

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

Appeal No. 17-03

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

GINA VIGIL, Appellant

Agency: DEPARTMENT OF GENERAL SERVICES, PUBLIC OFFICE BUILDINGS,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

Hearing Officer Joanna Lee Kaye held a hearing in this matter on August 6, 2003 in the Career Service Hearings Office. Assistant City Attorneys Christopher M.A. Lujan and Mindi L. Wright represented the Department of General Services, Public Office Buildings (Agency), with Equal Employment Opportunity Coordinator Rita Murphy present as advisory representative for the Agency. Gina Vigil (Appellant) was present and was represented by James C. Fattor, Esq. The Agency filed its written closing on August 19, 2003 as the hearing officer requested at the close of the hearing. Appellant elected not to file a written closing. Neither party has requested any extensions or other grants of leave for further filings.

MATTER APPEALED

Appellant, formerly a career-status Custodian for the Agency, challenges the Agency's decision to disqualify her from her position due to some restrictions assigned to Appellant's activity as a result of a car accident. Appellant counterclaims that she was capable of performing all essential functions of the position, and that the Agency's act in disqualifying her was an act of disability discrimination in violation of Career Service Rule (CSR) 14-21 and the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (1990) (ADA).

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

ISSUES

1. Whether the Agency demonstrated its disqualification of Appellant was not arbitrary or capricious.

2. If so, whether Appellant has demonstrated a *prima facie* case of discrimination; *i.e.*, whether Appellant has shown:
 - a) that she qualifies as "disabled" as required by the definition under the ADA, and
 - b) that she remained capable of performing the essential functions of her job under reasonable accommodations notwithstanding the disability, and
 - c) that the Agency failed to make reasonable accommodations, instead disqualifying her from the position.
3. If so, whether the Agency has demonstrated a legitimate business reason for its allegedly discriminatory actions.
4. If so, whether Appellant has shown that the Agency's stated business reason is a pretext for discrimination.

FINDINGS OF FACT

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

1. Appellant was a Custodian for the City and County of Denver at various agencies since 1997. She has been with the Agency in this case since April of 2001.
2. As a Custodian for the City, Appellant's essential job functions include general cleaning duties, collection and removal of trash, operation and storage of equipment including vacuums, floor buffers, mowers and snow blowers, receiving and storing supplies and equipment, setting up and tearing down furniture. The physical requirements of these functions include constant standing and walking, frequent lifting of up to twenty pounds, occasional lifting of up to fifty pounds, frequent bending, squatting, pushing and pulling, and handling of items. The duties further require occasional climbing of stairs and ladders, stooping, twisting, kneeling, crouching, and reaching above the chest, over the head and away from the body. (Exhibit 20; see, Exhibit 18.) The physical strength capacity required for this position classifies it as "medium work." (Exhibit 20, p. 3.)
3. The Agency's upright vacuums weigh from 8.5 to 58 pounds. The buffers weigh up to 35 pounds. The lawn mowers weigh 85 pounds. The snow blowers weigh 110 pounds. (Exhibit 19.)
4. When a temporary injury is work-related, the City and County of Denver's Executive Order 65 (Exhibit 23), and the accompanying Occupations Safety Policy (Exhibit 24) provide for an employee to be placed on modified duty pending resolution of the injury when it is determined that the employee is fully recovered, or has reached the maximum level of medical improvement anticipated. Only employees who are injured while on the job are eligible for modified duty assignments (see, Exhibit 24 p. 2).

