HEARING OFFICER, CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, COLORADO

Appeal No. 116-02

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

CELESTINA CORDOVA, Appellant,

Agency: DENVER DEPARTMENT OF HUMAN SERVICES, and
THE CITY AND COUNTY OF DENVER, a municipal corporation.

INTRODUCTION

This matter comes before the Career Service Board on appeal by Celestina Cordova filed June 10, 2002. Appellant appeals her termination from probationary employment. She alleges her termination was motivated by discrimination based on her pregnancy. The Agency responds that Appellant's termination bore no relationship to her pregnancy, but rather was motivated by problems with Appellant's attendance and performance.

For purposes of this Decision, Ms. Cordova shall hereinafter be referred to as "Appellant." Denver Department of Human Services shall be referred to as "DDHS" or "the Agency." The rules of the Career Service shall be referenced as "CSR" with a corresponding numerical citation.

A hearing in this matter was held before Personnel Hearing Officer Joanna Lee Kaye ("hearing officer") on September 17, 2002 at the Career Service Authority Offices. Appellant was present and represented herself. The Agency was represented by Assistant City Attorney Niels Loechell, with Clerical Supervisor Dennis Bottinelli present for the entirety of the proceedings as the advisory representative for the Agency.

Appellant testified on her own behalf and did not call additional witnesses.

The Agency called the following witnesses: Mr. Bottinelli, acting Operating Section Manager Martha Calderon, and Administrative Assistant II Lisa Romero.

Appellant offered one document referencing her job performance in a prior work setting. The Agency objected because it had not been provided a copy the document before the hearing as required in the Prehearing Order issued July 8, 2002, and because it contained statements by an individual other than the individual who composed the letter. The document was therefore not timely provided to the Agency and contained hearsay. It was not admitted for these reasons.

Agency Exhibits 3 through 5 were offered and admitted

No additional exhibits were offered or admitted.

PRELIMINARY MATTERS

1. The Hearing Officer's Jurisdiction

Appellant was a probationary employee and alleges discrimination on the basis of her pregnancy during the relevant times. The hearing officer finds she has jurisdiction to hear this case pursuant to CSR 5-61, 16-53 A. and 19-10 c), as follows in relevant part:

5-61 Employees in Employment Probationary Status

An employee in employment probationary status:

1) may be terminated or demoted at any time for any reason without cause except for discrimination as defined in **Rule 19 APPEALS**.

2) may not appeal any decision relating to his or her employment, including termination, except for alleged discrimination.

* * *

Section 19-10 Actions Subject to Appeal

...c) Discriminatory actions: Any action of any officer or employee resulting in alleged discrimination because of race, color, creed, national origin, sex, age, political affiliation, sexual orientation or disability including:

...2) Not attempting to make reasonable accommodations to the known physical or mental disability of a job applicant or an employee unless the accommodation would impose an undue hardship...

* * *

Jurisdiction over this appeal was not disputed by either party.

2. Burden of proof

In civil administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence.* In other words, to be meritorious, the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

In cases such as this one, where Appellant is a probationary employee, she can be terminated at any time for any reason excepting discrimination. *See,* CSR Rule 5-61, *above*. The Agency need not show just cause for its termination of Appellant's assignment. *Cf.*, In the Matter of the Appeal of Leamon Taplan, Appeal No. 35-99 (Hearing Officer Michael L. Bieda, 11/22/99).

Where Appellant claims discrimination, she bears the affirmative burden of proving, by a preponderance of the evidence, that the Agency's adverse employment action was taken against her because of her membership in a protected class (*e.g.,* sex and/or disability resulting from her pregnancy). In such cases, the party claiming pregnancy discrimination must show the Agency intentionally discriminated against her. E.E.O.C. v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1190 (10th Cir. 2000), *citing,* Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999). "A plaintiff may prove intentional discrimination in one of two ways: 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Horizon, *above, quoting* E.E.O.C. v. Wiltel, Inc., 81 F.3d 1508, 1513 (10th Cir. 1996).

