

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

MARGARET ATWOOD,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
DENVER RECEPTION AND DIAGNOSTIC CENTER,

Respondent.

This three-day hearing came before Administrative Law Judge Mary S. McClatchey on February 23, 24 and 25, 2000. Complainant was represented by Richard LaFond, Lafond & Sweeney, L.L.C. Respondent was represented by Jeanette Walker Kornreich, Assistant Attorney General, Office of the Colorado Attorney General.

PRELIMINARY MATTERS

Witnesses.

Complainant Margaret Atwood (AComplainant≡ or AAtwood≡) called the following witnesses: herself, Dr. James Lee Jones, clinical psychologist, and Dusti Baldwin, Correctional Officer II, Denver Regional Diagnostic Center (ADRDC≡), Department of Corrections (ADOC≡).

Respondent called the following witnesses: William Bokros, Warden of DRDC, Major Victor A. Chavez, Lt. John Mendoza, Major Ron Leyba, and Beverly Thompson, DRDC Personnel Liaison.

Exhibits.

Complainant=s Exhibits A - Z, AA, BB, and CC, , DD and GG were stipulated into evidence. Exhibits EE and FF were admitted without objection.

Respondent=s Exhibits 1 - 5, 8, 9, 10, 12 - 15, 17 - 27, 30, and 32 - 34 were stipulated into evidence. Exhibits 28 and 29 were admitted without objection. Exhibit 39 was admitted for the purpose of rebutting testimony regarding three other inmates offering to change shifts with Complainant. Exhibit 41 was admitted by stipulation for the specific purpose of showing the document that was intended to be included with Warden Bokros= termination letter, Exhibit 2. Exhibit 42 was admitted without objection.

Duration of Proceedings. At the close of evidence on February 25, 2000, the ALJ entered the following orders: the record would remain open until Complainant=s filing of Exhibit GG on or before March 6 and the parties= submission of written closing arguments on or before March 15, 2000.

Motion for Directed Verdict. Complainant presented her case first, since she bore the burden of proof on all claims. After Complainant rested, Respondent moved for directed verdict. A motion for directed verdict should be granted only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable persons could not arrive at a contrary verdict. See, Jorgensen v. Heinz, 847 P.2d 1981 (Colo. App. 1992), cert. denied. In passing on a motion for directed verdict, a trial court must view evidence in the light most favorable to the party against whom the motion is directed, and every reasonable inference drawn from the evidence presented is to be considered in the light most favorable to that party. Pulliam v. Dreiling, 839 P.2d 521 (Colo. App. 1992).

Respondent argued that Complainant had not been constructively discharged, since she had not demonstrated that the workplace had become so intolerable as to justify her resignation. Respondent further contended that the discrimination case law was inapplicable here, since Complainant had failed to demonstrate that Respondent had taken any action based on gender, and had failed to show that she had suffered sexual harassment. Complainant countered that she had met her burden of showing constructive discharge. She further argued that she had fully met the prima facie case for retaliation, which does not require that she prove Respondent=s actions were taken on the basis of gender. Respondent=s motion for directed verdict was denied.

MATTER APPEALED

Complainant appeals her administrative termination after having exhausted all available leave, claiming she was constructively discharged, and that Respondent violated the Colorado Anti-discrimination Act (Athe Act=) by retaliating against her

for participating in an investigation into allegations of racist conduct by other officers. For the reasons set for below, respondent's action is rescinded.

ISSUES

1. Whether Complainant was constructively discharged.
2. Whether the actions of the Respondent were arbitrary, capricious, or contrary to rule or law.
3. Whether the Respondent retaliated against Complainant in violation of the Colorado Anti-discrimination Act.
4. Whether either party is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

1. Complainant commenced probationary employment as a Correctional Officer I at the DRDC, DOC, on August 1, 1998. She was assigned to the graveyard shift, at her request.
2. DRDC is a temporary holding and health screening facility for DOC inmates, utilized prior to their permanent placement in state prison facilities.
3. On October 20, 1998, Complainant received her three-month evaluation. Her rating was A fully competent overall and on all individual factors. No problems were mentioned.
4. Complainant is a white female. She was on very friendly terms with many of the black officers at work.
5. In December, 1998, there were two A racial incidents witnessed by Complainant. The first involved some of the black officers who were preparing to send a sympathy card to another black officer, Sgt. Mason. Complainant was present while these black officers talked about the fact that there were only two white officers they would allow to sign the card along with them. Complainant was one of them; Sgt. Mark Harris was the other.

6. Two of these black officers, Correctional Officer (A/C/O) Kennedy and Sgt. Hendricks, Complainant's immediate supervisor, in the course of the discussion about not having white officers sign the card, referred to white officers as Apecker woods and Acrackers. These are racially derogatory terms for whites. C/O Kennedy said to Hendricks, AI noticed you didn't have any of the crackers sign the card. Sgt. Hendricks replied, AYeah man did you notice that? I was selective in who I let sign for the brother. The only white people I let sign were Atwood and Harris, and Atwood isn't white anyway, she's one of us, and Harris is a cool white guy, or words to that effect. Kennedy and Hendricks laughed.

7. Complainant was not offended by these remarks. She felt comfortable with the officers in this gathering.

8. The second incident occurred when Atwood, Sgt. Mason, Lt. Jackson, and Correctional Officer Kennedy were having a discussion about relationships. Lt. Jackson said, AI saw Hendricks today in his three-piece suit, kissing those pecker woods asses on day shift. Kennedy then said, AYeah, you know those high class white folks. Atwood then left the gathering.

9. When Atwood returned to her post, Sgt. Mason called her on the phone to see if she was ok, and to see why she had left. She told him that she didn't want to be a part of that conversation or keep the company of Kennedy, because she had a problem Awith his mouth anyway. Sgt. Mason said that he just wanted to assure that she was ok, and to tell her that she didn't have to leave.

10. Later that morning, Lt. Jackson called her at home to say he was sorry if he had offended her by calling white people Apecker woods.

11. Complainant did not file a complaint regarding these incidents.

12. On December 16, 1998, Complainant was approached by Lt. Lind regarding the racially derogatory statements made in her presence. The record does not disclose who informed Officer Lind about the racial incidents; it was not Complainant.

13. Lt. Lind told Complainant he needed her to write a statement. Complainant told Lt. Lind that she was not offended by the remarks, that she didn't want to be involved in any official investigation of either incident, and that she would not write out a statement about them.

14. Lt. Lind responded that if she wouldn't write a statement, she would have to speak with her supervising major, Major Leyba, about it. She did so, meeting with Major Leyba on or about December 19, 1998. Complainant told Major Leyba that the

statements had not offended her, that she did not want to start a problem that didn't exist, and that she didn't want to be retaliated against for making a written statement.

15. Major Leyba ordered Complainant to write the statement anyway.

16. At this December 19 meeting, Major Leyba also asked Complainant about security problems she had encountered while working under Sgt. Hendricks, which she had previously discussed with other senior officers. She informed him that Sgt. Hendricks was allowing maximum security inmates into the control center where she worked without another staff member present. Complainant informed Major Leyba that Sgt. Hendricks would often yell to her, "Open the damn door" in these situations. This violated security rules requiring that two officers be present when allowing an inmate out, and requiring a shift manager's approval prior to opening the doors. She noted that these experiences placed her in a security breach situation.

