STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2020B062(c)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

ANN GRECO,
Complainant,

v.

UNIVERSITY OF COLORADO BOULDER, COLLEGE OF ENGINEERING & APPLIED SCIENCE,
Respondent.

Administrative Law Judge ("ALJ") K. McCabe held the commencement hearing on May 12, 2020, and the evidentiary hearing on October 5, 6, 7, and 9, 2020, by web conference. The record closed on January 11, 2021. Complainant appeared for the hearing. Eric Maxfield, Esq., represented Complainant. Respondent was represented by Kellen Wittkop, Esq., Alex Loyd, Esq., and Erica Weston, Esq. Respondent's advisory witness was Alisha Bennett Stewart.

The audio and video recording of this hearing contains information subject to a protective order issued October 21, 2020. In addition to the documents designated by the parties, Exhibit 12, Exhibit 16, and Exhibit 56 will be included in the protected information. The publicly available version of this initial decision contains redactions of protected information.

A list of exhibits admitted into evidence and a list of witnesses who testified at hearing are attached in an Appendix

MATTERS APPEALED

In this consolidated matter, Complainant appeals Respondent's January 16, 2020 Disciplinary Action, Respondent's January 28, 2020 notice of "Psychological Fitness for Duty Evaluation Results and Notice Regarding Leave Status," Respondent's February 7, 2020, "Notice of Determination: Reassignment," and Respondent's April 29, 2020 Administrative Separation of her employment. Complainant alleges that she did not commit the acts for which she was disciplined and that precipitated the fitness for duty ("FFD") evaluation. Complainant alleges Respondent discriminated against her on the basis of disability in violation of the Colorado Anti-Discrimination Act ("CADA") and retaliated against her in violation of the Whistleblower Act and CADA.

Respondent argues that Complainant committed the acts for which she was disciplined, and that Respondent's decision to discipline Complainant was not arbitrary or capricious or contrary to rule or law.

For the reasons discussed below, Respondent's decision to discipline Complainant and subsequent actions are **affirmed**.

ISSUES

1. Did Complainant commit the acts for which she was disciplined?

2. Did Respondent act arbitrarily, capriciously, or contrary to rule or law?

3. Did Respondent discriminate or retaliate against Complainant on the basis of disability in violation of CADA?

4. Did Respondent retaliate against Complainant in violation of the Whistleblower Act?

5. Is Complainant entitled to an award of attorney's fees and costs?

FINDINGS OF FACT

Complainant's Student History

1. Complainant was a student of Respondent.

2. During her time as a student, Complainant received Americans with Disabilities Act ("ADA") testing accommodations. The accommodations were for extra time and a distraction free environment.

3. In approximately 2009, Complainant took a class from Doctor Wendy Young.

4. Dr. Young, Senior Instructor and Chair of CBE, was Complainant's supervisor at the time of Complainant's separation from employment. (Stipulated fact.[1])

5. Dr. Young was aware Complainant received testing accommodations during Complainant's time as a student.

6. Student ADA accommodations are separate from employee ADA accommodations.

7. Dr. Young gave Complainant a job as a student employee.

8. Complainant had a good relationship with Dr. Young while she was a student.

9. Complainant earned a Chemical Engineering Degree from Respondent.

Respondent's Offices

10. Respondent's College of Engineering and Applied Science has a Human Resources Department. The Human Resources Department is responsible for the life cycle of the employee – recruiting, hiring, onboarding, development, etc. of employees.

11. Respondent's Chemical and Biological Engineering Department ("CBE") is a department of Respondent's College of Engineering and Applied Science.

[1] The parties stipulated to certain facts.

12. Alisha Bennett Stewart, Respondent's College of Engineering and Applied Science's Director of Human Resources, was Complainant's Appointing Authority at the time of Complainant's separation from employment. (Stipulated fact.)

13. Ms. Bennett Stewart understands her role as an appointing authority is to evaluate situations as they arise, investigate, speak with employees, and make decisions.

14. Ms. Bennett Stewart has a goal of achieving a positive outcome when working with employees as an appointing authority.

15. Stephanie Prokop, Human Resources Manager, is also part of Respondent's College of Engineering and Applied Science's Human Resource Department.

16. Margaret Clarke is the Operations and Human Resources Manager for CBE.

17. Respondent also has a Central Human Resource Department. This is a university-wide human resource department. Respondent's Central Human Resource Department is broken into Centers of Excellence.

18. The Centers of Excellence allow Respondent's College of Engineering and Applied Science's Human Resource Department to partner with experts in certain areas when the need arises. As an appointing authority, Ms. Bennett Stewart relies on the Centers of Excellence for expertise in certain areas.

19. Molly Berry is a Principal Employee Relations Consultant in Respondent's Central Human Resource Department. Ms. Berry works on the Employee Relations Team Center of Excellence.

20. Ms. Berry is not in a decision-making role.

21. Ms. Berry's goals in working with employees are to help employees understand their rights and refer employees to resources. Ms. Berry also has a goal of helping employees be successful.

22. Respondent has an ADA Compliance Office. The ADA Compliance Office is part of Office of Institutional Equity and Compliance. The ADA Compliance Office is responsible for the ADA processes, including working with employees on attaining ADA accommodations

23. The ADA Compliance Office does not approve Family Medical Leave ("FML").

24. Meredith Smith works as a case manager handling disability accommodation requests in Respondent's ADA Compliance Office. Ms. Smith's role is a problem-solving and information-gathering role. Ms. Smith works with employees to understand their disability and how it impacts them at work. Ms. Smith must understand the essential functions of an employee's position in order to determine what accommodations may help the employee perform the essential functions of their job.

25. Ms. Smith strives to give employees a safe place to tell her what they are struggling with and then brainstorm possible solutions.

26. Ms. Smith works cases on a case-by-case basis. Each case varies. When Ms. Smith receives an accommodation request, she begins information gathering. This information gathering often includes a conversation with the individual seeking accommodation. If the accommodation is not obvious, for example a wider door to accommodate a wheelchair, medical documentation is typically needed. In working on accommodations with Complainant, Ms. Smith reviewed Complainant's position description, communicated with Complainant, and communicated with CBE.

27. Respondent has a "reasonable employer process." Respondent utilizes the reasonable employer process to make sure everyone has done everything that needs to be done for an employee who has exhausted leave and has gone through the ADA process. All of the offices, including Human Resources, ADA Compliance, and the Appointing Authority, participate in a Reasonable Employer Meeting at the end of the process to make sure everything has been done or if anything additional can be done for an employee.

28. Respondent offers employees Respondent's Faculty and Staff Assistant Program ("FSAP"). FSAP provides free counseling services to employees.

29. Respondent has a Behavioral Intervention Team ("BIT Team"). The BIT Team is a group of individuals from across Respondent's campus, and includes individuals from employee relations and FSAP. The BIT Team assesses threats to self or threat to others. Individuals are referred to the BIT Team when they pose a potential threat of harm.

Complainant's Employment History

30. Beginning on or about July 1, 2011, Complainant worked as a Laboratory Coordinator I in the CBE. (Stipulated fact.)

31. Complainant was a Lab Coordinator I throughout her employment with Respondent.

32. Per Complainant's position description, Complainant's job duties were laboratory support (60%), laboratory safety (20%), research support (10%), and computer support (10%).

33. Per Complainant's position description, Complainant's laboratory safety job duties included conducting safety training, working with "department personnel to ensure that safety standards are met and exceeded," and ensuring "proper disposal methods are used for all waste chemicals".

34. Per Complainant's position description, the mental functions required for the position were, "Analyzing, Communicating, Comparing, Computing, Coordinating, Copying, Instructing, Interpersonal Skills/Behaviors, Negotiating, Synthesizing".

35. Per Complainant's position description, a hazard of the position was "Exposure to toxic or caustic chemicals".

36. Complainant is knowledgeable about lab safety standards. Complainant performed work in different labs. One of the labs was a Chemical Engineering Lab. Complainant worked with dangerous chemicals in the Chemical Engineering Lab. Complainant ran experiments in the Chemical Engineering Lab. The Chemical Engineering Lab experiments were started and completed in the same day.

37. Dr. Young began supervision of Complainant in 2013.

38. Complainant had FML periodically throughout her period of employment.

39. Respondent limited Complainant's hours to 40 per week. Complainant could not work over 40 hours per week without approval. Respondent generally did not approve Complainant to work over 40 hours per week.

40. Dr. Young permitted Complainant to set her schedule each semester.

41. Until late 2018, Dr. Young allowed Complainant a significant amount of flexibility in her schedule. The flexibility included working from home, working on weekends, and working outside of scheduled hours.

42. The flexibility provided by Dr. Young was not an ADA accommodation.

43. Complainant enjoyed her job. Complainant also cared about the quality of education and the experience provided to students.

44. Complainant had good professional relationships with some students and professors during her period of employment.

45. Complainant also had poor professional relationships with some students and professors during her period of employment.

46. Complainant volunteered a significant amount of time with the Chem-E-Car Club during her period of employment. The Chem-E-Car Club is a student organization that uses the Chemical Engineering Lab.

Complainant's Performance History

47. Complainant received a Corrective Action in 2013 for, "failure to be prompt and accurate in time reporting, accountability and work performance issues, and a need to be more professional and consistent in [her] communication."

48. On June 25, 2019, Complainant received a Corrective Action for, "failure to be prompt and accurate in time reporting, accountability and work performance issues, and lack of professionalism and consistency in [her] communication." Ms. Bennett Stewart issued this Corrective Action.

49. Ms. Bennett Stewart specifically prohibited Complainant from working from home in the June 25, 2019 Corrective Action.

50. On January 7, 2020, Complainant received a Corrective Action for, "accountability and work performance issues, lack of professionalism and consistency in [her] communication, insubordination, and failure to be prompt and accurate in time reporting." Ms. Bennett Stewart issued this Corrective Action.

2018 Employment Events

51. In approximately August 2018, Complainant began seeking a promotion to a Lab Coordinator II position.

52. Complainant felt her decision-making responsibilities were above that of a Lab Coordinator I. Complainant brought this issue to the attention of Doctor Charles Musgrave, Professor and Chair of CBE, and Ms. Bennett Stewart.

53. Dr. Young initially supported Complainant exploring the possibility of promotion.

54. On August 17, 2018, Dr. Young sent Ms. Prokop an email. Dr. Young wrote:

    > Stephanie, it sounds like you already know the situation but it would be very helpful to have the descriptions associated with Ann's current position and the position(s) above her; that way, we can match what she is currently doing with the appropriate job descriptions. She has been at the top end of Exceeding Expectations for several years now and I suspect a promotion is in order.

55. After Complainant began to seek the promotion, Complainant's performance decreased. Complainant became focused on receiving a promotion. Complainant was also upset about her pay in comparison to others.

56. In this time period, Dr. Young also started to spend less time in the lab. Dr. Young's absence from the lab required Complainant to work more independently.

57. In 2018, Complainant began complaining to Dr. Young that she was working more than 40 hours per week. Complainant also told Dr. Young she could not remember the hours she worked. At this time, Dr. Young realized Complainant had not been turning in time sheets.

58. Starting in late 2018, Dr. Young began requiring Complainant to work according to her schedule. Dr. Young prohibited Complainant from working outside of her scheduled hours without permission and prohibited Complainant from working at home.

59. When this occurred, Complainant was not keeping track of her time and instructors were telling Dr. Young that Complainant was not present when needed.

60. In either October or November 2018, Complainant received an FML designation that permitted her to take up to 40 hours of FML per week. The FML was for physical medical issues. This type of FML designation is unusual, because it allowed up to 40 hours of FML per week. When Complainant used FML she could not work 40 hours in a week.

61. Complainant frequently approached Dr. Young about her schedule. Complainant wanted to be able to work 40 hours each week. Complainant believed resuming a more flexible schedule would allow her to work 40 hours per week.

2019 Employment Events

62. Complainant's performance continued to decline in 2019. Complainant staying on task was a significant performance issue. Complainant continued to focus on the promotion issue and not being paid as much as others.

63. In February 2019, Complainant reached out to Ms. Berry regarding concerns with the classification of her position.

64. Ms. Berry subsequently met with Complainant. Ms. Berry walked Complainant through the steps of having her position description reviewed, and how to engage her appointing authority and department in that process. During the conversation, Complainant informed Ms. Berry about medical conditions. Complainant informed Ms. Berry she was not sure about how to use FML. Ms. Berry walked Complainant through the basics of FML, including reporting to her supervisor, and that Complainant had a right to use FML. Ms. Berry referred Complainant to the ADA Compliance Office. Complainant was emotional during the meeting. As a result, Ms. Berry also referred Complainant to FSAP.

