

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

Appeal No. 87-06

DECISION

IN THE MATTER OF THE APPEAL OF:

MICHELLE FELIX

Appellant,

vs.

DEPARTMENT OF HUMAN SERVICES,
and the City and County of Denver, a municipal corporation,
Agency.

I. INTRODUCTION

The Appellant, Michelle Felix, appeals her employer's decision to deny her request to transfer from one working unit to another. The Appellant claims her employer's denial was motivated by unlawful discrimination based upon her race. A hearing concerning this appeal was conducted on December 15, 2006 by Bruce A. Plotkin, Hearing Officer. The Appellant represented herself. The employer, Department of Human Services (Agency), was represented by Diane Briscoe, Assistant City Attorney.

Appellants Exhibits A-C and Agency Exhibits 1-6 were admitted. The following witnesses testified for the Appellant: Ge Horn, Julie Bock, Diane Tilley, Cheryl Wentworth, and the Appellant. Jennifer Fairweather, Whitney Kramish, and Juanita Sanchez testified for the Agency.

II. ISSUES

The only issue to decide is whether the Agency's denial of the Appellant's request - to transfer from the Intake unit to the Ongoing unit of the Adult Protection Services Section of the Agency - was motivated by unlawful discrimination.

III. FINDINGS

The Agency is the welfare department for Denver. It is divided into the Family and Children's Section, and the Adult Services Section. The Appellant works in the Adult Services

Section. The Adult Services Section contains subdivisions including Adult Protective Services, which is responsible for the aging and the younger, developmentally-delayed populations. Adult Protective Services is further divided into one Intake Unit and two Ongoing Units. Seven to eight social workers serve each unit. The Intake Unit social workers, as the title suggests, take referrals from the police, hospital social workers, firemen, and other sources. Under state law, they must investigate allegations of adult abuse, neglect, or financial exploitation within three days. If the Intake social worker deems there is a case the Agency will retain, the case is transferred to one of the two Ongoing Units. Those social workers retain the case for as long as there is an adult protection issue. [Horn testimony].¹ Although social workers in both the Intake and Ongoing Units perform many of the same functions, there are substantial differences. Intake workers must be able to handle the more stressful aspects of social work, as they receive cases in crisis. They must be able to think and evaluate cases quickly, and effectively. The pace is much faster than for the Ongoing Units. [Wentworth, Fairweather testimony]. Intake workers need to be able to react to quickly-changing crises, and therefore feel comfortable with less control over their days than Ongoing workers. [Wentworth testimony].

The Appellant has been a social worker in the Agency for eight and one half years, first in the Family and Children's Section, the remainder in Adult Protective Services. In the Family and Children's Section she was an Ongoing Unit worker. [Appellant testimony]. At all times pertinent to this appeal, her immediate supervisor was Whitney Kramish, and her second-level supervisor was Doris Puga.

Before 2001, there was one Ongoing Unit and one Intake Unit in Adult Protective Services. In 2001, as a result of restructuring, a second Ongoing Unit was created. All social workers in Adult Protection Services, including the Appellant, were provided a questionnaire which asked for their preferences as to which unit, Intake or Ongoing, they wished to be placed. [Horn testimony]. No interview or other formality was required. Some workers transferred from one Ongoing Unit to another Ongoing Unit, and some transferred from the Intake Unit to one of the Ongoing Units. The Appellant was awarded her first choice, to be placed in an Ongoing Unit under then-supervisor Marion Parsons. [Appellant testimony]. The supervisors collectively made the ultimate decision as to where the applicants would be placed. Puga and Sanchez were supervisors at that time, and would have had input into the placement decisions. [Bock testimony]. To date, there remains no written policy establishing the parameters for transferring between units.

