

ORDER DISMISSING APPEAL WITHOUT PREJUDICE

IN THE MATTER OF THE APPEAL OF:

KIM FRAZIER,
Appellant,

vs.

CAREER SERVICE AUTHORITY,
and the City and County of Denver, a municipal corporation, Agency.

BACKGROUND

This is a pro se appeal of a layoff decision alleging race, color, sex, religious/creed, and disability discrimination as well as retaliation. The effective date of the layoff is May 2, 2008.

The Agency filed its "Motion to Dismiss for Failure to State a Claim for which Relief can be Granted" on April 16, 2008. The pro se Appellant's "Motion to Reconsider" was filed April 25, 2008 and is deemed to be her timely response to the Agency's motion. Appellant states she does not understand the reasons for the layoff or the layoff process. She suspects that the reasons for her layoff and its processing are discriminatory. The Agency moves for dismissal on the grounds that the appeal does not state a claim upon which relief can be granted. Upon consideration of the motion, the response, appeal documents, and applicable law, the Hearing Officer rules as follows.

APPLICABLE AUTHORITY

In an agency motion to dismiss, statements in the appeal must be viewed in the light most favorable to the appellant, all appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as she alleges them would entitle her to relief. In re Van Dyck, CSA 143-05, 1(2/16/06), *citing Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996).

In Velasquez v. Dept. of Higher Education, 93 P.3d 540 (Colo.App. 2003), the Colorado Court of Appeals held that a state employee has the burden of proof in an administrative lay-off because "a discharge for job abolishment does not implicate state constitutional protections." Id. at 543. The Hearing Office has applied that principle to appeals of non-disciplinary layoffs by city employees. See In re Golden, CSA 153-03, 2 (1/12/04). In the appeal of a layoff, the Appellant must establish by preponderance of the evidence that the Agency action in abolishing the Appellant's position was arbitrary,

capricious and without rational basis or foundation. In re Nguyen, CSA 169-03 (2/18/04).

AGENCY'S CLAIMS

The Agency basis its motion upon the following claims.

1. The Appellant has designated no witnesses.
2. The only exhibit endorsed by the Appellant is the Agency's Entry of Appearance.
3. Without witnesses or exhibits the Appellant cannot meet her burden of proof on any claim.

APPELLANT'S RESPONSE

The Appellant responded as follows.

1. Burden of Proof.

The Appellant seeks to change the burden of proof from her to the Agency. For reasons stated above, the burden of proof for layoff and discrimination claims lies with the Appellant. See *also* In re Roberts, CSA 179-04, 5 (6/29/05), *citing* McDonnell Douglas v. Green, 411 U.S. 792 (1973). Therefore this claim is denied.

2. Discrimination.

Intentional discrimination under CSR § 15-101 is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence that supports an inference that discrimination caused the adverse employment action. In re Johnson, CSA 135-05, 3(3/10/06).

In support of her claims of discrimination based on color, race, and sex, Appellant states that she was "the only Black female in Administration." While Appellant established the first two prongs of a claim of intentional discrimination, even when viewed in the light most favorable to her, she did not state a claim linking her color or race to an adverse agency action, without which her color and race discrimination claims fail.

Appellant asserts that she had incurred work related injuries but does not relate her disability to an adverse agency action.

Appellant states she is over the age of 40. However, she has not provided a claim supporting an inference that age discrimination played a part in the layoff.

In support of her allegations of discrimination based on religion and creed, Appellant did not provide evidence of membership in a protected class.

3. Retaliation.

A retaliation appeal must allege that the Agency retaliated because Appellant engaged in some protected activity. CSR § 15-106. Appellant has failed to do so.

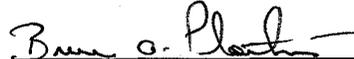
4. Other claims.

Appellant asserts the Agency has not adequately explained its reasons for her layoff and that it has not placed her on any reinstatement lists as of the effective date of the layoff. Appellant has not endorsed witnesses to support her claims, but has provided exhibits as follows: an excerpt from Insight listing new hires in 2008; job fair job opening and recruitment announcements; an April 24, 2008 printout of Appellant's "Master Record" listing the city jobs she has applied for and their disposition; the eligible lists on which she appears; the referrals list and the disposition of each referral; correspondence from the CSA Recruitment Division regarding applications for employment received by the City; portion of an application form submitted for the position of Advocacy Program Administrator; portions of Rule § 3-42 Re-instatement List.

The Appellant has failed to state a claim for which relief may be granted as to any of these averments. Her claim regarding the Agency's failure to place her on a reinstatement list is premature, as the Agency is not required to do so until after the date of her layoff, May 2, 2008. Career Service Rule 3-42 B.

Because the Appellant has failed to state a claim for which relief may be granted, the Agency's motion is GRANTED IN PART, AND DENIED IN PART only as to dismissal with prejudice. If the Agency fails to comply with the rule on reinstatement lists, the Appellant may re-appeal that claim

DONE April 30, 2008.



Bruce A. Plotkin
Career Service Hearing Officer

I certify that on April 30, 2008 I sent a correct copy of this Order to the following in the manner indicated.

Ms. Kim Frazier, 3320 Josephine St. , Denver, CO 80205 (via U.S. mail);
Robert A. Wolf, Assistant City Attorney, Dlefilng.litigation@denvergov.org (via email);
Mr. Jeff Dolan, Director, Jeff.Dolan@denvergov.org (via email).



S:/Share/hearings/Cases/Frazier,Kim24-08/Order Dismissing Appeal.doc