

ORDER ON MOTION TO RECONSIDER PARTIAL DISMISSAL

IN THE MATTER OF THE APPEAL OF:

MARY SCOTT, Appellant,

vs.

DENVER HEALTH AND HOSPITAL AUTHORITY,
and the City and County of Denver, a municipal corporation, Agency.

Appellant moves for reconsideration of the order entered on Oct. 17, 2013 dismissing the age discrimination claim for failure to cite her age in her response to the Order to Show Cause. Appellant also seeks a reversal of the order dismissing the discrimination claim based on a promissory estoppel theory. The Agency did not file a response to the motion.

This appeal challenges Appellant's termination under the Career Service Rules. It also asserts a claim of retaliation and discrimination on the bases of age, sex and a contractual promissory estoppel theory. Appellant asserts that her termination violated substantive and procedural Career Service Rules, and was taken in retaliation for her refusal to waive her employment rights and accept the Agency's Incentive Retirement Program (IRP). The Oct. 17th order dismissed all three discrimination claims.

In support of the motion to reconsider, Appellant claims that she is 65 years old with a birth date of June 14, 1948, and is therefore a person protected from discrimination under the Age Discrimination in Employment Act (ADEA). She also alleges that she was offered an election to participate in the Agency's IRP between Aug. 1 and Sept. 16, 2013. The plan was open to employees already eligible to retire under the rule of 75 or having attained the age of 65. Acceptance of the offer would require Appellant to release the Agency from liability for termination of her employment, and her rights under federal and state laws prohibiting employment discrimination and wrongful discharge. It also mandated as a condition of acceptance that Appellant release her pension rights, elect to give up her status as a Career Service employee, and terminate her employment by Nov. 1, 2013. In return, Appellant was offered lump sum payments of about \$31,000. [Appellant's Response, Exh. A.] Shortly after Appellant declined this offer, the Agency issued a pre-disciplinary letter. [Exh. B.]

Appellant cites two cases in support of her argument that the IRP offer was itself age discrimination. In Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir. 1990), it was held that a prima facie case of age discrimination is made if a retirement plan forces an older employee to choose between two options, both of which will leave her worse off than before the choice is made. Id. at 468. The Colorado Court of Appeals thereafter held that an offer of early retirement that "sufficiently alters the status quo [with choices that] make the employee worse off" can meet the employee's burden to allege a prima facie age discrimination case. Evenson v. Colorado Farm Bureau Mutual Insurance Co., 879 P.2d 402, (Colo.App. 1994).

Here, Appellant does not allege that her refusal to accept the IRP required her to give up any rights or otherwise placed her at a disadvantage. Instead, she argues that the Agency later retaliated against her for her decision to decline the IRP. Thus, Appellant has not alleged age discrimination based solely on the Agency's offer of this retirement incentive.

Appellant has not supported her sex discrimination claim by any allegations that the IRP offer was improperly based on her sex, and therefore the sex discrimination claim was properly dismissed.

Lastly, Appellant seeks reconsideration of the dismissal of her promissory estoppel claim by arguing that remedies ordered under the Career Service Rules may be equitable in nature. It is true that reversal or modification of an administrative action requires an order that an Agency take specific actions to return an employee to the status quo ante. However, that does not expand the substantive administrative jurisdiction of the Hearing Office beyond that provided by CSR § 19-10. That rule does not grant the Hearing Office the power to hear civil, contract or other claims heard by a general jurisdiction court.

Order

Based on the foregoing, the motion to reconsider is denied. This appeal will proceed on Appellant's claims challenging the dismissal and her claim of retaliation.

DONE October 30, 2013.


Valerie McNaughton
Career Service Hearing Officer

On October 30, 2013, I delivered a correct copy of this Order to the following, in the manner indicated:

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