STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2012G076**

PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

MITCHELL FOX-RIVERA,
Complainant,

vs.

DEPARTMENT OF PUBLIC HEALTH & ENVIRONMENT, LABORATORY SERVICES DIVISION,
Respondent.

Complainant petitions the State Personnel Board (Board) to grant a discretionary, evidentiary hearing to review the appointing authority's termination of his employment during the probationary period. The question presented for purposes of this preliminary recommendation is whether valid issues exist which merit a full evidentiary hearing. It is the recommendation of the undersigned administrative law judge that a hearing be **granted.**

SUMMARY

Complainant, a probationary Laboratory Technician employed by the Department of Public Health and Environment (DPHE), Laboratory Services Division (LSD), filed a petition for hearing on March 19, 2012, arguing that he was wrongfully terminated during the probationary period and that the termination decision was the result of discrimination based on race/creed/color and sex, including sexual harassment, and that Respondent defamed him in statements issued to The Denver Post and to third parties. Complainant seeks to be reinstated as a state employee, to receive back pay and the accrual of benefits as if he had not been terminated from state employment, to receive payments for the time and expenses he has incurred in answering the subpoenas of defense counsel after his termination, to be properly trained and supervised in his position, to have all of the false allegations concerning his termination be removed from his file, to obtain an apology, and to obtain other relief as appropriate including an award of attorney fees and costs.

Respondent argues that Complainant failed to meet his burden of showing that grounds exist under § 24-50-123(3), C.R.S. and/or Board Rule 8-46, 4 CCR 801, that merit a full hearing; Complainant's petition for hearing should be denied because he was a probationary employee terminated for unsatisfactory performance; Complainant cannot establish that his termination was the result of sex discrimination; Complainant cannot establish his claims of retaliation; Complainant cannot establish a *prima facie* case for his claims of race/creed/color and sexual harassment; Complainant cannot establish his claim of Hostile Work Environment/Harassment; the Board lacks jurisdiction to address Complainant's libel claim; and the Board lacks jurisdiction to hear Complainant's claim that DPHE violated its own internal policies, rules and procedures because his claim arises under Colorado case law. As relief, Respondent asks that Complainant's appeal be dismissed with prejudice.

UNCONTROVERTED FACTS

The following facts were either included in both parties' information sheets, were contained in exhibits that were not disputed by either party, or were not controverted by either party:

1. Complainant was hired as a probationary Laboratory Technician in October 2011. It was his first job after graduation from college.

2. Between October 11, 2011, and October 27, 2011, Complainant completed a training checklist which was initialed and dated by Complainant and his trainer, Kim Greeley.

3. On February 7, 2012, Complainant's immediate supervisor, Cynthia Burbach, sent an email to Complainant regarding a re-test result that he re-analyzed on December 30, 2011, which was outside the 20% variance. Ms. Burbach had determined Complainant's result failed to comply with DPHE's guidelines in the Standard Operating Procedure (SOP) and the training checklist for blood alcohol testing. In the email, Ms. Burbach detailed the discrepancies between the results of Complainant and other technicians. She also stated her concerns that Complainant failed to include the original result in her review packet so she could compare the results and failed to discuss the discrepancy with the reviewer or her. She instructed Complainant to re-test all the samples on the December 30, 2011 run and reminded him that he must be extra vigilant when analyzing samples.

4. On February 7, 2012, Ms. Burbach also emailed Complainant to address issues with his claim for overtime.

5. On February 22, 2012, Ms. Burbach counseled Complainant via email for claiming a 9-hour work day every Wednesday. She suggested Complainant help his co-workers if he did not have sufficient work. She also recommended that he answer the phone when co-workers were unable and assist co-workers with their quality controls (QCs) and entering data in the Laboratory Information Technology System (LITS).

6. On March 7, 2012, Ms. Burbach emailed Complainant regarding her receipt of complaints that he was not answering the phone, was not being productive, was looking at the internet, and was using his personal phone when he had work to perform. She reminded him that he needed to work during his 9-hour day and recommended that he assist co-workers. *Id.*

7. On March 9, 2012, Ms. Burbach received an email from a district attorney, Satima Porter, in which Ms. Porter informed Ms. Burbach of issues with the blood sample in one of her cases. In the email, Ms. Porter voiced her concerns regarding the discrepancy between Rocky Mountain Lab's retested result of .246 and DPHE's reported result of .181. Complainant had completed the testing for DPHE. In response to this email, DPHE reviewed several blood alcohol samples completed by Complainant. The review revealed that the results from Complainant's data packet needed to be re-analyzed.

8. After re-testing blood samples tested by Complainant, DPHE concluded that Complainant incorrectly operated a piece of laboratory equipment. Additionally, Respondent alleged that Complainant had failed to repeat the testing of several results a third time, failed to recognize his original results were significantly different from his re-analysis, and failed to seek guidance from his co-workers, trainer, work-leader or his supervisor regarding these results.

Finally, it was alleged by Respondent that Complainant failed to flag the sample so his supervisor would know the sample was a re-analysis, thereby prompting the supervisor to look at the lab's re-do book. Respondent took the position that it was not until the blood tests were re-analyzed that Complainant's error became apparent. Respondent took the position that the error was not identified initially because Complainant's samples, standards and controls met the quality control requirements that focus on numerical variances, and that Complainant had failed to flag the samples as re-analysis tests.

9. On March 13, 2012, Complainant spoke with Ms. Burbach regarding a problem with at least one blood sample. On that same day, Complainant sent an email to Ms. Burbach in which he admitted making several mistakes with his test results and that he was "still getting acquainted with a new work environment." Additionally, Complainant sent an email to Ms. Burbach acknowledging that he had signed "the Plan and Agree."

10. On March 14, 2012, Ms. Burbach completed a final annual Performance Management Summary Form, in which Complainant received a rating of Level 1 for not consistently and independently meeting expectations set forth in the performance plan. Under the accountability competency section of the Form, Ms. Burbach noted observing Complainant talking with a co-worker for more than thirty minutes to one hour before performing analysis work and looking at the internet for extended periods of time. She also noted Complainant "failed to communicate that the blood alcohol samples were not yielding results in an acceptable range" and did not confer with his work-leader, supervisor or other analysts. Additionally, she mentioned receiving complaints about Complainant not assisting other analysts. Under the job knowledge competency section, Ms. Burbach noted that Complainant did not possess the appropriate technical skills necessary for his position. Specifically, Ms. Burbach recounted her February 7 email to Complainant and her email correspondence with Ms. Porter on March 9. Ms. Burbach concluded by noting she had found seven blood alcohol samples analyzed by Complainant that were outside the appropriate reporting range. As such, she determined it was necessary to re-run a representative sample of Complainant's work from each alcohol data packet that he analyzed to ensure that the appropriate alcohol values were reported. She noted Complainant's errors would have implications on the lab and threatened his credibility as a witness in court.