65. Complainant did not reach back out to Ms. Berry for several months. Ms. Berry sent Complainant two emails after the meeting.

66. The ADA Compliance Office contacted Complainant following receipt of the referral from Ms. Berry. Complainant provided some information to the ADA Compliance Office verbally about possible medical conditions. The ADA Compliance Office provided Complainant with resources to pursue accommodations. Complainant elected not to pursue accommodations in early 2019.

67. In April 2019, Complainant approached Ms. Berry about her performance management evaluation.

68. In this time period, Ms. Berry was also working with CBE on Progressive Discipline of Complainant.

69. Ms. Berry received reports from Ms. Clarke about concerning behavior displayed by Complainant. Particularly, that Complainant was demonstrating instability at work.

70. On June 20, 2019, Dr. Young, Ms. Clarke, and Dr. Musgrave, met with Complainant to inform her that she would not receive a promotion.

71. During the meeting, Dr. Young, Ms. Clarke, and Dr. Musgrave presented Complainant with areas that needed improvement in order to receive a promotion.

72. Complainant did not grieve or appeal the denial of her promotion.

73. After the denial of promotion and change to the flexibility of Complainant's schedule, Complainant and Dr. Young's working relationship deteriorated.

74. Complainant allowed the promotion denial and reduced flexibility of her schedule to impact her day-to-day work. Complainant frequently brought both up with Dr. Young.

75. Following Complainant's receipt of a Corrective Action on June 25, 2019, Complainant contacted the ADA Compliance Office about pursuing accommodations.

76. Ms. Smith worked and communicated with Complainant during the accommodation process. Complainant provided Ms. Smith with medical documentation during the accommodation

process. Ms. Smith contacted Complainant's medical provider during the accommodation process. Ms. Smith worked with the CBE during the accommodation process.

77. As a result of the ADA accommodation process, Respondent found Complainant was a qualified individual with a disability.

78. During and before the accommodation process, Complainant mentioned behavioral health issues to Respondent. Complainant, however, only presented medical documentation related to physical health issues. Complainant did not present medical documentation to Respondent that indicated she needed a schedule with open-ended flexibility or a distraction free environment.

79. On September 19, 2019, Respondent issued a Notice of Determination. Complainant received the ADA accommodation of one hour of flexibility in her schedule. Complainant could come in to work up to one hour late and stay late in the evening to make up that hour. The accommodation met the recommendation made by Complainant's medical provider. Complainant also received an ergonomic evaluation.

80. Respondent has an internal appeals process for employees who are not satisfied with an accommodation. Notice of the internal appeals process was provided to Complainant in the Notice of Determination.

81. Complainant did not utilize the internal appeals process or otherwise appeal the September 19, 2019 Notice of Determination.

82. During the 2019 ADA accommodation process, Complainant displayed emotional and volatile behavior in meetings with Ms. Smith and Ms. Berry.

83. On September 30, 2019, Complainant participated in a private psychological examination. In an October 10, 2019 report, the examiner concluded

    This report was not provided to Respondent prior to Complainant's administrative separation from employment.

84. On or about October 3, 2019, Complainant informed Ms. Smith in a telephone conversation that her ADA accommodations were not working. Ms. Smith informed Complainant she could either appeal the September 19, 2019 Notice of Determination or submit additional medical documentation. Following the phone conversation, Ms. Smith sent Complainant an email informing her that, if she needed additional accommodations, Complainant could submit additional medical information.

Incidents Leading to Disciplinary Action and FFD Evaluation

85. On November 1, 2019, Complainant's schedule was from 8:30 a.m. to 12:30 p.m. Complainant used her ADA accommodation to flex her schedule and arrive one hour late on November 1. Complainant then would work from 9:30 a.m. to 1:30 p.m. on November 1, 2019.

86. On November 1, 2019, Complainant was running an experiment in the Chemical Engineering Lab.

87. The experiment was a difficult experiment for Complainant to run by herself.

88. The Chem-E-Car club was scheduled to arrive in the lab at approximately 3:30 p.m. on that date. Complainant planned to volunteer in the lab with the Chem-E-Car students.

89. On that date, faculty members and student workers had key access to the Chemical Engineering Lab.

90. During the course of the day, Complainant became concerned about exceeding her allowed 40 hours in the week and working outside of her scheduled hours. Complainant sent a series of emails to Dr. Young.

91. Complainant sent the first email at 12:28 p.m. and wrote:

> Do you have old data for the TFR[2]?
>
> Hendrik needs data to give to his students.
>
> I was not able to get through all the troubleshooting and running trials for him. It took me a while since I had to work alone and I'm still not done. Additionally, I'm limited to lifting 10lb so I have to make smaller batches which adds extra time. Also, I think we might have a bigger issue with the rotameters but will not know until I do more troubleshooting.
>
> A group needs to use the experiment on Monday. How do you suggest I fit the troubleshooting task into my schedule to ensure the experiment is functioning properly for Monday afternoon?

92. Dr. Young replied at 12:32 p.m. and wrote, "I will look for TFR data to give to Hendrik. Regarding troubleshooting, I suggest getting here right at 8:30 on Monday so as to do as much troubleshooting as possible before lab starts."

93. At 1:27 p.m., Complainant sent Dr. Young a second email and copied Ms. Berry. Complainant wrote:

> Okay, so I got the data to the students. No need to find extra data. The lab is a mess right now and I do not have time to clean up since I'm done for the day.
>
> Neil interrupted my train of thought so it took me a little longer to finish my last email to hendrik [sic] and this email to you.
>
> I would like to report that I requested to Neil that he gives [sic] me 10 minutes to finish my email/thought. He continued to ask questions and completely disregarded my request to wait 10 minutes. He is partly why I'm still here.
>
> What should I do about the waste and all the chemical mess from my experiments today? Just leave it over the weekend?
>
> Also, I do not think it will be feasible to clean the lab, get everything ready for lab, and troubleshoot this issue for lab on Monday at 1pm. I will be working from 8:30

[2] TFR is an instrument in the Chemical Engineering Lab.

to 12 which is only 3.3 hours since I have a 1 hour mandatory lunch break that starts at 12pm (otherwise I will not be able to take one).

Please provide me with a better suggestion that includes everything listed above.

94. At 1:38 p.m. Complainant sent Dr. Young a third email and copied Molly Berry. Complainant wrote:

> I don't know what to do and you have not approved over time and I can not reach you or Molly by phone ... I'm going to do something that is unsafe and leave the lab how it is. I have not rinsed the reactor or removed the pH probe or cleaned up any chemicals. This is not what I would normally do nor is it what I want to be doing but considering the circumstances I feel as if I have to leave. I do not want to get in trouble for being here when I'm not suppose [sic] to be here. It would be different if I was given the ability [sic] have flexibility in my schedule.

95. Complainant performed some clean-up of the lab following her third email. This clean-up included labeling the chemicals that were left out in the lab.

96. Ms. Berry was in a meeting at the time Complainant sent the 1:38 p.m. email. Ms. Berry left her meeting upon receiving the email and contacted Complainant by phone.

97. Complainant was emotional during the phone conversation with Ms. Berry. Complainant was hysterical and crying. Complainant was having a hard time talking. Ms. Berry spoke with Complainant for 5 to 10 minutes. Complainant informed Ms. Berry that Complainant was having a [redacted] Complainant informed Ms. Berry chemicals were left out in the lab. Ms. Berry attempted to help Complainant brainstorm ideas of what Complainant could do to solve the situation. Ms. Berry discussed with Complainant if she was able to clean up the chemicals in the lab before leaving. Complainant felt that was not an option and Complainant really needed to take a break. Complainant further informed Ms. Berry that she needed to leave the lab in an unsafe condition. Ms. Berry discussed with Complainant that Complainant needed to lock the lab and notify anyone with access to the lab it was in an unsafe condition. Ms. Berry and Complainant further discussed that Complainant was then going to take a 30-minute break and return to clean-up the lab.

98. At 2:01 p.m., Complainant sent Dr. Young a fourth email and copied Molly Berry. Complainant wrote, "I just talked with Molly and she has let me know that it is okay to take a break and come back to the lab to make it safe and cleanup this afternoon. I will be taking a 1hr break for lunch now and will return at 3pm."

99. Complainant then took a break.

100. Complainant did not notify individuals with access to the lab about the lab's condition.

101. Complainant left out labeled and closed carboys (jugs) with .1M Ethyl Acetate (fire hazard high rating), .1M Sodium Hydroxide (health hazard high rating), and Deionized Water.

102. Deionized Water is tap water.

103. Complainant did not clean the reactor and pH probe. The reactor and pH probe had reactants on them.

104. Failing to clean the reactor and pH probe could result in someone being accidentally exposed to dangerous chemicals.

105. Complainant left the lab for approximately 1.5 hours. Complainant returned at approximately 3:30 p.m.

106. Upon her return, Complainant helped the Chem-E-Car Club prepare the fume hood and their chemical prep area.

107. Complainant performed additional clean-up of the lab while the Chem-E-Car club prepared for trial runs.

108. Two members of the Chem-E-Car Club helped Complainant move carboys.

109. Complainant rinsed the reactor and pH probe with Deionized Water to remove all reactants.

110. One member of the Chem-E-Car Club helped Complainant dispose of the chemical waste. The chemical waste was properly put into a 55-gallon waste drum.

111. Dr. Young was in meetings during the time Complainant sent the second, third, and fourth emails. Dr. Young read the emails at approximately 4:30 p.m. Dr. Young then sent a response email at 4:31 p.m. Dr. Young wrote, "I am disappointed that due to your not accounting for cleanup time earlier today, you chose to work overtime. Is the clean up complete?"

112. Dr. Young went to the lab immediately following her 4:31 p.m. email.

113. Dr. Young located Complainant outside of the lab with the Chem-E-Car Club.

114. Dr. Young and Complainant went into the lab.

115. The lab was in a safe condition at that time.

116. Dr. Young yelled at Complainant. The Chem-E-Car Club was able to hear Dr. Young yelling at Complainant.

117. At 4:52 p.m., Dr. Young sent Complainant the following email:

> Dear Ann - leaving the lab in an unsafe state is unacceptable and negligent. It is up to you to determine when to start cleaning up so that you can leave on time. It is not acceptable to email me 45 minutes after your scheduled end time, tell me you made a mess, ask what to do about it, and when you do not receive a response within 11 minutes decide to leave an unsafe environment.
>
> This is extremely unsafe of you and I am highly disappointed that you did not clean up during your regular work shift.
>
> Please do not ever leave the lab in an unsafe condition.

118. Complainant reported her interaction with Dr. Young to Ms. Berry by email on the afternoon of November 1, 2019.

119. Ms. Berry scheduled a meeting with Complainant on November 5, 2019 to discuss the November 1, 2019 incident. Ms. Berry requested one of her colleagues to join the meeting because of concerns about Complainant's past behavior.

120. On November 5, 2019, Complainant met with Ms. Berry and her colleague.

121. During the November 5, 2019 meeting, Ms. Berry and Complainant reviewed the November 1, 2019 incident. Complainant explained what happened with Dr. Young later in the afternoon on November 1, 2019. Complainant was extremely emotional during the meeting and difficult to follow. Complainant cried during the meeting. Complainant informed Ms. Berry she had recently undergone a psychological assessment and that the CBE would have to accommodate some pretty severe restrictions. Ms. Berry explained the different resources available to Complainant. The resources discussed included FSAP, ADA, and FML.

122. On November 5, 2019, Ms. Berry also had discussions with Cherise Summers, Respondent's Assistant Dean for Administration of Respondent's College of Engineering and Applied Science, Ms. Prokop, and Dr. Young. The purpose of the discussions was to determine the severity of the incident on November 1, 2019.

123. On November 5, 2019, Doctor Melissa Mahoney, a professor, reported Complainant had an unprofessional interaction with her in front of students.

124. Dr. Mahoney sent Dr. Musgrave an email requesting Complainant not be in the Biology Laboratory on Tuesdays and Wednesdays.

125. On November 6, 2019, Dr. Musgrave sent Complainant an email that prohibited Complainant from working in the Biology Laboratory on Tuesdays and Wednesdays.

126. After the November 1, 2019, incident, Dr. Young and Complainant had a one-on-one meeting. The meeting was recorded by Dr. Young without Complainant's knowledge.

127. During the meeting, Dr. Young addressed the November 1, 2019 incident with Complainant. Dr. Young informed Complainant she could not leave the lab in an unsafe condition. Complainant maintained during the meeting that she did not leave the lab in an unsafe condition and had labeled the carboys before her break.

