

**BEFORE THE STATE PERSONNEL BOARD
STATE OF COLORADO**

Case No. 2026G044

RESPONDENT'S RESPONSE TO WHISTLEBLOWER ACT COMPLAINT

RICHARD GUGGENHEIM,

Complainant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Respondent, Department of Agriculture (CDA), by and through the undersigned Assistant Attorney General, Monica M. Manning, hereby submits its Response to the Whistleblower Act Complaint and states as follows:

INTRODUCTION

Complainant Richard Guggenheim brings a Whistleblower Act complaint in response to CDA conducting a necessary investigation into complaints of disruptive behavior and discrimination following an encounter between Complainant and his appointing authority during a regularly scheduled meeting for CDA management. To better assess the events of the meeting and ensure fairness to all attendees, CDA referred the investigation to a third party.

Complainant cannot establish a Whistleblower Act claim for several reasons. First, Complainant failed to comply with the Act's mandate to make a good-faith effort to disclose protected information to a supervisor, appointing authority, or member of the General Assembly before any external disclosure. Second, the actions identified—verbal directives during a meeting and initiation of an employment investigation—do not constitute “disciplinary action” under the Act. Third, Complainant cannot establish a causal nexus between his alleged disclosure and CDA's conduct because CDA acted for legitimate, non-retaliatory reasons consistent with statutory and policy obligations.

BACKGROUND

1. Complainant began employment with CDA on August 2, 2021, as the Plant Health Certification Program Manager.

2. At all relevant times, Complainant's appointing authority was Wondirad Gebru who serves as the Director of Plant Industry Division for CDA.

3. On November 6, 2025, the Plant Industry Division held a biweekly management meeting via Google Meet, led by Mr. Gebru and attended by eleven other CDA employees, including Complainant. The purpose of the meeting was to share updates from a senior management meeting, to share division happenings and directions, and to receive updates from the section and program managers.

4. During the meeting, Mr. Gebru briefed the group about an update from Human Resources related to the Inclusive Leadership cohort and offered encouragement to newer managers of the Division to join the Inclusive Leadership Program.

5. While Mr. Gebru presented this information, Complainant posted a message in the meeting chat stating, "It's DEI on steroids." Exhibit 1. Mr. Gebru told Complainant that it was inappropriate for him to send that comment to all managers and directed him to return to the meeting agenda.

6. Mr. Gebru reports that Complainant then turned on his camera, stated "I do not care," and continued talking about DEI and attacking Mr. Gebru. Exhibit 2. Mr. Gebru reports that he told Complainant that this conversation was not appropriate for the current meeting. *Id.*

7. According to Mr. Gebru, Complainant disregarded his directive and continued expressing his opinions about DEI despite repeated attempts by Mr. Gebru to return to the meeting agenda. *Id.* Another attendee reportedly expressed her disagreement with Complainant's stance on the Inclusive Leadership Program. *Id.*

8. After the meeting, Mr. Gebru saw two messages from Complainant, one of which asserted concerns about viewpoint discrimination and the other explained that he had already contacted U.S. Attorney General Pamela Bondi regarding his concerns about DEI initiatives at CDA. Exhibit 3.

9. Mr. Gebru submitted an incident report to CDA's Office of Human Resources summarizing the disruption that occurred during the November 6th meeting. Exhibit 2.

10. To ensure impartiality, CDA's Office of Human Resources referred the investigation into the events of the November 6th meeting to a third-party organization, Employment Matters. Exhibit 4. Notice of this investigation was provided to employees on December 5, 2025. *Id.* The investigation has not yet concluded.

11. On the same day he received notice of the investigation, Complainant sent CDA's Office of Human Resources a complaint from Complainant regarding the events during the meeting and regarding purported DEI practices. The Office of Human Resources forwarded Complainant's complaint to Employment Matters for further investigation.

12. Also on December 5, 2025, Complainant filed a Consolidated Appeal and Dispute Form, which included his Whistleblower Act Complaint ("Complaint"). Complainant contends that he made a protected disclosure to U.S. Attorney General Pamela Bondi on November 6, 2025, and that CDA retaliated against him by stating his comments during the November 6th meeting were inappropriate and by initiating a third-party investigation on December 5, 2025. Complaint at 10-11.

LEGAL STANDARD

The Whistleblower Act was enacted by the General Assembly to encourage state employees to disclose information regarding actions of state agencies to reduce the waste and mismanagement of public funds, to reduce abuses in government authority, to prevent illegal and unethical practices, and to protect state employees making such disclosures from disciplinary measures because of those disclosures. See C.R.S. § 24-50.5-101, et seq.

