

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

Appeal No. 139-04

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**DECISION AND ORDER**

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IN THE MATTER OF THE APPEAL OF:

**HENRY OWENS**, Appellant,

Agency: Department of General Services, Public Office Buildings, and the City and County of Denver, a municipal corporation.

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The hearing in this appeal was held on February 1, 2005 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and was represented by Ross Goldsmith, Esq. The Agency was represented by Assistant City Attorney Christopher Lujan. Having considered the evidence and arguments of the parties, the Hearing Office makes the following findings of fact, conclusions of law and enters the following decision:

**FINDINGS AND ANALYSIS**

This is an appeal of a ten-day suspension of Appellant Henry Owens, custodian with the Department of General Services, Public Office Buildings (Agency). The action dated September 16, 2004 was imposed for violations of Career Service Rules (CSR) and departmental regulations. The timely appeal asserts that the Agency action violated Career Service Rules 11, 15 – 17 and 19, and requests a rescission of the discipline, back pay, and removal of the disciplinary action from Appellant's personnel file.

The Agency's Exhibits 2 - 8, 12, and 13 were admitted without objection, and 9 and 11 were admitted over Appellant's objection. Appellant's Exhibits A - C were admitted over the Agency's objection. Exhibits D, F and G were rejected. Exhibits 1, 10, and E were not offered into evidence.

I. **NATURE OF DISCIPLINE**

Appellant was suspended for ten days based upon the appointing authority's conclusion that on March 16, 2004, he was absent from his assigned work area in the City and County Building between 11:20 p.m. and 1:30 a.m., and fell asleep while on duty, in violation of departmental and Career Service personnel rules governing the performance of his duties.

The Agency charged Appellant with violations of the following subsections of CSR § 16-50 A., Discipline and Termination:

- 1) Gross negligence or willful neglect of duty,
- 7) Refusing to comply with the orders of an authorized supervisor or refusing to do assigned work, which the employee is capable of performing,
- 13) Unauthorized absence from work, and
- 20) Other unspecified conduct.

Appellant was also charged with violations of the following subsections of CSR § 16-51 A., Causes of Progressive Discipline:

- 5) Failure to observe departmental regulations; specifically, the Public Office Buildings Division's Administrative Policies section prohibiting sleeping or taking breaks in courtrooms or other agency space.
- 10) Failure to comply with the instructions of an authorized supervisor, and
- 20) Other unspecified conduct.

At the request of Appellant's representative, the predisciplinary meeting was continued to allow Appellant to engage in the City's interactive process to determine whether Appellant's sleepiness was related to a disability that could be reasonably accommodated under the Americans with Disabilities Act (ADA), 8 USC § 1324b(g). That process concluded after an independent medical examination (IME) with a finding by ADA Coordinator Rita Murphey that Appellant was not disabled within the meaning of the ADA.

At the continued pre-disciplinary meeting held on September 13, 2004, Appellant participated with his representative Ross Goldsmith, Esq. Mr. Goldsmith stated that Appellant fell tired because of medication, lied down in his assigned work area and fell asleep. In imposing the ten-day suspension, the Agency considered the statement of Appellant's representative, his previous disciplinary history and work record, and their conclusion that Appellant did not inform his supervisors of his inability to work before falling asleep. [Exh. 2.]

## II. ISSUES

1. Whether the Agency proved that Appellant committed violations of the Career Service Rules by a preponderance of the evidence,
2. If so, whether the ten-day suspension imposed was reasonably related to the seriousness of the offenses in question in conformity with CSR § 16-10, and

3. Whether Appellant proved by a preponderance of the evidence that the discipline was imposed because of Appellant's race, color, creed, age, disability, or in retaliation for his assistance in the investigation of a complaint.

### III. EVIDENCE

The facts related to the discipline at issue here are largely undisputed. On March 11, 2004, the supervisory staff for the City and County Building's Public Office Buildings Division sent a memo to each member of the custodial staff establishing a trash detail rotation that required Appellant to load and unload the freight elevator, and throw the trash at 7:20 and 11:20 p.m. The memo warned that failure to adhere to the policy "may result in disciplinary action." [Exh. 3.] Appellant initialed his copy of the administrative policy to acknowledge his receipt of it. [Exh. 7, p. 2; testimony of Dan Barbee.]

