STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2006G047**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CYNTHIA HERNANDEZ,

Complainant,

vs.

DEPARTMENT OF REVENUE,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on August 24, 2006, at the State Personnel Board, 633- 17th Street, Courtroom 6, Denver, Colorado. Complainant appeared pro se. Assistant Attorney General Christopher Puckett represented Respondent.

MATTER APPEALED

Complainant, Cynthia Hernandez ("Complainant" or "Hernandez") appeals her disciplinary termination during the probationary period by Respondent, Department of Revenue ("DOR" or "Respondent"). Complainant alleges Respondent discriminated against her on the basis of race and national origin. Complainant seeks reinstatement.

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

ISSUES

1. Whether Respondent violated the Colorado Anti-Discrimination Act by terminating Complainant's employment due to her race and national origin.

FINDINGS OF FACT

Background:

1. Respondent hired Complainant as an Administrative Assistant II in the Pueblo Operations office of the Colorado Lottery in August 2005. Complainant is Hispanic. One of the reasons for her hire was the fact she spoke Spanish.

2. Mr. Rodney Furuto, Director of Operations & Development in the Pueblo office, made the decision to hire Complainant and became her immediate supervisor at that time.

3. The Pueblo Operations office is responsible for processing all claims for Lottery winnings. This requires that the Pueblo staff verify the claims, obtain social security information, and process the checks, in a timely and efficient manner. Customer service is essential to this process, because the faster Lottery winners receive their earnings, the more likely they and others are to play the Lottery.

4. The Pueblo office also has the main switchboard for the entire Lottery. All calls to the Lottery, statewide, are received and processed through the Pueblo office. Callers include Lottery players, retailers that sell Lottery tickets, Lottery commissioners, and members of the public.

5. The Pueblo office also has a main reception area with a customer counter where members of the public can purchase tickets, submit winning tickets for payment, and where retailers and others can obtain customer service.

6. In October 2005, Mr. Furuto went on family medical leave and soon retired. Carol Harmon was promoted to replace Mr. Furuto. It was widely believed by Ms. Harmon and her superiors at the Lottery that Mr. Furuto had allowed problems in the Operations section to fester and had not been a sufficiently hands-on manager.

7. Ms. Harmon is Hispanic. Her maiden name is Santos.

8. Upon assuming the Director position, Ms. Harmon focused on increasing the level of performance in the Pueblo Operations office. She set out to determine what the employees knew and were trained in, and where additional training was needed. She assessed what systems and policies were working well and which were not. As part of this effort, she met with each employee individually to discuss how the job was going, what was working and what needed to be improved, and any issues that needed to be addressed.

9. When Harmon met with the probationary employees, including Complainant, she reminded each of them about being on probation, and that they would be reviewed every three months during that period. When Complainant heard this from Ms. Harmon, she felt that it was an attack on her performance.

10. Harmon quickly determined that there had been inadequate training in the Operations division, and she obtained the approval of her supervisor to implement a new training program.

11. Over the course of several staff meetings, Harmon trained her staff in areas she felt needed improvement. She often followed up on those meetings with emails to the entire work group, containing specific job expectations and policy directives.

12. One staffing change Ms. Harmon implemented was to assign one employee to the front reception area at all times, on a rotating basis, so that the area was always covered and so that customer service there would improve.

13. Ms. Harmon's style of management did not appeal to all of those under her supervision.

Socializing at Work; Attire

14. Harmon noticed that Complainant talked to co-workers during the course of her workday more than Harmon believed was necessary. Harmon noticed that Complainant was away from her assigned workstation more than she believed appropriate.

15. Harmon often informed Complainant that she was talking to co-workers too much, and that she needed to stay in her work area.

16. After finding that her verbal reprimands about socializing were unsuccessful, in the fall of 2005, Harmon moved Complainant to an office with a co-worker she did not socialize with. Complainant had less access to the co-workers with whom she socialized the most.

17. Harmon was also concerned about Complainant's work attire. She noted that Complainant's bra straps were often showing. Members of the public could see Complainant's attire and Harmon found it to be unprofessional.

18. On November 4, 2005, Ms. Harmon met with Complainant to discuss several ongoing performance issues. Harmon informed Complainant that her work attire was inappropriate, as it revealed too much of her body, and that Complainant spent too much time talking on the job instead of working. Harmon admonished Complainant that when she was assigned to the receptionist's area, she must remain there and not "visit" with co-workers in other parts of the office.

19. In the fall of 2005, Kelly DeGrasse, an Administrative Assistant III who has worked in the Operations office for 23 years, noted that Complainant and another new co-worker spent a lot of time together at work socializing in Spanish and laughing. Ms. DeGrasse felt that she was being excluded, and it was an uncomfortable situation for her.

20. DeGrasse complained to Ms. Harmon about the issue. Other employees also complained to Harmon about the issue.

21. There were three employees, including Complainant, who socialized together at work in Spanish. Harmon directed all three employees to stop doing so, explaining that it made their co-workers feel uncomfortable and excluded. Harmon directed them to speak Spanish only to customers, for work-related reasons, as appropriate.