To state a claim under the Whistleblower Act, Complainant must establish by a preponderance of the evidence that: (1) he first made a disclosure to a supervisor or appointing authority; (2) the disclosure was of protected information, as defined by statute; (3) he suffered disciplinary action in retaliation for his disclosure of protected information; and (4) the disclosure was a substantial or motivating factor in the employer's action. C.R.S § 24-50.5-102(2); C.R.S. § 24-50.5-103(1) and (2); *Ward v. Industrial Comm'n*, 699 P.2d 960, 964 (Colo. 1985). Complainant bears the burden of proof for each of these elements. *Ward*, 699 P.2d at 964. If Complainant makes such a showing, the burden shifts to DOC to prove, by a preponderance of evidence, that it would have reached the same decision even in the absence of the protected conduct. *Id.*

LEGAL ARGUMENT

Complainant's Whistleblower Act Complaint fails for three reasons. First, by his own allegations, Complainant did not first report his concerns to his supervisor, appointing authority, or member of the general assembly as required by statute. Second, Complainant suffered no adverse action under the Act. And third, Mr. Gebru's comments to Complainant during the November 6th meeting and CDA's decision to initiate the investigation were not in retaliation of Complainant's purported disclosure but rather for legitimate, non-retaliatory reasons.

I. No prior disclosure to supervisor or appointing authority.

Under the Whistleblower Act, an employee must “make a good-faith effort to provide his or her supervisor or appointing authority or member of the general assembly the information to be disclosed *prior* to the time of its disclosure.” C.R.S. § 24-50.5-103(2) (emphasis added). Failing to do so disqualifies the employee from protection under the Act for the alleged disclosure. *Id.*; *Ward*, 699 P.2d at 967.

In his Complaint, Complainant states that he made a disclosure to United States Attorney General Pamela Bondi on November 6, 2025, regarding alleged misuse of federal funds and civil rights violations by CDA. Complainant explains that he *then* reported his disclosure to Bondi to Mr. Gebru. By Complainant’s own recitation of the facts, he failed to comply with the explicit requirement of the Act to *first* inform his supervisor, appointing authority, or member of the general assembly of the information to be disclosed. Complainant’s Whistleblower Act Complaint should be dismissed on this basis alone.

II. Complainant suffered no disciplinary action.

Complainant asserts two purported adverse actions: (1) Mr. Gebru telling Complainant that his comments during a meeting were inappropriate and muting his microphone and (2) CDA’s Human Resources Office initiating an investigation into the events that occurred during the November 6th meeting. Neither constitutes a disciplinary action as defined by statute.

The Whistleblower Act states that an appointing authority “shall not initiate or administer any disciplinary action against an employee on account of the employee’s disclosure of information.” C.R.S. § 24-50.5-103(1). A disciplinary action means “any direct or indirect form of discipline or penalty.” C.R.S. § 24-50.5-102(1). The statute sets out the following detailed list of what “discipline or penalty” could include: “dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty.” C.R.S. § 24-50.5-102(1).

When interpreting a statute, the court attempts “to give effect to the intent of the General Assembly” by looking at the statutory language and giving the words and phrases their “their commonly accepted and understood meaning.” *Beeghly v. Mack*, 20 P.3d 610, 612-13 (Colo. 2001). “When the language is clear and unambiguous, it may be presumed that the legislature meant what it clearly stated in the statute.” *Id.* at 213. “[O]missions from a statute are given the same effect as inclusions under the rule of interpretation *expressio unius est exclusio alterius*, which means the inclusion of certain items implies the exclusion of others.” *Cuevas v. Pub. Serv. Co. of Colo.*, 537 P.3d 418, 425, as modified on denial of reh’g (Aug. 10,

2023), cert. granted in part sub nom.; *Pub. Serv. Co. of Colo. v. Outdoor Design Landscaping, LLC*, No. 23SC659, 2024 WL 3317838 (Colo. July 1, 2024).

Initiating an employment investigation plainly does not appear as a listed disciplinary action in the Whistleblower Act. The inclusion of the laundry list of actions in the statute that qualify as a “discipline or penalty” implies that the general assembly’s omission of an investigation was intentional. As a practical matter, this interpretation makes logical sense since employment investigations are used to determine whether any discipline (including those listed in C.R.S. § 24-50.5-102(1)) should occur. Both Board Rules and the Colorado Anti-Discrimination Act (“CADA”) require an employer to investigate complaints of employee misconduct. *See* Board Rule 6-10; *Lawley v. Dep’t of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001) (holding the arbitrary and capricious standard requires appointing authorities to use reasonable diligence and care to procure relevant evidence before taking disciplinary action); C.R.S. § 24-34-402(1.5)(a) (explaining an employer may assert an affirmative defense to discriminatory harassment only if it takes prompt, reasonable action to investigate complaints). Given the employer’s legal requirement to conduct an investigation, mischaracterizing employment investigations as discipline would place employers in an impossible position of risking a whistleblower complaint or failing to comply with rule and law.

Moreover, Mr. Gebru’s simple act of telling Complainant that his statements about DEI were inappropriate for the meeting’s agenda and directing him to stay on topic does not qualify as discipline or penalty under the Whistleblower Act. While the Act’s list of disciplinary actions includes “reprimand” and “admonishment,” these terms must be defined in light of the other terms in the list. Under the doctrine of *noscitur a sociis*, courts interpret words grouped together in a list “to invoke their common core of meaning.” *In re McDaniel*, 973 F.3d 1083, 1103 (10th Cir. 2020) (quoting *Freeman v. Quicken Lones, Inc.*, 566 U.S. 624, 635 (2012)). The core meaning of the list of disciplinary actions in the Whistleblower Act – such as “dismissal, demotion, transfer, reassignment, suspension, corrective action” – invokes more than a simple verbal directive from supervisor to refrain from certain topics during a meeting and to stay on task.

