

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

LAWANDA JONES-THOMAS, Appellant,

vs.

DEPARTMENT OF ENVIRONMENTAL HEALTH, OFFICE OF THE MEDICAL EXAMINER, and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on April 20 and July 14, 2009 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing, and was represented by city employee Vern Howard, without Agency objection. The Agency was represented by Assistant City Attorney Robert Wolf. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE CASE

On February 19, 2009, Appellant LaWanda Jones-Thomas filed this appeal challenging the February 4, 2009 decision of the Office of the Medical Examiner ("Agency") that she was deemed to have abandoned her position pursuant to CSR § 14-51 d) based on her failure to report to work or notify her supervisor about the absences for four consecutive days. The appeal also alleges that the action was motivated by disability discrimination.

Agency exhibits 1 – 4 and Appellant's exhibits J and K were admitted without objection. Exhibit M was admitted over objection, and exhibit L was rejected for admission. The parties did not offer any of the remaining listed exhibits into evidence.

II. ISSUES

The issues in this appeal are as follows:

1. Did the Agency establish by a preponderance of the evidence that Appellant abandoned her position under Career Service Rule (CSR) § 14-51 d)?
2. Did Appellant establish by a preponderance of the evidence that the Agency's action was motivated by disability discrimination?

III. FINDINGS OF FACT

Appellant LaWanda Jones-Thomas is an Administrative Support Assistant III (ASA III) who has been an employee at the City and County of Denver for 17 years. Appellant was involuntarily transferred into the Office of the Medical Examiner at the beginning of 2008. On Jan. 6, 2009, Appellant fainted while at work, and was admitted for treatment at the Denver Health Medical Center emergency room. On Jan. 8, Appellant's husband called Chief Deputy Coroner Michelle Weiss-Samaras to inform her that Appellant had an MRI scheduled, and that she was seeing a cardiologist on Jan. 12. That same day, Ms. Weiss-Samaras also received a written excuse from work for Jan. 7 and 8 signed by a doctor at Denver Health and Hospitals. [Testimony of Ms. Weiss-Samaras.]

On Jan. 12, the Agency received a note from Appellant's doctor at Kaiser Permanente that Appellant had been unable to work from Jan. 6 to 12, and that she needed to continue to be off work due to medical issues until she was evaluated by a cardiologist and a disability physician. Both parties submitted a copy of this document [Exhs. 6 and D], but neither offered it into evidence. Both Appellant and Ms. Weiss-Samaras testified about the substance of the note, which is therefore not in dispute.

On Jan. 28, Ms. Weiss-Samaras sent Appellant a letter by USPS overnight priority mail with signature confirmation of delivery. The letter advised Appellant that she will have exhausted her 480 hours of FMLA time on Jan. 29, the following day. "As such, you are expected to return to work." [Exh. 2; testimony of Ms. Weiss-Samaras.] Postal Service Track & Confirm records show that the letter was delivered on Jan. 29 at 1:15 pm, and signed for by "L Jones." [Exh. 3.]

On Jan. 30, the Agency sent Appellant a notice that her FMLA leave had been exhausted the previous day, and noted her continued absence from work without available sick leave. The letter invited her and a representative to participate in an interactive process (IAP) meeting under the Americans with Disabilities Act (ADA) on Feb. 19. [Testimony of Ms. Weiss-Samaras.] Appellant accepted this letter on Jan. 30. [Testimony of Appellant.] It is undisputed that Appellant did not call her supervisor or report for work thereafter.

On Feb. 4, the Agency sent Appellant a notice that she had been determined to have abandoned her position under CSR § 14-51 d) based on her failure to report for work for four consecutive days, from Jan. 29 to Feb. 4, 2009. [Exh. 1.] Appellant received the letter that day, and called Ms. Weiss-Samaras. However, Appellant and Ms. Weiss-Samaras differed in their memory of what Appellant said during that phone call. Appellant recalled that she asked Ms. Weiss-Samaras why she had been terminated, since she was still on medical leave and had not received the paperwork. Ms. Weiss-Samaras testified that Appellant told her she had not seen the letter until that day, but admitted her husband Richard had signed for it.