11. David Butcher, Director of Respondent's Laboratory Services Division and Complainant's appointing authority, terminated Complainant's probationary employment on March 14, 2012, for unsatisfactory performance.

12. On March 19, 2012, Complainant filed his petition for hearing, alleging discrimination based on race/color/creed and sex, including sexual harassment, violations of Complainant's state and federal constitutional rights, and violation of the grievance procedures.

13. After Complainant was deemed to have waived investigation by the Colorado Civil Rights Division (CCRD), the matter was set for preliminary review and the parties filed information sheets.

COMPLAINANT'S CONTENTIONS

As relief, Complainant requests that a hearing be granted. If the hearing is granted, Complainant offers to prove the following allegations at hearing:

1. Cynthia Burbach was arbitrary and capricious when she terminated Complainant for unsatisfactory performance on March 14, 2012, after she claimed inaccurate results were brought to her attention on March 9, 2012, less than three days prior to termination. Ms. Burbach, the responsible Toxicology Supervisor, failed to provide supervisory oversight in accordance with the SOP, which provides: "The Toxicology Supervisor's responsibility is to review the toxicology analytical data to ensure that it will meet diagnostic, forensic and litigation needs."

2. Prior to the data being sent to prosecutors, it was Ms. Burbach's responsibility to have made certain that it would meet diagnostic, forensic and litigation needs, which she failed to do.

3. In the event of "Non-conformances," page 3 of the SOP states:

> The Toxicology Supervisor or Designee must determine whether corrective action is necessary when a situation that does not conform to the requirements of a Standard Operating Procedure, Laboratory Practice, Quality Assurance Plan or Regulations. The LSD Quality Assurance Manual outlines the corrective action process.

4. The female Toxicology Supervisor (Ms. Burbach) and the female Designee (Ms. Simmons) "never" performed this job duty on Complainant's performance. This indicates that he was performing satisfactorily. They failed to provide oversight and instruction to a new employee who should have been treated equally to his coworkers.

5. Complainant submits that the subject specimen should have been appropriately reviewed by the Toxicology Supervisor, as was required, and appropriate corrective action should have been taken before the specimen was sent out, in accordance with the "corrective action process." The failure of the Toxicology Supervisor to perform her responsibilities in this regard is being blamed on Complainant. The corrective action process is not being followed, and he is being made the scapegoat for the supervisory failure, which establishes that the termination of his employment under such circumstances is arbitrary, capricious, and contrary to rule or law.

6. Respondent has a Quality Assurance (QA) policy. If this quality assurance policy had been followed as was required of the reviewers, then problems would have been circumvented. The obvious purpose of this policy was both undoubtedly to assure appropriate training and learning by new hires, and to detect errors which all laboratory technicians make, both experienced and inexperienced.

7. In a meeting on Monday, March 12, 2012, with Ms. Burbach and Ms. Simmons, Ms. Burbach began her ploy to harass Complainant into resigning before she terminated him, on March 14, 2012. Ms. Burbach attempted forced resignation upon him by the intimidation of threatening termination and destruction of his career. Such conduct is unquestionably contrary to rule or law, and completely disregards the policies and procedures in place. Ms. Burbach told Complainant that she would give him the option to resign or she would terminate him. Additionally, Ms. Burbach never counseled, trained or informed him during the six (6) months of her hiring him that he was not adhering to a procedure, according to DPHE-LSD Supervisor's Checklist, as it was never signed and completed by employee or supervisor. It was not until the March 12, 2012 meeting with Ms. Burbach and Ms. Simmons that Complainant was informed that he was not performing in a satisfactory manner. Since that time, Ms. Burbach has made

false statements to *The Denver Post* and has publicly admonished him in what appears to be retaliation in an attempt to protect her shortfalls as a supervisor.

8. Additional appearance and proof of discriminatory retaliation is, upon information and belief, that Ms. Burbach has supplied every legal representative who is connected with blood samples that Complainant analyzed during his employment at the lab, his personal contact information in order to relieve her responsibility of being subpoenaed to court hearings. Complainant has been forced to oblige subpoenas from defense attorneys and a public defender or be arrested for failure to appear. He has not received pay for his time. Strangers have appeared at his home unannounced claiming they are investigating for defense attorneys.

9. Libel has taken place on the part of Ms. Burbach and LSD due to the memo by Ms. Burbach published in *The Denver Post* on April 20, 2012, specifically mentioning Complainant and stating claims by Ms. Burbach and LSD that cannot be proven. Additionally, the claims in the article were amended suggesting LSD is unable to provide solid documentation or evidence to support the claims they are making. In reference to *The Denver Post* article, in paragraphs 8 and 9 where public defender Douglas Wilson states, that "his office hasn't been notified of the laboratory errors" and, "You would think somebody might share this with everyone [and] I've not heard a peep," implies further questionable credibility on the part of the management of the lab in regard to withholding information. This further establishes that the termination of Complainant, and the destruction of his reputation and career, is the product of conduct that is arbitrary, capricious and contrary to rule or law. Ms. Burbach is carrying out the threat made that his career would be destroyed if he did not resign.

10. Complainant has been the victim of discrimination on the basis of sex due to the extreme disciplinary action taken against him. There is no evidence or indication that any disciplinary actions were taken in regard to Ms. Burbach's or Ms. Simmons' failures and unsatisfactory work performances in failing to adhere to the responsibilities of laboratory supervisors in regard to the SOP. Both individuals mentioned are female. As a male, who was a relative new hire, it was discriminatory to terminate Complainant (male), and for no action whatsoever to be taken against the supervisory employees (females) whose responsibility it was to train and counsel Complainant who was a new hire in his first job after graduating from college. A male has been made a scapegoat and his career has been ruined as a consequence of the oversight and neglect of the responsible supervisors, and for purposes of protecting these two females. But for this supervisory neglect, Complainant would have received the appropriate training, oversight, mentoring and guidance and the subsequent events which have taken place would not have occurred.

Legal Argument

11. Pursuant to *Williams v. Colorado Dept. of Corrections,* 926 P.2d 110, 112 (Colo. App. 1996), a probationary employee is entitled to the enforcement of standard created by the employer as a matter of due process, and confirmed as follows:

> A probationary employee of the state has no constitutional or statutory right to appeal a dismissal from employment for unsatisfactory performance. However, when the state promulgates a regulation that imposes on a governmental department more stringent procedural standards than are constitutionally required, due process demands that the affected department adhere to those standards in discharging an employee.

