STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2023G007**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

GARY LITTLE,
Complainant,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

Administrative Law Judge (ALJ) Keith A. Shandalow conducted the evidentiary hearing in this matter on July 10-12, 2023 at the State Personnel Board (Board). The record was closed on July 18, 2023. Complainant Gary Little (Complainant) appeared and was represented by Casey Leier, Esq. Respondent Colorado Department of Corrections (Respondent or DOC) was represented by Jacob Paul, Senior Assistant Attorney General. Respondent's advisory witness, and Complainant's delegated appointing authority, was Jason Lengerich, Warden of the Buena Vista Correctional Complex.

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

MATTERS APPEALED

Respondent gave Complainant a corrective action shortly after the resolution of Complainant's previous Board petition alleging discrimination on the basis of race. Complainant initiated this matter with the Board alleging retaliation in violation of both the State Employee Protection Act (Whistleblower Act) and the Colorado Anti-Discrimination Act (CADA). Respondent contends that Complainant's corrective action was warranted and was not retaliatory.

For the reasons discussed below, Respondent's action is **affirmed**.

ISSUES

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

2. Did Respondent retaliate against Complainant in violation of CADA?

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

I. FINDINGS OF FACT

Background

1. Complainant began his employment with Respondent on or about May 1, 1999. (Stipulated fact.)

2. Complainant is Black.

3. Between May 1, 1999 and February 29, 2003, Complainant promoted from the rank of Correctional Officer I to Correctional Officer IV (Captain). (Stipulated fact.)

4. From March 1, 2003 through June 30, 2022, Complainant was a Correctional Officer IV (Captain) at several of Respondent's facilities. In early 2022, Complainant was a Correctional Officer IV (Captain) at Respondent's Denver Diagnostic and Reception Center (DRDC). (Stipulated facts.)

5. Between 2003 and 2021, Complainant applied for a promotion over 30 times, without success.

6. Complainant received Level 3 of 3 overall ratings on his Midyear Performance Evaluation of November 15, 2018, his Annual Evaluation of April 12, 2019, his Midyear Evaluation of November 12, 2019, his Annual Evaluation of May 19, 2020, and his Midyear Evaluation of October 16, 2020. Complainant received Level 2 of 3 overall ratings on his Annual Evaluation of April 26, 2021, his Midyear Evaluation of October 25, 2021, and his Annual Evaluation of April 21, 2022. He received a Promotional Evaluation on July 20, 2022 rating him 3 out of 5. (Stipulated facts.)

Complainant's 2021 Applications for a Program Manager I Position

7. In 2021, Complainant applied for several Program Manager I (Major) positions.

8. On October 12, 2021, Complainant was interviewed for an open Custody and Control Program Manager I position at the Denver Complex, along with two other candidates.

9. On November 16, 2021, Respondent informed Complainant in writing that he was not selected for the Program Manager I position.

10. Warden Long of the Denver Complex selected Todd Crist, a white male, for the position. Mr. Crist started in that position as a Major, effective December 1, 2021, at which time he became Complainant's supervisor.

Complainant's 2021 Petition for Hearing

11. On November 28, 2021, Complainant filed an appeal[1] with the Board alleging that his non-selection to a Program Manager position was the result of discrimination. (Stipulated fact.) The basis for the discrimination claim was race/color in violation of the Colorado Anti-Discrimination Act and was assigned case number 2022S018.

12. Complainant was out on COVID sick leave from November 11, 2021 until November 24, 2021. He was off duty on November 25-27, 2021. His first day back on the job was November 28, 2021, the day he filed his petition for hearing with the Board.

[1] The parties refer to Complainant's filing as an appeal, but it is also referred to herein as a petition for hearing.

13. Prior to filing his petition for hearing, Complainant did not make a good faith effort to provide his supervisor or his appointing authority or a member of the general assembly with the allegations of unlawful discrimination contained in his petition for hearing.

14. In his petition for hearing, Complainant referred to Respondent's failure to promote minorities to positions of Major and adds: "I would like to be promoted at the Denver Complex to Program Manager I and also be a lead on the promotional process oversight committee to ensure minorities have an equal and fair shot at promotion."

