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

Appeal No. 18-06

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

BRADY CRENSHAW
Appellant,

vs.

DENVER SHERIFF'S DEPARTMENT, DEPARTMENT OF SAFETY,
and the City and County of Denver, a municipal corporation,
Agency.

The Agency has moved to dismiss this appeal for failure to state a claim under Career Service Rule 19. Appellant has filed a response.

FACTUAL BACKGROUND

This is an appeal of the denial of a grievance which also alleges retaliation, harassment, and discrimination on the bases of race and color. Appellant Brady Crenshaw is a Deputy Sheriff assigned to the Denver County Jail. On Nov. 23, 2005, Appellant filed a grievance based upon statements made to him on Nov. 15th and 17th by his supervisor, Sgt. Collier. Appellant alleges that on both days Sgt. Collier repeatedly instructed him to report to the line to "feed the felons," i.e., serve food to the felony prisoners, and ignored Appellant's reminders that the duty was not scheduled to be performed until 10:30 a.m. The grievance claims this is the latest indication of the existence of a hostile work environment based upon his race, African American, and that Sgt. Collier has a documented history of harassing other employees of color. The grievance was denied, and the racial harassment allegation was referred for investigation to Internal Affairs. That investigation ended in findings of "exonerated" and "not sustained." [Appeal form and attachments.]

Appellant's exhibits submitted with his prehearing statement include Appellant's 2003 and 2004 grievances based upon two previous heated encounters with Sgt. Collier. [Exhs. A – E]. Appellant also included documents from complaints about Sgt. Collier by three female deputies, two of which are Hispanic, and an African American deputy. [Exhs. F – I]. In general, the complaints allege that Sgt. Collier abused his power by issuing unnecessary or improper orders in an angry manner. All but one complainant

believed Sgt. Collier's motive was discriminatory. The exception believed Sgt. Collier demonstrated a pattern of retaliating against those who would not obey his orders to break the rules. [Exh. H.]

The Agency argues that the supervisor's repeated requests to perform the duty of feeding the felony prisoners did not raise a claim of racial harassment, which requires racial conduct that is severe or pervasive enough to alter the conditions of employment, citing Bolden v. PRC, 43 F.3d 545 (10th Cir. 1994). In addition, the Agency states that the relief requested is beyond the scope of the Career Service Rules.

Appellant counters that his past grievances against Sgt. Collier based on racial harassment were sustained, and that there have been other incidents of harassment against employees of color. Appellant argues that he has been singled out for unfavorable treatment because of his race in this instance and on two other occasions, one in 2003 and one in 2004. [Exhs. B, C.] In the 2003 grievance, Appellant complained that Sgt. Collier accused him of leaving his post when he left for five minutes to use the restroom, and ordered him alone not to use the restroom without permission. The 2004 grievance arose from Sgt. Collier's order to perform a duty called "the fence pull" out of rotation, i.e, more frequently than other deputies. Appellant claims that jurisdiction is proper under Hicks v. Gates Rubber Co, 833 F.2d 1406 (10th Cir., 1987), Hirchfield v. New Mexico Corrections Department, 916 F.2d 576 (10th Cir. 1990), and Griffith v. Colorado Division of Youth Services, 17 F.3d 1323 (10th Cir. 1994).

ANALYSIS

Matters outside the pleadings have been presented and considered in the resolution of this motion, and therefore it is treated as one for summary judgment pursuant to C.R.C.P. Rule 12(b). On summary judgment motion, the evidence is viewed in the light most favorable to the non-moving party, and all reasonable inferences are drawn therefrom. Bryant v. Farmers Ins. Exh., 432 F.3d 114 (10th Cir. 2005). The issue to be resolved is whether, taking the allegations made in the appeal as true, Appellant has presented a genuine issue for hearing under C.R.C.P. Rule 56.

Racial harassment is a claim of discrimination which may be proven by two separate theories: tangible employment action harassment or hostile environment harassment. The first requires proof of "a significant change in employment status." Notice No. 915.002, § IV(B), EEOC Compliance Manual (June 18, 1999), *citing* Burlington Industries, Inc. v. Ellerth, 118 S.Ct. at 2268. Here, Appellant has not asserted any change in his employment status, and therefore the appeal does not present a claim under the tangible employment action theory.

