

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

BARBARA MICKENS,
Complainant,

vs.

DEPARTMENT OF CORRECTIONS, LIMON CORRECTIONAL FACILITY,
Respondent.

Administrative Law Judge Mary S. McClatchey heard this case in the offices of the State Personnel Board on February 9 and 10, 2005.¹ Complainant appeared through counsel, Ian Kalmanowitz, Esquire. Respondent appeared through Joseph F. Haughain, Assistant Attorney General.

MATTER APPEALED

Complainant, a Sergeant at the Limon Correctional Facility (“LCF”), Department of Corrections (“DOC”), appeals a corrective action. For the reasons set forth below, Respondent’s action is rescinded.

PROCEDURAL HISTORY

This case initially came before the Board on Complainant’s petition for hearing, which contained allegations of discrimination based upon age, gender, race, and retaliation for engaging in protected activity. On August 23, 2004, the Board Director issued a Preliminary Recommendation that a hearing be denied on the claims of age, race, and gender discrimination, and on the claim of hostile work environment; and that a hearing be granted on the claims of retaliation, arbitrary and capricious conduct, and relief that may be within the Board’s jurisdiction to award.

On September 23, 2004, the Board entered an order adopting the Preliminary Recommendation.

ISSUES

1. Whether the corrective action was arbitrary and capricious or contrary to rule or law;
2. Whether Respondent retaliated against Complainant for filing a claim of discrimination;
3. Whether Complainant is entitled to an award of attorney fees and costs.

¹ The case was commenced by telephone on December 22, 2004, at which time the parties presented stipulations and opening statements.

FINDINGS OF FACT

1. Complainant is certified as a Correctional Officer (“CO”) II, Sergeant, in DOC and stationed at LCF. She is African American.

The SHAPE-UP Program

2. In June 2000, Complainant was selected by LCF management to be Coordinator of the “SHAPE-UP” program at LCF (“Show How A Prison Experience-Undermines People”). The program was overseen by the Colorado District Attorney’s (D.A.) Council and designed to heighten the realities of incarceration for juvenile adult offenders sentenced to attend the program, and their families.

3. The SHAPE-UP program involved bringing over twenty juveniles into the prison facility. In order to protect the confidentiality of the youth, DOC was prohibited from obtaining their full names; only first names were used to track their attendance.

4. The presence of the unidentified youth in the prison facility posed a security issue for LCF. In the event of an emergency, the LCF security staff did not know who was present in the facility.

5. Major Trevor Williams was the commander of Custody and Control at LCF, with oversight responsibility over all security and housing operations. Often, when SHAPE-UP participants were in the prison, Major Williams would send sergeants over to assure the youth had some type of identification on their bodies. In addition, he would order other sergeants to bring direct orders to Sergeant Mickens, such as, “Major Williams wants to you [do the following].”

6. Mickens found Major Williams’ actions vis-à-vis the SHAPE-UP program to be unnecessarily intrusive and unsupportive. She viewed him as being hostile to the program and possibly to her. Mickens informed LCF Warden Gary Watkins about Williams’ actions when the SHAPE-UP participants were visiting. She never accused Williams of harassing her; she merely reported his behavior. She felt that Warden Watkins understood her concerns.

7. In the early summer of 2002, LCF managers relieved Mickens of her position as Coordinator of the SHAPE-UP program. She believed that they reassigned coordination of the program to a white woman, Diane McCracken.

8. State budget cuts led to discontinuation of the SHAPE-UP program in July 2003. However, no one at LCF explained this to Mickens; she assumed management looked upon her unfavorably.

9. After the SHAPE-UP program ended, the office was searched for evidence of wrongdoing by one or two of the staff members, but not by Mickens. One of the SHAPE-UP staff had allegedly made telephone calls to the Denver District Attorney’s office on behalf of an LCF inmate who had become involved with an employee in the Denver D.A.’s office.

10. When Mickens learned that the SHAPE-UP office had been searched, she had a question in her

own mind as to whether LCF management was looking for information against her.

The Choices Program

11. During the same period, 2000 to mid-2002, Mickens also ran another program that she co-founded, the Choices program. Choices involved traveling to schools with parolees and giving speeches to students on the choices they face and the reasons to stay out of prison. The Executive Director of DOC was so impressed by the Choices program that he arranged to have it delivered statewide.

12. In mid-2002, LCF officials informed Mickens that she would no longer lead the Choices program. She was not informed why. When Mickens asked Warden Watkins what would happen to the Choices program, he stated, "let someone else do it." Tim Smeltser, a white male, replaced her in the Choices program.

13. Mickens was one of only two black female correctional officers at LCF. She felt LCF's decisions to remove her from the SHAPE-UP and Choices programs, when the two positions were given to white individuals, might have been racially motivated.

