STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006G046**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

RONNI GAIL CLAY,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on September 27, November 8, and November 21, 2006 at the State Personnel Board, 633-17th Street, Courtroom 6, Denver, Colorado. Assistant Attorney General Eric Freund represented Respondent. Respondent's advisory witness was Warden Al Estep, the appointing authority. Complainant appeared and was represented by Brian Stutheit, Esq. The record in this case was closed after the submission and review of written closing arguments as of December 4, 2006.

MATTER APPEALED

Complainant, Ronni Gail Clay ("Complainant") appeals her termination by Respondent, Department of Corrections ("Respondent"). Complainant seeks reinstatement, back pay, and attorney fees and costs.

For the reasons set forth below, Respondent's action is **affirmed.**

ISSUES

1. Whether Respondent intentionally and unlawfully discriminated against Complainant on the basis of her gender in terminating her probationary employment.

2. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background

1. Complainant Ronni Gail Clay ("Complainant") was hired by Respondent as a Correctional Officer I ("CO I") on May 16, 2005.

2. After successfully completing her departmental training, Complainant was assigned to the Limon Correctional Facility ('LCF") starting June 26, 2005. As was true for other new CO I employees at the facility, Complainant was assigned to work the graveyard shift. Her hours were 10 PM until 6 AM.

3. LCF used its graveyard shift as a training shift for new correctional officers. At the time of Complainant's assignment, the shift captain was Captain Edward Sutton. The Field Training Officer ("FTO") for the shift was Sgt. Barbara Martinez. Complainant was also assigned a mentor when she arrived at LCF. Complainant's assigned mentor was Sgt. Lisa Sutton.

Complainant's Interactions with Command Staff on the Graveyard Shift

4. Complainant developed a level of friendship and interaction with the shift commander, Capt. Sutton, which was unusual for a CO I. Other staff members would observe Complainant in Capt. Sutton's office during her shifts, and Complainant spoke of the captain in a familiar way. After Capt. Sutton was re-assigned from the graveyard shift assignment, and Nathan Wilson had been promoted to lieutenant on that shift, Complainant developed an unusually friendly relationship with Lt. Wilson which was similar to the relationship she had developed with Capt. Sutton.

5. By December 2005, the graveyard shift was known for being chaotic and having low morale. Rumors were rife on the shift.

6. Warden Estep decided to replace Capt. Sutton as graveyard shift commander with Capt. Gabriel in early December 2005 because of problems with the graveyard shift.

Incident with Sgt. Sutton

7. Capt. Sutton's wife, Sgt. Lisa Sutton, was also assigned to the graveyard shift while Capt. Sutton was shift commander. Sgt. Sutton worked in housing unit assignments.

8. Captain Sutton and Sgt. Sutton were having marital difficulties during the time in question. These difficulties were well-known among the staff. The Sutton's would fight with each other and yell at each other while at work. The Sutton's separated in

the fall of 2005.

9. Some time prior to late December, 2005, Sgt. Sutton came to front gate on a day when she was to be off. Sgt. Sutton confronted Complainant while they were at the front gate about rumors that Complainant was having an affair with Capt. Sutton. Sgt. Sutton threatened Complainant. Complainant denied the rumor to Sgt. Sutton, and the two of them talked for a period of time.

10. After the confrontation with Sgt. Sutton, Complainant told other staff that she had been threatened and was afraid of coming to work. Complainant also spoke with Capt. Sutton about the situation. Capt. Sutton took no formal action at the time, and the incident was never formally reported.

11. After the incident at the front gate, Complainant developed a strong friendship with Sgt. Sutton.

Complainant's Relationship With Sgt. Martinez

12. Sgt. Barbara Martinez was Complainant's FTO. This meant that Sgt. Martinez would coordinate the training of new officers and write evaluation reports. As was true for the other sergeants on shift, Sgt. Martinez would also rotate into the position of master control sergeant. The master control sergeant would be by himself or herself for the majority of the shift in the master control room. The master control sergeant had a busy job. This position would open and close all of the facility doors, control the counting of prisoners, control the key inventory, and work the phones and the panels from that room.

13. Sgt. Martinez could be abrasive in the way she handled new officers. While some officers viewed this as merely being a "by the book" supervisor, other staff members believed that Sgt. Martinez focused her abrasiveness on pretty female officers, and would harass these officers more than the rest of the new officers. None of Sgt. Martinez's supervisors had made any comment to her about her work style or reported any concerns to the warden's office.

