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

Appeal No. 175-04

DECISION

IN THE MATTER OF THE APPEAL OF:

GLORIA GARCIA, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Ms. Gloria Garcia, appeals the termination of her employment, by the Career Service Authority, for alleged violations of certain Career Service Authority Rules (CSR), and specified Agency regulations. A hearing concerning this appeal was conducted June 3, 2005 by Hearings Officer Bruce A. Plotkin. The Appellant was present and represented by Gordon Thompson, Esq. The Agency was represented by Robert Wolf, Esq., with Personnel Director Kelly Jean Brough (Brough) serving as the Agency's advisory witness.

Agency Exhibits 1-17 were admitted without objection. The Appellant presented no additional exhibits.

The Agency presented Ms. Brough as its only witness. The Appellant testified for her case-in-chief, and also presented Emilly Torrez as her only other witness.

II. ISSUES

The following issues were presented for appeal:

A. whether the Appellant was in violation of CSR 16-50 A. 10), 18), 20), CSR 16-51 A. 4), 5), 7), or 11);

B. whether the Appellant has stated a claim upon which the Hearings Officer has jurisdiction to grant relief;

C. whether the Agency engaged in wrongful discrimination or retaliation against the Appellant;
D. If the Appellant violated any of the above-referenced rules, order or regulations, whether the Agency's termination of employment was reasonably related to the seriousness of the offense and took into consideration the Appellant's record.

III. BACKGROUND

During the time pertinent to this appeal, the Appellant was the front desk receptionist for the Career Service Authority, which is the human resources agency for the City and County of Denver employees. She held the classification of Administrative Support Assistant II, and reported directly to Debbie Saraceno. Brough was her second-level supervisor.

On November 10, 2004, during working hours, the Appellant forwarded a joke e-mail to 20 acquaintances within and outside the Agency. [Exhibit 1]. The e-mail purported to caution Spanish-speaking employees against using 12 vulgar Spanish slang expressions in the workplace, and was signed “Human Resources Department.” None of the twenty recipients complained directly to the Appellant, but one of them forwarded the e-mail to a division director who reports to Jim Nimmer, the Employee Development Manager. The division director inquired of Nimmer “[w]hy would Kelly [Brough] issue a statement like this?” Nimmer then brought the e-mail to Brough. Brough immediately directed the Appellant to recall the message. She also sent out the e-mail for translation. After receiving the translation, the Agency served its November 24, 2005 contemplation of discipline letter on the Appellant. A pre-disciplinary meeting followed on December 1, 2004. Present were Brough, Staff Assistant Debbie Saraceno, Employee Relations Supervisor Stacy Schalk, the Appellant and her union representative. Following that meeting, the Agency served the Appellant notice of separation from employment on December 8, 2004, effective December 15. This appeal followed the next day, on December 16, 2004.

IV. JURISDICTION

Jurisdiction was not challenged by the Agency. The Hearings Officer finds the subject of discipline of a Career Service employee is a proper matter for resolution at hearing. The Appellant timely filed her appeal and is properly before the Hearings Officer.

V. ANALYSIS OF RULES VIOLATIONS ALLEGED BY THE AGENCY

A. CSR 16-50 A. 10) Discrimination or harassment of any employee or officer of the City and County of Denver because of race, color, religion, national origin, sex, age, political affiliation, sexual orientation or disability. This includes making derogatory statements about a protected class regardless of whether the comments are made directly to a member of the protected class.
The Agency's only evidence related to this rule was Brough's testimony, that had the Agency failed to discipline the Appellant "we could have faced challenges around why we would allow that kind of language to be reflecting on a particular group of people." [Brough testimony]. At other times in the hearing, the Appellant referred to her sending the e-mail to people with Hispanic names. [Appellant testimony]. No evidence was provided that any statement within the e-mail was or may have been derogatory toward Hispanics or any particular protected class, only that it was vulgar language. For this reason, the Agency failed to meet its burden to prove the Appellant violated CSR 16-50 A. 10) by a preponderance of the evidence.

B. CSR 16-50 A. 18) Conduct which violates an executive order.

The Agency disciplined the Appellant for her alleged violation of Executive Order no. 16 ¶ II.G.

Employees should treat e-mail like written memoranda, understanding that messages not appropriate for sending by written memoranda are likewise not appropriate for e-mail.

1. Employees shall not use e-mail to send messages of a threatening, harassing, obscene, vulgar, or profane nature or to violate any law or criminal statute.

The Agency did not define which prohibition, within Executive Order #16, it believed the Appellant violated. The issue here is whether the language in the Appellant's e-mail was obscene or vulgar as contemplated by the rule, since the other prohibitions are clearly inapplicable.