"Cholla" remarks

22. During Complainant's employment, both she and Ms. Harmon referred to the other as a "cholla," which is a Spanish term for a low-rider or gangster. It is unclear whether these exchanges were made in a joking manner or were meant to offend.

23. During her employment, Complainant did not file a complaint regarding allegations of discrimination or harassment based on race or national origin. In addition, Complainant did not verbally complain to anyone at work about national origin or race discrimination.

Compensatory ("Comp") Time Policy

24. During the week of December 5, 2005, Harmon held a meeting with the Pueblo Operations office staff regarding work schedules and the requirement of obtaining pre-approval for compensatory time.

25. On December 12, 2005, Harmon sent a follow-up email to the Pueblo Operations office, including Complainant, regarding, "Work Schedule Discussion." The memo stated in part, "Per our conversation last week, effective immediately, everyone's schedule is 8:00 –5:00 p.m. with an hour lunch. By law, you are required to take a lunch break."

26. The email also stated, "If you need to work past 5:00 p.m., it must be approved by Tom or myself and then you should try to flex it within that week (i.e. come in late/leave early). I know there are exceptions where we have to stay late for retailer billings, but I still expect that to [be] discussed. I know that we all have things that come up like Doctor's appointments, etc., and Tom and I will work with you in using part of your lunch hour, etc., especially if you are low on leave." Tom Kitts was the Deputy Director of the Lottery and Harmon's boss.

27. On December 23, 2005, the office was short staffed due to the holidays. Ms. Harmon had left Complainant's co-worker, Andrea Davis, an Administrative Assistant II, in charge during her absence from the office.

28. Complainant, Davis, and others worked through lunch on that day.

29. Complainant submitted a time sheet for December that included unapproved compensatory time for December 23. Complainant did not obtain pre-approval for this comp time. At hearing, Complainant explained that she assumed Ms. Davis had approved her comp time. Complainant knew or should have known that an Administrative Assistant II had no authority to grant compensatory time.

30. On January 7, 2006, Harmon sent Complainant an email indicating that she had not pre-approved the comp time claimed on her time sheet.

Customer Complaint

31. In late December 2005, one of the Lottery's "frequent players" arrived at the Pueblo customer counter in the main reception area. This customer works across the street from the Operations office, and visits the office at least twice a week.

32. The customer stood at the counter, waiting for assistance. The staffer assigned to the reception area was not there. Complainant and a co-worker could see the customer standing there; however, they did nothing to assist the customer other than to tell her to "ring the bell."

33. The customer noted that Complainant and her co-worker saw her and continued nonetheless to talk to each other, instead of offering to assist her.

34. The customer became very frustrated, ultimately contacting the higher levels of Lottery management about the experience. Harmon had the responsibility of following through on the complaint.

35. Harmon took no immediate action against Complainant and her co-worker in response to this incident. Harmon sent an email to the entire Pueblo Operations staff on December 20, 2005. She stated, "Please do not tell a customer to 'ring the bell.' Instead, ask how you can help or overhead page the counter person if they are not around, or help them yourself." The email directed the counter staff to delegate counter coverage to another co-worker if they leave the counter area.

Unanswered Emails

36. On December 10, 2005, Harmon sent Complainant an email message regarding the processing of a claim for Lottery winnings. She noted that another staff member had received the claim, had verified that it was valid,

and had approved payment on it. Harmon stated, "I left it on your chair to finalize, file, etc."

37. Complainant did not reply to Harmon's email. In addition, she did not follow up on the directive, process the claim, or assure that the winner was paid.

38. Harmon handled the item herself.

39. On December 28, 2005, Harmon sent Complainant an email regarding a VPR (Validation Problem Record) that had not been processed in a timely manner. A VPR is a document that triggers an investigation by Lottery Security staff to determine whether the claim for winnings is legitimate and should be paid. Game tickets are valid for six months; therefore, VPR's must be processed within a specific period of time.

40. At the time Harmon sent Complainant the email regarding the VPR that had not yet been processed, it was close to the expiration date. She asked Complainant to check on the status of the VPR.

41. Complainant did not respond to this email.

Termination

42. On January 18, 2005, Harmon terminated Complainant's employment in a letter. The letter stated, "The reason for termination during your probationary period is that you have failed to perform the duties of your position according to standards of efficient service and conduct."

DISCUSSION

Complainant was a probationary employee at the time of her termination for unsatisfactory performance. Probationary employees lack a legally protected interest in continued employment. *Lucero v. Department of Institutions*, 942 P.2d 1246, 1248 (Colo.App. 1997). As a result, "unsatisfactory performance" is a ground for dismissal by the appointing authority during the probationary period without right of appeal. *Id*; Colo. Const. art. XII, §13(10).

The Colorado State Personnel Systems Act states in part, "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 . . . while a probationary employee." §24-50-125(5), C.R.S. Therefore, because Complainant has asserted a claim of race and national origin discrimination under the Colorado Anti-Discrimination Act (CADA), §24-34-402, C.R.S., she is entitled to a hearing on that claim. *Williams v. Colorado Dept. of Corrections*, 926 P.2d 110 (Colo.App. 1996).

