

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 169-03

DIRECTED FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

LESLIE NGUYEN, Appellant,

Agency: DENVER COUNTY COURT, and THE CITY AND COUNTY OF DENVER,
a municipal corporation.

A hearing in this matter was held on January 27, 2004 by Hearing Officer Joanna Lee Kaye in the Career Service Hearings Office. Assistant City Attorney Robert A. Wolf represented Denver County Court (Agency). Leslie Nguyen (Appellant) was present and was represented by Cecilia M. Serna, Esq. At the close of Appellant's case-in-chief, the Agency moved for Directed Findings. The Hearing Officer requested arguments on this Motion in writing and recessed the hearing that time. The Agency filed its written Motion for Directed Finding on February 3, 2004. Appellant filed her written Response to the Agency's Motion on February 10, 2004.

MATTER APPEALED

Appellant challenges the Agency's decision to disqualify her from her position as Administrative Assistant III for her alleged inability to perform the essential functions of her position because of physical impairments that rendered her incapable of working. Appellant, a Vietnamese immigrant, charges that the Agency's action was motivated by discrimination against her because of her race and national origin. Appellant also argues she qualifies as "disabled," and is entitled to the protections afforded under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (1990) (ADA). Appellant further charges that the Agency's decision to disqualify her was motivated by a Worker's Compensation claim she filed. Finally, Appellant argues that the Agency's failure to grant her disability leave was a violation of the CSR rules.

For the reasons set forth below, the Agency's action is **AFFIRMED**.

PRELIMINARY MATTERS

1. Standard of review.

In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

The burden of proof in a discrimination claim is on Appellant to make a *prima facie* showing of discrimination. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This is true in disability discrimination claims as well. See, White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995).

Appellant also bears the burden of proof in her challenge of wrongful disqualification. There is a presumption of "validity and regularity" in non-disciplinary administrative actions. See, Garner v. Colo. State Dept. of Personnel, 835 P.2d 527 (Colo. App. 1992). The employee must show the action is arbitrary, capricious or contrary to rule or law by a preponderance of the evidence. See, Velasquez v. Dept. of Higher Education, ___ P. 3d ___, WL 22097754 (Colo. App. 2003), Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994), Renteria v. Colo. State Dept. of Personnel, 811 P.2d 797 (Colo. 1991).

2. Evidence considered.

a. Appellant's statement of total disability on her application for Social Security is admitted and given some weight.

The Agency offered Appellant's Social Security Application documents (Exhibits 25 and 26) in an attempt to support its contention that Appellant is completely unable to work. Appellant objected to these documents as not relevant to this case because "disability" for purposes of Social Security is determined by different standards than for ADA coverage.

Appellant's argument references case law against using a prior statement of disability in a Social Security application as a *bar to judicially estop* an ADA claim. The Agency does not seek to judicially estop Appellant's ADA claim. It merely seeks to have Appellant's statements in those documents considered. As the Court said in Rascon v. U.S. West Comm., 143 F.3d 1324 (10th Cir. 1998):

One of the purposes of the Social Security Act is to provide income support to an individual who is unable to work, perhaps temporarily, because of a disabling condition. See 42 U.S.C. § 1381. One of the purposes of the ADA is to provide an opportunity for an individual to work in spite of a disabling condition, by

requiring accommodation and by eliminating discrimination. See 42 U.S.C. § 12101(a)(8)...

Thus, the ADA takes into consideration whether an individual with a disability can work *given reasonable accommodation*. See 42 U.S.C. § 12111(8) (emphasis added). The Social Security Act, on the other hand, does not take into consideration whether an accommodation would render the individual able to perform a job. Therefore, a statement that a person is disabled for purposes of obtaining social security disability benefits--a determination made without regard to accommodation--is not necessarily inconsistent with a statement that a person has been discriminated against in the workplace on the basis of her disability--a determination made only after giving due regard to accommodation.

Id. at 1331-1332. The Court continued:

We join the majority of circuits and hold that statements made in connection with an application for social security disability benefits cannot be an automatic bar to a disability discrimination claim under the ADA. *Such statements may, however, constitute evidence relevant to a determination of whether the plaintiff is a "qualified individual with a disability."*

Id. At 1332 (*emphasis added*). After reviewing the case law on this issue, the Hearing Officer finds these documents admissible. In light of the different standards and purposes of determining disability under these two laws, however, the Hearing Officer did not give significant weight to these documents.¹

b. The Findings and Order in Appellant's Worker's Compensation case has not been admitted or considered.