Id at 112 (citing Department of Health v. Donahue, 690 P.2d 243 (Colo.1984)).

12. In this case the employer failed to follow and apply its promulgated rules, policies and procedures in the training, supervision, discipline and termination of Complainant contrary to its due process obligations which it created. The failure to comply with the due process demands created by the employer establishes that the termination of Complainant was arbitrary, capricious and contrary to rule or law.

13. Ms. Burbach falsified Complainant's evaluation along with failing to provide him with a Position Description Questionnaire (PDQ); therefore, the evaluation items Individual Performance Goals (IPG) where she rates him unsatisfactory are not supported in her decision to terminate him based on her evaluation. Ms. Burbach accuses Complainant of falsifying his time card. She claims he was recording over-time when in fact he only claimed over-time when his job duties required him to do so. He also verbally asked permission to adjust his work schedule; however, Ms. Burbach incorrectly insists he made these modifications without her consultation. She claims Complainant was not answering the main toxicology phone line. Complainant answered the phone on several occasions.

14. Additionally, other individuals in the lab would neglect to answer the phone, which further manifests discrimination by Ms. Burbach. Ms. Burbach's accusations that Complainant had difficulty interacting with co-workers and not picking up extra duties is false. On several occasions Complainant was asked to discard the bio-hazard materials by Ashley Olson, a fellow coworker who was hired from the same state exam list, and he did in fact accept and was happy to oblige. Additionally, some tasks were only performed by Complainant since other individuals failed to recognize the need for these tasks to be done on a regular basis, such as the discarding of bio-hazard material and resupplying the stock of pipette tips, gas chromatography vials, gloves, caps and stoppers, etc. Ms. Burbach mentions receiving complaints regarding Complainant's job performance, but never followed or required complaints to follow the documentation regarding Respectful Workplace Standards given to Complainant on the first day of his employment.

15. The emails regarding Complainant's work and job duties were based upon inaccurate claims. Complainant submits that the employer's records will show that he was producing his share of blood alcohol tests if not more, which establishes that he was indeed performing his assigned job responsibilities. Additionally, he submits that due to Ms. Burbach's rare appearances in his work area, she has little knowledge of what is performed in the lab and can only make the accusations from hearsay by other individuals. The timing and manner in which Complainant's evaluation was prepared, which was just prior to his termination, clearly represents the capriciousness of Ms. Burbach. It also demonstrates Ms. Burbach's inability and failure to perform her duties as the Toxicology Laboratory Supervisor.

16. In regard to the inaccurate blood alcohol tests, Complainant did perform the tests as described in the SOP. He also accepts that he failed to recognize that the values warranted another analysis; however, in accordance with the responsibilities for the Toxicology Supervisor outlined in SOP, it was Ms. Burbach's duty to "review the toxicology analytical data to ensure that it will meet diagnostic, forensic and litigation needs." Her actions demonstrate neglect as a supervisor and failed to adhere to the attached Supervisor's Checklist.

17. On Tuesday, March 13, 2012, Complainant was forced to agree to the terms of the performance plan although he did not agree to the false statements on his evaluation.

When his evaluation was presented to him at a meeting with Mr. Butcher, Ms. Burbach and two other individuals, he did not agree to the false statements on his evaluation. Complainant was permitted to respond to the allegations; however Mr. Butcher had made his decision to terminate his employment prior to his response. None of Complainant's comments were recorded. Mr. Butcher also made it clear that any comments made in his defense would be unsubstantial and proceeded with termination.

18. Regarding the credibility of Ms. Burbach, Complainant submits that due to the claims of possible reasons for errors in the blood analysis she contradicts herself in documents from not following SOP to failure to operate a standard piece of equipment. Also, Ms. Burbach's official title is Toxicology Laboratory Supervisor; however, she addresses herself as Director of Toxicology Laboratory according to the letter to Mrs. Kresel.

19. As witnesses, Complainant may call the following:

A. Mitchell Fox-Rivera would testify to all matters at issue, including the facts and circumstances, the wrongful conduct of the employer and the relief sought.

B. Kim Greeley would testify to the lack of supervision on Ms. Burbach's and Vanessa Simmons' accord and that the incident at the lab was not entirely the fault of Complainant. Since he trained Complainant, he could testify to the proper training of procedures and that proper review of the data by Ms. Burbach and Vanessa Simmons was not followed. The "failsafe" procedures that were implemented by Vanessa Simmons predecessor, Harold, and Ms. Burbach were not conducted by the supervisor and lead. Upon information and belief, Mr. Greeley was appointed by Ms. Burbach to initially train Complainant for three weeks. Mr. Greeley was permitted to transfer away from Ms. Burbach due to her supervisory behavior. Mr. Greeley is the employee to whom Ms. Burbach made statements at the break area stating, "After the ordeal with Kim, Mr. Butcher said the next employee who has an issue with me will be fired."

C. Joel Fay can testify to the durations of conversations, content or otherwise. Additionally, Mr. Fay could support Mr. Greeley's statement on the protocols to review the "re-do" book in place prior to Ms. Simmons' employment.

D. Ashley Olson may testify regarding the job environment and the activities of Complainant.

E. Other employees of the employer with knowledge concerning the matters at issue.

F. Cynthia Burbach's affidavit states that "procedures are in place to ensure that this error is not repeated." This is proof that Mr. Greeley's statement is true because this is the same procedure that was not followed by Ms. Burbach and Vanessa Simmons and it's not a "new" procedure, but it was not being followed due to neglect of management. Ms. Burbach also states that out of 1,700 samples she was only able to identify four (4) samples and a 5th one may or may not be outside the appropriate range.

Ms. Burbach is unable to prove without a preponderance of a doubt that her reason to terminate Complainant's employment is valid. Out of 1,700 samples, is it cause to terminate an employee for an error of four that actually have not changed the outcome of a DUI case? What statistics can she bring to the Judge and Jury that will uphold her decision to terminate one male employee and not her female lead for failing to perform her job duties? Evidence of Ms. Burbach's credibility is where she signs her letter as Toxicology Lab Director rather than Supervisor.

