

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

Appeal No. 05-03

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE APPEAL OF:

DANNY DANIELS, Appellant,

Agency: DEPARTMENT OF AVIATION, DENVER INTERNATIONAL AIRPORT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

A hearing in this matter was held before Hearing Officer Joanna Lee Kaye on May 1 and 14, 2003 in the Career Service Hearings Office. Assistant City Attorney Jack M. Wesoky represented the Department of Aviation, Denver International Airport ("DIA" or "the Agency"). DIA's Director of Maintenance, Dan Brown, served as advisory witness for the Agency. Danny Daniels ("Appellant") represented himself.

MATTER APPEALED

Appellant challenges the Agency's decision to terminate his probationary employment. Appellant alleges his termination was motivated by discrimination against him because of his race and religious affiliation, collectively referred to during the hearing as that of "Black Hebrew." Appellant seeks reinstatement with back-pay.

For the reasons set forth below, the Agency's action is AFFIRMED.

ISSUES

1. Whether Appellant has demonstrated a *prima facie* case of discrimination.
2. If so, whether the Agency has demonstrated a legitimate business reason for its allegedly discriminatory actions.
3. If so, whether Appellant has shown that the Agency's stated business reason is a pretext for discrimination.

FINDINGS OF FACT

1. Appellant was hired as a Heavy Equipment Operator on a probationary basis on September 16, 2002.
2. On his written application, Appellant indicated that his race is Black or African American, and that he is a Hebrew. Appellant's appearance is that of an African American.
3. Three supervisors were present at Appellant's interview and conducted the interview. The supervisors present were not in Appellant's direct supervisory chain upon his assignment.
4. Upon his hire, Appellant was assigned to the crew of Operations Supervisor Robert Proffitt. Mr. Proffitt did not read Appellant's application and did not know Appellant was Hebrew. Mr. Proffitt is Caucasian.
5. Mr. Proffitt's supervisor is Assistant Director of Field Maintenance Ron Morin. Mr. Morin's supervisor is Director of Maintenance Dan G. Brown. Mr. Morin and Mr. Brown are both Caucasian.
6. Mr. Proffitt, Mr. Morin and Mr. Brown did not review Appellant's application or personnel file at any time relevant to this case.
7. Operations Supervisor Earl Threats testified that it is his practice to review the personnel files of new assignees. Mr. Threats was not in Appellant's chain of command.
8. At the relevant times to this case, a manager by the name of Bill Williams also bore a similar title to that of Mr. Brown. Mr. Williams' title was Director of Aviation, Field Maintenance, and this position ranked just beneath Mr. Brown's in seniority. Mr. Williams is African American. By the time the Agency was contemplating Appellant's termination, Mr. Williams had announced his intention to resign his post as of the end of the year, and his duties had been reassigned to Mr. Morin. Mr. Williams was not included in the decision to terminate Appellant. Mr. Proffitt testified that Mr. Williams is not in the chain of command with respect to Appellant. Mr. Williams did not testify.
9. During his orientation, Appellant was told that employees have a seven-minute grace period during which they may punch in either seven minutes early or seven-minutes late without their pay being docked. Appellant misunderstood this instruction to mean that arriving within seven minutes after the beginning of the assigned shift is acceptable.
10. Appellant was less than seven minutes late for work on the following five occasions. He arrived at 6:04 a.m. (four minutes late) on September 27, 2002. He arrived at 6:05 a.m. (five minutes late) on October 16. He arrived at 6:01 a.m. (one minute late) on November 13. He arrived at 6:02 (two minutes late) on December 10 and 26. (*See*, Exhibits 1 and A.)