The Agency moved for the admission of the Findings and Order in Appellant's Worker's Compensation case. Appellant objected that the decision had erroneous findings that were not supported by the evidence, and further that the ALJ's decision not to reopen her Worker's Compensation case was currently under appeal. The Agency responded that the rules of evidence permit the Hearing Officer to take adjudicatory notice of an administrative decision, even one under appeal, since the decision is final and authoritative unless and until overturned by a higher court.

However, because the Hearing Officer finds **in favor of the Agency** on other grounds, need not consider the ALJ's Findings and Order in the Worker's Compensation case.

¹ The following exhibits were also admitted and considered: Appellant's Exhibits A, C, E and K, and Agency Exhibits 1, 3, 4, 8 through 17, and 19 through 23.

ISSUES

1. Whether Appellant has made a *prima facie* case of discrimination based on her race or national origin.
2. Whether Appellant has made a *prima facie* case of disability discrimination.
3. Whether the Agency's decision to disqualify Appellant was motivated by her pursuit of a Worker's Compensation claim.
4. Whether Appellant has otherwise shown her disqualification was arbitrary, capricious or contrary to rule or law.

FINDINGS OF FACT

Based on the evidence presented at the hearing, the Hearing Officer finds the following to be fact:

1. Appellant was born in Saigon, Viet Nam. She immigrated to the United States in April of 1994.
2. Appellant's native language is Vietnamese. English is her second language. Appellant speaks with a heavy accent. Her co-workers and supervisors experienced some difficulty in communicating with her. During the hearing in this case, Appellant experienced difficulty understanding several questions from the Hearing Officer and attorneys during her testimony. Questions had to be repeated several times on some occasions. When explaining the oath, both Appellant's attorney and the Hearing Officer had to rephrase a question about Appellant's ability to tell the truth several times before Appellant understood the question and answered it. The Hearing Officer and attorneys had some difficulty in understanding Appellant's statements, and asked her to repeat her answers on several occasions. Appellant was also experiencing extreme pain during her testimony and this further hampered her ability to communicate.
3. Appellant began working for the Agency in February of 2000. She was an Administrative Support Assistant III at the time of her disqualification. Appellant's supervisor was Support Technician Sandy Trujillo. Appellant's relationship with Trujillo and her co-workers was excellent and she considered them a second family.
4. On May 21, 2002 Appellant dropped a box at work causing an injury to her left hand. Appellant continued working but experienced lingering pain in her hand after the injury. Appellant filed a Worker's Compensation claim as a result of this injury.
5. In August of 2002, Barry Ogin, M.D. (Ogin) performed surgery on Appellant's left hand. Her pain decreased somewhat after the surgery, then over time the pain began to worsen again. Appellant experienced numbness and tingling in her left

elbow, shoulder and neck. Her hand changed color when she experienced these symptoms. Appellant continued receiving medical treatments from Ogin.

6. On November 16, 2002, Appellant's physicians found her to be at maximum medical improvement (MMI), meaning Appellant's medical condition respecting the workplace injury to her hand was not expected to improve beyond this point. (See, Exhibit A.)
7. Appellant experienced numerous absences from May through December of 2002. Her sick leave balance remained low during this period. (Exhibit 21.)
8. In December of 2002 Sandy Trujillo was replaced by Linda Palmer (Palmer), who then became Appellant's supervisor.
9. Gail Jackson (Jackson) is a Probation Officer Supervisor. Erik Garcia-Gillespie (Garcia-Gillespie) has served as Probationary Services Administrator since June 30, 2003, and supervises Palmer and Jackson. Palmer and Jackson worked together as a team on some supervisory issues upon Palmer's appointment to the supervisory position.
10. On December 2, 2002 Appellant had a dentist appointment back-to-back with a chiropractic appointment related to her injury. Appellant had requested sick leave for the dentist's appointment and Worker's Compensation time for the chiropractic appointment. The leave was approved by Trujillo before she left her supervisory position.
11. On December 11, 2002 Palmer called Appellant to Jackson's office. The supervisors asked Appellant if she had taken Worker's Compensation time for her dentist's appointment. Appellant told them she had requested separate leave for each appointment. Jackson reiterated to Appellant that she must keep such leave requests separate. (See, Exhibit 3.) The discussion left Appellant with the impression that her new supervisors thought she was stupid and did not trust her.
12. After the conversation on December 11, 2002 Appellant returned to Jackson's office with her calendar and showed appointments during the course of 2002. Appellant tried to explain that she kept all her leave requests separate, but Jackson said she did not want to look at the calendar. Jackson became frustrated, swiveled her chair away from Appellant and told her she did not understand what Appellant was saying and did not want to listen to her. Appellant left Jackson's office at that time and was very upset by this incident.
13. A couple of days after the leave slip incident, Palmer stopped by Appellant's office and showed Appellant that she had found separate slips for the December 2, 2002 leave. Palmer apologized to Appellant.

