

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

Appeal No. 354-01

DISMISSAL ORDER

IN THE MATTER OF THE APPEAL OF:

RONALD STRASHEIM, Appellant,

v.

Agency: Department of Safety, Denver Sheriff Department, and the City and County of Denver, a municipal corporation.

This appeal is before the Hearing Officer for consideration of the Agency's Motion for Summary Judgment, filed with the Hearing Officer on November 8, 2001. Appellant filed his response to the Motion for Summary Judgment on November 19. Being fully advised of the matter, the Hearing Officer finds as follows:

Applicable Statutes and Rules

Career Service Rule ("C.S.R.") 3 covers recruitment and examination of employees. It provides, in relevant part:

§3-12 Charter Provision

The charter provisions relating to employment are: "The Career Service Board shall:... 2. Recruit, examine and certify applicants for employment and for promotion in the Career Service..." (Section C5.25) The personnel rules shall provide that: 1. Appointments shall be made solely upon merit and fitness to perform the work... 3. **No discrimination shall be made because** of race, color, creed, national origin, sex or political affiliations..." (Section C5.25-2), **age** or sexual orientation. (Emphasis added)

§3-22 Testing Procedures

c) Rejection of Applications

Applicants may be ineligible to test for any valid reason, including the following:

- 1) Incomplete application or giving false information in the filing or testing process;
- 2) **Failure to meet qualifications**, or to timely file for testing consideration; and/or
- 3) Not suitable for the position, including criminal convictions. (Emphasis added)

C.S.R. Rule19 provides, in relevant part:

§19-10 Actions Subject to Appeal

An applicant ...may appeal the following administrative actions relating to personnel.

- c) Discriminatory actions: **Any action of any officer or employee resulting in alleged discrimination because of race, color, creed, national original, sex, age, political affiliation, sexual orientation, or disability...** (Emphasis added)

§19-20 Presentation of Appeal

§19-21 Eligibility to File Appeals

- b) Discriminatory actions: Any applicant...shall be eligible to appeal any action listed in Section 19-10 Actions subject to Appeal, paragraph c) except that **any appellant alleging discrimination because of age must be 40 years of age or older**, except for Deputy Sheriffs who shall not exceed 70 years of age. (Emphasis added)

18 U.S.C. §922 (Omnibus Consolidated Appropriations Act of 1997, Public Law Number 104 through 208, amended) provides in relevant part:

§922 Unlawful acts

- (d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person - -
 - (9) has been convicted in any court of a misdemeanor crime of domestic violence.
- (g) It shall be unlawful for any person - -
 - (9) who has been convicted in any court of a misdemeanor crime of domestic violence, to...possess in...any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Facts

For the purposes of this Motion for Summary Judgment, the following facts are deemed to be admitted and true:

1. Appellant applied for a position as a Deputy Sheriff but was not selected.
2. Appellant was not selected for the position for a variety of reasons including, but not limited to, his conviction for a domestic violence assault in 1993
3. During his interview, Appellant admitted being convicted of a domestic violence assault for pushing and slapping his wife two or three times.
4. Appellant admitted in his response to the Motion for Summary Judgment that he was arrested for domestic violence on April 20, 1993, and that the matter was "dropped down" to assault.
5. The certified copy of computer-generated case information report indicates Appellant pleaded "no contest" to the assault violation.
6. Appellant is approximately six feet tall and weighs approximately 265 pounds. His wife is five feet, five inches tall and weighs 135 pounds.
7. Appellant is over 40 years of age.
8. Appellant asked Officer Marker, at the time of his interview, whether his conviction for assault was going to hurt his chances for employment. Officer Marker replied that "some people are arrested and go forward and that others are arrested and don't go forward." Appellant also asked Officer Marker about others working for the Sheriff's Department who had domestic violence and/or City ordinance violations. Officer Marker replied that those were taken on a case-by-case basis.
9. The job specifications for the Deputy Sheriff classification provide, in relevant part:
 9. Qualifies in the use of weapons, physically subdues violent prisoners and chases inmates on foot to apprehend them.
 - o Skill in using firearms and other tactical weapons.
 - o Skill in establishing and maintaining effective working relationships with other employees, organizations and the public in emergency and other situations,
 - o Skill in reacting calmly and effectively in emergency or stressful situations.