15. After the Board referred the matter to the Colorado Civil Rights Division (CCRD) for an investigation into Complainant's discrimination claim, which investigation Complainant waived, the Board conducted a preliminary review of Complainant's petition for hearing.

16. Pursuant to the preliminary review process, Complainant filed his Information Sheet with the Board on January 8, 2022, detailing his discrimination claim. In his Information Sheet, Complainant expressed his request that Respondent promote him to a Program Manger I position that would include "duties that will help review the promotional process to implement better practices and oversight for minorities with clear qualification to be future leaders and positively impact the CDOC and State of Colorado."

17. Respondent filed its Information Sheet on January 19, 2022.

18. On February 28, 2022, Board ALJ Tyburski issued a Preliminary Recommendation, finding that Complainant established a *prima facie* case of discrimination on the basis of race in violation of the Colorado Anti-Discrimination Act, and recommending that the Board grant Complainant's petition for hearing.

19. The Board adopted ALJ Tyburski's recommendation at its Board meeting on March 15, 2022.

20. Board case number 2022S018 was resolved through a release and settlement agreement on June 21, 2022. (Stipulated fact.)

21. The State Personnel Board ALJ dismissed 2022S018 on June 27, 2022. (Stipulated fact.)

22. As part of the Settlement Agreement, Complainant was to be promoted to the position of Major, which was to be effective July 1, 2022. (Stipulated fact.)

<u>Complainant's Actions Leading to a Professional Standards Investigation</u>

23. On or about January 27, 2022, Complainant entered Associate Warden (AW) Lucille Reaux's office to retrieve personal protective equipment (PPE) to distribute to employees during morning roll call.

24. While getting the PPE, Complainant noticed a document on AW Reaux's desk with his name on it.

25. Complainant was concerned that the document with his name on it related to some aspect of his employment.

26. Complainant went around to the side of the desk and quickly skimmed the document, which addressed Complainant's purported reluctance to meet with his supervisor, Major Crist, to discuss a Performance Improvement Plan.

27. Complainant also skimmed at least two other documents on AW Reaux's desk, one concerning Captain Avant, and another concerning a DOC employee's transfer to the Sterling Correctional Facility.

28. In January 2022, if not before, Complainant told his subordinate, Lieutenant (Lt.) Darrell Spignor, that he had viewed documents on AW Reaux's desk.

29. Subsequently, Lt. Spignor told another corrections officer, who in turn told another corrections officer, who told AW Reaux that, according to Lt. Spignor. Complainant had been viewing documents on AW Reaux's desk.

30. On January 31, 2022, AW Reaux directed Lt. Spignor to submit a written confidential report about what Complainant told him concerning viewing materials on AW Reaux's desk. Immediately after he was directed to do so, Complainant wrote and signed a Confidential Incident Report, in which he wrote that Complainant had been going into AW Reaux's office and viewed documents on her desk, and Complainant had been talking about information contained in Major Crist's personnel file.

31. On or about January 27, 2022, Lt. Spignor told Major Crist that Complainant had been going into AW Reaux's office since September 2021 looking for information regarding the Program Manager I promotional opportunity. Major Crist reported that information in a Confidential Incident Report that he signed on February 1, 2022.

32. The Confidential Incident Reports of Lt. Spignor and Major Crist were forwarded to Ryan Long, Warden of the Denver Complex, consisting of the Denver Reception and Diagnostic Center and the Denver Women's Correctional Facility.

33. Warden Long forwarded the reports to Respondent's Office of the Investigator General (OIG).

34. On February 7, 2022, the OIG opened Professional Standards investigation PS2021000415. (Stipulated fact.)

35. On or about February 7, 2023, the matter was referred to investigator Gary Spangler.

36. The scope of the investigation, as indicated in the investigation report, was as follows:

> On February 7, 2022, the Office of the Inspector General opened a Professional Standards investigation into Captain Gary Little after Lieutenant Darrell Spignor reported Captain Little disclosed to him he has been going into AW Reaux's office to look for information AW Reaux leaves laying around. A second allegation reported by Lieutenant Spignor alleges Captain Little had obtained Major Crist's personal file and has been discussing Major Crist's past disciplinary issues with staff.