14. Appellant experienced other instances where her supervisors would ask her to repeat instructions or assignments they gave her to make sure she understood them. Appellant found this insulting and believes her supervisors did not like or trust her because she is Vietnamese.
15. The Agency entered a Final Admission of Liability in Appellant's claim on April 8, 2003 (Exhibit A), and paid Appellant appropriate benefits under the Worker's Compensation claim.
16. Appellant's attendance improved somewhat during the first part of 2003, but she continued to take sick and vacation leave on a frequent basis. Her average balances were between 15 and 20 hours in each leave bank until May of 2003 (Exhibit 21).
17. Appellant was in three car accidents between 1998 and 2000 in which she experienced injuries which caused pain in her hands, arms and back similar to the symptoms of her work-related injury. During May of 2003, Appellant began experiencing increasing pain in her hands, arms, back and neck, which was worse on the right side than on the left. Dr. Ogini began a course of injections of a muscle relaxant known as "Botox" in Appellant's right back and neck muscles as a pain treatment. Appellant's pain continued to worsen after these injections. It is uncertain whether the worsening was from the work-related injury, the car accidents, or the Botox injections themselves.
18. On May 14, 2003 Garcia-Gillespie took Appellant to the hospital from work because she was experiencing pain in her hands and arms.
19. Appellant received a Botox injection on May 19, 2003. During work that same day, Appellant experienced debilitating pain and dizziness. Appellant could not use her hands and went to co-worker Audra's Ellison's office to ask her to get Appellant's lunch. Ellison observed that Appellant was unsteady. She put a chair in the hallway near the fax machine and asked Appellant to sit down so she would not lose her balance and fall. Appellant sat in the chair and was crying from the pain. Theresa Roberts (Roberts) and other co-workers approached Appellant and asked her what was wrong. Appellant told them she was in pain. Ellison returned and asked Roberts to drive Appellant to Denver Health. Roberts left work during work hours to take Appellant to DGH on an emergency basis. (Exhibit 8.)
20. Appellant returned to work on May 20, 2003.² That morning, Jackson spoke to Appellant about the incidents on May 19. Jackson told Appellant to try and avoid involving other employees in her Worker's Compensation issues, and to make plans for getting herself to the hospital should it become necessary to do so again during work hours. Jackson asked Appellant to repeat these instructions back to Jackson to make sure she understood them (see, Exhibit 8).

² Appellant reports these incidents happening on May 5 and 6, 2003.

21. During the work day on May 20, 2003 Appellant again experienced an episode of extreme pain and recurring muscle spasms in her neck, right ear, right eye and both hands. The pain was more intense in her right side than in her left side. The episode caused Appellant to lose her balance and she could no longer stand up. Appellant made her way to Jackson's office to tell her she could not work in her condition and needed to rest. Jackson asked Appellant if she had taken lunch yet and suggested Appellant take an early lunch to rest. Appellant rested in a vacant office, then returned to her desk but was still in such intense pain she was crying. Jackson went to Appellant's office and asked if she was still on her lunch break. Appellant told Jackson she was on duty. Jackson told Appellant that she needed to work if she was on duty or go to the doctor if she could not. Appellant went to Garcia-Gillespie's office, told him she could no longer stand the pain, and cried. Jackson joined them in his office, and asked Appellant if she wanted to go see the City's mental health counseling service. Appellant took the phone number but did not feel mental health services would help her with her physical pain and did not call the service. They told her she either needed to work or take leave and go back to the doctor if she needed to (Exhibit 10).
22. Appellant then called Ogin's office but the staff told her Ogin could not see her that day and she needed to go to DGH emergency. Appellant reported back to Jackson at 2:40 p.m. and told her she was leaving for the day (Exhibit 11). Appellant went outside and tried to walk to the bus stop. She lost her balance and fell on the street. Appellant was near the public library and went into the building. The security guard saw Appellant's City identification badge and offered to help her. She asked him to call a cab, and he offered to call an ambulance instead in case there were any complications on the way to the hospital. Appellant agreed and was taken to DGH by ambulance.
23. Appellant's sick and vacation leave banks remained almost completely used from May through October of 2003, the time of her disqualification (Exhibit 21).
24. Appellant received a doctor's excuse to be relieved from work from May 29, 2003 to June 2, 2003 (Exhibit 13).
25. Appellant received another Botox injection on June 4, 2003. On the morning of June 5, she again experienced terrible pain while at work. Appellant's supervisor told her that if she went to the doctor it would have to be on leave without pay. Appellant went to the Wellington E. Webb Municipal Building and approached the Career Service Employee Relations Section to ask for advice concerning her leave and benefits. One of the employees there donated sick time for Appellant to go to DGH.
26. Appellant then went to DGH and was seen by her family physician, Melanie Boyer (Boyer). Boyer examined Appellant, read her medical records and suspected a nerve problem. Appellant asked Boyer to put her on short-term disability and Boyer agreed, placing Appellant on leave from June 5 through June 22, 2003 as

