

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 99B146

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SYLVIA MARTINEZ,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, DELTA CORRECTIONAL FACILITY,

Respondent.

This matter came on for hearing on June 9, 2000 before Administrative Law Judge Mary S. McClatchey. Complainant was represented by Peter Stuart Blood. Respondent was represented by Susan J. Trout, Assistant Attorney General, Office of the Colorado Attorney General.

PRELIMINARY MATTERS

Witnesses.

Complainant Sylvia Martinez (Complainant) testified on her own behalf.

Respondent called Captain David Cotton, Correctional Officer IV, Delta Correctional Facility, Colorado Department of Corrections (DOC), and David Schumacher, Investigator, DOC Office of the Inspector General.

Exhibits.

Complainant's Exhibits A and B were offered but not admitted.

Respondent's Exhibits 1, 2, 3, 5, 6, 7, 8, 9, 11, 12, and 13 were admitted by stipulation.

Procedural Matters.

Complainant filed a petition for hearing on June 14, 1999, challenging her resignation on August 8, 1998 as having been a constructive discharge. She asked that the ten-day appeal deadline for filing an appeal be equitably tolled due to the circumstances of her separation from employment. The Board granted

Complainant a hearing on the issue of whether the appeal deadline should be equitable tolled.

After hearing on August 20, 1999, the Board issued an Order Re: Jurisdiction, concluding that equitable tolling was inappropriate and therefore dismissing the case for lack of jurisdiction. Complainant appealed to the Board, and on January 24, 2000, the Board reversed and remanded the case for a full hearing. The Board's order states as follows:

The Board reverses the administrative law judge's Order re: Jurisdiction. In part, the Board has concerns that the Receipt of Petition, Notice of Hearing on Limited Issue of Equitable Tolling failed to provide sufficient notice to Complainant of the issues and evidence to be considered at that limited hearing. Contemporaneously, the Board determines that enough evidence was solicited during the limited hearing on jurisdiction to support a finding that valid issues exists to warrant a hearing.

Respondent next filed an action in Denver District Court challenging the Board's jurisdiction to remand the case for full hearing. The district court dismissed that challenge on grounds Respondent had failed to exhaust administrative remedies as there was no final agency order ripe for review.

The full hearing on remand was set for June 9, 2000. Complainant filed two pre-trial motions. The first asked that the issue of equitable tolling not be considered at the June 9 hearing. This motion was denied on grounds that subject matter jurisdiction may be raised at any time, and that the Board had not expressly entered a final order on that issue. The second motion asked that the Board reconsider that order of the ALJ, and that a different ALJ be assigned to hear the case. Complainant did not request disqualification of the ALJ, and made it clear that she did not believe the ALJ was prejudiced against her. She stated that since the ALJ would be considering the issue of equitable tolling a second time, the ALJ would be unable to fairly and impartially hear the evidence and consider argument on that issue at the June 9 hearing.

The Board has no rule regarding interlocutory appeals of pre-trial orders. The Board's enabling statute and the Administrative Procedure Act (APA) empower the ALJ to consider all issues regarding hearings. The APA mandates that one entity preside over all aspects of administrative hearings, be it the agency itself or an ALJ. Therefore, the undersigned ALJ deemed it appropriate to consider and rule on Complainant's second motion. The ALJ denied the motion to reconsider and to re-assign a different ALJ to this case, on grounds the ALJ would consider all facts and arguments presented at the June 9 hearing in a fair and impartial manner.

Respondent filed a pre-trial motion requesting leave to take telephone testimony of one witness. The motion was granted.

At the commencement of the June 9, 2000 hearing, the ALJ made it clear that no facts or conclusions of law from the August 20, 1999 hearing would be considered herein. This Initial Decision therefore encompasses only facts and argument presented at the June 9, 2000 hearing. The scope of the hearing included all issues regarding the circumstances of Complainant's separation from employment, including whether she was constructively discharged. Respondent also raised the issue of subject matter jurisdiction, arguing once again that Complainant was not entitled to equitable tolling of the ten-day appeal deadline.