Appellant must first demonstrate that she is qualified for protection by affirmatively making a *prima facie* showing of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *see also,* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981). In order to show *prima facie* discrimination in a pregnancy discrimination case, Appellant must show: (1) she is a member of the protected group; (2) she was qualified for modified-duty position(s) sought; (3) she was denied the modified-duty position(s); and (4) the denial occurred "under circumstances which give rise to an inference of unlawful discrimination." *See,* Burdine, *above,* at 253.[1] Appellant need not provide direct proof of discrimination in the first instance. Rather, the *prima facie* requirement simply eliminates the most common legitimate reasons for an adverse employment action, and is considered sufficient to create a rebuttable inference. *See,* Kendrick v. Penske Transportation Services, Inc., 220 F.3d 1220, 1226-27 (10th Cir. 2000). [2]

If Appellant makes such a showing, the burden of proof then shifts to the Agency to rebut the *prima facie* inference by articulating a legitimate, non-discriminatory business purpose for its actions. The Agency need not affirmatively prove the absence of discriminatory intent at this point. It need only produce sufficient evidence to lead the trier of fact to rationally conclude that the employment decision was not motivated by Appellant's membership in a protected class. *See,* McDonnell Douglas, *above;* E.E.O.C. v. Flasher Co., Inc., 986 F.2d 1312, 1316-17.

If the Agency makes such a showing, Appellant must then demonstrate by a preponderance that the Agency's stated legitimate business purpose is a "pretext" for

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[1] Since pregnancy discrimination cases apparently take a variety of forms and the corresponding *prima facie* tests are modified for the particular circumstances of a given case, the hearing officer has attempted to locate and apply the form of the *prima facie* test most applicable to Appellant's arguments. The various types of pregnancy discrimination cases are discussed more fully below, under the "Discussion" section.

[2] Where there is no direct evidence of intentional discrimination, as is typically the case, the burden-shifting framework first articulated in McDonnell Douglas (*above)* is used to demonstrate intentional discrimination. *See also,* Anaeme v. Diagnostek, Inc., 164 F.3d 1275, 1278 (10th Cir.), *cert. denied,* 120 S.Ct. 50 (1999).

discrimination. *See,* McDonnell Douglas, above. In order to prove a "pretext," Appellant must demonstrate that, first, the Agency's stated legitimate justification is an excuse and was not the real reason for its actions, and second, that its actions against Appellant were actually directly motivated by her protected status. *See,* Flasher, above, at 1321-22 (*see,* keynote [33]). [3]

3. Appellant's request for a continuance.

At the beginning of the hearing in this matter, Appellant requested a continuance for the purpose of seeking counsel. Appellant expressed unfamiliarity with the proceedings as the reason for her request. The Agency objected and the hearing officer denied Appellant's request as untimely and for lack of a showing of any compelling reason, as is required in the Notice of Hearing issued July 8, 2002. Item 1 b) of the Notice of Hearing indicates that continuances will not be granted to accommodate after-acquired representation.

ISSUES

1. Whether Appellant has demonstrated a *prima facie* case of discrimination.

2. If so, whether the Agency has articulated a legitimate business reason for its allegedly discriminatory actions.

3. If so, whether Appellant has shown that the Agency's stated business reason is a pretext for discrimination.

FINDINGS OF FACT

1. Appellant began employment with the Agency in July of 2001. She began in the "CityWorks" program, in which TANF recipients receive training and then work a six-month probationary term. She was an Office Occupations Trainee during her CityWorks probation (*see,* Exhibit 5). Her supervisor under the CityWorks program was Anne Moores.

2. At the end of Appellant's CityWorks probation in January of 2002, DDHS Operating Section Manager Martha Calderon, along with Ms. Moores and four other supervisors, met and conferred on an Administrative Assistant II ("ASA II") opening at DDHS. Ms. Calderon testified that Ms. Moores did express some concerns about Appellant's attendance, absences, and her use of the required process for requesting leave during her CityWorks probation. The team weighed the concerns and decided to place Appellant in the position on a probationary basis, rather than hire a new individual without any training. Ms. Moores did not express any concerns about Appellant's performance to Ms. Calderon.

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[3] The Court in Kendrick reminds us that the first two elements of the burden-shifting analysis apply primarily to Motions for Summary Judgment. Once these preliminary hurdles have been cleared, the matter proceeds to a full trial on the merits, the burden-shifting model drops from the equation, and the remaining issue is whether the complainant has demonstrated by a preponderance that the action was taken against her because of her protected status. This burden lies at all times with Appellant. Id.; *see also,* Felton v. Trustees of California State Univ. and Colleges, 708 F.2d 1507, 1509 (9th Cir. 1983).

