

ORDER DISMISSING APPEAL

IN THE MATTER OF THE APPEAL OF:

ROBERT ALSON, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS,
and the City and County of Denver, a municipal corporation, Agency.

On May 24, 2011, Appellant filed three appeals asserting a series of acts at work resulted in age discrimination, general discrimination, harassment and retaliation. Orders to Show Cause issued in all three cases. In response to those orders, Appellant acknowledged he failed to establish jurisdiction in Cases #29-11 and #31-11. Appellant's claim in #29-11 was an appeal of his "successful" work review (PEPR). In #31-11, Appellant's claim was a whistleblower violation. In his acknowledgement, Appellant asks that, despite failing to establish jurisdiction, that neither case be dismissed but rather "subsumed" into remaining Appeal #30-11. The Agency did not object to the dismissal of those two appeals, but remained silent on the subsuming issue. In Appellant's remaining appeal, #30-11, Appellant claims he was subject to unlawful age discrimination, non-whistleblower retaliation, and harassment.

A. Age Discrimination Claim.

As stated in the Order to Show Cause, a complaint of age discrimination requires a showing of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence which supports an inference of age discrimination. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Appellant stated younger employees have been treated more favorably, meeting the first requirement. With respect to the requirement of showing some adverse action, Appellant states the comments in his PEPR were false, however, without deciding on the truth of the assertion, comments in a PEPR cannot be deemed an agency action. The only agency action complained of was Appellant's PEPR rating, and a "successful" rating cannot be deemed an adverse agency action. Consequently, Appellant has failed to state an age discrimination claim.

B. Non-Whistleblowing Retaliation Claim.

In order for his retaliation claim to survive, Alson must show a reasonable employee would have found the challenged agency action or actions materially adverse, meaning it or they would have dissuaded the theoretical reasonable employee from making or supporting a protected activity. See Burlington N. & Santa Fe Ry. Co. v. White, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006); (applied in the 10th circuit in Reese v. City of Yukon, 2006 U.S. Dist. LEXIS 61455 (D. Okla. 2006).

Alson responded the adverse (challenged) agency actions were the assessment of verbal and written reprimands. Alson stated the activity from which a reasonable employee would be dissuaded was "working through normal channels of the Agency and drawing officials attention to what was actually occurring within." [Response to Order to Show Cause]. Appellant referred, vaguely, to paragraphs "1,2,3,4,5,6 and 9." Appellant's verbal reprimand four months later, and his written reprimand five months later, were too remote to dissuade a reasonable employee from making or supporting a protected activity. Anderson v. Coors Brewing Company, 181 F.3d 1171 (10th Cir. 1999) (a period of six weeks gives rise to a rebuttable inference of a causal connection, but a period of three months does not). Finally, Alson describes his protected activity as "asserting his rights and calling official's attention to the true situation." [Response to Order to Show Cause]. These claims are too vague to establish a protected activity. Consequently, Alson failed to establish a retaliation claim.

C. Harassment Claim.

A harassment claim, known as a hostile work environment claim, requires a showing that, under the totality of the circumstances "(1) the harassment was pervasive and severe enough to alter the terms, conditions or privileges of employment, and (2) the harassment was based on some protected status. General harassment, if not based on a protected status, is not actionable. The issue here was whether Appellant's statements, if true, would establish an environment of pervasive harassment.

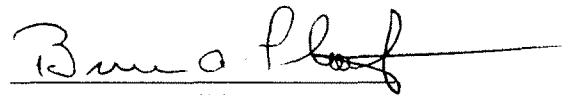
In his response, Appellant cites the following circumstantial evidence: unwarranted and unreasonable criticism of his work; failure to allow an open door meeting for no reason; written reprimand; menacing and angry behavior directed at him by his supervisor; an angry outburst by his supervisor; accusations made against Alson's wife; and an email accusing him of acting inappropriately. Alson did not relate any of these incidents to age, stating only that younger employees are treated more favorably.

Even if the incidents described were disturbing to Alson, they do not rise to the level of pervasive and severe actions which could have altered the terms, conditions or privileges of employment. Moreover, none of the incidents suggest age-based harassment. Even if they had, the law of harassment requires Alson to show not just sporadic age-based slurs, but a steady barrage of opprobrious age-based actions or comments, See Meritor v. Vinson, 477 U.S. 57, 67 (1986), citing Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir.1981), which he failed to do.

ORDER

As none of the Appellants remaining claims state a claim for which relief may be granted, jurisdiction is not established, the Orders to Show Cause are made final, and Appellants Appeals #29-11, 30-11, and 31-11 are DISMISSED WITH PREJUDICE . Appellant's "subsuming" request is moot.

Done June 16, 2011.



Bruce A. Plotkin
Career Service Hearing Officer

I certify that on June 16, 2011, I delivered a copy of this Order to the following in the manner indicated:

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