20. As exhibits, Complainant offers the following:

A. Exhibit 1, 1a, 1b, 1c: Standard Operating Procedure (Job Responsibilities);
B. Exhibit 2, 2a, 2b, 2c: Supervisor's Checklist;
C. Exhibit 3: The Denver Post article dated 4/20/2012;
D. Exhibit 3a: Continuation of above article;
E. Exhibit 3b: Online archive of The Denver Post article dated 4/20/2012;
F. Exhibit 3c: Email from Ms. Burbach to Nicole Simmons;
G. Exhibit 3d: Revised Affidavit of Cynthia Burbach;
H. Exhibit 4, 4b, 4c, 4d, 4e, 4f: Performance Management Summary Form;
I. Exhibit 5: Respectful Workplace Standards;
J. Exhibit 6: Email from Mr. Kim Greeley;
K. Exhibit 7, 7a: Email from Mr. Joel Fay;
L. Exhibit 9: The Denver Post dated May 1, 2012;
M. Exhibit 11. March 20, 2012 Letter from Burbach to Jennifer Kressel

21. As relief, Complainant seeks the following:

- Complainant, who is 23 years old, seeks to be reinstated as a state employee, retroactive to the date of his termination, as if no termination had taken place, and be given back pay and benefits for the time during which he has been separated from his position. In addition, that the termination and the adverse actions against him, and all of the false allegations and insinuations be removed from his personnel file and from the records of the employer, and that he be deemed to have not been terminated for all purposes, including for the accrual of accredited job service time, as if he had not been terminated.
- Complainant seeks a public apology, and retraction of all of the defamatory and unauthorized publications and statements made about him to the media, which have violated his constitutionally protected rights and entitlements. Further, that the employer make certain that all of its employees, including but not limited to Ms. Burbach, immediately cease and desist from any further false, malicious and defamatory statements about Complainant, and that a letter of apology from Ms. Burbach be published in the local media so as to help in undoing the malicious harm and damage caused Complainant, and to his career and future.
- Complainant requests that he be placed in a work environment free of discrimination and retaliation, and in which he will be treated appropriately and fairly, and that he be supervised and trained appropriately, in accordance with the promulgations of the employer.

- Due to continuing subpoenas and forced testimony in court since being terminated, he requests that he be reimbursed for expenses according to his rate of pay, approximately $18.00/hr and travel costs of $0.50/mile according to state policy.
- In addition, Complainant seeks other appropriate monetary relief, including his attorney fees, costs.

RESPONDENT'S CONTENTIONS

As relief, Respondent requests that Complainant's petition for hearing be denied, as Complainant has failed to meet his burden of showing that valid issues exist that merit a full hearing. Respondent offers to prove the following allegations at hearing:

Legal Argument

A. Complainant's petition for hearing should be denied because he was a probationary employee terminated for unsatisfactory performance.

1. Probationary employees do not have the same rights as certified employees. Colorado Constitution Article XII, § 13(10). Section 24-50-125(5), C.R.S., states that a probationary employee does not have a right to a hearing to review any disciplinary action taken pursuant to § 24-50-125(1), C.R.S., which states that employees may be dismissed by the appointing authority upon written findings of failure to comply with standards of efficient service or competence or for willful misconduct, willful failure or inability to perform their duties.

2. Board Rule 4-42A states that probationary employees do not have a right to a pre-disciplinary meeting or to progressive discipline. Probationary employees have no legally protected right to continued employment, nor do they have a right to formal notice of the reasons for termination. *Lucero v. Dep't of Institutions*, 942 P.2d 1246, 1248-49 (Colo. App. 1996). As such, Complainant does not have the right to appeal his dismissal for unsatisfactory performance.

3. As to terminations of probationary employees for unsatisfactory performance, the Board has jurisdiction *only* to hear claims of discrimination under the Colorado Anti-Discrimination Act. *Williams v. Dep't of Corrections*, 926 P.2d at 114; see also § 24-50-125.3, C.R.S. Consistent with the Colorado Constitution and sections 24-50-125(5) and 24-50-125.3, C.R.S., the Board cannot hear claims that may arise under other state or federal law or decide whether the decision by the appointing authority was arbitrary and capricious. Consequently, this Board cannot determine "the truth of the facts alleged to support the termination, except to the extent necessary to determine if unlawful discrimination was a cause of [Complainant's] discharge." *Id.*

B. Complainant cannot establish that his termination was the result of sex discrimination.

4. Complainant claims he is the victim of discrimination on the basis of sex because he was terminated, Ms. Burbach and Ms. Simmons as female supervisor employees did not receive disciplinary actions, and other employees were not disciplined for not answering the phone.

5. The Colorado Anti-Discrimination Act (CADA), codified at § 24-34-401, *et seq.*, C.R.S., prohibits discrimination in the form of certain employment actions on the basis of an individual's status in any number of protected classes. *See* § 24-34-402(1)(a), C.R.S. In analyzing cases under the CADA where there is no direct evidence of an employer's discriminatory motivation, the Colorado Supreme Court adopted the United States Supreme Court's burden-shifting analysis in the case of *Colorado Civil Rights Comm'n v. Big O Tires, Inc.*, 940 P.2d 397 (Colo. 1997). The burden-shifting analysis involves three stages: 1) a complainant must present a *prima facie* case of discrimination; 2) if a *prima facie* case is established, the employer must produce evidence of legitimate, non-discriminatory reasons for its actions; and, 3) a complainant must then produce competent evidence that the employer's reasons were a pretext for illegal discrimination. *Big O Tires,* 940 P.2d at 400.

6. The complainant must establish a *prima facie* case of intentional discrimination by showing: 1) that the complainant belongs to a protected class; 2) that the complainant was qualified for the job at issue; 3) that the complainant suffered an adverse employment decision; and 4) that the circumstances gave rise to an inference of unlawful discrimination. *Id.* However, "at all times, the employee bears the ultimate burden of persuading the trier of fact that she has been the victim of illegal discrimination." *Community Hospital v. Fail*, 969 P.2d 667, 675 (Colo. 1998).

7. With respect to Complainant's termination, for the sake of argument, DPHE does not dispute that Complainant satisfies the first, second and third prongs of this test. As to the fourth prong, Complainant cannot establish that the circumstances give rise to an inference of discrimination on the basis of sex for his termination. DPHE followed proper procedures in terminating Complainant as a probationary employee for unsatisfactory work performance in testing and reporting blood samples. Complainant is unable to provide any evidence that gives rise to an inference of unlawful discrimination.

8. Complainant makes a bare blanket assertion that David Butcher took Complainant's gender into consideration in making his decision. However, he provides no evidence to support this belief or to contradict the breadth of evidence supporting Complainant's termination for unsatisfactory performance. A mere belief, unsupported by evidence, is not sufficient to meet an employee's burden of establishing a *prima facie* case. *See George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo. App. 1997). One cannot reasonably infer discrimination from the circumstances surrounding his termination and his claims regarding such must be dismissed.