Mickens' Transfer to Housing

14. Captain Stephen Lockhart was a Correctional Supervisor in charge of living units 3 and 4 at LCF. After the SHAPE-UP program was discontinued and Sergeant Mickens had to be re-assigned, he became her supervisor in Housing. He had a vacancy on living units 3 and 4, and Mickens was given a day shift position and a schedule commensurate with her seniority: Monday through Friday, with weekends off.

15. Mickens started working as a floater on living units 3 and 4 in approximately August 2002. After she requested to be placed on one unit permanently, Captain Lockhart assigned her to unit 3.

16. In November 2002, Mickens approached Lockhart to request that he hire an inmate, E.R. Lockhart refused to do so, explaining that E.R. had a pattern of manipulating DOC staff and making unfounded complaints about staff. He informed Mickens that E.R. had made a complaint to an administrative assistant, Angie Cordell, about Mickens allegedly trying to "set up" another staff member.

17. Lockhart told Mickens that E.R. had filed the complaint about Mickens with Cordell, and that he (Lockhart) had forwarded it to an Inspector General investigator as a routine measure.

Inmate Letter

18. In November 2002, LCF intercepted a letter from one former inmate participant in SHAPE-UP to a current inmate. The author of the letter made reference to the fact that his girlfriend stayed in touch with Mickens, who might be able to either provide information on DOC policy or what was going on at LCF. This letter is not in evidence.

19. This letter was given to Associate Warden Al Estep, who read it and was concerned about

Mickens having this type of contact with outsiders. Estep gave the letter to Major Williams to discuss with Mickens. Williams did not act on this request, and he let the letter sit on his desk for approximately three weeks. Estep called Williams again; Williams indicated he felt the matter should be forwarded to Investigator Thiede, an LCF in-house investigator from the Inspector General's (IG) office, to review. Estep approved of this decision.

20. In November 2002, Captain Lockhart informed Mickens that he had seen incident reports or files on her regarding something she had done in the prison facility. He gave her no details, but she was concerned. She asked to see the reports.

21. Mickens contacted Estep, who indicated that he had seen a letter from a former inmate indicating she had spoken to individuals outside of DOC about DOC policies. She responded that in her work with SHAPE-UP, she had done that. Warden Estep directed her to stop talking to people outside of DOC about DOC policies. He informed her he had forwarded the letter to Major Williams and that she should speak to him about it.

22. On November 26, 2002, Mickens wrote a letter to Warden Watkins requesting any files concerning investigations of her.

23. Mickens did not approach Major Williams about the inmate letter.

24. LCF took no action relating to the inmate letter.

Information from LCF Inmate and Husband

25. Around this time, Mickens' husband, Charles Mickens, who also worked at LCF, was approached by an inmate, T.M., who informed him that prison staff, and specifically Major Williams, were attempting to obtain information to be used against Barbara Mickens. T.M. informed Charles Mickens in two separate conversations that he thought prison staff and Major Williams hated her, were "out to get" his wife, and that T.M. had a lot of respect for Ms. Mickens because she had helped him during his involvement in the SHAPE-UP program. Charles Mickens shared the information with his wife.

26. Barbara Mickens had worked with T.M. in the SHAPE-UP program and she had good rapport with him. When she received the information from her husband, she became extremely concerned about her situation at work.

27. On or about December 2, 2002, Mickens and T.M. had a conversation about several issues. In the course of the conversation, T.M. asked her if she had called another DOC staff person a "redneck" at the checkpoint at the prison. Mickens had indeed used the term, "redneck," in a joking fashion with Officer Spolarich recently (when she learned he had earned a favorable reassignment, she stated that he must belong to the redneck club). Mickens knew that the only potential original source of this information was Spolarich. She therefore believed that T.M.'s statements in this conversation were credible.

28. T.M. informed Mickens that Spolarich was very close to Major Williams and that she should not

talk to him anymore. He told her that Major Williams had asked him (T.M.) questions about her, ranging from whether she had brought drugs into the facility to whether he had seen her doing anything illegal or inappropriate. He informed Mickens that DOC staff hated her and were trying to collect information against her, and that Major Williams stated she had been investigated for several years and that it was known she was guilty of illegal acts; however, they have been unable to catch her.

29. T.M. also informed Mickens that Major Williams had called him into his office and had said things about her that he was too embarrassed to repeat. He said Williams was informing inmates that she was a racist. T.M. told Mickens to be careful. He stated that Major Williams had threatened to take away visits with his family if he told anyone about his conversations.

30. Mickens' longstanding belief that Major Williams did not like her led her to believe T.M.'s statements to be true.

31. Another inmate, C.H., informed Mickens that prison staff and inmates had searched the SHAPE-UP program office after it was shut down in order to look for incriminating information. The exact content of this conversation is unknown. However, because Mickens was not informed that the office had been searched, she believed, and may have been told by C.H., that they were looking for information on her.

