STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020B036**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

OSWALDO NUNEZ,
Complainant,

v.

DEPARTMENT OF HUMAN SERVICES, OFFICE OF CHILDREN, YOUTH & FAMILIES, DIVISION OF YOUTH SERVICES, LOOKOUT MOUNTAIN YOUTH SERVICES,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on August 18 through August 20, 2020 via web conference. The record was closed on August 20, 2020. Robert M. Liechty, Esq., represented Complainant Oswaldo Nunez (Complainant). Eric W. Freund, Senior Assistant Attorney General, represented Respondent Department of Human Services (Respondent or DHS). Respondent's advisory witness was Division of Youth Services (DYS) Associate Director Kristen Withrow.

A list of exhibits offered and admitted into evidence is attached hereto as Appendix A. A list of witnesses who testified at hearing is attached hereto as Appendix B.

MATTERS APPEALED

Complainant resigned his position as a Youth Services Specialist II at Lookout Mountain Youth Services Center (Lookout Mountain) and alleges that he was coerced or forced to resign. He raises claims of constructive discharge and unlawful discrimination on the basis of race. As relief, Complainant seeks a position within DYS without direct contact with Kristen Withrow or a position within the Department of Corrections.

Respondent denies that Complainant was coerced or forced to resign and denies that he was discriminated against on the basis of race. As relief, Respondent requests that Complainant's claims be denied and his appeal dismissed.

After Complainant rested his case-in-chief, Respondent made a verbal motion to dismiss pursuant to C.R.C.P. 41(b)(1). The undersigned ALJ deferred ruling on the motion. Respondent's motion is rendered moot by this Initial Decision.

For the reasons set forth below, Complainant's appeal is **dismissed**.

ISSUES

1. Whether Complainant's resignation was a constructive discharge entitling him to reinstatement.

2. Whether Respondent discriminated against Complainant on the basis of race/color in violation of the Colorado Anti-Discrimination Act.

FINDINGS OF FACT

1. Complainant began working at Lookout Mountain in February 2017, as a Youth Services Specialist (YSS) I. He was promoted to a YSS II position in April 2018.

2. Lookout Mountain is a secure treatment facility serving adolescent males committed to DYS. It was divided into separate units, referred to as "pods."

3. Complainant became a certified state employee in 2018.

4. Complainant is Hispanic, a Mexican-American.

5. At all times relevant to this matter, Kimberley Rumley-Cranwill, who was then the Assistant Director of Lookout Mountain, was Complainant's appointing authority.

6. Complainant had good rapport with the youth at Lookout Mountain and was generally well-respected by his co-workers.

7. On June 15, 2018, Complainant was given a confirming memorandum for failure to follow proper count and movement procedures.

8. On May 1, 2019, there was a riot on one of the four units at Lookout Mountain, during which several staff were injured. Complainant was not involved in this incident.

9. After the riot, Kirsten Withrow, who was then the Associate Director of DYS, and had previously worked at Lookout Mountain, returned to Lookout Mountain as its interim director.

10. Ms. Withrow was tasked with addressing the many issues at Lookout Mountain that led to the riot on May 1, 2019. She typically dealt with performance issues directly with employees rather than through the chain of command.

11. On May 30, 2019, Complainant wrestled with a youth on Spruce pod. A code red was called, indicating an emergency requiring staff intervention, because it appeared that Complainant and the youth were fighting. However, Complainant explained that it was horseplay. Horseplay is against the rules for youth and for staff as DYS Youth Service Centers.

12. On June 13, 2019, Complainant was given a written corrective action, signed by his supervisor, Martin Romero, and Ms. Rumley-Cranwill, which read in pertinent part:

> [O]n May 30, 2019, while supervising residents on Spruce B-pod Oswaldo Nunez engaged in a Physical Management of a resident without cause, he did not report the incident, and involved subordinate staff members in the unprofessional act later determined to be horse play between youth and staff. This behavior was observed by others and Emergency Response was initiated calling for additional staff support. Oswaldo Nunez was observed on video using an Escort (trained technique to respond in emergencies) and wrestling with the resident on the floor in the common area on two different occasions.

