HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 57-09

DECISION

IN THE MATTER OF THE APPEAL OF:

JACEK BURGHARDT, Appellant,

vs.

OFFICE OF THE CLERK AND RECORDER, and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

The Appellant, Jacek Burghardt, appeals the denial of his discrimination grievance against his employer, the Office of the Clerk and Recorder (Agency). A hearing concerning his appeal was conducted by Bruce A. Plotkin, Hearing Officer, on September 29, 2009. The Agency was represented by Robert Nespor, Assistant City Attorney, while the Appellant represented himself. Appellant's exhibits A-D were admitted. Agency exhibit # 4 was admitted. The Appellant testified on his own behalf during his case-in-chief and presented no other witness. The following witnesses testified for the Agency: Stephanie O'Malley and Helen Gonzales.

II. ISSUES

The issues to determine at hearing were:

A. whether the Agency engaged in unlawful national origin discrimination;

B. whether the Agency engaged in unlawful national origin harassment;

C. whether the Agency engaged in unlawful retaliation; and

D. if the Appellant proved either 1 or 2, above, whether the Appellant is entitled to remedies including: reassignment of duties, reversal of prior discipline.

III. FINDINGS

The Appellant was born in Poland. He is employed as an Administrative Assistant III by the Agency. Stephanie O'Malley is the director and head of the Agency. Her

deputy director is Helen Gonzales. Shortly after O'Malley's appointment in 2007, she undertook a reorganization of the Agency. As a result of the reorganization, seven or eight employees, including Burghardt, were reassigned.

In addition to reorganization requirements, another reason O'Malley reassigned Burghardt was due to his bitter working relationship with a co-worker. Their disputes, although petty, became sufficiently poisonous to the working atmosphere of the Agency that O'Malley pulled each of them into her office at least twice to chastise them. When the sniping continued, she forbade them to talk to each other unless it was for a business-related reason. At the time she reassigned Burghardt, O'Malley was unaware of his national origin, and none of the disputes between Burghardt and his co-worker involved his national origin.

In the spring of 2008, Burghardt applied for an ASA IV position at the Office of Economic Development (OED) and was not selected. O'Malley did not contact anyone at OED about Burghardt's application and was unaware he had even applied.

O'Malley had previously suspended the Appellant for four days, on November 21, 2007, for offensive remarks relating to the national origin of several co-workers. The Appellant appealed the suspension. The Hearing Officer reversed the suspension. On the subsequent petition to the Career Service Board, the Hearing Officer was reversed and the suspension was reinstated. The Appellant's request for the hearing officer to reverse the Career Service Board falls outside the scope of the Hearing Officer's jurisdiction.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR §19-10 A.2.a. as an appeal of the denial of a complaint alleging national origin discrimination, harassment and retaliation. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975); In re Luna, CSB 42-07, 4 (1/30/09).

B. Burden and Standard of Proof

The Appellant retains the burden of persuasion, throughout the case, to prove the Agency engaged in unlawful discrimination, retaliation, or harassment. The standard he must meet to prove each element of his claims is a preponderance of the evidence.

C. Discrimination

Colorado has adopted the burden-shifting test first announced in McDonnell Douglas v. Green, 411 U.S. 792 (1973), Bodaghi v. Department of Natural Resources, 969 P.2d 718 (Colo. Ct. App. 1998) (rev'd on other grounds) to establish a prima facie

case for discrimination. Intentional discrimination is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence which supports an inference of discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981). The Appellant claims the Agency discriminated against him based upon his Polish national origin.

1. Protected class. The Appellant stated he is from Poland. The Agency did not contest this assertion. The first element is established.

2. Adverse employment action. In the context of a discrimination claim,[1] an adverse employment action is employer conduct which results in a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a significant change in benefits. In re Wehmhoefer, CSA 02-08, 3 (2/14/08) *citing* In re Boden, CSA 86-06, 2 (5/23/07); Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2268 (1998). The Appellant acknowledged there was no direct evidence of an adverse action against him based upon his national origin. He claimed the following was indirect evidence of an adverse employment action. (a) Co-worker issues. The Appellant claimed one particular co-worker, whose national origin was not identified: treats others disrespectfully; complains about him and gets him in trouble; causes the Appellant to feel bad about the co-worker's complaints because of his national origin; causes customers to complain to him about the co-worker; causes him anguish because the co-worker talks down to him; is lazy. [Appeal; Appellant testimony]. (b) Disparate treatment. The Appellant also claimed other employees who engaged in egregious actions were not disciplined, or not as severely, for dissimilar conduct. He also alleged O'Malley took some negative action against other co-workers based upon their national origin. (c) Reassignment. He also claimed O'Malley transferred him to a less-desirable post. (d). Interference with transfer. Lastly, the Appellant claimed O'Malley interfered with his application to a position outside the Agency. I will analyze each claim in turn.