32. The information provided to her by T.M., C.H., and her husband, Williams' past actions when SHAPE-UP participants were at the prison, and her recent history of being replaced by white staffers in the Choices and SHAPE-UP programs, led Mickens to believe that Major Williams and other prison staff were truly out to get her fired.

33. Mickens felt she had been subjected to a hostile work environment due to her status as a black female.

DOC Mandatory Reporting Requirement

34. DOC Administrative Regulation 1450-05, Unlawful Discrimination/Sexual Harassment, contains the following mandatory reporting requirement:

“Staff who become aware of conduct they believe to be sexual harassment and/or unlawful discrimination, whether the conduct is directed at them, witnessed by them, or related to them by another staff, must report the incident. The incident must be reported directly to one of the following: a supervisor, the employee's appointing authority, the Inspector General's Office, or to the director of the Office of Human Resources.”
Section IV(C)(1)

“In the case of a complaint alleging discrimination and/or sexual harassment by the employee's immediate supervisor, the second level supervisor, or any other supervisory personnel, the employee may file a complaint directly with the appointing authority, and Inspector General's Office, or the Office of Human Resources.” Section IV(D)(1)

“False, inaccurate information, or the submitting of false evidence, maliciously or negligently reported, may be cause for corrective and/or disciplinary action.” Section IV(G)(7)

Mickens’ Complaint

35. Major Williams was above Mickens in the chain of command. On or about December 3, 2002, Complainant wrote a letter to Warden Watkins, containing her complaint against Williams. She stated the following:

- “I, Barbara Mickens, am notifying Gary Watkins, Limon Correctional Facility Warden, on December 4, 2002, that I feel physically threatened and intimidated by the on-going actions of Major Trevor Williams. I allege that due to these actions my rights under Title VII of the Civil Rights Act, other legislation, and the Governor’s Order, to maintain a healthy work environment free of discrimination and harassment has been violated”;
- Major Williams had subjected her to discriminatory actions, retaliation, and a hostile work environment. He had made rude, degrading and offensive remarks about her, including profanity and vicious statements;
- “I believe Major Williams has some issues concerning me being an older, African American woman and this is why he is picking white, male inmates to target against me. For example,
- “1. Inmates state that Major Williams has interrogated them concerning me. Questions ranged from me bringing in drugs to have they seen me doing anything inappropriate or illegal.
- “2. Inmates were told that I have been investigated for several years and that it is known that I am guilty of illegal acts; however, they have been unable to catch me.
- “3. A file of information that has been collected concerning me was shared with inmates.
- “4. White inmates have also been told that I am a racist. Stating I have called white staff ‘rednecks.
- “I have also in the past informed you of the actions Major Williams took against me while I was the Shape-UP Coordinator”;
- “I am asking to be provided with a safe working environment; I am also requesting a thorough investigation of Major Williams’ actions be done immediately. I am also asking for all information requested in my letter dated November 26, 2002, be provided to me including the file Major Williams has in his possession.”

36. Complainant met with Warden Watkins on December 4, 2002 to discuss the contents of her

complaint. Warden Watkins could see from her demeanor during this meeting that she believed what she reported and that she was deeply concerned and upset about her situation.

37. Warden Watkins informed Complainant that in light of her concern for personal safety in the workplace, she need not return to work until he determined a temporary re-assignment of Major Williams, while her complaint was being investigated.

38. On December 5, 2002, Mickens drafted a complaint for the IG's office. It repeated much of her December 3 complaint submitted to Warden Watkins. She requested a copy of the complaint Lockhart had mentioned to her, which had been delivered to the administrative assistant. She asked for copies of any complaints that were pending against her. She also referenced the fact that "in the past," she had "informed Warden Watkins of the actions Major Williams took against me while I was the Shape-Up Coordinator."

39. On or about December 5, 2002, Warden Watkins reassigned Major Williams to the position of Physical Plant Manager at LCF, where he would have no chain-of-command or supervisory authority over or routine work contact with Complainant.

DOC Staff Response to Inmate Allegations of Misconduct

40. It is common knowledge among LCF staff and managers that inmates attempt to manipulate DOC prison staff by telling lies about other staff.

41. Inmates can also be reliable informants concerning contraband in the prison, impending riots, and other issues.

42. It is not within the DOC Correctional Officers' discretion whether to believe or disbelieve an inmate's report of staff misconduct.

43. According to Warden Watkins, Warden Estep, Captain Lockhart, and Major Williams, when an inmate makes an allegation of misconduct on the job by a DOC Correctional Officer, the Correctional Officer in receipt of the report is required to document it, write an incident report, and submit it to a supervisor.

