

ORDER ON MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

TAI CHO, Appellant,

vs.

DEPARTMENT OF PARKS AND RECREATION,
and the City and County of Denver, a municipal corporation, Agency.

The Agency moved to dismiss this appeal on Jan. 12, 2009. Appellant filed his response to the motion on Jan. 20, 2009. Upon full consideration of the pleadings, arguments of the parties and applicable law, the Hearing Officer finds and orders as follows.

Procedural History

This appeal dated Jan. 2, 2009 is based on a claim that Appellant's layoff from his position of Head Starter at the Agency was motivated by age discrimination. The appeal also asserts that "[r]ules and regulations of Career Service Authority were not followed properly in laying off Appellant", and seeks rescission of the layoff, among other relief.

The parties agree that on Nov. 3, 2008, the Agency hand-delivered a written notice of layoff to Appellant, "effective February 28, 2008." [Appeal No. 126-08, Exh. A.] Appellant first appealed that action on Nov. 17, 2008, citing as a reason that "Career service rules and regulations were not followed properly in laying off Appellant", and seeking rescission of the layoff. "Failure to look for or find equivalent employment in career service [and] failure to enumerate efficiencies in layoff decision" were stated as the specific rule violations supporting the appeal. [Appeal No. 126-08.] Appellant and his attorney both filed pleadings moving to dismiss that appeal. Appellant's Nov. 18, 2008 handwritten letter sent to the Hearing Office stated, "I do not want to appeal my layoff. Please disregard my matter on 11/17/08. My attorney will notice to you soon. Sorry about this. Thank you." On the basis of these statements, the appeal was dismissed with prejudice on Nov. 18, 2008.

Twenty days after Appellant's request to dismiss the appeal, he filed two complaints of discrimination with the Career Service Authority. The first claimed that the

Agency's failure to transfer or demote him to a different work classification in lieu of layoff was discriminatory. Appellant noted that the layoff letter gave the effective date of the layoff as Feb. 28, 2008¹, but the contents of the complaint made it clear that Appellant understood he was to be laid off in the future. [Motion to Dismiss, Exh. 7.] The second complaint cited a different adverse action: the Sept. 2008 failure to hire him for an open position at Aqua Golf Course. The Agency investigated both complaints, and concluded in findings dated Dec. 19, 2008 that discrimination did not occur in either instance. [Motion to Dismiss, Exh. 8.] This second appeal was filed fourteen days thereafter.

Motion to Dismiss

1. Appeal of Layoff

The Agency's motion argues that the discrimination claims arising from the layoff are barred by the doctrine of claim preclusion. That doctrine, also known as *res judicata*, prevents a party "from relitigating a legal claim that was or could have been the subject of a previously issued final judgment. Satsky v. Paramount Communications, Inc., 7 F.3d 1464, 1467 (10th Cir. 1993). Claim preclusion requires proof of three elements: 1) a final judgment on the merits in an earlier action, 2) identity of parties, and 3) identity of the causes of action in both suits. Wilkes v. Wyo. Dept. of Employment Div of Labor Standards, 314 F.3d 501, 504 (10th Cir. 2003).

Appellant argues that the first appeal did not end in a final judgment, since the Nov. 3, 2008 notice of layoff, which erroneously gave Feb. 28, 2008 as the effective date of layoff, rendered the appeal of that layoff premature. However, Appellant's statement that "I do not want to appeal my layoff", affirmed by his attorney, indicates a voluntary decision with advice of counsel to withdraw that appeal based on Appellant's lack of interest in pursuing a hearing on the merits. The pleadings do not give as grounds that the appeal was premature. The dismissal specifically ordered dismissal with prejudice based on Appellant's own motion. Thereafter, neither Appellant nor his attorney moved for relief from that dismissal. Moreover, it is clear by Appellant's Dec. 8th complaints of discrimination that Appellant was not misled by the notice of layoff's mistaken substitution of 2008 for 2009. Under these circumstances, I find that the dismissal with prejudice was a final judgment on the merits.

In addition, both appeals had identical parties and causes of action. The first appeal clearly challenged the layoff as improper under the Career Service Rules, including the Agency's failure to "find equivalent employment" in lieu of layoff under CSR § 14-45. The second appeal does not raise a separately appealable action by claiming that the layoff violated a different part of Rule 14. Appellant has not claimed that he became aware of the grounds for the claim under § 14-45 after he moved for dismissal of the first appeal, or that the facts supporting this claim were concealed from

¹ The Agency issued a correction on Dec. 18, 2008, making it clear that the actual date of his layoff was Feb. 28, 2009. [Agency Motion to Dismiss, Exh. 2.]

him. Both appeals cited the layoff as the injury being challenged, and both claimed that the layoff violated Career Service Rules. The doctrine of claim preclusion bars later actions based on the same cause of action. Cause of action "is defined by the injury for which the claimant seeks redress and not by the legal theory on which the claimant relies." 1B J. Moore, J. Lucas & T. Currier, Moore's Federal Practice, ¶ 0.410(1) (2d Ed.1988); Argus Real Estate, Inc. v. E-470 Public Highway Authority, 109 P.3d 604 (Colo. 2005).

2. Appeal of Discrimination Complaints

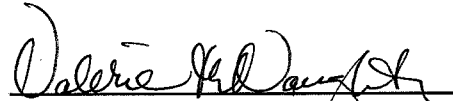
Appellant's two discrimination complaints asserted two different adverse actions: the Sept. 2008 failure to hire him at Aqua Golf Course, and the Nov. 3, 2008 layoff action. As determined above, in voluntarily withdrawing his first appeal, Appellant also waived his right to challenge the layoff under a different legal theory: i.e., that the layoff was caused by discrimination, a claim he could have made as a part of the direct appeal without the necessity of an internal complaint of discrimination. CSR § 19-10 A.

As to the second discrimination complaint based on the Agency's failure to hire him at the Aqua Golf Course in Sept. 2008, this appeal does not assert a claim based on that action, and Appellant's reply does not argue that it should be included in this appeal.

Order

Based on the foregoing findings, it is ordered that the appeal is dismissed based on the previous order of dismissal of the same claim dated Nov. 18, 2008.

Done this 21st day of January, 2009.


Valerie McNaughton
Career Service Hearing Officer