

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

TIFFANY RENEE MARTIN,
Complainant,

v.

GOVERNOR'S OFFICE OF INFORMATION TECHNOLOGY,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on December 5, 2022 through December 8, 2022. The hearing was conducted remotely by web conference. The record was closed on December 9, 2022. Complainant Tiffany Renee Martin (Complainant) appeared and represented herself. Respondent Governor's Office of Information Technology (Respondent or OIT) was represented by Eric W. Freund, Senior Assistant Attorney General, and Carlos Ramirez, Assistant Attorney General. Respondent's advisory witness, and Complainant's former appointing authority, was Laura Calder, who was, at all relevant times, OIT's Deputy Chief Financial Officer (CFO), Interim CFO, and the CFO.

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

MATTERS APPEALED

Complainant appeals a Step Two grievance decision, alleging that it violates her rights under the Colorado Anti-Discrimination Act (CADA). More specifically, Complainant alleges that Respondent discriminated against her on the basis of race, age, and sex, and retaliated against her, all in violation of CADA.

For the reasons discussed below, Complainant has failed to establish that Respondent discriminated against her on the basis of race, age, or sex, or retaliated against her. Therefore, Complainant's claims are **dismissed**.

ISSUES

- I. Over which of Complainant's claims does the State Personnel Board (Board) have jurisdiction?
- II. Did Respondent discriminate against Complainant on the basis of either race, age or sex in violation of CADA?
- III. Did Respondent retaliate against Complainant in violation of CADA?
- IV. Is Respondent entitled to an award of attorneys' fees and costs?

FINDINGS OF FACT

Background

1. Complainant began working for the State of Colorado in 1994. She currently holds a position of Administrator II (Voice Services) in OIT's Infrastructure Operations group. Complainant is a certified employee.
2. During most of the times relevant to this matter, Complainant was assigned to OIT's Financial Operations group.
3. Laura Calder, who is currently OIT's Chief Revenue Officer, was Complainant's supervisor from 2017 until August 2019, and then again from May 2020 until June 1, 2021, when Complainant transferred from Financial Operations to OIT's Infrastructure Operations.
4. Libby Dollar was Complainant's supervisor from August 2019 until May 2020.
5. Complainant's duties during all times relevant to this matter included processing state agencies' telecom requests and maintaining the inventory of state-owned telecom assets in a computer program known as TEMS, an acronym for telecom expense management system.

2017 Spot Award and Promotion

6. Since 2011, Complainant was assigned to OIT's Financial Operations group and was the subject matter expert (SME) for the state's inventory of telecom assets.
7. Complainant received a \$1,000 spot award in June 2017. (Stipulated Fact)
8. Complainant received a promotion to Budget Analyst II, through reallocation, with a 10% salary increase to \$69,590 effective September 1, 2017. Complainant completed the trial service period without reversion. (Stipulated Fact)

Investigation of Complainant's Conduct October-November 2017

9. On October 27, 2017, one or more OIT employees reported that on October 24, 2017 or October 25, 2017, Complainant was heard on the telephone loudly and inappropriately berating someone.
10. Barb Davis, who was then a Senior Human Resources (HR) Business Partner, investigated and concluded that "[t]he reported behavior is not in keeping with our values of teamwork, respect, integrity and service." Ms. Davis interviewed four employees about this incident and Complainant's conduct generally, although she chose not to interview Complainant. Ms. Davis concluded her investigation report, issued on November 14, 2017, as follows:

HR Recommendation: The findings demonstrate that a pattern of aggressive and confrontational behavior on the part of Tiffany Martin has been observed for over the past year. The reported behavior includes: yelling, display of anger and disrespect, inappropriate confrontation, cursing, and berating an internal customer. This behavior impacts other employees in the area making them uncomfortable, and unsettled as demonstrated by wanting to use earbuds during these periods.

Human Resources is recommending that a corrective action be issued to Tiffany Martin for inappropriate behavior and behavior not in keeping with OIT Values and the expectations listed in Tiffany's performance evaluation. It is suggested that a zero tolerance off [sic] these behaviors be communicated and that clear expectations be outlined within the corrective action. In addition, it is recommended that training, coaching and a change of supervisor be evaluated.

11. Complainant's then-supervisor, Ms. Calder, decided against giving Complainant a corrective action for this incident.

Complainant's Expressed Concerns in November 2017

12. On November 9, 2017, Complainant met with Ms. Davis and Ms. Calder to discuss Complainant's concerns about how she was being treated in Financial Operations and her work assignment with Voice Services. Complainant alleged that she was not treated as well as other employees with respect to requests for working at home, performing duties outside her assigned role without additional compensation, not being assigned high visibility projects that might lead to recognition and monetary awards, and being disrespected. She did not allege that she was discriminated against on the basis of her membership in a class protected by CADA.

13. On November 14, 2017, Ms. Calder addressed Complainant's concerns via email, explained that Complainant was mistaken about being treated less well than other OIT employees, and concluded that Complainant's concerns were without merit and required no management action.

Complainant's Performance Evaluations, 2017-2018, 2018-2019

14. For Complainant's job performance review period from April 1, 2017 through March 31, 2018, Ms. Calder gave Complainant an overall rating of "2," indicating "successful," with "3"s ("exceptional") for the following job duties: inventory and financial dispute updating, monitoring, review and analysis; perform and maintain role of SME of TEMS (telecom inventory system); and a "3" for the core competency of Job Knowledge. Ms. Calder did not mention Ms. Davis' investigation into Complainant's alleged October 2017 misconduct.

15. In her Performance Appraisal Narrative, Ms. Calder wrote, in pertinent part:

Tiffany is a dedicated [sic] and truly cares about the service she provides to our customers. I am grateful for all her work on these projects this year and for being such a valuable team member and sharing the knowledge and experience she has.

16. For the annual job performance evaluation for April 1, 2018 through March 31, 2019, Ms. Calder gave Complainant an overall rating of "2." Complainant received ratings of "3" for Objective – "Perform and maintain the role of SME of TEMS (telecom inventory system)" and a "3" for the core competency of Job Knowledge.

2019 Spot Awards and Reallocation Request

17. Complainant received a \$500 spot award in August 2019. (Stipulated fact)

18. On August 21, 2019, Complainant submitted her position description to Ms. Calder for a reallocation.

19. Ms. Calder referred Complainant's reallocation request to OIT's HR department, which wanted to do a "desk audit" of Complainant's job position. Upon becoming the interim CFO in August 2019, Ms. Calder reassigned supervision of Complainant to Libby Dollar. Both Ms. Calder and Ms. Dollar failed to follow up with HR regarding Complainant's reallocation request, which was not acted upon until July 2020.