On Tuesday, March 16, 2004, Appellant was scheduled to work his normal 5 p.m. to 1:30 a.m. shift on the south side of the fourth floor of the City and County Building. At 11:20 p.m., Custodial Supervisor Mike Brewer noticed Appellant had not loaded the freight elevator with the trash bins, as required by the new trash detail policy. After loading the trash himself, Mr. Brewer and supervisor Jeff Mestas attempted to locate Appellant in his assigned work area. Over the course of the next two hours, three supervisors searched for Appellant another three times without success. Appellant was next seen at the time clock at 1:30 a.m., the end of his shift.

Shortly after the start of his shift the following day, Appellant was asked to meet with his supervisors to discuss his absence from his work area the day before. He testified he informed them he had experienced chest pains, and the nitroglycerin he took made him drowsy. He also stated he had been depressed over the death of his dog. Appellant thereafter provided Mr. Mestas a list of his medicines, and drug fact sheets for nitroglycerin and Plavix. [Exhs. 4 – 6.]

The POB administrative policies require employees to notify their supervisor if they are taking any medicine that may make them sleepy or otherwise affect their ability to do their jobs. [Exh. 7, p. 10.] Appellant testified that he gave his medical documentation to his previous supervisor, Wardale Carlis. Mr. Carlis testified that he remembered Appellant giving him documents about his medical condition and medication in November 2003, and that he passed it on to another supervisor, Steven Pacheco, who then maintained the supervisor's file on all custodians, including Appellant. Mr. Mestas, Appellant's supervisor at the time of this incident, stated that he checked that file after the incident, and found no documents regarding medication.

At the predisciplinary meeting, Appellant's representative claimed that Appellant was disabled, and therefore any discipline based on his protected status would be discriminatory. As a result, the Agency initiated the interactive process to determine the issues of disability and reasonable accommodation. The process concluded with a determination that Appellant was not disabled. At the continued predisciplinary

meeting, Appellant's representative claimed the Agency knew of his medications and therefore should have accommodated Appellant when the medications caused him to become sleepy. Appellant's representative also stated that since Appellant was in his work area, he should not be disciplined for his supervisors' failure to find him. [Testimony of Dan Barbee.] Appellant testified that Mr. Barbee asked him how his heart stints were performing even before he told him about them. Mr. Barbee explained that he had worked for the company that made them before he came to work for the City. Appellant then explained his medical situation to Mr. Barbee, including his diagnosis of diabetes and a heart condition. [Testimony of Appellant.]

Mr. Barbee concluded it was Appellant's responsibility to be working in his area, and his supervisors were not at fault. He found that Appellant was sleeping on the job, and that as a result other employees were required to do his work. Mr. Barbee relied upon the ADA Coordinator's conclusion that Appellant is not disabled to find that the Agency could not allow the behavior as an accommodation of a disability. He determined a ten-day suspension was appropriate based upon the number and nature of previous disciplinary infractions that had not corrected Appellant's work behavior. Appellant's previous discipline included a four-day suspension for watching television at work on two successive days in February 2004, and two written reprimands and two verbal reprimands for tardiness between May 2003 and February 2004. [Exhs. 11 – 13.] Mr. Barbee was strongly influenced by the most recent incident, when Appellant acted in a similar fashion by watching television rather than doing his work. Since sleeping on the job is considered serious behavior tantamount to job abandonment, Mr. Barbee determined that a ten-day suspension was needed to correct the behavior. Mr. Barbee also testified that this discipline was less severe than that imposed on other employees for sleeping while on duty.

Appellant testified that he began experiencing chest pains about ten minutes to 11 p.m. He went to a courtroom chambers, put a nitroglycerin pill under his tongue, and lay down on the sofa. He woke up some time after his alarm rang at 1:15 p.m., went outside the chambers and looked around to see if anyone was there. He then headed to the basement to clock out. On the way, he noticed that his cart was not where he left it on the fourth floor. He explained at hearing that his alarm was set for 1:15 a.m. every night in order to allow him to gather his supplies and clock out in the basement at 1:30 p.m. No one said anything to him about his absence while he clocked out, and he did not mention it to anyone, because by then he was only concerned about going home. He stated he had no intention of falling asleep or discontinuing work.

