

DECISION

IN THE MATTER OF THE APPEAL OF:

GINA DUPREE, Appellant

vs.

DEPARTMENT OF HUMAN SERVICES, and the City and County of Denver, a
municipal corporation, Agency.

The hearing in this appeal was commenced on September 5, 2007 before Hearing Officer Valerie McNaughton. Appellant Gina Dupree was present and represented herself. The Agency was represented by Assistant City Attorney Niels Loechell. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact, conclusions of law and enters the following decision:

I. STATEMENT OF THE CASE

Appellant Gina Dupree appeals the June 1, 2007 termination of her probation by the Denver Department of Human Services (DDHS) on the ground of disability discrimination. Appellant filed a timely appeal of the action on July 2, 2007 pursuant to the jurisdiction provided in the Career Service Rules (CSR) § 19-10 B. 1.

II. ISSUE

The sole issue in this appeal is whether Appellant established by a preponderance of the evidence that the Agency discriminated against Appellant on the basis of a disability by terminating her probation.

III. FINDINGS OF FACT

The parties stipulated to the admissibility of Agency Exhibits 3, 4, 6, 7, and 9. The Agency did not offer any exhibits numbered 1, 2, 5 or 8. Appellant's Exhibit C was admitted over objection, excluding the handwritten notes thereon. Appellant withdrew Exhibits A - B and D - H.

The Agency stipulated to the following facts: 1) Appellant was qualified for the position of Administrative Support Assistant III (ASA III), 2) she was pregnant at the time of her hire, 3) Appellant was placed by her doctor on bed rest from April 25th until May 6th, the date her baby was delivered, 3) Appellant was on short-term disability for the period of bed rest, and 4) Appellant's performance was not the primary basis for the termination of her probation.

On Feb. 12, 2007, Appellant was hired as an ASA III by the city's Department of Human Services in the Family and Children's Business Office. From February to April, Appellant was being trained in her duties by another ASA III, and was not yet assigned her own areas of responsibility. Appellant was told that she was not expected to fully master one of her duties for four to six months. Appellant was aware she could be terminated for any reason during probation, and was therefore careful in the performance of her duties. Her supervisor, LaTunya Savage, did not inform her that her performance was inadequate in any respect during the ten weeks Appellant was on the job.

On April 23rd, Appellant was in her sixth trimester of pregnancy, and began to experience unusual physical symptoms while at work. She called her doctor about noon, and was advised to meet him at the Kaiser Hospital. Appellant then met with Ms. Savage, and informed her of her symptoms and of the doctor's instructions to go to the hospital. Appellant told Ms. Savage that she was worried this might adversely affect her job, since she was still on probation. Ms. Savage replied, "No, you don't need to worry about your job at this time, you just make sure you take care of yourself, and you let us know what's happening." [Testimony of Appellant.] Ms. Savage offered to take her to the hospital, but Appellant declined, stating she had a ride.

Appellant was admitted to the hospital that day. She underwent surgery and was ordered on complete bed rest to prevent premature birth. Appellant was told that order would be reconsidered on May 10th, Appellant's next scheduled doctor's appointment. Appellant met with Agency management to advise them of the medically ordered bed rest. Ms. Savage approved leave for that purpose, and Appellant was instructed to call in every day during her bed rest. Appellant testified she complied with that order, and informed Ms. Savage some time before the birth that she didn't know when she would be able to return.

On May 6th, Appellant's baby was born, three months before the July due date. After that date, the doctor's order of bed rest to prevent preterm birth was no longer in effect. Appellant was discharged from the hospital shortly thereafter, but her baby stayed in the hospital until July 10, 2007. Appellant called her supervisor to inform her of the birth. Appellant testified she called work every day for the rest of May to inform the Agency she was still on maternity leave. Appellant stated that based on her past work experience she believed she was entitled to six weeks' maternity leave after the birth. Appellant was not sure how

her absence was being recorded by the Agency, but believed she was still employed because she had not received any word to the contrary.

