is entitled to reinstatement to her position in the status of leave without pay (LWOP). At the time of discharge she had no paid leave remaining.

Respondent is required to timely provide Complainant with written notice of her medical certification requirements under FMLA in accordance with the law. Complainant is entitled to the remainder of FMLA job protection for the fiscal year, namely, 520 hours minus the period July 1 through August 24, 2012.

Respondent is also required to timely engage in the interactive process with Complainant to determine whether she needs reasonable accommodations for her position due to her fibromyalgia. If Respondent determines that such reasonable accommodations pose an undue hardship on the agency, it must comport with the remaining requirements governing transfer to a different position in accordance with *Ward, supra*.

ORDER

Complainant's discharge is rescinded. Respondent shall reinstate Complainant to her previous position on leave without pay status, shall provide Complainant with appropriate notices and rights due under FMLA, and shall engage in the interactive process with Complainant and meet all other requirements to comport with the ADA.

Dated this 16th day of August, 2013.

[redacted]
Mary McGlatchey
Administrative Law Judge
State Personnel Board
633 17th Street, Suite 1320
Denver, CO 80202-3604

CERTIFICATE OF MAILING

This is to certify that on the 16th day of August, **2013**, I electronically served a true copy of the foregoing **INITIAL DECISION** as follows:

Nora V. Kelly, Esquire
[redacted]

Micah R. Payton A.A.G.
[redacted]

[redacted]

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 $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 8-69, 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.