14. Sgt. Martinez and at least one other sergeant referred to Complainant on occasion as the "little princess."

15. While Capt. Sutton was the commander of the graveyard shift, Complainant used her friendship with the captain to complain him directly to him about issues she had with Sgt. Martinez. After Capt. Sutton was re-assigned form the graveyard shift in late fall of 2005, Complainant would speak with Lt. Wilson about some of her concerns with Sgt. Martinez.

16. Complainant believed that Sgt. Martinez was harassing her in a variety of ways.

17. Complainant complained to Capt. Sutton that Sgt. Martinez was overly harsh in her criticism of Complainant. As a result of this complaint, Capt. Sutton told Sgt. Martinez not to document negative criticism of officers, particularly of Complainant.

18. Complainant also believed that she was being held between doors too long by Sgt. Martinez when Sgt. Martinez was in master control.

19. Complainant would time that amount of time that passed after she arrived at a door and before the door was opened by the sergeant in master control. If the time went over three minutes, she would push the buzzer again. When she did this, Sgt. Martinez would often yell at her through the intercom to stop ringing the buzzer, and would continue to make her wait.

20. Complainant believed that Sgt. Martinez purposely made her wait in between doors for ten to fifteen minutes on numerous occasions, including one time where she had to wait eight to ten minutes while she was transporting an inmate. She believed that no other sergeant had made her wait more than three to five minutes to pass.

21. It was not uncommon for all staff members, including Warden Estep, to be held at doors for extended periods of time while the sergeant in master control handled the variety of duties that the control room position required. Other officers have experienced waits of ten minutes or more.

22. Complainant also believed that Sgt. Martinez was harassing her by the number of times she was directed to count two inmate units, rather than to count just one unit.

23. Each night, the graveyard shift officers would conduct a physical count of the prisoners. The staffing levels of CO I officers on the graveyard shift meant that some officers were able to count only one unit of prisoners. Other officers would have to be assigned to count two units. Complainant did not mind counting two units and would offer to take on the job of counting two units.

24. Officers who were assigned to count one unit rather than two units would have more time during their break to eat and socialize.

25. Complainant complained to Lt. Wilson that she was being assigned by Sgt. Martinez and other sergeants to count two units more than other officers were assigned to count two units. Lt. Wilson interceded on Complainant's behalf and told Sgt. MacKeen not to assign Complainant to count two units.

26. Complainant also believed that Sgt. Martinez harassed her in extending the time she had to spend outside on bad weather days performing a security check referred to as "breaking zones."

27. One of the security measures performed by the graveyard shift officers was a test of

the alarm system outside the facility walls. This test required that two or three officers go outside and set off the alarms by walking through the zones around the perimeter of the facility. The officers would also check the door locks as they walked the perimeter. The sergeant in master control would wait to see if the alarm sounded at time when the officers purposely broke the zone and, if it did, the officers outside would move on to another area. On a good night, the process could be completed in about 20 minutes. Nights that were cold, windy, snowy, or rainy often created conditions in which it was harder for the master control sergeant to know that the zones were breaking because of the test by the outside officers, rather than the weather conditions. Nights when the weather could be affecting the zones would often require more time to complete the tests.

28. Complainant believed that Sgt. Martinez was purposely keeping her outside breaking the zones on bad weather nights. Complainant also believed that Sgt. Martinez would call her out to the perimeter after waiting for Complainant to go into the bathroom.

Bi-weekly Performance reports

29. Sgt. Martinez created one bi-weekly performance planning and review document on Complainant dated July 31, 2005. This document evaluated Complainant on twelve specific areas, including such areas as appearance, attitude, dependability, job knowledge, communication, and team work. Sgt. Martinez made positive comments about Complainant in most areas, including noting that Complaint "does a great job" on job knowledge and work quality, works well with other, does a good job in being flexible, and was dependable and had safe work practice. The areas with corrective or negative observations primarily focused on Complainant's willingness to accept criticism. The bi-weekly report was not kept in a personnel file but in a training file.

30. Captain Sutton issued direction to Sgt. Martinez not to create negative documentation on staff, particularly on Complainant. As a result of this directive, Sgt. Martinez stopped documenting staff observations in bi-weekly performance planning and review documents for all of the new officers.