Appellant admits she did not call the office or report for work between Jan. 6 and Feb. 4, 2009. She argues however that 1) the Agency made the determination of job abandonment in order to circumvent her due process rights, 2) she did not receive the Jan. 28 letter ordering her to return to work until Feb. 4, the day she was terminated, 3) she believed the absences would be covered by workers' compensation, and 4) the absences, and subsequent termination, were caused by her disability, post-traumatic stress disorder (PTSD).

In support of her first argument, Appellant testified that the Agency planned to fire her for deficiencies in productivity, and the job abandonment action was taken to deprive her of her right to due process as a Career Service employee. The Agency prepared a contemplation of discipline letter to be delivered to her on Jan. 7, the day after she fainted at work, based on its perception that she was not meeting productivity goals. [Exh. J.] The notice was never given to Appellant, since she did not return to work. Ms. Weiss-Samaras admitted that the Agency planned to begin the disciplinary process on Jan. 7 regarding Appellant's failure to increase her production of death certificates. However, she denied she intended to fire Appellant on the basis of the productivity issues. Appellant was aware of the performance deficiency because she had monthly productivity reviews from September to December 2008, and "we told her she was going to have to put more effort in." The Agency stipulated that its action was taken solely under § 14-51 d), and that the procedures required by Rule 16 for disciplinary actions were not followed.

As to the second argument, Appellant testified that the Track & Confirm showing her husband signed a receipt for the Jan. 30 interactive process letter, not the Jan. 28 "return to work" letter. [Exh. 3-2]. Appellant contends that this is proven by the difference in tracking numbers on the envelope and the USPS delivery confirmation. [Exhs. 3-3, 4-1.] Appellant also testified it was the postman, not her husband, who signed as recipient of the Jan. 28 letter. [Exh. 3-3.] Appellant filed a complaint at the USPS about its delay in delivering the Jan. 28 letter.

Appellant next argues that her absences were caused by work-related injuries or disability. Appellant testified that she witnessed a parent stab a sibling to death in 1968 when she was nine years old. [Exh. M.] Appellant believes she fainted on Jan. 6 because of her PTSD, which was triggered by her exposure to dead bodies and the smell of embalming fluid at the Coroner's Office. It is undisputed that Appellant's duties at the Coroner's Office included completion of paperwork to release bodies to mortuaries, and storage of personal effects until Appellant released them to family members. Appellant stated that she had performed well in her previous positions with the city for 17 years, and her transfer last year to the Coroner's Office was involuntary. Since then, Appellant has received negative feedback about her productivity from her supervisor. She believes her performance has been harmed by her emotional reaction to the Coroner's Office and her exposure to dead bodies and the smell of embalming fluid.

Appellant was hospitalized at Denver Health on Jan. 6, and thereafter treated for the fainting episode at Kaiser until Jan. 12, 2009. Based on the recommendation of her

Kaiser physician, Appellant made an appointment with a cardiologist for Jan. 21, 2009. The cardiologist diagnosed a left ventricular systolic dysfunction, and ordered a routine electrocardiogram and daily use of three medications. [Exh. K.] Appellant did not call anyone at the Agency after seeing the cardiologist because “I thought my note¹ was sufficient. I thought I was going to end up on workers’ compensation because I passed out in the office.” Appellant believed that Ms. Weiss-Samaras would complete the paperwork necessary to file a workers’ compensation claim because she filled out the forms after Appellant reported an on-the-job injury to her wrist in 2008. [Testimony of Appellant.]

The Kaiser physician also recommended that Appellant see a disability physician. During her absence from work, Appellant was aware she was about to run out of FMLA leave. Appellant planned to file a claim for disability after seeing a disability physician, but stated she did not know where she could get that evaluation. Appellant asked her Kaiser physician’s assistant for a referral three times, but was told Kaiser does not perform disability evaluations.