20. Complainant was aware that other reallocations were approved in November 2019 and believed that she was being treated less well than other employees as evidenced by the delay in processing her reallocation. However, she did not file a grievance or file a petition for hearing with the Board at that time.

21. Complainant received a \$500 spot award in November 2019. (Stipulated fact)

L.K. Hired

22. In October 2019, Ms. Calder and Derek Martinez, Accounting Manager, created a new position within OIT's Financial Operations group: Telecom Revenue Analyst II, a position that was filled by L.K.¹ Complainant did not apply for that position, which was essentially an accounting position. L.K.'s duties included reviewing vendor invoices for telecom service and billings to state agencies for those telecom services. Mr. Martinez served as L.K.'s supervisor. The position was created and staffed without consultation with, or input from, Complainant.

23. Complainant criticized her exclusion from the hiring process and felt disrespectful because of that exclusion. In addition, Complainant was resentful of L.K. arising from Complainant's perception that her job duties and L.K.'s overlapped to a degree, that L.K. was inexperienced while Complainant was the SME regarding the TEMS inventory, and that L.K.'s hiring threatened Complainant's own job security.

24. Mr. Martinez later expressed regret for not involving Complainant in the creation of the Telecom Revenue Analyst II position and the hiring of L.K.

25. After L.K. was hired, there was some confusion about where L.K.'s duties began and Complainant's ended. This led to friction and frustration between L.K. and Complainant.

26. Complainant was frustrated, and felt excluded and disrespected when she occasionally was not brought into email exchanges or included in meetings that arguably touched upon her area of expertise. Complainant believed that her exclusion was persistent and intentional.

27. Complainant's supervisors directed Mr. Martinez and L.K. to include Complainant in all matters pertaining to Complainant's areas of expertise.

28. Complainant was also offended when L.K. questioned Complainant's advice or told Complainant that she, L.K., needed to confirm Complainant's advice with L.K.'s supervisor, Mr. Martinez.

¹ Initials are used to protect this person's privacy. L.K.'s name is immaterial.

29. Complainant perceived L.K. as inexperienced and purposefully undermining of Complainant's position and reputation. Complainant was also offended that L.K.'s salary was higher than hers.

December 2019 Incident

30. On December 18, 2019, L.K. emailed Mr. Martinez to inform him of an incident with Complainant.

31. L.K. wrote that Complainant "had created an environment in which it was difficult to perform my duties due to her bullying." L.K. reported that, during a meeting with Complainant to obtain information and understanding of certain quotes, Complainant began yelling and cursing and her tone "was often confrontational and extremely hostile."

32. After the meeting, L.K. overheard Complainant discussing the meeting with Jerry Haffner of OIT's Voice Services. L.K. heard Complainant referring to L.K. as a "young blood" without professional experience. L.K. felt bullied by this comment and found Complainant's then-supervisor, Ms. Dollar, who intervened and took Complainant and Mr. Haffner into her office to continue their conversation without being overheard. L.K. was unsettled and left for the day. She ended her email to Mr. Martinez as follows:

At this point I have decided to document the incident and to formally ask you to address the toxic nature of Tiffany's behavior with her supervisor. I would hope that between you and Libby an agreement can be reached in which a hostile work environment can thus forth be completely eliminated and a professional relationship can take place. I am nervous to have to address Tiffany again but understand it is essential to the productivity of my job. I will continue to make every effort to treat her with respect and hope that I can be treated with mutual respect as well. I appreciate you looking into this matter.

33. At the evidentiary hearing, neither party introduced evidence addressing actions, if any, taken arising from L.K.'s December 18, 2019 email to Mr. Martinez.

February 2020 Incident and Investigation

34. On February 18, 2020 L.K. emailed Ms. Calder, Ms. Dollar, and Mr. Martinez with a subject line, "February 18, 2020 Incident." L.K. overheard Complainant making disparaging remarks about L.K. to another employee. In her email, L.K. wrote, in pertinent part:

Tiffany's tone was very hostile as she asserted that "she is a dumbass". She continued with statements such as, "she thinks she knows everything but she looks like an idiot" and "she can keep looking like an idiot and failing" and "she thinks she has all this experience but just looks like a dumbass". . . . I felt sick to my stomach and very emotional as I don't know how to proceed with my job. I want to do what is right and am willing to hear out ways that I can improve but at this point I am so afraid to ask a question of anyone within the telecommunication group as I don't know how Tiffany is going to perceive my question and lash out. I don't want to be perceived as creating a problem within the office but I also don't want to feel afraid to come in or enter into a conference call with Tiffany.

I previously documented a large incident in the office and formally asked my supervisor, Derek Martinez, to address the issue with Tiffany's supervisor, Libby Dollar. After this occurrence she has lashed out verbally in two separate meetings and now once again in the office. I would like some direction on next step as I understand our workplace harassment policy states I should speak to HR but I wanted to address this with internal management first. I am attaching a copy of the first incident email. I really just want to do a good job in my position, ask meaningful questions so I can grow, and provide positive progress for the organization.

35. Pursuant to L.K.'s complaint, Ms. Davis of OIT's HR department investigated and issued a report to Ms. Calder on April 7, 2020.

36. Ms. Davis concluded that Complainant exhibited bullying behaviors not in compliance with OIT values, including yelling, cursing, and belittling other employees.

37. During her interviews with Ms. Davis in late March 2020,² Complainant admitted that her communication style was aggressive and confrontational and that she was fine with that.

38. In one of those interviews, Complainant alleged that she was the victim of bias "based on the fact that I am not a 'Finance' person and implicit bias racially since I am one of only a few minorities and how I am consistently treated and how other minorities in Finance have had to fight so hard for promotions and reallocations when they are given so freely to others"

39. Ms. Davis did find that Mr. Martinez and L.K. did not always include Complainant in discussions that overlapped into telecom issues. Ms. Davis characterized Complainant as "territorial and defensive of her job" and *the* telecom expert in OIT's Financial Operations group.