11. Appellant was more than seven minutes late on three occasions. He arrived at 3:50 a.m. on October 31, 2002 (approximately fifty minutes late). This was a snow-removal day and Appellant was due to be at work at 3:00 a.m. Appellant overslept on this occasion, woke up at 2:50 a.m., and called Mr. Proffitt to leave a message for Mr. Proffitt that he would be in as soon as possible. Appellant arrived at work at 6:13 a.m. (thirteen minutes late) on November 5. He arrived at 3:09 a.m. (nine minutes late as this was a snow-removal day) on December 5, 2002. (*See*, Exhibits 1 and A.)
12. The Agency uses a timekeeping system called the "kronos" system. There are several clocks the employees use to punch in on the kronos system and they are not perfectly synchronized. However, the margin of error is not in the evidence in this case.
13. During the month of December, it came to Mr. Proffitt's attention that Appellant was exhibiting a pattern of being late on the above occasions. Mr. Proffitt counseled Appellant on this issue, and Appellant informed Mr. Proffitt he had misunderstood the instructions during orientation concerning the seven-minute grace period. Appellant stated he intended to correct the mistake.
14. Appellant was not late for work after December 26, 2002 until his termination in January of 2003.
15. Appellant credibly testified that during a staff meeting, he heard Mr. Proffitt make a comment about a recent news article concerning the Aryan Brotherhood, which Appellant took as Mr. Proffitt making a joke about being a member of the Aryan Brotherhood.
16. Mr. Proffitt credibly testified that he did not make a statement during a staff meeting that he was in any way affiliated with the Aryan Brotherhood.
17. Mr. Morin testified that Mr. Proffitt brought his attention to Appellant's punctuality history around the week after Christmas of 2002. Mr. Morin knew Appellant by sight as a fellow employee at the time of this discussion. Mr. Morin requested that Mr. Proffitt monitor the situation and keep him apprised of any developments. Mr. Morin testified he did not consider termination at that time, and that he wanted to give Appellant a chance to improve.
18. Mr. Brown and Mr. Morin both testified that Mr. Morin brought Appellant's punctuality record to Mr. Brown's attention around the beginning of the second week in January of 2003. Mr. Morin told Mr. Brown they had an employee with punctuality problems during this meeting. Mr. Brown testified he did not recall Mr. Morin bringing up termination during this meeting, nor did Mr. Morin mention any other issues of concern about Appellant during this discussion.
19. Mr. Brown reviewed Appellant's attendance records in the kronos timekeeping system. (*See*, Exhibit 1.) Based on this information alone, Mr. Brown decided that Appellant's incidents of tardiness warranted termination.

20. Appellant testified he sold his car to a co-worker or around the end of 2002. The co-worker, a career-status African American male, felt Appellant had sold him a lemon. The co-worker filed a civil suit against Appellant. Other co-workers told Appellant that the co-worker had said he did not feel safe working near Appellant. Appellant testified that he met with Mr. Proffitt in December and asked him to reassign Appellant so that he would not have to work alongside the co-worker. Mr. Proffitt told Appellant there were no other assignments at that time.
21. Mr. Morin testified that about a week after the first meeting with Mr. Proffitt, Mr. Proffitt again came to see him about Appellant. This time he reported that Appellant was "having trouble" with a co-worker. Mr. Morin asked Mr. Proffitt to counsel both employees concerning this matter.
22. Mr. Morin testified that on January 14, 2003 he looked out a window of the Maintenance office building and saw Appellant apparently asleep in his city vehicle out in the parking lot. He was upset and went to Mr. Proffitt to report this observation. Mr. Morin testified that he reminded Mr. Proffitt that the City was in financial straights, and that it was important that they not create even the appearance of a waste of funds.
23. Mr. Proffitt testified that when Mr. Morin brought this to his attention, he looked out and saw Appellant out in the truck. He then went to the truck and woke Appellant up.
24. Appellant testified that he was on a lunch break and was only resting his eyes for a minute when this happened. Appellant told Mr. Proffitt that he was on his lunch break and thought it was alright.
25. Mr. Threats testified that employees are permitted to stand by in their vehicle radios and rest in the early morning hours on snow removal days. Mr. Threats further testified he has seen other employees sleeping in the parking lot as well as in the hallways of the Maintenance office building. Mr. Threats was not aware of any other employees who had been disciplined for such activity. Mr. Threats did not testify as to whether those employees he had observed were probationary employees.
26. Mr. Morin testified that he paid another visit to Mr. Brown on January 15, 2003. Mr. Brown testified that Mr. Morin reported that Appellant had been caught sleeping in view of the public and the main Maintenance Office Building. He also mentioned the personal dispute between Appellant and another employee.
27. Mr. Brown testified that these additional complaints were not part of the reason he elected to terminate Appellant, but instead the reason was Appellant's attendance. Mr. Brown testified that in his experience, employees who exhibit any attendance problems tend to do so chronically.
28. Mr. Brown testified that at the time he decided to terminate Appellant, he was not aware of Appellant's assertion that he misunderstood the seven-minute rule. Mr. Brown

testified that he learned of this assertion during the hearing. However, Mr. Brown testified he found Appellant's assertion lacking in credibility, and that it would not have made any difference to him in his decision to terminate even if he had known about it at the time.