3. Appellant was placed in the ASA II vacancy on approximately January 7, 2002 (*see,* Exhibit 5). She remained a probationary employee at all relevant times.

4. Clerical Supervisor Dennis Bottinelli became Appellant's supervisor upon her appointment to the ASA II position. Mr. Bottinelli reports to Ms. Calderon.

5. In her position as ASA II, Appellant was one of four file clerks who worked in the Agency's file bank, where all DDHS client files (approximately 35,000 files) are stored. Each file clerk is assigned certain groups, or "pods," of Human Services technicians for whom they handle and prepare files. The technicians, in turn, meet with clients to determine eligibility for various types of Human Services benefits. Appellant's duties primarily comprised filing new documents into client files, retrieving files from the file bank, and placing research data concerning eligibility ("systems checks" prepared by a data entry operator) into files to prepare them for eligibility meetings between technicians and clients. Appellant's physical duties included pushing a wheel cart with files on it, and lifting and carrying files between one and three inches thick.

6. Before the end of each day, the file clerks are expected to have systems checks filed for client meetings scheduled the following morning. There are approximately six technicians in each pod. Typically, each technician has one meeting scheduled for 8:30 a.m. and one meeting scheduled for 9:30 a.m. This requires each file clerk to prepare approximately twelve files before the end of each work day. Files for meetings scheduled for the remainder of the day can be pulled during the morning meetings.

7. At an uncertain time in December of 2001, Appellant discovered she was 1 1/2 to 2 months pregnant.[4] She told Mr. Bottinelli about her pregnancy in or around late January or early February of 2002. Appellant never specifically told Mr. Bottinelli she was having problems with her pregnancy or directly requested any changes in her job duties as a result of her pregnancy, and none were offered by the Agency.

8. Approximately two months after Appellant was hired, the Agency hired a deaf employee who could not speak. The employee was transferred into the ASA II position from elsewhere in the Career Service, and unfamiliar with the duties of her new position.

9. Appellant's desk directly adjoined the desk of the deaf employee. Appellant and the other two file clerks did not know sign language. While all three of them helped translate for the deaf employee through writing notes, Appellant spent more time helping the deaf employee in this regard because of her close proximity to the employee. However, helping translate for the deaf employee was not one of Appellant's assigned duties.

10. At some uncertain time, Appellant and the other file clerks reported to their supervisor, Dennis Bottinelli, that they felt the deaf employee was not pulling her own weight. Mr. Bottinelli was aware of these concerns, but did not observe that Appellant was spending more time helping the employee than the others were, and was not aware that this was the case.

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[4] Appellant delivered on July 24, 2002

11. Appellant also assisted another file clerk in coverage at the reception desk from 1:30 p.m. to 2:30 p.m., four days per week. The reception desk is located outside the file bank. When employees are covering the reception desk they cannot do file preparation work. In approximately March of 2002, Appellant was chosen to cover this duty alone, leaving her approximately one and a half hours at the end of the day on these four days to complete her systems checks filings.

12. Telephones at the file clerks' desks can be called directly from an outside line as well as from internal lines. The numbers for these phones are not published externally. They may be accessed through an internal Agency phone list available to other City employees, or from the employees themselves. On occasion Appellant received phone calls for technicians at her desk. Appellant either forwarded these calls to the technicians, or if she could, helped the individuals calling herself. Appellant did not complain of these calls until she later received a verbal warning which included reference to inappropriate phone use.

13. Mr. Bottinelli and Ms. Calderon testified that while there are occasions during which file clerks might receive business-related phone calls, due to the nature of the work these calls are infrequent and typically very short.

14. The Agency policy concerning personal phone calls is that they are to be limited to break times. No long-distance or collect calls are allowed.

15. Mr. Bottinelli observed Appellant frequently engaging in personal phone calls. Mr. Bottinelli observed that compared to other employees, Appellant's phone usage generally appeared excessive. Mr. Bottinelli testified that on one occasion some time in March, 2002, when he was working nearby Appellant's desk, he heard her phone ring three times in a row. Concerned that this might be an emergency, he picked up the line and an operator announced a collect call. The other party disconnected before Mr. Bottinelli could ascertain the source of the call.