Complainant's March 2020 Self-Evaluation

40. In a self-evaluation dated March 13, 2020 that Complainant drafted in preparation for her annual job performance evaluation, Complainant characterized her workplace as "a hostile work environment" in which, "in spite of consistently being opposed, ignored and/or challenged, like I'm inconsequential," she raised issues despite believing "that doing so will negatively reinforce the opinions that I am aggressive, contentious and unprofessional." She wrote:

I have consistently been excluded from discussions and decisions that could impact not only the effectiveness of my position, but OIT as a service provider. As the senior, most experienced and knowledgeable member of my "team", I have been relegated to the role of being a bit player and afterthought, only being looped in and considered when all else fails and even then, begrudgingly so. Inexperienced personnel are being enabled and empowered to make uninformed decisions with negative consequences and no accountability; meanwhile I'm perceived and treated like a difficult antagonist for having the audacity to actually acknowledge and expose those facts, while being told to just, "Let it go, because we're trying to move forward".

² Ms. Davis' written summary of her two interviews with Complainant pursuant to L.K.'s complaint against Complainant for alleged bullying indicates those interviews occurred on March 27 and March 30, 2020.

41. In response to the question, “How can your supervisor help you be more successful and productive in your job? How could OIT better use your talents?”, Complainant wrote:

Consider that I may have more to offer, other than just helping others to be successful in meeting the requirements of their (higher paying) job descriptions. Not allowing inexperienced employees to haphazardly proceed in their ill-advised endeavors, without seeking guidance, input or approval from more competent, experienced and reputable sources. Ensuring I’m included vs. excluded. Being supportive of my position and experience vs. opposing me on behalf of inexperienced employees with a twisted sense of entitlement and unwarranted sense of superiority.

42. Complainant also alleged disparate treatment with respect to her 2019 reallocation request: while her reallocation request lay dormant, several other reallocations were implemented, which indicated to Complainant that previous implicit bias had transformed into explicit bias. Complainant did not identify the specific basis of the alleged bias, e.g., race, age, or sex.

43. Complainant closed her self-evaluation as follows:

My individual mission and personal objective is to be recognized, respected and compensated for the wealth of knowledge and experience, I alone possess. That being said, I will continue using my voice to enlighten, expose and challenge inadequacies, inequities or any other issues regarding me and my position; regardless of how unpleasant or uncomfortable, others may feel by my doing so. I will not sit silent, while being willfully overlooked, undermined, devalued and discriminated against.

Complainant’s 2019-2020 Job Performance Evaluation

44. In her annual performance evaluation for the review period April 1, 2019 through March 31, 2020, completed in June 2020 by Ms. Calder after she was once again Complainant’s supervisor, Complainant received an overall rating of “2,” successful. She received a “3” rating for the objective “inventory and financial dispute updating, monitoring, review and analysis, and a “3” rating for the core competency of Job Knowledge. However, Complainant was rated at “1” (Needs Improvement) under Values for “Teamwork,” and was rated as a “1” for the core competencies of “Communication” and “Interpersonal Relations.” Ms. Calder’s comments regarding Teamwork: “Tiffany has an opportunity to work on her teamwork with her Finance-Telecom team mates who are also internal customers. Several examples of this need for improvement come from emails that do not reflect OIT values or standards of professionalism.”

45. In response to Ms. Calder’s comments, Complainant alleged that other employees were undermining her work and, when she corrected them, she was accused of being aggressive and unprofessional. She wrote, “I will never aim to appease blatantly biased fellow employees and I will continue using my voice to enlighten, expose and challenge inadequacies, inequities or any other issues regarding me and my position; regardless of how unpleasant or uncomfortable, others may feel by my doing so. I will not idly sit silent, while being willfully overlooked, undermined, devalued and discriminated against.”

Other 2020 Events

46. Effective July 1, 2020, Complainant received a promotion to Administrator IV, through reallocation, with no pay increase due to salary freezes occurring due to COVID. Her salary was maintained at \$73,824. Complainant completed the trial service period without reversion. (Stipulated Fact) However, Ms. Calder twice attempted to obtain a salary increase for Complainant despite the wage freeze, but she was unsuccessful.

47. On July 7, 2020, Complainant emailed Bob Nogueira, OIT's Chief People Officer and complained about the delay in OIT's handling of her reallocation request and the fact that the reallocation was not accompanied by a raise in base salary. She wrote, in pertinent part:

I have been with the State for 26 years, with OIT since its inception and this is not the first time (at OIT) I will be receiving a change in title, with no increase in pay. Nor is it the first time that I have inexperienced coworkers with higher paying salaries, that are dependent on my knowledge, experience and expertise, to do their jobs. Attached is a copy of my self-eval that I submitted in March. Receipt of this document wasn't even acknowledged until the All Hands where systemic racism was brought up. This is documented proof that bias and discrimination [sic] has been an issue for me personally at OIT, prior to systemic racism getting national attention. I look forward to hearing from you.

48. Complainant received a \$500 spot award in July 2020. (Stipulated Fact)

Salary Adjustment Pursuant to Equal Pay for Equal Work Act

49. Effective March 1, 2021, Complainant received a salary increase to \$77,531, an approximate 5% increase, resulting from a review under the newly enacted Equal Pay for Equal Work Act. (Stipulated Fact)

Complainant Complains of Exclusion and Being Undermined

50. In an email exchange with Ms. Calder on March 18, 2021, Complainant alleged that L.K. and a vendor made changes to the TEMS inventory without Complainant's knowledge using Complainant's credentials.

51. Ms. Calder investigated the matter and on March 25, 2021 emailed Complainant Ms. Calder's conclusion that L.K. did not use Complainant's credentials to make changes to TEMS. Ms. Calder admonished Complainant for making unsubstantiated accusations about her colleagues.

52. When informed of Ms. Calder's conclusions about the matter, Complainant responded in an email on March 25, 2021, and wrote, in pertinent part:

It's funny that you now take issue with unsubstantiated claims but had no issue with [L.K.] making unsubstantiated claims against me; on the contrary you had her go to HR to do so, so don't ever allege to me that there hasn't been blatant bias and malicious intent. If I had malicious intent as you inferred, I would have already filed cases against the lot of you. I have given you every opportunity to effectively and amicably address these issues for me, yet you continue to

prove just how unabashedly biased you are against me. You have once again validated all of my accusations of unapologetic favoritism, double standards, exclusion, discrimination and degradation [sic] and for that, I'm grateful. Sincerely, thank you.

53. Later on March 25, 2021, Ms. Calder responded via email and informed Complainant that she was referring Complainant's concerns to OIT's HR department for investigation.

