

**CAREER SERVICE BOARD,
CITY AND COUNTY OF DENVER, STATE OF COLORADO**

Appeal No. 82-07a

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

MICHELLE FELIX, *pro se*
Appellant-Petitioner

vs.

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

This matter is currently before the Career Service Board ("Board") on the Appellant's Petition for Review. Having reviewed and considered the record on appeal, the Board **AFFIRMS** the Hearings Officer's Decision dated February 14, 2008 on the grounds outlined below.

I. PROCEDURAL AND FACTUAL BACKGROUND

Appellant was disqualified from her employment as a Senior Social Caseworker with the Agency on November 21, 2007. The disqualification arose after Appellant, who had been on leave for medical reasons since mid-June 2007, exhausted all of the family and medical leave to which she was entitled and then provided the agency with a physician's certification indicating that she was unable to return to work except under a new supervisor.

The Agency thereafter initiated the interactive process during which Appellant's physician provided the City's ADA Coordinator with additional and clarifying information indicating in relevant part that: (1) Appellant was capable of performing the essential functions of her position but only if assigned to a new supervisor; (2) Appellant could return to work under the permanent restriction that she had to work under a different supervisor; and (3) the only reasonable accommodation that would allow Appellant to return to work was to be assigned to work under a different supervisor. Without making any determination as to whether Appellant was or was not "disabled" within the meaning of the Americans with Disabilities Act (ADA), the ADA Coordinator

concluded that assignment to a new supervisor was not a reasonable accommodation and referred the matter back to the Agency, at which time disqualification proceedings were initiated.

Appellant thereafter filed an appeal of her disqualification with the Career Service Hearings Office. Her appeal form indicated that she was filing a direct appeal of her disqualification and alleging that the disqualification was a result of race and/or disability discrimination, harassment based on race, and retaliation for her filing of a disability discrimination claim with the EEOC. The appeal form also purported to be an appeal the Agency's failure to respond to her grievance dated October 23, 2007. In a subsequently filed Amended Prehearing Statement, Appellant indicating that she was also asserting claims for retaliation based on whistleblowing activities, breach of an employment contract, infliction of emotional distress, and violations of constitutional rights to free speech and due process.

The Hearing Officer conducted a pre-hearing conference on January 30, 2008 to identify and narrow the issues to be presented at hearing. The primary issue addressed during the pre-hearing conference was whether the Hearing Officer had jurisdiction to grant the various remedies sought by Appellant. During her lengthy discourse with the Hearing Officer during the conference, Appellant admitted that at the time of her disqualification she had made it clear to the Agency that she would not return to work unless and until she was assigned a different supervisor, and further admitted that she was otherwise capable of performing the essential functions of her position. She also clearly stated that she would not accept reinstatement if ordered by the Hearing Officer unless conditioned on a permanent assignment to a different supervisor.

Based on Appellant's statements and the filings of record, the Hearing Officer found that the only remedy acceptable to Appellant for all of her claims was reinstatement under a different supervisor, which was a remedy he had no authority to grant. Citing to prior decisions holding that dismissal is appropriate where the hearing officer is without jurisdiction to grant the only relief acceptable to an appellant,¹ the Hearing Officer dismissed the appeal.

Appellant petitions for review of this order of dismissal under CSR 19-61 E, lack of jurisdiction.

II. FINDINGS

The Hearing Officer properly concluded that he does not have the authority to award Appellant the relief she requested. Under CSR 19-55, the Hearing Officer's authority is limited to issuing a decision affirming, modifying, or reversing the action which gave rise to the appeal. The action that gave rise to Appellant's appeal was her disqualification from employment. The Hearing Officer's authority was thus limited to affirming, reversing or modifying the Agency's disqualification. As such, if Appellant

¹ *In re Valdez*, CSA 96-06 (11/16/06); *In re Herzog*, CSA 23-05 (5/26/05).

were to succeed on the merits of her appeal, the Hearing Officer could require the Agency to reinstate Appellant to her former position and restore the status quo, but not to dictate that she be assigned to a different supervisor. That authority belongs solely to the Agency. Because Appellant has affirmatively stated that she is unwilling or unable to accept reinstatement as a remedy unless a change in supervision is also ordered, the Hearing Officer was correct in concluding that he lacked authority to grant the relief Appellant has requested.²

The Board recognizes that there might be circumstances under which a Hearing Officer, having concluded that cause did not exist for a disqualification, might find that reinstatement is not an appropriate remedy but order the agency to restore at least a portion of the appellant's pay and benefits. Such circumstances do not exist here. Appellant would not be entitled to restoration of pay and benefits in light of the established fact that she was unwilling or unable to return to work at the time of her disqualification without a change of supervisors, which was a condition that the Agency was not required to and did not agree to accept.

Finally, the Board points out that under these specific facts, even if the Hearing Officer could be said to have committed an error in dismissing this appeal on the jurisdictional grounds stated, dismissal would have nonetheless been appropriate given the undisputed facts already established at the time of the pre-hearing conference. The law in this jurisdiction is clear that assignment to a different supervisor is not a "reasonable accommodation" under the ADA. Therefore, even if Appellant could prove at a hearing that she was "disabled" within the meaning of the ADA,³ the Agency had no duty to accommodate her restriction of not working under her assigned supervisor. *MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1276 (10th Cir. 2005); *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1176 (10th Cir. 1997). See also, *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 33 (EEOC Notice No. 915.002, Oct. 17, 2002).

Geuss v. Pfizer, Inc., 971 F.Supp. 164 (E.D. Pa. 1996), the case to which Appellant cites for the proposition that a change in supervisors may constitute a reasonable accommodation, is unavailing. The requested transfer that the court found would have been a reasonable accommodation in that case involved both a significant change in job duties and a change of supervisors. Here, it is clear from the record that Appellant sought to be transferred to a different supervisor without any change in her duties or the clients she would serve. Moreover, to the extent that *Geuss* could be construed to hold that reassignment to a different supervisor may constitute a reasonable

² Because the Hearing Officer is limited to affirming, modifying or reversing the action giving rise to the appeal, he is also without authority to grant her other requested remedies, including awards for medical expenses, compensatory damages and punitive damages; ordering the removal of negative comments in her PEPR, and ordering the agency to issue a letter of apology.

³ As a matter of law, Appellant could not have proven that she was "disabled" under the ADA and CSR 14-20 given her restriction. Because the inability to work under one's assigned supervisor is not a "substantial limitation on a major life activity," Appellant could not have established that she was an "individual with a disability" under the ADA. *MacKenzie, id.*

accommodation under the ADA it is contrary to the established law of this jurisdiction under *MacKenzie and Siemon*.

III. ORDER

IT IS THEREFORE ORDERED that the Appellant's Petition for Review is **DENIED** and the Hearing Officer's Decision dated February 14, 2008 is **AFFIRMED**.

SO ORDERED by the Board on June 5, 2008, and documented, this 19th day of June, 2008.

BY THE BOARD:


Co-Chairperson

Board Members Concurring:

Tom Bonner
Nita Henry
Kit Williams