44. LCF management trains its staff to document, write up, and submit information received from inmates to supervisory officials. The truth or untruth of the inmate report does not affect this requirement.

45. DOC AR 1450-05, Unlawful Discrimination/Sexual Harassment, provides appointing authorities with the following options upon receipt of a complaint:

"Upon receipt of [a complaint], the appointing authority must immediately investigate the complaint and/or promptly refer the complaint to the Inspector General's Office for investigation." Section IV(D)(3)

46. It is within the manager's discretion to determine how to act on a report received from a Correctional Officer. The manager may either investigate the report him or herself, or the manager can refer it to the IG's office for investigation.

47. Warden Watkins elected to refer Complainant's December 3, 2002 letter to the IG office for investigation. In addition, on or about December 12, 2002, the IG received Mickens' December 5 complaint and commenced its investigation of the allegations made by Complainant.

IG Investigative Report

48. In connection with the IG investigation, witnesses identified by Complainant were interviewed, including, T.M., C.H., Lt. Tim Smeltser; Capt. Lockhart; Roger Spolarich; Sara Boyer; Associate Warden Estep; Major Trevor Williams; Warden Watkins; and Lt. Debbie Outen.

49. On or about January 27, 2003, the final investigative report was completed and forwarded to Warden Watkins.

50. Every DOC staff member interviewed denied ever having seen or heard Major Williams speak or act unprofessionally towards Mickens, either in or out of her presence.

51. According to the report, T.M. denied having made any of the statements attributed to him by Mickens in her complaint. He denied Williams spoke to him about Mickens, denied knowing Spolarich or having mentioned him to Mickens, and denied being threatened by Williams. He acknowledged discussing the letter with Williams. He acknowledged that he had been strip searched and shaken down the weekend after Mickens filed her complaint.

52. Inmate C.H. denied having made any statements attributed to him. He stated he had never seen Williams be critical or accusatory toward Complainant. C.H. stated he had not seen anyone bully Complainant, nor had he seen any staff behave unprofessionally or direct any abusive comments at her. C.H. had never seen any arguments between Complainant and other staff, witnessed anything he would consider harassment, verbal abuse or abuse of authority, and had not heard anything from other inmates regarding comments by other staff about Complainant.

53. C.H. recalled Complainant berating Major Williams and Sgt. Weigert to a roomful of inmates because they told her what needed to be done in the program; he stated that Mickens had made statements to SHAPE-UP inmate participants that Major Williams and one other staff member had put up roadblocks for the program.

54. C.H. related an occasion wherein Major Williams stopped SHAPE-UP visitors at the front gate after background checks had already been completed. C.H. stated that Williams required that a second background check be conducted, which caused the visiting group to have to turn around and leave, because they were already late. C.H. stated this "caused a lot of tension," and that Williams' actions "seemed to be directed at the program, not at Sgt. Mickens," but that Mickens complained about it. From

C.H.'s perspective, Williams' action seemed to be directed more at the functioning of the program than at Complainant.

55. C.H. stated that Mickens is a very outspoken person, and that it was his impression that LCF management does not like outspoken black women. C.H. reported that when he participated in searching the SHAPE-UP office, he was told they were looking for information relating to Mary West-Smith, the former state coordinator, and when he asked, why don't they just ask Mickens where the information was, he was told "not to involve Mickens."

56. In his interview, Captain Lockhart confirmed that he had informed Mickens about a complaint filed by an inmate against her with Ms. Cordell, his administrative assistant. He also stated that he was not aware of anything having been said at the "movement meeting"² by anyone that Mickens would quit rather than go back to Housing, and denied having made that statement.

57. In her interview, Lt. Debbie Outen stated the following:

- Outen never witnessed either Major Williams or any other LCF staff say anything unprofessional either to or about Mickens;
- Outen told the investigator that Captain Lockhart had stated that he was "sure she [Mickens] would quit" when she was reassigned to Housing;
- Outen reportedly "believed management was under the impression that Sgt. Mickens would quit when she was reassigned from the Shape Up Program";
- "Outen said she got the impression that management had transferred Sgt. Mickens in an effort to force her to quit because they didn't think she would accept the new assignment";
- "Lt. Outen said she believed the Shape Up Program had gotten a lot of good recognition for the facility under Sgt. Mickens' direction. It was her opinion, however, that management either did not like the program, or didn't like Sgt. Mickens running it. She said there seemed to be a lot of petty radio traffic when Shape Up visits occurred";
- "She recalled one occasion when Major Trevor Williams became upset about an incident at checkpoint involving Shape Up visitors and did a lot of yelling on the radio. She believed it was the day Major Williams wanted backgrounds done on some of the visitors and was upset by the way it had been handled. Outen said she could not recall what specifically was said that day on the radio, but she thought Williams sounded very 'aggressive;'"
- "Lt. Outen said Major Williams has a loyal following and if he doesn't treat an employee like one of his group, then the security staff feels like they should treat the person like an outsider also. In the past she has believed that Sgt. Mickens just was not treated well. She's seen some people not

² The type of meeting at which staff are assigned to new units. Mickens was re-assigned to Housing at one of these meetings, attended only by managers.

talk to Mickens or be kind of rude to her;”

- “Outen said she believed the way Sgt. Mickens was treated during the reassignment process was disrespectful in that management did not inform Mickens of the decision or why it was done.”

