

DECISION

IN THE MATTER OF THE APPEAL OF:

VICKY GALLO, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Vicky Gallo, appeals the denial of her grievance, issued by her employer, the Denver Sheriff's Department (Agency) on August 21, 2009. A hearing concerning her appeal was held on June 23 and 24, 2010. Bruce A. Plotkin, Hearing Officer, presided. The Appellant was represented by Daniel Foster, Esq., while the Agency was represented by Jennifer Jacobson, Assistant City Attorney. Appellant's Exhibits A-J, V and S were admitted. The following Agency exhibits were admitted: 7-1, 7-2, 8-6, 8-8, 9-1, 10-2, 10-4, 10-6, 10-8, 10-13, 10-15, 12, 13, and 16-1. In addition to the Appellant testifying on her own behalf, she offered testimony of Deputies Gray, Roena, and testimony of Captain Romero. These witnesses testified for the Agency: Deputies Hanley and Wyse; Captains Gutierrez and McCall; and Chief Diggins. For reasons which follow, the Agency's denial of the Appellant's grievance is AFFIRMED.

II. ISSUES

Prior to hearing, the Appellant's claims of race, sex and age discrimination were dismissed; the Appellant's claim of harassment on the basis of age was also dismissed. The case proceeded to hearing on the Appellant's claims of retaliation, and harassment on the bases of race and sex. Thus, the issues presented for hearing were as follows:

- A. whether the Agency's transfer of the Appellant was based upon unlawful retaliation;
- B. whether the Agency's created or permitted an unlawful race-based hostile work environment toward the Appellant;
- C. whether the Agency's created or permitted an unlawful gender-based hostile work environment toward the Appellant.

III. FINDINGS

Deputy Gallo began working for the Agency in 1985 in the Receiving (also known as "Intake") and Classification Unit at the County Jail where she remained for 20 years.

Within that unit she and Deputy Gray were part of a coterie of deputy sheriffs who met regularly at breaks and had lunch together. Over time, through attrition and transfers, the lunchtime group was reduced to two: Gallo, a white woman, and Deputy Gray, an African-American man.

For the first 19 of her 20 years in the Receiving and Classification Unit, Gallo's work was deemed excellent. The Agency converted the intake process in 2008 in order to improve security and reduce inmate incidents such as fights, grievances and risk of suicide. [Romero testimony]. The negative side to the conversion was the significant time required to place data into the newly computerized data bases. Prior to the conversion, deputies in Receiving worked independently and were able to finish their intake responsibilities no later than noon. During the first week after converting to the new system, deputies finished at 6:00 p.m. Subsequently, deputies were able to finish by 2:00 p.m. but only by working through their lunch hours. The book-in process that used to take about 5 minutes per prisoner became 20 minutes and more. [Romero cross-exam]. Scheduling for lunch breaks had been left to the discretion of the deputies, but when they were no longer able to take lunch due to the crush of new intake responsibilities, Sgt. Romero, Gallo's new supervisor, scheduled lunch breaks for Receiving/Classification deputies in order to ensure everyone would have some break. Gallo was unhappy with the conversion, as it had a direct impact on the frequency of her lunch and break meetings with Gray. [See, e.g. Exhibit 9-1; Gallo testimony]. The benefit of the conversion to the Agency was a decrease in inmate incidents, including 30% fewer assaults in the first year, [McCall testimony], and significantly fewer complaints by inmates [Romero testimony].

Gray and Gallo believed the Agency's various actions in limiting their meetings were motivated by race-based discrimination and harassment. In early 2009, when Gray accused co-workers and his supervisor of racism, the Agency undertook insubordination charges against him. As part of that process, Gallo was interviewed regarding her relationship with Gray. Gallo supported Gray's complaint that his insubordination case was motivated by racism. Separately, Gallo filed an EEOC complaint alleging gender discrimination and harassment. Within a day or two of Gallo's EEOC complaint, the Agency dropped its insubordination charge against Gray.