31. Once Capt. Sutton was replaced by Capt Gabriel as the commander of the graveyard shift, Capt. Gabriel ordered that the periodic reviews were to be continued. Sgt. Martinez returned to the practice of creating bi-weekly performance planning and review documents.

32. On or about December 16, 2005, Sgt. Martinez authored another bi-weekly report on Complainant. Again, the report included positive remarks on dependability, job knowledge, work quality, customer service, teamwork, flexibility and safe work practices. The report notes that "Officer Clay has come a long way. She improves every day. Officer Clay has a good feel for security and housing." Sgt. Martinez's criticism, however, also follows the same themes as in the July 31, 2005, bi-weekly

report. Sgt. Martinez noted, for example, that Complainant became frustrated and took "the victim stance" a lot, and did not take responsibility or blame but instead would argue that she had not been trained or shown how to do the work.

33. Complainant was not informed that a bi-weekly report had been completed in December. It had been Capt. Sutton's unofficial policy that all such evaluations would be reviewed with the officer before being placed into the officer's training file. That procedure was not followed with the December 16, 2005 bi-weekly report.

The December 22, 2005 Meeting Between Complainant and Sgt. Martinez

34. Prior to December 21, 2005, Complainant asked Lt. Wilson for her training file so that she could review it. She found the December 16, 2005 bi-weekly evaluation form in the file.

35. On December 21, 2005, Complainant went to Captain Gabriel and complained that she had found a review in her file that she had never seen before authored by Sgt. Martinez, and that she considered the review to be an attack on her character and integrity. Complainant also told Capt. Gabriel that Sgt. Martinez was spreading rumors about Complainant and Capt. Sutton having an affair. Capt. Gabriel arranged for a meeting on December 22, 2005, which included Complaint and Sgt. Martinez to give them a chance to talk about the review.

36. During the December 22, 2005, meeting, Complainant told Captain Gabriel that other staff members had told her that Sgt. Martinez was spreading rumors about her and Capt. Sutton. Complainant identified Sgt. Sutton as one of the staff members who had told her that Sgt. Martinez was spreading rumors about her, but also alleged that other staff members had said similar things to her. Complainant alleged during this meeting that it was Sgt. Martinez' personal problems with her that were causing the negative language in her bi-weekly review. Captain Gabriel told Complainant that he wanted her to write a report containing the names of the individuals who have told her that Sgt. Martinez was spreading rumors about her, and that he would investigate. Capt. Gabriel gave this assignment to Complainant as a direct order.

37. Complainant decided that she was not going to answer the question posed by Capt. Gabriel. She went to Lt. Wilson for assistance in replying to the order. Lt. Wilson assisted Complainant in writing a one page memo explanation of why Complainant thought that she shouldn't provide the names to Capt. Gabriel. Complainant wrote the memo while sitting at Lt. Wilson's computer in his office, with Lt. Wilson looking over her shoulder and offering suggestions. Lt. Wilson offered his help because he wanted to help keep Complainant out of trouble.

38. Complainant continued refused to obey Capt. Gabriel's direct order to provide a report with the names, and Capt. Gabriel reported Complainant's violation of his order to his superiors.

Complaints Against The Complainant

39. On December 29, 2005, Sgt. Martinez filed a hostile work environment complaint against Complainant. This complaint was based upon the accusations made by Complainant to Capt. Gabriel on December 21 and the meeting which occurred on December 22, 2005.

40. On the same date, Sgt. Martinez also filed a hostile work environment complaint against Sgt. Lisa Sutton for an incident which occurred on December 28, 2005. Sgt. Martinez alleged that she had been tripped by Sgt. Sutton as she walked past Sgt. Sutton as she walked past Sgt. Sutton right before roll call was to begin that night. Sgt. Martinez alleged that both Sgt. Sutton and Complainant began to laugh at her. She also alleged that Sgt. Sutton had also pushed her in the back after roll call ended that night.

41. COI Joseph Ballard also filed a complaint against Complainant alleging hostile work environment. CO Ballard's complaint was filed on January 3, 2006.

42. CO Ballard complained that there had been numerous rumors and mistruths spread about fellow correctional officers in the months that he had worked at LCF, and that most of the rumors had involved Complainant in some way.