37. Investigator Spangler reviewed the confidential incident reports and interviewed Complainant, Lt. Spignor, AW Reaux, and two other Captains who had been heard about the allegations upon which the investigation was based.

38. During his interview with Investigator Spangler, Complainant admitted that he had read several documents on AW Reaux's desk. He did not believe that he had breached his professional obligations by viewing confidential material because he did not intend to do so, asserting that his viewing was involuntary.

39. Investigator Spangler concluded his investigation in late March 2022.

40. Investigator Spangler issued his investigative report on or about March 29, 2022. Investigator Spangler concluded that Complainant did look for information in AW Reaux's office and read documents on AW Reaux's desk without authorization. Investigator Spangler also concluded that Complainant had access to Major Crist's personnel file through the discovery process in Board case number 2022S018.

41. Investigator Spangler submitted his report to Scott Smith, who was then the interim Investigator General (IG).

42. IG Smith sent the Professional Standards report to Warden Long.

43. Warden Long discussed the Professional Standards matter with Investigator Spangler and Rick Thompkins, DOC's Chief Human Resources Officer. They decided to hold the Professional Standards matter in abeyance until the resolution of Complainant's pending Board action.

Complainant's Corrective Action

44. On July 6, 2022, Warden Long delegated appointing authority to Warden Jason Lengerich to handle personnel matters related to Complainant. (Stipulated fact.) This was nine days after the resolution of Board case number 2022S018 and five days after Complainant was promoted to the rank of Major pursuant to the settlement agreement that resolved case number 2022S018.

45. On July 1, 2022, Warden Long issued a certificate characterizing Complainant's promotion as an "appointment to the position of Major."

46. On Complainant's first day on the job as a Major, July 7, 2022, Warden Long asked everyone in the administrative roll call if they any comments, but never called on Complainant.

47. In the July and August monthly newsletters of the Denver Complex, Complainant's promotion to Major was not mentioned, although other promotions were.

48. On July 20, 2022, Warden Lengerich met with Complainant to discuss the Professional Standards investigation PS2021000415. (Stipulated fact.)

49. On August 2, 2022, Warden Lengerich issued Complainant a corrective action. (Stipulated fact.)

50. As reflected in his notice of corrective action given to Complainant, Warden Lengerich found that Complainant read documents on AW Reaux's desk without authorization. Warden Lengerich concluded:

> Your actions by entering Associate Warden Lucille Reaux's office under the premise of retrieving personal protective equipment (PPE) for staff and then purposely reading information located on her desk for your own personal benefit is not only Conduct Unbecoming, but extremely unethical. Your unprofessional conduct is not supportive of the DOC Mission, Vision and Values. Your unethical behavior is a significant violation of trust to a supervisory staff member and is not a positive example to those whom you work with and supervise.
>
> In addition, your behavior demonstrates a willful violation of department rules and have significantly impacted your credibility as a correctional professional and are in direct violation of Administrative Regulations 1450-01 Code of Conduct, Section IV., Subsections A.6, A.8, A.9, B.1, B.2; Code of Ethics (Signed annually, by you on May 3, 2021 and again on May 4, 2022); your performance plan (Signed by you on February 3, 2022), Competencies (Accountability/Organization Commitment, Job Knowledge, Communication, Interpersonal Skills, and Customer Service).
>
> Your actions are contrary to that of a correctional professional with your level of training and experience. As a Correctional Officer V (Major), you have a professional and ethical responsibility to uphold the highest levels of integrity, honesty and public trust. Your actions and behavior are egregious violations of policy and have created a situation that has impacted your ability to perform effectively and efficiently in your position as a Major at the Denver Complex. This behavior has seriously impacted your ability to provide adequate customer service to stakeholders with integrity, and has negatively impacted your job performance.

51. Administrative Regulation (AR) 1450-01 (IV) (A) (6) provides, "DOC employees, contract workers, volunteers, offenders, and their families will be treated professionally, regardless of age, sex, race, national origin, sexual orientation, religious affiliation, disabilities, or offender's criminal history."