Appellant testified that his doctor informed him the nitroglycerin pills cause drowsiness and lightheadedness, and they need to be taken while seated. He states that he had already finished cleaning all of his assigned area, and did not think to call his supervisor to tell him how he was feeling. Appellant said he followed his doctor's advice that, when having severe chest pains, he should sit down, take nitroglycerin, and relax. He remembers giving medical documentation to Mr. Carlis when he was Appellant's supervisor.

Mr. Barbee testified that he knew of Appellant's heart stints at the April predisciplinary meeting, but did not know what medications he took for it. He believes nitroglycerin is a stimulant that dilates blood vessels, based upon his previous work with a pharmaceutical company. At that meeting, Appellant's representative claimed that Appellant was disabled, and the interactive process followed. Mr. Barbee stated that he saw only Exhibits A, 5 and 6 at the predisciplinary meeting.

Richard Saul was Appellant's direct supervisor. He testified that he knew Appellant had a heart condition, and heard he had surgery the previous December. After this incident, Mr. Saul asked Appellant to give him medical documentation to support his claim that he had fallen asleep because of the medicine he took. Despite three requests, he never got the documentation, he stated.

Jeffrey Mestas also supervised Appellant, and issued the Trash Detail Rotation order. [Exh. 3.] He testified that Appellant told him and supervisors Saul and Brewer at the March 17<sup>th</sup> meeting that he took medicine for chest pains. Mr. Mestas asked Appellant to furnish him a copy of the medicine he takes at work for safety reasons. The Agency has a policy requiring that employees notify their supervisors if taking any medicine that may make them sleepy. [Exh. 7, p. 10.] Appellant told him he had already provided the paperwork. Mr. Mestas checked the custodial services file kept in the supervisor's office, and was unable to find it. Mr. Mestas stated that the same documents are kept in the supervisory and Agency files. Appellant later furnished him a list of his medications, and information from a website about nitroglycerin and Plavix. [Exhs. 4 - 6.] The information about nitroglycerin did not indicate it causes drowsiness. [Exh. 5.]

Mr. Brewer testified that Appellant told him he supplied the information about his medication to Mr. Pacheco, Appellant's supervisor until December 2003. Mr. Brewer checked with Mr. Pacheco, who told him he didn't know anything about it. Mr. Brewer checked Appellant's file and did not find any reference to medication in it. Medication information provided by an employee pursuant to the policy is given to the supervisor and the safety officer. About a week thereafter, Appellant gave Mr. Brewer copies of Exhibits 5 and 6.

The Agency presented Appellant's report of outside employment, which indicates that Appellant works another full-time job starting at 3 a.m. [Exh. 9; testimony of Mr. Barbee.] Appellant testified that he has worked for that employer for the past ten years, and averages about thirty-five hours a week.

#### IV. ANALYSIS

Appellant was charged with seven violations of the personnel rules related to attendance and performance. The City Charter requires that the facts at issue in a Career Service appeal must be determined *de novo*. C5.25(4). Such a determination requires an independent fact-finding hearing and the resolution of factual disputes. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975.)

### A. Performance of Duties

Appellant is alleged to have been grossly negligent in the performance of his duties in violation of CSR § 16-50 A. 1). In support of this allegation, the Agency established by un rebutted evidence that Appellant was absent from his work area for over two hours on March 16, 2004. Appellant admits that he was asleep in a courtroom from about 11:00 p.m. to about 1:25 p.m. Since an employee who is asleep is not performing his duties, the only issue under this rule is whether this failure to perform was grossly negligent.

Negligence is the failure to use reasonable care or failure to act in a reasonably prudent manner under the circumstances. Lavine v. Clear Creek Skiing Corp., 557 F.2d 730 (10<sup>th</sup> Cir. 1977); In re: Casteneda, CSA # 79-03 (1/14/04). Gross negligence is an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. Black's Law Dictionary 717 (abridged 6<sup>th</sup> ed. 1991).

