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

Appeal No. 02-08

ORDER ON AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

RICHARD A. WEHMHOEFER, Appellant,

vs.

DEPARTMENT OF EXCISE AND LICENSE, and the City and County of Denver, a municipal corporation, Agency.

On Feb. 1, 2008, the Agency moved to dismiss this appeal. Appellant filed his response to that motion on Feb. 7, 2008.

Appellant Richard Wehmhoefer has been an on-call hearing officer for the Department of Excise and Licenses from August 16, 1990 to his termination effective Dec. 20, 2008. Appellant appealed that termination on Jan. 8, 2008 on the grounds of discrimination and whistleblower violation. The appeal alleges that Agency Director Awilda Marquez terminated Appellant based on his age, political affiliation, and in retaliation for a Dec. 19th conversation advising Ms. Marquez to adopt policies replacing the ones she revoked on Oct. 25, 2007. The Agency terminated Appellant the next day. Since an on-call employee does not hold career status pursuant to CSR § 5-42 D., the only issues raised by this appeal are the age and political affiliation discrimination claims, and the Whistleblower Protection Ordinance claim under D.R.M.C. § 2-106 et. seq.

I. Discrimination Claims

The motion to dismiss asserts that Appellant has failed to present a prima facie case to support his claims of discrimination because he failed to prove that he was satisfactorily performing his job and that his position was filled by a younger person. The Agency argues that both are required under McKnight v. Kimberly Clark Corp., 149 F.3d 1125 (10th Cir. 1998).

A. Prima Facie Case of Discrimination

Intentional discrimination is proven by evidence that an employee 1) was a member of a protected class, 2) was qualified to hold his position, 3) suffered an

adverse employment action, and 4) that action occurred under circumstances supporting an inference of discriminatory intent. In re Ortega, CSA 81-06, 14 (4/11/07); McDonnell Douglas v Green, 411 U.S. 792 (1973). In Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), the Supreme Court confirmed that McDonnell Douglas's formulation of the prima facie case was not intended as an inflexible rule, but rather an orderly way to evaluate the evidence on the critical question of intentional discrimination. Larson on Employment Discrimination, § 8-02 (Matthew Bender 2007).

The second element, proof of qualification to hold the position, requires only a showing that the employee possessed the employer's stated qualifications of the position, such as educational attainments. Larson on Employment Discrimination, § 8-02 [3] (Matthew Bender 2007), citing Cruz v. Coach Stores, Inc., 202 F.3d 560 (2nd Cir. 2000.)

> Most courts have held that where subjective qualifications, such as interpersonal skills, are at issue, a plaintiff is not required to prove during the prima facie case that he or she held these qualifications; rather, this inquiry is more appropriately made during the employer's rebuttal, during which the employer must explain the need for, and the plaintiff's lack of, the subjective qualifications at issue.

Larson on Employment Discrimination, § 8-02 [3] (Matthew Bender 2007), citing Thomas v. Denny's, Inc., 111 F.3d 1506, 1510 (10th Cir. 1997) .

The 10th Circuit's McKnight decision cited by the Agency, decided one year after it issued Thomas v. Denny's, Inc., supra, misquotes McDonnell Douglas's statement of the second element, and does not expressly overrule Thomas v. Denny. It is thus not persuasive to indicate what would be a very substantial shift in its interpretation of the Title VII prima facie case. In any event, a stricter interpretation of McDonnell Douglas by the 10th Circuit would be inconsistent with later Supreme Court decisions. See e.g. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

Here, Appellant was qualified by virtue of his Juris Doctor degree and five years' experience practicing law in Colorado. [Exh. A-2.] He was hired as a hearing officer, and in fact held that position for over 17 years. There can be no doubt that Appellant satisfied the second element of the prima facie case.

The Agency also quotes McDonnell Douglas in support of its argument that an employee must establish the fourth element by proof that another and younger employee was hired to replace him. However, the essence of discrimination is proof of the discriminatory intent behind the adverse action. While replacement by a person not in the protected group is relevant to that issue, it is not the only evidence that would tend to show an intention to

discriminate. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996). An employee may also present evidence of statements indicating hostility toward the protected group, more favorable treatment of employees not in the protected group, or even a statistical disparity in those hired, retained, or terminated. Furnco, supra; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

B. Age Discrimination Claim

The appeal and pleadings allege that Appellant was treated less favorably than younger hearing officers in that his billing statements were not paid in full. [Appellant's Prehearing Statement, p. 12.] Appellant also alleges discrimination based on the Director's failure to meet with him when she began her appointment, changes made without his consent to his recommended decision in the Frankie J's application, and his termination.

The appeal alleges discriminatory intent by proof of disparate treatment: that Appellant is over 40 and was terminated, and that the other hearing officers were not terminated.

An adverse employment action is employer conduct which results in a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a significant change in benefits. In re Boden, CSA 86-06, 2 (5/23/07), *citing* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). Where no discipline is imposed and no change in employee status or benefits occurs, there is no adverse employment action under CSR §19-10 B. 1.