MATTER APPEALED

Complainant appeals her resignation on August 8, 1998, arguing that she was constructively discharged and that the ten-day deadline for filing her appeal should be equitably tolled. For the reasons set forth below, Respondent's action is affirmed.

ISSUES

1. Whether the ten-day appeal deadline should be equitably tolled.
2. Whether Complainant was constructively discharged.
3. If Complainant was constructively discharged, whether the termination of Complainant was arbitrary, capricious, or contrary to rule or law.

FINDINGS OF FACT

1. On August 1, 1997, Complainant was hired as a Correctional Officer I at Delta Correctional Facility, DOC.

Background: Complainant and Inmate Talmadge

2. In November 1997, an inmate, Brennan Talmadge, began to talk to Complainant often during her shifts.
3. During the period of approximately November 1997 through July 1998, Complainant developed a friendship with Talmadge.
4. When Complainant performed inspections, she and Talmadge had conversations about her children and his children. She stopped by his room to look at mirrors he was working on while making her unit rounds. Once she requested that he make a mirror for her children as part of his arts & crafts work in the prison; he apparently did not do so.
5. Complainant was trained to write up inmates if they were engaging in inappropriate behavior. She had the discretion to do so if she deemed Talmadge's behavior to be inappropriate. She did not write up Talmadge for any behavior until August of 1998.

6. In December of 1997, Talmadge asked Complainant to refrain from writing up a friend of his for an infraction. She refused to do so, and told Talmadge this. Complainant told Captain Finney, one of her supervisors, about Talmadge's request. Captain Finney told Complainant that she had done the right thing.

7. In approximately March 1998, Captain Finney and Lt. Sexton observed Talmadge and Complainant conversing in the housing office where she was assigned to work, at 3:30 a.m. They advised her it was inappropriate and that after "lights out" inmates must be in their rooms. After that, Talmadge visited Complainant at the beginning and end of her shifts.

8. In March or April of 1998, one of Complainant's supervisors, Sergeant Stroud, said to Complainant and Captain Finney, "did you see how I handled your boyfriend? I think he's in lust." He was referring to Talmadge. Complainant did not appreciate this remark, but said nothing to Finney, Stroud, or anyone else.

9. Complainant gave her home telephone number to Talmadge. He gave it to his mother. Complainant had approximately three conversations with Talmadge's mother by telephone. In a July 1998 conversation with her, Complainant requested information on performing a Native American spiritual cleansing of her home.

10. By August of 1998, things appear to have soured between Complainant and Talmadge. On August 18, 1998, Complainant wrote an Incident Report on Talmadge. The report stated in part:

"I saw inmate Talmadge #57903 watching two inmates working and I asked him what he was doing down here. Inmate Talmadge #57903 said, What are you going to do? Write me up for being in an unauthorized work area.?" I said "Thank you for that idea. My writing hand has been needing some exercise." He said, "Well instead of writing, exercise it with this." He then picked up a small rock and tossed it at me, which I did not even attempt to catch, and it landed at my feet.

"I would like to note that I have counseled inmate Talmadge #57903 before regarding his familiarity with staff. When I have been assigned to other living units he has pursued me and wanted to come into the office and stay and talk. I have told inmate Talmadge 357903 that he is trying to become too familiar with me and that I do not feel comfortable with him around me. He will stop for 2 - 3 days and then continue with this process."

11. Complainant initially submitted this August 19 report as "Information Only". After receiving it, Captain Lockhart directed her to modify it to "Disciplinary," which she did.

12. During her conversation with Lockhart about the report, Complainant informed him that Talmadge had been too friendly with her on previous occasions. She said she should go on vacation, put in her two weeks notice, and resign. Lockhart said she shouldn't "quit over a piece of shit inmate. He'll be gone when you come back." Complainant felt a weight lifted from her shoulders.

13. During this period, Complainant was seeing a psychologist or psychiatrist for depression. Respondent was unaware of this.

14. Complainant went on vacation from August 19 to September 5, 1998.

15. Upon her return from vacation, Complainant saw Talmadge at the facility, and, realizing he had not been transferred to another prison facility, was disappointed.

16. That afternoon, she approached Captain Lockhart about why Talmadge was still at the facility. Lockhart's response is not in the record, but Complainant was not satisfied with it.