The evidence establishes that Appellant felt chest pains at 10:50 p.m. He sought out a place to lie down, found a sofa in a judge's chambers, took a nitroglycerin pill, and lay down with his alarm clock set to ring shortly before the end of shift. He was asleep until 1:20 a.m., the remainder of his shift. Appellant then clocked out without informing his supervisor that he had fallen asleep. The medical information Appellant later provided does not support a conclusion that the only medicine taken, nitroglycerin, causes drowsiness. [Exh. 5.] Appellant testified that he continues to take nitroglycerin, and has not fallen asleep on the job since this incident. Appellant also stated that he has another job, at which he works about seven hours a day. He sleeps between jobs, and sometimes goes home from his second job early in order to sleep. His work schedule requires Appellant to sleep when he can find the opportunity. Appellant brought along an alarm clock to alert him to the end of his shift demonstrates that Appellant anticipated sleeping for the remainder of his shift. The evidence thus demonstrates that Appellant knowingly failed to perform his duties in disregard of the consequences. Under those circumstances, I conclude that the Agency established Appellant was grossly negligent in the performance of his duties.

The Agency also cited the Public Office Buildings' Administrative Policy against sleeping in the courtrooms or other agency space in support of discipline under CSR § 16-51 A. 5). I find that the facts found above also establish a violation of this departmental policy, in violation of subsection 5).

### B. Refusal to Comply with Orders or Instructions

The Agency has charged Appellant with both refusal to comply with supervisory orders or refusal to do assigned work as prohibited by CSR § 16-50 A. 7), and failure to comply with instructions under CSR §16-51 A. 10). The Trash Detail Rotation memo was offered in support of both charges. [Exh. 3.] Therein, Appellant was instructed and

ordered to load and unload the freight elevators and remove trash at 11:20 p.m. every night. Appellant does not deny that he failed to perform any of those duties on March 16<sup>th</sup>, but argues that his nonfeasance was unintentional and is therefore not a refusal to comply within the meaning of the disciplinary rules.

I find that Appellant voluntarily went to a judge's chambers and lay down on a sofa. He took medicine he knew would make him sleepy, and did fall asleep. He brought with him his alarm clock, which he knew was set to ring at the end of the shift. Appellant should have reasonably anticipated that his actions would lead to his falling asleep for the remainder of his shift, given the demands placed on him by his second job, and that as a result he would fail to perform his portion of the trash detail. Those actions demonstrate an act of will that supports a violation of the above personnel rules.

### C. Unauthorized Absence

Appellant was charged with unauthorized absence from work in violation of CSR § 16-50 A. 13). The Agency argues that Appellant's failure to be where his supervisors could find him supports a finding that he violated the rule. The Agency supported this allegation by the testimony of four supervisors who searched for Appellant during the two hours he remained missing from his duties. Appellant's absence was first discovered when he failed to perform his part in the trash detail rotation, resulting in employees standing idle at the freight elevator while awaiting the trash Appellant had failed to load. Appellant contends that he was in fact in his assigned work area for the final two hours of his shift, although he was asleep and did not perform his assigned work during that time.

An important component of attendance is attention to duty. When an employee completely removes himself from his duties by taking actions resulting in his falling asleep, causing other employees to have to undertake his assigned duties, a charge of unauthorized absence is justified. See Mitchell v. Dept. of Defense, 22 MSPR 271 (1984). Here, Appellant took a two-hour nap that was anticipated to last until quitting time, leaving his work cart in another area. Under these circumstances, the Agency has proven unauthorized absence from work for two hours, in violation of CSR § 16-50 A. 13).

### D. Other Unspecified Conduct

Because I have found that the Agency has proven the Appellant committed violations of specific Career Service Rules, I do not reach the issue of whether Appellant violated either CSR § 16-50 A. (20) or 16-51 (11).

### V. PENALTY

I must now determine whether a ten-day suspension is reasonably related to the seriousness of the offense, taking into consideration Appellant's past disciplinary record, in compliance with CSR § 16-10.