52. AR 1450-01 (IV) (A) (8) provides, "Any act or conduct on or off duty which affects job performance and/or tends to bring the DOC into disrepute or reflects discredit upon the individual as a DOC employee, contract worker, or volunteer, or tends to adversely affect public safety, is expressly prohibited as conduct unbecoming and may lead to corrective and/or disciplinary action."

53. AR 1450-01 (IV) (A) (9) provides, "DOC employees, contract workers, and volunteers will exercise good judgment and sound discretion at all times."

54. AR 1450-01 (IV) (B) (1) provides, "Any action on or off duty on the part of DOC employees, contract workers, and volunteers that jeopardizes the integrity or security of the Department, calls into question one's ability to perform effectively and efficiently in his/her position, adversely affects public safety, casts doubt upon the person's integrity or which reflects

discredit upon the individual as a DOC employee, contract worker, or volunteer is expressly prohibited as conduct unbecoming."

55. AR 1450-01 (IV) (B) (2) provides, "While on or off duty, DOC employees, contract workers, and volunteers are required to maintain considerate, cooperative, cordial, and professional relationships toward each other. Professional relationships will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies."

56. DOC's Code of Ethics includes the following provisions:

> All employees, contract workers, and volunteers of the Colorado Department of Corrections:
>
> A. Will serve the public with respect, concern, courtesy, and responsiveness;
>
> B. Will demonstrate the highest standards of personal integrity, truthfulness, and honesty and will, through personal conduct, inspire public confidence and trust in government . . .

Procedural History

57. Complainant filed a timely petition for hearing on August 2, 2022, alleging that Respondent issued the corrective action to Complainant in retaliation for initiating, and providing information for, a discrimination charge, in violation of the State Employee Protection Act (Whistleblower Act).

58. After the parties filed their Information Sheets pursuant to the Board's preliminary review process, ALJ Tyburski determined that Complainant also presented a claim of retaliation in violation of CADA, and the matter was referred to the CCRD for an investigation into Complainant's CADA claim.

59. Complainant waived his CCRD investigation and ALJ Tyburski issued a Preliminary Recommendation on March 1, 2023, finding that Complainant established a *prima facie* case of retaliation in violation of both the Whistleblower Act and CADA, and recommending that the Board grant a hearing on those claims. On March 21, 2023, the Board adopted ALJ Tyburski's recommendation, and this matter was set for hearing.

II. HEARING ISSUES

A. Complainant's Whistleblower Act Claim

Complainant alleges that Respondent issued a corrective action to Complainant on August 2, 2022, in retaliation for reporting alleged discrimination, characterized as disclosures protected by the Whistleblower Act. Complainant also alleges that (1) he was given a performance evaluation that was less than his usual outstanding evaluations; (2) he was excluded from meetings during and after the pendency of his prior discrimination claim; (3) his promotion to Major was characterized as an "appointment"; and (4) news of his elevation to Major was not included in the monthly facility newsletter. Complainant contends that his protected disclosures began on November 28, 2021, when he filed a petition for hearing with the Board that included a

claim of race discrimination, and continued when filed his information sheet with the Board on January 8, 2022, and responded to Respondent's discovery requests on May 11, 2022.

1. Whistleblower Act standards

The purpose of the Whistleblower Act, set forth in the legislative declaration, 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 Com'n*, 699 P.2d 960, 966 (Colo. 1985). The 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, "[i]t must be initially determined whether the claimant's disclosures fell within the protection of the 'whistleblower' statute and that they were a substantial or motivating factor in the [action taken by the agency]. If the claimant's evidence establishes that his expression was protected by the 'whistleblower' statute, then the [reviewing adjudicator] must determine whether [the agency's] evidence established, 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 in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)).