Appellant's discrimination claim is also defeated by the nature of the conduct complained of. An adverse employment action is necessary to prove a claim of race discrimination under the disparate treatment theory. McDonnell Douglas v. Green, 411 U.S. 792 (1973). Since the supervisor's comments did not adversely affect Appellant's employment, the discrimination claim cannot stand.

In addition, it should be noted that a grievance is not appealable unless it "results in an alleged violation of the Career Service Rules . . . and negatively impacts the employee's pay, benefits or status. CSR § 19-10 (B)(2). The November comments made by Appellant's supervisor manifestly had no effect on Appellant's pay, benefits or employment status. Therefore, the grievance is not appealable.

Hostile work environment harassment is established by proof of conduct having "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11, quoted with approval in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). A prima facie case of hostile work environment harassment must show that "under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment, and (2) the harassment was racial or stemmed from racial animus." Bloomer v. United Parcel Service, Inc., 94 Fed.Appx. 820 (10th Cir. 2004) (internal quotations omitted). In evaluating all the circumstances of the conduct within the work environment, a court must consider factors such as "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

The November 2005 conduct was not overtly racial in nature, and Appellant has not produced any information from which I could find that but for his race the conduct would not have occurred. See McKinney v. Dole, 765 F. 2d 1129, 1131 (D.C.Cir. 1985). Moreover, three unpleasant encounters with a supervisor over the course of three years do not establish a pervasive pattern of actions which creates a hostile or offensive work atmosphere. Using the factors enunciated in Harris, id., the conduct was not frequent, severe, or physically threatening, and there is no showing that the conduct unreasonably interfered with Appellant's work performance. The 2003 grievance alleges conduct that was arguably humiliating, but the two events since that time did not combine to create a hostile work environment on the basis of race. The events demonstrate the occurrence of "isolated events without connection in time, character, or person", similar to those alleged and found wanting in Bloomer, supra, at 824.

The cases cited by Appellant do not support his argument. In Hicks v. Gates, supra, an African American female employee was subjected to a number of racial slurs, discipline, criticisms of her performance, and was touched by her supervisor on two occasions. The Hirschfield court affirmed a district court finding of sexual harassment based upon an inmate letter stating an intention to rape the female employee, three incidents where the inmate stared at her from a dark closet, and two incidents where a captain hugged and kissed her without her permission. In Griffith v. Colorado Division of Youth Services, supra, the district court did not find the existence of a hostile work environment.

Appellant's exhibits from four other employees alleging that Sgt. Collier took similar actions against them cannot be considered as additional evidence that Appellant himself

suffered a hostile work environment, absent a showing that Appellant's own work environment was itself permeated by racial harassment. [Exhs. G-23; I-1]. Appellant has therefore failed to present a genuine issue of fact for hearing on his claim of hostile work environment harassment.

As to the retaliation claim, Appellant's June 2004 and November 2003 grievances constitute protected activity supporting that charge. However, Appellant has not submitted any evidence that the November 2005 comments were themselves an adverse employment action, or that they were caused by Appellant's past grievances alleging racial bias. Both are necessary elements of a claim of retaliation. In re Garcia, CSA 175-04, 5 (7/12/05). Therefore, summary judgment is appropriate on the claim of retaliation.

ORDER

Based upon the above findings, this appeal is dismissed with prejudice.

Done this 6th day of April, 2006.

Valerie McNaughton
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 **ORDER** by depositing it in the U.S. mail, postage prepaid, this 7th day of April, 2006, addressed to:

Brady Crenshaw
12592 E. Elmendorf Pl.
Denver, CO 80239

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing it in interoffice mail this 7th day of April, 2006, addressed to:

Robert A. Wolf, Esq.
City Attorney's Office
Litigation Section
201 West Colfax Avenue Dept. 1108
Denver, CO 80202

Alvin J. LaCabe, Jr.
Department of Safety

Fred J. Oliva
Denver Sheriff's Department