17. At this meeting, Complainant also informed Major Leyba that she had concerns regarding retaliation for making these statements to him. He assured her he wouldn't have any retaliation in his facility, that he had an open door policy if there were any problems with retaliation, and that the information would go in his file, and no one would read it but him.

18. Major Leyba gave Complainant his direct line number to call if necessary in the event she suffered retaliation.

19. On December 21, 1998, Complainant wrote the statement as Major Leyba had ordered her to do, truthfully recounting her experiences related to him in their December 19 meeting, providing significant detail of the racial remarks and Sgt. Hendricks' security violations. (Exhibit B)

20. On December 28, 1998, Major Leyba convened a fact finding/inquiry board to investigate the allegations by Complainant in her December 21 statement. He appointed Captain Chavez as chairperson of this board.

21. The board convened on December 31, 1998. It interviewed fourteen individuals.

22. On January 14, 1999, Complainant received her six-month review, receiving "fully competent" overall and on each individual factor. No problems were noted.

23. In her interview before the board, Complainant informed them of some very serious breaches of security and codes of conduct by Sgt. Hendricks, including but not limited to: sleeping on duty; lying to his superiors about his regular practice of

allowing inmates out of their cells without a second officer present; entering inmates= cells alone; allowing an inmate to step into the control center and engage in a friendly exchange with him for ten minutes; treating inmates in a verbally abusive manner; smelling of alcohol while on duty and informing her that he is an alcoholic and that he is hooked on a sleeping drug; and never doing rounds during his shift.

24. Complainant reported about C/O Kennedy: he verbally abused inmates; he walked over wet floors the inmates had just cleaned and waxed, and said in front of the inmates that **Athey were just fucking inmates that they could do them over again.**≡

25. Complainant also informed the board that Sgt. Hendricks (again, her immediate supervisor) and C/O Kennedy had told her that they were angry with her for reporting their transgressions and that they were both harassing her and spreading rumors about her and that other staff were informing her of this.

26. Complainant also reported that Captain Drake had refused to take her off of shifts working with Sgt. Hendricks, even after she informed him that Major Leyba had ordered this. She also reported that Captain Drake had told her to smooth things out with Kennedy, whom he knew was angry with Complainant for having reported the racial remarks to Major Leyba.

27. Other officers interviewed confirmed that Complainant had voiced concern over the racial incidents, over Kennedy=s treatment of her after her report thereof, of Hendricks= orders to her to commit security breaches, and other concerns.

28. Other officers also confirmed that Sgt. Hendricks routinely committed security breaches and ordered inferior officers to commit them too, and slept on duty. They also stated that he falsified time and attendance records, failed to search inmates for contraband or DOC property and to properly fill out inventory sheets, had bad professional ethics, and other problems. Some also referenced racial tension at DRDC.

29. On January 17, 1999, the board completed its written findings and conclusions, which were supposed to be kept confidential. Sgt. Hendricks and C/O Kennedy somehow learned about Complainant=s allegations against them.

30. The board concluded that Sgt. Hendricks had committed numerous serious breaches of security and had ordered subordinates to commit them as well, and had falsified time and attendance records. It found that C/O Kennedy had engaged in verbal abuse of inmates and other staff. It recommended that they be referred for corrective or disciplinary action. Since all of the black officers denied using racially

derogatory terms, Complainant=s statement on those incidents was found not to be supported.

31. The board did not investigate Complainant=s allegations of retaliation by Kennedy and Sgt. Hendricks.

32. Following the board=s January 31 conclusions, Complainant received routine abusive retaliatory treatment from Kennedy. He gave her hostile looks, and was sarcastic with her. He was nasty to her during all of their encounters. When he had to walk past her, he would walk so close that she had to move out of his way. He physically intimidated her.

33. In one incident during mid-January, Complainant was performing a fence check and placed a call to Kennedy for official reasons. Kennedy refused to answer her call. The call was placed on another line, and Kennedy was overheard by Complainant and others saying, Awhat the hell does she want?≅ This was humiliating and intimidating to Complainant.

34. Kennedy=s abusive conduct was intimidating, hostile, and offensive to Complainant.

35. Complainant began to experience physical symptoms resulting from the stress of her work situation. She told another female officer, Dusti Baldwin (at that time the same rank as Complainant), that her hair was falling out because of problems she was experiencing at work. Complainant showed Baldwin where the hair was falling out behind her ear. She seemed stressed to Baldwin. Complainant explained to Baldwin that other officers were giving her a hard time, particularly Kennedy, in retaliation for her participation in the fact finding inquiry. She told Baldwin about the two Kennedy incidents involving his snide remark on the phone and walking by her in a physically intimidating manner.

36. Complainant complained about Kennedy=s retaliatory and harassing treatment of her to her immediate supervisors, Lt. McCandless, Lt. Cisneros (who replaced McCandless), and to Captain Drake.

37. Neither Lt. McCandless, Lt. Cisneros, nor Captain Drake took any action in response to Complainant=s complaint of workplace harassment by Kennedy. None of them initiated an investigation into her complaint; none obtained or documented as much information as possible regarding her complaint; none notified the DOC=s Director of Human Resources or the Inspector General=s Office in writing; none notified Warden Bokros, the appointing authority.

38. On January 20, 1999, after receiving no action on her complaints of retaliation and harassment by Kennedy, Complainant called Major Leyba, crying.

39. Major Leyba set up a meeting at 4:00 p.m. on January 20, 1999 with Complainant, Kennedy, and Beverly Thompson, the DRDC Personnel Liaison.

40. At the January 20 meeting, Complainant was upset, and cried at times. Complainant made it clear that she felt Kennedy was retaliating against her and harassing her because of her December 21, 1998 written statement and her participation in the fact finding inquiry. Thompson accordingly gave Complainant a copy of DOC Administrative Regulation 1450-5 regarding discrimination and workplace harassment.

41. At the January 20 meeting, Complainant discussed the racial comments that Kennedy and others had made in December. Kennedy denied having said them. After a break, Complainant and Kennedy reconciled, Kennedy apologized to Complainant, and the two agreed to work a few shifts together to show that they could get along. They did so, and never had any problems after that.

42. After receiving Complainant's complaint of workplace harassment by Kennedy in the January 20 meeting, Major Leyba failed to take any other action. He did not initiate an investigation into Kennedy's conduct; he did not obtain and document as much information as possible regarding her complaint; he did not notify the DOC's Director of Human Resources and the Inspector General's Office in writing; he did not notify the appointing authority. He took no disciplinary action against Kennedy.

43. During the months of February and March, 1999, Complainant was taunted and harassed by several superior officers, including Sgt. Hendricks. On one evening, Sgt. Cisneros, her immediate supervisor, said over the intercom, with Sgt. Fender present, "Atwood, get back to your post now." This publicly humiliating directive over the intercom was done for Lt. Cisneros and Sgt. Fender's amusement. It made Complainant feel harassed by her supervisors. She believed this harassment arose from her participation in the fact finding investigation.

44. On another occasion in February or March, Sgt. Fender, the shift supervisor, purposefully sent Complainant to the wrong building to make copies of official documents, in front of other officers. Sgt. Fender and the other officers all watched Complainant walk to the wrong building. Sgt. Fender then radioed her to come back and make the copies in the original building. They watched as she walked back. This incident also made Complainant feel publicly humiliated in front of the other officers, and harassed by her senior officer. Complainant again believed this harassment arose from her participation in the fact finding investigation.