Discipline is reasonably related to the seriousness of an offense if it is within the range of reasonable alternatives available to a reasonable, prudent agency administrator. In re: Gustern, CSA #128-02, p. 20 (12-23-02), *citing Adkins v. Div. of Youth Services*, 720 P.2d 626 (Colo.App. 1986.) Discipline is not excessive if it is substantially based on considerations that are supported by a preponderance of the evidence. Gustern, *id.*

Appellant's past record included five disciplinary actions within the past ten months, the most recent of which was a four-day suspension for the similar offense of watching television while on duty a month before the incident at issue in this appeal. Mr. Barbee, the appointing authority who imposed the current discipline, testified that he considered the number, nature and similarity of Appellant's past discipline in order to determine what level of discipline would be most likely to impress upon Appellant the need to correct his behavior and obtain compliance with personnel and departmental rules. Mr. Barbee also considered that Appellant's conduct was in violation of the recent trash detail assignment, caused a supervisor to have to perform his duties in order to prevent others from remaining idle, and that the search for Appellant consumed the time of three supervisors over a two-hour period.

Appellant argues that his behavior was involuntary, caused by a medical condition of which the Agency had notice, and thus does not justify the discipline. The Agency counters that the Career Service Rules do not require proof of intent as an element of a violation of the rules, and that Appellant likewise had notice of and understood the policy against sleeping on duty. The Agency also argues that Appellant's need for sleep was caused by his holding down another nearly full-time job, and therefore his behavior was voluntary.

The totality of the evidence demonstrates that at the time of the incident Appellant was in a physical state that made falling asleep likely given an opportunity. Appellant worked an average of seventy-five hours a week, and was prescribed a variety of medications for several serious physical conditions. However, the Agency is justified in requiring its employees to work during their shift. In the event of a medical emergency, employees may use sick leave by notifying a supervisor of their need for it. Appellant did not take advantage of his ability to take such leave, but instead left work without speaking to anyone about what had occurred.

This was not the first instance in which Appellant was found to have neglected his duties. Mr. Barbee was persuaded to increase the discipline imposed by this recurrence a month after Appellant had been warned by his supervisor two days in a row for watching television on the job. Appellant was ultimately suspended for four days for that conduct. [Exh. 11.] Appellant had also been given two verbal reprimands and two written reprimands for tardiness previous to the four-day suspension. The Agency reasonably concluded that progressive discipline required the imposition of more severe penalties for the March incident, given the fact that less severe discipline had not corrected the behavior. The deciding official also considered that his conduct had

required another employee to perform his duties, and had caused three supervisors to search for him during the two remaining hours of his shift.

It is found that the penalty imposed was consistent with the purposes of progressive discipline to correct inappropriate behavior and performance under CSR § 16-10.

## VI. DISCRIMINATION AND RETALIATION CLAIMS

This appeal also raises the issue that race, color, creed, age, disability discrimination and/or retaliation caused the Agency to impose the ten-day suspension. At the beginning of the hearing, Appellant moved to dismiss the claim of discrimination based on creed, and that unopposed motion was granted.

Appellant bears the initial burden of bringing forth a body of evidence from which the trier of fact can conclude that unlawful discrimination occurred if that evidence is unrebutted. Here, a prima facie case of discrimination on any of the above bases would consist of four elements: 1) that Appellant is a member of the protected class; 2) that he was qualified for the position he held; 3) the Agency took an adverse action, here, a ten-day suspension; and 4) that the suspension was imposed because the Agency intended to discriminate against Appellant, or, as to an age claim, that older workers were disproportionately and adversely impacted. Discriminatory intent may be proven circumstantially by evidence that the Agency treated employees outside the protected class more favorably under similar circumstances. McDonnell Douglas v. Green, 411 U.S. 792 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Smith v. City of Jackson, 2005 U.S.Lexis 2931.

The Agency concedes the first three elements of the prima facie case are present here with regard to the claims of race and color. It argues however that Appellant presented no evidence of discriminatory intent. The evidence showed only that another employee of unknown race was fired for sleeping on duty based upon a similar disciplinary history. [Testimony of Dan Barbee.] The exhibits and testimony raised no other evidence relevant to the issue of discriminatory motivation for the suspension.

Appellant argues that his excluded exhibits D, F and G form the basis for his disparate treatment discrimination claims on the bases of race and color.