43. CO Ballard also complained about an interaction he and Complaint had had on January 2, 2006. Complainant came to CO Ballard on that date and told him that someone had told her that Ballard was going to be fired. CO Ballard asked Complainant to tell him who had told her the information so that Ballard could go talk with that person. Complainant told CO Ballard that she would talk with her source and get back to him with the name. Complainant told CO Ballard the next day that she was not going to tell him who the source of the rumor was. CO Ballard later learned that Officer Mark Roy had been spreading that rumor, but Complainant did not provide Officer Ballard with Officer Roy's name.

44. On January 3, 2006, CO I Justin Allen also filed a complaint against Complainant alleging the creation of a hostile work environment. CO Allen alleged in his complainant that Complainant had been involved on numerous times slandering her co-workers, and in creating and spreading rumors.

Corrective Action Against Officer Roy:

45. One of Capt. Gabriel's first steps to correct the morale issues on graveyard shift was to treat rumor spreading more seriously than Capt. Sutton had done. He communicated this new emphasis to the staff at roll calls.

46. As a result of the new emphasis, one of the male graveyard shift officers, CO I Mark

been involved in the spreading of a rumor about Officer Ballard. At time, CO Roy was a probationary employee.

47. This matter was handled by Lt. Dauffenbach and Capt. Gabriel. They decided that Officer Roy should be placed on a corrective action. CO Roy was ordered to write a report on the staff code of conduct, and Capt. Gabriel sent it back to CO Roy for revision on more than one occasion.

48. CO Roy was not formally disciplined because he had turned himself in and there were no other performance issues pending at the time.

Warden Estep's Investigation

49. Warden Estep was on vacation from December 30, 2005 through January 3, 2006. Prior to when he left on leave, he instructed his administrative assistant to schedule a series of interviews for January 4, 2006, as part of his investigation into the complaint filed by Sgt. Martinez.

50. Warden Estep's administrative assistant generated a memo dated December 30, 2005, which scheduled Sgt. Martinez, Complainant, Capt. Gabriel, Lt. Dauffenbach, Sgt. Sutton, Capt Sokol, and Capt. Sutton for half hour interview times. The memo also listed interview times with CO I Justin Allen and CO I Joseph Ballard, even though neither CO Allen nor CO Ballard had filed a complaint by that time. By the time he left on leave, however, Warden Estep knew that more complaints were expected and he left instructions for those complainants to be added to the list.

50. The interviews of the staff members on January 4, 2006, provided Warden Estep with negative information about Complainant's behavior on the job. Captain Gabriel told the Warden that Complainant made a lot of accusations and then refused a direct order from him to provide the names of the sources of her information. Lt. Dauffenbach told the Warden that the graveyard shift had a lot of issues, and that he thought that Complainant was influencing the situation and that she was influencing Lt. Wilson in a similar way to the way she had influenced Capt. Sutton. Captain Sokol had known Complainant from prior work and reported that there was a lot of drama that surrounded where she was working. CO Allen reported about the rumors that he had been hearing and that he did not trust Complainant. Officer Ballard reported about the rumor that Complainant had informed him about and then refused to identify her source. Sgt. Martinez reported on the statements that Complainant had made to her, and that Capt Sutton had instructed Sgt. Martinez not to write negative reports about Complainant. Sgt. Martinez also reported to the Warden that she had heard Complainant laughing when Sgt. Sutton tripped her at roll call.

52. Complainant also had a chance to speak with Warden Estep on January 4, 2006. She complained to him that Sgt. Martinez was locking her between doors, had

her little princess, made her count two units repeatedly, and was a sergeant who targets and harasses certain people.

53. As part of his investigation, Warden Estep asked for an evaluation of the situation on graveyard shift from Sgt. MacKeen. Sgt. MacKeen filed a memo with the Warden dated January 10, 2006.

54. Sgt. MacKeen reported that the rumor mill on graveyard shift had been going on for months, and that morale was suffering. Sgt. MacKeen noted that Complainant's name had been associated with recent rumors.

55. Sgt. MacKeen also noted that Complainant had been getting close to Lt. Wilson, once Lt Wilson was promoted to lieutenant and Capt. Sutton had been moved from the shift. He reported that it appeared that Complainant was joking around with supervisors and treating them in a manner that others construed to be too familiar. He also reported Captain Sutton had told staff not to write negative documentation on Complainant, and that Lt. Wilson was recently spending time with Complainant and had instructed Sgt. MacKeene not to assign Complainant to count two units.