128. On November 7, 2019, Ms. Berry referred Complainant to the BIT Team. Ms. Berry referred the November 1, 2019 incident to the BIT Team because she felt it presented a serious safety concern due to the chemicals left out by Complainant.

129. The BIT Team met on November 11, 2019, and recommended Complainant undergo a FFD evaluation.

130. On November 12, 2019, Respondent placed Complainant on paid administrative leave. (Stipulated fact.)

131. Ms. Summers made the decision to place Complainant on paid leave in consultation with the BIT Team.

132. Ms. Summers placed Complainant on paid administrative leave as a result of the November 1 incident and other concerning behavior.

133. On November 12, 2019, Ms. Summers notified Complainant of the administrative leave by email. Ms. Summers provided a Notice of Administrative Leave. The Notice of Administrative Leave provided, in part:

> It has come to my attention from Wendy Young, Senior Instructor, that on November 1, 2019 you allegedly intentionally left an undergraduate lab space in an unsafe condition with harmful chemicals out in the open lab. Additionally, you have displayed behaviors on several occasions such as raising your voice at colleagues, and abruptly leaving the lab that have caused concern for your ability to perform your job. As a result, the department is going to undertake an investigation. Effective immediately, I am placing you on paid administrative leave pursuant to Department of Personnel Administrative Procedure 5-19 until further notice.
>
> Given the severity of the behavior and to ensure campus safety, I am requiring you to undergo a Fitness for Duty assessment…This assessment will be used to determine whether you are able to perform the essential duties of your position with safety to others in the campus community. [Respondent] will pay all expenses associated with this assessment. Once your appointment is confirmed you will be notified of the specific date and time….

134. Complainant did not grieve or otherwise appeal being placed on paid administrative leave or being required to take an FFD evaluation.

135. Ms. Smith became re-engaged with Complainant's case following the November 1, 2019 incident when the BIT team became involved.

136. On December 10, 2019, Complainant sent Ms. Smith an email. Complainant informed Ms. Smith her medical provider had been trying to contact Ms. Smith. Complainant inquired if Ms. Smith had been able to contact Complainant's medical provider.

137. On December 11, 2019, Ms. Smith replied and wrote, in part, "Before I follow-up with your medical provider, please provide some additional information about why you are requesting I contact them. Did you wish to request additional accommodations? If yes, can you clarify for me the accommodations you wish to request?"

138. On December 13, 2019, Complainant responded, "I will get back to you on Monday with the details. Is there a form for me to fill out or should I send an email with the accommodation request?" Later in the day, Complainant sent another email indicating she found a form and asked Ms. Smith if it was the form she should have filled out.

139. On December 13, 2019, in the same email string, Ms. Smith responded. Ms. Smith wrote:

> If you wish to request new accommodations, you can have your medical provider complete the attach medical information request form and you can complete the

attached accommodation request form. I am going to be out of the office next week Monday through Wednesday. In my absence, you can either email me the completed forms or fax the completed forms to 303-492-5005. I will follow-up with you when I return on Thursday.

140. Ms. Smith provided Complainant with a form for Complainant to fill out and a form for her medical provider to fill out.

141. Complainant did not submit a completed version of the form.

FFD Evaluation 1

142. On November 11, 2020, Ms. Berry reached out to Dr. Evan Axelrod. Ms. Berry sent the following email to Dr. Axelrod:

> The BIT team at CU Boulder placed Ann Greco, Lab Coordinator in Chemical engineering, out on Administrative leave effective Friday, November 8th. We are requiring Ann to go through a Fit for Duty assessment. Ann has been an active Employee Relations case for about 10 months, and we have been addressing unprofessional behavior with Ann through discipline.
>
> On Friday, November 1st Ann made the decision to leave the Lab in an unsafe condition (left dangerous chemical out in the open) while she left the lab unsupervised (students and staff members all have access to the lab and could have been harmed). Ann reported to me that she was having a [redacted] and needed to leave, however she did not follow proper procedures to notify those who have access of the unsupervised harmful chemicals. Ann was gone for a prolonged period of time before returning to the lab to clean and secure the chemicals.
>
> Additionally, Ann's colleagues, supervisor and myself have all experienced Ann's inconsistent and unpredictable behavior. It should be noted that a Faculty member has asked that Ann not be in the Lab 2 days a week during her course as she is afraid of Ann's behavior. Colleagues of Ann have reported Ann's explosive behavior (crying, outbursts, yelling, raising their voices) and that they feel she could "snap" at any time. They report [sic] unsafe around Ann. I have experienced these behaviors as well in meetings with Ann where she is crying, angry, stomping her feet, throwing her head back and hitting it on the back of a chair.
>
> I met with Ann last Tuesday, where Ann reported to me that she has recently had a psychological assessment in which she was diagnosed with [medical condition] and [medical condition]. When Ann was meeting with me, I noticed that she would get really angry and emotional, and then mid thought she would forget what she was talking about and then "pull herself together" and then completely change topics. In my multiple meetings with Ann, she is very hard to follow and seems really distressed. Notes from my meeting:
>
> Tuesday - Meeting with Ann, myself and Taylor Craven from Employee Relations. Ann requested the meeting to [sic] about her supervisor being aggressive towards her. When we met, Ann was having a hard time making complete sentences, and following any thought process. Ann would be mid-sentence, stop and get really frustrated and then move on to a different topic. It was hard to follow anything she

was saying. She stated she was frustrated that she has a disability and why won't the department just work with her. She stated the ADA office took too long last time (It should be noted that Ann has an ADA Accommodation for her physical disability). Ann claimed she had a psychological assessment on her own and was diagnosed with [medical condition] and [medical condition]. She stated " I am going to come back with a lot of restrictions that the department is going to have to follow." Ann was not willing to hear any of my suggestions (working with the ADA office, making a list of work duties to share with Wendy that she wasn't able to complete). Ann would make contradictory statements such as "I am having a hard time doing e-mails and getting my work done with my [medical condition]" and then a few minutes later she would say "I am not having a hard time getting my work done." After about an hour of the circular conversation I told Ann I wasn't sure where to go from here since she seemed to be shutting down all my suggestions and we ended the conversation.
Behaviors: Ann would be crying and then end the sentence mid-sentence, pull herself together and then completely change topics.
Ann was very agitated, picking at her hands, putting her heads [sic] in her hands.

I have attached some other information and e-mails from the incidents described above. Ann will receive her official admin leave letter today and then we hope Ann can get scheduled for a Fit for Duty assessment with you in the next week or two. Is it best for us to schedule the assessment with you, or do you prefer to reach out to Ann?

Please give me a call if you have any questions.

143. Ms. Berry scheduled Complainant's FFD evaluation with Dr. Evan Axelrod for November 22, 2020.

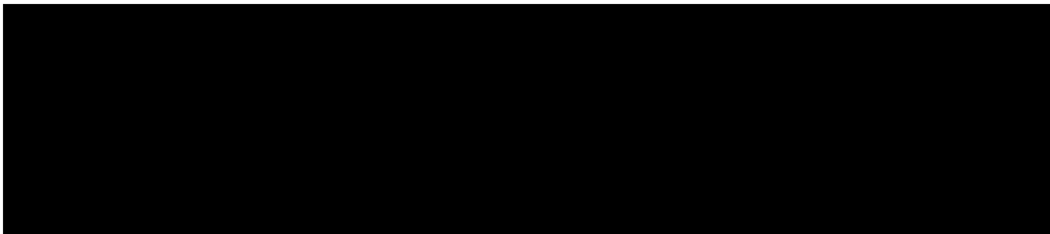
144. On November 22, 2020, Complainant went to the scheduled FFD evaluation.

145. Complainant did not complete the FFD evaluation.

146. Complainant was in Dr. Axelrod's office for an extended period of time and chose not to sign release forms to complete the FFD evaluation.

147. Complainant's behavior ranged from normal to extremely emotional with physical manifestations (stomping/thrashing) during the period of time she was in Dr. Axelrod's office.

148. Dr. Axelrod contacted Ms. Berry following his November 22, 2020, interactions with Complainant. Dr. Axelrod left a voicemail and informed Ms. Berry that Complainant had not completed the FFD evaluation, and based upon Complainant's behavior, it was unlikely that she was fit for duty as a Lab Coordinator I. Dr. Axelrod stated, in part:



Board Rule 6-10 Meeting and Investigation

149. On December 2, 2019, Ms. Bennett Stewart issued Complainant a Notice of Board Rule 6-10 meeting.

150. In the notice, Ms. Bennett Stewart informed Complainant that she had been informed of the November 1, 2019 incident and that Complainant had failed to complete the November 22, 2019 FFD Evaluation.

151. On December 9, 2019, Ms. Bennett Stewart conducted a Board Rule 6-10 meeting with Complainant. (Stipulated fact.) The meeting lasted approximately one hour.

152. Ms. Bennett Stewart participated in the meeting with her representative, Attorney Alex Loyd from Respondent's Office of University Counsel.

153. Complainant participated in the meeting with her representative, Pamela Cress from Colorado WINS.

154. Ms. Bennett Stewart discussed the November 1, 2019 incident and Complainant's failure to complete the FFD evaluation.

155. Complainant told Ms. Bennet-Stewart that she had misused her words and had misspoken during the November 1, 2019 incident.

156. Complainant stated she did not leave the lab in an unsafe condition on November 1, 2019.

157. Complainant told Ms. Bennett Stewart she left out Sodium Hydroxide and Deionized Water.

158. Complainant informed Ms. Bennett Stewart that late starts due to weather during the week of the November 1, 2019 incident contributed to Complainant's inability to complete her work during.

159. Complainant informed Ms. Bennett Stewart she refused to sign the consent for the FFD Evaluation because Complainant was unsure who would see the information. Complainant also informed Ms. Bennett Stewart her own provider recently had her complete a similar assessment.

160. Following the meeting, Complainant had until December 16, 2019, to submit additional information.

161. Ms. Bennett Stewart considered the possibility of termination, and drafted a Notice of Disciplinary Action with termination as the disciplinary action after Complainant's deadline for providing information lapsed on December 16, 2019.

[3] This was transcribed from an audio recording. "Ums" and other similar phrases were omitted.

162. Ms. Bennett Stewart spoke with two chemical engineers during her investigation, including Dr. Young.

163. Ms. Bennett Stewart spoke with Dr. Young after the Board Rule 6-10 meeting about the state of the chemicals left out in the lab. Ms. Bennett Stewart realized she was unaware of the state of the chemicals left out in the lab, and that Ethyl Acetate could have been in a pellet form. Ms. Bennett Stewart did not know the quantity or state of the chemicals left out. As a result, Ms. Bennett Stewart decided not to terminate Complainant's employment.

164. Ms. Bennett Stewart also spoke with Ms. Berry during her investigation. Ms. Berry informed Ms. Bennett Stewart that Complainant was in an emotionally heightened state during Ms. Berry's conversation with Complainant on November 1, 2019, and that Complainant knew the lab was in an unsafe condition.

165. On December 20, 2019, Complainant provided additional information to Ms. Bennett Stewart. Complainant provided a detailed description of what transpired on November 1, 2019, and pictures of the Chemical Lab. Complainant provided a description of the incident as follows:

> I would like to start off by making it clear that I did leave the lab safe and locked before taking a break. I returned to the lab an hour and a half after leaving initially. I returned to campus to supervise the Chem-E-Car student group that was preparing for a national competition and not specifically for work.
>
> The 'mess' that was out in the lab could have been safely left over the weekend. However, knowing that students were going to be working in the lab over the weekend, I made a judgment call and cleaned the area. The lab area that I utilized (lab benches and fume hood) was the same area where the Chem-E-Car members previously worked and were going to work over the weekend. The Chem-E-Car team needed to use the fume hood and surrounding benches which was the same area I was working on the experiment.
>
> Before leaving the lab, I followed standard protocols from EH&S. The ChBE UG lab teaching lab does not have standard protocols which is why I followed EH&S standards. I spent 10-15 minutes picking-up chemicals, closing carboy containers, placed flammable chemicals in the fume hood (not necessary/extra precaution), and I labeled chemicals (with full chemical name). There were two 2-liter graduated cylinders of deionized water left out and open.
>
> Additionally, to my knowledge no students were in the lab from when I left to when I returned. If there were students in the lab; they either work for me and had their own key, would have been let into the lab by faculty or staff member, and/or entered after someone with lab access did not lock the door after unlocking it. Knowing that three were limited people with access to the lab prior to 4pm, I decided to leave and return to clean up the residual mess that was left out.
>
> When I returned at 3:30, I helped the Chem-E-Car team get the fume hood and small chemical prep area setup and ready to use. While they were performing trial runs, I was cleaning up and making more room for the students to work. I requested help from a few of the students for items that I was unable to handle by myself.