45. In March, Sgt. Hendricks harassed Complainant in front of another superior

officer. Complainant was working as a Rover, which entails visiting all units to assist with any work that needs to be completed. Complainant was on Sgt. Hendricks' unit assisting an officer with work. When Complainant had completed her work, Hendricks refused to unlock the door to allow her to leave. He ordered her to come up to the control center where he and Lt. Jackson were, where he admonished her for being on his unit without his permission. This public humiliation was traumatic for Complainant, who felt it was in retaliation for having made the statements about him to the fact finding board.

46. Sgt. Hendricks later claimed, incorrectly, that he was enforcing the rule barring 15-minute breaks. Hendricks knew that Complainant was a rover and was not on break. This incident was later used by Captain Drake as part of a March 17 unjustified negative performance evaluation of Complainant.

47. These February - March 1999 harassing incidents were traumatic for Complainant. They were committed by superior officers, of a mocking nature, in front of other superior and staff level officers.

48. In addition, during this time, Complainant was socially ostracized and shunned by many of her peer level officers.

49. Complainant complained to Lt. Cisneros and Captain Drake about the harassing incidents.

50. Neither Lt. Cisneros nor Captain Drake took any action in response to Complainant's complaints of workplace harassment. Neither initiated an investigation into the alleged conduct; neither obtained or documented as much information as possible regarding her complaint; neither notified the DOC's Director of Human Resources or the Inspector General's Office in writing; neither notified the appointing authority.

51. On March 15, 1999, Complainant wrote a note to Lt. Cisneros requesting a shift change from graveyard to days, despite the fact that graveyard was the best shift to accommodate her parenting responsibilities. Lt. Cisneros said not to leave graveyard, that he would straighten things out on her shift. She rescinded her request and said she would stay.

52. Captain Drake's response to Complainant's complaints of workplace harassment was to write a performance evaluation citing those very complaints as poor performance. On March 17, 1999, Captain Drake gave Complainant an unjustified Needs Improvement performance evaluation. It cites Complainant for being away from her post for more than 15 minutes, which was unsupported by any specific dates or facts, and for which there are no supporting facts in this record.

Prior to receiving this performance evaluation, Complainant had never been cited for or verbally counseled for being away from her post for more than 15 minutes.

53. The March 17 evaluation also states:

Several man-hours of staff time have been spent on counseling/interviewing employees by allegations of Harassment toward you. When one situation is resolved it seems another one develops. The overall low morale of this shift has been a direct result of your actions. On two occasions you have jumped the Chain of Command and went directly to the Day Shift Commander and the Custody/Control Manager.≡

54. Complainant's day shift commander was Captain Victor Chavez. The Custody/Control Manager was Major Leyba. Captain Drake was clearly displeased that Complainant had apparently sought assistance from these superiors after he had denied her any relief.

55. The evaluation states in the Follow-up Action:≡ section:

By April 30, 1999 the end of your 9-month review if no improvement (sic) has been made will recommend you not be certified. Also recommend you be placed on a different shift with a fresh start and no shift bias.≡

56. The evaluation thus provided Complainant with no idea of what to do to improve her performance, except to stop making allegations of Harassment.≡ Complainant refused to sign it, and informed Captain Drake that she felt this was retaliation.

57. The evaluation cites as sources of information conversations with Sgt. Hendricks, Sgt. Fender, Sgt. Jones, and Lt. Cisneros. It is noteworthy that three out of these four had recently committed acts of harassment against Complainant. Complainant brought the evaluation to Sgt. Jones, who told her he had no idea why his name was on it. He had not spoken to Captain Drake about problems with Complainant.

58. After receiving this unwarranted poor performance evaluation, Complainant spent the remainder of her shift crying. She was devastated. She couldn't believe that Captain Drake was going to take her job.≡ She believed that there was little or no chance she would achieve classified status at DRDC.

59. The events of February and March involving harassment by superior officers, social shunning by peers, and receipt of the unwarranted negative performance evaluation by Captain Drake, were extremely stressful for Complainant. She

continued to suffer from her hair falling out. She also experienced sleeplessness and high blood pressure. While Complainant had a history of her hair falling out, at the time she commenced her employment at DRDC it was being successfully treated.

60. Complainant next approached Major Leyba about the retaliatory and harassing behavior of her superiors, requesting a meeting.

61. On March 18, Complainant met with Major Leyba and Bev Thompson, to discuss the March 17 evaluation and her continued harassment. At the meeting, Complainant made it clear she was being harassed on the graveyard shift as retaliation for having participated in the fact finding investigation. She specifically cited Sgt. Hendricks and Sgt. Fender=s harassing treatment of her. She also stated that other staff officers were not speaking to her and were ostracizing her.

62. Major Leyba understood Complainant=s claims regarding harassment and retaliation were covered by AR 1450-5, and he read portions of it to her at this meeting.

63. Complainant also expressed anger regarding Captain Drake=s unwarranted performance evaluation. Major Leyba informed her that he had already discussed it (at her request) with Captain Drake, and that the agreement was that she would be moved to day shift, and after thirty days [on April 30, 1999] the evaluation would be removed from her file. She agreed with this plan.

64. In violation of this agreement, the March 17 evaluation was not removed from her file until June 4, after she had left DRDC.

65. At this March 18 meeting, Major Leyba stated that he was giving her a Afresh start≡ by transferring her to day shift, commencing in April, under Captain Chavez=s command. He stated that Captain Chavez would be Afair but firm.≡

66. Complainant expressed fear that the harassment would continue on the day shift. Major Leyba responded that he would work with Captain Chavez to address issues as they arose. Complainant understood Major Leyba=s comment to mean that if Complainant received any further retaliation or harassment, he would stand by her. Bev Thompson, Personnel Liaison, understood Major Leyba=s comments to mean that if the harassment continued, Complainant could go to Captain Chavez and Major Leyba and they would resolve the issues immediately.

67. At this meeting, Major Leyba told Complainant that she needed to get a tougher skin.

68. At this March 18 meeting, after Ms. Thompson left, Captain Leyba complimented Complainant on her tan. He then took off his shirt, drew the curtains

closed, and showed her his tattoo on his upper left arm. She was stunned that he did this.

69. Other than transferring Complainant to day shift, Major Leyba did nothing to follow up on Complainant's allegations of harassment and retaliation by superior officers. He did not initiate an investigation into Sgt. Hendricks' or Sgt. Fender's conduct; he did not obtain and document as much information as possible regarding her complaint; he did not notify the DOC's Director of Human Resources and the Inspector General's Office in writing; he did not notify the appointing authority.

70. Commencing April 1, Complainant worked on day shift under the command of Captain Chavez. She and Captain Chavez had discussions about her having a fresh start,[≡] and he made it clear that he viewed her problems on graveyard shift as being behind her.

71. Captain Chavez assigned Complainant to Tower 2. Complainant, like most DRDC employees, disliked Tower 2 for a number of reasons. It was an extremely isolated post where she had almost no face-to-face contact with other staff, and had minimal contact with others by phone. There was very little to do on this post, except to watch the perimeter of the grounds for potential escapees. Complainant found this social isolation to be very difficult.