(a) Co-worker issues. There was no evidence the co-worker's meanness, even if true, was related to any adverse action taken by a decision-maker, without which there was no adverse agency action. Plotke v. White, 405 F.3d 1092, 1101 (10th Cir. 2005).

(b) Disparate treatment. See below at (d) Circumstances giving rise to an inference of discrimination.

(c) Reassignment as adverse action. The Appellant's claim here was based on his perception that the marriage desk is a less-desirable post than the records desk from which he was reassigned and to which he returned. The Appellant acknowledged neither his pay nor benefits had been reduced as a result of the transfer, nor was his position downgraded. [Appellant testimony]. Moreover, when O'Malley agreed to return the Appellant to the records desk, his complaint became moot, since, even if his transfer to the marriage desk had been an adverse agency action, the solution he

[1] as distinguished from an adverse action in a retaliation claim, as described below.

sought was granted. Also, other than his bare assertion, there was no other evidence the marriage desk is a less-desirable assignment. Further, O'Malley presented logical business-related reasons for transferring the Appellant to the marriage desk, including the need to reorganize the Agency, and to separate the Appellant from another co-worker whose minor daughter he had been texting, to the mother's great consternation. The Appellant admitted texting the minor and did not otherwise contest O'Malley's business-related reasons.

The Appellant also claimed O'Malley told him as long as she was in charge he would never be able to leave the marriage desk. O'Malley's transfer of the Appellant to his desired location successfully rebutted this claim. O'Malley denied making such a statement.

(d) Interference with transfer

The Appellant asserted he applied for an ASA IV position at the Office of Economic Development and had interviewed successfully for the position when O'Malley interfered and prevented his transfer. His proof was that O'Malley spoke with an interviewer at OED and then he was denied the position. He also alleged Gonzales told a coworker that O'Malley wouldn't allow his transfer. O'Malley replied she was unaware the Appellant was seeking employment elsewhere, never spoke with anyone at OED about the Appellant and, in any case, was unaware of his national origin until the present case arose. Her testimony was unrebutted, and her credibility unchallenged. Gonzales denied she made the statement the Appellant attributed to her, and testified she did not know Appellant was seeking employment elsewhere. Her testimony was also unrebutted and her credibility unchallenged.

(e) Circumstances giving rise to an inference of discrimination.

With respect to the Appellant's complaint about his co-worker, the Appellant must adduce evidence that O'Malley, not his co-worker, harbored some hostility towards him because of his national origin.[2] Plotke v. White, 405 F.3d 1092, 1099-1100 (10th Cir. 2005).

O'Malley testified the Appellant and his co-worker had frequent spats and she had to pull each into her office to chastise them for their publicly-displayed misbehavior. O'Malley testified, without rebuttal, that at no time did the Appellant mention national origin as any part of his disputes with the co-worker.[3] Rather, the spats revolved around the Appellant's rude comments to the co-worker, including that his co-worker

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[2] It is not enough to demonstrate evidence of discriminatory animus by just any co-worker. The animus must be shown to be made, or tacitly approved, by a decision maker who took an adverse action. Plotke at 1101. The Appellant demonstrated neither requirement.

[3] Question: During this period of time in which you claim you were harassed by [the co-worker] did she ever mention the word "Poland" or "Polish" or make any references whatsoever to national origin?
Answer: Not directly.
Other than these conclusory statements, the Appellant did not provide any other evidence of national origin animus.

needed to go to weight watchers, or needed to wash her hair, or how rude she was to others. Even after O'Malley ordered them not to speak to each other unless it was for a work-related reason, the same bickering continued. [O'Malley testimony]. The Appellant's difficulties with a co-worker fail to establish even the most tenuous connection between any adverse agency action and his national origin.

The Appellant also claimed O'Malley discriminated against other co-workers based upon their national origin. O'Malley transferred two of the Appellant's co-workers, one Pilipino and one Hispanic, shortly after she became Agency director. Other than referring to their national origin, he offered no comparative information from which one might determine whether the protected class of employees were treated less favorably than those in an unprotected class. In addition, O'Malley explained, without rebuttal, that all the complained-of actions were either voluntary or for valid business reasons. The Appellant's description of a transfer coupled with identification of national origin is an insufficient statement of an adverse agency action.

As to his claim that a co-worker in an unprotected class was disciplined less severely, the Appellant claimed the co-worker's actions were more egregious than his own yet she received a lesser discipline. First, O'Malley replied she became aware of the named employee's wrongdoing only through a media exposé, and was unaware of her national origin. Second, Gonzales explained, without rebuttal, that the employee did not appear for her pre-disciplinary meeting, and therefore presented no mitigation to the claims of wrongdoing against her. Third, Gonzales noted the employee was terminated, contrary to the Appellant's claim that she was disciplined less severely.