16. Ms. Calderon testified that while occasional personal calls during work hours are acceptable, she observed Appellant at times on the line for lengthy periods of time during work hours. Appellant's demeanor during these calls clearly suggested she was discussing personal business. Ms. Calderon testified that Appellant's personal phone calls rose to the level where "it appeared to be a problem."

17. Lisa Romero was a file clerk who worked in the file room with Appellant. She testified that she observed Appellant making personal calls at times when she should not have been on break. She testified such calls lasted from fifteen minutes to half an hour. Ms. Romero testified she knew the calls were personal because she overheard such things as Appellant addressing her children by name during the calls.

18. Mr. Bottinelli testified that other file clerks came to him and complained about having to pull Appellant's cases and complete her systems checks at the last minute on the mornings of April 9 and 16, 2002. He testified that the clients were already in their meetings with the technicians when this occurred, and the other clerks had to leave their own duties to help

Appellant on those occasions. He testified that this area of Appellant's performance was problematic when compared to the other file clerks.

19. Ms. Romero testified that she and the other file clerks complained to Mr. Bottinelli about having to pull Appellant's cases because the technicians came to them on the mornings the files were needed and they were not ready. Ms. Romero testified she could not recall how many times this happened. Ms. Romero admitted Appellant helped her with her work on a few occasions as well.

20. Ms. Calderon testified that the other file clerks complained to her that Appellant's work habits were of concern to them.

21. Appellant testified that there were occasions when other file clerks failed to have their systems checks completed for the morning meetings. Appellant offered no witnesses to specific incidents and no dates when those instances allegedly occurred. Mr. Bottinelli was not aware of instances where other employees failed to complete their systems checks.

22. On April 16, 2002 Appellant received a verbal warning (Exhibit 3) notifying Appellant of unacceptable work performance for her failure to complete her systems checks filings for the morning meetings on April 9 and 16. The verbal warning further stated that Appellant had been observed making personal telephone calls during work hours, which is not permitted. The verbal warning noted the occasion when Mr. Bottinelli answered Appellant's "constantly ringing" telephone and the operator announced a collect call. The verbal warning further noted that Appellant had a friend or family member call in sick for her on the morning of April 10, 2002, in violation of an Agency policy requiring the employee to call in sick personally (*see,* Exhibit 3). Finally, the verbal warning noted that Appellant arrived at work fifteen minutes late on the morning the verbal warning was issued. The verbal warning instructed Appellant to show immediate improvement in these areas. The verbal warning did not state that Appellant's use of sick leave was excessive.

23. Upon receipt of the verbal warning, Appellant approached Ms. Calderon and expressed concerns about it. Appellant told Ms. Calderon she felt singled out, and asked Ms. Calderon if other clerks had received warnings for behavior similar to that for which Appellant was being warned. Ms. Calderon declined to tell Appellant about confidential matters concerning other employees during that conversation. Ms. Calderon testified that another employee was later disciplined for similar activities and complaints, but that this employee had also alleged discrimination.

24. Appellant told Ms. Calderon during this conversation that she was receiving many misdirected calls at her desk. However, this was the first time Appellant had told anyone about this.

25. Appellant had to work the reception desk on the afternoons of April 8 and 15, 2002. Appellant had completed four of the six systems checks filings she was supposed to have completed on the morning of April 16, and therefore only needed assistance with the remaining two. However, she did not tell anyone she was unable to complete the remaining two until they were needed the following morning.

26. Ms. Calderon testified that the office keeps an attendance log in which absences and requests for leave are recorded. Information concerning Appellant's leave use taken from that attendance log (*see,* Exhibit 4) indicates the following from January 1 through May 31, 2002. Appellant was absent due to being ill for the entire day on eight occasions and for part of the day on four occasions. She was anywhere between 15 minutes to 3 hours late on five occasions. She was absent for the entire day due to a family member on 3 occasions and for part of the day on two occasions. She was an hour late returning from lunch on one occasion. She was absent for part of the day due to doctor's appointments on three occasions. She took a personal day on one occasion. The total time Appellant was absent from work during this time was 133.5 hours.