5. Appellant was on modified duty when she transferred to the Agency in April of 2001. This was for a foot injury she sustained while on duty on September 7, 2000, prior to her transfer to the Agency. Appellant's restriction was to remain off her foot for various periods of time. Appellant did little or no heavy lifting or overhead cleaning during her modified duty status.
6. Appellant was in a car accident on April 21, 2001 which caused injuries to her neck, back and shoulders (Exhibit 14). The car accident was not work-related. Appellant's foot injury was not affected in any way by this accident.
7. Appellant was off work after the car accident for three months (see, Exhibit 13 p. 1).
8. Between May of 2001 and May of 2002, Appellant continued to have pain in her back and neck. She was seen over a dozen times by Dr. Robert Bess, and underwent chiropractic therapy with Dr. Hill during this period. The pain in her right shoulder began to resolve, but then her left shoulder began to cause her increased pain (see, Exhibit 13 p. 1).
9. On April 1, 2002 an unknown physician gave Appellant a return-to-work pass which stated a restriction prohibiting Appellant from wearing steel-toed boots (Exhibit A). On May 6, 2002 Appellant received a pass releasing her to full duty with no restrictions (Exhibit B). Exhibits A and B both indicate in the upper right-hand corner that they were issued with respect to Appellant's foot injury on September 7, 2000. These passes are not related to any injuries arising from the car accident on April 21, 2001.
10. Appellant experienced exacerbation of the pain from her car accident after scrubbing a wall at work on Thursday, May 2, 2002. The pain was so severe she could not get out of bed the next day and called in sick. (See, Exhibit 13.) When she returned to work the following Monday, Agency supervisor Mike Brewer told her she could not return to work without a medical pass.
11. ADA Equal Employment Opportunity Coordinator, Rita Murphey (Murphey), is a Certified Rehabilitation Registered Nurse. On May 15, 2002, Murphey initiated the interactive process afforded to individuals suffering various forms of limitations under CSR 5-84. She began trying to ascertain the exact nature of Appellant's physical limitations in order to determine whether Appellant was "disabled" within the meaning of the ADA (see, Exhibit 4).
12. On May 20, 2002 Dr. Bess prepared a letter to Appellant's attorney indicating that at her two most recent visits, Appellant requested that he place restrictions on her bending at the waist, pushing and pulling, stooping, climbing, and lifting over 20 pounds. However, the letter indicates the MRI on Appellant's back was normal. He therefore anticipated these restrictions relating to her back pain would be temporary, pending resolution of the pain. The letter states Dr. Bess did not have a scan of the shoulder injury yet, and so he had not diagnosed the source of the pain.

He therefore could not determine whether Appellant would have any lingering restrictions to her arm. (Exhibit D).

13. On May 31, 2002 Murphey sent Dr. Bess a letter requesting clarification concerning Appellant's injuries related to her car accident (Exhibit 12). In his response to this letter, Dr. Bess indicates the diagnosis as "rotator cuff tear" and that Appellant was "unable to do full unrestricted work as a Custodian" at that time. This letter further indicates that the shoulder MRI still had not been done.
14. On June 18, 2002 Murphey sent Dr. Bess a letter seeking clarification of Appellant's physical restrictions. Dr. Bess responded that Appellant had a "possible rotator cuff tear," that the MRI required in order to confirm this diagnosis had not yet been done, and that it is "difficult to work as a Custodian with a rotator cuff tear." (Exhibit 11.)
15. On June 29, 2002 Dr. Bess gave Appellant a return-to-work pass (Exhibit C). The pass indicates in the upper right-hand corner that it pertained to an injury that was not job-related (NJR) and does not indicate a date of injury.
16. Murphey received the full duty return-to-work pass dated June 29, 2002 (Exhibit C). She compared it with Dr. Bess' responses to her June 18, 2002 letter. She found the documents inconsistent. On July 15, 2002 Murphey sent Dr. Bess a letter requesting clarification of this inconsistency. Dr. Bess responded that the June 29, 2002 full-duty pass was issued to Appellant in error because he had confused Appellant with another patient with the last name of Vigil (Exhibit 10, p. 4). Dr. Bess further stated that Appellant could do the following using only her right side: lift up to 20 pounds, push and pull, and reach above her chest and over her head. He opined that Appellant could not lift 21 to 50 pounds. Dr. Bess predicted Appellant might be able to return to work full duty in one month's time (see, Exhibit 9).
17. Performing moderate-level work such as running buffers, mowers and snow blowers using only one side of the body puts an inordinate amount of strain on the side being used and increases the likelihood of injury.
18. The Agency sent Appellant to Dr. Brad Aylor at Rehabilitation Associates for an independent medical evaluation on August 21, 2002. During the exam Appellant told Dr. Aylor about the exacerbation of her pain after scrubbing a wall at work in May of 2002. During the evaluation with Dr. Aylor, Appellant corrected his understanding of her duties on two major points. First, whereas Dr. Aylor thought Appellant's duties included lifting 21 to 50 pounds on an occasional basis, Appellant told him that she lifted this much weight on a frequent basis. And whereas Dr. Aylor understood the duties to require reaching above chest and away from body only 33% of the work day, Appellant told him that this was required from 33% to 66% of the work day.
19. Dr. Aylor placed restrictions on Appellant, prohibiting her from lifting 20 to 50 pounds, and reaching over her head. Dr. Aylor opined that Appellant should not be

released to full duty, but instead should be restricted to work rated at the sedentary level, which is two levels below medium-level work. (See, Exhibit 20, p. 3.)