Next, the Appellant asks the Hearing Officer in the current case to reverse the Career Service Board's reinstatement of discipline in a prior case. First, while the Hearing Officer revels in the fantasy of such inverted authority, a reversal of Career Service Board's Findings and Order falls outside the Hearing Office jurisdiction. CSR 19-55. Second, in the appeal of his suspension, the Appellant did not complain the assessment of discipline was based upon any discriminatory animus. Finally, following the Board's issuance of its Findings and Order, the Appellant's remedy lay in an appeal to the District Court and he declined to appeal.

As to one co-worker who left the Agency, and whose foreign national origin was identified by the Appellant, the Appellant did not dispute the employee's position was simply moved to a different agency during the aforementioned reorganization, without a reduction in pay, benefits or status.

D. Retaliation

A retaliation claim must be supported by evidence of a materially adverse action, meaning an Agency action that is likely to deter a reasonable employee from making or supporting a claim of discrimination. Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405 (2006). The Appellant's claim here is O'Malley retaliated against him by interfering with his application to the Office of Economic Development, in revenge for

his appeal of the aforementioned suspension. [Appellant's pre-hearing statement p.2]. For reasons stated above, O'Malley rebutted the Appellant's claim that she even knew about, leave alone interfered with, his application.

E. Harassment/Hostile Work Environment

Harassment, also known as a hostile work environment, is proven by evidence that 1) the offending behavior was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and 2) the behavior was based upon a protected status or stemmed from animus against a protected status. In re Hernandez, CSA 03-06, 10 (5/3/06), *citing* Bloomer v. UPS, 94 Fed. Appx. 820 (10th Cir. 2004).

The appellant claimed the co-worker, referenced above, created a hostile work environment based upon his disputes with her. [Appellant pre-hearing statement p.2]. First, as previously stated, the Appellant failed to connect his arguments with his co-worker to management. Second, the only credible evidence concerning the nature of his disputes with his co-worker was they were unable to get along and engaged in petty arguments which were not based on any animus against a protected status. Petty squabbling does not rise to the level of creating a hostile work environment.

The Appellant also claimed the Agency permitted a hostile work environment based upon the following statement.

> The agency allows anybody to harass me because of my national origin. [name redacted - a different co-worker than that named above] had been making number of harassing comments about me, she would walk around the office telling everybody I am racist and nobody makes as many mistakes as [me]. She would also approach me and tell me that I am racist and even don't know about it. She would suggest that I should hate Jacob Werther, [by] making comments you hate Jacob don't you.

[Appeal attachment p. 5]. The Appellant needs to do more than make an empty claim to establish a claim of harassment. Scaife v Cook County, 446 F.3d 735, 740 (7th Cir. 2006. His statement fails to meet any of the elements of a hostile work environment. Even taken at face value, the statement above does not suggest a national origin animus against the Appellant, does not state the comments were severe or pervasive, does not suggest a change in terms, conditions or privileges of employment, and does not state whether management was even aware of the statement.

The Appellant's next basis for his harassment claim is his co-worker harassed him by making unfounded and false accusations, and caused him mental anguish. [Appellant pre-hearing statement p.2]. For the same reasons stated immediately above, this claim fails.

The Appellant also claimed harassment because he was suspended. This conclusory statement also fails to meet the most basic elements for a claim of

harassment. In addition, the Appellant is now precluded from such claim, having failed to make it at the time of the suspension appeal. Also the suspension was upheld on appeal to the Career Service Board and not appealed at least until now, outside the time and subject matter jurisdiction of the Hearing Office. In sum, the Appellant failed to prove any of his harassment claims.

F. Requested Remedies.

In the absence of establishing any of his claims by a preponderance of the evidence, there remains no basis upon which to grant the Appellant's requested relief.

1. As a generally matter, the decision whether to transfer an employee rests in the sound discretion of the agency. In addition, O'Malley was within her rights to transfer the Appellant based upon his failure to maintain satisfactory relations with co-workers, and based upon he restructuring of the Agency. In addition, the Hearing officer is without jurisdiction to grant a change of supervisor. In re Felix, CSA 82-07 (2/14/08).

2. The Appellant failed to establish that O'Malley had any connection to the decision of another agency not to hire him. Moreover, the Hearing Officer has no jurisdiction of a non-party agency to require such a remedy.

3. The Hearing Office lacks jurisdiction to overturn the Career Service Board's order reinstating the Appellant's two-day suspension.

V. ORDER

Having failed to prove any of his claims of discrimination, retaliation or harassment, the Appellant's appeal is DISMISSED WITH PREJUDICE.

DONE November 4, 2009.

Bruce A. Plotkin
Hearing Officer
Career Service Board