Legal Standards for Discrimination Claim

Summary judgment is appropriate if there is no genuine issue as to any material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). This means that, if the Agency, as the

moving party, is able to establish that, assuming every fact Appellant has alleged is true, Appellant is still not entitled to a judgment in his favor as a matter of law because Appellant cannot establish an element essential to his burden of proof during the hearing on the merits.

Appellant, having alleged age discrimination, would bear the burden during the hearing to show that his employment application was denied for an illegally discriminatory purpose (i.e., his age). If, and only if, Appellant establishes that age discrimination occurred in the decision to deny his application for a Deputy Sheriff position could the Hearing Officer order the Agency to continue the background check with the object of offering Appellant a Deputy Sheriff position. If Appellant cannot as a matter of law establish a case of age discrimination, then the matter must be dismissed.

The requirements for establishing an employment discrimination case were originally set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Appellant bears the burden to prove that he was discriminated against on the basis of age. The burden would then shift to the Agency to show that there was a *bona fide* business reason for its actions. If the Agency shows a *bona fide* business purpose, then Appellant has to show that the *bona fide* business purpose is pretextual. See also *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center et al. v. Hicks*, 509 U.S. 502 (1993).

Pursuant to this analysis, Appellant, as proponent of the claim of discrimination, initially must establish a *prima facie* case of discrimination by a preponderance of the evidence. *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 529 (10th Cir. 1994).

Appellant does not need to prove the case by direct evidence of discrimination; indirect evidence is also acceptable. Evidence of discrimination is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp.* See *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1964 (2000). Under this framework, Appellant bears the initial burden of establishing a *prima facie* case by showing that: (1) he belongs to a protected class; (2) he was qualified for the job; (3) despite his qualifications, he was not selected for the Deputy Sheriff's position; and (4) the job was not eliminated *Id.* at 1138. See also *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3rd 1220, 1229 (10th Cir. 2000). Upon such a showing, a rebuttable presumption arises that the employment decision was motivated by unlawful discrimination. The burden then shifts to the Agency to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the termination. Thereafter, the burden reverts to Appellant, who may avoid dismissal only by showing that a factual dispute exists whether the Agency's articulated reason was pretextual.

Appellant must first show that he is a member of one or more protected classes and that the Agency took an adverse employment action against him. Then he must show that he was able to perform the job and that he was treated less fairly than younger employees. Finally, he must show that the position job was not eliminated.

Appellant alleges, and the Agency concedes, that he is 40 years old. Therefore, he is a member of a protected class under the provisions of the Age Discrimination in Employment Act

(ADEA).¹ He is also entitled to appeal the employment action based upon age discrimination as set forth in C.S.R. §19-10 c). He has also established that an adverse employment action was taken against him in so far as he was not selected for a Deputy Sheriff position. The Agency does not contest the fact that the position was not eliminated after Appellant's rejection. The sole issue involves the third prong of the test, whether Appellant was qualified for the position.²

The job specifications for a Deputy Sheriff include the requirement that the Deputy be qualified in the use of firearms. The provisions of 18 U.S.C. §922(g) make it illegal for someone who has been convicted of a domestic violence misdemeanor to own or possess a firearm or ammunition.³ 18 U.S.C. §922(d) makes it illegal for anyone to supply firearms or ammunition to anyone who has been convicted of domestic violence. There is no statute of limitations on the age of the domestic violence conviction in 18 U.S.C. §922.