2. Complainant failed to state a *prima facie* case of violation of the Whistleblower Act

The first question is whether Complainant has proven by a preponderance of the evidence that his disclosures "fell within the protection of the whistle-blower statute" and that his disclosures "were a substantial or motivating factor" in the decision to terminate his employment. *Ward*, 699 P.2d at 968.

a. Complainant's showing of protected disclosures

In order to show that his disclosures fall within the protection of the Whistleblower Act, Complainant must be able to prove that: 1) he 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 Complainant has made a "good faith effort to provide to his 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.

(1) Did Complainant make one or more disclosures of information to any person?

(a) Defining the parameters of a "disclosure"

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

orally. *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." *Ferrel v. Colorado Dep't of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007).

First Amendment 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 marks omitted).

To constitute a matter of public concern, Complainant's motive in speaking must be to redress a broader public purpose and not just a personal grievance. *David v. City and County of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996). In *David,* the Tenth Circuit found that a plaintiff's EEOC complaints did not address matters of public concern where the plaintiff's charges failed to allege "that other employees have been subjected to harassment or retaliation or that the harassment and retaliation has interfered with the Department's performance of its governmental responsibilities." *Id*. at 1356. In other words, if the speech is designed to redress a personal issue, it is not speech that addresses a public concern. On the other hand, if the speech is intended to remedy a systemic problem, it is likely a matter of public concern.

(b) Application to Complainant's Alleged Disclosures

In Complainant's petition for hearing in case number 2022S018, Complainant's alleged disclosures were not limited to his own, personal situation, but also addressed a need for a systemic reform. His petition references Respondent's purported failure to promote minorities to positions of Major and above. He added, "I would like to be promoted at the Denver Complex to Program Manager I and also be a lead on the promotional process oversight committee to ensure minorities have an equal and fair shot at promotion."

Furthermore, Complainant's intent in filing his petition for hearing in case number 2022S018 is made even clearer in his Information Sheet, filed with the Board on or about January 8, 2022. In his Information Sheet, Complainant expressed his request that Respondent promote him to a Program Manger I position that would include "duties that will help review the promotional process to implement better practices and oversight for minorities with clear qualification to be future leaders and positively impact the CDOC and State of Colorado."

Therefore, in Board case number 2022S018, Complainant's allegations, his "disclosures," concerned matters of public concern and were protected disclosures under the Whistleblower Act.

(2) Did Complainant provide his disclosure to an appropriate person?

The Whistleblower Act requires that an employee who wishes to disclose information must "make a good faith effort to provide to his 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.; *Ward*, 699 P.2d at 967. Complainant has not established that he made a good faith effort to disclose the information contained in his November 28, 2021 petition for hearing to his supervisor, his appointing authority, or a member of the general assembly prior to his filing his petition for hearing with the Board. Complainant was notified on November 16, 2021 that he was not hired for the Program Manager I position. Although Complainant was out on COVID leave from November 11, 2021 through November 24, 2023, and was on holiday leave on November 25 and 26, 2021 (Thanksgiving and a Governor's holiday), he offered no evidence that he was incapable of phoning or emailing his supervisor, his appointing authority, or a member of the general assembly, during this time prior to his November 28, 2021 filing of his petition for hearing.

b. Complainant's showing that disclosures were a substantial or motivating factor in the imposition of discipline

(1) Was Complainant the subject of discipline?

The Whistleblower Act prohibits the imposition of "any disciplinary action against any employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. "Disciplinary action" is construed broadly in the Act and specifically includes corrective action. § 24-50.5-102(1), C.R.S. Complainant has met this element of the test for Whistleblower Act protection.

(2) Did Complainant show that his disclosures were a substantial or motivating factor in the imposition of discipline?

Once it is established that protected disclosures 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.RS. Under *Ward*, Complainant must demonstrate that his protected disclosures were a substantial or motivating factor for the action taken against him. In other words, he must demonstrate a causal connection between his protected conduct and the adverse action. If he sustains this burden, Respondent then has an opportunity to prove, by a preponderance of the evidence, that it would have made the same decision in the absence of Complainant's disclosures. *Ward,* 699 P.2d at 968. This allocation of the burden of proof assures that employees do not abuse the Whistleblower Act to evade appropriate consequences for poor job performance. *Taylor v. Regents of University of Colorado,* 179 P .3d 246, 249 (Colo. App. 2007).