In February 2006 Whitney Kramish became the Appellant's immediate supervisor when her former supervisor retired. Kramish previously was employed as a case worker in Boulder for one year, and performed other social work since 2001. The Appellant believed Kramish did not have sufficient experience as a supervisor, so in August 2006, the Appellant requested a transfer to Wentworth's Ongoing Unit by asking Wentworth directly. Wentworth told the Appellant she had no objection, but explained the decision was not hers alone, and directed the Appellant to Puga. A supervisory committee consisting of a Hispanic (Puga) and two Caucasians (Wentworth and Kramish) denied the Appellant's request. The committee members determined the Appellant's request was based upon her personal preference

¹ Horn is a Senior Social Case Worker in the Adult Protective Services Section.

between supervisors, and agreed it would set a poor precedent to allow supervisor-shopping. [Exhibit 3, Wentworth testimony]. Division Director Juanita Sanchez concurred in the committee's decision and the reason for it. [Exhibit 4, Sanchez testimony]. The committee members stated they would support an informal-process transfer if the Appellant wished to transfer from her Ongoing Unit to an Intake Unit, but the Appellant declined. [Fairweather testimony, Exhibit B]. Other lateral transfer opportunities were open to the Appellant, albeit with the same formal process required of any applicant. *Id.*

On September 25, 2006, the Appellant filed a formal complaint concerning the denial of her transfer, alleging the Sanchez and Puga denied her request to transfer, while the same supervisors allowed Caucasians to transfer between units. [Exhibit B]. As a result of the complaint, Jennifer Fairweather, Director of Human Resources at the Agency, undertook an informal inquiry. She concluded Puga has allowed workers to transfer "between functional areas" such as between Intake and Ongoing units, but has never allowed a transfer from one Ongoing Unit to the other simply as a preference of supervisor, as was the case here. Fairweather determined that a full investigation into the Appellant's complaint was not warranted. [Fairweather testimony]. The Appellant then perfected her appeal on October 17, 2006.

IV. ANALYSIS

A. Jurisdiction

The Appellant claims two of her supervisors, Juanita Sanchez and Doris Puga, unlawfully discriminated against her based upon her race. [Appellant Appeal, Appellant testimony]. The Appellant's principal complaint is she was singled out as the only person who was required to submit to a formal application process in order to transfer from one unit to another, while other White social workers were transferred without a formal process. [Appellant testimony]. I find I have jurisdiction of the Appellant's discrimination claim under Career Service Rule (CSR) 19-10 B. 1.

B. Burden of Proof

The Appellant retains the burden of persuasion, throughout the case, to prove unlawful discrimination on the basis of race, by a preponderance of the evidence. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-512 (U.S., 1993). The Appellant bears the initial burden of production to make a prima facie showing that the Agency discriminated against her on basis of her membership in a protected class, in this case, race. If the Appellant meets that obligation, the burden shifts to the Agency to produce evidence of a legitimate, non-discriminatory reason for the action. If the Agency does so, the plaintiff may then show the defendant's proffered reasons are, in reality, a pretext for unlawful discrimination. Sanchez v. Denver Pub. Sch., 164 F.3d 527, 531 (10th Cir. 1998) (internal cites omitted).

C. The Appellant's Prima Facie Case

In order to establish a prima facie case of discrimination the Appellant must show: 1) she is a member of a protected class; 2) she suffered an adverse employment action; 3) she was qualified for the position at issue; and 4) she was treated less favorably than others not in the protected class.

1. Protected Class.

There was no dispute that the Appellant's race, African-American, satisfies this element of proof.

2. Adverse Employment Action.

An adverse action is an employment action which affects pay, benefits or status. Sanchez v. Denver Public Schools, 164 F.3d 527 (10th Cir. 1998). The Appellant's evidence supports the finding that the transfer she sought did not involve a change in pay, benefits or status). [Horn, Wentworth, Tilley cross-exam, Appellant testimony].

The denial of a lateral transfer is not an adverse employment action as a matter of law. McCrary v. Aurora Pub. Schs, 57 Fed. Appx. 362, 368-369 (10th Cir. 2003), Henderson v. UPS, 2006 U.S. Dist. LEXIS 37302, 37-38 (D. Colo. 2006), Sanchez v. Denver Public Schools, 164 F.3d 527 (10th Cir. 1998). Because the Appellant failed to establish this essential element, her prima facie case fails and I need not address whether the Agency denied the transfer for a valid reason. Henderson at 37.