27. Mr. Bottinelli testified that Appellant's leave use seemed excessive compared to that of other employees.

28. Appellant called in and provided doctor's excuses on each of the occasions she was absent during Mr. Bottinelli's supervision, and he approved these absences. Appellant never specified that the cause of her absences was pregnancy-related. However, Mr. Bottinelli knew that some of Appellant's requests for leave were for doctor's appointments.

29. Appellant testified that frequently on the days she was late for work, her tardiness was caused by morning sickness requiring her to clean up and change clothes again after she had already prepared for work.

30. Appellant testified she did not request special treatment, an adjustment to her schedule or a change in her duties due to her pregnancy, because she feared such a request might jeopardize her job.

31. Ms. Calderon testified that as Appellant's probationary period neared its end, she consulted with Division Director Doris Puga and they agreed that because of Appellant's chronic attendance problems, her periodic lack of effort in her job performance, and her poor time management in general, Appellant should not pass probation. Mr. Bottinelli also participated in this decision process. Ms. Calderon and Mr. Bottinelli testified this decision did not have anything to do with Appellant's pregnancy. Rather, it resulted from reasoning that a probationary employee typically tries to do their best, and the supervisors therefore did not anticipate that Appellant would improve in these areas.

32. On May 31, 2002 the Agency terminated Appellant's employment. Appellant timely filed an appeal of her termination on June 10, 2002.

33. During the past two years, another employee supervised by Mr. Bottinelli and Ms. Calderon became pregnant, went on maternity leave, returned to work thereafter, and received an "exceeds expectations" performance rating during the year following her pregnancy.

DISCUSSION

1. Analysis of the case law governing pregnancy discrimination.

A brief review of the controlling case law governing pregnancy discrimination is instructive in determining the exact nature of Appellant's protected status. Discrimination claims in their present form generally arise from the Civil Rights Act of 1964. *See,* 42 U.S.C. sec. 2000e ("Title VII"). Title VII prohibits unlawful employment discrimination on the basis of an individual's membership in a protected class. A person's sex, or gender, is one of the original protected classes in the Act. *See,* 42 U.S.C. sec. 2000e-2.

In 1976, the United States Supreme Court held that an employer's disability plan which excluded pregnancy-related disabilities did not violate Title VII. *See,* General Elec. Co. v. Gilbert, 429 U.S. 125, 140-41 (1976). Two years after the decision in Gilbert was entered, Congress overruled the Supreme Court by passing the Pregnancy Discrimination Act ("PDA"). *See,* Pub.L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. sec. 2000e (k)); Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C., 462 U.S. 669, 678-79 & nn. 15-17 (1983) (discussing legislative history of the PDA). Pursuant to the PDA, the definitional section of Title VII was amended by the addition of the following language:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. sec. 2000e (k). Claims brought under the PDA are typically analyzed as "disparate treatment" cases. *See,* E.E.O.C. v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1190 (10th Cir. 2000), *citing* E.E.O.C. v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 947 (10th Cir. 1992). The above section was added to Title VII "to prevent the differential treatment of women in all aspects of employment based on the condition of pregnancy." Carney v. Martin Luther Home, Inc., 824 F.2d 643, 646 (8th Cir. 1987).

Upon review of actual cases involving pregnancy discrimination, two main categories of such cases emerge. In one category, the employee is pregnant and suffers no ill effects. In these cases, the discrimination theory is that the employer has discriminated against the employee by imposing leave or job modifications despite the absence of medical need. In the other category, an employee is pregnant and suffers complications requiring modifications or other accommodations. The theory of discrimination here is the employer's failure to provide those modifications or accommodations.