Appellant admitted to Officer Marker that he had been convicted of domestic violence. He also admitted it in his response to the Motion for Summary Judgment. Because of this conviction, Appellant is prevented from possessing a firearm or ammunition. 18 U.S.C. §922 also makes it illegal for the Denver Sheriff's Department from providing Appellant with a firearm and ammunition. Based upon this, Appellant is unable to meet the job specification for Deputy Sheriff that requires him to be able to use a firearm.

Appellant states in his response to the Motion that about 98% of the time Deputy Sheriffs do not carry firearms because firearms are not allowed at the City jail. He claims that this negates the classification requirement that he carry a gun as an appropriate factor for determining his qualification for the job.

The Hearing Officer disagrees. While a Deputy Sheriff may not carry a gun while he is at the City jail, the job also includes responsibilities away from the jail that might require the officer to be armed. It is unreasonable to require the Sheriff's Department to maintain a separate designation, or restrict job assignments, for an officer who may not be able to perform duties requiring the use of firearms.

Appellant argues that the Agency in fact employs Deputy Sheriffs who have domestic violence convictions. While the Hearing Officer hopes that this is not true, she does not have

¹ It is unclear whether Appellant is also attempting to claim discrimination because he is nearly six feet tall and weighs 265 pounds. There is nothing in the documentation supplied by the parties and attached to the Notice of Appeal or the Motion for Summary Judgment to suggest that Appellant wasn't hired because of his height or weight. The context of the references to Appellant's height and weight in the October 1, 2001 unfavorable recommendation for employment is in relationship to the domestic violence matter and the fact that Appellant is approximately seven inches taller than his wife and weighs almost twice as much. In any case, there is no indication that height and weight restrictions exist for this position. Further, if such restrictions existed, they are not considered disabilities under the Americans with Disabilities Act. Therefore, the Hearing Officer will not consider whether Appellant was denied the position because of his size.

² C.S.R. §3-22 c) 2. also gives the Agency the power to reject applications of prospective employees who are not qualified for a position. The analysis would be the same as under the test for discrimination.

³ Because 18 U.S.C. §922 automatically makes it illegal for anyone who has been convicted of domestic violence to possess a firearm, there is no need to address the Agency's ability to reject Appellant's application due to a criminal conviction under C.S.R. §3-22 c) 3.

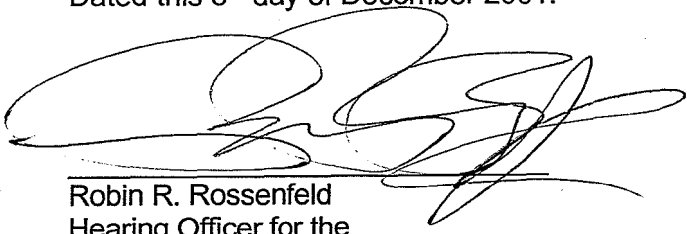
the jurisdiction to override the clear language of 18 U.S.C. §922 and make an exception for Appellant because others may have slipped through the net.

Finally, Appellant points to statements made by Officer Marker during his interview as somehow creating an exception from 18 U.S.C. §922's restrictions. A plain reading of these statements show them to be neutral as to whether or not the domestic violence conviction would stop Appellant's hiring as a Deputy Sheriff. In any case, Officer Marker has no authority to contradict the limitation imposed by the Federal government.

Due to his inability to carry a firearm, Appellant is not qualified for a Deputy Sheriff position. There is no need to determine whether the other reasons listed by the Agency in its decision to reject the application were legitimate or not. Appellant's case fails on the third prong of the test. The case must be dismissed.

The Hearing Officer concludes that, due to the reasons stated herein, she lacks jurisdiction to consider this appeal. Accordingly, this appeal is hereby DISMISSED with prejudice. Further, the Agency's Motion to Vacate Hearing Date, filed on November 29, 2001, while this Motion was pending, is dismissed as moot.

Dated this 3rd day of December 2001.

A large, stylized handwritten signature in black ink, appearing to read 'Robin R. Rossenfeld', is written over a horizontal line.

Robin R. Rossenfeld
Hearing Officer for the
Career Service Board