D. The Agency's Response

Even assuming the Appellant had established a prima facie case, the Agency established a legitimate, non-discriminatory business reason to deny the Appellant's requested transfer. The four supervisors who unanimously agreed to deny the Appellant's transfer request all believed it would set a bad precedent to allow social workers to transfer based only upon their preference for a particular supervisor. [Wentworth, Kramish, Puga, Sanchez testimony].

E. Appellant's Pretext Argument

1. Dianne Tilley and Ge Horn were allowed to switch units without formal application. [Exhibit C, p.2].

The Appellant established both Tilley and Horn, who are Caucasian, were allowed to transfer between two Ongoing Units without formal process, [Tilley and Horn testimony], while she was required to submit to a formal application. [Appellant testimony, Exhibit C]. The Appellant's assumptions are incorrect. In 2001, at the time Tilley and Horn transferred, all workers, including the Appellant, were invited to submit their preference as to which unit they preferred. The Appellant was granted her first preference at that

time. Therefore, while it was true that Tilley and Horn were allowed to transfer between two Ongoing Units, the same option was open to the Appellant. At that time, circumstances were substantially different in that the division was reorganizing. No social worker since then has been allowed to transfer simply to satisfy a preference of supervisors. In addition, the Agency policy, albeit unwritten, denies transfers between units with the same function, as sought here by the Appellant.

2. No Caucasian or Hispanic had to submit to a formal application and interview process in order to change units.

The Appellant presented Bock as an example of this proposition. Bock, a Caucasian, transferred between functional units, from Intake to Ongoing, at the end of 2005. [Bock testimony]. Bock's transfer was therefore consistent with the Agency legitimate stated business purpose of allowing only transfers between functional units, and not merely to change supervisors.

The Appellant also presented witness Ge Horn, a Caucasian, for the proposition that Horn transferred from one Ongoing Unit to another Ongoing Unit, which would negate the Agency's position that informal transfers are allowed only between functional units. Horn transferred in 2001 without formal process; however Horn was unsure who the supervisors were at the time, [Horn testimony], making it unclear if Horn was similarly situated to the Appellant. Moreover, as previously stated, the option to transfer in 2001, even within the same functional unit, was available to all social workers including the Appellant, and the Appellant received her first choice of transfer without a formal process, as did Horn. [Appellant, Horn testimony].

3. Caucasian social workers were allowed to transfer within the same functional units simply in response to their preference for a different supervisor.

In response to the Agency claim that transfers were not allowed only for the purpose of changing supervisors, the Appellant claimed another social worker was allowed to transfer between supervisors because she did not like her then-current supervisor. [Wentworth testimony]. Wentworth denied this claim, stating she and other supervisors decided to transfer that social worker due to performance issues, specifically, not keeping up with the pace required in the Intake Unit. The supervisors decided the pace in Ongoing was better suited to her abilities. Thus neither of the Appellant's assumptions was true. The social worker transferred between functional units, and the transfer was not due to her stated preference of supervisors.

The Appellant also stated another social worker was allowed to transfer to his preferred supervisor. It was unclear what that worker's race is, a necessary element. Also, Wentworth and Kramish replied that transfer occurred between functional units and was also imposed for performance reasons. [Exhibit 5, Wentworth testimony].

V. CONCLUSION AND ORDER

The evidence does not support the Appellant's claim that the denial of her request to transfer between two Ongoing Units was motivated by unlawful discrimination. Each of the Appellant's averments was either not established by the evidence, or was rebutted by her own or Agency witnesses. This appeal is therefore **DISMISSED WITH PREJUDICE**.

DONE January 29, 2007.



Bruce A. Plotkin
Hearing Officer
Career Service Board

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq.*, within fifteen calendar days after the date of mailing of this Decision as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or facsimile transmission as follows:

BY MAIL OR PERSONAL DELIVERY:

Career Service Board
c/o Employee Relations
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY FAX: 720-913-5720. Transmissions of more than ten pages will not be accepted.