Complainant's actions were deemed a violation of the DYS Code of Conduct, and DYS Safe Practices Policies 9.3 and 9.4.

13. On July 12, 2019, Complainant was directed to escort a group of youths from the dining hall back to their pod. Instead of following established protocols for line movements, Complainant led the group between two groups of youths from other pods, which created a risk of conflict or physical altercation. This was observed by Ms. Withrow and Mr. Gibson, who spoke with Complainant about the violation of protocol right after the incident.

14. In August or September 2019, Complainant was sent to Adams County Youth Service Center for a three-week retraining program along with two other YSS IIs from Lookout Mountain.

15. During a roundtable discussion in September 2019, Robert Meyer, a Caucasian YSS I at Lookout Mountain, admitted that he had engaged in horseplay with youth. He was told that such conduct must stop, but was not given any other consequences. Mr. Meyer's roughhousing did not involve wrestling with youth.

16. During the period of May 2019 through September 2019, Complainant would often complain to co-workers that Ms. Withrow was targeting him, criticizing him for everything that he did. In September, Complainant told some of his co-workers that he would resign if criticized again.

17. Sometime in or around September 2019, Keith Reuter, YSS II, heard part of a conversation between Complainant and Ms. Withrow and heard Ms. Withrow tell Complainant words to the effect that "you cannot act like a gangster." Mr. Reuter did not hear the entire conversation between Complainant and Ms. Withrow.

18. On September 27, 2019, in the early afternoon, Kathy Nadeau, a staff member in charge of Cedar pod, asked Ms. Rumley-Cranwill, to speak with M.B.,[1] YSS I. M.B. was very upset about what had occurred the evening before, claiming that the staff were making fun of him.

19. Ms. Rumley-Cranwill met with M.B., who told her that he felt unsafe and disrespected and did not want to work with Complainant again. M.B. alleged that Complainant made fun of him and was disrespectful towards him, along with other staff. M.B. also said that a joke was made about him that was very disrespectful, but he refused to say what the joke was. Ms. Rumley-Cranwill then called Ms. Withrow into the meeting and M.B. repeated what he told Ms. Rumley-Cranwill, but once again refused to reveal the nature of the joke that offended him.

20. On September 27, 2019, Ms. Rumley-Cranwill, Ms. Withrow, Jaime Nuss, a Human Resources employee being trained by Ms. Withrow, and Mr. Romero called Complainant into a meeting to discuss two matters: (1) M.B.'s allegations of staff making fun of him; and (2) comments Complainant made to a female subordinate, M.M., that caused the subordinate to start crying. When asked about the incident with M.B., Complainant became defensive and stated that he was resigning. Discussion continued and Complainant repeated that he would resign. Ms. Rumley-Cranwill responded that if he intended to resign, he could do so now.

21. On September 27, 2019, Complainant wrote out a resignation note: "I Oswaldo Nunez, Placing my two weeks [sic] notice from Lookout Mountain Effective 09/27/2019…Last day 10/11/19."

22. Complainant also signed a Combined Notice and Acknowledgement of Resignation/Advisement of Appeal Rights on September 27, 2019.

[1] To protect this employee's privacy, he is referred to by his initials only. Other employees referenced herein whose full names are not relevant, are also referred to by initials only.

23. Complainant did not file any discrimination complaint or grievance while at Lookout Mountain.

24. The next Monday, September 30, 2019, Pete Yslava, YSS I, spoke with Ms. Withrow about Complainant's resignation and asked her if she would be willing to speak with Complainant. Ms. Withrow indicated that she would be willing to talk to Complainant.

25. Mr. Yslava then called Complainant and told him that Ms. Withrow was willing to talk with him. Complainant told him that he felt like he was being targeted.