Because her baby was still very ill and was expected to be in the hospital until August, Appellant did not initiate a discussion with her supervisor about when she would be returning to work. Appellant testified she did not believe she was required to set a date for her return to work until the end of the six weeks' maternity leave. Appellant testified she intended to call her supervisor midway through the six-week period to discuss her return date. Appellant also stated she did not return to work after her baby's birth because her doctor had not yet given her a medical release.

On June 1st, Appellant received official notice that she had failed to pass employment probation, and was therefore being separated effective that day. [Exh. 3.] On June 20th, Appellant filed a complaint of discrimination based on disability.¹ Two days later, the Agency responded that its investigation of the records showed the decision was "based upon the business needs of the organization." The response supported that conclusion by reciting that Appellant had already missed 28 days of work, Appellant told her supervisor she would need an indefinite additional amount of time off, and the business office concluded that it could not afford to grant that time if it was to meet its work goals and deadlines. [Exh. 4.] On July 2, 2007, this appeal was filed, claiming discrimination on the basis of disability.

At hearing, Appellant testified that she believed she was terminated based on her pregnancy, preterm labor and/or her subsequent delivery of a baby girl. Since Appellant was still in training, she believed her absences did not affect the Agency's ability to handle its work load. For that reason, Appellant believed the Agency's stated reason for the decision was not accurate, and that the real reason for her termination was disability discrimination based on her high-risk pregnancy.

Appellant admitted that after the birth of her baby on May 6th, she was no longer disabled and could have returned to work. However, Appellant did not do so because she believed she was entitled to six weeks of maternity leave. Six weeks from the birth date would have ended on June 17th. In fact, the Agency does not automatically grant maternity leave. [Testimony of Human Resources Division Director Jennifer Fairweather.]

LeTunya Savage testified that she had assigned other staff to do Appellant's work while Appellant was on bed rest during the pregnancy. A few days after the baby's birth, Appellant called Ms. Savage. Appellant told her she would talk to her doctors about returning to work as soon as possible so she could use the remaining time from the six weeks to be with her baby after the

¹ Appellant's timely appeal of this action (CSA 30-07) was dismissed without prejudice on June 13, 2007 based upon Appellant's failure to file a complaint of discrimination under CSR § 15-101 et. seq.

baby's discharge from the hospital. Ms. Savage believed that Appellant's statement was notice that Appellant intended to ask for additional time off after her baby returned home from the hospital. Ms. Savage testified she was of the opinion that the request was reasonable, and she would have granted it if Appellant had returned to work and thereafter made a request for specific time off when her baby was released from the hospital. [Testimony of LeTunya Savage.]

Ms. Savage further testified that some time between May 21st and May 25th, Appellant left a voice mail message for her. In that message, Appellant said the doctor told her the baby would not be well enough to go to day care after being released from the hospital, and so Appellant would not be able to return to work.

After receiving this message, Ms. Savage decided that Appellant's desk could not be left empty on an indefinite basis. Ms. Savage then recommended the termination of Appellant's probation based on Appellant's inability to return to work. Division Director Allen Pollack approved the recommendation, and the Agency sent Appellant official notice on June 1, 2007 that she had failed to pass probation.

IV. ANALYSIS

This appeal alleges that the Agency discriminated against Appellant on the basis of a disability. Prior to the appeal, Appellant filed an internal complaint of disability discrimination, which was denied.

In an appeal of an action terminating probation on the basis of discrimination under CSR § 19-10 B.1., an employee has the burden to prove the action was discriminatory. *In re Allen*, CSA 16-06, 3 (6/6/06). Under the Americans with Disabilities Act (ADA), a person may prove a disability in three ways: 1) the actual existence of a physical or mental impairment substantially limiting a major life activity, 2) a record of such impairment, or 3) being regarded as having such an impairment. *In re Solano*, CSA 107-04, 4 (4/29/05); 42 USC § 12102(2); 29 CFR § 1630.2(g) (1994 ed. and Supp. V).