- "incapacitated" and "unable to perform work of any kind". Boyer further indicates Appellant's June 22, 2003 return date as "tentative." (Exhibit 14.)
27. On June 5, Appellant requested Family Medical Leave (FML) (Exhibit 14). This request was granted on June 9 retroactive to March 7, 2003 effective until June 22, 2003 (Exhibit 15).
 28. On June 9, 2003 Appellant had an MRI performed which the reviewing physicians found suspicious for reflex sympathetic dystrophy (Exhibit 16).
 29. On June 18, 2003 Boyer extended Appellant's short-term disability leave to July 18, 2003. Boyer indicates "this time may be extended further per further evaluation & treatment." (Exhibit 17.)
 30. On August 25, 2003 Appellant was referred to Grace Alfonsi M.D. (Alfonsi) who extended Appellant's short-term disability leave to October 15, 2003 (Exhibit 19).
 31. As of August 28, 2003 Appellant had exhausted every type of leave available to her, including her FML and leave donated by other employees (see, Exhibits 21-22). Palmer and Garcia-Gillespie discussed their options regarding Appellant. They decided to pursue pre-disqualification proceedings.
 32. On September 24, 2003 Garcia-Gillespie prepared a letter notifying Appellant that the Agency was contemplating her disqualification (Exhibit 22). The letter states that full-time attendance is an essential function of Appellant's position, reiterates the history of Appellant's absences since January of 2003, and notes that Appellant had not worked since June 5, 2003. The letter set a pre-disqualification meeting for October 1, 2003.
 33. During the pre-disqualification meeting on October 1, 2003, Appellant appeared with her attorney. She told the Agency that she was trying to reopen her Worker's Compensation claim. The hearing on Appellant's Worker's Compensation claim was set for December 2, 2003 (Exhibit E). Appellant provided no information indicating when she would be able to perform the essential functions of her position, or any other position. (See, Exhibit 23.) She did not request any accommodations other than additional time off, and did not request an interactive process.
 34. Appellant never provided a release to return to work at any time relevant to these proceedings. Appellant never described or requested any kind of accommodations for her impairment that would permit her to do any type of work for the Agency.
 35. The Agency did not undertake the interactive process to determine whether Appellant was "disabled" under the ADA and therefore entitled to reasonable accommodations under the ADA and CSR rules. Garcia-Gillespie believed the fact that Appellant had reached MMI without any specific work restrictions precluded the need for an interactive process.

36. On October 15 Alfonsi again extended Appellant's leave to December 5, 2003 (Exhibit 20).
37. Garcia-Gillespie's understanding was that the City intended to contest Appellant's petition to re-open her Worker's Compensation claim because it took the position that the exacerbation of her symptoms was not work-related. He proceeded with disqualification. He notified Appellant of the disqualification action by his letter of October 16, 2003 (Exhibit 23).
38. Jackson played no part in the disqualification process and held no particular opinion as to whether Appellant should be disqualified.
39. At the time of the hearing, Appellant had no neck mobility. She could not move her head up or down, right or left. She could not raise her right hand over her head. Appellant's testimony under cross-examination was as follows:

Q. You never said on that form that you could work, did you?

A: I cannot work.

Q: You cannot work.

A: Right.

Q: To this day you cannot work, correct?

A: Right.

Q: So just to clarify, if you were offered your job back tomorrow, you couldn't do it because of the pain, correct?