17. On September 7, 1998, Complainant had another negative encounter with Talmadge. He entered an office she was in and angrily informed her he had retaliated against her for the rock-throwing Incident Report by telling others that she and he were lovers. She was very upset by this, and discussed it with another officer, who told her to go to her supervisor and tell him about it. She was unable to do so because she was so upset she was crying, and did not want to approach a supervisor in this fragile emotional state.

18. On September 7, 1998, Complainant did compose herself enough to write a second Disciplinary Incident Report Form on Talmadge. It is dated September 7 by both her and the shift commander, Tom Helphinstone, who also signed it. It stated in part:

"Talmadge #57903 entered the office and started to tell me that he had been called to major Green's office a couple of weeks ago regarding an incident report I had written on him. Talmadge . . . said that Major Green had told him because inmate Talmadge #57903 had thrown a rock at me that that could be considered assault on a peace officer and that he could get eight (8) years. He said " don't appreciate that report and you put down that I'm a stalker and now that's in my jacket and that's f*cked up." He then said "I was so mad that in retaliation I told the whole camp about and me and you. Yeah, I told the whole f*ckin' camp that we're lovers." I said "That was very manly of you, thank you." He said "Well nobody messes with my time and if I have to do more time you're going to go down with me and now everyone here thinks I'm a stalker, how f*cked up is that? I have to live here." I said, "Well

now everyone thinks I'm a whore, your whore and I have to work here and I don't appreciate that." He said "You could have talked to me first before you went and did that. I apologized to you for throwing that rock." I said "Get out of this office cause I am not discussing this with you." He left and I did security rounds.

When I came back to the office he entered and closed the door to the L.U. office and said "I want to talk to you about this." I got up and went and opened the door and said "There is nothing to talk about." He again said "You should have talked to me about the report." I said "I did what I had to do. You crossed the line and you know that." He said "I tried to talk to you the next day in Living Unit 5, but you gave me a f*cked up look." I said "I am not discussing this any further with you, but just remember what you said about me because the burden of proof now lies on you.

At that time Officer Pacheco entered the office and inmate Talmadge #57903 left. When Officer Pacheco left inmate Talmadge #57903 came into the office and said AI want to apologize for everything I said. You were right, it wasn't very decent of me to go and say what I did. I just hope you can find it in your heart to forgive me.= I said "you have ruined my reputation with your lies to the camp." He said "I only told (inmates) Lil' anthony and Schlegel." He left the office and went about his duties . . . "

19. That evening, September 7, Complainant called Talmadge's mother and asked her to intervene on her behalf and to stop her son from retaliating against her.

Events leading to September 8, 1998 Meeting.

20. On or about September 7, Warden Hickox informed Captain David Cotton that he had been advised there was an allegation by Talmadge against Complainant. The Warden directed Cotton to interview the inmate, which he did.

21. Cotton told Talmadge that this was a serious allegation and he was considering writing a report charging him with fraud. Talmadge stated that it was not a fraudulent allegation, and repeated that he had had sex with Complainant at the prison camp on at least three occasions. At that point, Cotton stopped the interview, because it was appropriate for the Office of the Inspector General (OIG) to take over the investigation.

22. Later on September 7, Warden Hickox assigned Investigator David Schumacher, from the OIG, to investigate Talmadge's allegations against Complainant. Schumacher first interviewed the inmate, who repeated his allegation and stated that he had discussed his relationship with his mother on the prison telephone system, which he knew to have been tape recorded.

23. Schumacher next obtained the tape recordings of conversations between Talmadge and his mother. He listened to one in which Talmadge told his mother he had said things to others at the prison about a female officer, and his mother said it would be unfortunate if it came to light because the officer's job could be in jeopardy and she had two children. Investigator Schumacher pulled the four female officers' personnel records and confirmed that the only unmarried one with two children was Complainant, so that she alone fit the description from the telephone conversation.

24. Schumacher next set up an interview with Complainant, to get her side of the story.

25. On September 8, 1998, Captain Cotton, one of her immediate supervisors, asked Complainant to attend a meeting at the end of her shift, which commenced at 6:50 a.m. and ended at 3:00 p.m. She was not informed of the subject of the meeting.

