

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2019G075(C)**

GARY CHRISTOPHER WARD,
Complainant,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on August 3, 2020. The hearing was conducted remotely through a web conference using Google Meet. The record was closed on August 5, 2020. Complainant Gary Ward represented himself. Vincent E. Morscher, Senior Assistant Attorney General, represented Respondent Department of Corrections (Respondent or DOC). Respondent's advisory witness was Michelle Brodeur, DOC's Chief of Clinical and Correctional Services.

MATTERS APPEALED

Complainant claims that Respondent retaliated against him for alleging unlawful discrimination in violation of the Colorado Anti-Discrimination Act. Complainant, who resigned from his DOC employment, and whose resignation is not an issue in this appeal, seeks a finding in his favor and all available equitable relief.

Respondent argues that none of its actions concerning Complainant were retaliatory and that Complainant's claim should be denied and his appeal dismissed.

For the reasons set forth below, Complainant's discrimination claim is denied and his appeal is **dismissed**.

ISSUE

Whether Respondent retaliated against Complainant in violation of the Colorado Anti-Discrimination Act.

FINDINGS OF FACT

Procedural Background

1. Complainant began his employment with DOC in January 2016, and worked primarily at the Sterling Correctional Facility (SCF) as a Health Services Administrator (HSA), Health Professional VI. (Stipulated Fact.) Complainant was an HSA until he resigned his position effective December 27, 2019. Complainant was certified in or about January 2017.

2. Between May 2019 and August 2019, Complainant filed nine petitions for hearing with the State Personnel Board (Board), raising claims of gender discrimination and retaliation in violation of the Colorado Anti-Discrimination Act (CADA).

3. Complainant's petitions were evaluated pursuant to the preliminary review process. In her Preliminary Recommendation, ALJ McCabe recommended that a hearing be granted solely on Complainant's claims of retaliation in violation of CADA addressed in Complainant's first and second petitions for hearing. The Board adopted the recommendation.

4. After he filed his petitions for hearing with the Board, Complainant resigned his position with DOC. He subsequently filed an appeal with the Board, alleging that his resignation was forced or coerced. However, the Board dismissed the appeal of his resignation as untimely.

5. After the Board adopted the Preliminary Recommendation, this matter was scheduled for hearing.

Factual Background

6. As an HSA, Complainant's duties included operational and supervisory oversight of a multi-disciplinary clinical services staff of approximately ten employees, including medical, dental, mental health and rehabilitation services for offenders at SCF.

7. At all times relevant to this matter, Michelle Brodeur was DOC's Director of Clinical and Correctional Services. She oversaw the correctional and clinical services for offenders at every DOC facility. Ms. Brodeur supervised Dr. Jill Lampela, DOC's Chief of Clinical Operations.

8. Dr. Lampela was responsible for all clinical operations at every DOC facility. Dr. Lampela supervised regional HSAs. Regional HSAs are responsible for directly supervising HSAs at the individual facilities.

9. From approximately October 2018 through Complainant's resignation in December 2019, Dr. Lampela was Complainant's supervisor.

10. When Complainant was hired as the HSA for SCF, he was tasked by then-Regional HSA Brian Hoffman with improving the Mental Health/Drug and Alcohol (MH/DA) staff, which was in disarray. Complainant's supervision of the MH/DA staff at SCF, and his attempt to hold these staff members accountable, created friction between Complainant and the MH/DA staff.

11. The MH/DA staff at SCF were generally resistant to supervision by HSAs and had waged a successful campaign against the previous HSA, resulting in that HSA's departure from SCF.

12. On the other hand, the SCF medical staff expressed a positive view of Complainant and his management style.

13. Shortly after Complainant's arrival at SCF, MH/DA staff members began to file a series of grievances against him, objecting primarily to his style of communication, which was generally direct and straightforward.

14. Complainant received a Performance Improvement Plan (PIP) in September 2016 addressing Complainant's communication and interpersonal skills, and another PIP in February 2018 addressing his communication and performance management.

15. At some point prior to November 2018, Nicole Wilson, one of the MH/DA staff, submitted a grievance alleging that Complainant had inappropriately touched her. Ms. Wilson also alleged that Complainant had inappropriately touched two of his administrative assistants, J.T. and J.R.¹ This grievance was investigated and then-Regional HSA Matt Busa concluded, “I have determined that Mr. Ward has not touched female staff and is respecting their personal space”

November 6, 2018 Incident at Sterling Correctional Facility

16. On the night of November 6, 2018, there was a riot at SCF during which four correctional officers were assaulted by offenders. Complainant, who was home in Denver at the time of the riot, was contacted by Ryder May, SCF’s Associate HSA, who informed him of the situation. Mr. May indicated to Complainant that he (Mr. May) had the situation under control, which to Complainant meant that there was no need for him to report to SCF to assist. However, Mr. May was very stressed while dealing with the situation at SCF that night.