Put simply, the true focus of a pregnancy discrimination claim is not on the pregnancy itself, but rather on the *effects* of the pregnancy (or lack thereof,) and how the agency responds to the effects of the pregnancy (or lack thereof). When seen in this light, pregnancy discrimination is somewhat of a hybrid between sex or gender discrimination, and disability discrimination. As a

practical matter the pregnancy discrimination analysis more resembles an analysis under the Americans with Disabilities Act ("ADA") than it does discrimination on the basis of sex.[5] In the first category of cases, the pregnant employee is *regarded* as disabled and treated thus, despite the absence of a disability.[6] In the second category, the pregnant employee actually is disabled by the pregnancy, but duty modifications or reasonable accommodations are presumably not forthcoming.[7]

2. Analysis of the present case.

Appellant's case clearly falls within the latter scenario, in that she did experience symptoms, and she asserts it was the impact of those symptoms on her ability to maintain attendance standards which was the basis for termination.[8] Thus, the real inquiry here is not whether the Agency terminated Appellant *because she was pregnant*, but rather whether the Agency terminated Appellant because of the symptoms of her pregnancy without providing reasonable accommodations.

The Agency argues that Appellant has not shown the Agency engages in a pattern of discrimination because it did not terminate another employee who was also pregnant. However, for the reasons stated above, the Agency's argument has no merit here. First, there is no evidence that the other employee was experiencing complications requiring her to miss work, as Appellant argues was the case here. Recalling that the focus of a pregnancy discrimination claim is not the pregnancy itself, but the need for accommodations and corresponding action by the Agency, its evidence concerning the other employee lacks sufficient detail to determine whether its treatment of that employee is applicable in an analysis of Appellant's case. Second, the Agency did not establish that the other pregnant employee was on probation. Instead, Agency testimony tends to suggest she was a career-status employee. Assuming this to be true, it means the Agency would have been required to prove just cause for the termination in the first instance. This alone might have been sufficient motivation to avoid terminating that employee, whereas

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[5] The definition of "disabled individual" under CSR Rule 1, in relevant part, is: "An individual who (1) has a physical or mental impairment which substantially limits one or more major life functions; or (2) has a record of such impairment; or (3) is regarded as having such an impairment.... " This language is virtually identical to that found in the ADA's definition or disability, at 42 U.S.C. sec. 12102 (2). *Applied,* In the Matter of Robert Stone, Appeal No.12-01 (Decision entered April 14, 2001).

[6] *See, e.g.* Richards v. City of Topeka, 173 F.3d 1247 (10th Cir. 1999), in which the plaintiff, an apparatus operator for the Topeka City Fire Department, filed suit under the Americans with Disabilities Act ("ADA") and the Pregnancy Discrimination Act ("PDA") when the City regarded her as "disabled" by her pregnancy and placed her on modified duty because of her pregnancy, despite evidence that she was not disabled by her pregnancy and could continue on a full-duty status.

[7] In Horizon (*above*), the employer deemed the plaintiff not qualified for modified duty because she was not injured on the job, which was one of the requirements for modified duty. The Court in Horizon held that this did not defeat the plaintiff's *prima facie* showing of discrimination because it was an objective qualification not relevant to whether the plaintiff was actually capable of doing a modified assignment.

[8] The hearing officer takes the Agency's additional complaints about Appellant's performance as part of the legitimate business justification for terminating Appellant, and her arguments in response as part of her allegations that these constituted a pretext for discrimination.

the Agency bore no such burden in this case. The hearing officer therefore finds this illustration unpersuasive.

a. Appellant's prima facie case.

Recalling the elements of a *prima facie* showing of pregnancy discrimination set forth in Burdline, *above,* Appellant must show: (1) she is a member of the protected group; (2) she was qualified for modified-duty position(s) sought; (3) she was denied the modified-duty position(s); and (4) the denial occurred "under circumstances which give rise to an inference of unlawful discrimination."

The hearing officer is aware that the *prima facie* test in Horizon presumes the employee has requested modified duty and that it has been denied. The Agency has argued that Appellant never specifically requested modification in her duty because of her pregnancy. However, this may be a problem with the applicability of the existing *prima facie* standard, rather than with Appellant's evidence. The fact is that illness and the resulting disability associated with pregnancy can be unpredictable and sporadic. In any event, though, it is reliably temporary.[9] Appellant did call in each time she was experiencing difficulty and provided doctor's notes for her absences. The hearing officer is inclined to consider Appellant's calling in sick or late in association with her symptoms, and requesting time off for doctor's appointments, as requests for modification and / or accommodations.

In light of these considerations, the hearing officer finds the following. Appellant has shown that 1) she was a member of the protected class, being pregnant during the time in question. The hearing officer further finds that 2) any modification of duties required by Appellant's condition, as she alleges it was affected by her pregnancy, would only have involved modifying her existing duties, for which she would have remained qualified.