September 8, 1998 Meeting.

26. Complainant arrived at the meeting just after 3:00 p.m. fatigued from a full day of work.

27. Present were Captain Cotton, Investigator Schumacher, and Major Sue Worthington, who was there as a woman due to the sexual nature of the allegations against Complainant.

28. Captain Cotton started the meeting by introducing the two others, whom Complainant had met in passing but had not worked with closely. Cotton explained that an inmate had accused Complainant of having had a sexual relationship with her. He then handed the meeting over to Investigator Schumacher.

29. Schumacher explained that he had been asked to investigate the allegations made by the inmate. He stated he had met with the inmate who had repeated his statement that he had had sex with Complainant on more than one occasion on the prison grounds.

30. Schumacher next handed Complainant a copy of the DOC staff Code of Conduct, Administrative Regulation (AR) 1450-1, showing her the sections that would have been violated in the event the allegations proved to be true. He read the Garrity warning to her, then asked her to read it to herself, which she did. He asked her if she had any questions about it, which she did not, and then asked her to sign it. Complainant then signed it. The Garrity warning states in full:

I wish to advise you that you are being interviewed as part of an official investigation of the Colorado Department of Corrections. You will be asked

questions specifically directed and narrowly related to the performance of your official duties or fitness for office. You are entitled to all the rights and privileges guaranteed by the laws and the constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself. I further wish to advise you that if you refuse to answer questions or do not answer them fully and truthfully relating to the performance of your official duties or fitness for duty, you will be subject to departmental charges which could result in corrective or disciplinary action including dismissal from the Department of Corrections. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements may be used against you in any subsequent criminal proceeding. However, these statements may be used against you in relation to subsequent departmental charges.

31. DOC Administrative Regulation 1150-4, Investigations, provides that when employees under investigation for misconduct are given the Garrity warning, as Complainant was, "they must answer all questions fully and truthfully."

32. Schumacher explained that he had listened to a tape recording of Talmadge talking with his mother about an officer on September 7, and he played the recording. Schumacher explained that he had 600 - 800 minutes of tape of Talmadge talking to his mother.

33. Investigator Schumacher asked Complainant if she had had sex with Talmadge, and she stated in no way shape or form did she have a sexual relationship with him.

34. Schumacher mentioned Clinton at some point during the meeting, intending to convey to Complainant that he defined sexual relationship broadly, not narrowly as Clinton had done at the press conference in which he wagged his finger denying a relationship with the White House intern. Complainant may have taken this reference to Clinton as an indication that Schumacher did not believe her.

35. Complainant stated that she never kissed or embraced Talmadge. She did indicate he had bragged about having had sexual intercourse with other DOC staff persons, and that she felt he may have desired that with her.

36. Schumacher asked Complainant the nature of her relationship with Talmadge. She stated the following:

- she had developed a friendship with Talmadge when assigned to the graveyard shift;
- not long after starting graveyard shift (around March 1998) Captain Finney and Lt. Sexton had observed Talmadge in the housing office where she was assigned to work, at 3:30 a.m., speaking with her. They advised her it was inappropriate and that after "lights out" inmates must be in their rooms. She said that after that, Talmadge visited Complainant at the beginning and end of her shifts;

- when she had performed inspections, she and Talmadge had had conversations about her children and his children;
- she stopped by his room to look at mirrors he was working on while making her unit rounds;
- she had given her home telephone number out to Talmadge, and she had had contact with Talmadge's mother by telephone on several occasions. She relayed that in one conversation with his mother a month prior, she had requested information on performing a Native American spiritual cleansing of her home;
- on the prior evening, she had contacted his mother to request her intervention in getting Talmadge to stop bothering her, and had informed her that if he didn't stop she would have to write him up;
- she had once requested that Talmadge make a mirror for her children as part of his arts & crafts work in the prison;
- Talmadge had asked her to bring items into the facility for him, but she had refused. He had asked her to bring in a model to send his daughter for her birthday.

37. Complainant referred to Talmadge as her "friend" on numerous occasions during the interview.

38. Complainant was asked whether she had ever reported any of the information about Talmadge in Paragraph 36 above to her superiors at DOC, and she indicated that she had not.