After Appellant was terminated for job abandonment on Feb. 4, she “finally connected the dots” about who to see for a disability evaluation. She decided to call Concentra Medical Center, since she had used Concentra for her 2008 worker’s compensation claim for a wrist injury. On Feb. 13, Appellant was evaluated at Concentra by Dr. William Chythlook, and diagnosed with prolonged post-traumatic stress disorder. His report states that Appellant could return to work on Feb. 13 with the following restrictions: “no exposure to fumes, no work in [Coroner’s] office.” The report anticipated maximum medical improvement by Mar. 13, 2009. [Appeal attachments, p. 5.] Ms. Weiss-Samaras testified that she did not see the reports of the cardiologist or disability physician before this hearing.

Appellant testified that her disability is post-traumatic stress disorder, which she believes causes her to be disabled in the major life activity of being exposed to dead bodies. Appellant concedes that she is medically restricted from returning to work at the Coroner’s Office, but seeks reinstatement with the hope that she will be able to use the interactive process to request a similar job in another work location. Appellant has tried to schedule an IAP several times in the past, but “each time there was an issue.”

IV. ANALYSIS

As the proponent of the order of termination, the Agency bears the burden to prove that its determination of job abandonment was appropriate under CSR § 14-51 d). Appellant bears the burden of proving her claim of disability discrimination. C.R.S. § 24-4-105(7); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

¹ This refers to the doctor’s note dated Jan. 12, 2009 excusing Appellant’s work absences from Jan. 6 to 12, and recommending evaluations by a cardiologist and disability doctor.

1. CSR § 14-51 d). Job Abandonment

Under the Career Service Rules, separations other than dismissal must be designated as one of the six categories listed in § 14-10. This separation was implemented under § 14-51, Voluntary resignation, subsection d), Abandonment of position.

An employee shall be deemed to have abandoned his or her position if the employee fails to report for his or her assigned shift and fails to notify his or her immediate supervisor of the absence prior to the start of his or her shift for three (3) consecutive work days. This situation shall be termed "job abandonment." The required signature of the employee on the resignation shall be waived. Instead, the appointing authority shall file a statement indicating that the conditions of this paragraph have been met.

CSR § 14-51 d).

Appellant admits that she did not report to work or to her supervisor from Jan. 30 to Feb. 4, as asserted in the letter terminating her employment under the above rule. In defense, Appellant first argues that the Agency denied her procedural due process by terminating her Rule 14, which does not require the pre-disciplinary procedures mandated in Rule 16.

As an employee holding career service status, Appellant is entitled to the procedures afforded under Rule 16 prior to the imposition of discipline, including pre-disciplinary notice of the charges against her and an opportunity to respond to those charges. These rules create a property interest in Career Service employment with the City and County of Denver, and define the dimensions of that property interest. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Career Service Rules are intended to be those "necessary to foster and maintain a merit-based system according to the principles" governing the personnel system. "Dismissals, suspensions or disciplinary demotions of non-probationary employees in the Career Service shall be made only for cause, including the good of the service." Denver Charter, § 9.1.1. B.

The Supreme Court has determined that "public employees who can be discharged only for cause have a constitutionally protected property interest in their tenure and cannot be fired without due process". Gilbert v. Homar, 520 U.S. 924, 928-29 (1997), citing Board of Regents v. Roth, *supra*; Perry v. Sinderman, 408 U.S. 593 (1972). If the procedure provided by the rule does not give the employee a "real opportunity to protect" that right, it violates due process. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681-82 (1930).

To determine what process is constitutionally due, we have generally balanced three distinct factors: 'First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the

probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.' Mathews v. Eldridge, 424 U.S. 319, 335, (1976).

Gilbert v. Homar, *supra*, 931-32.