72. Complainant quickly learned that Tower 2 had a reputation among correctional officers as the place where problem employees are assigned. If a correctional officer is assigned to Tower 2 for more than two days, it is viewed by other staff as punishment.¹ Officer Baldwin testified that she once heard Captain Morman say of a correctional officer disciplined for mistreatment of inmates, 'Why do you think he's in Tower 2?'[≡] Officer Ray called Complainant and told her that when he was in

¹ There are exceptions to this rule for a few correctional officers who actually enjoyed the social isolation of Tower 2 and requested the post. DRDC management customarily assigned these particular officers to Tower 2. It was clear to DRDC management that Complainant was not one of the exceptions to this rule. While Respondent maintained at hearing that Tower 2 was not a disciplinary post,[≡] Captain Chavez himself testified that he squelched those rumors off the bat.[≡] This testimony corroborates Complainant's position.

trouble he was assigned to Tower 2.

73. Complainant felt that everyone knew she was assigned to Tower 2 because of her complaints about the retaliation and harassment of her by superior officers. She therefore viewed her Tower 2 assignment as a further act of official retaliation by the leadership at DRDC.

74. By this time, the pattern of harassment and the punishing isolation of Tower 2 rendered Complainant in a very fragile emotional state. She became depressed.

75. On April 2, 1999, Complainant informed Captain Chavez that she felt she was being punished by being assigned to Tower 2, and requested that she be moved to another post.

76. Complainant informed Captain Chavez that three other officers had offered to change shifts with her. Captain Chavez refused to allow her to change shifts with those officers. He was unable at hearing to provide a reason for this refusal.

77. Captain Chavez refused to move Complainant off of Tower 2, and he assigned her there again for the entire month of May.

78. Captain Chavez testified on direct exam that he assigned Complainant to Tower 2 in May because it was open, since Krause, the officer customarily assigned there, was out on FMLA leave. However, on cross examination, Captain Chavez admitted that when he made the May schedule assigning Complainant to Krause's Tower 2 post on April 22, he was unaware that Krause would be out on FMLA leave in May.

79. Captain Chavez had the authority to assign Complainant to a post other than Tower 2, but chose instead to displace officer Krause from his normal Tower 2 post in order to assign Complainant there. This decision was extremely difficult for Complainant to endure emotionally.

80. Captain Chavez discussed the Tower 2 assignment and all other issues relating to Complainant with Major Leyba, who had final approval authority over Captain Chavez's decisions, on a regular basis. Major Leyba approved all of Captain Chavez's decisions concerning Complainant.

81. The stress of her work situation, particularly the continued assignment to Tower 2, which she reasonably viewed as an act of institutional retaliation against her, led to a more serious emotional strain on Complainant. She began to suffer from sleeplessness. In April she began to oversleep in the morning, and to therefore violate the call-off policy requiring two hours' notice prior to missing or being late

for a shift. On April 4, she was one hour and 15 minutes late; on April 6, she was two hours late; on May 1, she was 35 minutes late. On each of these mornings, she was woken up by the call from DRDC staff inquiring as to her whereabouts.

82. At the end of April, Complainant learned that her sister had decided to stop taking medication for Hepatitis C, which would result in her certain death within a matter of months.² Complainant was personally devastated by this situation. In addition, Complainant's roommate had moved out, and she was therefore in dire financial straights.

83. Captain Chavez discussed Complainant's lateness problem with her. She explained that she had personal problems she was contending with. She also explained that she viewed her Tower 2 assignment as retaliation, and stated that she was still being retaliated against by co-workers who were avoiding her and were sarcastic with her. Captain Chavez agreed not to issue a written corrective action at that time, but instead to make it a verbal warning.

84. On May 2, 1999, Complainant hand-wrote a note to Captain Chavez thanking him for his support of her, and explaining her situation. She stated in part, "Please understand that I just had the hardship of the investigation and now my family."

85. The very next day, Complainant was ten minutes late for work. Captain Chavez was very irritated by this, and ordered Lt. Mendoza to issue a corrective action to Complainant for being late four times in a thirty-day period. He did so on May 4. She was given three months to improve in this area.

86. On May 16, Complainant violated the call-off policy again. As of that date, over two weeks had passed since her unwarranted March 17 performance evaluation was supposed to have been removed by agreement. She was worried about this. Complainant met with Chavez on May 16 and asked him why her evaluation had not yet been removed from her file as agreed on April 30. He responded that Major Leyba had not requested that he do so, and stated he would not do so until he approved it. This caused additional stress for Complainant.

87. At this May 16 meeting, Complainant discussed her situation with Chavez, telling him: her blood pressure was extremely high because of the job and the people who work at DRDC; her sister was terminally ill; she was having to pay high rent due to her roommate moving out; and, she was under a doctor's care due to stress related illness and was taking anti-depressants for her stress.

² Complainant's sister died in August 1999.

88. Complainant also informed Captain Chavez that she had been informed by three other officers that officer Hewin, Captain Chavez's nephew, had been late four times and failed to show up for work twice without calling, and had not suffered any consequences. She said she felt singled out for being written up for being late. Captain Chavez told her to stay away from the rumor mill and to worry about her own career and not that of others. He did investigate the situation and recommended that Hewin receive a corrective action; Complainant was unaware of this.

89. Complainant reminded Captain Chavez that she had asked him to remove her from Tower 2 because she was told by several staff members that it was a disciplinary measure. He repeated that she should stay away from the rumor mill. He said that once the new staff members were trained, he would bring her in.

90. Complainant told Chavez that she felt ill, and that she wanted to go home and to the doctor. She requested FMLA leave. He gave her a copy of the sick leave administrative regulation.

91. During the period of April 1 until the time she left the facility on May 26, Complainant talked to Captain Chavez at least five times about her stressful situation. She explained that she was not sleeping, and that she felt she was still being retaliated against by being on Tower 2.

92. During the month of May, Complainant also called Major Leyba numerous times every week regarding her situation. Major Leyba was bothered by these calls, and told her to stop calling her directly and that she must go through his secretary to make an appointment with him. This violated his commitment made at the March 18 meeting to be there for her if she felt she was being harassed or retaliated against on the day shift.

93. In May, Lt. Mendoza became Complainant's new day shift supervisor. Complainant explained to him her involvement in the fact finding investigation and the fact she felt she was still being retaliated against by being in Tower 2.

94. On May 23, 1999, Complainant was not present for roll call at 5:45 a.m. She was contacted at home and arrived for work at 7:00 a.m. Captain Chavez recommended corrective action.

95. On May 27, Complainant called Captain Chavez at his residence at 2:40 p.m. and informed him that she was out on sick leave for mental health reasons. He advised her to contact Bev Thompson on May 28.

96. On May 28, 1999, Complainant visited the Piney Creek Medical Center. She met with Dr. Gary Childers, presumably a psychologist. He advised Complainant

that she should not return to work, and gave her anti-anxiety medication. On June 3, Dr. Childers gave Complainant a note that stated, "Margaret Atwood is currently off work secondary to anxiety created by stress in the workplace."

97. On May 31, 1999, Captain Chavez wrote a memo to Major Leyba recommending Complainant's immediate termination.

98. On June 4, Complainant brought the June 3 note to work and gave it to her day shift supervisor, Lt. Mendoza. She informed him that she would not be returning to work for a while, and that she had retained two attorneys, one to look into workers compensation issues and the other to look into the Department of Corrections. He informed her that the doctor that signed her note was not a DOC recognized workers compensation doctor.