In early July 2009, due in part to the poor working relationships within the Receiving and Classification Unit, the Director of Corrections reassigned Captain Silver Gutierrez to command the Receiving and Classification Unit. Gutierrez immediately made several staffing and assignment changes. As part of that process, on July 21, 2009, and with the approval of Chief Diggins, Gutierrez ordered Gallo's transfer to the Main Unit of the County Jail. [Exhibit R]. There was no change in rank, pay or benefits. Gallo was one of two deputies Gutierrez transferred out of the Receiving and Classification Unit, although the other deputy requested a transfer. At the same time, Gutierrez brought three newer deputies into the unit because they were technically proficient in learning the new system and eager to learn. Gutierrez said "I wanted to bring my own people in." [Exhibit S; Gutierrez cross-exam].

On July 30, 2009, Gallo filed a grievance concerning her reassignment. The grievance was denied on August 21, 2009. This appeal followed timely on September 4, 2009.

IV. ANALYSIS

A. Jurisdiction and Review

As an employee of the Career Service personnel system, Gallo may appeal the denial of her grievance under the Career Service Rules. CSR § 19-10 A.1.a.

Subject matter jurisdiction is proper under CSR §19-10 A.2.a., as the appeal from the Agency's denial of Gallo's discrimination, harassment and retaliation grievance. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Appellant retains the burden of persuasion, throughout the case, to prove the Agency engaged in one or more of the cited unlawful behaviors involving her transfer. The standard by which the Appellant must prove her claims is by a preponderance of the evidence.

C. Dismissal of Harassment/Hostile Work Environment Claim

At the end of the Appellant's case-in-chief, the Agency's motion to dismiss Gallo's gender-based hostile work environment claim was granted for Appellant's failure to establish a *prima facie* claim. The case then proceeded on the Appellant's remaining two claims: retaliation and the creation of a race-based hostile work environment.

D. Appellant's Retaliation Claim.

A retaliation claim is established when an employee makes or supports a protected claim, in this case, discrimination, and the agency responds in such a way that is materially adverse, which, in this case, means the agency response would dissuade a reasonable person in Gallo's position from filing her grievance or supporting Gray's race discrimination claim. See Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405 (U.S. 2006).

1. Protected Activity. Gallo was interviewed by the Agency in its insubordination case against Gray. Gray claimed the charges were race-based discrimination, and Gallo supported Gray's view. Gallo claimed the Agency transferred her for supporting Gray's position. Gallo's support of Gray's discrimination claim was a protected activity. In addition, Gallo filed her own grievance about co-workers' treatment of her, claiming Agency supervisors either participated in, or allowed race and gender based discrimination and harassment. [Appellant's appeal]. Gallo's grievance was also a protected activity.

2. Material Adversity. While Gallo claimed Romero was the driving force behind her transfer, it is important to note Gallo's transfer, the alleged adverse action, was made not by Romero but by Gutierrez with Diggins' approval. Therefore Gallo must prove Gutierrez knew about, or deferred to, Romero's alleged prejudicial sentiments regarding Gallo's protected activities before it may be determined whether such transfer would dissuade a reasonable person in Gallo's position from supporting Gray or filing a

filing a grievance.

Romero denied ever speaking with Gutierrez, and Gutierrez denied ever consulting with Romero about Gallo before transferring her. [Romero testimony; Gutierrez testimony]. Gallo alleged such a conclusion must nonetheless be inferred because: there is no other reasonable explanation for the transfer, given Gallo's 20 years of nearly impeccable service in the Receiving Unit; her transfer within days of filing her grievance; and the Agency's sudden dismissal of the insubordination charges against Gray. [Appellant closing statement]. By itself, the timing of Gallo's transfer is suspect; however, Gutierrez and other Agency witnesses provided an alternative rational explanation for Gallo's reassignment. As anticipated at its inception, the new intake system resulted in a reduction of inmate grievances and fights by 30%, [Romero testimony; McCall testimony], and improved tracking data has reduced mistakes in inmate placement and other errors. [McCall testimony].