54. On March 26, 2021, Complainant emailed Mr. Nogueira to complain of the discrimination of which she believed she was the victim. She wrote:

Good morning Bob Last year (7/7/20) I reached out to you regarding what I consider the blatant bias that I am a victim of. You and I had a phone call/conference (7/15/20) and that was the end of it; there was no follow up or follow through. In the 8 months since then, the degradation and discriminatory behavior continues. There has been no acknowledgment or accountability for the discrimination I suffer at the hands of my manager, Laura Calder and the employees she empowers to do the same. Laura has made it abundantly clear that she has no intention of acknowledging or effectively addressing my concerns and continues to defend those who exclude and undermine me, while accusing me of having malicious intent when I provide her with documented proof of the exclusion and the impact to my credibility. Her negligence and the cumulative offensives have made the situation untenable for me and I will not continue to suffer in silence, patiently waiting for HR to address the critical position I am in. Therefore, I need to know if this email to you will suffice in initiating an exploratory conversation that will lead to an adequate investigation into my allegations of inequality, inequity, discrimination and unapologetically blatant bias, or do I need to escalate this further? I look forward to hearing from you. -- Tiffany Renee Martin Asset Management Administrator

55. Mr. Nogueira informed Complainant that OIT's HR department would open an investigation into Complainant's concerns.

56. OIT's HR department decided to retain the services of a third party to investigate Complainant's concerns and contracted with Flynn Investigations Group to conduct the investigation.

57. In March 2021, L.K. transferred to a different position within OIT's Financial Operations and was no longer in direct and frequent contact with Complainant.

Flynn Group Investigation into Complainant's Discrimination Claims

58. Respondent hired the Flynn Investigations Group (Flynn Group) to investigate allegations of discrimination raised by Complainant [in her Self-Evaluation and email exchanges with Ms. Calder in mid to late March 2021]. The Flynn Group issued its findings through a detailed Investigation Report on June 22, 2021. Complainant was notified of the general findings on July 19, 2021. (Stipulated Fact)

59. The investigation was active from March 26, 2021 to June 22, 2021.

60. Mr. Flynn, who conducted the investigation, interviewed ten individuals, including Complainant, Ms. Calder, L.K., Ms. Dollar, and Mr. Martinez, and reviewed dozens of documents, including email exchanges.

61. Mr. Flynn identified the allegations he was tasked with investigating as (1) Complainant is intentionally excluded from meetings and discussion by L.K., and L.K. purposefully interferes with Complainant's work; and (2) Complainant's most recent 5% pay increase is unfair based on her assumption that other asset managers received a greater increase. Mr. Flynn concluded that it was less likely than so that these allegations were true.

62. In his Executive Summary, Mr. Flynn wrote:

Ms. Martin seems to view [L.K.] as a threat to her job security and a daily affront to her sense of expertise in her field. Ms. Martin remains angered by the prior investigation finding that she engaged in objectively rude and abusive treatment of [L.K.]. This ire seems to have colored Ms. Martin's perception of subsequent encounters with [L.K.] and Ms. Calder, leading to her present complaints, which seem to demonstrate a resentful perpetuation of the preexisting conflict.

Ms. Martin claims that her alleged poor treatment is connected to her race, African American. There is no support in the available information for this contention. Rather, it seems much more likely that, to the extent Ms. Martin was treated differently by anyone, differential treatment is the result of Ms. Martin's combative nature. According to multiple witnesses, Ms. Martin has been behaving in a similarly objectionable manner at work for years.

Complainant's 2020-2021 Job Performance Evaluation

63. For the annual performance review period of April 1, 2020 through March 31, 2021, Complainant received an overall rating of "2." For the objective of "Fulfills leadership roles and responsibilities and provides direction in a responsible, accountable, and effective manner," Complainant was rated a "1." Under the Values rubric, Complainant was rated as "1" for Respect and Teamwork. Under core competencies, Complainant was rated "1" for Communication and Interpersonal Relations.

64. Complainant objected to her "needs improvement" ratings, writing, in pertinent part,

I've made several complaints and had several conversations about being undermined, excluded, provoked & disrespected yet Laura has never effectively addressed any of my concerns; on the contrary, she has continued to empower and side with those that do and I have more respect for myself, than to accept such blatant disrespect and discrimination from anyone. Laura doesn't support or defend me, therefore I continue to defend myself and am then deemed disrespectful for doing so.

Transfer Out of Financial Operation to OIT's Infrastructure Operations in June 2021

65. A desk audit was conducted for Complainant's position, resulting in Complainant being transferred from Finance to Infrastructure Operations (Voice Services) effective on or about June 1, 2021. (Stipulated Fact)

66. Complainant does not have any issues with her current supervisor and her current team.

Grievance After Flynn Investigative Report

67. On July 19, 2021, Ms. Davis emailed Complainant with the results of the Flynn investigation. Ms. Davis wrote, "It was determined that there were no findings to support your allegations."

68. Complainant filed a Step One grievance on July 29, 2021. The grievance was heard by her supervisor, Gerald L. Haffner, Supervisor, OIT Voice Services. (Stipulated Fact)

69. Complainant included a "Statement of Grievance" with her grievance form identifying the four grounds serving as the basis of her grievance. Those grounds included: "1. Interference with Job Responsibilities," "2. Hostile Work Environment," "3. Unequal Pay," and "4. Back Pay." (Stipulated Fact) As relief, Complainant requested receiving equal pay for equal work, seeing that managers were held responsible for their actions, and having Respondent ensure that all employees received the same training.

70. Complainant and Mr. Haffner met on August 5, 2021, to review Complainant's grievance. (Stipulated Fact)

71. On August 19, 2021, Mr. Haffner issued his Step One Grievance Response and denied Complainant's grievance. (Stipulated Fact)

72. Mr. Haffner's Step One decision was as follows:

Based on the information we discussed in the informal grievance meeting and additional information gathered, I have decided to deny the requested relief as noted above. My decision is based on the following determinations of your four grievance concerns:

1. Interference with job responsibilities:

Assignment and responsibility changes to meet changing business needs had been made on the Finance team adding a finance representative to oversee the billing and financing for telecommunications which impacted your role and your contacts. I did not find any job interference outside of normal business changes.

There was an issue with the TEMS system not showing who made the changes and this issue was determined by MTS³ to be a glitch in the system.

³ MTS was a vendor of OIT's telecom products.

2. Discrimination based on Race:

You stated that your job was interfered with based on race because “why would they ([L.K.] and Laura) not use my knowledge of the system over a new hire that does not know the system”. I did not find any discrimination based on race and have no emails or IM’s to substantiate this claim.

3. Hostile Work Environment:

Hostile work environment is an extreme form of discrimination and harassment under Title VII, and I did not find that a hostile work environment existed. I found no emails, IM’s, or other evidence that substantiated this claim at this time. As to all employees having to take the same training for actions taken, I cannot discuss if any action was taken against or if any training was given to another employee as a result of this action.