Complainant bears the burden of proof in her claim of race and national origin discrimination. *Bodaghi v. Department of Natural Resources*, 995 P.2d 288, 300 (Colo. 2000). Complainant asserts that she was subjected to a hostile work environment based on her race and national origin. To properly raise such a harassment claim under the CADA, the employee must file a harassment complaint at his or her workplace and the employer must have failed to initiate a reasonable investigation of the complaint and to take prompt remedial action, if appropriate. Section 24-34-402(1)(a), C.R.S. Here, Complainant filed no race or national origin harassment complaint with Respondent. Therefore, she has failed to meet the statutory prerequisite for a harassment claim.

Complainant also asserts that she was terminated based on her race and national origin. To prove intentional discrimination under the CADA, an employee must first establish, by a preponderance of the evidence, a *prima facie case* ("*pfc*") of discrimination. The elements of a *pfc* of intentional discrimination are:

a. complainant belongs to a protected class;
b. complainant was qualified for the position;
c. complainant suffered an adverse employment decision despite his or her qualifications; and
d. circumstances give rise to an inference of unlawful discrimination.

Bodaghi, 995 P.2d at 300.

Once the employee has established a *pfc* of intentional discrimination, she has created a presumption that the employer unlawfully discriminated against the complainant. If the employer does not rebut the presumption, the fact finder is required to rule in favor of the complainant. *Id.*

The burden next shifts to the agency to articulate a legitimate, non-discriminatory reason for the adverse employment action. The agency must provide evidence to support its legitimate purpose for the decision. If the agency offers sufficient evidence to sustain the proffered legitimate purpose, the presumption created by the *pfc* is rebutted and drops from the case. *Id.*

The burden then shifts back to the employee to prove that the employer's proffered reasons were in fact a pretext for discrimination. The employee can satisfy this burden of proof through evidence already in the record. Colorado law does not require, in every case, that the complainant offer additional evidence to support an inference of intentional discrimination. *Bodaghi*, 995 P.2d at 298.

Complainant has failed to establish a *prima facie* case of intentional discrimination. The circumstances of her termination do not give rise to an inference of unlawful discrimination. The preponderance of evidence

demonstrates that Complainant had ongoing problems performing at a level required of the position. Her job performance in the area of customer service was consistently poor over time. In addition, she repeatedly ignored emails from her direct supervisor, failing to acknowledge receipt, to provide a reasonable time in which she would follow the directive, or to perform the work requested. The two email directives sent from Harmon to Complainant were time sensitive. There is no evidence in the record as to why Complainant flagrantly disregarded Ms. Harmon's directives in this fashion. Lastly, less than two weeks after Ms. Harmon sent an email reiterating the requirement of obtaining pre-approval from high level managers for comp time, Complainant submitted a time sheet with comp time recorded on it, without having obtained the required pre-approval.

Complainant asserts that Ms. Harmon's directive not to speak Spanish with her co-workers for reasons unrelated to work is evidence of discriminatory animus. However, the evidence demonstrated that several non-Spanish speaking co-workers felt excluded when Complainant and two other co-workers socialized in Spanish. The practice drove a wedge between Lottery staff members and was causing a morale problem in the work unit. It was a reasonable response for Ms. Harmon to direct the Lottery employees to refrain from speaking Spanish around co-workers who did not speak the language. Further, the directive was limited in scope and did not comprise an official English-only policy.

Assuming for the sake of argument that Complainant had presented a *prima facie* case of intentional race and national origin discrimination, Respondent presented sufficient evidence demonstrating a legitimate business reason for terminating Complainant. This evidence is discussed at length above. In addition, the evidence demonstrated that the directive to refrain from speaking Spanish in the presence of co-workers was made exclusively out of business necessity, to address team and morale issues. *See, Maldonado v. City of Altus*, 433 F.3d 1294, 1306-07 (10th Cir. 2006).

Complainant has failed to demonstrate that Respondent's proffered reasons for terminating her were a pretext for race or national origin discrimination. Pretext is often demonstrated by showing that the employer's proffered explanation is unworthy of credence. *Bodaghi, supra*. In fact, Complainant does not challenge the bulk of evidence against her. For example, Complainant admitted that Ms. Harmon often admonished her for excessive socializing at work, and testified that she did not respond to either of the two email directives sent to her from Ms. Harmon.

For the foregoing reasons, Complainant has failed to meet her burden of proving that Respondent intentionally discriminated against her.

CONCLUSION OF LAW

1. Respondent did not intentionally discriminate against Complainant on the basis of race or national origin.

ORDER

Respondent's action is **affirmed**. Complainant's appeal is **dismissed with prejudice.**

Dated this 27th day of September, 2006.

Mary S. McClatchey
Administrative Law Judge
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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 9 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 28th day of Sept. 2006, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, to the following addresses:

Cynthia A. Hernandez
55 Solar Drive
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And via interoffice courier:

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