In response to Gallo's retaliation claim, the Agency replied the new intake system required a more labor-intensive and co-dependent effort on the part of intake deputies. The Agency theorized Gallo was used to a system which was highly independent for each deputy and could be accomplished in 3-5 minutes per inmate, whereas the new system requires 15-30 minutes of data input per prisoner and is dependent upon deputies cooperating with each other in order to complete data entry for each others' shifts. So time-consuming was the new process that deputies were having to forego lunch just to complete data entry for newly arrived inmates. It was for that reason that Romero implemented a fixed lunch-hour system so that each deputy would have some break time. Gallo, according to the Agency, resented the imposition on her freedom to take breaks, lunch, and visits with Gray as she saw fit, consequently leaving work unfinished, which placed a difficult burden on other intake deputies to finish Gallo's work in addition to their own data entry duties. Her co-workers' complaints, and Gallo's resistance to change, ultimately led to her transfer.

While the two competing explanations are equally plausible, I find, more likely than either claim, that Gutierrez simply insisted on rebuilding the Receiving and Classification sections unit with his choice of deputies. Gutierrez' impassioned zeal was evident throughout his testimony, as he insistently corrected both opposing counsel and the Hearing Officer throughout his testimony. Gutierrez' verve was convincing proof that he likely insisted on structuring the Unit according to his mission rather than due to some nefarious influence by Romero or anyone else.

Finally, Gallo presented no evidence that the position to which she was transferred was objectively less desirable than her former position.¹ Gallo's failure to establish her

¹ Even a reassignment resulting in no loss of pay or benefits may be "materially adverse" if the reassignment was to an objectively less desirable position. Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2416 (U.S. 2006). As the Supreme Court noted in that case "[a]lmost every job category involves some responsibilities and duties that are less desirable than others." Common sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable. That is presumably why the EEOC has consistently found '[r]etaliatory work assignments' to be a classic and "widely recognized" example of "forbidden retaliation." 2 EEOC 1991 Manual § 614.7, pp. 614-31 to 614-32; see also 1972 Reference Manual § 495.2 (noting Commission decision involving an employer's ordering an employee 'to do an unpleasant work assignment in retaliation' for filing racial discrimination complaint); Dec. No. 74-77, CCH EEOC Decisions (1983) ¶ 6417 (1974) ('Employers have been enjoined' under Title VII "from imposing unpleasant work assignments upon an employee for filing charges')." *Id.* at 2416, 2417."

transfer was adverse eliminates the basis upon which a reasonable deputy in her position would have been dissuaded from supporting Gray or filing her own. Consequently, her retaliation claim fails.

E. Appellant's Race-Based Harassment Claim

General harassment, in the sense of general annoyances or insult, is not actionable. Gallo must show "more than a few isolated incidents of racial enmity." Hicks v. Gates Rubber Co., 833 F.2d 14-6, 1412 (10th Cir. 1987), quoting Snell v. Suffolk Co., 782 F.2d 1094, 1103 (2d Cir.1986). There must be a "steady barrage of opprobrious racial comments". *Id.* at 1412-13, citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir.1981). To prove the kind of indirect race-based harassment alleged here,² Gallo must prove, under the totality of the circumstances, (1) the agency actions were pervasive or severe enough to alter the terms, conditions, or privilege of her employment, and (2) the harassment was race-based or stemmed from racial animus. Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). Some of the factors to consider in evaluating whether an environment is hostile or abusive include the frequency of the 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. EEOC v. PVNE, L.L.C., 2007 U.S. App. LEXIS 11276 (10th Cir. 2007). Since nearly all the alleged harassment was committed by one or more of Gallo's unidentified co-workers, Gallo must establish Gutierrez knew or should have been aware of the harassment and failed to intervene. Myers v. LeFlore County Bd. of Comm'rs, 1998 U.S. App. LEXIS 1491, 6-7 (10th Cir. 1998), citing Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1444 (10th Cir. 1997).³

Gallo claimed the following actions and inactions were indicative of racial harassment: dirty dishes were left in her cubbyhole; connections to her computer were unplugged; she was teased about her relationship with Deputy Gray; someone drew on the community board a heart with her first name and Gray's first name in it; she was the only Intake deputy whose colleagues were instructed to report every mistake to Romero; McCall and Romero gave unspecified disapproving looks and gestures to her and to Gray; there were rumors that she was in a sexual relationship with Gray; some unknown person from the County Jail left an anonymous message for Gray's wife on their home answering service stating Gray was having an affair with Gallo; Romero singled out Gallo in public for remedial training because she allegedly made disproportionate mistakes in Intake; McCall changed the lunch schedule in order to prevent Gallo from having lunch with Gray; Romero told Gray "what's it going to take to keep you away from her [Gallo], she's married;" another deputy yelled at Gallo in front of inmates and visiting attorneys; Romero interrupted breaks between Gallo and Gray by unspecified looks or gestures; another deputy slammed her door right next to where Gallo and Gray were visiting; after 19 years of highly-rated work reviews, Gallo's work review score dropped from exceeds expectations to needs improvement because