Since Executive Order 16 refers to "any law or criminal statute," guidance as to what is prohibited may be found in Colorado's obscenity statute. Given the definitions therein, the Appellant's e-mail does not seem to meet the definition of obscenity. The Colorado statute defines "obscene" as "material or a performance that: (a) The average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex..." Colorado Revised Statutes (CRS) 18-7-101 (2)(2003), and further defines "material" as "anything tangible that is capable of being used or adapted to arouse [prurient] interest, whether through the medium of reading, observation, sound, or in any other manner...." Id at (1). "Prurient interest" means "a shameful or morbid interest." Id at (6.5). The point of Appellant's e-mail seems to be the ostensible humor created by the shock value of the vulgarity of its language, rather than a shameful or morbid interest in sex, i.e. no sex, no obscenity.

The word vulgar in the context of Executive Order 16 means "coarse or crude." Webster's Unabridged Dictionary (1979). "A vulgar word or phrase... is usually taboo in Standard English, particularly if it is the kind of obscenity that most people consider disgusting, repulsive, or offensive to decency; the use of such language can bring harsh social judgments." The Columbia Guide to Standard American English (1993).
Brough stated "never have we seen [such vulgar and inappropriate] language in an e-mail." [Exhibit 7]. The Agency's Exhibit 2 is the English translation of the e-mail, and is filled with Spanish slang which translates to variations of s___ and f____. The slang is intentionally vulgar, since vulgarity is the point of the humor expressed in the e-mail.

The Appellant responded (1) the recipients all have sent her equally vulgar joke e-mails; (2) her intent was funny and inoffensive because it represents the way "my people" speak, and (3) that no one could reasonably deem the e-mail was an official Agency representation, as the Agency alleges. [Appellant testimony].

First, even if others may have violated the same Executive Order those violations cannot excuse the Appellant's misconduct, unless the Agency applied the proscription in a discriminatory or otherwise improper manner. The Appellant failed to make such a showing. Second, the Appellant's intent, even if harmless, is not relevant to the proscription of Executive Order 16, since Executive Order 16 was designed to prohibit precisely the kind of language expressed in the Appellant's e-mail. Third, for reasons stated below, the Hearings Officer agrees no one could reasonably deem the e-mail was an official Agency document. Nonetheless, the Appellant's e-mail violated the standards of propriety expressed in Executive Order 16. Consequently, the Appellant violated CSR 16-50 A. 18).

C. CSR 16-50 A. 20) Conduct not specifically identified herein may also be cause for dismissal.

The Agency identified the specific conduct of the Appellant's sending the e-mail described above as its basis for discipline. Therefore the Hearings Officer declines to apply this rule.

D. CSR 16-51 A. 4) Failure to maintain satisfactory working relationships with co-workers, other City and County employees or the public.

The only direct evidence presented by the Agency concerning this rule was in its prior discipline of the Appellant. [Exhibit 7-17]. The Agency also presented evidence that at least one employee was offended by the content of the Appellant's e-mail [Exhibit 7-3, Brough testimony], but the Agency failed to present evidence how that offense may have impacted her working relationship with the Appellant. The Agency therefore failed to prove the Appellant violated CSR 16-51 A. 4) by a preponderance of the evidence.

E. CSR 16-51 A. 5) Failure to observe departmental regulations.

The Agency claimed the Appellant violated the following Agency regulation.

CSA Policy – Equipment Usage
Computers:
Computers are to be used for City business purposes only, except during lunch, breaks, before or after work hours...

[Exhibit 7-2].

The Appellant was subject to the Agency's policy concerning equipment use on November 10, 2004. Brough testified that policy was distributed to all CSA employees in October, 2004. [Brough testimony]. The Appellant did not dispute that she received a copy of that policy. The Appellant did not dispute that she used an Agency computer to send Exhibit 1 during her working hours. The November 10, 2004 e-mail was for personal purposes, to entertain the recipients, and served no business purpose. As such, she was in violation of CSR 16-51 A. 5).

F. CSR 16-51 A. 7) Unauthorized operation or use of any vehicles, machines, or equipment of the City and County.

The same facts that established the Appellant violated CSR 16-51 A. 5), above, also establish her violation of this rule.

G. CSR 16-51 A. 11) Conduct not specifically identified herein may also be cause for progressive discipline.

The Agency identified the specific conduct described above as its basis for discipline. Therefore the Hearings Officer declines to apply this rule.