17. After speaking with Mr. May, Complainant called his supervisor, Dr. Jill Lampela, and told her what little he knew about the situation at SCF. He then told her that he was going out for a run and would be unreachable for the next half hour.

18. Dr. Lampela was frustrated with Complainant’s lack of knowledge about all that was occurring at SCF, and was further frustrated that Complainant did not attend promptly to the crisis at SCF.

19. Dr. Lampela thought that it was Complainant’s duty to report to SCF during this crisis, but she failed to direct Complainant to report to SCF. Dr. Lampela was very disappointed that Complainant did not go to SCF that night.

20. Complainant was placed on administrative leave with pay on November 9, 2018, based on his failure to go to SCF during the riot. Every other department head at SCF went to the facility on the night of November 6, 2018.

Complainant’s November 2018 Step II Grievance

21. On November 14, 2018, Complainant submitted a Step II grievance, choosing to skip Step I. In his grievance, Complainant alleged that Dr. Lampela did not provide direction or supervision to him during the November 6, 2018 incident despite the fact that she thought that he needed to report to the facility. As relief, Complainant requested that when he returned from administrative leave, he be assigned a different supervisor.

22. On November 19, 2018, DOC’s Office of Inspector General (OIG) referred Complainant’s Step II grievance to DOC’s Office of Human Resources (OHR).

23. In a letter dated November 27, 2018, Jennifer Murphy, DOC’s Employee Relations Supervisor, informed Complainant that his Step II grievance was being referred back to his appointing authority, Ms. Brodeur.

¹ To protect the privacy of these individuals, whose identities are not material to this matter, they are referred to by their initials.

24. On December 6, 2018, Ms. Brodeur held a Step II grievance meeting with Complainant.

25. Ms. Brodeur issued her Step II grievance decision on December 14, 2018. Addressing Complainant's accusation that Dr. Lampela intentionally failed to direct Complainant to report to SCF during the November 6, 2018 incident, Ms. Brodeur concluded that, "During the review of the grievance, there was not any indication that your supervisor consciously withheld supervisory direction from you." Ms. Brodeur concluded, "After a review of the documents you provided, discussions during the grievance meeting, review of policy and conversation with other parties I am denying the relief you requested."

Complainant's November 14, 2018 Unlawful Discrimination Complaint

26. On the same day that he submitted his Step II grievance, November 14, 2018, Complainant submitted an unlawful discrimination complaint, alleging a pattern of gender discrimination and harassment with regard to his interactions with Dr. Lampela. In his complaint, Complainant contended that as the only male left in the entire clinical management team, he suffered microaggressions at every monthly HSA meeting, during which Dr. Lampela would purportedly hug female HSAs and say things like "I love you," but would not do the same with Complainant. Complainant also addressed the November 6, 2018 incident, and asserted that he reported to Dr. Lampela and spoke with her four times that night but she "did not provide any direction/supervision to me in any way." Complainant added that, "I believe this omission of supervision was done on purpose, so she could later make serious allegations concerning my job performance."

27. On November 15, 2018, Ms. Brodeur sent a letter to Complainant regarding his November 14, 2018 discrimination complaint. Ms. Brodeur informed Complainant that she forwarded his complaint to the OHR and to the OIG for review pursuant to DOC's Administrative Regulation (AR) 1450-05, which addresses complaints of harassment and discrimination, and that "[u]pon determination of the appropriate course of action, you will receive written notice from the OIG."

2018-2019 Mid-Year Review

28. Complainant was given his mid-year review on November 26, 2018, drafted by Dr. Lampela. He was given an overall rating of Level II (Successful). However, Dr. Lampela rated him at Level I (Needs Improvement) for the core competency of Communication.

29. To prepare Complainant's mid-year review, Dr. Lampela solicited comments about Complainant's job performance from former Regional HSA Matt Bussa, and Matt Hansen, who was then SCF's Warden. In drafting and finalizing the mid-year review, Dr. Lampela deleted several complimentary comments provided by Mr. Bussa and Warden Hansen while leaving in all negative comments and occasionally attributing some of her own negative comments to others.