Exhibit D is a pleading in a separate appeal by Custodial Supervisor Wardale Carlis, who appeared as a witness for Appellant at the hearing in this appeal. Among the attachments to that pleading is the 35-page report of an internal investigation into asserted disparate treatment by two POB supervisors, Steve Pacheco and Daniel Swinarski, on the basis of race. Appellant was one of eighteen custodians interviewed in October 2003. The report indicates that Appellant complained he was disciplined by Mr. Pacheco for being late, while three Hispanic females were not. [Exh. 13.] Appellant also told the interviewer he overheard supervisor Steve Pacheco state, “[a]ny monkey

can do the job.” Exhibit D was excluded prior to the commencement of evidence based upon its lack of connection to the intent of the decision-maker in this case, Mr. Barbee.

Exhibit F is a chart comparing the discipline imposed on POB employees by race and sex from 2002 to 2003. Exhibit G is a statistical breakdown of discipline based on race. Both were excluded because they did not reflect the identity of the deciding official, or indicate whether the circumstances or prior disciplinary history made an inference of disparate treatment appropriate.

Exhibits D, F and G were offered to prove that disciplinary rules were imposed more frequently on African American employees. Disparate treatment discrimination based solely on a comparison of the discipline imposed on other employees must compare only those who bear a high degree of similarity to that of the party claiming discrimination. Similarly situated employees “must have reported to the same supervisor . . . , must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to [appellant’s], without such differentiating or mitigating circumstances that would distinguish their conduct or the appropriate discipline for it.” Mazzella v. RCA Global Communications, Inc., 642 F.Supp. 1531, 1546-47 (S.D.N.Y. 1986.)

Even if the exhibits were admitted, they are insufficient to establish discriminatory motive. Exhibit F shows that all employees were given verbal reprimands for tardiness, regardless of race. Appellant was not disciplined for frequent violations of the attendance and punctuality rules. [Exh. D, p. 36.] Other types of favoritism asserted during the October investigation were not similar in kind to that alleged in this appeal. Thus, the exhibits do not tend to establish disparity in treatment based on race or color. Appellant did not present any other evidence that would support a finding that race or color motivated the decision to impose discipline. The claims of discrimination on the bases of race and color are therefore dismissed for failure to establish each element of a prima facie case.

Appellant failed to present any evidence of his age and membership in the protected group under CSR § 19-10 c) and the Age Discrimination in Employment Act (ADEA), that his supervisor was aware of his age or protected status, or that the suspension was imposed because of his age. That claim is therefore dismissed for failure to establish a prima facie case. O’Connor v. Consolidated Coin Caterers Group, 517 U.S. 368 (1996).

The appeal also claims Appellant was disciplined because he is disabled, in violation of CSR § 19-10 c) and f). However, Appellant failed to prove the existence of a disability; i.e., that he had a physical impairment which substantially limited one or more of his major life activities, as required in order to state a claim under the ADA. 29 CFR 1614.203(a)(1); Poindexter v. Atchison, Topeka & Santa Fe Railway Co., 168 F.3d 1228 (10<sup>th</sup> Cir. 1999.) Appellant did not offer any testimony or evidence as to the nature of any impairments, or their effect on his life and ability to do the essential functions of his job, with or without reasonable accommodation. The only evidence of Appellant’s

medical condition is that contained in Exhibits B and C, which indicate that Appellant is not disabled.

Appellant argues only that his medication caused the drowsiness which led to the rules infractions, and that therefore the discipline is discriminatory. However, the evidence shows that the Agency had no knowledge that Appellant took nitroglycerin, or that nitroglycerin causes drowsiness. Appellant testified that his doctor informed him that drowsiness is a side-effect of this medicine, but he did not submit any information to his supervisor that confirms that fact. [Exh. 5.] Mr. Carlis testified that he received medical information from Appellant and passed it on to Appellant's supervisor for inclusion in his file. That is insufficient to meet Appellant's burden to show that he is disabled, since it does not indicate a physical limitation substantially limiting a major life function. . "It is insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a medical diagnosis of an impairment." Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), citing 29 CFR §§ 1630.2(j)(2)(ii-iii).