Since 1999, the Career Service Rules have contained provisions that permit an agency to separate an employee for "acts comprising resignation" or "job abandonment". CSR § 14-51 c), d). The "useful, or at least harmless, legal fiction" of constructive resignation has been upheld when an employee takes action inconsistent with continued employment, such as refusing to report for work or perform his or her duties, coupled with a refusal to resign. See Patterson v. Portch, 853 F.2d 1399, 1506-07 (7th Cir. 1988); Bean v. Wisconsin Bell, Inc., 366 F.3d 451 (7th Cir. 2004). The employer is then put in the difficult position of continuing to pay the employee without having control over the employee's attendance or performance. The Colorado Supreme Court applied the principle when it denied a retired military officer reinstatement to the Denver Police Department based on his failure to request reinstatement under the Denver Civil Service Rules within ninety days after the end of the national emergency for which he was called into service. Dies v. City & County of Denver, 483 P.2d 378, 380 (Colo. 1971). I find that the Rules permit an agency to separate an employee without pre-disciplinary procedures based on job abandonment. CSR § 14-51 d).

Appellant certainly has a protected property interest in her employment of 17 years' duration with the City and County of Denver. The real issue here is whether she received all process that was constitutionally due. That question depends largely on balancing the interests of the parties, the risk of deprivation posed by the procedure used, and the probable value of additional procedural safeguards.

Here, the Agency determined that Appellant's failure to report to work or contact the Agency for four days without leave to support her absences, and after being ordered to return to work, constituted job abandonment. Appellant claims she was deprived of her job because she was not granted the usual pre-disciplinary procedures. Clearly, both parties have important interests at stake: Appellant in her continued employment, and the Agency in being able to staff and run its operation.

I must then balance the risk of deprivation and the value of a pre-termination notice and meeting. Stated more simply, did the procedure provided by the rule give Appellant a real opportunity to protect her employment rights? Appellant testified that she has been and continues to be medically unable to work in the atmosphere of the Coroner's Office, despite being able to do the work. Given that evidence, it is difficult to anticipate that she would have received a more positive result if she had been permitted to respond to the charges prior to her termination. Thus, a pre-deprivation notice and meeting would not have been of any real value. The Agency, on the other hand, has an interest in preventing and discouraging continued unexplained staff absences, and resolving the status of AWOL employees as soon as possible in order to perform its work and achieve its mission. While such absences could also be handled

as disciplinary matters under § 16-60 S, an agency may use the procedures of § 14-51 d) where the circumstances support an inference that the employee has taken actions inconsistent with continued employment. Appellant's testimony that she was and is unable to work at the Coroner's Office supports the Agency's use of § 14-51 d) separation procedures.

Secondly, Appellant argues that she did not receive the Jan. 28 letter ordering her return to work. The evidence demonstrated that Appellant fainted on the job, and submitted a medical excuse for absences up from Jan. 6 to 12, 2009. The Agency was told that she would be seeing a cardiologist and disability physician. Appellant was aware that she would run out of FMLA leave by Jan. 29, and had no sick leave available, yet she did not return to work or call the Agency after Jan. 29. I find that Appellant had constructive notice of the Agency's order to return to work dated Jan. 28, based on the USPS Track & Confirm reports showing her husband's signature on the identical item number as the Jan. 28 letter. [Exhs. 3, 4.] Appellant's testimony that her husband signed only for the interactive process letter is also disproven by the fact that the latter was not mailed until Jan. 30, 2009 – a day after her husband signed for the return to work letter. Moreover, Appellant admitted receiving the interactive process letter, which gave her notice that her leave had expired. This fact alone should have caused Appellant to return to work, or call to explain her continued absence, by at least Feb. 2, 2009, thus avoiding a determination of job abandonment.