> Two students helped moved 10-liter carboys full of either deionized water, 0.1M Sodium Hydroxide, and 0.1M Ethyl Acetate.
>
> I rinsed the reactor and pH probe of all the reactants using deionized water. After the reactor was cleaned, I had a student helped [sic] me dispose of the waste into the 55-gallon drum where the waste is accumulated until the container is full and ready for EH&S to pick-up. I documented the lab clean-up work completed that day…

166. Ms. Bennett Stewart considered the additional information provided by Complainant despite the fact it was untimely provided.

167. Ms. Bennett Stewart performed independent research on the chemicals left out during her investigation.

168. Ms. Bennett Stewart did not talk to anyone in the Chem-E-Car Club about the state of the lab on November 1, 2019.

Disciplinary Action

169. On January 16, 2020, Ms. Bennett Stewart issued Complainant a Notice of Disciplinary Action.

170. Ms. Bennett Stewart determined:

> After carefully considering all of the information presented to me in our Board Rule R 6-10 meeting on December 9, 2019 and your written response provided on December 20, 2019, I find that you did leave the lab in an unsafe state, including knowingly leaving out deionized water and sodium hydroxide, not rinsing the reactor or removing the pH probe. Your written statement reiterated to me that even though you state the lab was in a safe place before you took a break, you had to return at 3:30pm to further clean the lab and needed student assistance to move 10-liter carboys full of either deionized water, 0.1M Sodium Hydroxide, and 0.1M of Ethyl Acetate. I additionally followed-up and spoke to Molly Berry about the phone call conversation, and was informed that you did share with Molly that you would be leaving the lab in an unsafe state and that you were having a "meltdown" and reported needing to leave the lab as is. I additionally find that even though you stated to me that you misused your words in your email to Wendy on November 1, 2019 at 1:38pm, your statement of “I'm going to do something that is unsafe and leave the lab how it is” is extremely concerning. As a Lab Coordinator I, I expect you to be able to communicate clearly and effectively regarding the condition of the lab at all times, and I expect you to manage your time appropriately. Based on the totality of the information, I have determined that you did leave the lab in an unsafe condition for at least an hour and a half, and you did not meet expectations of your position to ensure that safety standards are met and exceeded. Laboratory safety accounts for 20% of your position description.
>
> I also find that your conduct placed members of our community at a significant safety risk, and is serious enough to warrant immediate discipline. I conducted my own research on these chemicals on the Center for Disease Control and Prevention website [web address] and found the following information:

> *Sodium hydroxide is very corrosive. It can cause irritation to the eyes, skin, and mucous membrane; an allergic reaction; eye and skin burns; and temporary loss of hair. Workers may be harmed from exposure to sodium hydroxide. The level of harm depends upon the dose, duration, and work being done.*
>
> Again, a fundamental duty of your job is to keep the lab in a safe condition. That was not done in this case, which is a serious matter warranting discipline.
>
> I additionally considered the Behavior Intervention Team's action to place you on Administrative Leave and the response from Dr. Axelrod that he does not feel that you are fit for duty. While I do not consider these facts to be independent bases for this disciplinary action, I consider them to be aggravating circumstances. Dr. Axelrod's statement that he does not feel that you are fit for duty is very concerning when combined with lab safety concerns described above.

(Italics in original).

171. Ms. Bennett Stewart issued a disciplinary reduction in pay:

> Based on the serious nature of your conduct and placing our Engineering community at risk, I have decided that the appropriate decision is to issue you a Disciplinary Action. As a result of this Disciplinary Action, your pay will be docked 20% beginning January 16, 2020 - March 31, 2020 with a new monthly salary of $3,536.80.

172. Complainant timely appealed the disciplinary action.

FFD Evaluation 2

173. Ms. Bennett Stewart provided Complainant a second opportunity to undergo a FFD evaluation. Ms. Bennett Stewart wanted to provide Complainant an opportunity to show she was fit for duty.

174. On January 15, 2020, Complainant attended an FFD evaluation with Dr. Axelrod.

175. Complainant completed the January 15, 2020 FFD evaluation.

176. On January 20, 2020, Dr. Axelrod provided Respondent a written report. Dr. Axelrod found Complainant was not fit for duty as a Lab Coordinator I with considerations.

177. In making his determination, Dr. Axelrod considered information provided by Respondent.

Beginning of ADA Process and Determination to Remove Complainant from Paid Administrative Leave

178. On January 20, 2020, Ms. Berry received Dr. Axelrod’s FFD evaluation that found Complainant was not fit for duty as a Lab Coordinator I.

179. On January 21, 2020, Ms. Berry sent the FFD evaluation to Ms. Bennet Stewart.

180. Ms. Bennett Stewart reviewed the FFD evaluation in its entirety. Ms. Bennett Stewart was sad about receiving a not fit for duty determination for a long standing employee. Ms. Bennett Stewart had hoped the time between the first and the second FFD evaluations would have given Complainant some time to improve.

181. Ms. Bennett Stewart referred Complainant's not fit for duty to the ADA Compliance Office to review if there were reasonable accommodations for Complainant.

182. Ms. Bennett Stewart was not involved with the ADA process. The ADA Compliance Office occasionally provided updates to Ms. Bennett Stewart by email.

183. The ADA Compliance Office began review of the FFD evaluation to determine if Complainant could resume her position with accommodations.

184. Ms. Smith reached out to Dr. Axelrod for clarification of his evaluation and to assess what the next steps were for Complainant as related to the ADA process. Dr. Axelrod provided, what Ms. Smith considered to be, an unusual determination that indicated Complainant was not fit for duty with considerations.

185. Ms. Smith sent Dr. Axelrod an email. Ms. Smith wanted to know if Complainant could be fit for duty if certain considerations were made or if Complainant was not fit for duty no matter what.

186. On January 27, 2020, Ms. Smith spoke to Dr. Axelrod by phone. In the phone conversation, Dr. Axelrod clarified that he did not see Complainant being fit for duty even with considerations. The considerations provided were extensive, and completion of those considerations would not necessarily make Complainant fit for duty. Complainant would need to undergo additional assessment to determine if she was fit for duty after the considerations were completed. Dr. Axelrod further provided that Complainant may be able to psychologically perform positions that did not include .

187. Ms. Smith did not discuss providing a distraction free environment or flexible schedule with Dr. Axelrod.

188. On January 28, 2020, Ms. Bennett Stewart issued Complainant a memorandum on "Psychological Fitness For Duty Evaluation Results and Notice Regarding Leave Status" ("Memo"). Ms. Bennett Stewart sent the Memo to Complainant by email and certified mail.

189. The Memo informed Complainant that Complainant was found to be not fit for duty by the FFD evaluator, that she could not return to work, and that she would be taken off of paid administrative leave.

190. Ms. Bennett Stewart determined it would not be a prudent use of tax payer dollars to allow Complainant to continue on paid leave after the unfit for duty determination, as Complainant was unable to fulfill the functions of her position. Complainant had been on paid administrative leave for approximately 2.5 months at the time of Ms. Bennett Stewart's decision.

191. The Memo provided Complainant her leave balances.

192. The Memo further informed Complainant that she could contact the ADA Compliance Office:

> Based on the results of the evaluation, you are not approved to return to work until ADA Compliance has further assessed this matter, including whether there are reasonable accommodations that would allow you to perform the essential functions of the job. You may contact ADA Compliance directly at [phone number] and/or via email at [email address]. Please note that a referral to this office does not constitute being considered or perceived as an individual with a disability. The ADA Compliance unit is responsible for performing individualized assessments to determine whether an employee's condition qualifies as a "disability" as defined by the Americans with Disabilities Act, and, if so, whether reasonable accommodations may be provided to enable the employee to perform the essential functions of his/her position.

193. The Memo did not notify Complainant of appeal rights to the State Personnel Board.

194. Complainant timely appealed Respondent's determination to take her off of paid administrative leave.

195. Complainant disagreed with the determination that she was not fit for duty.

196. An employee may submit an independent FFD evaluation following an unfit for duty determination. Respondent analyzes independent FFD evaluations after a not fit for duty determination. This analysis includes looking at the qualifications of the medical provider performing the FFD evaluation, including looking at if that medical provider is qualified to do a threat assessment. The analysis also includes looking at the employee's relationship with the medical provider and considerations given by that medical provider.

197. Ms. Smith told Complainant multiple times, in writing and verbally, Complainant could provide additional information and it would be taken into consideration.

ADA Interactive Process

198. Respondent engaged in the interactive process with Complainant from January 27, 2020 to March 23, 2020.

199. On January 30, 2020, Ms. Smith sent Complainant an email. Ms. Smith wrote:

> Employee Relations has referred you to ADA Compliance as you were recently administered a Fitness-for-Duty evaluation, and the medical provider who conducted the evaluation deemed you were "Not Fir for Duty" in your position of a Lab Coordinator. ADA Compliance is working with the medical provider who conducted the evaluation to understand if there are any workplace accommodations that would enable you to perform the essential functions of the job. While we are assessing options, you are temporarily on unpaid leave as an accommodation. It would be beneficial for us to connect via phone after I have had time to review the fitness-for-duty evaluation and connected with the medical provider. Are you available next Wednesday, February 5, 2020 at 9:00 a.m.?

I have attached the ADA Compliance Procedures for reference as we work through this process.

200. Ms. Smith attached the Respondent's ADA Compliance Procedures to the January 30, 2020 email. The ADA Compliance Procedures define reasonable accommodations for employees and explain the interactive process.

201. Also on January 30, 2020, Complainant sent an email asking if she could submit additional medical documentation. The ADA Compliance Office confirmed Complainant could submit additional information from a qualified medical provider. Complainant did not submit additional medical documentation.

202. On February 5, 2020, Complainant and Ms. Smith had a telephone conversation.

203. Based upon her conversation with Dr. Axelrod, Ms. Smith assessed if Complainant should be allowed leave as an accommodation. Ms. Smith determined that leave was not appropriate because it would be indefinite and it was unclear if Complainant would ever be able to return to her position. Ms. Smith determined there were no accommodations available that would make Complainant able to perform the essential functions of her position.

204. On February 7, 2020, the ADA Compliance Office issued Complainant a Notice of Determination Reassignment ("February 7 Notice of Determination").

205. The February 7 Notice of Determination informed Complainant that the ADA Compliance Office determined there were no reasonable accommodations that would allow Complainant to perform the essential functions of a Lab Coordinator I.

206. The February 7 Notice of Determination provided an assessment of additional unpaid leave as an accommodation and determined it was not an appropriate accommodation. The February 7 Notice of Determination provided unpaid leave was not a possible accommodation, because of "the broadness and indefinite timeframe of leave for you to complete the considerations is unreasonable under the ADA."

207. The February 7 Notice of Determination provided Complainant with a list of the restrictions for the reassignment search. These restrictions were [redacted]

208. The February 7 Notice of Determination provided information on an internal appeals process if Complainant disagreed with the assessment that she was not fit for duty in her position. Complainant did not pursue the internal appeal process.

209. Complainant timely appealed the February 7 Notice of Determination to the State Personnel Board.

210. Respondent provided Complainant an extensive interactive process after the February 7 Notice of Determination through its reassignment search.

211. On February 7, 2020, the ADA Compliance Office began the alternate reassignment search with Complainant and began looking for a position that Complainant was able to perform.

212. Reassignment would allow Complainant to have a non-competitive transfer to a position at or below Complainant's job level across the entire university.

213. Complainant provided the ADA Compliance Office with a resume and a list of her previous job duties.

214. The ADA Compliance Office initiated the search to find an alternate position for Complainant.

215. For a 30-day period, the ADA Compliance Office worked with Human Resources to routinely search unfilled positions with Respondent. Respondent established the following parameters for the alternate position search:

> In order to identify potential positions and based on ADA regulations, the recruiting team assessed whether: 1) the open position was at or below the level of the Lab Coordinator position, and 2) you met the minimum qualifications for the open position. Additionally, based on the FFD Dr. Axelrod placed the following limitations on positions for which you could be considered fit to perform, with or without accommodations:
>
> As such, the recruiters considered these limitations when searching unfilled positions and assessing your qualification for the position. Additionally, ADA Compliance also requested you confirm whether you still have a lifting restriction of 10 pounds that was documented in an FMLA certification in October 2019. Though you did not respond to this inquiry, no positions were eliminated from consideration due to the lifting restriction.