29. At the time Mr. Brown decided to terminate Appellant, he had never met Appellant, had not reviewed his personnel file and did not know of Appellant's race or religious affiliation.
30. Mr. Brown prepared a Letter of Termination (Exhibit 2).
31. On January 16, 2003 Mr. Morin called Appellant, Mr. Proffitt, and Crew Leader Gina Abalos into his office. He hand-delivered Appellant's termination letter to him at that time. Appellant subsequently timely filed this appeal on January 23, 2003 (Exhibit 3).

DISCUSSION

1. The CSR Rules governing probationary terminations.

It is undisputed that Appellant was a probationary employee at the time of his dismissal. CSR 5-61, Employees in Employment Probationary Status, states as follows in relevant part:

An employee in employment probationary status:

- 1) may be terminated or demoted at any time for *any* reason without cause except for discrimination as defined in Rule 19 **APPEALS**.

(Emphasis added.) CSR Section 19-10 Actions Subject to Appeal in turn states:

An applicant or employee who holds career service status 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.....

2. Burden of proof.

In *de novo* administrative proceedings such as this one, the level of proof required for a party to prove its case is a *preponderance of the evidence*. This means that the party bearing the burden must demonstrate that the assertions it makes in support of its claims are more likely true than not.

In cases where a party alleges discrimination, that party bears the initial burden of affirmatively establishing a *prima facie* showing of discrimination. In other words, the employee must show that: a) he is a member of a protected class, b) an adverse employment action was

taken against him, and c) the action in question was taken under circumstances tending to give rise to an inference that the action was motivated by discrimination against the employee because of his membership in the protected class. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Appellant makes such a showing, the Agency must then demonstrate a legitimate, non-discriminatory business purpose for its actions. If the Agency makes such a showing, Appellant must then demonstrate that the Agency's alleged non-discriminatory business purpose is a pretext, or an excuse, for discrimination. Id.

3. The arguments.

a. Appellant's *prima facie* showing of discrimination.

Appellant argues that the following facts tend to suggest that the Agency terminated him because of his protected status as a Black Hebrew. First, Mr. Proffitt told him during orientation that he could be up to seven minutes late without consequence. Then, after several months during which Mr. Proffitt allowed Appellant to act on that mistaken assumption, Mr. Proffitt, who publicly expressed affiliation with the Aryan Brotherhood albeit in a joking fashion, then reported Appellant's attendance record to the higher supervisors without giving him a chance to correct the problem.¹

Appellant asserts this was a deliberate and successful attempt to sabotage Appellant by leading him to believe late arrival was alright in order to create a negative attendance record, which Mr. Proffitt could then report. Appellant points out that the Agency has apparently ignored the fact that Appellant was not late after Mr. Proffitt counseled him on this issue.

Furthermore, Appellant asserts that resting or sleeping on the job is permitted on snow days, and that Appellant has observed others sleeping while on breaks in the lunchroom and hallways with apparent impunity. Yet he was punished for doing the same thing.

Finally, Appellant feels it is inappropriate for the Agency to consider Appellant's personal dispute with another employee as grounds for his termination, when it was the other employee who first complained to the crew about having to work with Appellant, and where Appellant was requesting a reassignment to avoid further conflict and because of safety issues raised by the employee's complaints.

At the close of Appellant's presentation of his *prima facie* case, the Agency moved for summary judgment alleging that Appellant had shown no circumstances tending to give rise to an inference of discrimination. The agency argued that first, any alleged statement by Mr. Proffitt about being affiliated with the Aryan Brotherhood was too tenuous to show any relationship between such a statement and Appellant's termination. The Agency further argued that there was no showing that Mr. Brown, who was the final decision maker, knew of

¹ Because this phase of the hearing was Appellant's *prima facie* case, Mr. Proffitt had not yet testified as to whether he actually made this comment. The hearing officer therefore ruled on the Agency's subsequent Motion for Summary Judgment without the benefit of this testimony.