56. Sgt. MacKeen summarized his perception of the situation on graveyard shift that:

"Clay has consistently tried to manipulate higher ranking staff to gain their loyalty in order for her to get what she wants. And conducts herself in a manner that I believe to be unprofessional. I would also consider Clay as a liability to the Department as she is more trouble than she is worth. She has consistently been involved with whatever drama has been going on with Graveyard Shift since she had arrived. All of her negative actions have always seems to have been swept under the rug."

57. Warden Estep also asked Sgt. Cooper if Capt. Sutton had told her not to write negative documentation on staff, and specifically Complainant. Sgt. Cooper told the Warden that Capt. Sutton rarely spoke to her directly, but that it was her understanding from other sergeants was that she was not to correct Complainant unless she felt the need to be reprimanded by Capt. Sutton.

Complainant's January 8, 2006 Performance Review:

58. Lt. Wilson was not in Complainant's supervisory chain of command until he was promoted from to lieutenant. Lt. Wilson began training for his new lieutenant position on November of 2005, and was officially Complainant's supervisor as of December 1, 2005.

59. Lt. Wilson initially drafted Complainant's performance review for the period of May 16, 2005 through November 15, 2005.

60. Lt. Scott Dauffenbach who had been in Complainant's chain of command until Lt. Wilson took over in December, 2005, believed that Lt. Wilson had been improperly influenced by Complainant, and sought permission from Major Williams to revise Complainant's evaluation draft authored by Lt. Wilson.

61. Lt. Dauffenbach then completed a revision of the evaluation and, as was the practice for draft evaluations, had the revised evaluation reviewed by supervisors. This revised evaluation was provided to Complainant on January 8, 2006.

62. The revised evaluation gave Complainant a satisfactory overall rating, but noted that Complainant needed improvement in the areas of communication and interpersonal skills. The review specifically noted that "C/O Clay has recently had difficulty communicating effectively with her chain of command and enforcing Colorado Department of Corrections policies without creating negative reactions." The report also noted the Complainant had difficulty accepting constructive criticism from her co-workers. There were no other formal reviews in Complainant's file which noted that Complainant was performing at anything other than a competent level.

Warden Estep's Findings:

63. At the conclusion of his investigation, Warden Estep found that Sgt. Martinez was credible as to her hostile work environment complaint and as to the pushing and tripping incident.

64. Warden Estep issued a termination letter to Complainant dated January 12, 2006, in which the Warden found that Complainant had caused turmoil by starting and spreading rumors, had tried to control situations through manipulation of staff in authority, was someone who was easily frustrated and had a problem taking responsibility for her actions. Warden Estep also found that Complainant was present when Sgt. Sutton tripped and pushed Sgt. Martinez, contrary to her prior statement to him that she never saw that action occur. Complainant's employment was therefore terminated effective January 12, 2006.

65. Warden Estep did not consider Complainant's gender in making his decision to terminate Complainant's employment. Warden Estep terminated Complainant's employment because he had credible information from both male and female officers, and from line officers as well as supervisory officers, that Complainant's actions had caused disruption and problems on the graveyard shift.

66. Warden Estep also found that Sgt. Sutton had tripped and pushed Sgt. Martinez, and Sgt. Sutton was given a combined corrective action/disciplinary action for the incident. Sgt. Sutton did not appeal this decision.

67. Warden Estep also issued a combined disciplinary action and corrective action for Capt. Sutton as of February 24, 2006. One of the allegations which Warden Estep

found to be true was that Capt. Sutton had been showing favoritism and that he had created an atmosphere where training sergeants were fearful of saying anything negative about new officers. Capt. Sutton did not appeal Warden's Estep's decision.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; C.R.S. §§ 24-50-101, et seq.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Probationary employees, on the other hand, are not yet certified to their positions and have different , and more limited, rights under state law. A probationary employee terminated for unsatisfactory performance does not have the right to hearing before the Board. Colo. Const. Art. XII, Section 13(1). As a result, the Board lacks jurisdiction to probe the basis for termination of a probationary employee based on allegations of unsatisfactory performance. *Williams v. Colorado Dept. of Corrections*, 926 P.2d 110 (Colo.App. 1996).

This does not mean, however, that a probationary employee can be terminated from employment without recourse under all circumstances.

