

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 41-03

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

KIM STEWART, Appellant.

Agency: Career Service Authority, and the City and County of Denver, a
municipal corporation.

PROCEDURAL HISTORY

On March 26, 2003, Kim Stewart (Appellant) filed an appeal with the Career Service Hearings Office alleging discrimination, due process violations and that she was involuntarily placed on Family Medical Leave (FML). She is requesting "[a] formal investigation of family medical [leave] usage, Lujan's & Nimmer's use of electronic email [sic], explanation for justification for violating my civil rights, disability rights, explanation of why the agency attempted to block my right to receive unemployment and short term disability after forcing me on FML."

Appellant alleges that the Agency's actions were retaliatory and harassing in nature and were generally motivated by discrimination based on race, age and disability. Appellant asserts that the Agency's actions were in violation of Career Service Rules (CSR) 11 and 14 (governing leave), CSR 15-106 (prohibiting retaliation for reporting harassment or discrimination), 19 (governing appeals), the Family Medical Leave Act, the United States Constitution, and the Americans with Disabilities Act.

On April 8, 2003 the Hearings Office issued an Order to Show Cause why this matter should not be dismissed as untimely, due to an apparent delay in Appellant's filing of her first-level grievance. Appellant's response to the Order to Show Cause was due on April 21, 2003. The Agency filed a Motion to Dismiss on April 23, 2003, requesting the case be dismissed as abandoned for Appellant's failure to timely respond to the Show-Cause Order. In response to the Agency's Motion to Dismiss, Appellant produced a date-stamped copy of her Response, indicating it had been filed with the Career Service Hearings Office on April 21, 2003.

Having reviewed all the pleadings in the Hearings Office file on Case No. 41-03, the undersigned Hearing Officer concludes that this appeal must be **DISMISSED** for the following reasons:

DISCUSSION and CONCLUSIONS OF LAW

1. Appellant's first-level grievance is untimely.

Career Service Rules provide, in pertinent part: "The employee shall present a grievance to the immediate supervisor within ten (10) calendar days after *notification* of the action which gives rise to the grievance." (CSR 18-12 2), Emphasis added.) In this case, Appellant alleges that the underlying event triggering her grievance was the Agency's act in placing her on Family Medical Leave. Appellant asserts in her grievance that the date she was placed on Family Medical Leave (FML) was February 4, 2003. Under the rule then, Appellant's first-level grievance was due no later than February 14, 2003. Yet Appellant did not file her first-level grievance until March 13, 2003, nearly a month late.

Even if the jurisdictional 10 calendar days is calculated from the date Appellant received "notification" that FML was approved, February 25, 2002, under the rule her grievance was due no later than March 7, 2003. It was filed on March 13, 2003. Therefore, the Hearing Officer concludes that Appellant's first-level grievance was not timely filed and her appeal must be dismissed.

2. Appellant's discrimination claim, if brought under CSR 19-10 c), must fail as untimely.

Historically, there have been two avenues through which city employees may bring discrimination claims. The first is under CSR 19-10 c). Discrimination claims under this subsection are typically brought as a challenge to some underlying, yet identifiable and distinct, employment action, such as a disciplinary action, failure to make reasonable accommodations, failure to hire or promote, etc. In cases where the underlying action must first be grieved, it is appropriate to raise the discrimination claim during the grievance process, as Appellant did here. However, if the grievance itself is untimely, as here, the discrimination claim must fail along with the grievance as untimely.

3. Appellant's charge of harassment and discrimination, if brought under CSR 15-100 *et seq.*, is not yet ripe for adjudication.

The second avenue for bringing a discrimination claim arises from a pattern of behavior or series of events which, when taken as a whole, may give rise to an inference of discrimination or hostile work environment. Such cases may or may not have one or more distinct acts or events triggering a claim of discrimination. Historically such claims have been pursued under CSR 15-100 *et seq.* In this case, it is not clear from the pleadings whether Appellant is bringing her claim of discrimination under CSR

19-10 c) (Discriminatory actions) or 15-100 *et seq.* (Harassment and/or Discrimination) or both.

Career Service Rules provide, in pertinent part (Emphasis added.):

“15-103 Action of Individual Experiencing Unlawful Harassment

Individuals who experience unlawful harassment are *urged* to:

- A. make it clear that such behavior is offensive to them and request that such behavior be discontinued;
- B. report such conduct to their supervisor...If the complaint involves the employee's supervisor...the employee may go to...the Career Service Authority Employee Relations Section.

15-104 Investigation

The...Career Service Authority will immediately undertake effective, thorough, and objective steps concerning the allegation of harassment or discrimination. If an investigation is deemed necessary, it will be completed and a determination regarding alleged harassment will be made and communicated to the employee as soon as practicable...