Appellant's race or creed at the time he made the decision. Therefore he could not possibly have been motivated by discrimination.²

In support of this proposition, the Agency cited Robinson v. Adams, 847 F.2d 1315 (9th Cir. 1987). However, in that case the employee's application was denied presumably without any of the employers at issue knowing of Appellant's race. Clearly however, in this case, both Mr. Proffitt and Mr. Morin, the supervisors informing Mr. Brown of the allegations against Appellant, did know that Appellant was African American. Appellant's allegations of discrimination are directed primarily against Mr. Proffitt. Therefore, that case is not controlling here. An agency authority cannot operate as "a mere rubber-stamp or 'cat's paw' for the allegedly biased investigators" who are responsible for the negative employment recommendations. "...[U]nder certain circumstances, a defendant may be held liable for a subordinate employee's prejudice even if the manager lacked discriminatory intent." English v. Colorado Department of Corr., 248 F.3d 1002, 1011 (10th Cir. 2001).

Furthermore, Summary judgment is proper only when the pleadings, documents, and evidence on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of *law*." Rogers v. City of Chicago, 320 F.3d 748 (7th Cir. 2003). Summary judgment is appropriate only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991). "Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." Id.

The Tenth Circuit Court of Appeals recently cited Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999), in which that Court said:

[R]acial epithets are often the basis of racial harassment claims[] and may likewise create an *inference* that racial animus motivated other conduct as well.

O'Shea v. Yellow Technology Services Inc., 185 F.3d 1093 (10th Cir. 1999) (*emphasis added*).

Under these cases, the hearing officer was not persuaded that the record was devoid of any inference of discrimination. Instead, an alleged racial epithet constituted *some* evidence that racial animus might have motivated other relevant conduct in this case. The hearing officer therefore denied the Agency's Motion for Summary Judgment and the hearing proceeded to the Agency's case-in-chief.

b. The Agency's showing of a legitimate business reason.

The Agency demonstrated it had legitimate business reasons for terminating Appellant as follows. First, Mr. Proffitt testified that he did not make a statement during a staff meeting that he was affiliated with the Aryan Brotherhood. The hearing officer found this denial very credible.

² Mr. Brown had not yet testified at this stage of the hearing. Therefore, the hearing officer ruled on the Agency's Motion for Summary Judgment without the benefit of his testimony.

In addition, Mr. Brown persuasively testified that he made the decision to terminate Appellant based solely on his review of the kronos records indicating Appellant's incidents of tardiness. Mr. Brown further testified that even if he had known About Appellant's allegation that he misunderstood the seven-minute grace period, it would not have made any difference in his decision, since Mr. Brown was not persuaded by Appellant's assertion that he misunderstood the orientation instructions.

Finally, Mr. Brown testified that complaints about Appellant's personal conflicts with a co-worker, and sleeping in view of the public, were not operative in his decision to terminate Appellant. Therefore, these considerations are not relevant to consideration for the reasons for Appellant's termination and they have been disregarded.

This evidence sufficiently rebutted Appellant's cat's paw theory of Mr. Brown merely rubber-stamping a discriminatory action by Mr. Proffitt or Mr. Morin. The Agency therefore had demonstrated a legitimate business reason for terminating Appellant.

At the close of its case-in-chief, the Agency once again moved for Summary Judgment. The hearing officer denied this Motion based on the fact that Appellant had not been provided any opportunity to present the merits of his challenge that the Agency's stated reason was a mere pretext for discrimination.

c. Appellant's showing of pretext.

Appellant presented testimony by Mr. Threats that others were allowed to sleep on the job, but that apparently those other employee were not disciplined. The hearing officer is unpersuaded by this argument. First, Appellant's sleeping on the job was not a consideration when Mr. Brown elected to terminate him. Second, even if it had been, there is no evidence in the record whether these employees were probationary or career status, or whether the employees might have been disciplined without his knowledge.

Mr. Threats further testified that Mr. Williams was still at DIA during the time Appellant was terminated. Yet the Agency witnesses testified that Mr. Williams' relevant duties had already been assigned to others, and Mr. Morin testified he was actually performing those duties at the time of Appellant's termination. The hearing officer found this testimony persuasive. In the absence of testimony from Mr. Williams himself that he was still performing the relevant duties, or some other more persuasive evidence that the chain of command was broken in this case, Appellant has not shown by a preponderance that Mr. Williams was deliberately eliminated from the chain of command respecting Appellant's termination.