26. Complainant did not attempt to contact Ms. Withrow.

27. On October 1, 2019, Ms. Withrow sent an email to Vernon Jackson, Manager, Center for Equal Opportunity and Risk Management, informing him of what transpired with Complainant on September 27, 2019:

> Hi I wanted to give you a heads up. We had an employee Oswald Nunez who resigned on Friday after he was given feedback to female staff leaving crying on Wednesday after an interaction with him and another staff who came forward that Ozzy had made fun of him (he was a new staff and scared of Ozzy retaliated due to his perceived power on campus). Kimberly and I asked if it was racial, sexual orientation and he said he wasn't comfortable discussing. He asked to never work on that unit again with Ozzy. When we met with Ozzy around this he denied all of this and submitted his resignation indicating that he was targeted. In addition, since my arrival at LMYSC Ozzy received a corrective action (although I could have done disciplinary action due to the egregiousness of the behavior). In addition, I confronted him for a line movement across campus that could have facilitated an incredibly unsafe situation. It was after these interactions and a general disregard for LMYSC's programming and how we were training to do things he was sent to Adams for training specific to being a YSSII. He was sent to what I would say remedial training specific to structuring shift, boundaries, building appropriate relationships with youth and staff. When he was at Adams he reportedly told the YSSIIIs that I sent him there because I was racially profiling him. This is not accurate, we retrained all YSSIIs at Spruce that were hired in the last year (Larry Raisely and Monica Jimenez went to Gilliam and Ozzy to Adams as his schedule couldn't be met by trainers at Gilliam else they all would have gone there). I just wanted to bring this all to your attention. I accepted his resignation. I believe I responded in a way that direct due to the number of significant performance concerns. I had another employee approach me to reconsider accepting Ozzy's resignation. I offered to meet with Ozzy, but haven't heard from him to date. Any questions let me know.

28. There is no evidence that Ms. Withrow made any offensive or derogatory remarks to Complainant directly, nor any remarks about his race or national origin/ancestry. She never said anything racially insensitive to Complainant.

29. Complainant filed his appeal with the Board on October 23, 2019, checking boxes of the Appeal Form for discrimination on the basis of race/color and forced resignation.[2]

DISCUSSION

Complainant has asserted claims of constructive discharge and unlawful discrimination on the basis of race/color in violation of the Colorado Anti-Discrimination Act.

A. Complainant Was Not Constructively Discharged

Complainant bears the burden of proving that he was constructively discharged. *Harris v. State Bd. of Agric.*, 968 P.2d 148, 151 (Colo. App. 1998). To prove an allegation of constructive discharge, an employee "must present sufficient evidence establishing deliberate action on the part of an employer that makes or allows the employee's working conditions to become so difficult or intolerable that a reasonable person in the employee's position would have no other choice but to resign." *Wilson v. Bd. of Cty. Comm'rs*, 703 P.2d 1257 (Colo. 1985); *Koinis v. Colo. Dep't of Pub. Safety*, 97 P.3d 193 (Colo. App. 2003). The determination of whether there has been a constructive discharge requires an objective evaluation of the employer's actions and the effects of those actions on the employee instead of the employee's subjective view. *Christie v. San Miguel Cty. Sch. Dist. R-2(J)*, 759 P.2d 779 (Colo. App. 1988).[3] As the Colorado Supreme Court in *Wilson* noted: "The First Circuit Court of Appeals has recognized that, unless the actions of the employer constitute, in effect, a discharge, the employee has no right simply to walk out; he must accept the orders of his superior, even if felt to be unjust, until relieved of them by judicial or administrative action. Were this not so, a public employee would be encouraged to set himself up as the judge of every grievance; and the public taxpayer would end up paying for periods of idleness while the grievance was being adjudicated." *Wilson*, 703 P.2d at 1259 (citation omitted).

If the employee establishes a discharge, "then . . . it will be the appointing authority's burden to prove that the termination imposed was justified by the factual circumstances." *Harris*, 968 P.2d at 152 (citation omitted).