216. On March 23, 2020, Ms. Bennett Stewart sent Complainant an email with a Notice of Leave Status attached. Ms. Bennett Stewart issued Complainant the Notice of Leave Status to provide Complainant with her leave statuses and to let Complainant know about short-term disability.

217. The Notice of Leave Status provided:

> I am providing this notice to outline your current leave status at the University of Colorado Boulder. On November 12, 2019 you were placed on paid administrative leave. You were on this period of paid administrative leave through January 27, 2020. On January 28, 2020 you began a block period of leave for your own personal medical condition. A review of your leave records indicates that you exhausted your sick leave on February 3, 2020, annual leave on February 5, 2020 and your Family Medical Leave is anticipated to exhaust on March 25, 2020. At the time of this notice, you have not submitted a claim for Short-term Disability (STD) insurance and may do so by contacting Employee Services at [telephone number].

> I understand that you are currently working with ADA Compliance to assess if reassignment as an accommodation is a reasonable accommodation that may help you return to work. As you were notified by ADA Compliance on February 21, 2020, if you decline to pursue the reassignment as an accommodation procedure, reject a vacancy that has been offered as a reassignment, fail to respond in a timely manner to the ADA Compliance unit during the search period, or the search period has been exhausted and no reassignment has been made, you will be referred to the Reasonable Employer Process, and a Reasonable Employer Meeting may be held. An explanation of the Reasonable Employer Process is attached to this document for your convenience.
>
> Please be advised that if you are not able to return to work as of March 26, 2020 or at the conclusion of the ADA interactive process, you can be administratively separated pursuant to Procedure 5-6 of the State of Colorado Personnel Board Rules and Director's Administrative Procedures, which provides, in part:
>
>> 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.
>
> The ADA Compliance unit is responsible for performing individualized assessments to determine whether an employee's condition qualifies as a "disability" as defined by the Americans with Disabilities Act, and, if so, whether reasonable accommodations may be provided to enable the employee to perform the essential functions of his/her position. If you have any questions about their process, you may contact the ADA Compliance unit at [telephone number] and/or via email at [email address]. *Please note that, when applicable, the appeal rights associated with a Notice of Determination issued by the ADA Compliance unit are extinguished if employment is terminated.*
>
> If you do not plan to return to work and would like to discuss your eligibility for Long-term Disability or PERA Disability, please contact Employee Services [telephone number].

218. On March 25, 2020, Jayna Davis, Respondent's FML Leave Coordinator, emailed Complainant and notified Complainant that her FML case would be closed due to exhaustion of leave.

219. On March 31, 2020, the ADA Compliance Office issued Complainant a Notice of Determination ("March 31 Notice of Determination").

220. The March 31 Notice of Determination informed Complainant that the ADA Compliance Office was unable to reassign her to an alternative position.

Administrative Separation

221. On April 10, 2020, Respondent held a Reasonable Employer Meeting regarding Complainant. (Stipulated Fact.) Ms. Bennett Stewart was present for the Reasonable

Employer Meeting. (Stipulated Fact.) Ms. Berry, Ms. Smith, Mr. Loyd, and Respondent's FMLA Leave Manager, were also present for the meeting.

222. Complainant was informed of the meeting. Complainant was not invited to attend the meeting. It is not standard practice for an employee to attend the Reasonable Employer Meeting.

223. Ms. Bennett Stewart wanted to conduct the Reasonable Employer Meeting to ensure that everything that could be done for Complainant had been done, and to verify there were no additional steps that could be taken for Complainant.

224. During the meeting, Ms. Bennett Stewart was informed that Complainant had exhausted leave. Ms. Smith discussed the reassignment search and informed Ms. Bennett Stewart that there were no positions for which Complainant was qualified. This surprised Ms. Bennett Stewart because Respondent is a large employer. During the meeting, Ms. Bennett Stewart was informed that even in a custodial type position, Complainant would be required to work with chemicals. Based upon the information provided, Ms. Bennet Stewart believed the search for an alternate position had been exhaustive.

225. During the meeting, the administrative separation process under Board Rule 5-6 was discussed. Ms. Bennett Stewart had never administratively separated an employee before and referred to Complainant's situation as a test case in notes.

226. During the meeting, Ms. Bennett Stewart learned Complainant had not applied for short-term disability.

227. Following the Reasonable Employer Meeting, Ms. Bennett Stewart made the determination to administratively separate Complainant from employment. Ms. Bennett Stewart felt that everything that could be done for Complainant had been done. Ms. Bennett Stewart did not take this decision lightly.

228. On April 29, 2020, Ms. Bennett Stewart issued Complainant a Notice of Administrative Discharge/Separation. Ms. Bennett Stewart sent Complainant the Notice of Administrative Discharge/Separation by email.

229. Prior to her administrative separation, Complainant had exhausted all protected leave.

230. Complainant failed to submit a claim for short-term disability prior to her administrative separation.

231. The Notice of Administrative Discharge/Separation provided:

> On March 23, 2020, you received a Notice of Leave Status letter outlining your leave status at the University of Colorado Boulder.
>
> After considering all of the available information, including the Reasonable Employer meeting held on April 10, 2020, I have decided to administratively discharge you effective April 29, 2020 pursuant to State Personnel Board Rule 5-6. This rule allows an appointing authority to administratively discharge an employee who has exhausted all job-protected leave and is unable to return to

work, with or without accommodation, after Family Medical Leave and Short-Term Disability leave have been exhausted.

A review of your leave records indicates that you exhausted your sick leave on February 3, 2020, annual leave on February 5, 2020; and your Family Medical Leave exhausted on March 25, 2020. To date, you have not submitted a claim for Short-term Disability (STD) insurance. In sum, under Rule 5-6, you have exhausted all credited paid leave as of March 25, 2020.

As additional background regarding this matter, you were employed by the University of Colorado Boulder as a Lab Coordinator in the Chemical and Biological Engineering Department. An essential function of the Lab Coordinator is ensuring the safety of students working in labs with a variety of hazardous materials. As a result of a lab safety incident on November 1, 2019, and as a result of "unpredictable and emotionally volatile behavior" in the workplace, you were placed on paid administrative leave on November 12, 2019 pending a Fitness for Duty (FFD)evaluation. This FFD initially occurred on November 22, 2019, however you were unable to complete this evaluation on that day. You were scheduled for a second FFD which occurred on January 15, 2020. The medical provider who conducted the evaluation, Dr. Evan Axelrod of Nicoletti-Flatter Associates, determined that you were "not fit for duty at this time" meaning you are "not capable of working in a position that includes the responsibilities of a Lab Coordinator."

As a result [sic] being determined "not fit for duty" in the FFD, you were referred to ADA Compliance in a written letter dated January 28, 2020 to assess if there were reasonable accommodations that would enable you to be fit-for-duty and perform the essential functions of your position. ADA Compliance engaged with you in an interactive process which included an expansive search across the University of Colorado Boulder for reassignment. On February 7, 2020 and March 31, 2020, ADA Compliance issued Notice of Determinations (NODs) which outlined that they were unable to identify reasonable accommodations, including reassignment as an accommodation, which would enable you to work at the University of Colorado Boulder.

Following the ADA interactive process, a reasonable employer meeting was held on April 10, 2020 to determine next steps based on the available information. After carefully considering all of the information presented to me, I am issuing this administrative discharge/separation of service under Rule 5-6, effective immediately.

Please contact me directly at [email address] to arrange a time to complete checkout procedures. You may also want to contact a benefits counselor at [telephone number] to provide you with information about continuation of your health insurance benefits under the COBRA program. The benefits counselor can also assist you in understanding your PERA benefits.

As a certified employee who is administratively discharged, you are entitled to be considered for reinstatement when you have recovered and are able to return to work.

> You may protest this action by filing an appeal with the State Personnel Board. The Office of Employee Relations has standard appeal forms for your use. You may contact the Office of Employee Relations at [telephone number]. The appeal must be postmarked, delivered, or faxed no later than ten (10) calendar days after your receipt of this letter, addressed as follows…

232. Complainant timely appealed the Notice of Administrative Discharge/Separation to the State Personnel Board.

DISCUSSION

I. RESPONDENT DID NOT PROVIDE FALSE INFORMATION FOR THE FFD EVALUATION.

Complainant argues the Second FFD evaluation results were based on false information provided to Dr. Axelrod. Complainant alleges the false information was that Complainant left the lab in an unsafe condition on November 1, 2019.

Prior to the first FFD evaluation, Ms. Berry sent a lengthy email to Dr. Axelrod describing Respondent's concerns about Complainant. The email was provided prior to Respondent's disciplinary decision for the November 1, 2019 incident. As related to the November 1, 2019 incident, Ms. Berry provided:

> On Friday, November 1st Ann made the decision to leave the Lab in an unsafe condition (left dangerous chemical out in the open) while she left the lab unsupervised (students and staff members all have access to the lab and could have been harmed). Ann reported to me that she was having a ██████ and needed to leave, however she did not follow proper procedures to notify those who have access of the unsupervised harmful chemicals. Ann was gone for a prolonged period of time before returning to the lab to clean and secure the chemicals.

As discussed below, Respondent has proven by preponderance of the evidence that Complainant left the lab in an unsafe state on November 1, 2019. However, even if that were not the case, Ms. Berry provided an accurate description of the incident based upon Complainant's contemporaneous statements to Ms. Berry on November 1, 2019. Complainant verbally told Ms. Berry she was leaving chemicals out and also wrote multiple emails indicating Complainant was leaving the lab in a less than safe condition. It is also true that Complainant informed Ms. Berry she was having a ██████, failed to provide notification to individuals with access to the lab that it was not in a clean state, and left the lab for a prolonged period of time, 1.5 hours versus the half of an hour she discussed with Ms. Berry.

Further, the information related to the November 1, 2019 incident was just a small portion of the information provided to Dr. Axelrod. Ms. Berry described "inconsistent and unpredictable behavior" exhibited by Complainant. Ms. Berry's description is supported by evidence in the record.

Complainant did not demonstrate Respondent provided false information for the FFD evaluation. As discussed below, Respondent had a legitimate, non-discriminatory reason to discipline Complainant and to have concern for Complainant's ability to safely perform her job duties as a result of the November 1, 2019 incident. The evidence in the record does not support that Respondent provided false information to the FFD evaluator.

II. RESPONDENT DID NOT DISCRIMINATE OR RETALIATE AGAINST COMPLAINANT IN VIOLATION OF CADA.

A. Respondent did not discriminate against Complainant in violation of CADA.

Complainant has the burden to prove by a preponderance of the evidence that she was discriminated against on the basis of her disability. *Colorado Civil Rights Com'n v. Big O Tires, Inc.*, 940 P.2d 397 (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."

The Colorado Anti-Discrimination Act ("CADA") provides that it is a discriminatory or unfair employment practice to:

> …discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of disability...; but, with regard to a disability, it is not a discriminatory or an unfair employment practice for an employer to act as provided in this paragraph (a) if there is no reasonable accommodation that the employer can make with regard to the disability, the disability actually disqualifies the person from the job, and the disability has a significant impact on the job.

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

The Colorado Civil Rights Commission ("CCRC") has promulgated rules to implement CADA. The rules state CADA, as related to disability, "...is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act, as amended, and the Fair Housing Act concerning disability." 3 CCR 708-1-60.1(A). Therefore, interpretations of CADA, "...shall follow the interpretations and guidance established in State and Federal law, regulations, and guidelines; and such interpretations shall be given weight and found to be persuasive in any administrative proceedings." 3 CCR 708-1-10.4.

To establish a *prima facie* case of discrimination in employment on the basis of one of the protected classes, Complainant must demonstrate:

> First, an employee must show that he belongs to a protected class. Second, the employee must prove that [s]he was qualified for the job at issue. Third, the employee must show that [s]he suffered an adverse employment decision despite his qualifications. Finally, the employee must establish that all the evidence in the record supports or permits an inference of unlawful discrimination.

Bodaghi v. Dep't of Natural Resources, 995 P.2d 288, 297 (Colo. 2000).

Complainant can establish the first and third elements of a *prima facie* case of discrimination. As to the first element, Complainant is disabled within the meaning of the law and, therefore, a member of a protected class under CADA. Respondent found Complainant was a qualified individual with a disability during the 2019 reasonable accommodations process. As to the third element, Complainant experienced three adverse employment actions: discipline, removal from paid administrative leave during an employer initiated leave, and administrative separation.