20. Murphey reviewed Appellant's case and determined Appellant's injuries did not qualify her as "disabled" under the CSR rules or the ADA. However, she elected to try to find Appellant a transfer suitable to accommodate the limitations caused by her injuries, notwithstanding that Appellant was not disabled under the ADA. On September 16, 2003 she initiated the portion of the interactive process under CSR 5-84 E and F in which a suitable alternate position is sought. (See, Exhibits 5 through 8.)
21. On December 16, 2003 the three-month interactive process expired and Murphey was still unable to find Appellant an alternative position for transfer. Murphey terminated the interactive process at that time and notified Appellant (see, Exhibit 4).
22. The Agency notified Appellant that it was contemplating medically disqualifying her from her position by its letter of January 10, 2003 (Exhibit 2). The Agency held a pre-disqualification meeting on January 21, 2003. Appellant provided no new medical documentation at the meeting.
23. The Agency notified Appellant she was medically disqualified from her position by its letter of February 4, 2003 (Exhibit 3).
24. Appellant timely appealed on February 14, 2003 (Exhibit 1).

DISCUSSION

1. The Hearing Officer's Jurisdiction

The hearing officer finds she has jurisdiction to hear this case as a disqualification case, pursuant to CSR Rule 19-10 b), as follows in relevant part:

Section 19-10 Actions Subject to Appeal

An applicant or employee who holds career service status may appeal the following administrative actions relating to personnel.

- ...b) Actions of appointing authority: Any action of an appointing authority resulting in... disqualification... which results in alleged violation of the Career Service Charter Provisions, or Ordinances relating to the Career Service, or the Personnel Rules.

Appellant alleges a violation of CSR 14-21, which states that an agency may pursue disqualification when an employee suffers an impairment which prevents them

from "satisfactory performance of the essential functions of the position." The rule reads as follows in relevant part:

Prior to disqualification because of physical... impairment... if it is determined pursuant to [CSR 5-84] that an employee is disabled within the meaning of the... (ADA), the agency or department must have attempted to make a reasonable accommodation pursuant to that rule. If a reasonable accommodation cannot be provided or the employee rejects a reasonable accommodation, disqualification may be initiated.

If it is determined that an employee is not disabled within the meaning of the ADA, the agency or department need not attempt to make a reasonable accommodation and disqualification may be initiated.

(Emphasis added.)¹

The hearing officer finds she has jurisdiction Appellant's allegation of disability discrimination under CSR 19-10 c) as follows in relevant part:

Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of...disability including:

...2) Not attempting to make reasonable accommodations to the known physical or mental disability of a job applicant or an employee unless the accommodation would impose an undue hardship...

2. Burden of proof

The City Charter, C5.25 (4) and CSR 2-104(b) (4) require the hearing officer to determine the facts of the case "de novo." This means that she is mandated to make independent determinations of the facts and resolution of factual disputes. Turner v. Rossmiller, 535 P.2d 751 (Colo. App. 1975.)

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. See, 13-25-127, C.R.S (2001). In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

An agency responsible for disqualifying a Career Service employee under CSR 19-10 b) affirmatively bears the initial burden of establishing, by a preponderance of the evidence, that the Agency's action was not arbitrary or capricious. An agency's decision

¹ The hearing officer does not have jurisdiction over ADA claims. Her jurisdiction is limited to the CSR rules. However, CSR Rule 1, defining "disabled individual," and CSR 5-84, 9-62 f), and 41-21 governing disability-related transfers, were promulgated to mirror federal ADA standards and refer directly to the ADA. Therefore, the hearing officer can look to ADA case law and federal regulations in her application of the related CSR rules governing disability..

is arbitrary and capricious when it "is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Board of County Commr's v. O'Dell, 920 P.2d 48, 50 (Colo. 1996):

Assuming the Agency has shown its decision to disqualify Appellant was not arbitrary or capricious, in cases such as this one where Appellant counterclaims discrimination, Appellant then bears the burden of affirmatively establishing a *prima facie* showing of discrimination. To make a *prima facie* showing, she must show that: a) she is qualified as "disabled" within the definition under the ADA; b) she is capable of performing the essential functions of her job under reasonable accommodations notwithstanding the disability, and c) that the Agency failed to make reasonable accommodations, instead disqualifying her from the position. Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999). If Appellant makes such a showing, the Agency must then demonstrate a legitimate, non-discriminatory business purpose for its actions. For instance, one way of demonstrating a legitimate business purpose is by showing that the disability in question genuinely prevented the employee from doing the job and there was no available reasonable accommodation. See, e.g., Colorado Civil Rights Commission v. North Washington Fire Protection District, 772 P.2d 70 (Colo. 1989). If the Agency makes such a showing, Appellant must then establish that the Agency's non-discriminatory business purpose is a pretext for discrimination. Murphy, above.