Here, Complainant has not met his burden of establishing deliberate action on the part of Respondent that caused or permitted Complainant's working conditions to become so difficult or

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[2] Complainant filed his appeal prior to retaining an attorney to represent him, and checked the race/color box instead of the national origin/ancestry box. At hearing, Respondent argued that Complainant could not allege racial discrimination because being Hispanic was not a racial category. However, Hispanicity may be considered a racial classification. *See Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016). *See also, Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.,* 478 U.S. 421, 464 n. 37 (1986) (plurality opinion) (discussing a potential Title VII claim of "preferential treatment to blacks and Hispanics based on race").

[3] Based on applicable Colorado case law, Colorado Civil Jury Instruction 31:9 (June 2020 update) defines constructive discharge as follows:

> A constructive discharge occurs when an employer deliberately (makes an employee's working conditions) (or) (allows an employee's working conditions to become) so intolerable that the employee has no reasonable choice but to quit or resign and the employee does quit or resign because of those conditions. However, a constructive discharge does not occur unless a reasonable person would consider those ***working*** conditions to be intolerable.

intolerable that a reasonable person in his position would have no other choice but to resign. The evidence at hearing established that on several occasions Ms. Withrow had issues with Complainant's job performance, and spoke to him about her concerns. Respondent took no action against Complainant that negatively impacted his pay, status or tenure. The only actions that were established at hearing were that Complainant was given a corrective action arising from his conduct during the May 20, 2019 horseplay incident; Ms. Withrow questioned Complainant about the line movement incident on July 12, 2019; and Ms. Withrow questioned him about M.B.'s allegations and the crying YSS I incident in late September 2019. These actions cannot be considered so difficult or intolerable that a reasonable person would have no alternative but to resign.

At hearing, Complainant sought to establish that Ms. Withrow targeted him and criticized him every time she saw him. He also alleged that Ms. Withrow blamed him for all the problems that Lookout Mountain was experiencing, and added that her attitude was based on racial bias. Complainant's allegations about these issues are not credible. Although several former employees testified that they believed that Ms. Withrow was biased against Hispanics, such testimony was vague and conclusory, and failed to provide the specific detail required to establish such purported bias. The fact that Complainant failed to grieve what he perceived as Ms. Withrow's harassment also undermines Complainant's contentions. It appears that Complainant sought to bolster his allegations of Ms. Withrow's animus by mischaracterizing certain situations. For example, Complainant testified that while he was at Adams County undergoing training in September 2019, a YSS III who worked there, Jamillah Rehman, told him that Ms. Withrow had told someone that Complainant was a thug. At hearing, Ms. Rehman denied ever telling Complainant that, or anything resembling that. In short, Complainant failed to establish that Ms. Withrow targeted him, or harassed him, or was biased against Hispanics. What criticisms of his work performance by Ms. Withrow that Complainant did establish were justified by the circumstances. Ms. Withrow was responding to actual, legitimate performance issues that were in need of addressing. Despite those performance issues, Complainant was given only one corrective action during the time that Ms. Withrow was interim Director at Lookout Mountain.

During the relevant time period, Respondent never raised the possibility of disciplining Complainant, and certainly never did anything that would permit a reasonable employee to think that his job was in jeopardy. It was Complainant himself who raised the issue of resignation, who threatened to, and then did, resign when questioned about the issues with M.B. and the YSS I, M.M., who was seen crying after speaking with Complainant. Again, there was no imminent threat of discipline, let alone a threat of termination.

Based on the foregoing, Complainant cannot be said to have been constructively discharged. He resigned voluntarily. Complainant's failed to establish that Respondent made or allowed Complainant's working conditions to become so difficult or intolerable that a reasonable person his position would have no other choice but to resign. This failure is fatal to Complainant's constructive discharge claim.