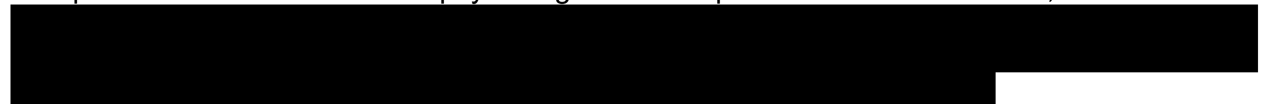
As to the second element of a *prima facie* case, Complainant did not establish that she could perform the essential functions of her job as a Lab Coordinator I, with or without reasonable accommodations following the November 1, 2019 incident. A person with a disability, "...is 'otherwise qualified' if, with reasonable accommodations, [they] can perform the reasonable, legitimate, and necessary functions of [their] job." *AT & T Technologies, Inc. v. Royston*, 772 P.2d 1182, 1185 (Colo. App. 1989). Complainant could not perform the reasonable, necessary, and legitimate functions of her job, with or without reasonable accommodations.

It is undisputed that the essential functions of Complainant's position included safety functions, including ensuring lab safety and working with dangerous chemicals. The evidence in the record supports that throughout most of her employment Complainant had some capacity to perform the safety functions of her position. The evidence in the record, however, also demonstrates that, at some point prior to the November 1, 2019 incident, Complainant was no longer able to competently perform the safety functions of her position. This is not to say Complainant was not aware of the safety standards. The evidence presented demonstrates Complainant is knowledgeable about safety standards. Complainant's medical conditions prevented her from performing her job duties related to safety.

Complainant's behavior on November 1, 2019, combined with her history of emotional behavior at work, constitute evidence that Complainant was no longer fit to perform the safety functions of her position. Complainant worked in a position where she handled dangerous chemicals and was responsible for ensuring others did the same. On November 1, 2019, whether or not the lab was actually left in an unsafe condition, Complainant exhibited behavior that demonstrated she lacked the skills to independently exercise judgment and ensure chemicals were safely used and stored. Complainant was responsible for managing her own time. Complainant was responsible for running and cleaning up the experiment within her scheduled hours. Complainant failed to competently perform those necessary functions.

The second FFD determination confirmed for Respondent that Complainant could no longer perform the safety, communication, and supervisory functions of her position. As of at least November 1, 2019, Complainant was no longer qualified for the position of Lab Coordinator I "no matter how much accommodation" Respondent extended, because she could no longer perform the essential functions of her job related to safety. *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1162 (10th Cir. 1999).

Although Complainant disagreed with the determination that she was unfit for duty and argued she could have been reasonably accommodated in the position, Complainant did not provide any medical documentation to demonstrate she could perform the essential functions of her job prior to her administrative separation from employment. Complainant had approximately three months from receiving notice of her FFD determination to present additional medical documentation to Respondent. Complainant was aware she could submit additional medical documentation because Ms. Smith told Complainant she could do so multiple times. Significantly, Complainant obtained her own psychological exam prior to the November 1, 2019 incident.



Complainant argued she could perform the essential functions of her job if allowed the accommodations of the original open-ended flexibility of her schedule and a distraction free environment. First, at the time of the adverse employment actions, the evidence in the record demonstrates Complainant no longer had the ability to perform the essential functions of her job

as a Lab Coordinator I. Second, Complainant never provided medical documentation to Respondent to support her assertion she could perform the essential functions of her position with such accommodations. Third, Complainant argued that the open-ended schedule was an effective accommodation for Complainant and allowed her to perform her job successfully. Complainant's original schedule was not an ADA accommodation. There is evidence in the record that indicates Complainant was having difficulties at work prior to the schedule change. Complainant experienced performance issues related to tracking time, accountability, and communication dating back to 2013.

Reasonable accommodation also requires the employer to engage in an interactive process with an individual to determine if reassignment is a possibility. *See Smith*, 180 F.3d at 1161 and 1171-72. Respondent initiated the interactive reassignment process after receipt of Complainant's FFD evaluation.

Respondent determined Complainant's restrictions based upon the FFD Evaluation and engaged in an exhaustive reassignment search for a period of 30 days, communicating with Complainant throughout. Complainant argues that the search criteria were unnecessarily limited by the FFD determination based on false information. The evidence in the record does not support that the FFD determination was incorrect or based on false information.

Respondent properly engaged in the interactive process by engaging in a reassignment search with Complainant after it determined Complainant could no longer perform the essential functions of her position as a Lab Coordinator I. Therefore, Complainant has failed to demonstrate the second element necessary to establish a *prima facie* case of discrimination.

Complainant argues Dr. Young's lack of participation in the interactive process negates it. Involving Dr. Young in the interactive process following the FFD determination was not necessary. The ADA Compliance Office, through Ms. Smith, was familiar with Complainant's position as a Lab Coordinator I. Ms. Smith worked with Complainant and CBE during the 2019 ADA accommodation process. Ms. Smith concluded, based upon the FFD determination and her conversation with Dr. Axelrod, Complainant could no longer perform an essential function of her position as a Lab Coordinator I. Complainant's position as a Lab Coordinator I necessarily involved safety. Complainant was no longer capable of performing essential functions related to safety. The solution in the interactive process then was a search for a new position. Despite Complainant's arguments, there is no evidence in the record that a distraction free environment or a more flexible scheduled would have been a reasonable accommodation for Complainant following the FFD determination.[4]

Complainant argued Respondent's division of resources was complicated and Complainant did not know where to go for assistance. There is evidence in the record to the contrary. Following the November 1, 2019 incident, Complainant reached out directly to Ms. Berry with concerns about Dr. Young and directly to Ms. Smith about receiving additional accommodations. The evidence further supports that Complainant appropriately reached out to these resources with some regularity prior to the November 1, 2019 incident. This indicates Complainant knew and understood the resources available to her.

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[4] The 2019 ADA accommodation process is not an issue before the State Personnel Board. There is evidence in the record that demonstrates Respondent engaged in an interactive process with Complainant during the 2019 ADA accommodation process and that Complainant received an accommodation that met the recommendation of Complainant's medical provider.

Complainant further argued Complainant did not know what information needed to be provided to receive the accommodations that she felt were necessary. Ms. Smith provided Complainant necessary information and informed Complainant she could provide additional medical documentation to support the need for additional accommodations. Complainant failed to present necessary documentation to Respondent. The evidence demonstrates Respondent consistently provided Complainant with the resources she needed to receive accommodations.

To establish the fourth and final element of a *prima facie* case, Complainant must proffer evidence that supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297. Under CADA, intentional discrimination may be proven by either direct evidence or indirect evidence. *See George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). "Direct evidence is '[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.' (citations omitted)." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). However, as the Colorado Supreme Court has acknowledged, "direct evidence of discrimination is rare." *Bodaghi*, 995 P.2d at 296. "[E]mployees must often rely on indirect evidence and reasonable inferences to establish a case of discrimination under the *McDonnell Douglas* analysis." *Id*. Complainant may rely on, "existing conditions from which a fair inference of such discrimination could legitimately be drawn." *Colorado Civil Rights Com'n v. State, Sch. Dist. No. 1*, 488 P.2d 83, 87 (Colo. App. 1971).

Complainant failed to present direct evidence or indirect evidence of discrimination. There is no direct evidence of discrimination in this case. There is no evidence in the record that there were any derogatory comments about Complainant's disability or anything else that directly demonstrates discriminatory intent. Complainant presented no information to demonstrate she was treated differently than other similarly situated employees. Complainant failed to establish the fourth element of a *prima facie* case of discrimination.

Dr. Young's removal of Complainant's flexible schedule and refusal to allow Complainant to resume the flexible schedule is not evidence of discriminatory intent on the part of Respondent. First, there is no evidence in the record that the original flexibility of Complainant's schedule was an ADA accommodation. Second, there is no evidence that Dr. Young acted with discriminatory intent when she removed the schedule. Dr. Young's awareness that Complainant had accommodations as a student is not evidence of discriminatory intent in removal of the original flexibility of Complainant's schedule. The flexibility was removed years after Complainant was a student and years after Complainant became a Lab Coordinator I. The evidence in the record indicates that Complainant was not tracking her time and was not available when necessary while she had this flexibility. The evidence in the record indicates Dr. Young ended the flexibility in Complainant's schedule when it became apparent it was no longer working. It seems in late 2018 there was the "perfect storm" of events that drew Respondent's attention to a problem with Complainant tracking and managing time that likely had been ongoing for some time.[5]

The evidence in the record does not demonstrate Respondent ignored or neglected information provided by Complainant about possible medical conditions that may need accommodation before or after the November 1, 2019 incident. The evidence in the record demonstrates Complainant was referred to the ADA Compliance Office and that the ADA Compliance Office engaged with Complainant.

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[5] In a relatively short time period, Complainant began seeking a promotion, Dr. Young became less available to provide direction to Complainant, and Complainant obtained FML that she was responsible for tracking.

Complainant did not establish the second and fourth elements of a *prima facie* case of discrimination. Therefore, Complainant failed to demonstrate Respondent discriminated against her in violation of CADA.

Even if Complainant had established a *prima facie* case of discrimination, Respondent articulated legitimate, nondiscriminatory reasons for each adverse action. Complainant did not demonstrate those reasons were pretextual. "Pretext can be shown by 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.' (citation omitted)." *Morgan v. Hilti, Inc.*, 108 F. 3d 1319, 1323 (10th Cir. 1997). As discussed above, the lab being left in unsafe condition was not false information. Complainant made multiple statements in writing and verbally that indicated the lab was being left in an unsafe condition on November 1, 2019. Complainant failed to present evidence that Respondent used the FFD evaluation as pretext for discrimination. As discussed below, Respondent had just cause to discipline Complainant for the November 1, 2019 incident. Following that incident, Respondent had an obligation to ensure Complainant, a person who worked in a safety sensitive position, was safe to continue in the performance of her job duties. After the FFD determination was received, Respondent took legitimate steps to accommodate Complainant that ultimately were unsuccessful, resulting in Complainant's administrative separation from employment. Complainant did not prove by preponderance of the evidence that Respondent's stated reason for its actions were pretextual. To the contrary, Respondent proved by preponderance of the evidence that its stated reasons for its actions were true. The facts of this case do not support a finding a pretext.

B. Respondent did not retaliate against Complainant in violation of CADA.

Claims of retaliation for engaging in protected activity for alleged violation of CADA are within the Board's statutory authority under § 24-50-125.3, C.R.S. Under CADA, it is a "discriminatory or unfair employment practice … [f]or any person … [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because [s]he has filed a charge with the [Colorado Civil Rights] commission, or because [s]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.

To establish a *prima facie* case of retaliation, Complainant must show: (1) protected opposition to discrimination, (2) an adverse employment action occurred, and (3) a causal connection between the protected activity and the adverse employment action. *Smith v. Board of Educ. of Sch. Dist. Fremont RE-1,* 83 P.3d 1157, 1162 (Colo. App. 2003).

Complainant can establish the first two elements of a *prima facie* case of retaliation. As to the first prong, Complainant engaged in protected opposition when she filed an appeal with the State Personnel Board alleging discrimination on January 31, 2020. It also seems likely that some of Complainant's complaints about the loss of flexibility to her schedule prior to her appeal of discipline were protected opposition to alleged discrimination. Ms. Berry's notes from her November 5, 2019 meeting with Complainant indicate Complainant complained about the flexibility of her scheduled, stated she was disabled, and asked why CBE would not work with her. As to the second prong, Complainant clearly suffered adverse employment actions, from discipline to separation.

As to the third element of a *prima facie* case of retaliation, Complainant must establish a causal connection between the protected activity and the adverse employment action. Temporal proximity alone may be sufficient to establish an inference of retaliatory motive. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999). Complainant's protected activity was ongoing, and the adverse employment actions occurred contemporaneously to that protected activity. However, in this case temporal proximity does not demonstrate a causal connection between the protected activity and the adverse employment actions. Here, intervening events undermine a finding of causation. *See Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1203-1204 (10th Cir. 2006). Here, there was a discrete event on November 1, 2019, that precipitated the events leading to each of Respondent's adverse employment actions. The November 1, 2019 incident undermines any causation based upon temporal proximity. It was the November 1, 2019 incident that prompted the request for fitness for duty evaluation and the disciplinary action, not any appeal to the State Personnel Board or other complaint. It was the not fit for duty determination that resulted in the end of unpaid leave and a determination that Complainant could not be accommodated in her position. And it was the exhaustion of leave that resulted in Complainant's administrative separation from employment. As Complainant failed to demonstrate a causal connection, Complainant has not established a *prima facie* case of retaliation under CADA.

As discussed above, had Complainant established a *prima facie* case of retaliation, Respondent provided a legitimate business reason for each of its actions, including the January 16, 2020, disciplinary action. The evidence in the record does not support that Respondent's legitimate business reasons are pretext for retaliation.