4. Unequal Pay/Back Pay:

My findings are that you were given an increase in pay in March 2021. In speaking with HR and evaluating the desk audit and process, this was based on the closest job description that HR could find to what your job duties were at that time. I have reached out to your old supervisor and she stated that she did not get a raise request from you, but does have some emails directing you to HR to get the process started. During this timeframe, the followed process for reclasses/ promotions and in-range increases was stopped indefinitely within OIT due to COVID-19 impacts and budget reductions. This impacted the April 2020 process and all remaining biannual processes occurring every April and November. It appears your PD was revised in July of 2020; however, no pay raise would have been authorized for any employee. From the timelines I was given it looks like HR did a review and a desk audit. After the desk audit was done, they changed your job title. In January 2021, the new Equal Pay for Equal Work Act (EPEW) was implemented. This allowed HR to conduct a salary analysis which resulted in you receiving a 5% increase. Even though this did take a long time to complete, with the impacts of COVID-19 and the freezing of in-range increases for all employees, I feel your raise was completed timely and in a manner keeping with the Equal Pay for Equal Work requirements.

If you disagree with this decision, you can elect to proceed with Step 2, the formal written grievance process as outlined in the Personnel Board Rules, Chapter 8, Part A. Section II Grievances. You have ten (10) days after the receipt of this informal decision to initiate the Step 2 grievance process. Here is a link to the statewide grievance process and forms on the DPA website. Your grievance must be put in writing and submitted to Don Wisdom as the appointing authority.

I appreciate your coming to me with your concerns and submitting a grievance.

Feel free to contact me if you have additional questions.

73. On August 30, 2021, Complainant submitted a Step Two written grievance. The Step Two grievance was heard by Don Wisdom, Senior Director, Infrastructure Operations. (Stipulated Fact)

74. Complainant included a "Statement of Grievance" with her grievance form. The statement provided a historical account of her employment and a listing of 18 issues that covered matters occurring from August 21, 2019 through July 26, 2021. This statement included issues not raised in the Step One process. (Stipulated Fact)

75. In her Step Two grievance, Complainant alleged discrimination arising from being a Black woman "of a certain age."

76. Mr. Wisdom met with Complainant on October 5, 2021, to review Complainant's grievance. (Stipulated Fact)

77. Complainant and Mr. Wisdom agreed to extensions of the grievance process. (Stipulated Fact)

78. On November 5, 2021, Mr. Wisdom issued his Step Two Grievance Response. Mr. Wisdom provided that he was partially granting her requested relief. (Stipulated Fact)

79. In his Step Two grievance decision, Mr. Wisdom wrote, in pertinent part:

In all of my research and interviews, including the emails, documents, and discussion with you, I have not found that anyone has been discriminatory toward you. Due to your aggressive and combative behavior, I have recognized that staff try to avoid including you in meetings and discussions in some situations, yet they do recognize that your knowledge is valuable in your role and on the team. For this reason, Laura had set an expectation that you were to be included in any meetings that pertain to your area of responsibility. My research has found that in addition to Laura, Libby also communicated to staff that this was a requirement. Staff seem to have acknowledged this, but some scenarios have played out where you were inadvertently not included in email threads or discussions. I believe this is an area that can be addressed and improved overall going forward.

...

Regarding Laura Calder's treatment of you, I found that she did try many things to help make the situation better, including working to get you a higher salary; escalating to multiple levels above her for this review and approval, supporting the desk audit as an alternative option to justify a salary increase, meeting with you to identify what it would take to make things better, asking staff to include you in meetings and decisions related to telecom assets and your responsibilities, and following through on the realignment of your position back to the Telecommunications support team. ...

...

Based on the information I have gathered, I have decided to partially grant the requested relief.

1. Your relief request to be included in any and all meetings and decision-making that impact your position, job duties, responsibilities and effectiveness is partially granted, provided you can recognize the OIT Values and embrace them as a collaborative team player without conducting yourself in an aggressive, disruptive, and combative manner.

2. Your relief request for OIT Finance Staff to not update any assets outside of bill code/CORE template or name changes, without your prior knowledge, involvement or approval is also partially granted, provided you can recognize the OIT Values and embrace them as a collaborative team player without conducting yourself in an aggressive, disruptive and combative manner.

3. Your relief request for management/CFO Laura Calder and Barb Davis be held accountable for their disparate treatment against you is denied, as I have found no evidence to support your allegations of disparate treatment.

4. Your relief request for the disparate treatment against you to cease and no further retaliation is to be brought against you for filing these grievances is granted in the sense that I have found no evidence to support the allegations that the disparate treatment was occurring against you.

The decision issued in this letter is final and binding unless you choose to pursue this matter further. If this is the case, you may file a petition for a discretionary hearing with the State Personnel Board.

80. Complainant filed her petition for hearing on November 15, 2021. (Stipulated Fact)

81. In her petition, Complainant alleged unlawful discrimination on the basis of race, age, and sex, as well as retaliation.

82. Upon receipt of Complainant's petition, the Board referred the matter to the Colorado Civil Rights Division (CCRD) for an investigation into Complainant's discrimination claims.

83. Complainant submitted a [Charge] of Discrimination to the CCRD on December 9, 2021. (Stipulated Fact)

84. Effective March 1, 2022, Complainant was promoted to Administrator II (Voice) with a salary of \$89,000.04.

85. The CCRD investigated Complainant's [Charge of Discrimination] and issued a No Probable Cause (NPC) opinion on June 27, 2022. The opinion was served on the parties on July 8, 2022, and Complainant has not appealed the determination. (Stipulated Fact) The opinion did not notify Complainant of her appeal rights.

86. On July 13, 2022, Mr. Nogueira informed Complainant that her annual salary was increased to \$91,668.00 effective July 1, 2022.

87. After issuing its NPC Opinion, the CCRD referred the matter back to the Board, and the undersigned ALJ set this matter for the evidentiary hearing conducted from December 5, 2022 through December 8, 2022.

DISCUSSION

A. Burden of Proof

Complainant brings claims of race, age, and sex discrimination in employment, and retaliation, all in violation of CADA.

Complainant has the burden of proof for her discrimination and retaliation claims. See *Bodaghi v. Dep't of Nat. Resources*, 995 P.2d 288, 297 (Colo. 2000).

B. Jurisdiction Issues

As a preliminary matter, Respondent alleges that the Board lacks jurisdiction to consider Complainant's discrimination claims on two separate grounds. First, Respondent argues that Complainant did not allege that any discriminatory act occurred within ten days prior to her initiating this matter with the Board, and thus her claims are outside the ten-day limitations period and are time-barred. Second, Respondent contends that Complainant has waived her discrimination claims by failing to appeal the CCRD's NPC opinion.