58. When Warden Watkins received the IG investigative report, he determined that none of the allegations contained in Complainant’s December 3, 2002 complaint had been substantiated.

59. Warden Watkins felt that Mickens had been negligent in making her complaint. He was angry that Major Williams’ career had been on the line due to the investigation. He was frustrated that so many DOC resources had been spent responding to Mickens’ complaint.

Pre-disciplinary Meeting

60. On March 4, 2003, Watkins sent Mickens a letter noticing a pre-disciplinary meeting for “false reporting of unlawful discrimination and sexual harassment.”

61. On March 4, 2003, Complainant attended the pre-disciplinary meeting with her husband as her representative. Watkins attended with a representative from the DOC Human Resources office.

62. Watkins began the meeting by reading from the investigative report. He reviewed Mickens’ allegations, then reviewed the investigative report findings that the witnesses interviewed denied the conduct alleged.

63. Mickens then had the opportunity to provide her response. She spoke at great length. She explained the genesis of her concerns as follows: first, on Thanksgiving weekend, Captain Lockhart had told her “they” had a file on her; then she contacted Associate Warden Estep, who verified there was a letter from a former inmate alluding to her discussing prison policy; Associate Warden Estep had gotten “very agitated with me,” and was so loud her husband could hear him on the telephone; Estep then referred her to Major Williams, but “before I could call Trevor [Williams], my husband said this is all coming into place. And he said – have you talked to [T.M.]? And I said, no. And he said well, something happened between T.M. and Trevor [Williams] that has gotten him very upset. So, that’s where this stuff came from.”

64. She explained that it was her husband who had referred her to T.M. This was, apparently, the first time she disclosed her husband as the original source of the information.

65. During the course of the meeting, Mickens informed Warden Watkins of the following:

- “other inmates were telling me, have you talked to [T.M.]?” Mickens explained that she had a good relationship with T.M. because he had worked with her in the SHAPE-UP program;
- She believed that T.M. was intimidated into rescinding his statement, and so was C.H. She informed Warden Watkins that on the day immediately following her filing of the complaint on

December 3, T.M. was repeatedly strip searched and “shaken down” in retaliation for coming forward to her with the information;

- Mickens stated that Sergeant Knox had told her that he was ordered to strip search and shake down T.M. by management, who had informed him that they thought T.M. had drugs. She stated that she was aware T.M. had been shaken down and strip searched three additional times in the one- to three-day period immediately following December 3, 2002;
- Mickens made it clear that she believed the allegations at the time she received them; she believed the allegations at the time she included them in her complaint; and she believed the allegations as of the date of the pre-disciplinary meeting;
- She stated, “they came to me with these allegations. They certainly terrified me. They certainly intimidated me and I was fearful. . . .” She reminded Warden Watkins that the information was so upsetting to her that she had had to receive medical treatment.

66. During the course of the meeting, Charles Mickens stated that T.M. came to him on two separate occasions and reported that the staff at DOC staff, particularly Major Williams, hated his wife. Charles Mickens also stated, “We didn’t think that we’re a – a serious problem. And I think DOC policy is that anytime somebody comes to you with anything that you are supposed to report it.”

67. Ms. Mickens suggested that Warden Watkins talk to Lt. Outen again, who would verify Mickens’ complaint, and Sergeant Knox, regarding the shakedown and strip searches of T.M.

68. Subsequent to this meeting, Warden Watkins spoke with Sgt. Knox and Lt. Outen. Those conversations did not change his mind.

69. Prior to imposing corrective action against Mickens, Warden Watkins spoke to DOC managers and Human Resources professionals, who approved of his decision to impose corrective action.

70. On April 3, 2003, Warden Watkins issued a corrective action to Complainant for negligently providing false and inaccurate information. He reviewed the allegations in her December 3 complaint, and the results of the investigation. He reviewed some of the information Mickens had shared at the pre-disciplinary meeting. He did not make reference to the fact that Mickens’ husband was the original source of the information upon which she relied in making the complaint.

71. Warden Watkins wrote in the Findings section,

“There is no disputing the fact that the information that came to you was very upsetting. However, the way that you received it brings into question its reliability and credibility. The information that you provided me caused me to disrupt Major Williams’s current job assignment and required a major realignment of the Management Team’s duties. It appears to me that you only thought about your situation and did not give any consideration to the consequences of your allegations against Major Williams.

