

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 18-08

ORDER

IN THE MATTER OF THE APPEAL OF:

MARC STEWARD, Appellant,

vs.

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

On April 1, 2008, Appellant filed his response to the Order to Show Cause issued in this appeal. The Agency filed its reply on April 4, 2008. Upon consideration of the pleadings herein, the following findings and order are entered in this appeal.

Procedural History

This is a direct appeal of the termination of Appellant's employment probation in the position of Aviation Customer Service Agent with the Department of Aviation. The appeal alleges that the action was in retaliation for his complaint about mold in the workplace caused by his concerns for his health and that of other agency employees.

In his response to the order, Appellant states that on Oct. 30, 2007 he emailed Nancy Hogue that he suspected there was mold inside the booth where he worked, caused by repairs to the garden area below the booth. He and his co-worker both experienced burning eyes, draining sinuses, and dry itchy throats as a result of the mold. After a maintenance employee vacuumed the booth and cleaned the equipment and surfaces, the booth was habitable again. Ms. Hogue directed Appellant's request for a containment area to Keith Williams, the airport's Safety Manager. Appellant emailed Mr. Williams with several suggestions, and copied his own supervisor and manager. His supervisor later suggested he try to control the "enthusiastic tone" he used in that email. Appellant then requested a meeting with his section supervisor, and was informed "in a very condescending tone" that "there are people with big degrees that are a lot smarter than he or I that are working on the situation." Appellant concluded that the issue was a sensitive one. [Appellant's response, p. 1.]

Appellant alleges that during his probation he was not informed of any major concerns about his performance. He states he received an award for outstanding customer service and several positive comment cards from airport patrons. On Dec. 19, 2007, the entire supervisory group met and discussed ongoing concerns about Appellant's performance, including problems taking supervisory directions, tardiness, cell phone use, and being unavailable by radio during work hours. Appellant was not given any documentation of any counseling done as to these matters. On Jan. 9 or 10, 2008, Appellant was informed that his probation was being extended.

Appellant filed a grievance alleging that his failure to pass probation was in retaliation for raising health concerns, in violation of the Whistleblower Protection Act, D.R.M.C. § 2-106 et. seq. [Appellant's response, p. 2; Appeal, Atch. 3-4.] On the suggestion of Jim Thomas in Human Relations, he withdrew the grievance and began meeting with his supervisor in an attempt to pass probation. The weekly progress reports did not indicate any major performance concerns, nor address any of the previously expressed performance issues. [Appellant's response, p. 2.] On March 18, 2008, he was notified by letter that he had failed to pass probation. [Appeal, Atch. 1-2.]

The Agency argues that Appellant has failed to establish any facts supporting a link between his disclosures and the adverse action, and that the five months between the two events disproves such a link. In addition, the Agency stated that the email notice of suspected mold was not a report of official misconduct under D.R.M.C. §§ 2-107(d) and 108, citing In re Wehmhoefer, CSA 02-08.

Analysis

When matters outside the pleadings are presented to the hearing office on the issue of whether the appeal states a claim upon which relief can be granted, the matter shall be treated and disposed of as one for summary judgment under C.R.C.P. 56. C.R.C.P. Rule 12(b). Thus, for the purpose of resolving this issue, the factual allegations shall be taken as true without assessment of credibility. Norton v. Leadville Corp., 610 P.2d 1348 (1979); Discovery Land & Dev. Co. v. Colorado-Aspen Dev. Corp., 577 P.2d 1101 (Colo.App. 1977.)

A claim under the Whistleblower Protection Ordinance is raised by allegations that 1) a supervisor imposed or threatened to impose 2) an adverse employment action upon an employee 3) on account of the employee's disclosure of information about any official misconduct to any person. In re Wehmhoefer, CSA 02-08; D.R.M.C. § 2-108. "Official misconduct" means any act or omission by any officer or employee . . . 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 . . . 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.” D.R.M.C. § 2-107 (d). The legislative declaration for the Whistleblower Protection Ordinance states as follows:

The city council hereby determines and declares that [city employees] should never suffer retaliation from their supervisors or appointing authorities for communicating information about illegal activities, unethical practices or other forms of official misconduct experienced or witnessed by employees in the scope of their employment. . . Therefore, the purpose of this [ordinance] is to eliminate the possibility or the threat of any adverse employment action that may be taken against any [employee] for reporting such information to appropriate reporting authorities.

D.R.M.C. § 2-106.

The legislative history reveals that it was formulated after a year-long process with stakeholder groups which

considered the measure a good government policy that will mesh well with existing whistleblowing protections at the state and federal levels . . . The legislation narrowly defines both reportable misconduct and adverse employment action. The intent is to focus on protecting reports of actual wrongdoing as opposed to handling disputes that are really personnel matters and to discourage frivolous reporting.

Summary of General Government Committee meeting, July 24, 2007.

Here, Appellant asserts that his emails informing various Agency personnel of suspected mold was a disclosure of official misconduct. The issue is whether the email reported misconduct as that term is used in the ordinance.

Appellant alleges he was terminated “for having knowledge of mold and the health risks of being exposed to mold.” [Appellant’s response, p. 2.] Appellant suspected that his emails caused his termination because his supervisors appeared defensive on the subject. He does not assert that the temporary existence of mold in his booth was itself a violation of law, rule or regulation. Nor does Appellant allege that he reported a violation of any health or safety law or regulation to any appropriate reporting authority for enforcement purposes. At best, Appellant’s email was an effort to discuss a work-related issue with airport staff in order to correct the problem.

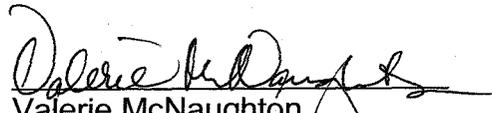
The Career Service Rules provides “a process to resolve workplace issues at the lowest possible level (the level at which they occur).” Rule 18, Purpose Statement. “The City encourages employees to informally and directly

discuss work-related issues with their direct supervisor.” C.S.R. § 18-20. Discussions between employee and supervisor about working conditions that do not assert official misconduct are not disclosures under the Whistleblower Protection Act. Even if an official’s future actions with regard to the mold issue are found to violate a law or regulation, an employee’s initial report of the problem to his supervisor is not thereby rendered a disclosure of official misconduct under the ordinance. Such an interpretation would run contrary to the ordinance’s intent “to focus on protecting reports of actual wrongdoing”. In fact, Appellant acknowledges that his emails led to official action that corrected the mold issue as well as his health symptoms arising from the mold. Therefore, Appellant has failed to allege facts which if proven would establish that he disclosed official misconduct at any time before the termination of his probation. In re Wehmhoefer, CSA 175-04, 6 (7/12/05).

Order

The appeal is dismissed for failure to state a claim upon which relief can be granted.

DONE this 11th day of April, 2008.


Valerie McNaughton
Career Service Hearing Officer

I hereby certify that on April 14, 2008 a copy of this Order was sent to the following:

Marc K. Steward, 356 South Newport Way, Denver, CO 80224 (via US mail)
City Attorney’s Office, Litigation Section, dlefiling.litigation@denvergov.org (email)
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