Appellant asserts that her termination was caused by a disability arising from her pregnancy. The parties agree that Appellant was temporarily disabled from performing her job from April 23 to May 6, 2007, while she was on doctor-ordered bed rest. Appellant admitted that she was not disabled after the May 6 birth of her baby. Because Appellant immediately informed her supervisor of the birth, the Agency knew that Appellant's high-risk pregnancy, and thus her disability, was over on May 6. It is undisputed that the decision to terminate probation was made shortly before June 1, 2007. Based on this evidence, it is clear that Appellant cannot establish that she was either disabled or regarded as disabled at the time of the adverse employment action.

A person with a record of a disability is also protected from discrimination

if she has "a history of . . . a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k). A disability as that term is used in the ADA requires a permanent or long-term impairment. See 29 C.F.R. Pt. 1630, App. § 1630.2(j). Impairments while recovering from surgery are not evidence of a permanent disability. Gutridge v. Clure, 153 F.3d 898, 901-902 (8th Cir. 1998), citing Heintzelman v. Runyon, 120 F.3d 143, 145 (8th Cir. 1997). Appellant failed to prove that she suffered a permanent or long-term impairment that substantially limited one or more of her major life activities. Therefore, Appellant failed to establish that her two weeks of bed rest to prevent premature birth during pregnancy is a record of impairment under the ADA. It follows that Appellant failed to prove that disability discrimination motivated the Agency in terminating her probation.

As to the ultimate issue of whether the action was motivated by discrimination, the Agency's decision to terminate probation was caused by Appellant's failure to return to work or communicate with her supervisor to schedule her return to work. While Appellant testified she assumed she was entitled to maternity leave, her failure to confirm the existence of that leave was both unreasonable and inconsistent with her stated intent to obtain a medical release to return to work as soon as possible. Appellant also failed to contact her supervisor after her May 10, 2007 doctor's appointment was cancelled because of the premature birth, or after May 27, 2007, the midway point in what she believed was her maternity leave, as she testified was her intent.

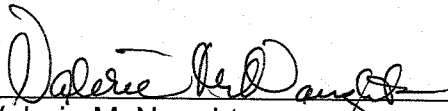
A prima facie case of pregnancy discrimination would have been established in this appeal by proof that: 1) Appellant was a member of a protected group, i.e., that she was pregnant; 2) she was qualified for her position; 3) she was terminated; and 4) the termination occurred under circumstances which give rise to an inference of unlawful discrimination. See In re Allen, CSA 16-06, 3 (6/6/06), citing EEOC v. Horizon Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000). By her own admission, Appellant was no longer pregnant at the time of her termination, as her pregnancy ended on May 6th with the birth of her child. To the extent that Appellant raised the issue of pregnancy discrimination, I find that Appellant failed to prove she was a member of the protected class at the time of the alleged discriminatory act.

Based on the foregoing, I conclude that Appellant has failed to establish either disability or pregnancy discrimination by a preponderance of the evidence.

ORDER

Based on the foregoing findings of fact, the Agency's decision dated June 1, 2007 to terminate Appellant's probation is AFFIRMED.

Done this 2nd day of October, 2007.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

A party may petition the Career Service Board for review of this decision in accordance with the requirements of CSR § 19-60 *et seq.* within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of mailing below. The Career Service Rules are available at [www.denvergov.org/csa/career service rules](http://www.denvergov.org/csa/career%20service%20rules).

All petitions for review must be filed by mail, hand delivery, or fax as follows:

BY MAIL:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, Dept. 412
Denver CO 80202

BY PERSONAL DELIVERY:

Career Service Board
c/o Career Service Hearing Office
201 W. Colfax Avenue, First Floor
Denver CO 80202

BY FAX:

(720) 913-5995
Fax transmissions of more than ten pages will not be accepted.

Certificate of Service

I hereby certify that I have forwarded a copy of the above decision on Oct. 2, 2007 as indicated below:

Ms. Gina Dupree, 2350 S. Linden Court #D, Denver, CO 80222 (U.S. mail)
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Jennifer Fairweather, DHS, Jennifer.Fairweather@denvergov.org