III. RESPONDENT DID NOT RETALIATE AGAINST COMPLAINANT IN VIOLATION OF THE WHISTLEBLOWER ACT.

Complainant alleges that Respondent violated the Whistleblower Act. The purpose of the Whistleblower Act is to encourage "state employees ... to disclose information on actions of state agencies that are not in the public interest." § 24- 50.5-101, C.R.S.; *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo. App. 1987). The Whistleblower Act "protects state employees from retaliation by their appointing authorities or supervisors because of disclosures of information about state agencies' actions which are not in the public interest." *Ward v. Industrial Comm'n*, 699 P.2d 960, 966 (Colo. 1985). The Whistleblower Act prohibits the initiation or administration of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S.

In determining whether there has been a violation of the Whistleblower Act:

> It must be initially determined whether the claimant's disclosures fell within the protection of the "whistle-blower" statute and that they were a substantial or motivating factor in the [agency's] opposition to his receipt of benefits. If the claimant's evidence establishes that his expression was protected by the "whistle-blower" statute, then the Commission must determine whether the [agency's] evidence establishes, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct.

Ward, 699 P.2d at 968 (adopting the procedure outlined in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

A. Complainant did not make protected disclosures.

The first question is whether Complainant has proven by a preponderance of the evidence that her disclosures "fell within the protection of the whistle-blower statute". See *Ward*, 699 P.2d at 968.

In order to show that her disclosures fall within the protection of the Whistleblower Act, Complainant must establish that: 1) she made a disclosure of information, as that term is defined in § 24-50.5-102(2), C.R.S., and applicable case law; and 2) that she Complainant has made a "good faith effort to provide to her supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of its disclosure." § 24-50.5-103(2), C.R.S. Additionally, in order for Complainant's disclosures to be protected, the disclosures must not be exempted from the Act's protections, pursuant to § 24-50.5-103(1)(a)-(c), C.R.S., which include an employee who discloses information that he or she knows to be false or who discloses information with disregard for the truth or falsity of the information; information from public records that are closed to public inspection pursuant to § 24-72-204, C.R.S.; or without lawful authority, information that is confidential under any other provision of law or closed to public inspection under § 24-72-204(2)(a)(I) and (2)(a)(VIII), C.R.S.

The Whistleblower Act defines "disclosure of information" as "the written provision of evidence to any person ... regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-102(2), C.R.S. Disclosures may be presented in writing or offered verbally. *Ward*, 699 P.2d at 967. "[D]isclosures that do not concern matters in the public interest, or are not of 'public concern', do not invoke this statute. (citations omitted)." *Ferrel v. Colo. Dep't of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

Whistleblower Act protections also depend, in part, upon the analysis as to whether statements were of "public concern." First Amendment precedent, therefore, is helpful in understanding the contours of such a requirement. *See Ward*, 699 P.2d at 968 (adopting the First Amendment allocations of burden of proof in *Mt. Healthy* as the template for a whistleblower analysis). The Supreme Court has characterized a matter of "public concern" as one "fairly considered as relating to any matter of political, social, or other concern of the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." *Id.* at 147-48. "While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests." *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996)(internal citations and quotation omitted).

Here, it is not clear precisely when Complainant made disclosures or what those disclosures were beyond Complainant's complaints that she did not receive a promotion and lost the flexibility of her original schedule. Complainant's complaints about the denial of her promotion and lack of flexible schedule are not matters of public concern. Complainant was bringing up these issues to address an internal personnel dispute and her own working conditions. Complainant was not making the disclosures to expose improper operations of the government that extended beyond her own personnel situation. Complainant was personally disappointed she was not promoted and was personally frustrated by the changes to the flexibility of her schedule. As Complainant's disclosures were not matters of public concern, Complainant failed to establish Respondent retaliated against her in violation of the Whistleblower Act.

B. Respondent did not take adverse actions on account of disclosures.

The second question is whether Complainant has proven by a preponderance of the evidence that her disclosures "were a substantial motivating factor" in Respondent's actions. See *Ward*, 699 P.2d at 968. Even if the ALJ concluded Complainant made protected disclosures, Complainant did not establish Respondent disciplined and administratively separated her because of protected disclosures. Once it is established that a protected disclosure occurred, the employee must demonstrate that the adverse action was taken "on account of the employee's disclosure of information." § 24-50-103(1), C.R.S.

Complainant did not demonstrate that her complaints in regard to Respondent's denial of her promotion or about the changes to the flexibility of her schedule caused Respondent to discipline and administratively separate her from employment. The evidence establishes that, on November 1, 2019, Complainant caused a lab safety incident and Respondent acted appropriately following that lab safety incident. There is simply no evidence in the record that the adverse employment actions and administrative separation were retaliatory.

IV. RESPONDENT DID NOT ACT ARBITRARILY, CAPRICIOUSLY, OR CONTRARY TO RULE OR LAW WHEN IT DISCIPLINED COMPLAINANT, REMOVED HER FROM PAID LEAVE DURING AN EMPLOYER INITIATED LEAVE, FOUND SHE COULD NOT BE ACCOMMODATED, AND ADMINISTRATIVELY SEPARATED COMPLAINANT FROM EMPLOYMENT.

A. Standard of Review.

An ALJ's review of the appointing authority's disciplinary action is governed by the statutorily mandated "arbitrary, capricious, or contrary to rule or law" standard. § 24-50-103(6), C.R.S.; *Dep't of Corrections v. Stiles*, Case No. 19SC107, 2020 CO 90, slip op. at p. 3, par. 3 (December 21, 2021). "The applicable standard of review has two nonsequential parts: The Board (or an ALJ acting on behalf of the Board) may modify or reverse an appointing authority's disciplinary action if such action was (1) 'arbitrary [or] capricious' or (2) 'contrary to rule or law.' § 24-50-103(6)." *Stiles* slip op. at p. 4, footnote 1.

"[I]n reviewing an appointing authority's disciplinary action, the ALJ must logically focus on two analytical inquiries: (1) whether the alleged misconduct occurred; and, if it did, (2) whether the appointing authority's disciplinary action in response to that misconduct was arbitrary, capricious, or contrary to rule or law. (citation omitted)." *Stiles* slip. op. at p. 20-21, par. 38.

B. The alleged misconduct occurred.

Certified state employees have a property interest in their positions and may only be disciplined for just cause. *See* Colo. Const. Art. XII, § 13(8); § 24-50-125, C.R.S.; *Dep't of Institutions v. Kinchen*, 886 P.2d 700, 704 (Colo. 1994). Respondent bears the burden of establishing just cause for discipline. *See Kinchen*, 886 P.2d at 707-08. The Board may reverse or modify Respondent's decision to discipline Complainant if the action is found to be arbitrary, capricious, or contrary to rule or law. § 24-50-103(6), C.R.S.

State employees are required to, "conduct [themselves] in accordance with generally accepted standards and with specific standards prescribed by law, rule of the board, or any appointing authority." § 24-50-116, C.R.S. Pursuant § 24-50-125(1), C.R.S., Respondent may

administer discipline to a certified state employee for, "failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined." *See also* Board Rule 6-12.

Ms. Bennett Stewart chose to discipline Complainant for leaving the lab in an unsafe state and Complainant's communication during the incidents on November 1, 2019. Ms. Bennett Stewart concluded Complainant's actions posed a significant safety risk.

Complainant committed the acts for which she was disciplined. On November 1, 2019, Complainant left the lab in an unsafe condition. Complainant left out dangerous chemicals and failed to clean the reactor and pH probe. Complainant's failure to clean the reactor and pH probe could have resulted in a person's exposure to hazardous chemicals.

Complainant testified she left the lab in a safe condition on November 1, 2019. However, as the event was happening, Complainant wrote she was going to leave the lab in an unsafe condition, then told Ms. Berry she was going to leave the lab in an unsafe condition, and before leaving wrote she was going to leave and come back to make the lab safe per Ms. Berry's instruction. Complainant's contentions after the fact that she misspoke and left the lab in a safe condition are not credible. Complainant admitted to leaving out carboys that contained chemicals and admitted to leaving the uncleaned reactor and pH probe out.

The evidence in the record also demonstrates that Complainant displayed erratic and volatile behavior during the November 1, 2019 incident. This behavior included an emotional conversation with Ms. Berry, where Complainant stated she was having a [REDACTED] Complainant's behavior during this incident, including Complainant repeatedly indicating that the lab would be left in a condition that was not the standard safe condition, reasonably caused Respondent to have concern for Complainant's ability to safely manage the lab and handle dangerous chemicals.

Complainant testified the work week was unusual due to delayed starts as a result of weather and that she was afraid to get in trouble for working outside of her set schedule. Complainant's explanation does not justify her actions during the November 1, 2019 incident. Complainant's behavior during the incident was a failure to comply with expected standards for competent service. On November 1, 2019, Complainant knew she had a four-hour work day regardless of weather delays earlier in the week. Complainant was responsible for completing necessary tasks, including ensuring the lab was in a safe condition, within her hours for the day. An employer can reasonably expect a person in Complainant's position would be able to do this.

It is important to note, that Complainant's emotional behavior during the incident was not isolated. Complainant exhibited emotional behavior in meetings with Ms. Berry and Ms. Smith. The evidence in the record further indicates that Complainant exhibited behavior at work that caused coworkers to feel uncomfortable and unsafe. On November 5, 2019, Ms. Berry did not feel comfortable meeting alone with Complainant based upon Complainant's behavior in previous meetings. Had Complainant's behavior during the November 1, 2019 incident been isolated, the incident would likely warrant different action, particularly as related to the FFD evaluation, by Respondent.

Complainant committed the acts for which she was disciplined and that led to the FFD evaluation. The acts for which Complainant was disciplined constitute a failure to perform

Complainant's duties, including an obligation to ensure safety in the lab. *See* § 24-50-116, C.R.S, § 24-50-125(1), C.R.S., and Board Rule 6-12. Therefore, Ms. Bennett Stewart had just cause to discipline Complainant.

C. The disciplinary action in response to the misconduct was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision to discipline an employee is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused "to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it," 2) failed "to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion," or 3) exercised "its discretion in such manner that after a consideration of the evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001).

As to the first *Lawley* prong, Ms. Bennett Stewart used reasonable diligence and care to procure evidence relating to Complainant's conduct. Prior to making her decision to discipline Complainant, Ms. Bennett Stewart conducted the required Board Rule 6-10 meeting, reviewed information provided by Complainant despite the fact that it was untimely provided, spoke with two chemical engineers, and performed independent research on the chemical Complainant stated she left out in the lab. Complainant's own statements support the lab was left in an unsafe condition. While Ms. Bennett Stewart might have procured additional evidence, her diligence was reasonable.

As to the second *Lawley* prong, Ms. Bennett Stewart gave candid and honest consideration to the evidence. "This prong is satisfied if the appointing authority considered, in good faith, the relevant evidence, including the evidence related to the factors that an appointing authority must consider under Rule 6-9 in exercising its discretion on disciplinary matters." *Stiles*, slip op. at p. 26, par. 47. Board Rule 6-9 states:

> The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness, and effect of the act, the error or omission, type and frequency of previous unsatisfactory behavior or acts, prior corrective or disciplinary actions, period of time since a prior offense, previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered.

Ms. Bennett Stewart wrote in Complainant's Notice of Disciplinary Action:

> After carefully considering all of the information presented to me in our Board Rule R6-10 meeting on December 9, 2019 and your written response provided on December 20, 2019, I find that you did leave the lab in an unsafe state, including knowingly leaving out deionized water and sodium hydroxide, not rinsing the reactor or removing the pH probe…Based on the totality of the information, I have determined that you did leave the lab in an unsafe condition for at least an hour and a half, and you did not meet expectations of your position to ensure that safety standards are met and exceeded. Laboratory safety accounts for 20% of your position description.

I also find that your conduct placed members of our community at a significant safety risk, and is serious enough to warrant immediate discipline.

It is evident from the analysis and discussion in the Notice of Disciplinary Action that Ms. Bennett Stewart considered the factors set forth in Board Rule 6-9. Ms. Bennett Stewart concluded that Complainant's behavior, because of the potential safety issue, was sufficiently serious to warrant immediate discipline. It is also evident that Ms. Bennett Stewart considered the information available to her in good faith, as she contemplated a much more serious disciplinary action of termination and after consideration of evidence took a lesser form of discipline, temporary reduction of pay. It is also evident Ms. Bennett Stewart gave candid and honest consideration to the evidence before her based upon Ms. Bennett Stewart's testimony at the hearing about her evaluation of Complainant's actions.