99. On June 4, Lt. Mendoza wrote a memo to Warden Bokros advising him of the contents of this conversation with Complainant, and attached the June 3 note stating she was "off work secondary to anxiety created by stress in the workplace."

100. On June 4, 1999, Sgt. Mendoza, the new day shift supervisor, received a memo from Major Leyba directing him to remove the March 17 unwarranted performance evaluation from Complainant's file. He then did so. The memo was dated May 3. Interoffice mail at DRDC takes approximately four days to process. Captain Chavez informed Complainant on May 16 that Major Leyba had not yet ordered him to remove the evaluation from her file. It is therefore found that the memo was not sent until at least late May.

101. On June 5, 1999, Captain Drake executed an abbreviated nine-month performance review for Complainant. It was for the two-month period of February 1 through March 31, 1999, when Complainant had been on graveyard shift, a time when he was in her chain of command. He rated Complainant "Needs Improvement" in two areas, and reiterated the contents of his March 17 unwarranted performance evaluation (which should have been removed from her personnel file as of April 30, but had not been).

102. On June 9, 1999, Complainant called Captain Chavez and informed him that all future contact, including signatures, was to be through her attorney, and provided him with his name and telephone number. Captain Chavez relayed this information to Lt. Mendoza, who then put this information in memo form to Major Leyba, and copied Warden Bokros and Captain Chavez.

103. On June 10, 1999, Complainant went to see Dr. James Lee Jones, clinical psychologist, to whom her physician had referred her. She informed him about the following: her participation in the fact finding investigation, the retaliation she had

suffered by superiors, her being ostracized by peers at work, her punishing isolation in Tower 2, and her resulting physical symptoms of high blood pressure, headaches, hair falling out, and sleeplessness. She reported that the most disturbing aspect of her work situation was the fact she had gone through the chain of command three times but had received no relief. She also informed him of her sister's situation, and that she was currently taking paxil, an antidepressant and antianxiety medication. He diagnosed her with adjustment disorder with anxious mood. A month later he adjusted his diagnosis to major depression.

104. On June 11, 1999, Warden Bokros sent a letter to Complainant at her address, not to her attorney as she had requested, and copied A Legal Services, Brad Rockwell,≡ who was not only counsel for DOC but also served in the non-legal capacity of ADA (Americans with Disabilities Act) Coordinator. The letter stated in part: she was ineligible for FMLA leave; her sick and annual leave had been exhausted on June 10; she must request leave without pay utilizing the enclosed leave request and authorization form; she was ineligible for short term disability leave; a fact-finding meeting had been scheduled in his office for June 23 to discuss her medical status and possible return to duty; a fitness-to-return form was enclosed which she must present prior to returning to work; failure to return to work when released by her health care provider and as scheduled by her supervisor could result in her termination upon exhaustion of leave. It is found that these forms were actually enclosed with the letter. Complainant gave the letter to her attorney.

105. Complainant's attorney did not respond to Warden Bokros' June 11 letter in any way.

106. Complainant believed that her attorney would handle any matters regarding her continued employment at DOC. Her attorney never requested additional leave of any type, and never sent in the forms that were enclosed with Warden Bokros' June 11 letter.

107. On the day of or the day before the June 23 meeting, Warden Bokros called Complainant at her home and encouraged her to attend the meeting. She said she would not, and that he should contact her attorney. She also told him that she could not handle talking about her condition. At that time he knew that her condition involved Astress and anxiety,≡ and he understood that it was Afrom her job.≡ It was clear to him from her statements that she would not talk about her condition or returning to work without her attorney. He did not make it clear that her attorney was welcome at the June 23 meeting. He did not offer to meet with her attorney.

108. Complainant did not participate in the June 23 meeting regarding her work status, on advice of counsel. Present were Warden Bokros, DOC attorney Rockwell, as ADA Coordinator, because of her anxiety and stress condition, and possibly

others.

109. According to Warden Bokros, the purpose of the June 23 meeting was to assess whether to accommodate any further request for leave by Complainant.

110. On July 6, 1999, Complainant reported for her physical exam with the DOC designated workers compensation doctor. The workers compensation doctor released Complainant for work on July 7, 1999.

111. Complainant did not report for work on July 7, 1999.

112. On July 14, Warden Bokros sent Complainant a letter advising her that her leave had been exhausted and her employment was being terminated. It stated in part: **APersonnel procedures provide that when an employee has exhausted all accrued leave and is unable to return to work, the appointing authority may separate the employee. Based upon the needs of the agency, it is my decision to terminate your employment effective July 14, 1999.≡**

113. At the time he terminated Complainant, Warden Bokros was aware of her complaints of harassment and retaliation. Major Leyba had told him **Aeverything he knew about Atwood and her situation,≡ according to the testimony of Leyba.**

114. Warden Bokros testified that the harassment and retaliation allegations were **Avague≡ to him. He does not recall speaking to any specific individual in an effort to follow up on or clarify her allegations of harassment and retaliation.**

115. Warden Bokros did nothing to follow up on the information he received regarding Complainant=s allegations of harassment and retaliation prior to terminating her.

116. Warden Bokros did not check to assure that the DOC administrative regulation on harassment, AR 1450-5, had been followed. He is unaware whether or not this AR was followed with respect to Complainant.

117. At the time he terminated Complainant, Warden Bokros knew that she had an attorney. He made no attempt to contact him, and did not inform Brad Rockwell, DOC=s in-house counsel, that she had an attorney. Rockwell never attempted to contact Complainant=s attorney.

118. The parties stipulate that Complainant had exhausted all leave at the time she was terminated.

119. DOC AR 1450-5 is the administrative regulation pertaining to **AUnlawful Employment Practices: Policy Prohibiting Workplace Discrimination and**

Harassment.≡ This policy states the following, in part:

Alt is the policy of the Department of Corrections (DOC) to maintain a healthy work environment free of workplace harassment and discrimination. . . Violations of workplace discrimination/harassment will be dealt with firmly and appropriate personnel action will be taken, up to and including termination.≡

AThe purpose of this Administrative Regulation is: A. To provide the DOC with guidelines for ensuring a workplace free from discrimination/harassment.≡

ADiscrimination for or against any person is prohibited . . . [and] includes . . . actions either committed or omitted specifically because of membership in one or more of the protected classes: race, ethnicity≡

AWorkplace harassment [is defined as]: A course of conduct which results in an intimidating, hostile, or offensive environment.≡

AReprisals or retaliation by the DOC or any of its representatives for filing a complaint of alleged workplace harassment and/or discrimination is expressly prohibited.≡

Upon receipt of a complaint of workplace harassment, Respondent Awill obtain and document as much information as possible regarding the complaint≡

Upon receipt of a complaint of workplace harassment, Respondent Ashall notify the DOC=s Director of Human Resources and the Inspector General=s Office in writing, within five (5) days of receipt of complaint to facilitate appropriate DOC tracking. Respondent will immediately notify their Appointing Authority.≡

Alt is not necessary for a supervisor to have a signed complaint before causing an investigation into workplace harassment or discrimination if the supervisor has cause to believe violations have occurred or are occurring. If there is a question, the supervisor should contact their Appointing Authority. . . .≡

AFailure of the respondent to comply with this Administrative Regulation is a separate offense and may be cause for individual disciplinary actions and/or personnel action.≡

AAppointing Authorities will assure compliance and take immediate action to

eliminate any form of workplace discrimination/harassment.≡

AA confidential file relating to discrimination and/or harassment investigations shall be maintained by the Inspector General.≡

120. Complainant requests reinstatement to a certified Correctional Officer I position at a facility other than DRDC, back pay and benefits including any promotional increases or overtime earnings, minus income earned since her departure from DRDC, attorney fees and costs, and appropriate training and updating to ensure that she is fully trained for the position.≡ She also requests any monies on medical matters that would have been covered by her insurance≡ had she not been separated from employment.