C. Complainant cannot establish his claims of retaliation.

9. To establish a claim of retaliation, a complainant must show: (1) that he engaged in protected opposition to discrimination; (2) he suffered an adverse action that a reasonable employee would have found material; and (3) that there is a causal nexus between his opposition and the employer's adverse action. *Antonio v. Sygma Network, Inc.,* 458 F.3d 1177, 1181 (10th Cir. 2006). To infer a causal connection and prove retaliation requires a showing of "close temporal proximity" between the protected activity and the subsequent adverse action. *Marx v. Schnuck Markets, Inc.,* 76 F.3d 324, 329 (10th Cir. 1996). *See also, Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985; *Burris v. United Telephone Co.*, 683 F.2d 339, 343 (10th Cir. 1982). The inference of retaliation generally requires a close temporal proximity between the protected activity and the subsequent adverse action. *Marx, supra.* Generally, unless the adverse action is "very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Id.* at 328.

10. Complainant has not identified any protected activity that would infer a causal connection and show a "close temporal proximity" between that protected activity and the subsequent adverse action. Rather, in blanket fashion, Complainant claims DPHE is retaliating against him as evidenced by Ms. Burbach's alleged false statements to *The Denver Post* and alleged distribution of his personal contact information. DPHE denies these allegations. Neither DPHE nor Ms. Burbach has made false statements to *The Denver Post* and neither gave out Complainant's personal contact information. One cannot reasonably infer retaliation from the circumstances surrounding his termination and his claims regarding such must be dismissed.

D. Complainant cannot establish a *prima facie* case for his claim of race/creed/color and sexual harassment.

11. DPHE notes that Complainant failed to even address or attempt to present a *prima facie* case for his claims of race/creed/color discrimination and sexual harassment, which he originally cited in his Consolidated Appeal/Dispute Form. He cannot prove a *prima facie* case for such claims and those claims should be dismissed.

E. Complainant cannot establish his claim of Hostile Work Environment/Harassment.

12. For the Complainant to prevail on his hostile work environment claim, he must show that "[t]he workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of...employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S, 17, 21 (1993) (*quoting Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 65 (1986)); *see also St. Croix v. Univ. of Colo, Health Sciences Center*, 166 P.3d 230, 242-243 (Colo. 2007). Under this standard, Complainant must show the work environment was both objectively and subjectively hostile and/or abusive. *Davis v. United States Postal Serv.,* 142 F.3d 1334, 134 (10th Cir.1998). An objective hostile working environment is based on what reasonable person would find to be hostile or abusive; and a subjective hostile work environment is based on what the Complainant perceives as hostile. *St. Croix, supra,* 243. A hostile work environment is based on the totality of the circumstances within the workplace, which may "include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Sys., Inc., supra,* at 21-23. However, the 10th Circuit of Appeals have limited to work place harassment to only racial or sexual discrimination. "General harassment if not racial or sexual is not actionable." *Bolden v. PRC Inc.*, 43 F.3d 545, 551 (10th Cir.1994); *see also Stahl v. Sun Microsystems, Inc.,* 19 F.3d 533, 538 (10th Cir. 1994).

13. Here, Complainant claims that Cindy Burbach and Vanessa Simmons harassed him into resigning before his termination by threatening him with termination and destruction of his career and failing to counsel him on his unsatisfactory performance prior to March 12, 2012. Complainant, however, has failed to specify his protected class or present any evidence demonstrating how the work environment was both objectively and subjectively hostile. DPHE denies Ms. Burbach and Ms. Simmons threatened termination and destruction of Complainant's career. As such, Complainant is unable to demonstrate a hostile work environment.

F. The Board lacks jurisdiction to address Complainant's libel claim.

14. Complainant also alleges that DPHE and Cindy Burbach committed libel "due to the memo by Ms. Burbach published in *The Denver Post* on April 20, 2012, specifically

mentioning Mr. Fox-Rivera and stating claims by Ms. Burbach and the Lab [that] cannot be proven." In support of his contention, Complainant argues "the claims in the article were amended suggesting the Lab is unable to provide solid documentation or evidence to support the claims they are making." *Id.*

15. Libel is the written form of defamation. *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 898 (Colo. 2002); *see also Keohane v. Stewart*, 882 P.2d 1293, 1298, n. 5 (Colo. 1994). The tort of defamation arises under common law. *McIntyre v. Jones*, 194 P.3d 519, 524 (Colo. App. 2008). The Board lacks jurisdiction to hear Complainant's libel claim because the tort of defamation arises under Colorado common law. As mentioned above, as a probationary employee, Complainant has the right to appeal his dismissal on the grounds of unlawful discrimination or another statutory or constitutional violation. *See* Board Rules 4-42A and 8-46(B). Thus, the Board lacks jurisdiction to address this claim.

16. Assuming for sake of argument that the Board has jurisdiction over Complainant's libel claim, DPHE can prove "substantial truth" as an affirmative defense. To state a claim for defamation under Colorado case law, the complainant must prove the defendant's publication of a defamatory statement by a preponderance of the evidence. *Barnett v. Denver Pub. Co., Inc.*, 36 P.3d 145, 147 (Colo. App. 2001). The defendant has the opportunity to prove "substantial truth as an affirmative defense." *Id.* Here, Cindy Burbach in her email to Chris Halsor on March 21, 2012, stated that Complainant was terminated for unsatisfactory work performance on March 14, 2012, after she learned on March 9, 2012, that several blood samples analyzed by Complainant were reported outside the appropriate reporting range. The reasons stated for Complainant's termination in Ms. Burbach's email are the same as the reasons stated in the termination letter and Complainant's Performance Management Summary Form. As such, Complainant is not entitled to a hearing on this issue.

G. The Board lacks jurisdiction to hear Complainant's claim that DPHE violated its own internal policies, rules and procedures because his claim arises under Colorado case law.

17. Complainant asserts DPHE failed to follow and apply its rules, policies, and procedures for his training, supervision, discipline and termination. Specifically, Complainant claims Cindy Burbach was arbitrary and capricious by failing to provide supervisory oversight in accordance with the SOP by failing "to review the toxicology analytical data to ensure that it will meet diagnostic, forensic and litigation needs" and to provide oversight and instruction to Complainant. Complainant also claims that Ms. Burbach failed to follow the QA Policy.

18. The Board lacks jurisdiction to hear Complainant's claim that DPHE violated its own internal policies, rules and procedures because his claim arises under Colorado case law. *See Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984). As mentioned above, as a probationary employee, Complainant has the right to appeal his dismissal on the grounds of unlawful discrimination or another statutory or constitutional violation. *See* Board Rules 4-42A and 8-46(B). As such, the Board lacks jurisdiction over this claim.

19. The facts of *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984), are distinguishable from the current case because in *Donahue* the probationary employee was discharged for unsatisfactory job performance in violation of Personnel Rule 7-3-1 which granted employees the right to an appropriate pre-disciplinary meeting. Here, Complainant does not have such right. As noted above, under Board Rule 4-42A, Complainant as a

probationary employee does not have a right to a pre-disciplinary meeting or to progressive discipline.