Complainant's November 29, 2018 Unlawful Discrimination and Retaliation Complaint

30. On November 29, 2018, Complainant submitted an unlawful discrimination complaint against Dr. Lampela and Ms. Brodeur, alleging that, since he submitted his November 14, 2018 discrimination complaint, "there are two separate conditions that I feel are retaliatory in nature." Those two conditions included the failure to change his supervisor despite AR 1450-05, IV(C)(5)(e), which provides that "[u]pon receipt of an unlawful discrimination and/or

discriminatory harassment complaint, the appointing authority will take steps to provide immediate relief to the complainant until resolution can be achieved through appropriate inquiry or investigation.” In addition, Complainant alleged that his mid-year review constituted “[c]lear retaliation for me filing a discrimination complaint against Ms. Lampela.” Complainant pointed out that “[t]hree of out [sic] six competencies contained rather serious performance ‘allegations’. However, I was completely unaware of these reported deficiencies.”

31. On December 4, 2018, Grace Novotny, OIG’s Chief Investigator, sent a letter to Complainant, acknowledging receipt of Complainant’s November 29, 2018 unlawful discrimination complaint pursuant to AR 1450-05, and informing Complainant that the OIG would not investigate the complaint.

December 7, 2018 Board Rule 6-10 Meeting and Subsequent Investigation

32. On December 7, 2018, Warden Hansen held a Board Rule 6-10² meeting with Complainant arising from his handling of the November 6, 2018 incident. Afterwards, Warden Hansen investigated SCF employees’ perceptions of Complainant as a supervisor.

33. As part of Warden Hansen’s investigation of Complainant’s supervisory performance, on January 18, 2019, Warden Hansen spoke with Breton Willson, an SCF MH/DA staff member, who disclosed an alleged incident that occurred in March 2017 involving Complainant. Mr. Willson told Warden Hansen that, in March of 2017, while presenting some paperwork, Complainant grasped Mr. Willson’s hand and held it for a prolonged time. Mr. Willson claimed that this physical contact made him uncomfortable and he felt that Complainant was making a sexual advance. Mr. Willson characterized Complainant as a sexual predator. Mr. Willson said previous to the alleged hand-holding incident, Complainant had touched his knee while seated in conversation and put his hand on Mr. Willson’s shoulder, back and arm while talking.

34. Although Warden Hansen did not believe that Complainant had harassed or made a sexual advance towards Mr. Willson, he gave Mr. Willson a copy of AR 1450-05.

35. After Mr. Willson reviewed AR 1450-05, he felt that he was obligated to submit a complaint against Complainant, which he did.

36. Mr. Willson’s complaint was referred to the OIG, which conducted an investigation and issued an Investigative Report. The OIG investigator concluded that Mr. Willson’s complaint was not credible.

Continuation of Rule 6-10 Meeting and Complainant’s April 2019 Discrimination Complaint

37. On March 28, 2019, Warden Hansen conducted a continuation of the Rule 6-10 meeting with Complainant. During this Rule 6-10 meeting, Complainant was provided the two investigative reports, one of which, in Complainant’s view, “contained very disturbing testimony by Mr. Bretton [sic] Wilson [sic].”

² Board Rule 6-10 provides, in pertinent part, “When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline, disclose the source of that information unless prohibited by law, and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision.”

38. On April 8, 2019, Complainant submitted a discrimination complaint against Mr. Willson, alleging that Mr. Willson created a hostile work environment, and accusing Mr. Willson of conduct unbecoming (insubordination, professionalism, workplace conduct, formal investigations/legal contacts). Referring to what Mr. Willson told the OIG investigator, Complainant wrote that it revealed that “Mr. Wilson [sic] wanted to see me removed as SCF’s HSA and to that end he made false, serious, slanderous and defamatory allegations against myself with the explicit goal of getting me fired from the CDOC. Additionally, I feel that this represents a hostile work environment.”

39. On April 10, 2019, Ms. Novotny sent an email to Complainant regarding his April 8, 2019 complaint:

As we discussed previously in our phone conversation, the information contained in your formal complaint and previous email to Mr. Hansen, has already been investigated and has been presented to the assigned Appointing Authority, Mr. Matthew Hansen. As we discussed, the OIG will not be conducting any additional investigation into your claims since the information is already contained in a formal investigative report. This matter is being referred back to Mr. Hansen for review and disposition.