A: Right.

DISCUSSION

1. Appellant has failed to make a *prima facie* case of discrimination based on her race or national origin.

In order to make a *prima facie* showing of discrimination, Appellant must show that she a) belongs to one or more protected classes, b) was qualified for the job, c) suffered an adverse employment action, d) under circumstances tending to give rise to an inference of discrimination. Colorado Civil Rights Comm'n. v. Big O Tires, Inc., 940 P.2d 397 (1997); see also, McDonnell Douglas (*above*).

It is undisputed that Appellant is a member of the protected classes of race and national origin, and that the Agency took an action to disqualify her from her position. However, the circumstances do not tend to suggest that this action was motivated by or connected with Appellant's race or national origin.³

³ As set forth below, the Hearing Officer further concludes that Appellant is not qualified for the position because she is incapable of working.

Appellant asserts that she understands English very well, but that the main problem is others being able to understand her. She argues that her co-workers were like family to her before the supervisory change in December of 2002. She argues that her new supervisors' habit of asking her to repeat instructions was unnecessary, demeaning, and constitutes evidence that the Agency's action against her was motivated by discrimination because of her race and national origin.

In support of her national origin discrimination claim, Appellant cites Carino v. University of Ok. Bd. Of Regents, 750 F.2d 815 (10th Cir. 1984). In that case, the employer demoted a Filipino supervisor because the employer believed the supervisor's Filipino accent made him unsuitable for a supervisory position. Affirming the district court's decision in favor of the employee, the Court stated:

A foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions... Cf. Salem v. La Salle High School, (No. 82-01310-BR, C.D. Cal. March 31, 1983) (language difficulties that interfere with performance of duties may be legitimately considered in employment decisions). The court found that plaintiff's accent would not interfere with the duties required of a supervisor.

That case is not persuasive here. First, there is no evidence that Appellant's accent or national origin were motivations behind the Agency's decision to disqualify her. The only evidence related to Appellant's communication abilities is of the supervisors expressing frustration and difficulty in understanding her, and asking her to repeat instructions back to them. While Jackson's swiveling around in her chair and refusing to listen is an inappropriate response, it is important to recall that she did not participate in the decision to disqualify Appellant.

It is not unreasonable or discriminatory to ask an employee to repeat instructions when one is having difficulty communicating and there is genuine doubt as to whether the employee understands. The Hearing Officer directly observed and experienced first-hand Appellant's command of the English language. While her command of English is generally sound, there were periods of *substantial* difficulty, in others' ability (including the Hearing Officer) to understand Appellant, as well as Appellant's ability to understand what was being said. When explaining the oath, both Appellant's attorney and the Hearing Officer had to rephrase a question about Appellant's ability to tell the truth several times before Appellant understood the question and answered it.

While Appellant's national origin might be related to her communication difficulties, the Hearing Officer finds a legitimate necessity in the supervisors' actions attempting to achieve effective communication about work-related issues. As the Tenth Circuit's ruling in Carino (above) would suggest, the ancillary consequences of *legitimate* language barriers were not intended to be addressed in discrimination laws.

The Hearing Officer concludes that Appellant has failed to show any circumstances tending to suggest a connection between her protected status and the Agency's decision to disqualify her. Therefore, Appellant has failed to make a *prima facie* case of racial discrimination.

2. Appellant has failed to make a *prima facie* case of disability discrimination.

To prove she is qualified for protection under the ADA, Appellant must show that a) she suffers from some impairment that substantially limits one of more major life activities,⁴ and b) that she is capable of performing the essential functions of a position with or without reasonable accommodations, despite the disability. See, Fail v. Community Hosp., 946 P.2d 573 (1997); AT & T Technologies v. Royston, 772 P.2d 1182 (Colo. App. 1989). Further, Appellant must affirmatively describe the reasonable accommodations that would allow her to perform the essential functions of her position. See, White v. York Int'l Corp., 45 F.3d 357, 360-61 (10th Cir. 1995).

a. Appellant must request and describe a reasonable accommodation before the Agency is required to initiate the interactive process.