39. Investigator Schumacher discussed the DOC policy regarding "professional distancing" with Complainant. Professional distancing means that DOC staff treat inmates fairly, firmly, and consistently, as professional clients, but not as friends.

40. Once an officer shows favoritism to an inmate or parolee, it opens the door for conflict issues to arise. Further, any demonstration of favoritism can be viewed by inmates as a show of weakness. Violations of professional distancing can threaten prison security. Social relationships such as that Complainant had with Talmadge (and his mother) cross the professional line and are contrary to professional distancing.

41. Schumacher asked Complainant if she was comfortable with the concept of professional distancing. She answered that she had been at the commencement of her DOC employment, but at that time, she was no longer comfortable with it.

42. At this point in the meeting, Complainant noticed that the attitude of those in the room changed, because she had disclosed numerous infractions of the Code of Conduct, which prohibits social relationships with inmates and their families, and requires the reporting thereof to supervisors.

43. DOC's Staff Code of Conduct, AR 1450-01, states as follows:

- "Staff may not knowingly maintain social, emotional, sexual, business or financial associations with current offenders, former offenders, or the family and/or friends of offenders. This also includes, but is not limited to, telephone calls, letters, notes, or other communications outside the normal scope of employment." (Section IV(D), pages 2 - 3)

- "Staff are required to report to their Appointing Authorities any previous or current relationships between: (a) the staff with an offender; (b) the staff with a family member of an offender" (Section IV(D)(4)(a) and (b), page 3)

44. Complainant was visibly upset throughout the meeting, although she maintained her professional demeanor.

45. After Complainant's numerous admissions of Code of Conduct violations, Complainant was given a break; she was so upset that tears were running down her face.

At that time, the meeting appears to have broken up. Investigator Schumacher left the room. It is unclear whether Major Worthington stayed or left at this time.

46. Captain Cotton and Complainant then discussed Complainant's options with her at that time. Captain Cotton advised Complainant that she would be placed on administrative leave pending further investigation and an R-8-3-3 meeting to determine facts and possible disciplinary action, if any. He explained the disciplinary process, that an R-8-3-3 meeting would be held with the Warden, at which both she and the Warden would have a representative present. He stated that the result of the disciplinary process could lead to anything from corrective action to disciplinary action up to and including termination.

47. Complainant then asked if she had any options other than going through the disciplinary process. Captain Cotton stated that she could resign. She asked how much prospective employers would know about her infractions if she resigned. He stated that with a negotiated resignation, they would not know anything other than that she had resigned and was not eligible for re-hire.

48. Complainant filled out the resignation form, asking Captain Cotton for assistance as she did so. She started to answer the question of why she was leaving DOC by checking the box for mental stress, but then asked Cotton how she should answer it. He told her she should put "personal reasons." He felt that "mental stress" would reflect more poorly on Complainant, and advised her in that manner in order to assist her.

49. At no time during the September 8 meeting did anyone inform Complainant either directly or indirectly that she had to choose between resigning and being terminated.

50. At no time during the September 8 meeting did Complainant believe that she had to choose between resigning or being terminated.

51. The infractions committed by Complainant were very serious, because they constituted a pattern of misconduct of maintaining a social relationship with an offender and his family and of having failed to report it to her supervisors.

52. Complainant was aware of the seriousness of her breach of the staff Code of Conduct at the September 8 meeting.

53. The meeting lasted a total of 45 - 60 minutes.

54. Complainant was not offered the opportunity to take additional time to consider her decision to resign, nor did she request it.

55. DOC has administrative regulations governing internal investigations, which are separate from its regulations governing the disciplinary process. Administrative Regulation 1150-4, Investigation of Employee Misconduct, states under "Employee Rights" that "DOC employees, at their option, may request to have a representative/observer present during an interview as long as the representative is available to attend the interview within a reasonable period of time. During the interview the representative may only act as an observer." (Section V(C)(2) and (3), page 9.)

56. No one informed Complainant of her right to an attorney or to take a break at the meeting. At no time did Complainant request a break or to consult an attorney.