VI. ANALYSIS OF APPELLANT'S CLAIMS AGAINST THE AGENCY

A. Retaliation.

The Appellant claims the Agency's discipline was based upon unlawful retaliation. A retaliation claim under federal employment discrimination law is governed by a framework of shifting burdens of production and proof as described in McDonnell Douglas v. Green, 411 U.S. 792 (1973), Poe v. Shari’s Mgmt. Corp, 188 F.3d 519 (10th Cir. 1999). In order to make a prima facie showing of retaliation, the Appellant must demonstrate: 1) that she engaged in a protected activity; 2) that this exercise of her protected civil rights was known to the Agency; 3) that the Agency thereafter took an employment action adverse to plaintiff; and 4) that there was a causal connection between the protected activity and the adverse employment action. Once the plaintiff demonstrates these elements, a presumption of retaliation is raised. The defendant then has the opportunity to rebut this presumption by articulating some legitimate, nondiscriminatory reason for its decision. The plaintiff, who bears the burden of persuasion throughout the entire process, must then demonstrate by a preponderance of the evidence that the proffered reason was a mere pretext for retaliation. Poe, id.

The Appellant claimed several separate incidents of unlawful retaliation. The Appellant's evidence regarding her first retaliation claim was that she testified on behalf of a co-worker in a separate case, then five days later was terminated in the present
case. [Appellant testimony and Closing Argument], thus establishing the first three prongs of the Poe test. The timing of the Appellant’s termination, five days after her testimony, raises an inference of impropriety under the fourth prong. The Agency responded that its determination to discipline the Appellant was simply upholding Career Service Rules and Regulations against improper use of Agency e-mail. [Brough testimony]. The Appellant failed to answer the Agency. The Hearings Officer finds the Agency had a legitimate, non-retaliatory purpose in upholding its rules and regulations. E-mail use and abuse is a legitimate concern to the Agency, and the Appellant presented no evidence that the Agency application of its rules were an improper pretext for retaliation. Since the Agency rebutted the Appellant’s retaliation claim, the Appellant failed to establish this retaliation claim by a preponderance of the evidence.

The Appellant’s second retaliation claim was that she complained to her supervisors regarding other employee’s work, and was then terminated, although she should have been protected for her whistle-blowing. The Appellant failed to establish that she reported on any unlawful activity for which whistle-blower protection might apply, nor did she provide notice as is required under the act. CRS 24-10-109. Moreover, such claim is outside the jurisdiction of the Hearings Officer. For these reasons, she fails in this claim as well.

The Appellant’s third retaliation claim was that she applied for and was denied a bi-lingual pay differential. In this instance as well, the Appellant failed to state how her application is a protected activity, and failed to state a causal connection between her activity and an adverse Agency action which may demonstrate a retaliatory motive. The retaliation claim thus fails.

Finally, the Appellant claimed the Agency’s failure to promote her to an unspecified position for which she applied was retaliatory. None of the key elements of retaliation was present in this claim. The Appellant’s application for a promotion was not a protected activity. She failed to establish how the Agency’s denial of her promotion may have been connected. She also failed to establish a retaliatory motive by a proximity in time between the failure to promote and the Agency’s firing her. As none of the elements of retaliation was established, the Appellant failed to establish a prima facie case of retaliation here as well.

B. Discrimination.

There are two theories by which city employees may bring discrimination claims. The first is disparate treatment, in which an employee alleges she was subject to an adverse action not imposed on other employees who are not in a protected category. The second theory is that the employer has created a hostile work environment, and involves a pattern of behavior or series of events which, when taken as a whole, may give rise to an inference of discrimination. The Appellant presented some evidence under only a hostile work environment theory.
The Appellant may establish a prima facie case of disparate treatment based upon discharge for violation of a work rule by showing (1) she is a member of a protected class; (2) she was discharged for violating a work rule; and (3) similarly situated non-minority employees were treated differently. When comparing the relative treatment of similarly situated minority and non-minority employees, the comparison need not be based on identical violations of identical work rules; the violations need only be of comparable seriousness. Elmore v. Capstan, Inc., 58 F.3d 525 (10th Cir., 1995).

1. Appellant's Disparate Treatment Discrimination Claim.

The Appellant stated other employees sent her equally vulgar e-mails. She believed most of the senders of the other objectionable e-mails were Hispanic, but did not know if any of them were disciplined for their improper e-mails. [Appellant testimony]. Without establishing how other members of a non-protected group were treated more favorably for similar violations, the Appellant failed to establish a prima facie case for this claim of disparate treatment discrimination.

The Appellant also claimed a Caucasian employee was not disciplined as severely for sending an improper e-mail in which the sender sought contributions toward lottery ticket purchases. The Agency admitted disciplining that employee to a lesser degree, but only because he had no prior discipline, a legitimate Agency consideration in its choice of discipline under CSR 16-10. The Hearings Officer finds the two situations were dissimilar. In addition, the Appellant made no pretext argument to rebut the Agency's legitimate explanation for the difference between the two cases. She thus failed to establish disparate treatment discrimination by a preponderance of the evidence.