40. On April 22, 2019, Complainant emailed Ms. Brodeur and Rick Thompkins, DOC’s Human Resources Director, seeking clarification about the status of his November 14, 2018 gender discrimination complaint. Complainant expressed concern about Respondent’s failure to respond to his November 14, 2018 gender discrimination complaint. Complainant alleged that Respondent had violated provisions of AR 1450-05 by not meeting with him and not issuing a decision within 45 days of the OIG referral.

41. On April 26, 2019, Warden Hansen issued a disciplinary action and a corrective action to Complainant. The disciplinary action was subsequently rescinded.

42. On April 29, 2019, Complainant was provided with his performance evaluation for the fiscal year April 1, 2018 through March 31, 2019.

43. On May 3, 2019, Complainant filed an appeal of his disciplinary and corrective actions with the Board.

Responses to Complainant’s Discrimination and Retaliation Complaints

44. On May 23, 2019, Mr. Hansen, who was by then the Deputy Director of Prison Operations, issued a response to Complainant’s two discrimination complaints – the November 14, 2018 gender discrimination complaint against Dr. Lampela and the November 29, 2018 retaliation complaint against Dr. Lampela and Ms. Brodeur. Mr. Hansen concluded:

I have received both of your complaints, along with Professional Standards Investigation #2019-000241 in which your allegations were investigated along with other possible performance concerns, along with all other relevant information available. I have determined that there is no evidence to support your allegations of gender/sex discrimination or retaliation at this time.

45. On May 29, 2019, Ms. Brodeur issued a response to Complainant’s April 8, 2019 discrimination complaint against Mr. Willson. Ms. Brodeur wrote, in pertinent part, “I have

investigated your complaint, conducted discussions with those you named, along with other relevant information provided to me. I have determined that there is no evidence to support these claims.”

Complainant’s Board Petitions and Subsequent Events

46. On or about May 30, 2019, Complainant filed a petition for hearing with the Board, alleging that Ms. Brodeur’s response to Complainant’s April 8, 2019 discrimination complaint violated provisions of AR 1450-05: the requirement that a response be issued within 45 days of the OIG referral and that the appointing authority meet with Complainant prior to issuing a decision. Complainant raised claims of gender discrimination and retaliation.

47. On June 3, 2019, Complainant filed another petition for hearing with the Board, this time alleging that Mr. Hansen’s May 23, 2019 response to his November 14, 2018 gender discrimination complaint and his November 29, 2018 gender discrimination and retaliation complaint violated AR 1450-05. Complainant alleged that Warden Hansen did not issue his decision within 45 days of the OIG referral and failed to meet with him prior to issuing the response to the complaint. Complainant claimed that Respondent’s actions were retaliatory.

48. On August 2, 2019, Complainant was given an amended corrective action, without an accompanying disciplinary action, which provided, in part, as follows:

[A]llegations presented by several staff assigned to the SCF Therapeutic Community Programs (T.C.) during a prior grievance review that indicated possible violations by you of Administrative Regulation 100-18, Mission Statement, 1450-01, Code of Conduct, and your performance plan. These violations are related to your communications and interactions with your subordinate staff. Additionally, information was provided regarding concerns that you had not provided adequate oversight and leadership to your staff following a significant incident within Sterling Correctional Facility (SCF) on November 6, 2018.

49. On December 11, 2019, Complainant resigned from employment with CDOC. (Stipulated Fact)

50. Complainant appealed his resignation, claiming it was forced or coerced, but his appeal was dismissed as untimely and was not addressed in this matter.

DISCUSSION

Complainant alleges that Respondent retaliated against him in violation of CADA. Section 24-50-125.3, C.R.S., empowers the Board to review appeals for allegedly discriminatory actions.

More specifically, Complainant alleges that Respondent retaliated against him for opposing perceived gender discrimination, in violation of CADA. Complainant’s first petition for hearing, filed with the Board on June 3, 2019, alleged that Ms. Brodeur failed to timely respond to the discrimination complaint Complainant submitted on April 8, 2019, and failed to meet with him, all in violation of AR 1450-05. Complainant alleges it was retaliatory for his having previously filed an unlawful discrimination claim against Ms. Brodeur.

Complainant's second petition for hearing, received by the Board on June 6, 2019, alleged that Mr. Hansen retaliated against Complainant for his November 14, 2018 unlawful gender discrimination complaint against Dr. Lampela and his November 29, 2018 complaint against Dr. Lampela and Ms. Brodeur, alleging discrimination and unlawful retaliation. Complainant alleged that Mr. Hansen's response to his unlawful discrimination and retaliation charges violated administrative regulations by being untimely and by Mr. Hansen not meeting with him to discuss his claims.