20. Even so, Complainant's supervisors adhered to the provisions of SOP and the QA Policy. Ms. Burbach did review the toxicology analytical data to ensure that it would meet diagnostic, forensic and litigation needs. On February 7, 2012, she sent an email to Complainant informing him that his analyzed blood alcohol sample, which was previously analyzed by a former employee, did not conform to the guidelines in the SOP and the training checklist for blood alcohol testing, which Complainant signed. Additionally, after receiving the email from Satima Porter on March 9, 2012, DPHE began retesting Complainant's previous analyzed samples. As mentioned above, DPHE determined Complainant failed to operate a piece of laboratory equipment correctly, failed to repeat the testing of several results a third time, failed to recognize his original results were significantly different from his re-analysis, failed to seek guidance from his co-workers or his supervisor regarding his results, and failed to flag the sample so that the supervisor would know that it was a re-analysis, thereby prompting the supervisor to look at the re-do book. Employees are responsible for identifying re-analysis/re-test blood samples for the supervisor's review. Complainant did not flag the samples as re-analysis tests. Since Complainant's samples, standards and controls met the quality control requirements in terms of numerical variances, the errors were not immediately identified by the supervisor. As such, Ms. Burbach did adhere to DPHE's policies and procedures by reviewing the toxicology analytical data and has subsequently issued corrective actions (amended reports) for the samples that were found to be significantly higher than the reported results by Complainant.

21. DPHE denies all of Complainant's claims not specifically addressed above and refutes said claims for the reasons stated above.

22. Complainant has not met his burden of demonstrating the existence of valid issues that merit a hearing. Therefore, the Board should deny his petition for hearing.

23. If a hearing is granted, Respondent may call the following witnesses to testify. They may be contacted at the Colorado Department of Public Health and Environment, 8100 Lowry Blvd. Denver, CO 80230, Telephone: (303) 692-3090.

A. Mr. David Butcher, Director of LSD, may testify regarding facts and circumstances surrounding Complainant's probationary employment with DPHE, Complainant's many performance issues during his probationary employment with DPHE, Complainant's termination, and any other matter relevant to this appeal.

B. Ms. Cynthia Burbach, Toxicology Laboratory Supervisor, may testify to the facts and circumstances surrounding Complainant's probationary employment with DPHE, Complainant's many performance issues during her probationary employment with DPHE, Complainant's termination, and any other matter relevant to this appeal.

C. Ms. Vanessa Simmons, Physical Scientist III/Work Leader, may testify to the facts and circumstances surrounding Complainant's probationary employment with DPHE, Complainant's many performance issues during her probationary employment with DPHE, Complainant's termination, and any other matter relevant to this appeal.

D. Ms. Nicole Simmons, Administrative Assistant III, may testify to her knowledge of Complainant's work performance and the inappropriate text messages that she received from Complainant.

E. Ms. Kimberly Stephens, Laboratory Technician I, may testify to her knowledge of Complainant's work performance.

F. Ms. Heather Krug, Laboratory Technician I, may testify to her knowledge of Complainant's work performance.

G. Mr. Monte DiPalma, Laboratory Technician I, may testify to his knowledge of Complainant's work performance and the inappropriate text message that he received from Complainant.

H. Ms. Ashley Olsen, Laboratory Technician I, may testify to her knowledge of Complainant's work performance.

24. If a hearing were granted, DPHE may offer the following exhibits:

A. Letter from David Butcher to Complainant dated 9/19/11;
B. Complainant's completed training check list;
C. Email from Cindy Burbach to Complainant dated 2/7/12 re: Retest;
D. Email from Cindy Burbach to Complainant dated 2/7/12 re: Overtime;
E. Email from Cindy Burbach to Complainant dated 2/22/12 re: Kronos;
F. Email from Cindy Burbach to Complainant dated 3/7/12 re: 9 hour day;
G. Email correspondence between Cindy Burbach and Satima Porter dated 3/9-13/12;
H. Email from Complainant to Cindy Burbach dated 3/13/12 re: Mistakes;
I. Email from Complainant to Cindy Burbach dated 3/13/12 re: Plan Submitted;
J. Complainant's Performance Management Summary Form;
K. Complainant's Termination Letter dated 3/14/12;
L. Email from Cindy Burbach to Chris Halsor dated 3/21/12 re: Complainant.

25. As relief, DPHE respectfully requests that this Board deny Complainant's petition for hearing and dismiss Complainant's appeal with prejudice.

REPLY OF COMPLAINANT TO RESPONDENT'S INFORMATION SHEET

1. The alleged factual allegations of Respondent similarly seek to portray Respondent in a light that is misleading. Respondent fails to acknowledge the significance of the omissions of its supervisory and management employees, and disregards the significance of the deficiencies of its management or supervisory employees, and the fact that Complainant was still in the process of becoming familiar with the work environment, and the applicable rules. Complainant's supervisors were aware of Complainant's inexperience, and his being in the learning phase, and nevertheless they failed to appropriately review his work, knowing this.

2. The Training Checklist information provided by Complainant is correct.

3. The February 7, 2012 email from Ms. Burbach is not correct, as set forth in Complainant's Information Sheet.

4. Complainant was entitled to overtime claimed, and Ms. Burbach had previously approved several time cards with overtime. Overtime was included in Time Cards only when actually worked, and Complainant will prove that he was a dedicated and productive worker who did not waste time at the workplace.

5. The work schedule had been pre-approved prior to the February 22, 2012 email from Ms. Burbach. Phone answering has already been addressed, and Complainant did so as necessary, and did assist other employees in this regard.

6. Complainant used the equipment in the exact manner in which he had been trained to use it. If inappropriate use of the equipment was an issue, then it was because Complainant had not been adequately or appropriately trained to use the equipment. Due to Complainant's lack of experience, when the second test results were within twenty percent variance of samples on that run, Complainant presumed that the second test results were accurate. Complainant did not recognize that the .181 value was inaccurate, due to his limited experience. It was Complainant's practice to seek guidance from his work lead, Vanessa Simmons, whenever he recognized the need to do so. The SOP of the Lab did not require flagging of retests. However, Complainant understood that a sticky note was to be placed on the most recent test result report, indicating that it was a retest. Complainant did place a sticky note on the retest result that showed the .181 value. If Complainant's supervisor had looked at the test result itself, she would have known that it was a retest.