In addition, the Agency apparently counted pregnancy-related absences against her in its decision to terminate her. Using these absences against her in a termination can clearly be seen as a denial of her request for such accommodations. The hearing officer therefore further finds Appellant has facially shown that 3) she was not provided modified duty which took into account the attendance complications of her pregnancy,

Finally, the hearing officer finds that 4) the Agency's inclusion of Appellant's chronic attendance problems which were, at least in part, directly related to her pregnancy, "give rise to an inference of unlawful discrimination." Therefore, Appellant's allegations clear the hurdle of a *prima facie* showing of discrimination sufficiently to shift the burden to the Agency to proffer a legitimate business explanation for terminating her. [10]

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[9] Appellant also complained of having to push the file cart around. Unlike Appellant's attendance problems, this duty was a specific issue for which Appellant could have requested modified duty, but did not. Appellant cannot expect the Agency to read her mind and modify such a duty if she does not request it. The hearing officer has therefore disregarded this issue.

[10] *Cf.,* Horizon, *above,* where the employee requested duty modifications and was denied as unqualified for modified duty since her disability did not arise from a work-related injury.

b. The Agency's legitimate business reasons for terminating Appellant.

The Agency rebutted Appellant's assertion that her attendance complications were associated strictly with her pregnancy. During Mr. Bottinelli's testimony, he reviewed Appellant's attendance records during her six-month tenure under the CityWorks program when she was not pregnant. He observed approximately 70 hours of absence (an average of twelve hours per month) during that time. In addition, Ms. Calderon, who was on the management team, testified the team decided to hire Appellant on a probationary basis from the CityWorks program despite concerns over her attendance habits, because she was already trained.

In addition, a review of the attendance record in Exhibit 4 illustrates that Appellant's absences and instances of tardiness apparently involving her own physical condition comprise only part of her attendance difficulties. Even assuming every single instance of Appellant's leave use for herself is associated with her pregnancy-related complications, there are still at least six remaining instances of absence involving Appellant's family members. On February 22 and 25, Appellant was absent due to her son's illness. On March 18, she was again absent the entire day to take her son to the doctor. On March 21, Appellant was absent half the day due to "husband." On May 3, she was absent due to her daughter's illness. Finally, Appellant was absent the entire day on May 17, 2002 because Appellant fell and hurt her back.

In light of the totality of this evidence, the hearing officer finds it more likely than not that the Agency had legitimate business concerns over Appellant's attendance problems that were unrelated to her pregnancy.

Furthermore, the Agency proffered reasons for terminating Appellant that were unrelated to her attendance problems. While occasional personal calls during work hours are acceptable, Mr. Bottinelli, Ms. Calderon and Ms. Romero all observed Appellant on the line for lengthy periods of time, during which Appellant's demeanor clearly suggested she was discussing personal business. On one occasion when Mr. Bottinelli was working nearby Appellant's desk, he picked up her line after it rang repeatedly and an operator announced a collect call. It seems more likely than not that if this had been a wrong number, the other party would at least have inquired as to the identity of the recipient, or asked the operator to do so. Instead, the other party suspiciously disconnected.

In addition, the Agency provided evidence tending to suggest that Appellant's performance was not adequate. Ms. Romero and other co-workers had to pull Appellant's systems checks for her on at least two separate occasions. On April 16, 2002 the Agency issued a verbal warning to Appellant for failing to complete her assigned systems checks in time for scheduled morning meetings on April 9, and again on April 16.

Finally, the supervisors responsible for determining that termination was appropriate took into consideration that Appellant's performance would likely not improve because probationary employees typically do their best in light of their probationary status. They therefore concluded it was unlikely that her performance would improve.

In light of all this evidence, the hearing officer concludes that the Agency has proven by a preponderance of the evidence that it had legitimate business reasons for terminating Appellant which were unrelated to her pregnancy.

c. Appellant's evidence of pretext.