Appellant also argues that the absences should be excused because she assumed they would be treated as an on-the-job injury. She based her assumption on the fact that the incident happened at work, and her conclusion that it was caused by her PTSD, in reaction to working conditions at the Coroner's Office. However, there is no evidence that the Agency was given any information that would have led it to suspect that work factors triggered the fainting spell. In examining the place Appellant fell, Ms. Weiss-Samaras saw no indication that Appellant hit or was injured by anything at work. Ms. Weiss-Samaras testified Appellant told her she had been ill in the days before Jan. 6. Appellant's husband told her Appellant would be seeing a cardiologist regarding the fainting incident. Appellant did not report a work injury, as she admitted she had done in 2008 when she injured her wrist. On that prior occasion, Ms. Weiss-Samaras completed the paperwork for the workers' compensation claim because Appellant reporting a work injury. Here, she did not. Based on this evidence, I must conclude that Appellant's assumption that the Agency would treat her fainting as a work injury without a request or additional information from her was not a reasonable one, and did not excuse her failure to report to work or to her supervisor.

Finally, Appellant argues that the absences were excusable because they were caused by her disability, PTSD. Appellant credibly testified that she suffered through a traumatic event as a child when she witnessed her parent kill a sibling. A month after her termination, she was diagnosed with PTSD and restricted from work in the Coroner's Office.

Disability leave may be granted by an agency if an employee is "physically or mentally unable to perform the duties of the employee's position or any other position

within the City and County of Denver due to injury, occupational disease or accident experienced in the course of employment.” CSR § 11-120. Appellant presented no evidence that the fainting incident or PTSD prevented her from performing her duties or that of any other city job. The only evidence is that Appellant fainted once, and was released to work on Feb. 13 with a restriction against working at the Coroner’s Office or being exposed to fumes. Appellant offered no evidence that her diagnosed PTSD was a serious health condition, as necessary to support a request for FMLA, or that it affected anything other than work at the Coroner’s Office. § 11-153.

Appellant did not apply for disability leave, additional FMLA leave, or seek other city work. Appellant did not request leave without pay or any other permission to cover the absences. Most significantly, Appellant did not inform the Agency of her belief that the fainting was a product of a disability, or medical facts supporting such a conclusion. All of these facts are persuasive of the conclusion that Appellant did not consider herself disabled during the absences that support the termination, or ask the Agency to grant leave based on a disability or any other reason. Therefore, the Agency did not improperly deny leave for the absences.

2. Disability discrimination

Appellant has raised a claim that the termination decision was motivated by disability discrimination. A disability protected by federal and state law has been defined as 1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; 2) a record of such impairment; or 3) being regarded as having such impairment. 42 USCA § 12102(1); In re Vigil, CSA 110-05, 7 (3/3/06). The phrase “major life activities” refers to basic activities that an ordinary person can perform with little difficulty, such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 USCA 12102(2)(A).

Appellant asserts that her diagnosed PTSD affects her ability to be exposed to dead bodies and embalming fluid. However, highly job-specific tasks such as exposure to dead bodies or smells are not major life activities, and workplace-induced stress is not a separate impairment in determining the issue of disability. See Sutton v. United Air Lines, 527 U.S. 471 (1999); Ramirez v. New York City Bd. of Educ. 481 F.Supp.2d 209 (E.D.N.Y. 2007). Moreover, Appellant did not prove the Agency was aware of her Feb. 13 diagnosis of PTSD on Feb. 4, the date of its termination action. Therefore, Appellant failed to establish that the termination was motivated by disability discrimination.

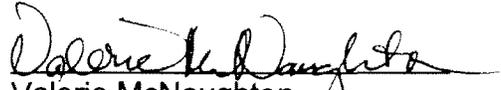
Order

Based on the foregoing findings of fact and conclusions of law, the following orders are entered:

1. The Agency’s termination decision dated February 4, 2009 is AFFIRMED.

2. Appellant's claim of disability discrimination is dismissed.

Done this 14th day of August, 2009.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision within fifteen days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery below. CSR § 19-60, 19-62. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed by mail, hand delivery, fax OR email as follows to:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.