3. The Agency has demonstrated its disqualification of Appellant was not arbitrary or capricious.

The Agency asserts its disqualification of Appellant was proper under CSR 14-22 Grounds for Disqualification, which states as follows in relevant part:

An employee shall be deemed to be disqualified if any of the following conditions occur:

- ...b) Physical or mental impairment or incapacity: When an employee becomes unable to perform the essential functions of the position because of mental or physical impairment or incapacity...

The Agency first asserts that the classification of Custodian includes the following essential functions: collection and removal of trash, operation and storage of equipment including vacuums, floor buffers, mowers and snow blowers, receiving and storing supplies and equipment, setting up and tearing down furniture. These functions require frequent lifting of up to twenty pounds, occasional lifting of up to fifty pounds, frequent bending, squatting, pushing and pulling of carts and other items. The duties further require occasional climbing of stairs and ladders, stooping, twisting, kneeling, crouching, and reaching above the chest, over the head and away from the body. (Exhibit 20) The physical rating for this position is medium-level work (EXHIBIT 20, p. 3). These job requirements are set forth in further detail in the Classification Specifications of Custodian (EXHIBIT 18).

A job function is "essential" when it is reasonable to require the duty of all employees in a given class. A program's requirements are those that are reasonable and legitimate, that is, necessary for all positions and uniformly required of all employees. AT&T Technologies Inc. v. Royston, 772 P.2d 1182 (Colo. App. 1989). The infrequency with which an employee is required to perform a given duty does not eliminate the need to be capable of performing that duty. Coski v. City and County of Denver, 795 P.2d 1364 (Colo. App. 1990). A position's function is considered "essential" when it is "fundamental to the nature of the program." See, School Board v. Arline, 480 U.S. 273, 107 S. Ct. 1123, 94 L.Ed.2d 307 (1987) (fn. 17).

The functions at issue are uniformly required by the position of Custodian (see, Exhibit 18). Cleaning office buildings requires the use of heavy machinery, and the ability to lift heavy objects and reach above one's chest. The Agency's requirement that Appellant be able to perform these tasks is reasonable. The hearing officer concludes that these functions are fundamental to the position of Custodian. Therefore, they are "essential functions" under the above case law.

The Agency argues that the evidence in this case demonstrates Appellant's medical restrictions disqualify her from the position. The hearing officer agrees. During the interactive process, two physicians, Dr. Robert Bess and Dr. Brad Aylor, restricted Appellant from full-duty capacity based on their understanding of Appellant's duties. Specifically, they both recommended against lifting of objects weighing twenty to fifty pounds, and use of her injured arm at or above the chest (see, Exhibits 10 and 13). These limitations prohibit Appellant from doing the above duties.

4. Appellant's arguments in response to the Agency's case are unpersuasive.

a. Appellant does not have a valid release to return to full duty.

Appellant argues that she has full-duty return-to-work passes that the Agency must honor. However, neither of these passes is effective in this case. The first one (Exhibit B) indicates it is for a foot injury that occurred on September 7, 2000. It is not related to the restrictions arising from the injuries to Appellant's back and shoulder from the later car accident. The second (Exhibit C) is from Dr. Bess, who indicated that he issued this pass in error because he confused Appellant with another individual of the same last name (see, Exhibit 10, p. 4). Therefore, neither releases Appellant to return to work with respect to her car accident restrictions.

b. Appellant cannot perform essential functions of her job as she asserts.

Appellant further argues that despite the limitations set on her by the physicians, she is capable of performing the essential functions of her job. First, she asserts that several of the functions considered "essential" by the Agency are not actually part of her regular duties. She argues that she has not had to lift heavy machinery or perform any other duties that are prohibited by her restrictions during the past year that she worked.

This argument is unpersuasive. First, the hearing officer has already concluded the duties at issue are essential functions of the position of Custodian. In addition, during the times Appellant was at work during her last year, she was on modified duty as a result of the on-the-job injury. That injury has since resolved and has therefore become irrelevant (see, Exhibit B). She was not at work at all for another significant portion of the last year. Finally, even if Appellant was not required to do these duties, it means that someone else was required to do them for her. Appellant cannot now use her modified duty as a model of the essential functions of her position.