The Colorado case law implementing the Whistleblower Act fails to define the standard by which the causal connection is established. Therefore, case law implementing the anti-retaliation provisions of CADA and Title VII (they are identical) provides useful guidance. Under this long line of cases, in anti-discrimination cases involving retaliation claims, the causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Love v. RE/MAX of America, Inc.,* 738 F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.,* 181 F.3d 1171, 1179 (10th Cir. 1999). The inference of retaliation generally requires a "close temporal proximity" between the protected activity and the subsequent adverse action. *Marx v. Schnuck Markets, Inc.,* 76 F.3d 324, 329 (10th Cir. 1996).

Here, Warden Lengerich issued Complainant the corrective action just days after the resolution of his discrimination claim in case number 2022S018. Based on temporal proximity alone, it is appropriate to infer a causal connection between Complainant's alleged protected disclosures and the adverse employment action in the form of the corrective action.

3. Respondent has proven that it would have issued the corrective action even in the absence of Complainant's protected disclosures

Even if Complainant had established that he made a good faith effort to disclose the information contained in his November 28, 2021 petition for hearing prior to his filing his petition for hearing with the Board, Respondent proved, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected activity. *See Ward*, 699 P.2d at 968. Complainant's unauthorized reading of confidential material in AW Reaux's office violated DOC's Code of Conduct and Code of Ethics. Complainant's conduct was unprofessional and lacked good judgment and integrity. A corrective action was warranted regardless of Complainant's prior Board petition.

B. Complainant's CADA Retaliation Claim

Complainant also alleges that Respondent retaliated against him in violation of CADA for his previous claim of race discrimination. The purported retaliation took the form of the corrective action Warden Lengerich gave Complainant on August 2, 2022.

Under CADA, it is a "discriminatory or unfair employment practice … [f]or any person, whether or not an employer … [t]o discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by [CADA], because he has filed a charge with the [Colorado Civil Rights] commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." § 24-34-402(1)(e)(IV), C.R.S. The anti-retaliation provision of CADA parallels that of its federal counterpart in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). 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). Board Rule 9-4 provides: "In determining whether discrimination or harassment has occurred, the Board shall apply Colorado law, including the standards and guidelines adopted by the Colorado Civil Rights Commission. The Board may refer to federal law in the event Colorado legal standards are unclear."

1. *Prima Facie* Elements

To establish a *prima facie* claim of retaliation under CADA, Complainant must demonstrate that: (1) he engaged in protected opposition to discrimination; (2) Respondent took an adverse employment action against him; and (3) there exists a causal connection between the protected activity and the adverse action. *Smith v. Board of Educ. Of Sch. Dist. Fremont RE-1*, 83 P.3d 1157, 1162 (Colo. App. 2003).

By raising his prior race discrimination claim with the Board in case number 2022S018, Complainant opposed a practice made a discriminatory practice by CADA. As such, his prior unlawful discrimination claim constitutes activity protected by CADA, establishing the first prong of a *prima facie* retaliation claim under CADA.

An adverse action under Title VII and CADA retaliation cases 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).

The Tenth Circuit "liberally define[s] the phrase 'adverse employment action'.... Such actions are not simply limited to monetary losses in the form of wages or benefits. Instead, [the circuit] take[s] a case-by-case approach, examining the unique factors relevant to the situation at hand. One factor that strongly indicates a challenged action is an 'adverse employment action' is that the action causes harm to future employment prospects." *Hillig v. Rumsfeld,* 381 F.3d 1028, 1031 (10th Cir.2004) (internal citations and quotation marks omitted). The scope of adverse employment action is broader for retaliation than for discrimination. "[T]he antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 64 (2006).