“Relying solely on second and third hand information to formulate a serious complaint like you did was not only unfair but illogical. A thorough and complete investigation was done as a result of your allegations. The CID investigator noted that none of your identified witnesses corroborated any of your beliefs about the events in your complaint. As you requested, I interviewed Sergeant A. Knox and Lieutenant D. Outen. Again, neither one of these staff members supported your claim of the statements you advised me that they had made previously.

“A staff member’s career and personal reputation was at stake based on allegations that were not received personally, but by unreliable sources.

“It is my determination that you negligently provided false and inaccurate information to me without thinking about the validity or the reliability of the statements nor the potential consequences to the involved staff member.”

72. Warden Watkins found Complainant to be in violation of the following DOC Administrative Regulations (“ARs”):

- 1450-1, Staff Code of Conduct: Section IV, Subsection J—“Professional relationships with colleagues will be of such character as to promote mutual respect, assistance, consideration, and harmony within DOC and with other agencies.”
- 1450-1, Staff Code of Conduct: Section IV, Subsection N—“Any action on or off duty on the part of DOC staff that jeopardizes the integrity or security of the Department, calls into question the staff’s ability to perform effectively and efficiently in his or her position, or casts doubt upon the integrity of the staff, is prohibited. Staff will exercise good judgment and sound discretion.”
- 1450-5, Unlawful Discrimination/Sexual Harassment: Section IV, Subsection G, Paragraph 7—“False, inaccurate information, or the submitting of false evidence, maliciously or negligently reported, may be cause for corrective and/or disciplinary action.”

73. As a corrective action, Warden Watkins directed Complainant as follows: “You must read and provide me a written report detailing your understanding of DOC AR’s 1450-1 and 1450-5, specifically in reference to the sections noted above. This report should be in my office by April 30, 2003.” The corrective action notified Complainant that her failure to comply with the corrective actions may result in further corrective and/or disciplinary action.

74. There have been at least ten claims of discrimination deemed unfounded or unsubstantiated at DOC in the last four years. Respondent has not imposed a corrective action on any other employee who filed a discrimination claim determined to be unsubstantiated or unfounded.

75. On April 16, 2003, Complainant filed her Step I grievance with Respondent, requesting that the corrective action be dismissed and removed from her personnel file, that all harassment against her at LCF cease, that an independent investigation be conducted, and that her submission of the grievance, with discussion of the ARs identified in the corrective action, meet the request of Warden Watkins' corrective action.

76. On April 17, 2003, Warden Watkins denied her grievance.

77. On July 7, 2003, Warden Estep issued a corrective action to Complainant based upon the Complainant's non-compliance with the corrective action previously issued by Warden Watkins.

78. On or about August 24, 2003, Complainant submitted a nine-page letter to Warden Estep as her compliance with both corrective actions issued to her.

DISCUSSION

Complainant bears the burden of proving that Respondent's action was arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S.; Rule R-8-48, 4 CCR 801. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

Complainant did not commit the acts upon which the corrective action was based

The April 3, 2003 corrective action issued by Respondent was premised on Complainant's purported violation of three DOC AR's. Complainant has proven that she did not violate any of the three AR's.

The first two AR's are contained in the DOC Staff Code of Conduct, AR 1450-1, Section IV, Subsection J, governing professional relationships, and Subsection N, governing staff actions that might cast doubt upon the integrity of the staff, and governing the exercise of good judgment. No evidence in the record supports the claim that Complainant violated either of these provisions.

Respondent imposed the corrective action primarily for Complainant's alleged violation of AR 1450-5, Section IV, Subsection G, Paragraph 7, "False, inaccurate information, or the submitting of false evidence, maliciously or negligently reported, may be cause for corrective and/or disciplinary action." Black's Law Dictionary defines negligence as "an absence of care or attention in the doing or omission of a given act." Black's Law Dictionary, Sixth Edition (1990).

There is no evidence in the record demonstrating that Complainant negligently reported information to Warden Watkins on December 3, 2002. To the contrary, the evidence established that DOC Administrative Regulation 1450-05 and standard agency policy required her to make the report. Every single DOC manager who testified at hearing stated that whenever a Correctional Officer receives a report from an inmate regarding staff misconduct, that officer is required to document it, write it up in an incident report, and submit it to a supervisor. That is precisely what Mickens did; therefore, she was not negligent in doing so.