² There are two kinds of sexual harassment, direct sexual harassment, also known as *quid pro quo sexual harassment*, where submission to sexual conduct is made a condition of concrete employment benefits, and indirect sexual harassment, also known as hostile work environment sexual harassment, which is continuous conduct which either unreasonably interferes with an employee's work or creates an intimidating, hostile or offensive work atmosphere. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412 (10th Cir. 1987).

³ An employer is responsible for acts of harassment in the workplace which relate to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action. 29 CFR Part 1609 (10/1/1993).

because Romero failed to require other deputies to assist Gallo, insuring she wouldn't complete her work; Romero enforced unspecified unit rules more strictly against her than other deputies; Romero influenced Gutierrez to transfer her; and the day after Gallo filed her EEOC complaint, insubordination charges against Gray were dropped. In the only direct reference to race, Gallo alleged a specified deputy said she couldn't understand why Black men are with White women;

Although Gallo's allegations must be considered in their entirety, some of them, even collectively, are patently not harassing and do not tend to prove a pervasive atmosphere of race-based harassment. Others of Gallo's allegations were dispelled by equally convincing Agency rebuttal. Some of Gallo's complaints appear to be justified.

The following incidents, while clearly indicative of infantile pranks, do not contain any inference of racial animus, even if considered collectively. (1) dishes in Gallo's cubbyhole; (2) unplugged connections to her computer; (3) drawing of a heart with Gallo and Gray names; and (4) being teased about her relationship with Gray (without an inference of racial animosity).

The following incidents were rebutted by equally convincing Agency responses.

(1) Disapproving looks and unspecified gestures. Non-verbal cues can be loaded with meaning, including racial animosity; however here, Gallo and Gray were both vague about the nature of the gestures, looks and other cues. They could not specify who it was, when it was or what it was, making it difficult to make any preponderant conclusions about the intent or relevance of the gestures. In addition, the Agency presented equally convincing evidence that the disgusted looks could just as well have been the looks of frustration from Gallo's co-workers, almost all of whom believed she was not carrying her fair share of the load during her shifts after the conversion of the intake system. [Romero cross-exam; Hanley testimony; Wyse testimony; McCall testimony; Exhibit 9; Exhibit 10-2]. Even Gray admitted his visiting with Gallo may have negatively affected her ability to do her work. [Gray cross-exam].

(2) Rumors of a sexual relationship. Gallo's allegation, that co-workers engaged in rumor-mongering about her relationship with Gray, are justified by the Agency's admissions. [McCall testimony; Romero testimony]. The issue is whether such rumors were shown to be racially motivated. Given the admitted frequency with which Gallo visited with Gray before the Intake Unit transition, it is reasonable to suspect co-workers would gossip just as much even in the absence of racial disparity. Even taking into consideration Gallo's other claims, the gossip about her relationship with Gray does not amount to racially-motivated harassment.

(3) Lunch schedule change. Gallo contends McCall changed her lunch schedule to prevent her from having lunch with Gray, inferably, to prevent the two individuals of different races from being together. Naturally McCall denied any such motive, but she offered a logical alternative reason for the change, in order to allow all Intake deputies to have some break during their shifts. She and Romero admitted the effect may have been to reduce the number of lunch hours Gallo and Gray could spend together, however the legitimate business reason for the change was not rebutted by Gallo, and therefore negates her race-based assumption.

(4) "What's it going to take to keep you away from her?" Gallo and Gray both alleged Romero spoke these words to Gray. Romero vehemently denied making such a statement and, as with most un-witnessed exchanges, there was no other evidence which might affirm either claim. This claim remains unproven.