7. It was well known that Complainant was still getting acquainted with the work environment, and that the propensity to have errors is greater, and the need for an adequate period of training and supervision was imperative. Complainant marked the Performance Management Summary Form (Plan) as agreed to because Ms. Burbach informed him that he must agree to it in order for her to complete his job evaluation. The Plan was signed by Complainant on March 13, 2012, at 2:53 p.m. The Plan was first given to Complainant on March 13, 2012. The Plan purports to indicate that it was signed by Cynthia S. Burbach on October 19, 2011, and by Laurie Peterson-Wright (sic) on October 21, 2011. If the dates that the Supervisor and the Reviewer signed the Plan are correct, then they both knew that it should have been provided to Complainant in a timely manner. The Plan, which purported to cover the time period from October 10, 2011, through March 14, 2012, by its literal terms, was required to have been provided to Complainant ". . . within 30 days of the Evaluation period start date." The Position Description Questionnaire (PDQ), or job description of Complainant was never completed and given to Complainant at the time of employment nor was one provided during the time frame in which these inaccurate retests were performed. Respondent failed to provide Complainant with a job description, and failed to provide the Plan within the required time period, as the Plan was required to enable the employee to understand his or her job duties and responsibilities, and for the supervisor to use as a basis for evaluation. This was yet another omission by Respondent's management.

8. Complainant was not provided the required Plan until March 13, 2012. The evaluation used to terminate Complainant on the next day was based upon a Plan that Complainant had not seen during his employment, except for the day before his termination. Complainant was terminated without ever having seen his job description in a timely manner, and essentially without have been given a Plan. The claimed deficiencies in the annual

performance review are largely untrue, there are many exaggerations, and have been previously addressed herein and in Complainant's prior filings.

9. On the date of termination, Respondent did not have proof that more than one blood specimen was inaccurate.

10. The March 20, 2012 letter from Ms. Burbach to Ms. Kresel proves that the appropriate review protocol was not being followed by management during Complainant's employment. The letter states that Ms. Burbach implemented this allegedly "new procedure" as of March 12, 2012.

LEGAL ARGUMENT

11. Respondent makes numerous legal arguments in attempting to avoid a hearing in this matter. However, Complainant submits that it is in the interest of justice, equity and substantial fair play that Complainant be afforded a hearing to establish that his rights and entitlements were wrongfully violated by Respondent in terminating him.

12. Complainant was a new graduate and a new hire that reasonably and justifiably relied upon Respondent to provide appropriate training and supervision. Complainant trusted that Respondent would honor its duties and responsibilities in the employment relationship in other ways as well, including with respect to its policies and procedures governing the employment relationship. Respondent did not fulfill these responsibilities, and did not comply with its own policies and procedures which governed the employment relationship, including those pertaining to providing a job description, and a Plan.

13. Due process requires that Respondent comply with its own policies and procedures, or standards that it created, as recognized in *Department of Health v. Donahue,* 690 P.2d 243 (Colo.1984). As such, Complainant respectfully requests that he be afforded a hearing.

DISCUSSION

Complainant contends that his two female supervisors used him as a scapegoat when previously undetected quality problems arose in his testing results of DUI blood alcohol samples drew public scrutiny. The question for the Board at this early juncture is whether a hearing should be granted on any issue which the Board has the jurisdiction to hear. An employee has the burden of "demonstrating the existence of valid issues which merit a hearing by showing that there is an evidentiary and legal basis that would support a finding that the action was arbitrary, capricious, or control to rule or law, and that the relief requested by complainant is within the Board's statutory authority." Board Rule 8-50(G).

Probationary Employees

The Board's jurisdiction to hear appeals from probationary employees is limited. "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." C.R.S. § 24-50-125(5). *See also* Colo. Const. Art. XII, sec. 13(10)("After satisfactory completion of any such period [of probation], the person shall be certified to such class or position within the personnel system, but unsatisfactory performance

shall be grounds for dismissal by the appointing authority during such period without right of appeal").

These limitations have been construed to prohibit the Board from rendering judgment on whether there was sufficient cause to terminate a probationary employee's employment based upon his or her work performance, but to allow the Board to determine related legal issues, such as issues of discrimination. In *Willliams v. Colorado Dept. of Corrections*, 926 P.2d 110 (Colo. App. 1996), the Board had not sustained a claim of racial discrimination by a probationary employee, but had found that the agency was arbitrary and capricious in terminating Complainant's employment based upon his performance. The Board ordered reinstatement and certification of the employee. The Colorado Court of Appeals, however, reversed that decision on the grounds that "Williams' only right was to a hearing to determine if he had been subjected to racial discrimination by Department Personnel... However, because the Department argued that its decision to terminate Williams' employment was based on his unsatisfactory performance, the Board was without jurisdiction to probe the basis for the termination, except to determine the merit of his racial discrimination claim." *Id.* at 113.

Complainant raises a few inter-related arguments which fall within the prohibition against the Board evaluating dismissals of probationary employees on the basis of work performance or which are too broadly framed to support a claim of jurisdiction.[1]

Complainant's due process argument, for example, appears to be that the agency has failed to follow its own internal procedures in evaluating and supervising his work. Complainant points to the standard operating procedures for quality control of results that, according to Complainant, would have been able to internally catch the discrepancies eventually discovered in Complainant's work if such procedures had been used. This argument, however, directly raises whether Complainant was properly terminated for unsatisfactory performance when the performance of his supervisors could have eliminated the eventual public embarrassment over the incorrect results. In other words, the argument is that Complainant shouldn't have been fired for his performance when his bosses also contributed to the performance problem. Such an argument would require the Board to determine if Complainant was indeed terminated for his own poor performance, and falls within the restrictions in C.R.S. § 24-50-125(5).

Complainant also argues that the department failed to follow its own procedures in terminating Complainant's employment, and cites to *Department of Health v. Donanhue*, 690 P.2d 243 (Colo. 1084)("[w]hen the state promulgates a regulation that imposed on a governmental department more stringent procedural standards than are constitutionally required, due process demands that the affected department adhere to those standards in discharging an employee"). Complainant does not specifically identify the promulgated standard he believes has been implemented by Respondent and that was violated in the manner in which he was terminated. The quality assurance standard operating procedure does not appear to be a standard which would create a due process right in the manner in which Complainant was terminated from employment because it does not address employee discipline or remedies for problems. It would, in fact, be improbable to find such a regulation or promulgated rule which creates a due process right for a probationary employee given that the

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[1] Complainant has also failed to articulated any reasonable factual or legal basis for hearing based upon his initial claims of unlawful discrimination based upon race/creed/color or sexual harassment. Complainant has also not argued in his Information Sheet that there was a violation of the grievance procedures in this case. These claims are deemed to have been abandoned by Complainant and will not be analyzed.