The Board Has Jurisdiction to Consider Complainant's Discrimination Claims

The series of events that culminated in Complainant's initiating this Board action began with the exchange of emails between Complainant and Ms. Calder between March 18, 2021 and March 25, 2021, in which Complainant raised issues of discrimination. Complainant's concerns were referred to OIT's HR, which in turn retained the Flynn Group to investigate. Mr. Flynn completed his investigation into Complainant's allegations of discrimination and issued his report to OIT's HR department on June 22, 2021. Ms. Davis notified Complainant of the Flynn Group's findings on July 19, 2021. That notice did not include any information about appeal rights.

Complainant initiated the grievance process ten days later, on July 29, 2021. Mr. Haffner issued his Step One grievance decision on August 19, 2021. Complainant timely initiated her Step Two grievance on August 30, 2021 (August 29, 2021 was a Sunday). Mr. Wisdom issued his Step Two grievance decision on November 5, 2021. Complainant filed with the Board ten days later, on November 15, 2021.

Any statute of limitations applicable to Complainant's discrimination claims was equitably tolled during the pendency of the Flynn Group investigation. The doctrine of equitable tolling provides for the tolling of a statute of limitations when "flexibility is required to accomplish the goals of justice." *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996). The statute of limitation was again tolled upon the submission of Complainant's Step One grievance, pursuant to Board Rule 8-12(D)(1), which provided that "A grievance initiated within ten (10) days from the disputed action or occurrence suspends the deadline to file an appeal with the Board if the written grievance at Step Two asserts . . . Discrimination or retaliation in violation of the Colorado Anti-Discrimination Act ('CADA')" Complainant initiated the grievance process within ten days of being notified of the Flynn Group's conclusion that her discrimination claims were unfounded. She initiated her appeal to the Board within ten days of receipt of the Step Two grievance decision. Therefore, the issues Complainant raised that were addressed in the Flynn Group investigation are not time-barred and the Board has jurisdiction to consider them.

Complainant's Failure to Appeal The CCRD's NPC Opinion Does Not Divest the Board of Jurisdiction to Consider Complainant's Discrimination Claims

Board Rule 8-20(B)(1) provides that when the CCRD issues its opinion, it provides that opinion to the Board, which in turn notifies the parties of the CCRD opinion and provides notice of the parties' right to appeal within ten days of the receipt of the notification. If the Complainant fails to object to a CCRD NPC opinion within ten days, the discrimination claims will be deemed abandoned.

Here, it is true that Complainant did not object to the CCRD NPC opinion within the ten-day limitations period. However, the Board, for reasons unknown, failed to provide Complainant the requisite notice of her right to object to the NPC opinion. When an agency fails to provide proper notice of appeal rights required by applicable law, then the ten-day period for filing an appeal with the Board is equitably tolled. See *Ehrle v. Dep't of Admin.*, 844 P.2d 1267, 1272 (Colo. App. 1992) (noting that "[t]he ten-day time period for appealing does not commence until the required notice is given," and holding that the ten-day period would run from the date that a written notice which complied with the applicable rules regarding notice); *Renteria v. Dep't of Personnel*, 811 P.2d 797, 802-03 (Colo. 1991) (holding that an employee's time to appeal does not run if the notice did not properly advise the employee of his or her right to appeal).

Complainant was not provided notice of her right, and her need, to object to the CCRD NPC opinion. Her failure to object to the NPC opinion, therefore, does not constitute a waiver of that objection. Accordingly, the Board has jurisdiction over Complainant's discrimination claims.

C. Complainant's CADA Claims

Pursuant to § 24-50-123(3), C.R.S., the Board has jurisdiction over a final grievance decision that purportedly violates an employee's rights under CADA.

In her Step One grievance, Complainant raised a claim of discrimination based on race. In her Step Two grievance, Complainant referred to being discriminated against because she is a Black woman "of a certain age." This appears to be a claim, repeated in the initial filing with the Board, of discrimination on the basis of age and sex, in addition to race.

CADA prohibits discrimination "in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified" due to, *inter alia*, that person's race, age, or sex. § 24-34-402(1)(a), C.R.S.

Colorado has adopted the United States Supreme Court's analysis announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for evaluating employment discrimination claims. *Colorado Civ. Rights Commn. v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997), *as modified on denial of reh'g* (July 28, 1997). First, a complainant must establish a *prima facie* case of discrimination. *Id.* If the complainant establishes a *prima facie* case of discrimination, the burden of production shifts to the respondent to articulate a legitimate, nondiscriminatory reason for the subject employment decision or action. *Id.* at 401. "Once the employer meets its burden, the complainant must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Id.* Pretext can be shown by "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 nondiscriminatory reasons.” *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir.1997).⁴

To establish a *prima facie* case of employment discrimination on the basis of race, age or sex, Complainant must demonstrate that: (1) she belongs to a protected class, (2) she was qualified for the job at issue, (3) she suffered an adverse employment decision despite her qualifications, and (4) all the evidence in the record supports or permits an inference of unlawful discrimination. *Bodaghi*, 995 P.2d at 297.

Complainant Has Not Established A *Prima Facie* Case of Unlawful Discrimination on Any Basis

Complainant has not established a *prima facie* case of unlawful discrimination on the basis of race, age, or sex in violation of CADA.

Complainant established the first two prongs of a *prima facie* case of discrimination based on race, age and sex: she is Black, she is over 40 years old, she is female, and was qualified for her position with Respondent.

Complainant failed, however, to establish the third prong of a *prima facie* case of discrimination; she has not established that she was subjected to an adverse employment action under CADA. The actions that Complainant characterizes as adverse employment actions include the delay in considering her request for a reallocation of her position in 2019, excluding her from some meetings or telephone conferences, friction between her and L.K., and the Flynn Group investigation that failed to conclude that she was a victim of unlawful discrimination. These actions, taken singly and collectively, do not rise to the level of adverse employment actions under CADA.

