

ORDER – 12/6/11

IN THE MATTER OF THE APPEAL OF:

RUSSELL LUXA, Appellant,

vs.

DEPARTMENT OF PUBLIC WORKS,
and the City and County of Denver, a municipal corporation, Agency.

On September 16, 2011, Appellant was ordered to show cause as to why his Whistleblower and non-whistleblower retaliation claims should not be dismissed. After multiple stays and extensions, the parties both filed responses to the show cause order. By separate motion, Appellant also requests an unopposed order to stay deadlines.

The Whistleblower Protection Ordinance prohibits a supervisor from imposing or threatening to impose any adverse employment action upon an employee on account of the employee's disclosure of information about any official misconduct to any person. In re Wehmhoefer, CSA 02-08, 4-5 (2/14/08); DRMC § 2-108(a). Official misconduct means any act or omission by any officer or employee of the city and county that constitutes: 1) a violation of law; 2) a violation of any applicable rule, regulation, or executive order; 3) a violation of the code of ethics as codified in article IV of this chapter 2, or any other applicable ethical rules and standards; 4) the misuse, misallocation, mismanagement or waste of any city funds or other city assets; or 5) an abuse of official authority. DRMC § 2-107(d).

In support of his claim, Appellant asserts that, after he reported official misconduct by City Engineer Lesley Thomas, he was placed on investigative leave in July 2011, and then terminated from employment in August 2011. He initially reported Thomas engaged in bullying and inappropriate behavior toward her subordinates, in violation of CSR §§ 15-110, 16-60 M, 16-60 N, and Executive Order 112, to CSA Human Resources Representatives Roxanne Stuber and Kathy Billings, as part of an investigation in January 2011. He repeated these allegations against Thomas to Denver City Auditor Dennis Gallagher sometime before July 2011, and then again on August 1, 2011, as part of his notice to sue the City of Denver for claims based on the same allegations against Thomas.

The Agency appears to contend that Appellant has not provided admissible evidence of the alleged misconduct, as the attachments to the Appellant's response to the show cause order was a string of emails from an anonymous employee to Ms. Stuber, and a *Westword* news paper article in which he was referenced anonymously. Further, the Agency argues Appellant has not established his whistleblower claim because he did not show a causal connection between the adverse employment action imposed by his direct supervisor, Mitch Kumar, and his disclosure of Ms. Thomas' misconduct.

Appellant has alleged sufficient evidence to establish a prima facie case for his whistleblower claim. Contrary to the Agency's assertion, Appellant is not required to present his evidence in its entirety at this stage. To that end, the Agency's argument as to the admissibility of the attachments to Appellant's response is not ripe. Further, insofar as the Agency is asserting the adverse employment action must have been imposed by his immediate supervisor, Mr. Kumar, as a result of Appellant's disclosure of official misconduct, that assertion is inaccurate. The City's Whistleblower ordinance defines a supervisor as "any person who is authorized to recommend or to impose any adverse employment action upon any employee." DRMC § 2-107(e). At this point, Appellant has only to assert facts sufficient to make a prima facie case, and he has done so.

The Career Service Rules also prohibit "retaliation against employees for reporting unlawful harassment or discrimination or assisting the City in the investigation of any complaint." CSR § 15-106. A retaliation claim is established by showing that an employee engaged in a protected activity, and the agency response to such activity would dissuaded a reasonable person in the employee's position from taking the protected action. In re Gallo, CSA 63-09, 3 (8/27/10); citing Burlington Northern & Santa Fe Ry. V. White, 126 S.Ct. 2405 (2006).

Appellant asserts the Agency retaliated against him for assisting the City in the investigation of anonymous complaints regarding Ms. Thomas' alleged bullying conduct. In support of his non-whistleblower retaliation claim, Appellant states his protected activities were his interviews with Stuber and Billings, as well as his meeting with Gallagher, all of which related to Thomas' bullying. After those activities, Appellant states he was placed on investigatory leave then terminated. The Agency contends Appellant's claim is insufficient because he has not established causation or official misconduct, and is relying on anonymous allegations against Ms. Thomas, but Ms. Thomas did not impose the discipline in this case.

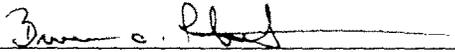
Appellant is not required to proffer all of his evidence in support of his claim at this stage. Appellant has asserted sufficient facts to support a prima facie case of retaliation, by asserting he assisted in investigations through his interviews regarding Ms. Thomas' alleged bullying conduct, following which the Agency disciplined him.

ORDERS

1. Appellant may proceed with his whistleblower and non-whistleblower retaliation claims, and the Order to Show Cause is DISMISSED

2. Appellant's unopposed motion dated December 2, 2011, requesting a fourteen-day stay of deadlines is GRANTED, as she has demonstrated good cause for such request. The parties are ordered to provide a status report on or before December 16, 2011.

DONE December 6, 2011.


Bruce A. Plotkin
Career Service Hearing Officer

I certify that, on December 6, 2011, I delivered a correct copy of this Order to the following:

Mr. Russell Luxa, russellluxa@comcast.net (via email);
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