The prospect of lost wages, benefits, or the job itself are significant or material alterations to an employee's job status and can be considered adverse employment actions in a retaliation case. *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1316 (10th Cir. 2006). However, an adverse employment action is not necessarily limited to these acts. *EEOC v. C.R. Eng., Inc.*, 644 F.3d 1028, 1040 (10th Cir. 2011). For example, conduct that harms employment prospects, such as a negative job reference, can also count. *Hillig*, 381 F.3d at 1033–35. The U.S. District Court for the District of Colorado has deemed a performance improvement plan for a Colorado State Patrol trooper to be materially adverse and thus an adverse employment action in the retaliation context. *Luchaco v. Colorado State Patrol*, No. 08-CV-02348-LTB-KMT, 2010 WL 3430850, at *13 (D. Colo. Aug. 30, 2010) (unpublished). The court in *Luchaco* reasoned that even if the corrective action was correctly issued, it could dissuade the employee from making or supporting a discrimination charge against the employer. *Id.* The Tenth Circuit has noted:

> Disciplinary proceedings, such as warning letters and reprimands, can constitute an adverse employment action. A reprimand, however, will only constitute an adverse employment action if it adversely affects the terms and conditions of the plaintiff's employment -- for example, if it affects the likelihood that the plaintiff will be terminated, undermines the plaintiff's current position, or affects the plaintiff's future employment opportunities.

Medina v. Income Support Div., 413 F.3d 1131, 1137 (10th Cir. 2005) (citations omitted). *See also, e.g.*, *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).

A corrective action is the first step in state employment to a disciplinary action. Board Rule 6-2 generally requires imposition of a corrective action prior to a disciplinary action. A corrective action is a formal document retained in the employee's personnel file and often forms the basis for a negative performance evaluation. The threat of receipt of a corrective action would dissuade a reasonable state employee from making a charge of discrimination. Here, the language of the corrective action is particularly critical:

> Your actions and behavior are egregious violations of policy and have created a situation that has impacted your ability to perform effectively and efficiently in your position as a Major at the Denver Complex. This behavior has seriously impacted your ability to provide adequate customer service to

> stakeholders with integrity, and has negatively impacted your job performance.

Furthermore, the corrective action contained the following warning: "Failure to correct your performance may result in further corrective and/or disciplinary action up to and including termination." The corrective action in this matter would dissuade a reasonable employee from making or supporting a charge of discrimination. Therefore, Complainant has established the second prong of a *prima facie* case of retaliation claim under CADA.

To establish the third prong of a *prima facie* claim of CADA retaliation, Complainant must establish a causal connection demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. *Chavez v. City of Arvada,* 88 F.3d 861, 866 (10th Cir.1996). Here, Complainant's protected activity stretched from November 2011, when he initiated his claim of race discrimination with the Board, until the settlement agreement executed in late June 2022. During that time, Complainant was investigated for his unauthorized viewing of documents on AW Reaux's desk, and shortly after his Board case was resolved through settlement, he was the subject of the Rule 6-10 process that ended with the imposition of the August 2, 2022 corrective action. In other words, the adverse action occurred contemporaneously with Complainant's protected activity. Based on temporal proximity alone, Complainant has demonstrated a causal connection between his protected activity and the adverse action he received. Accordingly, Complainant established the third prong of a *prima facie* claim of CADA retaliation. Therefore, Complainant established a *prima facie* case of CADA retaliation.

2. Legitimate, Non-Retaliatory Reason for Respondent Action

Once Complainant establishes a *prima facie* retaliation case, the burden shifts to Respondent to proffer a legitimate, non-retaliatory reason for the adverse employment action. If Respondent does so, Complainant must establish that the purported legitimate, non-retaliatory reason for the adverse employment action is pretextual. *Hansen v. SkyWest Airlines*, 844 F.3d 914, 925 (10th Cir. 2016).

As discussed above, Respondent has proffered a legitimate, non-retaliatory reason for administering Complainant a corrective action. Complainant's conduct in AW Reaux's office – the unauthorized viewing of confidential material – was a serious breach of Respondent's Code of Conduct, justifying a corrective action, if not a more severe disciplinary action. Respondent has satisfied its burden to proffer a legitimate, non-retaliatory reason for the corrective action.

3. Pretext

Complainant did not establish by a preponderance of the evidence at hearing that Respondent's legitimate, non-retaliatory reason for the corrective action was pretextual. Complainant introduced no evidence that Respondent's motive for issuing the corrective action was to retaliate against him because he raised a claim of race discrimination.