Appellant claims that the doctors who placed the restrictions on her have an inaccurate understanding of the physical nature of her position. Yet Dr. Bess had treated Appellant for her car accident injuries for over a year when Murphey sought clarification from him (Exhibits 10-12; D). When Dr. Aylor interviewed Appellant she told him the physical demands of the position were even *greater* than his understanding. Her description to Dr. Aylor of the physical requirements of her position are contradictory to her assertions at hearing. Appellant appears to adjust her description of facts to suit the audience. Her assertions at the hearing are contrary not only to her own earlier assertions, but also to the Agency's description of the requirements of her position. The hearing officer finds Appellant's latter assertions lack credibility.

Appellant asserts that even where the restrictions might impinge on her ability to perform essential functions, they only do so as to her left side, which is the injured side. Appellant maintains that she can perform all the real functions of her job, such as running sweepers, buffers and mowers, using the right side of her body, and that she can dust over her head using an extension. Again, the hearing officer finds this claim unpersuasive. These are heavy pieces of machinery requiring strength and leverage to push, pull and steer them. ADA Coordinator Rita Murphey, a Certified Rehabilitation R.N., testified that using only one side of the body to do this type of work puts inordinate strain on the side being used. This increases the likelihood of injury to that side.

Therefore, in light of this evidence, the hearing officer concludes that the Agency has demonstrated its disqualification of Appellant was not arbitrary or capricious.

5. Appellant has failed to make a *prima-facie* showing of disability discrimination.

As in other discrimination cases, the case law on disability discrimination requires the party claiming discrimination to make an affirmative *prima facie* showing that the relevant protections apply to them. See, Poindexter v. Atchison, 168 F. 3d 1228 (10th Cir. 1999). In order to make a *prima facie* showing of disability discrimination; Appellant must show that: 1) she is qualified for ADA coverage under the definition of "disabled individual," that 2) she is capable of performing the functions of his position given reasonable accommodations notwithstanding the disability, and that 3) the Agency failed to make reasonable accommodations, instead disqualifying her from the position. All three of these elements must be shown for Appellant to make her *prima facie* case against the Agency. However, for the reasons set forth below, she has shown none of them.

a. Appellant has not shown that she is “disabled” for purposes of the ADA.

In order to satisfy the first *prima facie* element, Appellant must show that she is qualified for coverage as a “disabled individual.” The definition of “disabled individual” under CSR Rules 1 and 5-84 D, in relevant part, is:

An individual who (1) has a physical or mental impairment which substantially limits one or more major life functions; or (2) has a record of such impairment; or (3) is regarded as having such an impairment....²

The governing case law makes it clear that in order for Appellant to establish that she is “disabled” within the meaning of this definition, she must show: 1) some “impairment,” and 2) that the impairment “substantially limits” a “major life activity.” Poindexter, above, at 1230.

According to the EEOC regulations, “substantially limit[ed]” means “[u]nable to perform a major life activity that *the average person in the general population* can perform;” or “[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which *the average person in the general population* can perform that same major life activity.”

Toyota Motor Mfg. Ky. Inc. v. Williams, 534 U.S. 184, 195-96 (2002) (*emphasis added*).

“Major life activities” are activities such as walking, seeing, hearing, speaking, breathing, learning, thinking, or working. See, Bragdon v. Abbott, 524 U.S. 624 (1998); see also, Toyota Motor Mfg., *above*, at 196. Further, if the claimed inability is “working,” significant restrictions must be shown “in the ability to perform either a class of jobs or a broad range of jobs in various classes...” *Id.*, citing 29 CFR § 1620.2 (j) (3) (i). See also, § 1630.2 (j) (3) (i) which states that “[t]he inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working.”

Even if an individual is not suffering a real impairment but instead is only *perceived* by the Agency as having such an impairment, the Agency must regard the impairment to substantially limit a major life activity. Sutton v. United Air Lines Inc., 571 U.S. 471, 489 (1999); Murphy, *above*, at 523 (1999). Finally, it is the employee’s responsibility to specifically plead or prove both the impairment in question, and the major life activity in question. Poindexter, *above*, at 1230.