Further, Mickens had a good faith belief that the substance of her complaint was true. The reports Mickens received from her husband and the two inmates in November and December 2002 did not come to her in a vacuum; they came to her within the context of her longstanding perception of hostility from Major Williams. The IG investigative report corroborated that history. Moreover, it provided objective confirmation of the generally unwelcome atmosphere in which she felt she worked. C.H. informed investigators that Major Williams forced SHAPE-UP participants to undergo a second background check, resulting in their being turned away from the prison. Lt. Outen reported that it was her opinion that management either did not like the SHAPE-UP program, or didn't like Mickens running it, and that there seemed to be a lot of petty radio traffic when the SHAPE-UP visits occurred. Lt. Outen also reported that because Mickens was not in Williams' inner circle, in the past she has believed that Sgt. Mickens "just was not treated well," and that she had "seen some people not talk to Mickens or be kind of rude to her."

In addition to this history, Mickens had, in 2002, been removed as coordinator of SHAPE-UP and Choices, without adequate explanation as to why, and had recently learned about a letter that was of concern to Associate Warden Estep and a complaint that Captain Lockhart had forwarded to the IG investigator. In the wake of this recent history at LCF, Mickens had reason to believe the reports she received.

Mickens did not violate any of the three AR's upon which the April 3, 2003 corrective action was premised. Therefore, that corrective action, and the subsequent corrective action based on her alleged noncompliance therewith, must be rescinded.

Respondent's action was arbitrary and capricious

In determining whether an agency's decision is arbitrary or capricious, it must be determined whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

The testimony of Warden Watkins demonstrated that he was unaware at the time he imposed the corrective action, and at the time of hearing, that AR 1450-05 mandates that a DOC employee report discrimination if he or she "believes" discrimination has occurred. This failure to familiarize himself with the controlling regulations demonstrates a fundamental failure to use reasonable diligence and care to consider all pertinent information prior to imposing corrective action. *Lawley*.

Warden Watkins erroneously utilized an objective standard in analyzing Mickens' decision to file her complaint, in violation of the rule. Warden Watkins found that Mickens' reliance "solely on second and third hand information to formulate a serious complaint like you did was not only unfair but

illogical.”

The AR, by contrast, utilizes a subjective standard to trigger the reporting requirement. AR 1450-05(IV)(C)(1) requires, “Staff who become aware of conduct they **believe** to be sexual harassment and/or unlawful discrimination, whether the conduct is directed at them, witnessed by them, or related to them by another staff, **must report the incident.**” Respondent concedes, and the evidence demonstrates conclusively, that Mickens believed she had been subjected to discriminatory conduct. In fact, Warden Watkins opened his “Findings” section of the corrective action by stating, “There is no disputing the fact that the information that came to you was very upsetting.” Respondent’s failure to read and adhere to AR 1450-05 prior to imposing corrective action was arbitrary and capricious under *Lawley*.

In addition, Warden Watkins ignored evidence in the IG report that corroborated Mickens’ complaint, thereby demonstrating that she filed the complaint in good faith. The Warden was aware of Sergeant Mickens’ longstanding concerns and perception that Major Williams did not support the SHAPE-UP program. The statements of Lt. Outen and inmate C.H. corroborated her perception of hostility from Major Williams. Therefore, even using the improper, objective standard of reviewing Mickens’ state of mind when filing her complaint, Warden Watkins had sufficient information available to him from which to determine she did not file it negligently. Respondent’s imposition of corrective action against Complainant was arbitrary and capricious under *Lawley, supra*.

Lastly, it is noted that AR1450-5’s mandatory reporting requirement is in direct conflict with its anti-retaliation provision. DOC Administrative Regulation 1450-5(IV)(B)(1) states, “Retaliation by the DOC, or any of its representatives, or employees, for filing a complaint of alleged sexual harassment and/or discrimination is expressly prohibited.” It is arbitrary and capricious for Respondent to violate its own anti-retaliation provision in imposing corrective action against an employee for adhering to its mandatory reporting requirement. No reasonable appointing authority would permit such an anomaly to occur. *Lawley*.

The Corrective Action was Retaliatory

It is a discriminatory or unfair employment practice to "discriminate against any person because such person has opposed any practice made a discriminatory or an unfair employment practice by this part 4, because he has filed a charge with the commission, or because he has testified, assisted, or participated in any manner in an investigation, proceeding, or hearing conducted pursuant to parts 3 and 4 of this article." Section 24-34-402(1)(e)(IV), C.R.S. This language is identical to that in the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. section 2000e-3(a). Therefore, federal case law interpreting this provision is given persuasive authority by the Board. *See also, Colorado Civil Rights Commission v. Big O Tires*, 940 P.2d 397 (Colo. 1997). *See also, Dep’t of Natural Resources v. Bodaghi*, 995 P.2d 288 (Colo. 2000)(federal case law applies in application of state anti-discrimination act, section 24-34-402, C.R.S.)

The general shifting burdens approach to Title VII suits set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and its progeny, apply to retaliation claims. *Berry v. Stevinson*

Chevrolet, 74 F.3d 980, 984 (10th Cir. 1996).