In discrimination cases under CADA, “claims of adverse action on the basis of [membership in a protected class are reviewed] on a case-by-case basis, examining the unique factors relevant to the situation at hand.” *Piercy v. Maketa*, 480 F.3d 1192, 1203 (10th Cir. 2007) (internal quotation marks omitted). The Colorado Court of Appeals has held that “[a]dverse employment action means an ultimate employment decision involving hiring, firing, compensation, benefits, or the failure to promote or grant leave.” *Krauss v. Catholic Health Initiatives*, 66 P.3d 195, 201 (Colo. App. 2003). Adverse employment actions include acts that “constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Haynes v. Level 3 Commc’ns, LLC*, 456 F.3d 1215, 1222 (10th Cir. 2006). Additionally, actions that carry “a significant risk of humiliation, damage to reputation, and a concomitant harm

⁴ CADA was drafted to mirror federal anti-discrimination laws and federal case law is frequently used to interpret CADA. See e.g. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997). CADA claims are often analyzed using the federal anti-discrimination statute, Title VII of the Civil Rights Act of 1964. See *Lawley v. Dep’t of Higher Educ.*, 36 P.3d 1239, 1253–54 (Colo. 2001); *Williams v. Dep’t of Public Safety*, 369 P.3d 760, 771 (Colo. App. 2015). See also *Ward v. Dept. of Natural Resources*, 216 P.3d 84, 92 (Colo. App. 2008) (federal law is considered in determining whether discrimination has occurred under CADA). Pursuant to Colorado Civil Rights Commission Rule 10.14(C), 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.”

to future employment prospects” may rise to the level of an adverse action.” *Annett v. Univ. of Kansas*, 371 F.3d 1233, 1239 (10th Cir. 2004).

Here, Complainant did not suffer any significant, negative change in employment status, nor did she suffer any action that created a significant risk of humiliation, damage to reputation or a harm to future employment prospects. Although Complainant was criticized in her annual performance evaluations for the manner in which she communicated with internal and external customers, these criticisms did not negatively impact Complainant’s current status or future employment opportunities. The evidence indicates the opposite; Complainant was on the receiving end of several Spot Awards, several raises, and several promotions during the relevant time period. Between September 1, 2017 and July 1, 2022, Complainant’s base salary increased from \$69,590 \$91,668.00, an increase of over 31% in less than 5 years. And, Complainant’s September 1, 2017 salary was a 10% increase over her previous salary. What Complainant identifies as adverse employment actions fail to rise to the level of adverse actions as defined by pertinent case law.

With respect to the fourth prong of a *prima facie* case of unlawful discrimination based on race, age, or sex, all the evidence in the record does not support or permit an inference of unlawful discrimination. The relatively minor inconveniences and annoyances that Complainant experienced are more than outweighed by the Spot Awards, raises and promotions that Respondent conferred upon her. Ultimately, Complainant’s identification of unlawful discrimination as the cause of the actions to which she took exception is without adequate evidentiary proof, and remains speculative, at best. As Complainant herself articulated her view, “I believe that race plays a factor in this because I cannot think of any other explanation for the dismissive attitude toward my concerns and the consistent and frequent acts that ignore my experience and expertise in my field and the undermining of my reputation. I don’t believe race is the sole basis for the unacceptable conduct. I’ve not experienced any overt racial discrimination.” Complainant’s subjective view that race (or age or sex) was a factor in how she was treated, without more, is insufficient to permit an inference of unlawful discrimination. See *George v. Ute Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. App. 1997).

Complainant has not established a *prima facie* case of unlawful discrimination on the basis of either race, age, or sex. Accordingly, Complainant’s CADA claims are unfounded.

Complainant Did Not Establish that Respondent’s Reasons for Its Action Were Pretextual

Even if Complainant were able to establish a *prima facie* case of discrimination on the basis of race, age, or sex, Respondent has articulated legitimate, nondiscriminatory reasons for the actions upon which Complainant relies in her discrimination claim, and Complainant has not established that those reasons are pretextual.

Respondent articulated the reasons for the actions to which Complainant objects. As established at the hearing by a preponderance of the evidence, Complainant was occasionally excluded from email exchanges and meetings because it was not clear that Complainant was a necessary party to those activities or because the participants viewed Complainant’s communication style as combative and aggressive. Complainant’s 2019 reallocation request was delayed as a result of the change in Complainant’s supervision accompanied by the request falling between the cracks and HR’s procrastination in starting a desk audit. The delay was not a result of any unlawful discrimination against Complainant. When Complainant’s reallocation request was implemented without an increase in Complainant’s base salary, it was because of a state employee wage freeze necessitated by the COVID-19 pandemic and the significant impact that

health care crisis had on the state budget. Despite that wage freeze, Ms. Calder twice attempted to obtain a raise for Complainant, although without success.

Complainant provided no evidence that any of the actions to which Complainant took exception were taken because of Complainant's race, age, or sex. Complainant failed to establish that Respondent's actions were a pretext for unlawful discrimination.

Complainant has not established a *prima facie* case of employment discrimination in violation of CADA on any basis. Accordingly, Complainant CADA discrimination claims must be dismissed.

Respondent Did Not Retaliate Against Complainant in Violation of CADA

Complainant alleges that all Respondent's negative comments about her and her communication style were made after she raised claims of bias and discrimination on the basis of race.

CADA prohibits discrimination "against any person because such person has opposed any practice made a discriminatory or unfair employment practice by this part 4 . . ." § 24-34-402(1)(e)(IV), C.R.S. The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964.

To establish a *prima facie* case of retaliation, Complainant must show: (1) protected opposition to discrimination; (2) an adverse employment action occurred subsequent to or contemporaneous with the protected activity; 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).

With respect to the first prong, "to qualify as protected opposition the employee must convey to the employer his or her concern that the employer has engaged in a practice made unlawful by the [statute]. General complaints about company management and one's own negative performance evaluation will not suffice." *Hinds v. Sprint/United Mgt. Co.*, 523 F.3d 1187, 1202–03 (10th Cir. 2008); *Anderson v. Acad. Sch. Dist. 20*, 122 Fed. Appx. 912, 916 (10th Cir.2004) (unpublished) (cited favorably by the court in *Equal Empl. Opportunity Commn. v. Jetstream Ground Services, Inc.*, 134 F. Supp. 3d 1298, 1323 (D. Colo. 2015) ("[A] vague reference to discrimination and harassment without any indication that this misconduct was motivated by race (or another category protected by Title VII) does not constitute protected activity and will not support a retaliation claim").

Although Complainant complained of bias prior to March 13, 2020, she did not allege that the bias she perceived arose from unlawful discrimination based on either race, age, or sex. However, during interviews with Ms. Davis of OIT's HR department in late March,⁵ Complainant alleged bias "based on the fact that I am not a 'Finance' person and **implicit bias racially**" (Emphasis added.) Complainant's contention that she was the victim of racial bias, a practice made unlawful under CADA, constitutes opposition to unlawful discrimination, satisfying the first prong of a *prima facie* case or retaliation under CADA.