Appellant argues that she was entitled to the interactive process to determine whether she was "disabled," and therefore entitled to reasonable accommodations which would have allowed her to return to work. She posits that with reasonable accommodations, there are other positions for which she would qualify. Appellant argues that the Agency's failure to engage her in the interactive process was a *per se* violation of the ADA and corresponding rules at CSR 14-20 *et seq.*

The Hearing Officer disagrees. CSR 5-84, Reasonable Accommodations for Individuals with Disabilities Policy, states as follows in relevant part:

E. Interactive Process

If an employee (1) *provides notice that the employee needs a reasonable accommodation to perform the essential functions of the position*; or (2) the agency or department has actual or constructive notice that an employee may have a disability *for which the employee needs reasonable accommodation*, the agency or department shall initiate an interactive process....

(*Emphasis added.*) This rule might be read to suggest that once the Agency has actual notice that the employee is suffering from an impairment, the burden to initiate the interactive process shifts to the Agency. However, controlling case law in the Tenth Circuit and persuasive authority in numerous other jurisdictions confirms that the employee bears an affirmative responsibility of first requesting *and describing*

⁴ Major life activities include, but are not limited to, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, reading, touching, learning and working." See, Fail (above).

reasonable accommodations before the responsibility shifts to the Agency to initiate the interactive process. See, e.g., White v. York International Corp. (above) at 360 (noting that the employee must describe the reasonable accommodations making it possible to perform his duties); id. at 363 (the employer does not have to engage in the interactive process unless the employee shows that a reasonable accommodation is available).

The Court's ruling in Jones v. Aluminum Shapes, Inc., 339 N.J. Super. 412 (2001) is instructive on this issue:

"To show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: (1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability; (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith."

Id. at 418; citing Taylor v. Phoenixville School District, 184 F.3d 296, 315-316; 319-320 (3d Cir. 1999). See also, Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996) (an employee's request for an accommodation triggers an employer's obligation to participate in the interactive process), certiorari denied, 519 U.S. 1029, 117 S. Ct. 586, 136 L. Ed. 2d 515; Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, at 1285 (7th Cir. 1996) (holding that an employee's request for a reasonable accommodation requires communication between the parties and that both parties bear the responsibility for determining what accommodation is necessary); Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 951-952 (8th Cir. 1999) (rejecting employer liability based solely on not engaging in the interactive process but requiring the employer must do so when a disabled employee requests an accommodation); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997) (holding that a plaintiff must show that reasonable accommodations were available and that an employer cannot be held liable merely for not engaging in the interactive process).

In Appellant's case, the information before the Agency clearly suggested that she was suffering an impairment extreme enough to prevent her from working at all, rendering the interactive process meaningless. None of the medical documents indicates Appellant is capable of performing any type of work given any accommodations. None of the documents releases her to return to work with any kind of restrictions. On the contrary, the documents in evidence only remove Appellant from work entirely, and indicate that she is *incapable* of working (see, e.g., Exhibit 14). At no time has Appellant ever offered any evidence to the contrary. Appellant did not suggest she could do any kind of work at the disqualification meeting. She did not describe or request any kind of reasonable accommodation, nor did she ask for an interactive process, at the disqualification meeting or at any other time.

Appellant testified she was still unable to work at the time of the hearing in this case. In her written Response to the Agency's Motion for Directed Finding, Appellant

argues that she did not admit to being completely unable to work during her testimony at the hearing. She asserts that her admission was to an inability to do her current job.

The Hearing Officer is unpersuaded. Appellant did not limit her statement that she is incapable of working to her current position, as she now argues. It is Appellant's burden to describe what accommodations would permit her to work. Yet Appellant has described no task she can accomplish. Appellant has not shown she is capable of performing the essential functions of any position, with or without a reasonable accommodation. She has therefore failed to show that she qualified for coverage within the meaning of the ADA, one of the elements necessary to show a *prima facie* case of disability discrimination.

Garcia-Gillespie testified that he believed Appellant was not entitled to the interactive process because Appellant reached MMI on November 16, 2002 (Exhibit A). This is not a reason for failing to offer the interactive process. MMI simply means that an employee's condition is not expected to improve. It does not mean that the employee is completely recovered or suffers no physical impairments. It does not mean that she is not "disabled" and thus entitled to the protections of the ADA.

However, the only evidence available to the Agency clearly indicates that Appellant is incapable of working. If Appellant is incapable of working, then the purpose of the interactive process (to determine what Appellant's working abilities are and what reasonable accommodations may be offered to Appellant) is rendered moot and the Agency's error was harmless. The Hearing Officer finds no evidence of bad faith in the Agency's actions, or that Appellant could have been reasonably accommodated but for the Agency's failure to engage the interactive process.