Appellant claims that Mr. Bottinelli's treatment of her changed when she told him she was pregnant in late January or early February 2002, implying Mr. Bottinelli discriminated against her because of her pregnancy, and that therefore the Agency's stated reasons for terminating her are a pretext for discrimination. Yet Mr. Bottinelli did not begin supervising Appellant until around the second week in January of 2002 (*see,* Exhibit 5), only two or three weeks before she told him she was pregnant. The hearing officer is not persuaded that Appellant had sufficient time to ascertain Mr. Bottinelli's demeanor toward her to convincingly allege this. In addition, Appellant stated twice in her testimony that she suspected Mr. Bottinelli did not like her personally. Assuming this were true, it is not an argument in support of discrimination. Instead, personal dislike suggests a motivation for terminating Appellant that is unrelated to her protected status, and is therefore antithetical to her claim of discrimination.

Appellant further asserts her attendance complications began when she became pregnant, again implying that allegations of poor attendance are a pretext for discrimination. However, Appellant failed to timely proffer documentation or call any witnesses tending to demonstrate that her attendance was not a problem before she became pregnant, or that her excessive absences during the period in question were associated strictly with her pregnancy. And while considering Appellant's pregnancy-related attendance complications as a partial basis for her termination can clearly be seen as improper, additional attendance problems unrelated to Appellant's pregnancy care is clearly a legitimate business concern for the Agency. Appellant has therefore failed to show that the Agency's consideration of her excessive absences constitute a pretext for discrimination.

Appellant argued that the phone calls she was observed engaging in were business-related, misdirected calls which she chronically received. However, the Agency proffered three persuasive eyewitness accounts of Appellant using the telephone for personal business during work hours. There was virtually no evidence tending to demonstrate that Appellant's phone usage was typical of other file clerks. Appellant offered no explanation why she would be receiving such a disproportionately large volume of misdirected calls. The hearing officer is not persuaded that the Agency's consideration of Appellant's excessive phone usage in its decision to terminate her constitutes a pretext for discrimination.

Appellant asserts she spent more time helping the deaf employee whose desk adjoined hers than did the other file clerks, and that her time was further compromised by her coverage of the reception desk. However, while the hearing officer recognizes these complications as legitimate and evidently unfair, she remains unpersuaded that Appellant's failure to complete her work resulted solely from these causes. Instead, it is more likely than not that Appellant's excessive use of the telephone, combined with numerous absences (many of which were unrelated to her pregnancy) contributed to her time management difficulties. In any event, Appellant's arguments once again do not show any intent on the part of the Agency to discriminate against her.

Finally, Appellant argues that the Agency's performance-related justifications for her termination are a mere pretext since other employees experiencing similar performance-related difficulties were not disciplined and she was. Once again, the hearing officer is unpersuaded by Appellant's arguments of disparate treatment. First, there has been no suggestion that the Agency was aware of other employees excessively using the telephone. Second, while Ms. Romero did admit that the file clerks helped one another with their work on occasion, Mr. Bottinelli and Ms. Calderon were unaware of other file clerks failing to complete morning systems checks, and Appellant offered no evidence to establish that they did know. She offered no specific dates and no witnesses to corroborate such a claim. Appellant's argument of disparate treatment over performance considerations must therefore fail.

As the party claiming discrimination, Appellant ultimately bears the burden of proving it is more likely than not that the Agency took actions complained of because of her protected status. *See,* Kendrick v. Penske, *above.* When considering all this evidence, the hearing officer concludes the Agency had legitimate business reasons for terminating Appellant, and is unpersuaded that the Agency's stated business reasons for terminating Appellant are a mere pretext for intentional discrimination.

CONCLUSIONS OF LAW

1. Appellant has made a *prima facie* showing that she was qualified for protection under the CSR rules prohibiting discrimination against her because of her pregnancy, sufficiently to shift the burden to the Agency to proffer a legitimate business explanation for terminating her.

2. The Agency has shown by a preponderance of the evidence that it had legitimate business reasons for terminating Appellant that were unrelated to her pregnancy.

3. Appellant has failed to demonstrate by a preponderance of the evidence that the Agency's stated business reasons for terminating her were a pretext for discrimination against her because of her pregnancy.

DECISION AND ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to terminate Appellant is AFFIRMED.

This case is hereby DISMISSED.

Dated this 24th day of September, 2002.

Joanna Lee Kaye
Hearing Officer for the
Career Service Board