Under C.R.S. § 24-50-125(5), "A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that such probationary employee shall not have the right to a hearing to review any disciplinary action taken pursuant to subsection (1) of this section while a probationary employee." *See also* Board Rule 8-46(B), 4 CCR 801. Therefore, probationary employees who allege a violation of a statute, such as the Colorado Anti-Discrimination Act, do have a right to a Board hearing on such a claim. *Williams*, 926 P.2d at 114. *See also Lucero v. Department of Institutions, Division of Developmental Disabilities*, 942 P.2d 1246, 1248 (Colo.App. 1996). The hearing, though, is limited to the issue or issues over which the Board has jurisdiction, and does not include an evaluation of whether the employee was terminated for just cause.

A. Burden of Proof

A complainant alleging discrimination always carries the ultimate burden of proof as to that issue. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1248 (Colo. 2001). The Board may reverse Respondent's decision to terminate employment if the action is found to be contrary to law. *See* C.R.S. § 24-50-103(6).

II. HEARING ISSUES

A. Respondent did not intentionally and unlawfully discriminate against Complainant.

Prima Facie Showing of Unlawful Discrimination

In order to prove intentional discrimination under C.R.S.. §24-34-402, a claimant must first establish, by a preponderance of the evidence, a *prima facie* case of unlawful discrimination. The factors of a *prima facie* showing are: (1) that the complainant belongs to a protected class; (2) that the complainant was qualified for the position; (3) that the complainant suffered an adverse employment decision despite her qualifications; and (4) that the circumstances gave rise to an inference of unlawful discrimination. *Lawley*, 36 P.3d at 1247.

Complainant has met the *prima facie* showing requirement with the evidence that she presented in this matter. The first three factors were not at all contested at hearing. It was undisputed that Complainant is a female correctional officer who had gone through the DOC training academy successfully and was obtaining competent work reviews prior to the time she was terminated from her employment.

The fourth factor is typically the hardest factor for a complainant to demonstrate. In this case, however, there were a number of pieces of evidence offered by Complainant from which an inference of unlawful discrimination on the basis of gender can be drawn. For example, Complainant presented evidence that her Field Training Officer ("FTO") was known to target pretty women for harsher treatment, that Complainant suffered harsher treatment from her FTO than was suffered by other officers evaluated by the FTO, that it was a complaint from her FTO which was the driving force behind Complainant's termination, that a male officer of the same rank and position who was also accused of spreading rumors was given only a corrective action, and that of all of the individuals who were involved in the incidents surrounding Complainant's termination, she was the only employee fired. Such circumstances are sufficient to give rise to the inference that Complainant's gender played a role in Respondent's decision to terminate her employment.

Respondent's Demonstration of a Non-Discriminatory Reason for Termination

Once a complainant established a *prima facie* case of intentional discrimination, there is a presumption that the employer has unlawfully discriminated against the complainant. *Lawley*, 36 P.3d at 1247 – 48. At this point, the employer has the burden of producing an explanation to rebut the *prima facie* case by providing a non-discriminatory explanation for its actions. *Id.* at 1248. If the employer fails to rebut the presumption, the complainant prevails. *Id.* However, if the employer articulates a legitimate, non-discriminatory reason for the adverse decision and provides evidence to support its

discriminatory reason for the adverse decision and provides evidence to support its legitimate purpose, the presumption created by the *prima face* case is rebutted and drops from the case. *Id.*

If the employer meets its burden of producing a legitimate reason for the employment action, the complainant is to be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the adverse employment decision were, in fact, a pretext for discrimination. *Id.* At this point, the factfinder is in a position to decide the ultimate question: "whether, in light of all of the evidence in the record, the employee has proved that the employer intentionally and unlawfully discriminated against the employee." *Id.* "[P]roof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason is correct... The fact finder must believe the plaintiff's explanation of intentional discrimination." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146, 120 S.Ct. 2097, 2108, 147 L.Ed.2d 105 (2000). It is permissible, however, for the trier of fact to infer the ultimate fact of discrimination form the falsity of the employer's explanation. *Id.* at 147.

In this case, Respondent has demonstrated through the provision of ample competent evidence that its non-discriminatory reasons for terminating Complainant's employment were that Warden Estep considered Complainant to have contributed to the problems experienced on the graveyard shift. These are legitimate non-discriminatory reasons for the termination of employment of a probationary employee such as Complainant.

The question, then, is whether Complainant has been successful in proving that the proffered reasons were merely a pretext for discrimination. Complainant has not done so in this case.

Any one of the problems that Complainant was accused of causing would have been rational grounds for Warden Estep to terminate Complainant's probationary employment.