DISCUSSION

In this appeal of an administrative action, the Complainant bears the burden of proof to demonstrate by preponderant evidence that the Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. (1999); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Complainant bears the burden of proof on her constructive discharge claim. Harris v. State Board of Agriculture, 968 P.2d 148, 152 (Colo. App. 1998). Complainant also bears the burden of proof on her claim that she was retaliated against in violation of the Colorado Anti-discrimination Act, Section 24-34-402, C.R.S. Love v. RE/MAX of America, Inc., 738 F.2d 383, 385 (10th Cir. 1984). The administrative law judge, as the trier of fact, must determine whether the burden of proof has been met. Metro Moving and Storage Co. v. Gussert, 914 P. 2d 411 (Colo. App. 1995).

1. Complainant was constructively discharged.

In Colorado, a constructive discharge occurs when an employer takes deliberate action which makes or allows an employee's working conditions to become so difficult or intolerable that the employee has no reasonable choice but to quit or resign and the employee does quit or resign because of those conditions. A constructive discharge does not occur unless a reasonable person would consider those working conditions to be intolerable. Boulder Valley School District R-2 v. Price, 805 P.2d 1085, 1088 (Colo. 1991); Wilson v. Board of County Comm=rs, 703 P.2d 1257, 1259 (Colo. 1985); Christie v. San Miguel Cty. School Dist., 759 P.2d 779, 782 (Colo. App. 1988).

Complainant has proven that she was constructively discharged. The conditions of her employment became so difficult or intolerable that a reasonable person would have left such a situation. Commencing in January, 1999, Kennedy engaged in physical intimidation of Complainant, and was hostile to her in all of their

daily encounters. Kennedy=s actions violated DOC=s harassment policy, AR 1450-5, in two ways: he engaged in Aa course of conduct which resulted] in an intimidating, hostile, or offensive environment= for Complainant, and in so doing he retaliated against her for having Afiled a complaint= regarding his discriminatory conduct.

When Complainant reported Kennedy=s retaliatory and harassing treatment of her to her immediate supervisors, Lt. McCandless, Lt. Cisneros, and Captain Drake, they did nothing, violating AR 1450-5, DRDC=s harassment policy. Under that policy, they were required to deal with the harassment firmly and take appropriate personnel action against Kennedy; initiate an investigation into her complaint; obtain and document as much information as possible, notify the DOC=s Director of Human Resources or the Inspector General=s Office in writing, and notify Warden Bokros, the appointing authority. Their failure to enforce this policy also constituted a separate violation of the policy, subjecting them to individual disciplinary or personnel action.

Although Complainant and Kennedy resolved their differences after the January 20 meeting, Major Leyba violated the harassment policy by failing to deal with Kennedy=s retaliatory harassment Afirmly= and to take Aappropriate personnel action= against Kennedy, by failing to Aobtain and document as much information as possible regarding the complaint,= and by failing to notify the HR Director, Inspector General, and Warden Bokros of her complaint.

Major Leyba allowed Kennedy to get away with his violation of the harassment policy without suffering any consequence whatsoever. This constituted a violation of the policy that could have subjected Major Leyba to personnel or disciplinary action. The policy states,

AFailure of the respondent to comply with this Administrative Regulation is a separate offense and may be cause for individual disciplinary actions and/or personnel action.=

It is axiomatic that rules are only respected by line staff in any institution when they are enforced by management. Major Leyba=s failure to enforce the harassment policy with respect to Kennedy sent a message to Complainant and others that retaliatory harassment of Complainant would not be dealt with firmly. This message was heard loud and clear by the DRDC staff and leadership, as evidenced by the events of February through May, 1999.

Immediately following the harassment by Kennedy, in February and March 1999, Complainant=s superiors, Sgt. Cisneros, Sgt. Hendricks and Sgt. Fender, began to publicly humiliate her. Sgt. Cisneros yelled at Complainant, AAtwood, get back to your post now,= for Sgt. Fender=s amusement. Sgt. Fender, in front of

several other officers, sent Complainant to the wrong building to make copies, while they all watched her walk to the wrong building and back. Sgt. Hendricks refused to allow Complainant to leave his building before forcing her to come up to the control center so he could chastise her in front of Lt. Jackson for being on his unit without his permission. Sgt. Hendricks used indirect physical intimidation in addition to public humiliation against Complainant.

These actions of superior officers, in front of Complainant's peers, sent a clear message: harassing Complainant is not only acceptable, it is encouraged as a means of entertainment on the job. In response to this message from superior officers, Complainant's peers went along with the Ajoke by shunning and ostracizing her socially.

While there is a certain level of good natured ribbing and teasing in all work settings, these incidents were not routine light-hearted kidding. Complainant had broken the code of silence by participating in the fact finding investigation, and Sgt. Hendricks and other superior officers punished her for it in very public ways that were endorsed by DRDC leadership through its inaction.

Complainant came to work every day during this period of February and March expecting that she might be subjected to public humiliation by her supervising officers and would be socially ostracized by many of her peers. This would be difficult for any employee. However, in the unique context of a prison facility where trust among co-workers is essential to maintaining security, this type of social breakdown and lack of trust among co-workers creates a security threat. This factor would add significantly to any reasonable person's stress level in that situation.

When Complainant registered her complaint about Sgt. Hendricks and Lt. Fender to her supervising officers, Lts. McCandless and Cisneros and Captain Drake, they violated the harassment policy by failing to take any action at all to follow up. Lt. Hendricks and Lt. Fender's actions had constituted harassment of Complainant because they created a work environment for her that was Aintimidating, hostile, or offensive to her, and because that harassment constituted a Areprisal or retaliation against Complainant for breaking the code of silence by making statements about Sgt. Hendricks' and C/O Kennedy's racial slurs. McCandless, Cisneros, and Drake had a duty to deal with the harassment Afirmly and take Aappropriate personnel action against the offenders, to obtain and document as much information as possible regarding the complaint, and to notify the HR Director, the Inspector General, and Warden Bokros about her harassment complaint. Even if they had had a question about whether the actions she complained of constituted harassment under the policy, they had a duty under that policy to contact Warden Bokros regarding her complaints.

Complainant next received the unjustified poor performance evaluation on

March 17 from Captain Drake. This evaluation confirmed Complainant's reasonable belief that management was retaliating against her for complaining about the harassment. Captain Drake made it official: it became a very term of Complainant's continued employment at DRDC to refrain from making further allegations of harassment. This evaluation on its face is a violation of AR 1450-5, which prohibits reprisals or retaliation by the DOC or any of its representatives against employees that make complaints about workplace harassment.