57. On September 9, 2000, Talmadge rescinded his statements regarding his affair with Complainant, admitting his prior statements were false. No one contacted Complainant to inform her of this.

58. On June 14, 1999, Complainant filed a petition for hearing with the Board, alleging constructive discharge.

59. Complainant seeks reinstatement and back pay.

DISCUSSION

In this action alleging constructive discharge, Complainant bears the burden of proving that her termination was involuntary. Harris v. State Board of Agriculture, 968 P.2d 148 (Colo.App. 1998). Complainant also bears the burden of proving

that the ten-day appeal deadline governing dismissals should be equitably tolled. Samples-Ehrlich v. Simon, 876 P.2d 108, 110 (Colo. App. 1994).

Credibility.

In Charnes v. Lobato, 743 P.2d 27, 32 (Colo. 1987), the Colorado Supreme Court held,

Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors, including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses.

Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstances shown by the evidence which affect the credibility of a witness.

Complainant testified clearly that she experienced "problems" with Talmadge from November through the end of her tenure at DOC, that she viewed him as inappropriate in his overtures to her, and that she told him to stay away because he was getting too familiar. She testified that her problems with Talmadge were very troubling to her. She further testified that after writing up Talmadge for the rock throwing incident, and after Captain Lockhart failed to transfer Talmadge to another prison facility, she felt "sick and depressed" about it, that her supervisors were not taking her problems with Talmadge seriously. Complainant also testified that one of the reasons she resigned was that since her problems with Talmadge weren't taken seriously, she worried that if she had similar problems with another inmate in the future, that wouldn't be taken seriously either.

This testimony was directly contradicted by Complainant's admissions on cross examination and by her own action or inaction with regard to Talmadge during the period November 1997 through July 1998. Complainant admitted that she

referred to Talmadge at the September 8 meeting as a friend; that she gave him her personal telephone number; that she had had ongoing friendly exchanges with him during work hours; and that she had in fact never written Talmadge up for inappropriate conduct during her entire tenure, until the rock-throwing incident in August 1998.

Complainant allowed the social relationship with Talmadge to develop and never complained to any supervisor about his conduct for nine months. It is also significant that Complainant initially wrote up Talmadge for throwing a rock at her as an "informational" report only, and that she had to be directed to make it a "Disciplinary" report by Captain Lockhart. It appears that she had allowed the power dynamic between herself and Talmadge to become unbalanced, and that she was indeed providing him with special treatment.

Complainant's testimony regarding the trauma she suffered in relation to Talmadge's conduct towards her from November 1997 through July 1998 therefore holds little weight. It defies reason for Complainant to conclude that her supervisors were not supportive of her during this period if she never put them on notice that his conduct was problematic to her. It does appear, however, that in August of 1998 her attitude towards him had changed, and that she did want Talmadge transferred.

With regard to the September 8 meeting, Complainant testified that after she asked, "what if I resign?" the attitude of everyone in the room changed and they became more supportive of her. She testified that the tone of their voices changed to become less negative, and that they drew closer to her physically. Her counsel argued that her motivation in deciding to resign was driven primarily in response to this positive feedback, to please those in the room, and that when she saw their positive response to her suggestion of resigning, she followed through with the resignation in order to make herself feel better due to her fragile emotional state.

At hearing, however, it came to light first through Investigator Schumacher and then through Captain Cotton, that the meeting had adjourned at the time the issue of resignation was raised. What occurred is that Captain Cotton raised the resignation issue in response to Complainant's question of, "What other options do I have?" other than going through the R-8-3-3 (disciplinary) process. Further, Complainant later contradicted her own testimony by testifying on direct exam that she "surprised them" when she said she had contacted Talmadge's mother, stating, "their attitude did change then," because she "had done something wrong."