(5) Romero or McCall's interrupted breaks between Gallo and Gray. At least on this point the parties agree Romero did interrupt one or more of the meetings between Gallo and Gray. [Exhibit 8; Romero testimony; Exhibit 9; McCall testimony; Exhibit 10-2; Exhibit 10-3]. Romero explained the interruption was due to the number of complaints by other deputies that Gallo and Gray were disruptive to their own work and also, by taking unscheduled breaks when work remained, placed an unfair burden on others to finish Gallo's work. The Agency's claim rebuts Gallo's race-based harassment claim.

(6) Slamming door. The deputy in question admitted she did close the door too hard, but denied any racial animus, and her explanation that Gallo and Gray were laughing loudly and disrupting her work is just as much reason to close one's door as Gallo's racial animus claim.

(7) Sudden change in work review rating. Here also, the parties agree to the fact, but not the underlying motivation. The Agency readily admits Gallo's work history was stellar year after year, and changed only in the past two review years, 2008-09 and currently. [McCall testimony; Romero testimony; Gutierrez testimony; Exhibits A-L] Gallo alleges the sudden change proves race-based harassment; however McCall and Romero both had many positive things to say about Gallo's overall performance, and take issue only with her effort and resistance in implementing the new intake procedures. Both averments rebut Gallo's allegation by offering an equally plausible explanation: Gallo was entrenched in what had become a cozy situation and actively resisted necessary change for the benefit of the Agency and the inmates it serves.

(8) Romero picked on Gallo. The objective evidence favors Gallo's assertion. Although witness Roena testified for the Appellant, his frankness was compellingly objective. He asserted Gallo was picked on excessively and publically, even though she made no more mistakes than anyone else with the new intake system, and she did not leave more work undone at the end of her shift than anyone else. Roena's assertion was cemented by Gutierrez who found, following a two-month study, that every deputy, including Gallo, was making a concerted effort during their shifts. [Gutierrez cross-exam]. That evidence refutes the testimony of Gallo's co-workers who claimed she put in little effort and left much work to be finished by others. Nonetheless, the same problem remains for Gallo, to prove that Romero's picking on her was motivated by racial animus. Gallo's offer of deductive conclusiveness – that she explained away every other basis, thus only one that remains is race-based harassment – is not shown by a preponderance of the evidence since many of her alleged indices of harassment were patently not race-based or were explained adequately by the Agency on alternative grounds.

(9) Romero influenced Gutierrez to transfer Gallo. As stated above, Gutierrez's assertion, that he wanted to remake the Intake Unit with "his own people," is more convincing than Gallo's assertion that he succumbed to Romero's influence. Moreover, in the absence of additional evidence, Gallo's assertion that Romero spoke with Gutierrez about transferring her is no more convincing than Romero's denial.

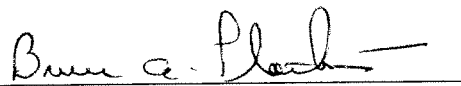
The following complaints by Gallo were justified. (1) Gallo was picked on inordinately by Romero. (2) Gallo was humiliated by Romero's public declaration that she required retraining. (3) Romero unfairly singled out Gallo by asking her co-workers to report her intake errors whereas all Intake Division deputies had difficulty adjusting to the new system. As stated above, the most convincing evidence with respect to these incidents was Roena's un rebutted testimony.

While the incidents immediately above spell an unfortunate conflict between Gallo and Romero, they are the sort of non-actionable incidents the courts describe, perhaps with insensitivity to the human toll they take, as "those petty slights or minor annoyances that often take place at work and that all employees experience." McMahon v. Oklahoma, Slip Copy 2010 LS 1838646 (D. OK 2010), citing Burlington Northern, supra. In addition, the conflict between Romero and Gallo provided justification for Silver-Gutierrez' decision to reshape the Receiving and Classification Unit, in part, to provide better harmony in the workplace. Such action is within the purview of his authority. For reasons stated here and above, Gallo failed to prove, by a preponderance of the evidence, that her reassignment was motivated by unlawful, race-based harassment.

VI. ORDER

The Agency's denial of Gallo's grievance is **AFFIRMED**. This appeal is **DISMISSED WITH PREJUDICE**.

DONE August 27, 2010.



Bruce A. Plotkin
Career Service Hearing Officer