To establish a *prima facie case* ("*pf*c") of retaliation under the Act, Complainant must establish that she:

1. engaged in protected activity of opposing discriminatory conduct or filing a charge of discrimination;
2. was subjected to adverse employment action; and
3. a causal connection exists between the protected activity and the adverse action.

Berry v. Stevinson Chevrolet, 74 F.3d 980, 985 (10th Cir. 1996).

Respondent conceded the *pf*c of retaliation prior to hearing. Therefore, at hearing, Respondent had the burden of production to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.*; *Dep't of Natural Resources v. Bodaghi*, 995 P.2d 288 (Colo. 2000).

Respondent argues that its legitimate, nondiscriminatory reason for the adverse action taken herein was its desire to assure Mickens better understood staff relationships and the purpose of investigations. Respondent states in its trial brief, "The issue is whether State agencies, like State courts, retain some control over the prudent use of their scarce resources."

Respondent has failed to proffer a legitimate, nondiscriminatory reason for imposing the corrective action. Respondent could have achieved its purpose in several ways that did not involve adverse action. The warden could have had a meeting with Ms. Mickens, in which to review his concerns and discuss the purpose and importance of the administrative regulations he felt she needed to consider. Keenly aware that the information Mickens had received was "very upsetting" to her, he had no legitimate reason to impose adverse action against her for acting on her concerns in the manner mandated by AR 1450-05 and standard agency practice.

Assuming *arguendo* that Respondent's proffered reason was accepted as legitimate and nondiscriminatory, Complainant has the burden of proving Respondent's reason to be a pretext for retaliation. *Berry*, 74 F.3d at 986. Pretext may be proven either directly by demonstrating that an unlawful motive more likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 257 (1981).

Here, pretext is proven directly. The corrective action, on its face, acknowledges that Complainant was very upset about the information she received. Respondent's rule mandated that she report her belief she was discriminated against, yet Respondent imposed adverse action against her for filing the discrimination complaint. Based on the evidence, retaliation more likely was the motivation for the action taken, rather than an interest in educating Complainant on agency rules.

In addition, pretext has been proven indirectly here, as Respondent's proffered reason for imposing corrective action is unworthy of credence. *Berry*, 74 F.3d at 986.

Respondent argues that it has not impermissibly retaliated against Complainant for filing her complaint, because the complaint was groundless. However, this argument ignores Respondent's concession of the *prf* of retaliation. The first element of the retaliation *prf*, "opposition activity," is "protected when it is based on a mistaken good faith belief that Title VII has been violated." *Love v. RE/MAX*, 738 F.2d 383, 385 (10th Cir. 1984) ("Every circuit that has considered the issue has concluded" same.). The evidence demonstrated that Complainant had a good faith belief that Respondent had discriminated against her on the basis of race and sex.

Finally, it is noted that strong public policy considerations support employees' ability to maintain discrimination claims based on a reasonable good faith belief that an employer's conduct was discriminatory, without fear of reprisal. *Crumpacker v. Kansas Dept of Human Resources*, 338 F.3d 1163, 1172 (10th Cir. 2003).

Attorney Fees are not mandated

Complainant requests an award of attorney fees and costs incurred in bringing this action. Section 24-50-125.5, C.R.S. states,

"Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . ."

State Personnel Board Rule R-8-38 implements this provision:

"Attorney fees and costs may be assessed, upon final resolution of a personnel action, against a party as follows:

1. If the personnel action is found to have been instituted frivolously. A frivolous personnel action shall be defined as an action or defense in which it is found that no rational argument based on the evidence or the law is presented.
2. If the personnel action is found to have been made in bad faith, was malicious, or was used as a means of harassment. Such a personnel action shall be defined as an action or defense in which it is found that the personnel action was pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth.
3. If the personnel action is found to have been groundless. A groundless personnel

action shall be defined as an action or defense in which it is found that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support such an action or defense.” Board Rule R-8-38(A), 4 CCR 801.

The circumstances of this case do not meet the standard for an award of attorney fees and costs against Respondent. The request for such an award is denied.

CONCLUSIONS OF LAW

1. Respondent’s action was arbitrary, capricious, and contrary to rule or law;
2. Respondent retaliated against Complainant for filing a discrimination claim;
3. An award of attorney fees and costs is not mandated.

ORDER

Respondent shall rescind both corrective actions imposed against Complainant and shall remove them from her personnel file. Complainant is not entitled to an award of attorney fees and costs.

DATED this ___ day of
March 2005 at
Denver, Colorado

Mary S. McClatchey
Administrative Law Judge
1120 Lincoln St., Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the ___ day of **March 2005**, I placed a true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE AND NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Ian Kalmanowitz
Cornish and Dell’Olio
431 North Cascade Avenue, Suite 1
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