Board has taken explicit steps to eliminate rights relating to disciplinary process for probationary employees. Board Rule 4-42(A) clarifies that "[p]robationary employees do not have a right to a pre-disciplinary meeting, to a mandatory hearing to review discipline for unsatisfactory performance, to be granted a period of time to improve performance, to be placed on a reemployment list, or to the privilege of reinstatement. However, probationary employees may petition the Board for a discretionary hearing on non-disciplinary matters." Complainant's contention that there is a rule violation here which would support jurisdiction is too vague to be persuasive.

Discrimination and Liberty Interest Claims

Complainant also raises other claims, however, which would fall outside of the restrictions of C.R.S. § 24-50-125(5) if sufficiently supported at this point.

Unlawful Discrimination

Complainant contends that he was the subject of unlawful discrimination based upon his sex or gender.

Claims of sex discrimination under CADA which are founded upon circumstantial evidence of discrimination follow the burden shifting procedure described in *Colo. Civil Rights Comm'n v. Big O Tires*, 940 P.2d 397, 400 (Colo. 1997), beginning with the presentation of a *prima facie* case of discrimination by the employee.

A traditional *prima facie* case of gender discrimination requires sufficient circumstantial information all of the elements of a *prima face* case of discrimination: 1) that the complaint belonged to a protected class; 2) that complainant was qualified for the job at issue; 3) that the complaints suffered an adverse employment decision; and 4) that the circumstances gave rise to an inference of unlawful discrimination. *Id.*

As a member of a historically factored group, however, Complainant may not rely on the traditional factors to establish a *prima facie* case by way of circumstantial evidence, unless "in lieu of showing that he belongs to a protected group, [he] establish[es] background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority." *Notari v. Denver Water Dept.*, 971 F.2d 585, 589 (10th Cir. 1992).

Respondent agrees that Complainant meets the middle two elements of Complainant's *prima facie* case. The issue, then, is to determine whether Complainant has sufficiently supported the first and fourth elements.

Complainant has not presented sufficient information to demonstrate that he can meet the first element of his *prima facie* case that Respondent was one of these unusual employers who discriminated against male employees. While Complainant's direct and second level supervisors were female, his appointing authority was male. Complainant's chain of command, therefore, included both men and women. More fundamentally, Complainant has not presented any incidents or reasons to believe that he or the men in the office generally were treated more severely or differently than the women in the office. Complainant has not met the requirements of the first element of his *prima facie* showing.

Complainant has also failed to present sufficient information to support the fourth element of his *prima facie* case, that is, that the circumstances give rise to an inference of unlawful discrimination based upon his gender. Complainant argues that the agency failed to train and supervise him, pursuant to its own quality control procedures, and then publically blamed him for errors including providing his home address information to third parties so that they could appear at his house unannounced. Complainant has provided that the performance management summary form which was purportedly created in October of 2011 and which includes a reference to the fact that Complainant needed to be trained on blood alcohol tests, with reporting of results of training on March 1, 2012, was not presented to Complainant for his signature and agreement until March 13, 2012. Complainant alleges that that he was told that he needed to resign or that he would face the destruction of his career. While these allegations, if shown to be true, would indicate that there were significant issues in the manner in which Complainant's termination was handled, such issues are not indicative of a gender bias. Complainant's only support for his contention that he was unlawfully discriminated against on the basis of his gender was his argument that he is a male and his two female supervisors made him the scapegoat for their own failures to perform quality control on his work product. There is nothing about the circumstances of the scapegoating that Complainant alleges has occurred which suggests that Complainant's gender had any influence in this case. Complainant's information is insufficient to support the fourth element of his *prima facie* case.

Complainant, therefore, has failed to sufficiently support his claim of gender discrimination to warrant a hearing on that claim.

Liberty Interest Claim

Complainant has also argued that the destruction of his career has been orchestrated through libel when his former supervisors made statements reported in the Denver Post which were untrue and which blamed him for errors. Complainant refers to this as a libel claim because it involves the public dissemination of falsehoods about Complainant's termination. The Board would not use a tort claim as its cause of action but would consider instead this claim to be a liberty interest claim:

> The concept of liberty recognized two particular interests of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other employment opportunities. The manner in which a public employee is terminated may deprive him of either or both of these liberty interests. When the termination is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, **due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal**.

Sullivan v. Stark, 808 F.2d 737, 739 (10th Cir. 1987)(quoting *Miller v. City of Mission*, 705 F.2d 368 (10th Cir. 1983)(emphasis added)).

A claim based upon Complainant's liberty interest requires that there be a defamation which occurred "in the course of termination of employment." *Renaud v. Wyoming Dept. of Family Services*, 203 F.3d 723, 726-27 (10th Cir. 2000)(quoting *Paul v. Davis*, 424 U.S. 693, 708 – 10 (1976)). It is not sufficient that a defamatory statement by Respondent, standing alone, would implicate Complainant's constitutional right to a hearing to clear his name. *Id.* The focus of the claim is upon the protection of an employee's reputation and his ability to obtain

other employment through the examination of the published statements of his former state employer. This claim is not an examination of whether Respondent's disciplinary action was appropriate based upon Complainant's poor performance. As a result, a liberty interest claim falls outside of the ambit of claims that probationary employees are prohibited from bringing to the Board. *See* Colo. Const. Art. XII, sec. 13(1); C.R.S. § 24-50-125(5). *See also Williams*, 926 P.2d 113.

A *prima facie* case of a liberty interest violation requires a showing of four elements:

1. The statement at issue must impugn the good name, reputation, honor, or integrity of the employee;

2. The statement must be false;

3. The statement must occur in the course of terminating the employee or must foreclose other employment opportunities;

4. The statement must be published.

Workman v. Jordan, 32 F.3d 475, 481 (10th Cir. 1994).

In this case, Complainant argues that he was blamed for a series of blood alcohol level analysis errors and publically fired under circumstances in which his supervisors failed to take responsibility for their roles in the errors, and that false statements concerning his work were publically disseminated in The Denver Post and to third parties, such as criminal defense attorneys. Complainant contends that these public statements were issued to unfairly blame him for errors and to explain Respondent's position on why he was terminated from employment. Such allegations are sufficient, at this preliminary juncture, to warrant an evidentiary hearing on Complainant's liberty interest claim.

RECOMMENDATION

For the foregoing reasons, it is the preliminary recommendation of the undersigned administrative law judge that Complainant's petition for hearing be **granted**.

[redacted]

Dated this 5th day
of September, 2012,
Denver, Colorado.

Denise DeForest
Administrative Law Judge
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 4th day of September, 2012, I electronically served true copies of the foregoing **PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Andrew T. Brake
[redacted]

Bradford Jones A.A.G.
[redacted]

[redacted]

Andrea C. Woods