HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 75-07

ORDER DISCHARGING SHOW CAUSE

IN THE MATTER OF THE APPEAL OF:

LYNNE LOMBARD-HUNT, Appellant,

vs.

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

This matter is before the Hearing Officer on the Order to Show Cause as to why the remaining claims in this appeal should not be dismissed. Appellant timely submitted her response, as did the Agency. Upon review of the pleadings and the submissions of the parties, it is found and ordered as follows:

In this appeal of the termination of Appellant's probationary employment with the Department of Human Services, Appellant claimed her termination was based on discrimination because of her race, color, age, disability, and intimidation. Appellant's prehearing statement also alleged that the termination was retaliatory and violated the Whistleblower Protection ordinance. The age and disability discrimination claims and the claim of hostile work environment based on age were dismissed on Agency motion by order issued December 5, 2007.

By Order to Show Cause dated Dec. 5, 2007, Appellant was required to state the factual bases for her race and color discrimination claims, and for the claims of retaliation and whistleblowing.

Race and Color Discrimination Claims

Appellant's response to the order states that the claims will be supported by evidence that her trainer, who rated her negatively, gave poor evaluations only to black women in the class based on prejudice rather than their performance. Appellant also stated that her supervisor belongs to and identifies with a sorority that discriminates against applicants based on their color, and that the supervisor demonstrated dislike for Appellant based on her color.

The Agency response claims that Appellant failed to recite specific facts, or to deny the substance of the evaluation. It also claims Appellant failed to prove the

elements of an adverse action, disparate treatment, or her qualifications, in accordance with the prima facie case of discrimination established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Finally, the Agency argues that Appellant does not claim that the reasons presented by the Agency for her termination were pretextual.

Because the appeal did not state the factual bases for the discrimination claims, the Hearing Office issued an order to show cause in order to provide the Agency with fair notice of the grounds supporting the claims. At the pleading stage, an appellant is not required to present the evidence supporting her prima facie case of discrimination or claim of pretext. If an appeal's statement of the claim amounts to mere conclusions, appellant is given an opportunity to make a showing of sufficient facts to give the agency notice that there is a triable claim for relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007). Discrimination cases do not require a more exacting pleading standard than that governing other claims for relief. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). General rules of pleading require only "a short and plain statement of the claim showing that the pleader is entitled to relief." C.R.Civ.P. Rule 8

"Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases." Swierkiewicz v. Sorema N.A., supra, at 512. See also McDonnell Douglas, supra, at 802, n. 13 ('The specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations'); and Teamsters v. United States, 431 U.S. 324, 358, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). The cases cited by the Agency relate to the allocation of proof at hearing rather than the adequacy of the initial pleading to provide notice of the claim.

Here, the allegations that her trainer and supervisor acted on motives of race in making the decisions that resulted in Appellant's termination are sufficient to notify the Agency as to the race and color discrimination claims.

Retaliation Claim

Appellant's response to the order to show cause asserts that her supervisor engaged in a pattern of adverse actions shortly after Appellant submitted a letter in support of a co-worker in an employment hearing. The actions included failing to train or supervise her, refusing to meet with her, falsifying her time sheets, and culminated in her termination on Oct. 24, 2007.

The Agency argues that probationary employees have no right to appeal a termination based on a claim of retaliation because the word retaliation is not specifically stated in the rule providing appeal rights to employees who do not hold career status. CSR § 19-10 B.1.

The Supreme Court has ruled that federal anti-discrimination statutes should be construed to include retaliation because it is an intentional act which subjects a person

to differential treatment. Jackson v. Birmingham Bd. of Education, 544 U.S. 167, 173-174 (2005) ("retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination.") Accord, Choike v. Slippery Rock Univ. of Pa, 2006 US Dist LEXIS 49886 (W.D.Pa. 2006).

The Career Service Rules clearly do not use the terms discrimination, harassment and retaliation as mutually exclusive concepts. Harassment is discriminatory treatment that requires proof of severe or pervasive intolerable conduct rather than a discrete adverse employment action. See e.g. In re Felix, CSA 46-07, 2 (8/23/07). Therefore, harassment is an act of intentional discrimination that may be appealed by non-career status employees under CSR § 19-10 B. 1. Moreover, there is no indication in the rules that the Career Service Board intended to exclude retaliation appeals while allowing whistleblower appeals for the same class of employees.

The Agency next argues that Appellant's letter in an employment hearing is not a protected activity unless it was in opposition to discrimination. The Agency cites O'Neal v. Ferguson Constr. Corp., 237 F. 3d 1248 (10th Cir. 2001). That case was based on a retaliation claim under federal civil rights statutes. 42 USCA § 2000e-2 (Title VII) and 42 USCA § 1981. In contrast, the Career Service Rule barring retaliation specifically includes "retaliation against employees for . . . assisting the City in the investigation of *any complaint*" (emphasis added). CSR § 15-106. That rule has been interpreted to prohibit retaliation for the filing of a grievance (In re Crenshaw, CSA 18-06, 4 (4/6/06), an appeal under Career Service Rule 19 (In re Schultz, CSA 78-05 (Order 8/15/05), or a complaint to the Denver Board of Ethics (In re Padilla, CSA 25-06, 12 (9/13/0).

In the light most favorable to Appellant, the appeal and pleadings raise a sufficient claim of retaliation to give the Agency notice of the basis of the claim that the October termination of her probationary employment was caused by Appellant's September letter in support of an employment appeal.

Whistleblower Protection Claim

Appellant claims in her prehearing statement and response to the order to show cause that her termination was in retaliation for a letter she submitted in an employment appeal in support of a co-worker. Appellant states that the letter reported only that Appellant never saw her co-worker display any rudeness. This is not an allegation of a report of official misconduct, a prerequisite for protection under the City's Whistleblower Protection ordinance, D.R.M.C. §2-107(d).

Order

1. Appellant's direct appeal alleging violation of the City's Whistleblower Protection ordinance is dismissed for failure to state a claim for relief.

2. Appellant's direct appeal of her termination from probationary employment will go forward on the issues of race and color discrimination and retaliation at the hearing

currently scheduled for **January 18, 2008.**

3. The Order to Show Cause is discharged.

Dated this 24th day of December, 2007.

Valerie McNaughton
Career Service Hearing Officer

I hereby certify that on December 24, 2007 a copy of this Order was sent to the following:

Lynn Lombard-Hunt, 1777 E. 39th Ave., #312, Denver, CO 80205 (via U.S. mail) ✓
Niels Loechell, Assistant City Attorney, Niels.Loechell@denvergov.org (via email) ✓
City Attorney's Office, dlefiling.litigation@denvergov.org (via email) ✓