The Hearing Officer concludes that the Agency's failure to engage Appellant in the interactive process was not a *per se* violation of the ADA and corresponding CSR rules because Appellant failed to request or describe reasonable accommodations that would allow her to perform the essential functions of any position in the Agency.

b. Appellant's request for indefinite leave is not a reasonable accommodation.

Appellant argues that her request for additional time off for an indefinite period of time constitutes a request for a "reasonable accommodation" that gave rise to the Agency's responsibility to initiate the interactive process. In support of her argument that a temporary leave is a "reasonable accommodation," Appellant cites Rascon v. U.S. West Comm., 143 F.3d 1324 (10th Cir. 1998). There, the employee suffered from behavior problems arising from post-traumatic stress disorder. He continued to work while experiencing these emotional problems. After several such problems arose while he was on the job, the employee sought in-patient treatment in a long-term program. He maintained that he would be able to perform the essential functions of his position upon completion of the program, which would be approximately four months but no longer than nine months. During Rascon's treatment, two doctors opined that his prognosis was good and expected him to be able to return to work upon completion of

the program. In other words, the period of leave he requested had a defined duration and end.

The Tenth Circuit agreed that Rascon's request for this temporary leave was a reasonable accommodation. However, the Court continued stating that "an indefinite unpaid leave is not a reasonable accommodation where the plaintiff fails to present evidence of the expected duration of her impairment." Rascon, at 1334, *citing Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996); *see also Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) (holding that "reasonable accommodation does not require the [employer] to wait indefinitely for [the employee's] medical conditions to be corrected").

Appellant's case thus differs from Rascon in two critical respects. First, the employee in that case continued working despite his behavioral problems, and only went on long-term leave to enter a program designed to alleviate those problems. But Appellant experienced excessive absences over a long period of time, and then was rendered completely incapable of working beyond June 5, 2003. Second, whereas Rascon offered a definite time frame within which his treatment was expected to be completed, in Appellant's case there is no suggestion of any timeframe, reasonable or otherwise, after which she will be sufficiently recovered to return to any type of work. In fact the record suggests, to the contrary, that Appellant's condition is chronic, worsening, and difficult to diagnose and treat.

Therefore, as the cases cited by the Tenth Circuit in Rascon (*above*) would suggest, the holding in that case is not dispositive here. The Hearing Officer concludes that Appellant's request for indefinite leave is not a "reasonable accommodation."

c. Appellant's argument that the Agency "regarded" her as disabled must fail.

Appellant argues that whether she qualified as "disabled" under the ADA is not material because the Agency's disqualification evidenced that it "regarded" her as disabled, thus qualifying her for coverage under the ADA.

The Hearing Officer has reviewed several cases interpreting the "regarded as" clause of the ADA. None of them applies this clause in the manner Appellant argues. However, 29 CFR 1630.2, which sets forth the definition of the clause, reads as follows in relevant part:

(l) Is regarded as having such an impairment means:

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.⁵

The Hearing Officer concludes that Appellant misapprehends the intent of the ADA as indicated by the governing case law and regulations. Appellant's situation fits none of the definitions of being "regarded as" disabled set forth above in 29 CFR 1630.2 (l). The Hearing Officer is further unpersuaded that the Agency's disqualification of Appellant because of her actual, admitted inability to work brings her under the purview of the ADA because it "regards" her as "disabled." If this were true, then it would render the requirements of qualification for ADA coverage meaningless. The Hearing Officer declines to apply a construction of the ADA that would essentially bootstrap every person who was disqualified for any medical or psychological impairment into ADA coverage, despite whether or not their actual medical condition would have otherwise qualified them for ADA protections, or whether that condition would permit them to work in any capacity. Having an "impairment" is not the same as being "disabled" within the meaning of the ADA. Before the person actually qualifies for coverage under the Act, the impairment must substantially limit a major life activity, *and* the individual must still be able to perform the essential functions of a position with whatever reasonable accommodations are necessary.

For the reasons stated above, Appellant's argument that she qualifies for protections under the ADA because the Agency regarded her as disabled must fail.