1. Is Complainant entitled to equitable tolling of the ten-day deadline for filing an appeal?

Section 24-50-125(3), C.R.S. (1999) mandates that all appeals of dismissals must be filed within ten days of the dismissal, "or within such additional time as may be permitted by the board in unusual cases for good cause shown." At the time Complainant resigned her position with DOC, Board Rule R10-6-1, 4 CCR 801-1, was in effect, and therefore governs this action. Board Rule R10-6-1(3) states as follows:

A(3) Extensions for Good Cause. The time period for filing an appeal under R10-6-1(a) may be extended for good cause. For the purpose of this rule, "good cause" is defined to mean: any cause, not attributable to the moving party's act or omission, which, in the judgment of the administrative law judge, requires that the time period for filing an appeal be extended. (Emphasis in original)

To establish good cause under the rule, Complainant must establish that a cause not attributable to her warrants extension of the deadline. The case law governing equitable tolling is consistent with this rule. See Samples-Ehrlich v. Simon, 876 P.2d 108, 110 (Colo. App. 1994)(it is complainant's burden to establish that respondent's actions prevented her from filing a timely appeal; "If there is no evidence to demonstrate that defendant engaged in any conduct which adversely affected the filing of the plaintiff's claim, a court may not apply the doctrine of equitable tolling.")

There is insufficient evidence in the record to demonstrate that Respondent's actions (or omissions) either prevented or adversely affected Complainant's filing of a timely claim. Respondent received a report of inappropriate sexual conduct; Respondent investigated it by interviewing Talmadge and Complainant; in the course of interviewing Complainant, Respondent explained to her what further action would occur in view of the Code of Conduct violations that came to light at that meeting. Respondent's conduct was appropriate under the circumstances. This case is distinguishable from cases such as Salas v. State Personnel Bd, 775 P.2d 57 (Colo.App. 1988), where the lack of proper notice was found to toll the appeal deadline. See also Renteria v. Colorado State Department of Personnel, 811 P.2d 797 (Colo. 1991). In Salas, the Court of Appeals concluded that notice of appeal rights was due to the complainant only after establishing that the complainant was indeed a certified employee at the time of termination. As a certified employee, the complainant in Salas had a clear right to notice of appeal rights under section 24-50-125, C.R.S. Here, complainant was not entitled to notice of appeal rights because she resigned. Nothing about Respondent's conduct at or prior to the September 8 meeting changes this fact.

If Complainant's position were to prevail here, any time an employee resigns, state agencies would be duty-bound to provide notice of appeal rights, simply because the employee might later claim he or she was constructively discharged due to the uncomfortable nature of the meeting in which the resignation occurred. All meetings in which employee misconduct arises are by their very nature uncomfortable situations. If, upon learning about the disciplinary process that

awaits them, the employee elects to resign instead of enduring that process, it does not place a burden on Respondent to provide appeal rights. There is no statutory or regulatory requirement that appeal rights be provided to resigning employees, and the Board will not impose one in a quasi-judicial forum here.

Since the Board remanded this case for a full hearing on all issues, the undersigned will also enter conclusions of law on the issue of constructive discharge.

2. Was Complainant 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. The determination of whether the actions of an employer amount to a constructive discharge depends upon whether a reasonable person under the same or similar circumstances would view the new working conditions as intolerable, and not upon the subjective view of the individual employee. 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). It is Complainant's burden to prove that her separation from employment was involuntary. Harris v. State Board of Agriculture, 968 P.2d 148 (Colo.App. 1998).

Complainant's argument in support of her claim of constructive discharge is essentially as follows: she found Talmadge's approaches of her to be problematic; she complained about his behavior to supervisors and they did nothing about it; she was called in for questioning on September 8 in a hostile and threatening manner; she was very vulnerable at that time, suffering from depression; at the September 8 meeting, she received negative feedback and felt that no one believed her; and, given her fragile emotional state, she decided to resign because she felt it was what those in the meeting wanted her to do.

Even if all of Complainant's allegations were taken at face value, which they are not as evidenced by the credibility discussion above, she has not established that her working conditions were so difficult or intolerable that any reasonable employee had no choice but to quit or resign. Complainant had the ability and the power to put a stop to the social relationship with Talmadge by writing him up for violating her boundaries as soon as he started initiating contact with her in November of 1997. A reasonable person would have done this.

Complainant herself was responsible for allowing her own working conditions to become whatever they did. Respondent had no involvement in either the creation of or maintenance of the social relationship between Complainant and Talmadge.