Finally, Appellant asserts he was sabotaged by Mr. Proffitt's deliberately misleading him into being late several times. Appellant argues that Mr. Proffitt's discriminatory motivation was illustrated by his comment about the Aryan Brotherhood.

However, Appellant offered no additional evidence during the pretext phase of the hearing to overcome Mr. Proffitt's credible testimony that he made no such statement about being affiliated with the Aryan Brotherhood. While the hearing officer is persuaded that

Appellant heard *something*, the exact words of Mr. Proffitt's alleged statement are not in the record. The hearing officer is left to speculate what the actual statement might have been, and therefore how damaging it actually would have been to the Agency, or whether or not Appellant misunderstood what Mr. Proffitt said, or whether he may have misinterpreted some reference in any such statement.

Once there has been a full trial on the merits, the sequential analytical model adopted from McDonnell Douglas ". . . drops out and we are left with the single overarching issue whether plaintiff adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken" against Appellant because of his protected status. Kendrick v. Penske Transportation Services, Inc., 220 F.3d 1220, 1226 (10th Cir. 2000). The ultimate burden of proving discrimination, and therefore any arguments in support of that allegation, lies at all times with Appellant. McDonnell Douglas, *above*, at 802.

Without any corroborating evidence, such as the testimony of another employee who heard the alleged statement, the hearing officer does not find by a preponderance of evidence that Mr. Proffitt made a discriminatory statement. Therefore, Appellant has failed to prove this element of his case by a preponderance of evidence.

The hearing officer was persuaded that Appellant genuinely misunderstood the instructions he was given at orientation concerning the seven-minute rule, and that he intended to correct the problem. However, Mr. Proffitt credibly testified that he did not intentionally mislead Appellant during orientation. The hearing officer also found the testimony of Mr. Proffitt persuasive on this point. The hearing officer is not persuaded by a preponderance of the evidence that Mr. Proffitt deliberately misled Appellant.

Moreover, Mr. Brown credibly testified that he did not find Appellant's assertion of misunderstanding credible, and would have terminated Appellant even if he had known about this assertion at the time he terminated Appellant. Mr. Brown's testimony on this issue is at the heart of this case. While the hearing officer *was* persuaded that Appellant's misunderstanding of the rule led to most of the incidents of tardiness, Mr. Brown *was not*. However, even if she disagrees with Mr. Brown's assessment, the hearing officer can only reverse the Agency's decision to terminate Appellant if she is persuaded by a preponderance of the evidence that this assessment was a mere excuse *to discriminate against Appellant because of his protected status*.

Such a factual disagreement between the hearing officer and Mr. Brown alone does not lead to a conclusion that the Agency's motivation was one of discrimination. On the contrary, it leads to the conclusion that the decision maker, who was not aware of Appellant's race or creed, independently elected to terminate him solely for incidents of tardiness.

Based on the totality of evidence in this case, the hearing officer concludes that Appellant has not shown that the Agency's decision to terminate him was motivated by discrimination due to his membership in protected classes. Instead, the preponderance of evidence suggests that Appellant's termination was motivated solely by a stern requirement by the Agency to be timely.


CONCLUSIONS OF LAW

4. Appellant demonstrated a *prima facie* case of discrimination.
5. The Agency has demonstrated a legitimate business reason for its allegedly discriminatory actions by a preponderance of the evidence.
6. Appellant has not shown by a preponderance of the evidence that the Agency's stated business reason is a pretext for discrimination.

ORDER

Based on the Findings and Conclusions set forth above, the Director's decision to terminate Appellant from his probationary status is AFFIRMED. This case is hereby DISMISSED WITH PREJUDICE.

Dated this 16th day of May, 2003.


Joanna Lee Kaye
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 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the U.S. mail, postage prepaid, this 20 day of May, 2003, addressed to:

Danny Daniels
12961 Randolph Pl.
Denver, CO 80239

I further certify that I have forwarded a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER** by depositing same in the interoffice mail, this 20 day of May, 2003, addressed to:

Jack M. Wesoky
Assistant City Attorney
Employment Law Section

James Thomas
Denver International Airport

V. Garudo