Under CADA, it is a "discriminatory or unfair employment practice ... [f]or any person, whether or not an employer ... [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." § 24-34-402(1)(e)(IV), C.R.S. The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964. Federal Title VII law serves as a guide to CADA. *Colo. Civil Rts. Comm'n v. Big O Tires, Inc.*, 940 P.2d 397, 399 (Colo. 1997). Board Rule 9-4 provides, "Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred."

To establish a *prima facie* case of retaliation in violation of CADA, Complainant must establish the following three prongs: (1) he engaged in protected opposition to discrimination; (2) he suffered a materially adverse action, *i.e.*, an action sufficient to dissuade a reasonable worker from engaging in protected opposition to discrimination; and (3) a causal connection existed between the protected activity and the materially adverse action. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1064 (10th Cir. 2009).

If the employee establishes a *prima facie* case of retaliation in violation of CADA, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for its actions. *McDonnell Douglas v. Green*, 411 U.S. 792, 806 (1973); *Big O Tires*, 940 P.2d at 400-01. If the employer states a legitimate, non-retaliatory reason for its actions, "the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Id.* at 401.

A. Complainant engaged in protected opposition to purported discrimination.

The first prong of a *prima facie* case of retaliation requires Complainant to show that he engaged in protected opposition to an employment practice that is unlawful under CADA. "Protected opposition can range from filing formal charges to voicing informal complaints to superiors." *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004).

On November 14, 2018, Complainant submitted a gender discrimination complaint. Then on November 29, 2018, Complainant submitted an unlawful discrimination complaint against Dr. Lampela and Ms. Brodeur, alleging retaliation for submitting his November 14, 2018 discrimination complaint. These complaints constitute protected opposition to an employment practice that is unlawful under CADA. Accordingly, Complainant has established the first prong of a *prima facie* case of retaliation.

B. A reasonable employee would have found the actions taken by Respondent after Complainant's November 2018 complaints materially adverse.

The second prong of a *prima facie* case of retaliation requires Complainant to establish that he was subjected to actions that a reasonable employee would have found to be adverse, *i.e.*, an action sufficient to dissuade a reasonable worker from making a complaint. See *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68. See also *McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006). Actions such as corrective actions, threats of corrective actions, letters of reprimand, negative performance evaluations, and job reassignments can be considered adverse actions in the context of a claim of retaliation in violation of CADA. See *Dunn v. Shinseki*, 71 F. Supp. 3d 1188, 1191-92 (D. Colo. 2014) (negative performance reviews may qualify as adverse employment actions in retaliation cases); *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004) (a series of allegedly adverse actions can be analyzed in the aggregate to determine whether, taken together, they amount to an adverse employment action).

Complainant alleges that Respondent violated several of its own policies in responding to his gender discrimination claims, including failing to remove Dr. Lampela as his supervisor, failing to meet with him, and failing to issue a written decision within the established timeframes. In addition, Complainant claims that the relevant policy, AR 1450-05, required Respondent to remove Dr. Lampela as Complainant's supervisor, which was not done. In addition, the evidence indicates that Dr. Lampela crafted Complainant's mid-year review, given to Complainant on November 26, 2018, in such a way as to de-emphasize positive observations of others, accentuate negative comments, and make it appear that management personnel other than Dr. Lampela (*i.e.*, former Regional HSA Matt Bossa and Mr. Hansen) were responsible for the negative comments. Furthermore, Complainant was called into a Board Rule 6-10 meeting on December 7, 2018, raising the possibility that he would be subjected to a disciplinary action.

Although not generally or specifically identified as an adverse action in the case law, treating Complainant's complaints in the manner in which Respondent did – not meeting with Complainant to discuss his complaints and failing to issue decisions in a timely manner, for instance – may be viewed as adverse actions that are likely to dissuade a reasonable person from engaging in protected activity. Instead of taking Complainant's complaints seriously, and expeditiously and definitively investigate Complainant's allegations of discrimination, Respondent acted as if Complainant's concerns were not worthy of prompt and genuine consideration. Respondent's treatment of Complainant's complaints would likely dissuade a reasonable person from bringing a complaint. Moreover, a somewhat negative mid-year review, and being summoned to a Rule 6-10 meeting, which raised the possibility of discipline, are properly viewed as adverse actions under these circumstances.

Accordingly, Complainant has established the second prong of a *prima facie* case of unlawful retaliation in violation of CADA.