Next, Complainant had the March 18 meeting with Major Leyba. It is uncontested that Major Leyba understood that Complainant felt Lt. Hendricks and Lt. Fender were engaging in retaliatory harassment of her, and that she was being subjected to social ostracizing by her peers. He read portions of AR 1450-5 to her at the meeting. The only action Major Leyba took was to transfer Complainant to a different shift. He refused to enforce the harassment policy against Lts. Hendricks and Fender or Captain Drake. He swept the problem under the rug. He violated the harassment policy by failing to take firm action against any of the three supervising officers, failing to take appropriate personnel action, failing to obtain and document as much information as possible regarding her complaint, and failing to notify the HR Director, Inspector General, and Warden Bokros of the complaint.

Major Leyba's inaction had the effect of endorsing Sgt. Hendricks and Lt. Fender's harassment of Complainant. In addition, his failure to immediately remove the unwarranted March 17 evaluation from her file, and his ultimate failure to assure its removal at any time during her DRDC employment, had the further effect of endorsing Captain Drake's retaliation against Complainant for making a harassment complaint. His failure to enforce AR 1450-5 constituted a separate violation of that policy, which subjected her to disciplinary or personnel action.

Upon reassignment to the new shift on April 1, Complainant received not the afresh start she was promised, but was immediately sent an unmistakable signal that she was being punished via her Tower 2 assignment. This assignment had the immediate effect of worsening her social isolation and confirming her feeling that DRDC leadership was not on her side. Complainant lined up three separate officers who agreed to take Tower 2 shifts for her; her requests were turned down for no apparent reason. She knew Captain Chavez had the power to assign any other officer to that post. Any reasonable person in her situation would understand that she was being punished.

Complainant explained to both Captain Chavez and Major Leyba that she felt she was being punished in Tower 2. They ignored these complaints. Major Leyba stopped taking her calls.

Captain Chavez testified on direct exam that he re-assigned Complainant to

Tower 2 for a second month in May because Officer Krause was out on FMLA leave for that month. However, on cross examination he admitted that on April 22, the date he made the May schedule, he was unaware that Krause would be out on leave. He therefore manufactured this reason for her Tower 2 assignment for hearing. His credibility on this and all other issues is therefore called into serious question.

Captain Chavez had full authority to keep Officer Krause on Tower 2 in April. Likewise, in May, he had the discretion to assign any other officers to the post. In May, he chose to assign Complainant there again, with full knowledge that she was suffering emotionally from her perceived institutional retaliation. He was unable to provide any reason for keeping her there for the full two-month period at hearing. His motives for doing so are highly suspect.

In the end, every single DRDC manager to whom Complainant reported retaliatory harassment failed to enforce the harassment policy. As noted above, this failure to enforce the policy in itself constitutes a separate violation of the policy.

All of the above actions by DRDC leadership constitute deliberate acts that made or allowed Complainant=s working conditions to become so difficult or intolerable that she had no reasonable choice but to leave the situation; hence, she was constructively discharged. She left near the end of her second month in the social isolation of Tower 2, with no end date in sight, on or about May 27. She was suffering from depression, sleeplessness, hair falling out, high blood pressure, and headaches.

2. Complainant=s termination was contrary to rule.

Once an employee prevails on a claim of constructive discharge, it is the appointing authority=s burden to prove that the termination imposed was justified by the factual circumstances. Harris v. State Board of Agriculture, 968 P.2d at 152. Here, the only stated reason for Complainant=s termination in the record, and the only one argued by Respondent at hearing, was her exhaustion of all available leave. It is uncontested that Complainant had exhausted all available leave at the time of her termination.

Was Respondent=s termination of Complainant arbitrary, capricious, or contrary to rule or law? The answer to this question is contained in the discussion above regarding constructive discharge. DRDC supervising officers Hendricks and Fender harassed and retaliated against Complainant in violation of AR 1450-5. Captain Drake retaliated against Complainant for making harassment complaints in his March 17 evaluation, in violation of the rule. All supervisors to whom Complainant turned for protection refused to provide it, thereby violating the rule

and causing her further trauma. She then was punished by being assigned to Tower 2 for two months.

Since DRDC leadership's multiple violations of AR 1450-5 constitute the means by which it constructively discharged Complainant, the discharge was, by definition, contrary to rule AR 1450-5. Further, since Respondent's rule violations were directly responsible for Complainant's failure to return to work and resultant exhaustion of all available leave, exhaustion of leave cannot legitimately form the basis for her termination.³ But for DRDC leadership's repeated violations of AR 1450-5, Complainant would not have exhausted her leave. The termination imposed was therefore not justified by the factual circumstances, was contrary to rule, and cannot stand. To conclude otherwise would allow Respondent to benefit directly from its own rule violations.

Complainant's expert testified that the primary stressor leading to her physical symptoms was her job conditions. He further testified that had she suffered no retaliation for participating in the fact finding inquiry, she would not have had to leave work. His conclusions were based largely on the fact that after Complainant went up the chain of command several times, it became clear to her that she would not be protected by management, and that she would therefore be unable to secure a safe work environment. This opinion was supported by the evidence submitted at hearing. In fact, all of the evidence regarding Sgt. Hendricks, Lt. Fender, and Captain Drake's mistreatment of Complainant, as well as DRDC managers' failure to enforce AR 1450-5, was unrebutted.

3. Complainant has not established a prima facie case of retaliation under the Colorado Anti-discrimination Act.

Complainant asserts that she was discharged in retaliation for participating in an investigation under and opposing practices barred by the Colorado Anti-Discrimination Act, Section 24-34-402(1)(e)(IV), 7 C.R.S. (1999)(the Act). In order to establish a prima facie case of retaliation under the Act, Complainant must establish: 1) she engaged in the protected activity of participating in an investigation under the statute or opposing activity prohibited by the statute; 2) she was subjected to adverse employment action; and 3) a causal connection exists between the protected activity and the adverse action. Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996). Once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a nondiscriminatory reason for the

³ The fact that the termination letter cited exhaustion of leave as the basis for termination has no bearing on the conclusion that the termination was contrary to rule.

challenged action. The plaintiff may then demonstrate that reason to be pretext.

The Act defines discriminatory or unfair employment practices to include:

A discriminat[ing] against any person because such person has *opposed* any practice made a discriminatory or an unfair employment practice by this part 4, . . . or because he has testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article.≡ Section 24-34-402(1)(e)(IV), C.R.S. (Emphasis added.)

Complainant has satisfied the second element, adverse action, by proving constructive discharge. However, she has failed to prove the first element, engaging in activity protected under the Act.

Complainant asserts that she engaged in conduct protected under the Act because she participated in the investigation into Kennedy=s and Hendricks= racial slurs (references to white officers as Apecker woods≡ and Acrackers≡), and because she opposed retaliatory harassment she received for participating in that investigation. Those racial slurs could be construed as racially harassing to whites.

This argument fails, however, because at the time the facts of this case occurred, racial slurs or racial harassment of any type was not prohibited by the Act. Since the actions Complainant opposed were not prohibited by the Act, retaliation against her for her opposition thereto was not prohibited by the Act. In other words, actions taken to oppose practices made unlawful by the anti-discrimination statutes are protected. But actions taken to oppose practices that are not made unlawful by the anti-discrimination statutes are not protected.