In this case, Appellant asserts she is *not* disabled and can do the essential functions of the job. She has neither pled nor proven any ‘major life activity’ she is incapable of performing because of the pain in her arm and neck. Nor has she shown the Agency *regarded* her as incapable of performing any major life function. Finally, even

² The wording in these rules is virtually identical, except that CSR 5-84 D refers to major life “activity.” This language is in turn virtually identical to that found in the ADA’s definition of “disability,” at 42 U.S.C. § 12102 (2).

if Appellant had a history of a substantial impairment to her ability to walk from the foot injury, those restrictions were lifted and Appellant was released to full duty with regard to her foot injury as of May 6, 2002 (Exhibit B). That history is irrelevant to the cause for disqualification in this case, the injuries arising from the car accident.

Therefore, Appellant has not shown she is "disabled" under the ADA.

b. Appellant has not shown she is capable of performing the essential functions of the position given reasonable accommodations despite her disability.

The second requirement of a *prima facie* showing is that Appellant is otherwise capable of performing the essential functions of the position despite her disability, with reasonable accommodations. Even if she qualified as "disabled" under the first prong of the test, Appellant has failed to show this is the case.

An otherwise qualified person is one who can perform "the essential functions" of the job in question. See, 45 C.F.R. § 84.3(k) (1985); see, Southeastern Community College v. Davis, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979). As set forth above, the hearing officer has concluded Appellant's restrictions prohibit her performing a number of essential custodial duties.

Appellant argues that she could perform the duties of her position if she were given reasonable accommodations. However, the elimination of essential job functions is not considered a "reasonable accommodation." Bellus v. State of Colorado, 843 P.2d 119 (Colo. App. 1992; see also, 43 C.F.R. § 84.12(c) (1985). Thus, since the duties Appellant requests modification of are essential to the position, her request is not reasonable.

c. The Agency did not fail to provide reasonable accommodations to Appellant.

It is important to recall that the Agency is not required to make any accommodations at all if Appellant is not disabled within the meaning of the ADA. (See, CSR 14-21, above.) When a person *is* suffering some form of covered disability and is not able to perform the essential functions of the job, the Agency is only required to make *reasonable* accommodations that will enable the impaired person to perform those functions.

Appellant has not shown she is "disabled" within the meaning of the ADA. However, even if she had, she has still failed to show that the Agency did not make reasonable attempts to accommodate her impairments.

When reasonable accommodations cannot be made within a given position, the alternative is to seek a suitable transfer position under CSR 5-84 E. Despite its determination that she was not "disabled" within the meaning of the ADA, the Agency made a good-faith attempt to find Appellant a suitable accommodating transfer position

under that rule. It was unable to do so. The Agency asserts that this series of events left the Agency with little choice but to pursue disqualification proceedings. The hearing officer agrees.

For the foregoing reasons, Appellant has failed to make a *prima facie* showing of disability discrimination. Her claim that the Agency acted in violation of CSR 14-21 must therefore fail.

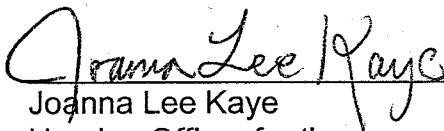
CONCLUSIONS OF LAW

1. The hearing officer has jurisdiction to hear this case and render a decision.
2. The Agency demonstrated that its decision to disqualify Appellant from her position as Custodian, based on her medical restrictions and her inability to procure a return-to-work pass after an exacerbation of a non-work-related injury to her shoulder, was not arbitrary or capricious.
3. Appellant failed to demonstrate a *prima facie* showing of disability discrimination:
 - a) Appellant asserts she is not disabled. She failed to show either a relevant history of a "substantial limitation on a major life activity," or that the Agency regards her as disabled. She has therefore failed to demonstrate she is "disabled" under the CSR rules and prevailing authority governing disability discrimination.
 - b) Appellant has not shown she is capable of performing the essential functions of the position despite her medical restrictions.
 - c) Even if Appellant had shown elements a) and b) (*above*), she failed to demonstrate the Agency failed to make reasonable accommodations for her limitations.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to disqualify Appellant from her position as Custodian is AFFIRMED.

Dated this 12th day of September 2003.


Joanna Lee Kaye
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 12th day of September, 2003, addressed to:

Gina Vigil
1446 King Street
Denver, CO 80224

James C. Fattor, Esq.
303 E. 17th Ave. #800
Denver, CO 80203

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS AND ORDER** by depositing same in the interoffice mail, this 12th day of September, 2003, addressed to:

Mindi L. Wright
Assistant City Attorney
Employment Law Section

Luis A. Colón, Director
Department of General Services

Dan Barbee
Public Office Buildings

Audrey Lenke