Complainant contended at hearing that the corrective action was not justified and that he did not violate DOC's Code of Conduct or Code of Ethics. Complainant argued that his conduct in viewing documents on AW Reaux's desk was "involuntary," and naturally arose from human nature, *i.e*., it was not his intent to read confidential materials but once he saw his name on one of the documents, he could not help himself.

No matter how one views human nature, without rules and laws to govern the conduct arising from human nature, it is likely that society would devolve into something resembling chaos. As James Madison put it in Federalist Paper No. 51:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.

And so, state employees are subject to applicable statutes and Board rules, and, in turn, state agencies are also subject to statutes and Board rules that establish applicable parameters of legitimate agency conduct.

In short, Complainant's reliance on human nature to justify his actions and argue that he should not be held accountable for those actions, is not persuasive. Complainant viewed confidential documents without authorization. DOC's Code of Conduct and Code of Ethics required Complainant to act professionally, with integrity and good judgment. Despite the temptation, Complainant's unauthorized viewing of confidential material was unprofessional and reflected poorly on Complainant's integrity and judgment. Respondent's corrective action was justified and was not pretextual. Accordingly, Complainant's CADA retaliation claim fails.

C. Complainant is Not Entitled to an Award of Attorney Fees and Costs

Had Complainant been successful in either of his two claims, he might have been awarded attorney fees and costs pursuant to three statutes. If Complainant prevailed on his Whistleblower Act claim, he would have been entitled to an award of attorney fees and costs pursuant to § 24-50.5-104(2), C.R.S. If Complainant prevailed on his CADA retaliation claim, he may have been entitled to an award of attorney fees and costs after filing with the District Court pursuant to § 24-34-405(8)(e)(II), C.R.S. Given that Complainant's claims are unfounded, Complainant is not entitled to an award of attorney fees and costs.

The Board is authorized to award attorney fees and costs if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment, or was otherwise groundless. § 24-50-125.5, C.R.S. A groundless personnel action is one in which it is found that "despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action ..." Board Rule 8-33(C). Frivolous actions, on the other hand, are actions in which it is found that "no rational argument based on the evidence or law was presented." Board Rule 8-33(A). A personnel action made in bad faith, that is malicious, or that was a means of harassment "means that it was pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-33(8). As discussed above, Complainant has failed to prove, by a preponderance of the evidence, that Respondent retaliated against him in violation of either the Whistleblower Act or CADA. Because Respondent's actions were not instituted frivolously, in bad faith, maliciously, or as a means of harassment, Complainant is not entitled to an award of attorney fees and costs pursuant to § 24-50-125.5, C.R.S.

CONCLUSIONS OF LAW

1. Respondent did not retaliate against Complainant in violation of the State Employee Protection Act (Whistleblower Act).

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

3. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is **dismissed** with prejudice.

Dated this 30th day of August 2023**,** at Denver, Colorado

/s/ [redacted]

Keith A. Shandalow, Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, Colorado 80203

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of August 2023, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Casey J. Leier, Esq.
cleier@ll.law

Jacob Paul, Esq.
Senior Assistant Attorney General
Jacob.Paul@coag.gov

[redacted]

APPENDIX A

ADMITTED EXHIBITS

Complainant's Exhibits: A, I, J, N, O, K, L, V, X, Y, AA, BB, CC, DD, EE, FF, JJ, KK, II, ZZ

Respondent's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

APPENDIX B

WITNESSES WHO TESTIFIED AT HEARING, IN ORDER OF APPEARANCE

Major Todd Crist

Major Gary Little

Investigator Gary Spangler

Associate Warden Lucille Reaux

Warden Jason Lengerich

Warden Ryan Long

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. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).

3. 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. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. 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. 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. Univ. of S. Colo., 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

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. 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. See Board Rule 8-53(A)(5)-(7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at dpa_state.personnelboard@state.co.us.

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 8-54.

ORAL ARGUMENT ON APPEAL

In general, no oral argument is permitted. Board Rule 8-55(C).

PETITION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).