The Act was amended after the facts of this case occurred, effective July 1, 1999, to protect individuals who are harassed on the job. Section 24-34-402(1)(a), C.R.S. (1999). Prior to its amendment, the Act only protected employees whose pay, status, or tenure had been adversely affected.⁴ The racial slurs of Kennedy and Hendricks did not adversely affect Complainant=s pay status, or tenure. Therefore, her opposition to those racial slurs was not protected by the Act.⁵

⁴ At that time, the Act made it unlawful Ato refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation≡ on the basis of sex, race, etc.

⁵ While the undersigned ALJ denied Respondent=s motion for directed verdict in part by finding that the Act did cover Complainant=s actions, this ruling was made on completely different grounds than those raised by Respondent in its closing argument on which it prevails here. Respondent did not argue that racial harassment was not covered by the Act in support of its motion for directed

Complainant contends that the actions opposed or reported by an employee claiming retaliation do not have to be illegal in fact for the retaliation to be actionable, citing Archuleta v. Colorado Department of Institutions, 936 F.2d 483, 487 (10th Cir. 1991). However, Archuleta does not stand for the proposition that the conduct complained of need not be covered by the Act under which the plaintiff proceeds. In fact, the Archuleta court made a point of noting that Title VII's retaliation provision was not so broad as to include retaliation for participation in acts not covered by Title VII, such as a state personnel hearing. Id., 936 F.2d at 487, n. 2.

In view of the above, Complainant has failed to establish a prima facie case of retaliation under the Act.

4. Attorney Fees.

Complainant requests attorney fees. Under Section 24-50-125.5, C.R.S., if a personnel action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee bringing the appeal or the [respondent] shall be liable for any attorney fees and other costs incurred

An award of attorney fees may be based on any one of these listed factors independently. Hartley v. Department of Corrections, 937 P.2d 913 (Colo. App. 1997).

Board Rule R-8-38 defines in bad faith, maliciously, or as a means of harassment as:

An action or defense in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth. (Emphasis added).

Deliberate disregard of a known rule, even under advice of counsel, may constitute bad faith warranting an attorney fee award. Mayberry v. University of Colorado Health Sciences Center, 737 P.2d 427 (Colo. App. 1987). In Mayberry, an employer allowed extra parties to sit in on a predisciplinary meeting, in violation of a personnel board rule and a one-month-old Court of Appeals decision clarifying that

verdict.

rule. The Court found sufficient facts to support an attorney fee award.

Here, the warden testified that he was aware of Complainant's allegations of harassment and retaliation. He further testified that he knew she was on leave due to stress and anxiety, the source of which he believed to be from her job. Warden Bokros further testified that he never checked to assure that the harassment policy was followed with respect to Complainant. At the time of hearing, he was unaware of whether DRDC had followed the policy in connection with Complainant.

AR 1450-5 states, in part:

Appointing Authorities will assure compliance and take immediate action to eliminate any form of workplace discrimination/harassment.

It is not necessary for a supervisor to have a signed complaint before causing an investigation into workplace harassment . . . if the supervisor has cause to believe violations have occurred. . . . If there is a question, the supervisor should contact the Appointing Authority.

The warden had a duty under this policy to take immediate action to eliminate the pattern of harassment against Complainant, to conduct an investigation, to contact her supervisors, to contact her attorney to learn more about her allegations, and generally to find out the truth of her situation, prior to taking adverse employment action against her. Ultimately, his highest duty was to deal firmly with DRDC leadership's pattern of failing to enforce the policy. It appears that instead, he concluded it was easier to just get rid of Complainant than to find out the truth.

The Warden deliberately disregarded AR 1450-5, which charged him, as top administrator of DRDC, with its enforcement. His failure to act on his knowledge of Complainant's harassment and retaliation complaints constituted a disrespect for the truth under Board Rule 8-38. The Warden's termination of Complainant was in bad faith. Complainant is therefore entitled to attorney fees and costs.

5. Remedy.

Complainant is entitled to reinstatement to her position as a Correctional Officer I and back pay and benefits, minus any income she has earned since May 27, 1999. While customarily DOC would be entitled to reinstate Complainant to the DRDC facility, in this case the facts demonstrate that such a remedy would not place Complainant in the same situation she would have occupied if she had not endured the mistreatment of Respondent. See Dept. of Health v. Donahue, 690 P.2d 243 (Colo. 1984).

When an employee is wrongfully terminated, he or she is entitled to a remedy which will make him whole. Lanes v. O'Brien, 746 P.2d 1366, 1373 (Colo. App. 1987). The remedy should be equal to the wrong sustained by the employee. Donahue, 690 P.2d at 250. Such an employee is not entitled to any windfall. Id. Likewise, however, the remedy crafted by the fact finder should not in any way reward the employer for its wrongful conduct. Carr v. Fort Morgan School Dist., 4 F.Supp. 2d 989 (D. Colo. 1998).

Here, it would not make Complainant whole in any sense of the word to return her to DRDC, where several supervising officers retaliated against Complainant for breaking the code of silence, and where every single manager, up to and including the current warden, has deliberately disregarded the harassment policy as it applied to Complainant. To return Complainant to that facility would cause her further damage. See, Cunningham v. Department of Highways, 823 P.2d 1377, 1384 (Colo. App. 1991)(allowing department to apply the rule of three instead of appointing complainant to position would provide no effective remedy and would merely allow discriminatory practice to continue). Therefore, DOC is ordered to reinstate Complainant to any facility other than DRDC.

Complainant requests that the Board return her to work as a certified employee, and that she be allowed to bypass the remainder of her probationary term. She argues that but for the wrongful conduct of Respondent, she would have remained at DRDC through the remainder of her probationary period and would have been certified.

The Colorado constitution mandates that prior to certification, all probationary employees must complete a probationary period. It states, "After satisfactory completion of any such [probationary] period, the person shall be certified. . . ." Colo. Const. art XII, Section 13(10). Complainant has not yet satisfactorily completed her probationary period. While Respondent's wrongful termination caused her separation from employment, interrupting her probationary service, it would constitute a windfall to excuse Complainant from completing the remainder of her probationary term. Therefore, Complainant is to be reinstated as a probationary employee, with her probationary period remaining equivalent to the time between May 27, 1999 and July 31, 1999, or 65 days.

Complainant requests that she be reimbursed any medical expenses she has paid that would otherwise have been covered had she not been discharged. This request is granted. Complainant further requests that she be re-trained to ensure that she is fully prepared to resume her position. The Board is without authority to grant this type of request.

CONCLUSIONS OF LAW

- 1. Complainant was constructively discharged.**
- 2. Respondent=s termination of complainant was arbitrary, capricious, or contrary to rule or law.**
- 3. Respondent did not violate the Colorado Anti-discrimination Act.**
- 4. Complainant is entitled to attorney fees and costs.**

ORDER

Respondent is ordered to reinstate Complainant to her former position of Correctional Officer I, in a facility other than DRDC, and to pay her back pay plus benefits minus whatever compensation she has received since May 27, 1999. Respondent shall reimburse Complainant for medical expenses she incurred that would have been covered had she not been separated from employment. Complainant shall be reinstated as a probationary employee, with 65 days of probation remaining.

**DATED this _____ day of
April, 2000, at
Denver, Colorado.**

**Mary S. McClatchey
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, Colorado 80203**

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").**
- 2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University**

of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3244.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

**Richard C. LaFond
Charlotte N. Sweeney
1756 Gilpin Street
Denver, Colorado 80218**

**Jeanette Walker Kornreich
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203**