Complainant may have believed, for example, that she had good reasons for not wanting to reveal her sources of information to Capt. Gabriel. Once that order was issued, however, Complainant was bound to comply or face consequences. Complainant testified at hearing that she had "re-negotiated" the order so that she did not have to submit the names. This statement was clearly not correct – merely because she had explained why she didn't want to provide the names, and had apologized to Capt. Gabriel for taking that stance, she had not renegotiated the order.

Complainant was also at odds with her FTO over an evaluation that, examined more objectively, seems to be only a relatively mild critique of Complainant's performance. Moreover, the bi-weekly training review at the heart of this dispute was not the type of review that was going to be placed in Complainant's personnel file. Complainant,

evidence of the truthfulness of Sgt. Martinez's observation in the bi-weekly training review that Complainant had trouble accepting criticism and was easily frustrated.

At about the same time as Complainant's dispute with Sgt. Martinez was unfolding, Warden Estep was also trying to address a serious morale and performance problem with the graveyard shift. The shift commander, Capt, Sutton, and his wife, a sergeant on the same shift, had been having serious marital difficulties, and these problems had seeped into the work environment. Complainant found that her actions in cultivating an unusual degree of friendship for a CO I with the shift commander had created several results: she gained the reputation of an officer whose work could not be critiqued because of her friendship with the captain, she became the target of rumors of an affair between herself and the captain, and she found herself the target of Sgt. Sutton's anger.

The morale on the graveyard shift was also low because of the rumor mill present on that shift. Other staff members came forward with allegations and evidence that Complainant had been actively spreading rumors and that it was causing disruption and mistrust.

Warden Estep conducted a reasonable level of investigation about these allegations. He met with a number of staff members about the allegations, spoke with Complainant about the allegations, and solicited additional information from staff members not initially interviewed once new information had come out in the interviews.

The Warden also took consistent action in assigning disciplinary consequences. Complainant argues that, of the two Sutton's and Complainant, it makes no sense for Complainant to be the one who was fired. Complainant ignores the important fact, however, that she was the only one of the three to be a brand new probationary CO I employee. The disciplinary calculus is quite different between employees who have held certified positions and have a record of service in the department, and probationary employees who have no right to dismissal only for just cause and have only a limited service record. The Board rules, for example, require that an appointing authority take the disciplinary history, or lack of disciplinary history, into account when deciding the appropriate remedy for a certified employee. These rules do not apply to probationary employees. Moreover, probationary employees generally do not have a history of good conduct and valuable contributions to offset the negative weight of a disciplinary incident. It is also not unreasonable or discriminatory to consider a probationary employee who becomes embroiled in conflict and morale problems within a short period of employment as someone not well-suited for long-term employment.

Complainant has also argued that the assignment of only a corrective action to Officer Roy for spreading rumors is also evidence that Respondent's explanation is a pretext. Officer Roy's situation, however, had several important distinguishing features. He had come forward and confessed his involvement in spreading a rumor, and that was the only performance issue associated with his service.

The persuasive evidence in this case established that Warden Estep was not motivated by Complainant's gender in reaching his decision that her probationary employment was to be terminated, but was instead motivated by a series of reports from a wide range of other employees as to problems caused or exacerbated by Complainant's behavior.

Complainant has therefore failed to persuade the undersigned that Respondent's proffered reasons for terminating her employment were merely pretext for discrimination.

B. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Given the above findings of fact an award of attorney fees is not warranted. Complainant was not successful in her argument that she had been terminated for unlawful reasons. Additionally, the evidence in this case supports that Warden Estep had sufficient information about Complainant's actions to be concerned about Complainant's performance, and that he had a rational argument for terminating Complainant's probationary employment.

CONCLUSIONS OF LAW

1. Respondent did not intentionally and unlawfully discriminate against Complainant in terminating her probationary employment.

2. Attorney's fees are not warranted.

ORDER

Respondent's action is **affirmed.** Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this 18th day of January, 2007.

Denise DeForest
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

2006G046

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.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 8 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 1/2 inch by 11 inch paper only. Board Rule 8-73, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 19th day of Jan., 2007, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Brian K. Stutheit, Esq.
Stutheit & Garland, P.C.
1520 West Canal Court
Suite 210
Littleton, CO 80120

and in the interagency mail, to:

Eric W. Freund
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Andrea C. Woods