Complainant argues that under the standard set forth in Boulder Valley School District, supra, she need only prove that at the September 8 meeting she reasonably believed that her employment was being terminated. However, Complainant's own testimony defeats this argument. She never testified that she believed that her employment had been or would certainly be terminated. Nor did she testify that she was coerced into making a choice between resigning or being terminated.

Complainant was told plainly that she would go through a completely separate process to determine what, if any, discipline would occur as a result of her Code of Conduct violations. Moreover, even if Complainant had been asked to resign, which she wasn't, that fact would not establish constructive discharge. Christie, 759 P.2d at 783. In Harris, the employer's suggestion that the employee "consider" resigning was found not to establish, "as a matter of law, that complainant's resignation was coerced." Harris, 968 P.2d at 152.

Even if Respondent had given Complainant a choice between resigning and being terminated, that would not have constituted a constructive discharge if Respondent had had good cause to believe that there were grounds for termination. Parker v. Board of Regents of Tulsa Jr. College, 981 F.2d 1159, 1162 (10th Cir. 1992).

Complainant argues that the conditions of the September 8 meeting were so harsh that they amounted to a situation of coercion and harassment that led her to resign. Complainant's feeling that no one believed she was innocent of the sexual misconduct charge was a subjective one, perhaps caused by her depressed state, and does not meet the objective standard of proving constructive discharge in which a reasonable person under the same or similar circumstances would view the working conditions as intolerable.

A reasonable person in Complainant's situation would have known that she had three excellent alibis regarding her innocence on the sexual misconduct charge: her August 19 disciplinary incident report against Talmadge for throwing the rock at her; her September 7 report, in which she had written out in great detail Talmadge's statements about retaliating against her for the August incident report by making the false accusation; and the other guard with whom she had shared Talmadge's false accusation on September 7.

The strongest source of Complainant's discomfort at the September 8 meeting was undoubtedly her dread of the impending disciplinary process. However, Respondent was not the source of that discomfort; therefore, Respondent cannot be held accountable for it. An employer must create the conditions giving rise to resignation in order for there to be a constructive discharge. That is not the case here.

Complainant argues that Respondent's failure to advise her of her right to have a representative present under AR 1150-4 contributed to the coercive nature of the meeting to such a great degree as to create a constructive discharge situation. While the issue of whether a resigning employee has the opportunity to consult counsel one of many factors appropriate for consideration in assessing a claim of constructive discharge, it is concluded that the absence of counsel did not render the conditions of Complainant's resignation to be a constructive discharge. Captain Cotton did explain that Complainant had the right to counsel throughout the disciplinary process, including at the fact finding meeting with the warden.

AR 1150-4 does not require DOC to advise employees of their right to a representative, but it provides that employees may request one. The State Personnel Board has no rules requiring that employees have the right to counsel during investigations of employee misconduct. The Board has apparently determined that the right to counsel should commence at that precise point where the disciplinary process is initiated, not at the investigatory stage. In the absence of a Board rule requiring that DOC do otherwise, DOC is well within its rights to promulgate its own rule providing employees under investigation with the right to a representative, but not requiring that employees be advised of that right at the time of the investigation. While Complainant had received AR 1150-4 at the time she was originally hired, she did not know or recall that she had a right to a representative. Respondent's failure to advise Complainant of her right to a representative did not violate DOC regulations, Board regulations, or common law.

CONCLUSIONS OF LAW

1. Complainant is not entitled to equitable tolling of the deadline for filing an appeal.
2. Complainant was not constructively discharged.

ORDER

The Complainant's appeal is dismissed with prejudice.

Dated this ____ day of July, 2000 at Denver, Colorado	Mary S. McClatchey Administrative Law Judge 1120 Lincoln Street, Suite 1420 Denver, Colorado 80203
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CERTIFICATE OF MAILING

This is to certify that on the ____ day of July, 2000, I placed true copies of the foregoing **INITIAL DECISION** in the United States mail, postage prepaid, addressed as follows:

Peter Stuart Blood
315 Colorado Avenue, Suite B
Pueblo, Colorado 81004

and in the interagency mail, to:

Susan J. Trout
Assistant Attorney General
Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203