Because Complainant has not identified an action taken by CDA that constitutes a discipline or penalty under the Act, his Whistleblower Complaint fails.

III. CDA did take any action in retaliation for Complainant’s disclosures.

To successfully assert a Whistleblower Act claim, Complainant must also prove that his alleged disclosures were a substantial or motivating factor behind the disciplinary action. *Ward*, 699 P.2d at 964. A complainant meets this burden by establishing that his disclosures played an important or significant part in the decision at issue. *Johnson v. Jefferson Cnty. Bd. of Health*, 662 P.2d 463, 476 (Colo. 1983). Analysis of this factor involves a “sensitive inquiry into such circumstantial

and direct evidence of intent as may be available.” *Id.* (citation omitted). A list of non-exhaustive factors pertinent to the analysis includes: the historical background of the decision at issue; the causal nexus between the disclosures and the decision at issue; the extent to which the appointing authority may have departed from normal procedures or policies in reaching her decision; the pretextual character, if any, of the reasons advanced for the decision; and the evidentiary support for the asserted reasons for the decision. *Id.*

In addition to the above analysis, the *Ward* court also held that a defendant agency may prevail by showing by a preponderance of evidence “that it would have reached the same decision even in the absence of protected conduct.” *Ward*, 699 P.2d at 964 (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)); *see also*, *Taylor v. Regents of Univ. of Colo.*, 179 P.3d 246, 249-50 (Colo. App. 2007) (affirming defense verdict in which plaintiffs demonstrated the elements of the Act, but the defense showed, by a preponderance of evidence, that a professor would not have received a pay raise even if he had not made protected disclosures).

CDA’s decision to initiate an investigation into the events of the November 6th meeting was not retaliatory. Rather, as explained above, when an employer receives an internal complaint of discrimination or believes that disciplinary action may be warranted, statute and rule require the employer to exercise reasonable diligence to investigate. *See Lawley*, 36 P.3d at 1252; C.R.S. § 24-34-402(1.5)(a). To ensure impartiality, CDA decided to refer the investigation to a third party. The investigation is still ongoing.

Additionally, Mr. Gebru’s directives to Complainant during the November 6th meeting were not retaliatory but rather made for the legitimate, non-discriminatory reason of needing to keep the meeting on track and on topic. Government employers have a legitimate interest in minimizing disruption to ensure “the effective and efficient fulfillment of its responsibilities to the public.” *Connick v. Myers*, 461 U.S. 138, 151-53 (1983). An employee’s interest in speaking on matters of public concern does not require supervisors to “tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships.” *Id.* at 154. Mr. Gebru’s instructions to Complainant to focus on the meeting agenda were motivated by Complainant’s disruptive behavior, not the content of his disclosures.

Lastly, Mr. Gebru was unaware of Complainant’s alleged protected disclosure when he allegedly retaliated. Complainant sent two direct messages to Mr. Gebru explaining that he had already contacted U.S. Attorney General Bondi about his concerns at 9:28 a.m. and 9:32 a.m., while the management meeting was still ongoing. Exhibit 3. However, Mr. Gebru did not check his chat until after the meeting had concluded. Thus, he was not aware of the purported disclosure at the time he instructed Complainant to stay focused on the meeting agenda. Lack of awareness defeats a causal connection in cases of Whistleblower Act retaliation.

Armstrong v. Arcanum Group, Inc., 897 F.3d 1283, 1286 (10th Cir. 2018) (in the context of a federal whistleblower claim, “retaliation could not have been ‘because of the protected activity’ if the retaliator did not know of the protected activity); see also *Butler v. City of Prairie Vill., Kan.*, 172 F.3d 736, 747 (10th Cir. 1999).

CONCLUSION

Complainant is unable to demonstrate each element beyond a preponderance of the evidence and, therefore, cannot maintain a Whistleblower Act claim. As shown above, Complainant failed to comply with the requirement of first informing his supervisor, appointing authority, or member of the general assembly of his purported concerns. He also has suffered no disciplinary action under the Act. Finally, because of its legal obligations, CDA would have initiated the employment investigation even in the absence of protected conduct. For these reasons, CDA respectfully requests that the Board dismiss Complainant’s Whistleblower Act Complaint.

Respectfully submitted this 22nd day of January, 2026.

PHILIP J. WEISER
Attorney General

/s/ Monica M. Manning

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **RESPONDENT'S RESPONSE TO WHISTLEBLOWER ACT COMPLAINT** upon all parties herein by e-mail, this 22nd day of January, 2026 addressed as follows:

Richard Guggenheim
Rich.guggenheim@gmail.com

/s/ Felicia Rei