Without proof of a disability, the necessity to reasonably accommodate does not arise under the ADA. Therefore, Appellant's claim that the Agency should have waived its rule against sleeping on duty as a reasonable accommodation of Appellant's medical need to take nitroglycerin is not well founded. [See Exh. B.]

The ADA also prohibits discrimination against a person who has a record of a substantially limiting impairment. 29 CFR § 1630.2(k). This part of the definition of disability is intended to prevent discrimination because of a history of disability or a misclassification as disabled. ADA Handbook, EEOC Interpretive Guidance, 43. The definition's third part prohibits discrimination against those who are regarded as disabled by their employer. "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987).

Appellant offered the evidence of Mr. Carlis that Appellant had given him medical documents in November 2003 which explained his medical condition and the medications he was required to take as a result of having stints put in his heart. However, those documents, whatever they contained, were not in Appellant's file at the time of this incident. The supervisors and deciding official had no knowledge that Appellant was taking nitroglycerin until he informed them of that fact shortly after the incident. Mr. Barbee knew only that Appellant had a heart stint. There is no evidence that Appellant was considered or misclassified as disabled by the Agency. I find that Appellant has not established by a preponderance of the evidence that the Agency discriminated against him on the basis of a disability under CSR § 19-10 c).

Finally, Appellant claims that his suspension was imposed in retaliation for his role as a witness in an internal investigation into custodian complaints of supervisor favoritism based on race. Appellant was interviewed in October 2003, along with all but one of the custodians on night crew at the City and County Building. [Exh. D, pp. 7, 40.]

Appellant claims he reported discrimination from the summer of 2003 up to the fall of 2004 in grievances, testimony in an appeal filed by another employee<sup>1</sup>, meetings with Human Resources personnel, and predisciplinary meetings. [Appellant's More Particular Statement, p. 1, filed Dec. 17, 2004.]

The Career Service Rules prohibit retaliation against an employee for reporting discrimination or assisting the City in the investigation of any complaint of harassment or discrimination. CSR § 15-106. A prima facie case of retaliation is established by showing:

- (1) protected opposition to discrimination or participation in a proceeding arising out of discrimination;
- (2) adverse action by the employer contemporaneously or subsequent to the employee's protected activity;
- and (3) a causal connection between such activity and the employer's action.

Williams v. Rice, 983 F.2d 177, 180 (10<sup>th</sup> Cir. 1993.)

An eighteen-month gap between the first EEO activity and the adverse action does not support an inference of a causal connection between the protected activity and the discipline. See Richmond v. Oklahoma University Board of Regents, 1998 U.S. App. LEXIS 26600; Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (1997). Appellant submitted no evidence or argument that explains the absence of more immediate retaliatory action, or that would otherwise support a finding that the discipline was caused by Appellant's participation with seventeen other custodians in an internal investigation. Appellant has therefore failed to meet his burden to establish retaliation under CSR § 15-106.

### **ORDER**

The Agency's discipline of Appellant dated September 16, 2004 is AFFIRMED.

Dated this 31st day of  
March, 2005.

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Valerie McNaughton  
Hearing Officer  
Career Service Board

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<sup>1</sup> A review of the transcript of Appellant's testimony reveals that Appellant was a fact witness whose testimony did not include any reference to discrimination. In re: Robert Perez, CSA # 137-03, transcript 11/10/03, pp. 206 - 214.

**CERTIFICATE OF MAILING**

I hereby certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the U.S. mail, postage prepaid, this \_\_ day of \_\_\_\_\_, 2005, addressed to:

Ross Goldsmith, Esq.  
695 S. Colorado Blvd., S. 490  
Denver CO 80207

Henry Owens, Appellant  
14562 E. Andrews Avenue  
Denver, CO 80239

I further certify that I have forwarded a true and correct copy of the foregoing **DECISION** by depositing same in the interoffice mail, this \_\_day of \_\_\_\_\_, 2005, addressed to:

Christopher Lujan  
Assistant City Attorney  
Litigation Section

Luis Colon  
Manager, Department of General Services

Dan Barbee  
Director, Public Office Buildings

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