To establish a prima facie case of hostile work environment harassment, the Appellant must show under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus. A showing of pervasiveness requires more than a few isolated incidents of racial enmity. The Appellant must produce evidence to show the workplace was permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. Bloomer v. UPS, 94 Fed. Appx. 820 (10th Cir., 2004). The Appellant's only evidence pertaining to this claim was that a prior supervisor asked her not to speak Spanish at an unspecified time. Such evidence fails to establish any conduct that would constitute a hostile work environment.
VII. CONCLUSION

The Agency proved, by a preponderance of the evidence, that the Appellant violated CSR 16-50 A. 18), 16-51 A. 5), and 7), while it failed to establish violations of CSR 16-50 A. 10), 20), 16-51 A. 4), and 11). The Appellant failed to prove the Agency acted in an unlawful manner for any of her claims of retaliation and discrimination. What remains is to determine the propriety of the Agency’s decision to terminate the Appellant’s employment.

VIII. REASONABLENESS OF DISCIPLINE

The Agency is required to assess the degree of discipline that is reasonably related to the seriousness of the offense and that takes into consideration the Appellant’s past record. CSR 16-10. To determine whether the discipline is reasonably related, it must be within the range of reasonable alternatives available to a reasonable, prudent agency administrator. In re Armbruster, CSA 377-01 (3/22/02), citing Adkins v. Div. of Youth Services, 720 P.2d 626 (Colo. App. 1986). In determining whether the discipline is within the range of reasonable alternatives, the hearings officer will not disturb the Agency’s determination of the severity of the discipline unless it is clearly excessive or based substantially on considerations that are not supported by a preponderance of the evidence. In re Armbruster, CSA 377-01 (3/22/02).

The Appellant’s November 10, 2004 e-mail, taken alone, was probably insufficient to merit termination; instead this seems to be a case of the last straw. The determination here is not what discipline the Hearings Officer would assess, but whether the Agency’s determination was within the range of reasonable alternatives available to it. In that regard, the Appellant had already received two suspensions plus a written reprimand all within the past year, [Exhibit 7-8, 7-12, 7-16] for conduct which included a flip attitude toward her supervisors. [Exhibit 7-13, 7-17]. None of the three disciplinary actions was appealed, and thus established a presumption of validity. Brough stated the Agency had considered dismissing the Appellant from employment after her second suspension within the past year, and after this incident, Brough felt she could not change the Appellant’s offending behavior. [Brough testimony].

In response to the Appellant’s offer to correct her “mistake” [Exhibits 5, 6], Brough replied she rejected the Appellant’s suggestions because they placed additional responsibility on the Agency. For example, taking away the Appellant’s e-mail access, or monitoring her e-mails [Exhibit 5-1] would reduce the Agency’s productivity by requiring someone else to reply to e-mails sent to the Agency, or to monitor the Appellant’s e-mails. In response to the Appellant’s suggestion to “issue a friendly reminder and add the correct rule [regarding city e-mail use]” [Exhibit 6-1], Brough stated it would not help, as employees were already clearly reminded what rules pertained to proper e-mail use. Brough’s rejection of the Appellant’s suggestions was reasonable. The Agency should not have to bear the burden of the Appellant’s suggestions.
The Agency made much of a division director’s statement “[w]hy would Kelly [Brough] issue a statement like this?” as a reason the November 10 e-mail was an egregious violation of Career Service Rules, since, as inferred by the statement, it was taken as official policy of the CSA. [Exhibit 7, Brough testimony]. Yet, the statement was allegedly made by an unnamed division director who then told Nimmer, who, in turn related it to Brough, who then repeated the statement at hearing. Such second-degree hearsay is too tenuous to sustain any weight, and there was no indication the speaker was unavailable. For these reason, the Hearings Officer disregards the statement as an aggravating factor in the Agency’s discipline.

Having received three prior disciplinary actions in less than one year, the Appellant raised the range of reasonable alternatives to include termination as a next, logical step in progressive discipline as envisaged by CSR 16-51. Therefore the Agency’s choice to terminate the Appellant’s employment was not clearly excessive. The Agency met its burden to prove the Appellant violated CSR 16-50 A. 18), 16-51 A. 5), and 7) each by a preponderance of the evidence.

For these reasons, the Hearings Officer finds the Agency’s choice to terminate the Appellant’s employment was within the range of reasonable alternatives available to a reasonable, prudent agency administrator. Further, the Agency’s choice was not clearly excessive or based upon considerations that were not supported by a preponderance of the evidence.

IX. ORDER

The Agency’s termination of the Appellant’s employment on December 8, 2004 is AFFIRMED.

DONE this 12th day of July, 2005.

Bruce A. Plotkin
Hearings Officer
Career Service Board