C. Complainant has established a causal connection between the purported protected activity and the materially adverse actions.

The third prong of a *prima facie* case of retaliation requires Complainant to demonstrate a causal connection between his protected activity and the adverse actions.

Complainants usually establish a causal connection by showing the close temporal proximity between a protected activity and an adverse action. See, *e.g.*, *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir. 2006) (“We have repeatedly recognized

temporal proximity between protected conduct and termination as relevant evidence of a causal connection sufficient to justify an inference of retaliatory motive”). Generally speaking, a time period between the protected activity and the adverse action of three months or more cannot support an inference of a causal connection. See *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (a period of three months between the protected activity and the adverse action, standing alone, is not sufficient to establish causation); *Piercy v. Maketa*, 480 F.3d 1192, 1198 (10th Cir. 2007) (acknowledging that an adverse employment action occurring three months after the protected activity cannot, standing alone, demonstrate causation).

In the two weeks after his unlawful discrimination complaint submitted on November 14, 2018, Respondent allegedly violated AR 1450-05, and Dr. Lampela provided Complainant a mid-year review that is best characterized as slanted against Complainant. After Complainant’s November 29, 2018 unlawful discrimination complaint, Complainant was called into a Rule 6-10 meeting on December 7, 2018, with the threat of disciplinary action. Mr. Hansen then conducted an investigation into perceptions of Complainant’s management style and allegations of Complainant touching employees inappropriately, leading to a disciplinary action and corrective action on April 26, 2019.³ There is a temporal proximity between Complainant’s discrimination complaints and adverse employment actions taken against him.

Accordingly, the temporal proximity between the Complainant’s protected activities in November 2018 and the adverse actions referenced above establish a causal connection sufficient to meet the requirements of the third prong of a *prima facie* case of unlawful retaliation in violation of CADA.

D. Complainant Failed to Establish That Respondent’s Purported Legitimate, Non-Retaliatory Reasons for Its Actions Were a Pretext for Retaliation.

At hearing, Respondent provided legitimate, non-retaliatory reasons for the adverse actions taken against Complainant. The preponderance of the evidence established that Dr. Lampela was not removed as Complainant’s supervisor because Ms. Brodeur reasonably concluded that there was no basis to believe that Dr. Lampela’s failure to order Complainant to go to SCF on the night of the November 6, 2018 incident had anything to do with gender discrimination. The preponderance of the evidence also established that Dr. Lampela’s questionable handling of Complainant’s mid-year review was the result of Dr. Lampela’s lingering frustration with Complainant’s failure to understand the gravity of the November 6, 2018 riot at SCF and his failure to understand his duty to report. Again, there is no evidence to suggest that Dr. Lampela’s criticism of Complainant was based on Complainant’s gender.

Respondent conducted the Rule 6-10 meeting out of a legitimate concern over Complainant’s failure to report to SCF to assist in a very serious incident. The tardiness in responding to Complainant’s unlawful discrimination complaints is best explained by the flood of internal grievances and complaints submitted by Complainant during this period, and the confusion among the OIG, OHR, and Ms. Brodeur and Mr. Hansen about who would address what, rather than an intentional plot to discriminate based on Complainant’s claims of CADA violations. There is insufficient evidence to conclude that the untimely responses to Complainant’s discrimination complaints were caused by an intent to retaliate against Complainant because of his initial gender discrimination complaints.

³ Mr. Hansen subsequently rescinded the disciplinary action.

Complainant provided no persuasive evidence that Respondent's articulated legitimate, non-retaliatory reasons for its actions were a pretext for retaliation arising from Complainant's protected activity in opposing perceived gender discrimination in November 2018.

Accordingly, Complainant's retaliation claim ultimately fails because Complainant has not established that Respondent's actions were a pretext for retaliation in violation of CADA.

CONCLUSION OF LAW

Respondent did not retaliate against Complainant in violation of the Colorado Anti-Discrimination Act.

ORDER

Complainant's discrimination claim is denied and his appeal is **dismissed with prejudice**.

Dated this 21st day
of September 2020,
at Denver, Colorado

/s/ [REDACTED]
Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

CERTIFICATE OF SERVICE

This is to certify that on the ____ day of September 2020, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Gary Christopher Ward
[REDACTED]
[REDACTED]
[REDACTED]

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NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. and Board Rule 8-62, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-65, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Board Rule 8-63, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is \$5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-64, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-67, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-70, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days of receipt of the decision. The petition for reconsideration must allege an oversight or misunderstanding by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-60, 4 CCR 801.