⁵ Ms. Davis' written summary of her two interviews with Complainant pursuant to L.K.'s complaint against Complainant for alleged bullying indicates those interviews occurred on March 27 and March 30, 2020.

The second prong of a *prima facie* case of retaliation under CADA requires a showing Complainant suffered an adverse action. An adverse action in a retaliation claim under Title VII and CADA is defined as an action that would dissuade a reasonable employee from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68-70 (2006). See also *McGowan v. City of Eufala*, 472 F.3d 736, 742 (10th Cir. 2006). Actions such as corrective actions, threats of corrective actions, letters of reprimand, negative performance evaluations, and job reassignments can be considered adverse actions in the context of a claim of retaliation in violation of CADA. See *Dunn v. Shinseki*, 71 F. Supp. 3d 1188, 1191-92 (D. Colo. 2014) (negative performance reviews may qualify as adverse employment actions in retaliation cases).

Subsequent to, but shortly after, Complainant's late March 2020 opposition to unlawful discrimination based on race, these material events occurred: (1) in June 2020, Ms. Calder provided Complainant with her annual job performance evaluation. Ms. Calder gave Complainant an overall satisfactory rating of "2," and gave Complainant exceptional ratings of "3"s for the objective "inventory and financial dispute updating, monitoring, review and analysis, and for the core competency of Job Knowledge; however, she gave Complainant "needs improvement" ratings of "1," under Values for "Teamwork," and for the core competencies of "Communication" and "Interpersonal Relations"; (2) effective July 1, 2020, Complainant received a promotion to Administrator IV through allocation, although she did not receive a pay raise at that time due to salary freezes imposed during the COVID-19 pandemic; and (3) Complainant received a \$500 spot award in July 2020.

In the first few months after Complainant raised the issue of race discrimination, Complainant was provided a satisfactory job performance with ratings of exceptional in more than one category, a promotion, and a Spot Award. These matters would not dissuade a reasonable employee from making or supporting a discrimination claim. These matters certainly did not serve to dissuade Complainant from alleging unlawful discrimination, despite the "needs improvement" ratings Complainant received in her June 2020 job performance evaluation. See *Burlington Northern & Santa Fe Railway Co.* 548 U.S. at 68-70. These actions do not constitute adverse employment actions in the context of a CADA retaliation claim. In Complainant's case, she continued to claim race discrimination, and initiated a series of complaints, and grievances that culminated in this matter being litigated.

Complainant did not suffer an adverse action that would dissuade a reasonable person from making or supporting a charge of discrimination. Accordingly, Complainant did not establish the second prong of a retaliation claim under CADA. Complainant has not established a *prima facie* case of retaliation under CADA. Her retaliation claim fails, and must be dismissed.

E. Respondent is Not Entitled to an Award of Attorneys' Fees and Costs

Respondent has requested its attorneys' fees and costs incurred in this litigation. Board Rule 8-51(B) provides:

Upon final resolution of a proceeding under this Chapter 8, Resolution of Appeals and Disputes, Part A, attorney fees and costs may be assessed against a party if the Board finds that the personnel action from which the proceeding arose, or the appeal of such action was frivolous, in bad faith, malicious, a means of harassment, or was otherwise groundless.

1. Frivolous means that no rational argument based on the evidence or law was presented.
2. In bad faith, malicious, or as a means of harassment means that the appeal or defense was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth.
3. Groundless means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory.

Although Complainant did not prevail in this matter, her claims were not frivolous, nor were they advanced in bad faith, malicious, a means of harassment or otherwise groundless. Complainant's claims were based on her good faith interpretation of the facts and the law that was not without some merit, although not ultimately successful. What Complainant perceives as unlawful discrimination, and what the statutory and case law establishes as unlawful discrimination, are not aligned. Complainant's perceptions do not translate into legal liability for Respondent. However, Complainant, and prospective complainants, should not be dissuaded from bringing good faith discrimination claims by imposing upon them, if ultimately unsuccessful, Respondent's attorneys' fees and costs.

Accordingly, Respondent is not entitled to an award of attorneys' fees and costs.

CONCLUSIONS OF LAW

1. The State Personnel Board has jurisdiction over Complainant's CADA claims.
2. Respondent did not discriminate against Complainant on the basis of race, age, or sex in violation of the Colorado Anti-Discrimination Act.
3. Respondent did not retaliate against Complainant in violation of the Colorado Anti-Discrimination Act.
4. Respondent is not entitled to an award of attorneys' fees and costs.

ORDER

Complainant's appeal is **dismissed**. Respondent's request for an award of attorneys' fees and costs is **denied**.

DATED this 23rd day
of January 2023,
at Denver, Colorado

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

APPENDIX A: EXHIBITS

Complainant's Stipulated Exhibits: B, C, E, G, H, I, J, K, O, R, V, X, Y, Z

Complainant's Exhibits Offered at Hearing and Admitted: A, D, F, L, M, T, W

Complainant's Exhibits Offered at Hearing and Not Admitted: Q, S, U

Respondent's Stipulated Exhibits: 1, 6, 7, 8, 9, 10, 12, 13, 17, 19, 20, 24, 25, 26, 27.7, 28, 43, 44, 58, 59, 60, 61, 65

Respondent's Exhibits Offered at Hearing and Admitted: 3, 4, 5, 11, 18, 25.1, 25.7, 25.8, 25.9, 25.10, 25.11, 25.12, 25.13, 25.14, 25.15, 25.16, 25.17, 25.19, 25.20, 25.22, 28.1, 28.2, 28.3, 28.4, 28.5, 28.6, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 48, 51, 52, 57

Respondent's Exhibits Offered at Hearing and Not Admitted: None

APPENDIX B: WITNESSES TESTIFYING AT HEARING

Complainant, Tiffany Renee Martin

L.K.

Elizabeth "Libby" Dollar

Rory Geisler

Barbara "Barb" Davis

Bob Nogueira

Jerry Haffner

Don Wisdom

Laura Calder

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of January 2023, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Tiffany Renee Martin
[REDACTED]

Eric W. Freund, Esq.
Senior Assistant Attorney General
Eric.Freund@coag.gov
[REDACTED]

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

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

RECORD ON APPEAL

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

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

BRIEFS ON APPEAL

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

ORAL ARGUMENT ON APPEAL

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

PETITION FOR RECONSIDERATION

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

The parties may file by email to: dpa_state.personnelboard@state.co.us. Instructions for filing by email can be found at Board Rule 8-6(C).