The first asserted action of discrimination was the denial of 3.75 hours of billable time at the rate of $41.60 per hour, or total lost pay of $156. Since those funds were denied from July to Sept. 2007, prior to the claimed whistleblower activity, it is clear that Appellant is asserting only an age discrimination claim in this regard. Denial of $156 in pay is not the type of employment decision that may be directly appealed under § 19-10 B. 1., and does not rise to the level of an adverse employment action. Likewise, the Director's failure to meet with Appellant, and the act of making changes to his recommended decision, are not sufficiently serious to amount to an adverse action as necessary to establish a prima facie case of age discrimination.

Finally as to the age claim, Appellant asserts that he was terminated based on his age, over 40. In support of this claim, Appellant states that he was terminated and other hearing officers were not. Appellant does not allege the ages of the other hearing officers, the age of the Director who took the action, or other facts supporting an inference that the Director's motive was to discriminate against Appellant based on his age. Absent allegations which if proven would assert a prima facie case, the hearing office lacks jurisdiction to proceed to hearing on a discrimination claim.

C. Political Affiliation Discrimination Claim

Appellant also raises a claim that the termination was caused by his political affiliation. In support of that claim, he asserts that the Director was a new mayoral appointee, did not meet with Appellant for a month or two after her appointment, and at that time declined his request for a meeting with the hearing officers, stating as the Mayor's new appointee, she could do whatever she wanted "and there is nothing you can do about it." [Appeal, p. 4.] Appellant states that the message he received from that declaration was that he would suffer adverse consequences if he ever questioned her authority.

A claim of political affiliation discrimination under CSR § 19-10 A.2.a. requires that an employee's political affiliation or beliefs was a substantial or motivating factor of an agency adverse action, and that the employee's position did not require political allegiance. In re Hurdelbrink, CSA 109-04, 119-04, 8 (1/5/05). "Political affiliation generally refers to membership in a political party". In re Maes, CSA 180-03, 6 (10/21/04).

Appellant does not allege that his political affiliation is different from that of the Agency's deciding official or the Mayor who appointed her. In addition, the pleadings do not reveal any facts supporting a claim that it was Appellant's political affiliation or beliefs that led to the termination. At best, the appeal indicates that Appellant discerned in Ms. Marquez an intolerance for opposition to her policies, and an intent to change the hearing process to encourage decisions based on factors other than on the evidence presented. Appellant does not allege that membership in a political party or support for any candidate would form the basis for future hearing officer decisions under the new Director. Appellant uses the word "political" as a contrast to a system of permitting decisions to be fair, impartial, and based on the evidence. That use of the word suggests a system rewarding personal popularity or connections rather than affiliation with a political party. The appeal therefore fails to allege a prima facie case of political affiliation discrimination.

II. Claim under Whistleblower Protection Ordinance

Appellant asserts that he took action on the evening of Dec. 19, 2007 to disclose information to Ms. Marquez about her official misconduct, and that he was terminated by letter dated the next day as a result of that action.

A claim under the Whistleblower Protection Ordinance, D.R.M.C. § 2-106 et. seq., 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. 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).

Here, Appellant asserts that he reported to Ms. Marquez that she needed to implement replacement policies that covered those rescinded on Oct. 25, 2007. On that date, Ms. Marquez revoked the policies governing penalties arising from violations of the Colorado Liquor Code. [Exh. L-1.] Appellant alleges that the Director violated rules and regulations in revoking those policies. Appellant asserts that the call alerted Ms. Marquez to the fact that Appellant intended to pursue a claim that her rescission of the penalty policies was an abuse of her authority. However, Appellant does not indicate what rules and regulations were violated, or what power abused, by revocation of the policies. Without that authority, it does not appear that rescinding set penalties for specific violations of the Liquor Code was an act of official misconduct. While Appellant's telephone call may have been considered by the Director to be confrontational of her policies, what Appellant said in that call did not disclose a violation of law, rule, or ethics, allege a misuse of funds, or raise a claim of an abuse of authority. See In re Garcia, CSA 175-04, 6 (7/12/05); In re Smith, CSA 17-05, 7 (7/07/05).

III. Failure to Provide Notice of Termination

Appellant also asserts that he was denied proper service of the termination decision in accordance with CSR § 19-20 A.2., since the termination letter was sent by regular mail, not, as indicated in the rule, hand delivery or certified mail.

Lack of proper delivery of an ultimate employment decision is not a separate ground for jurisdiction under Rule 19. An agency's failure to effect delivery of a disciplinary decision may constitute good cause for the hearing office's acceptance of a late appeal. However, Appellant received the Agency's letter on Dec. 27, 2007, and filed this appeal on Jan. 8, 2008, well in advance of the thirty-day time limit for appeal under § 19-20 A.1.a. Therefore, Appellant was not prejudiced by the absence of hand delivery or delivery by certified mail of the termination letter.

ORDER

Based on the foregoing findings and conclusions, it is ordered as follows:

1. Appellant's claims of discrimination based on age and political affiliation are dismissed, and

2. Appellant claim under the Whistleblower Protection Act is dismissed.

3. Based upon this order's dismissal of all claims contained in the appeal, Appellant's motion for discovery and the Agency's motion to quash subpoenas are moot.

Dated this 14th day of February, 2008

Valerie McNaughton
Career Service Hearing Officer

I hereby certify that I have forwarded a copy of the foregoing order on Feb. 14, 2008, by the methods indicated below:

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