B. Respondent Did Not Discriminate Against Complainant Based on His Race/Color

Complainant alleges that Respondent discriminated against him on the basis of his race, Hispanic. Section 24-50-125.3, C.R.S., confers jurisdiction on the Board to consider discrimination claims in the state personnel system.

The Colorado Anti-Discrimination Act (CADA), and the Board's rules mandate that employment decisions be made without discrimination on the basis of race. *See* § 24-34- 402(1)(a),

C.R.S. ("It shall be a discriminatory or unfair employment practice ... [f]or an employer ... to discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of ... race .... "); Board Rule 9-3 ("Discrimination against any person is prohibited because of ... race .... This applies to all employment decisions").

CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. *See, e.g*., *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). Under Board Rule 9-4, "[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."

"Colorado has adopted the following approach [for analyzing discrimination claims based on circumstantial evidence], modeled on the [U.S.] Supreme Court's analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for proving an inference of discriminatory intent." *St. Croix v. Univ. of Colo. Health Scis. Ctr*., 166 P .3d 230, 236 (Colo. App. 2007). "Initially, [the complainant] must establish a prima facie case of discrimination by showing (1) he or she belongs to a protected class; (2) he or she was qualified for the job at issue; (3) he or she suffered an adverse employment decision despite his or her qualifications; and (4) the circumstances give rise to an inference of unlawful discrimination." *Id*. (citing *Colo. Civil Rights Comm'n v. Big O Tires*, 940 P.2d at.397, 400 (Colo. 1997)).

"If the complainant establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. Once the employer meets its burden, 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." *Big O Tires*, 940 P.2d at 401. *See also Bodaghi v. Dep't of Natural Resources*, 995 P.2d 288, 298 (Colo. 2000) (if the employer produces evidence of a legitimate, nondiscriminatory reason for its action, the factfinder "giving full and fair consideration to the evidence offered by both sides, proceeds to decide the ultimate question: whether, in light of all the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee").

Complainant has established the first prong of a *prima facie* case of unlawful discrimination – he is Hispanic. Complainant also established the second prong of a *prima facie* case of unlawful discrimination – he was qualified for his job.

The third prong of a *prima facie* case of unlawful discrimination requires Complainant to establish that he was on the receiving end of an adverse employment action. A complainant must file an appeal within ten days after an adverse action. § 24-50-125, C.R.S. The only action that occurred within the ten days prior to Complainant filing his appeal with the Board was his resignation, which he characterizes as a constructive discharge. Based on the determination, above, that Complainant was not constructively discharged, he has failed to establish an adverse employment action.

Complainant has not established the third prong of a *prima facie* case of unlawful discrimination in violation of CADA. Accordingly, his claim of unlawful discrimination in violation of CADA must fail.

CONCLUSIONS OF LAW

1. Respondent did not constructively discharge Complainant.

2. Respondent did not discriminate against Complainant on the basis of race/color in violation of the Colorado Anti-Discrimination Act.

ORDER

Complainant's appeal is **dismissed** with prejudice.

Dated this 5th day
of October 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 6th day of October 2020, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Robert M. Liechty, Esq.
Robert M. Liechty PC
1800 Gaylord Street
Denver, CO 80206
rliechty@crossliechty.com

Eric W. Freund, Esq.
Senior Assisant Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203
Eric.Freund@coag.gov

[redacted]

APPENDIX A

EXHIBITS ADMITTED INTO EVIDENCE BY STIPULATION OR AT HEARING

Complainant's Exhibits: A, B

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

APPENDIX B

WITNESSES TESTIFYING AT HEARING

Oscar Pacas

Pete Yslava

Robert Meyer

Keith Reuter

Shawn Parks

Oswaldo Nunez

Molly Pavelick

Samantha Rieber

Beatrice Morreale

Monica Jimenez-Jimon

Erik Scholze

Jamillah Rehman

George Gibson

Martin Romero

Kimberly Runley-Cranwill

Stephen Gordley

Kristen Withrow

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

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

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

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

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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