3. Appellant has failed to show that the Agency's action violated public policy.

Appellant argues that the Agency's decision to disqualify Appellant was motivated by retaliation for her Worker's Compensation claim, and was therefore in violation of public policy. See, Lathrop v. Entenmann's, 770 P.2d 1367 (Colo. App. 1989). There is no evidence to support this assertion. The Agency paid Appellant's Worker's Compensation benefits and entered a Final Admission of Liability in Appellant's claim on April 8, 2003 (Exhibit A). Thereafter it considered the matter closed. It took no further action until Appellant was rendered unable to work for a period of several weeks. The Agency was not aware that Appellant had moved to reopen the Worker's Compensation claim until it had elected to pursue disqualification because of Appellant's extended leave and the disqualification meeting was already in progress. Finally, the Hearing Officer finds it

⁵ Subsection (h) in turn reads as follows:

(h) Physical or mental impairment means:

- (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
- (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

irrelevant whether Appellant's extended time off work was for a Worker's Compensation claim or not. The fact is, for whatever reason, Appellant could not work. This was the motivation behind the Agency's decision to disqualify her.

4. Appellant has failed to show the Agency's action was arbitrary, capricious, or contrary to rule or law.

Under the CSR rules, a disqualification is a non-disciplinary administrative action in which the burden of proof lies with Appellant as the "proponent of the order." See, Velasquez, above. The proponent must prove by a preponderance of the evidence that the Agency's action was arbitrary, capricious and/or contrary to rule or law. See, Renteria, above.

In Lawley v. Dept. of Higher Education, 36 P.3d 1239 (Colo. 2001), the Colorado Supreme Court specifically restated that the arbitrary or capricious exercise of discretion by an agency can arise in only three ways:

"(a) By neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it. (b) By failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion. (c) By exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable [persons] fairly and honestly considering the evidence must reach contrary conclusions."

Lawley, above at p. 1252, quoting Van DeVeight v. Board of County Comm'rs, 98 Colo. 161, 55 P.2d 703 (1936).

While the Agency's misapprehension of the rules governing disability apparently led to the decision not to engage Appellant in the interactive process, at the time it made this decision it had numerous medical documents leading it to believe that Appellant was completely incapable of working. Its conclusion that an interactive process was futile therefore does not constitute neglect or refusal to use reasonable diligence and care to procure evidence pertaining to Appellant's disqualification. The Agency further held a pre-disqualification meeting, at which Appellant had the opportunity to provide any additional information on her case. She provided no medical releases allowing her to return to work, and no information otherwise indicating she was capable of working in any capacity.

The Agency then gave candid and honest consideration to the materials before it, and concluded that Appellant was incapable of working for an indefinite period of time. Under these circumstances, reasonable persons, fairly and honestly considering the

evidence, would not have been compelled to reach contrary conclusions about Appellant's inability to work.

Appellant argues that she is entitled to disability leave under CSR 11-120, which permits for up to ninety days of leave for a work-related disability. She asserts that the Agency's failure to grant her this leave is a violation of the rule. However, Appellant herself testified that no one knew whether the exacerbation of her injury leading to her inability to work arose from the work injury or from Appellant's car accident. None of the medical documents in the file definitively establish one way or the other whether Appellant's complications arose from her work injury or the car accident. Therefore, Appellant's claim under CSR 11-120 must also fail.

Based on Appellant's evidence, the Hearing Officer concludes she has not shown that the Agency's action was arbitrary, capricious, or contrary to rule or law.

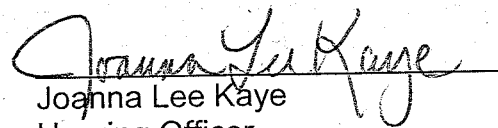
CONCLUSIONS OF LAW

1. Appellant failed to make a *prima facie* case of discrimination based on her race or national origin.
2. Appellant failed to make a *prima facie* case of disability discrimination.
3. The Agency's decision to disqualify Appellant was not motivated by her pursuit of a Worker's Compensation claim.
4. Appellant has not met her burden to show her disqualification was arbitrary, capricious or contrary to rule or law.

ORDER

Based on the Findings and Conclusions set forth above, the Agency's Motion for Directed Findings is GRANTED. The Agency's decision to disqualify Appellant is AFFIRMED. The hearing presently set to reconvene on Friday, February 27, 2003 is VACATED. This matter is DISMISSED.

Dated this 18th day of February, 2004.


Joanna Lee Kaye
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in the U.S. mail, postage prepaid, this 18th day of February, 2004, addressed to:

Cecelia M. Serna, Esq.
940 Wadsworth Blvd., #400
Lakewood, Colorado 80214

Leslie Nguyen
2522 South Genoa Street
Aurora, Colorado 80013

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in the interoffice mail, this 18th day of February, 2004, addressed to:

Robert A. Wolf
Assistant City Attorney
Employment Law Section