As to the third *Lawley* prong, the evidence in the record does not demonstrate that, "reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley,* 36 P.3d at 1252. Reasonable persons fairly and honestly considering the evidence may reach the same disciplinary decision as the decision made by Ms. Bennett Stewart. Complainant's misconduct here is sufficiently flagrant and serious that immediate discipline was appropriate. *See* Board Rule 6-2; *see also* § 24-50-125(1), C.R.S.

Ms. Bennett Stewart's decision to discipline Complainant was not contrary to rule or law. Pursuant § 24-50-125(1), C.R.S., Respondent may administer discipline to a certified state employee for, "failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform his duties, or final conviction of a felony or any other offense which involves moral turpitude, or written charges thereof may be filed by any person with the appointing authority, which shall be promptly determined." *See also* Board Rule 6-12. Complainant demonstrated an inability to perform her job duties on November 1, 2019. As discussed above, Ms. Bennett Stewart gathered evidence, considered evidence, and reached a reasonable decision. Ms. Bennett Stewart's decision was not contrary to rule or law.

For all of these reasons, Respondent's decision to temporarily reduce Complainant's pay was not arbitrary, capricious or contrary to rule or law.

D. Respondent's January 28, February 7, and April 29, 2020 actions were not arbitrary, capricious, or contrary to rule or law.

As a result of the November 1, 2019 incident and other behaviors exhibited by Complainant, Respondent made a determination to request Complainant undergo a FFD evaluation. As discussed above, Respondent demonstrated by preponderance of the evidence Complainant committed the acts for which she was disciplined and that precipitated the FFD evaluation. The FFD evaluation determined Complainant was not fit for duty. Subsequent to the not fit for duty determination, Respondent placed Complainant on unpaid leave on January 28, 2020, determined Complainant was not able to perform her position with or without reasonable accommodations on February 7, 2020, and administratively discharged Complainant on April 29, 2020. These actions impacted Complainant's base pay, status, and tenure. Although not disciplinary in nature, the actions were adverse to Complainant and stemmed from Respondent's decision to place Complainant on leave following the November 1, 2019 incident. As a result, Respondent bears burden to prove these actions were not arbitrary, capricious, or contrary to rule or law.

As discussed above, Respondent had just cause to discipline Complainant for her actions on November 1, 2019. On November 1, 2019, Complainant failed to "comply with standards of efficient service or competence." *See* § 24-50-125(1), C.R.S. The nature of Complainant's conduct during the incident, combined with Complainant's past behavior, caused Respondent to have concern for Complainant's ability to safely perform her job duties and reasonably led to a fitness for duty evaluation. Complainant did not appeal or grieve Respondent's decision to require an FFD evaluation.

Complainant exhibited a pattern volatile behavior at work that culminated in an incident where Complainant had an emotional break down and left the lab in an unsafe condition. Even during the November 1, 2019 incident, Complainant was aware of the safety standards and was experiencing what Complainant described as [redacted] that caused her not to be able to meet those standards. It would have been irresponsible after that incident, with the past pattern of volatile behavior, for Respondent to allow Complainant to continue in her position without some sort of fitness for duty assessment. Complainant worked in a position where she handled dangerous chemicals and was responsible for ensuring others did the same.

As to the first *Lawley* prong, Ms. Bennett Stewart used reasonable diligence and care to procure evidence prior to removing Complainant from paid administrative leave, and administratively separating Complainant from employment. Respondent through the ADA Compliance Office used reasonable diligence in determining Complainant could not be accommodated in her position.

Prior to removing Complainant from paid administrative leave, Ms. Bennett Stewart gathered evidence during the disciplinary process related to the November 1, 2019 incident. After Complainant failed to complete the first FFD evaluation, Ms. Bennett Stewart elected to give Complainant a second opportunity to complete the FFD evaluation. In doing that Ms. Bennett Stewart continued to "gather" evidence and sought a complete FFD evaluation result before taking any adverse actions against Complainant related to leave. Ms. Bennett Stewart used reasonable diligence and care in procuring the FFD evaluation, and making a determination to remove Complainant from a paid administrative leave.

Following receipt of the FFD evaluation results, Ms. Bennett Stewart referred Complainant's case to the ADA Compliance office. The ADA Compliance Office has expertise in the ADA accommodations process. Ms. Smith reviewed the FFD evaluation results. Ms. Smith clarified concerns with Dr. Axelrod about the FFD evaluation results prior to determining Complainant could not be accommodated in her position. Respondent demonstrated it used reasonable diligence and care to gather information during the ADA process and making the determination that Complainant could not be accommodated in the position of Lab Coordinator I.

At the end of the process and prior to administratively separating Complainant, Ms. Bennett Stewart conducted a Reasonable Employer Meeting. Ms. Bennett Stewart met with, among others, Ms. Smith, Ms. Berry, and a person who handled FML. Ms. Bennett Stewart received confirmation that Complainant had exhausted leave, had not applied for short-term disability, and about the ADA process. Ms. Bennett Stewart questioned the inability to find Complainant a position during the search process and received verification a position could not be found. Respondent demonstrated by preponderance of the evidence Ms. Bennett Stewart used reasonable diligence and care in gathering information prior to administratively separating Complainant from employment.

As to the second *Lawley* prong, Ms. Bennett Stewart gave candid and honest consideration to the information available prior to placing Complainant on leave, prior to determining Complainant could not be accommodated in her position, and prior to administratively separating Complainant from employment. Dr. Axelrod determined Complainant was unfit for duty. There is no evidence in the record that false information was provided to achieve a desired discriminatory result in the FFD evaluation. Complainant never presented information to Respondent that contradicted the FFD evaluation results. The evidence in the record demonstrates Ms. Bennett Stewart in good faith relied on the FFD evaluation results and the expertise of the ADA Compliance Office as it addressed Complainant's case following the FFD evaluation. The evidence in the record also demonstrates that Ms. Bennett Stewart did not address the situation with Complainant lightly. Respondent demonstrated by preponderance of the evidence that Ms. Bennett Stewart gave candid and honest consideration in making decisions related to Complainant following the November 1, 2019 incident.

As to the third *Lawley* prong, the evidence in the record does not demonstrate that, "reasonable persons fairly and honestly considering the evidence must reach contrary conclusions." *Lawley,* 36 P.3d at 1252. Ms. Bennett Stewart reasonably placed Complainant on unpaid leave upon receiving notice from an FFD evaluation that Complainant was not fit for duty and, as discussed above, allowed Complainant to proceed through the ADA process as required by law. Ms. Bennett Stewart made the decision to administratively separate Complainant from employment only after all avenues had been exhausted. A reasonable employer with an unfit for duty result could follow the steps taken by Respondent in this case and could reach the same conclusions as Respondent.

Respondent's decision was not contrary to rule or law. Board Rule 5-15 states, in part:

> Administrative leave may be used to grant paid time when the appointing authority wishes to release employees from their official duties for the good of the state. In determining what is for the good of the state, an appointing authority shall consider prudent use of taxpayer and personal services dollars and the business needs of the department.

Ms. Bennett Stewart made her decision to remove Complainant from paid administrative leave in compliance with Board Rule 5-15. Ms. Bennet Stewart determined continuing paid administrative leave was not a prudent use of taxpayer dollars after Complainant had already been on paid administrative leave for a period of 2.5 months and it was determined Complainant was not fit for duty in her position.

As discussed above, Respondent allowed Complainant to proceed through the ADA accommodations process as required by law. As discussed below, Respondent complied with Board Rule 5-6 when it determined it would administratively separate Complainant from employment.

Respondent failed to comply with requirements to provide notice of appeal rights when it made the decision to place Complainant on unpaid leave as required by Board Rule 8-4. Despite Respondent's error, Complainant timely appealed the decision and this failure did not prejudice Complainant.

E. Respondent complied with Board Rule 5-6 when it administratively separated Complainant from employment.

An employee's administrative separation from employment is controlled by Administrative Procedure 5-6, which states:

> 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 shall inform the employee of appeal rights and the need to contact the employee's retirement plan on eligibility for retirement.
>
> B. An employee cannot be administratively discharged if FML, state family medical leave, or short-term disability leave (includes the thirty (30) day waiting period) apply, or if the employee is a qualified individual with a disability under the ADA who can reasonably be accommodated without undue hardship.
>
> C. A certified employee who has been discharged under this rule and subsequently recovers has reinstatement privileges.

Administrative Procedure 5-6 imposes a series of requirements before an employee can be discharged for exhaustion of leave: (1) the employee must have exhausted all credited paid leave; (2) the employee must be unable to return to work; (3) the employee cannot have the protection of FML or short-term disability leave; (4) the employee cannot be a qualified individual with a disability under the ADA who can be reasonably accommodated; (5) there must be a good faith effort to communicate with the employee concerning his or her work status and plans; and (6) there must be a written notice of the discharge issued after such communication or good faith communication effort, and this notice must have appeal rights and retirement plan information.

In this case, the evidence presented demonstrates that Complainant exhausted all credited paid leave, and was unable to return to her full-time position at the time of her administrative separation, satisfying the first and second requirements. In addition, Complainant received written notice of her administrative separation via the Notice of Administrative Discharge/Separation issued April 29, 2020.

Complainant exhausted her FML protections prior to the Notice of Administrative Discharge/Separation issued April 29, 2020 and did not have any additional protected FML. Complainant did not apply for short-term disability leave prior to her administrative separation, despite receiving information about short-term disability leave. Therefore, Complainant was not protected by FML or short-term disability leave at the time of her administrative separation, satisfying the third requirement.

As discussed above, Respondent could not reasonably accommodate Complainant under the ADA. Complainant could not perform the essential functions of her job and Respondent could not find an alternate position for Complainant that met Complainant's restrictions. This satisfies the fourth requirement for administrative separation under Administrative Procedure 5-6.

Respondent made good faith efforts to communicate with Complainant throughout her period of paid administrative and unpaid administrative leave. Respondent provided Complainant notice of her leave status and communicated with her regarding reasonable accommodations. This satisfies the fifth requirement for administrative separation under Administrative Procedure 5-6.

The Notice of Administrative Discharge/Separation contained the requisite appeal rights and retirement plan information, satisfying the sixth requirement.

Respondent administratively separated Complainant in compliance with Board Rule 5-6.

V. COMPLAINANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS.

Section 24-50-125.5(1), C.R.S., provides, in pertinent 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 bringing the appeal 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.

A frivolous action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). Actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(B). "Groundless means 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 8-33(C).

Complainant is not entitled to an award of attorney's fees. As discussed above, Respondent's actions had a rational basis. Respondent did not take adverse action against Complainant as a means to annoy, harass, or otherwise abuse Complainant.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which she was disciplined.

2. Respondent's actions were not arbitrary and capricious, or contrary to rule or law.

3. Respondent did not discriminate or retaliate against Complainant in violation of CADA.

4. Respondent did not retaliate against Complainant in violation of the Whistleblower Act.

5. Because Respondent's personnel action was not frivolous, done in bad faith, or groundless, Complainant is not entitled to an award of attorney fees and costs.

ORDER

1. Respondent's decisions are affirmed.

2. Complainant's claims will be referred to the State Personnel Director for review of matters within the State Personnel Director's jurisdiction.

Dated this 19th day,
Of February, 2021,
At Denver, Colorado.

/s/

K. McCabe
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203
(303) 866-3300

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of February, 2021, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Eric Maxfield, Esq.
Eric@maxfieldgunning.com

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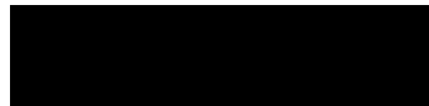

APPENDIX

EXHIBITS

COMPLAINANT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibit D.

RESPONDENT'S EXHIBITS ADMITTED: The following exhibits were admitted into evidence: Exhibits 1 through 63.

WITNESSES

The following is a list of witnesses who testified in the evidentiary hearing:

Alisha Bennett Stewart, Director of Human Resources

Meredith Smith, Sr. Title I & Title II Program Manager, ADA Compliance

Doctor Evan M. Axelrod, Psy.D., ABPP, Nicoletti-Flater Associates

Molly Berry, Principal Employee Relations Consultant

Doctor Wendy Young, Senior Instructor and Associate Chair

Ann Greco

Doctor Anushree Chatterjee, Associate Professor

Jason DesVeaux, Former Student, Employee, and Chem-E-Car Club Member

Marissa Hardy, Student and Chem-E-Car Club Member

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 served 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 served 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 Rules 8-62 and 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 8-66, 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 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 8-60, 4 CCR 801.