

**DECISION DISMISSING APPELLANT’S RETALIATION CLAIM
AND AFFIRMING WRITTEN REPRIMAND**

DONNA LAWRENCE, Appellant,

v.

DENVER INTERNATIONAL AIRPORT, AIRPORT INFRASTRUCTURE MANAGEMENT,
and the City and County of Denver, a municipal corporation, Agency.

I. INTRODUCTION

Appellant filed an appeal under the Career Service Rules [CSRs], following the denial of her grievance in which she claimed: discrimination based on race, age, and disability; harassment based on those same protected classes; and retaliation for having filed a complaint. All claims except her retaliation claim were dismissed prior to hearing. A hearing concerning the remaining retaliation claim was conducted by Bruce A. Plotkin, Hearing Officer, on October 25, 2016. The Agency was represented by Assistant City Attorney Charles Mitchell, while the Appellant was represented by Stan Gosch, Esq. Agency exhibits 1-7 were admitted, as were Appellant exhibits E, G, and I – K. Appellant testified on her own behalf, and the Agency called Mark Baker.

II. ISSUES

The only issue to decide is whether Appellant’s December 14, 2015 discrimination complaint contributed to or motivated the Agency’s issuance of Appellant’s written reprimand on April 20, 2016.

III. FINDINGS

The Appellant, Donna Lawrence, is a Management Analyst III in the Asset Management Department of Denver International Airport. She began employment there in 2007. On December 14, 2015, she lodged a written complaint against her immediate supervisor, Michael Santos, alleging discrimination, intimidation, harassment and retaliation. In response, the Agency hired an independent investigator. The investigation expanded to include a subsequently-discovered allegation that Lawrence threatened a co-worker. The investigation concluded on April 20, 2016, finding no basis to sustain any of Lawrence’s 12 allegations against her supervisor, but sustaining the allegation that Lawrence threatened a co-worker. That same day, Mark Baker, the Interim Senior Vice President of the Airport Infrastructure Management Division, served a written reprimand on Lawrence for her threat. Lawrence had no prior discipline. Lawrence filed a grievance concerning her written reprimand on May 10, 2016. The grievance was denied on May 27, and this appeal followed timely on June 6, 2016.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR 19-10 A. 2. a., following the denial of Lawrence's complaint. I conduct a *de novo* review, meaning I consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Appellant bears the burden of persuasion, by a preponderance of the evidence, to prove (1) she engaged in a protected activity; (2) the Agency took an action that a reasonable employee would have found materially adverse; and (3) there is a causal connection between the protected activity and the adverse action. Burlington Northern & Santa Fe Ry. V. White, 548 U.S. 53 (2006); In re Koonce, CSB 36-13A (10/16/14); *see also* In re Moore, CSA 103-09, 3 (10/4/10). In the context of a Career Service appeal, an appellant needn't prove retaliation was the only reason for her written reprimand, but only a contributing or motivating factor. Koonce, p.5.

C. Retaliation Claim

1. Protected activity. Lawrence's discrimination complaint is the kind of activity protected from retaliation. Burlington Northern, *supra*.

2. Material adversity. A written reprimand may qualify as an adverse action. Whittaker v. Northern Illinois University, 424 F.3d 640, 648 (7th Cir. 2005).

2. Causal connection. This was the only element in dispute. This element must be determined by circumstances demonstrating a retaliatory motive.

One factor in determining causation is whether there was a very close temporal proximity between the employee's protected act and her employer's subsequent adverse action. Lawrence filed her discrimination complaint on December 14, 2015. Four months later, the Agency issued its written reprimand. Even three months is not close proximity, Marquez v. Baker Process, Inc., 42 F. App'x 272, 276 (10th Cir. 2002), so the time between Lawrence's complaint and her reprimand does not establish an inference of retaliatory motive. Lawrence also cited the following as evidence of Santos' retaliatory motive.

a. Retaliation for talking with Janice Hathaway in HR on August 24, 2015, about her meeting with Santos on August 20.

Mark Baker, Lawrence's second-level supervisor, asked Lawrence to lead a presentation on education metrics. At the meeting, which was also Santos' second day as supervisor, Lawrence claimed Santos stopped her presentation, saying the Planner Group convinced him they should take over the analysis, essentially reassigning Lawrence's job to the Planner Group. Lawrence said "I think he [Santos] was retaliating because I had talked to Ms. Hathaway about some things Mr. Santos had said to me." She claimed Santos told her he would not have any "violent communications" with her.

Santos stated the August 20 meeting was his first week of employment and he had not yet talked with the Planning Group, so they could not have convinced him to take over Lawrence's analysis. He denied he intended to transfer her job. He denied Lawrence met him after that meeting, or that he ever talked with her about "violent communications" as the term made no sense to him. Further, the inference concerned him sufficiently to report it to Hathaway.

Hathaway remembers her meeting with Lawrence and denied Lawrence referred to Santos' use of the words "violent communications," as claimed by Lawrence. Baker was at the August 20 meeting. He remembered the content, and remembered Santos asked Lawrence to present an education training. Baker did not recall Santos saying Planners convinced him they should take over the analysis of education training. Lawrence's recollection and impressions about Santos' motives were not more compelling than those of Santos, Baker and Hathaway. Moreover, Lawrence raised no credibility issues with regard to Baker or Hathaway. This claim fails to establish a causal connection between Lawrence's complaint and the Agency's written reprimand.

b. Refusal to communicate face-to-face/communication only by email.