15-105 Action

If it is determined that unlawful harassment or discrimination has occurred, the Agency will take effective remedial action commensurate with the severity of the offense. Appropriate action will be taken to deter any future harassment.”

Initially it appears that an employee is not *required* to report or request investigation under these subsections (but see paragraph 4, below, re: jurisdiction). However, where an employee brings a claim of discrimination under any subsection of CSR 15-100 through 15-106, rather than pursuant to CSR 19-10 c), and no investigation of the claim has been undertaken, such claim may not be ripe for adjudication. That is, if the complained of pattern of behavior, series of events or inability to seek and/or get relief is not set forth with specificity in the appeal itself, an investigation may be prudent in order to avoid unnecessary litigation and with the goal of judicial economy.

If reporting or requesting an investigation results in a determination that discrimination has occurred and effective remedial action is undertaken, then the ends of judicial economy are met by obviating the need for hearing. If, after reporting or investigation, no remedial action is taken or deemed necessary, or the remedial action is not effective to deter harassment or discrimination, then the case is ripe for

adjudication. It is unclear, from the pleadings in this case, whether Appellant reported or requested an investigation regarding alleged discriminatory acts, possible due process violations or the allegation that she was involuntarily placed on Family Medical Leave (FML). It is unclear, from the pleadings, what action(s) the Agency took, if any, in an attempt "to block my right to receive unemployment and short term disability" and whether the allegations of discrimination based on race, age and disability apply to a specific act or a series of acts. That is, there appears to be a variety of acts and issues in this case including Worker's Compensation, FML, unemployment and disability issues. Apparently, these issues have not been addressed other than by the filing of this appeal.¹ The Hearing Officer may have jurisdiction over some of the alleged acts and issues but clearly has no authority over unemployment and Workers Comp issues and no authority to order the requested relief in this case. Therefore, the Hearing Officer concludes that this matter is not ripe for adjudication.

4. Jurisdiction and authority to hear discrimination cases:

Career Service Rules delineate the Hearing Officer's jurisdiction by providing a list of "Actions Subject to Appeal". The list includes actions of the Personnel Director, actions of an Appointing Authority, discriminatory actions, grievances resulting in rules violations, grievance of Performance Enhancement Program Reports (PEPRs) and Harassment or discrimination. (CSR 19-10) Authority to hear discrimination cases under CSR 19-10 c) is not limited to cases involving actions of the Personnel Director or the Appointing Authority and is not limited to cases involving grievances. Therefore, the Hearing Officer concludes that she has authority to hear discrimination cases, subject to the limitations, if any, contained in CSR 19-10 c) whether or not a report of discrimination has been made and whether or not investigation has been requested or completed.

The Hearing Officer also has specific authority (CSR 19-10 f)) to hear "Harassment or discrimination" cases. The title of subsection 10 f) suggests that this granting of authority is to be read in conjunction with appeals filed under CSR 15-100 *et seq.* CSR 19-10 f) provides: "Harassment or discrimination: The *disposition* by a supervisor or other appropriate official of a complaint of harassment or discrimination may be appealed if such disposition has not resulted in stopping the prohibited behavior." (Emphasis added.) The Hearing Officer concludes that, where a claim of discrimination is made pursuant to any part of CSR 15-100 through 15-106, there is authority for the Hearing Officer to hear such claim only where there is a "disposition by a supervisor or other appropriate official of a complaint of harassment or discrimination".

In this case, Appellant alleged violations of CSR 15-106. However, there is no indication that Appellant has yet reported or sought the administrative disposition

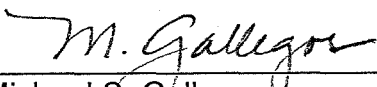
¹ It is the opinion of this Hearing Officer that filing a grievance alleging discrimination is not the same as "reporting" harassing or discriminatory conduct or requesting investigation as contemplated by CSR 15-100 through 15-106.

necessary to create jurisdiction under CSR 19-10 f). Therefore, the undersigned Hearing Officer concludes that she does not have the authority to hear Appellant's claims brought under CSR 15-106.

ORDER

WHEREFORE, this appeal is DISMISSED for failure to timely file a first-level grievance. FURTHER, Appellant's claim of discrimination, under CSR 15-106, is DISMISSED for lack of jurisdiction. Nothing in this Order precludes Appellant from reporting or requesting an investigation of any or all the allegations made in her appeal.

Dated this 6th day of June, 2003.



Michael S. Gallegos
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **DISMISSAL ORDER** by depositing same in the United States Mail, postage prepaid, on the 6 day of June 2003, addressed to:

Kim Stewart
3320 Josephine Street
Denver, CO 80205

I further certify that I have forwarded a true and correct copy of the foregoing **DISMISSAL ORDER** by depositing same in interoffice mail, on the 6 day of June 2003, addressed to:

Robert D. Nespor
Assistance City Attorney

Jim Yearby
Career Service Authority