There is nothing in this allegation that would tend to prove a causal connection to Lawrence's written reprimand. Moreover, Santos met face-to-face with Lawrence on November 24, 2015, and December 3, 2015, which was after the time she alleged he stopped meeting with her and would communicate only by email. After describing several instances of perceived affronts that Santos: "started in" on Lawrence; declined to meet Lawrence one time when he was not in his office; awarded another subordinate a "Nailed It" recognition, but did not give Lawrence the same award; and used the word 'prerogative' as if to mock Lawrence for her use of that word some time earlier.

Lawrence concluded from these alleged affronts that "Mr. Santos then started communicating with me only by email [while he] called my co-workers to have them come talk to him in his office. My perception is that Mr. Santos felt I shouldn't have communicated with HR about him and is retaliating [by requiring communication only by email]. He may have heard gossip about my issues with [employee X] and [employee Y]; I had a long history with them." Santos acknowledged much of his communication with Lawrence was by email, but only after she accused him of threatening her livelihood. These allegations concerning Santos' communication by email fail to present indicia of a retaliatory motive.

c. Additional factors.

Even if Lawrence had presented sufficient evidence to establish retaliation, the Agency presented a non-retaliatory reason for issuing a written reprimand, namely, that Lawrence threatened a co-worker. The independent investigation found it was more likely than not that Lawrence made a threat about a co-worker to another employee, stating "I hate her so bad... I could physically hurt her right now." I find the following evidence persuasively supported the independent investigator's finding that Lawrence threatened a co-worker.

- Lawrence denied she made a threat. However, she did not raise any credibility issue with respect to the co-worker to whom she made the alleged threat about another co-worker.¹ Lawrence raised no such improper motive at the time of her interview with the investigator and, even after an opportunity to prepare for hearing, raised no credibility issue then. On the other hand, Lawrence had evident motive to deny she made such a threat.
- Lawrence acknowledged she had a "falling out" with the co-worker about whom she allegedly made a threat;
- Santos took the threat seriously enough to take action on it;

¹ When asked at hearing why either co-worker, or the investigator might fabricate Lawrence's threat, Lawrence answered "I have no idea."

- When the independent investigator questioned Lawrence about the allegation, Lawrence laughed after denying the allegation. This evidence is not persuasive alone, but it struck the interviewer at the time that Lawrence was not alarmed by the accusation. Those two indicia, together, contribute some evidence to the conclusion below;
- Lawrence denied she was at work when the Agency alleged she made a threat. Lawrence explained she was on leave from December 23, 2015 until returning to work on January 4, 2016. However, the co-worker who Lawrence allegedly threatened recalled a conversation with another co-worker on January 15, 2015. The co-worker informed her that, two weeks earlier, Lawrence approached her to say "I hate her so bad... I could physically hurt her right now," but the co-worker did not provide a specific date to the investigator. Moreover, using Lawrence's literal statement, the co-workers would have discussed Lawrence's threat on New Year's Day (January 15 minus two weeks), an unlikely occurrence given the holiday. It is more likely than not the reference to "two weeks" was the co-worker's approximation of her exchange concerning Lawrence. If the exchange occurred on January 4 or 5, which would be 10 or 11 days before the two co-workers' discussion, it is reasonable the reporting employee might describe that period as two calendar weeks or two work weeks.

The evidence, immediately above, requires a conclusion, by a preponderance of the evidence, that Lawrence made a threat about a co-worker in violation of Executive Order 112. ["...actual or attempted: threatening behavior..."].

Lawrence also claimed that, because her written reprimand issued the same day as the independent investigation results, there was a temporal link between her protected activity and the Agency's adverse action. That interpretation misconstrues the nature the element of causal link in a retaliation claim. The issuance of the investigator's report and the Agency's issuance of a written reprimand link two Agency actions, not, an Agency action with Lawrence's protected action. Moreover, even if such a connection were permissible, the Agency, as found above, had a legitimate, non-retaliatory motive for issuing the reprimand.

The investigation was referred to an outside and independent organization. Lawrence did not raise a specter of bias, prejudice, or other impropriety in that investigation. The independent investigation concluded there was no basis for Lawrence's retaliation claim, but found a legitimate basis for the accusation that she committed violence in the workplace. Because both findings issued the same day, it was a logical and a legitimate Agency function to issue the written reprimand at that time.

Finally, while Lawrence complained Santos retaliated against her, it was Baker who issued and served the written reprimand. Lawrence did not claim Baker had any untoward motive to retaliate against her, and she did not claim Santos persuaded Baker to issue the reprimand.

In summary, an independent investigator conducted a thorough investigation of Lawrence's retaliation claim, and found none of the underlying bases was sustained by a preponderance of the evidence. Lawrence raised no inference of impropriety as to the manner in which the investigation took place; nor did she raise a specter of bias, prejudice, interest, corruption or other improper bent by the investigator. The investigator's conclusions were reasonable. Santos was at least as credible as Lawrence, and Santos - the person Lawrence charged with retaliating against her - did not issue the reprimand that Lawrence claimed was retaliatory.

For reasons stated above, Lawrence failed to prove, by a preponderance of the evidence, that her complaint against her supervisor, filed December 14, 2015, was a contributing factor or motivated the Agency's written reprimand issued against her on April 20, 2016.

V. ORDER

Appellant's appeal is dismissed with prejudice. The Agency's written reprimand is, consequently, affirmed.

DONE November 23, 2016.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You 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 the Hearing Officer's decision, as stated in the decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o OHR Executive Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: CareerServiceBoardAppeals@denvergov.org

AND

Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.