

CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal No. 63-09A.

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

VICKY GALLO,

Appellant/Petitioner,

vs.

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

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Hearing Officer's Decision, but finds the Hearing Officer did not have jurisdiction over Appellant's claim of retaliation.

I. FACTUAL AND PROCEDURAL BACKGROUND

In July 2009, Appellant was involuntarily transferred out of the Agency's Classification Unit. She filed a grievance over the transfer and on her grievance form alleged sexual harassment (Rec., p. 3), despite the fact that complaints of discrimination, harassment or retaliation may not be brought through a grievance under CSR 18-10 C. 2. Although Appellant did not use the correct procedure, her grievance put the Agency on notice of a complaint of sexual harassment under CRS 15. *See, In re the Appeal of Shermaine Norman-Curry*, No. 28-07, 11/15/07 (CSB, Findings and Order on Interlocutory Review).

In response to the grievance, Director Lovingier spoke with Appellant, who alleged that members of her unit had engaged in a pattern of objectionable behaviors, including unplugging connections to her computer, sabotaging her work, leaving dirty dishes in her cubbyhole, spreading rumors that she and an African American Deputy were engaged in an intimate relationship and drawing hearts on the blackboard with Appellant and Deputy Gray's names inside. Although Lovingier acknowledged that

“these antics are inappropriate” (Rec. p. 5), he did not initiate an investigation or otherwise address Appellant’s complaint of sexual harassment. Lovingier talked to Captain Gutierrez about professionalism and accountability in the Classification Unit and then denied Appellant’s grievance. (Rec., pp. 5-6).

On September 4, 2009, Appellant filed a career service appeal of the denial of her grievance. (Rec. pp. 1-6). In an Order dated October 20, 2009, the Hearing Officer dismissed the appeal of the grievance, but permitted Appellant to proceed to hearing on claims of sexual/racial harassment and retaliation for engaging in a protected activity. (Rec. pp. 62-66). The hearing took place on June 23 and 24, 2010. At the close of the hearing, the Hearing Officer dismissed Appellant’s claim of sexual harassment because she had failed to present a *prima facie* case. In his Decision dated August 27, 2010, the Hearing Officer found that Appellant had not proven her claims of retaliation and harassment based on race and affirmed the Agency’s denial of Appellant’s grievance.

II. FINDINGS

A. The Hearing Officer’s Jurisdiction

In 2007, the Career Service Board reminded the Sheriff’s Department that it had specific obligations under CSR 15 with regard to complaints of discrimination, harassment or retaliation, and advised the Agency that it was not fulfilling those obligations. *In re the Appeal of Shermaine Norman-Curry*, No. 28-07, 11/15/07 (CSB, Findings and Order on Interlocutory Review). In this case, another employee of the Agency attempted to bring a complaint of sexual harassment through the filing of a grievance. Notwithstanding the Board’s decision in *Norman-Curry*, it appears the Agency still has not advised its employees of the proper procedures for filing sexual harassment complaints, and of greater concern, it appears the Agency is still not taking appropriate action on those complaints.

There is no evidence in the record that the Agency investigated or otherwise took effective, thorough and objective steps to address Appellant’s complaint of sexual/racial harassment, as required by CSR 15-104. Appellant’s complaint about coworker/supervisor harassment was not necessarily related to her complaint about being transferred, even though they were both raised in the same grievance. Although the Agency acknowledged that the behaviors Appellant complained about were “inappropriate”, it failed to make any effort to determine whether such inappropriate antics were directed at Appellant because she is a woman or because of her association with another deputy who belongs to a protected class. Even if the inappropriate behavior amounted to nothing more than the kind of petty annoyances that often occur in the workplace, the Agency could not make such a determination without conducting some sort of investigation.

For purposes of the Hearing Officer’s jurisdiction to hear this appeal, Appellant’s transfer was not an employment action that could be appealed directly to the hearings

office under CSR 19-10 A. 1. (a) – (e).¹ Further, a grievance over a transfer that does not impact an employee’s pay, benefits or employment status may not be appealed under CSR 19-10 A. 2. (b). Thus, the Hearing Officer’s jurisdiction to hear this appeal rested solely on the provisions of CSR 19-10 A. 2. (a):

Discrimination, Harassment or Retaliation: Any action, that is not subject to a direct appeal, of any supervisor/manager or employee resulting in alleged discrimination, harassment or retaliation because of race, color, religion, national origin, gender, age, political affiliation, sexual orientation, disability, or any other status protected by federal, state or local law may be appealed if, after filing a formal complaint as required by Rule 15 CODE OF CONDUCT, the disposition of such complaint has not resulted in stopping or otherwise addressing the alleged discrimination, harassment or retaliation. (Emphasis added).

As we have already noted, Appellant’s grievance operated as a formal complaint of sexual/ racial harassment under CSR 15. Because the Agency failed to address this complaint, it could be appealed under CSR 19-10 A.2. (a). However, the Hearing Officer’s jurisdiction under this rule was limited to the complaint Appellant reported to the Agency: sexual/racial harassment. There is no allegation in Appellant’s grievance that her transfer was the result of retaliation for engaging in protected activity; this claim was raised for the first time in Appellant’s notice of appeal and therefore was not properly before the Hearing Officer. (Rec. pp. 1-3).

B. The Hearing Officer’s Findings on Retaliation

This appeal remained active before the Hearing Officer for almost a full year and based on the record, the parties have spent a great deal of time, effort and resources on Appellant’s claim of retaliation. Although this claim was not properly before the Hearing Officer, nevertheless, we will address his findings because retaliation appeared to be the central issue in the career service hearing and remains the central focus of Appellant’s appeal to the Board.

At the hearing, the burden of proof was on Appellant to demonstrate that her transfer was retaliatory. Appellant therefore needed to prove: 1) that she engaged in activity in opposition to unlawful discrimination; 2) that a reasonable employee would have found the challenged action to be materially adverse, and 3) a causal connection between the adverse employment action and the employee’s protected activity. *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1176 (10th Cir. 2007). The parties do not dispute that Appellant’s statement to Internal Affairs in support of Deputy Gray’s discrimination claim was protected activity. However, based on the evidence in the record, Appellant failed to prove the second and third elements of a retaliation claim.

¹ We do not decide whether an involuntary transfer may be a “retaliatory adverse employment action” under CSR 19-10 A. 1. (f) and the City’s Whistleblower Ordinance, as Appellant did not make a whistleblower claim and that issue is not before us.

Although Appellant testified that she viewed her transfer as an adverse employment action, she did not demonstrate that a reasonable employee in the Classification Unit would have found the transfer adverse. In fact, Deputy Roberto Roena testified that he voluntarily requested a transfer from the Classification Unit and Appellant acknowledged during her testimony that Deputy Lusk had also requested to leave the Unit. Thus, Appellant did not demonstrate that the transfer was both subjectively and objectively adverse.

Further, Appellant did not demonstrate causation. There is sufficient evidence in the record to support the Hearing Officer's findings that Captain Gutierrez had legitimate, business-related reasons for transferring Appellant, particularly when employees of the Agency have no entitlement to an assignment of their choice (at the time of the hearing, Capt. Gutierrez had been transferred from the Classification Unit), and Appellant's transfer to another unit did not impact her pay, benefits or employment status. Moreover, in order to prove causation, an employee must demonstrate that the decision-maker knew of the employee's protected activity; without knowledge, his actions cannot be retaliatory. *Hinds v. Sprint/United Mgmt.*, 523 F.3d 1187, 1203 (10th Cir. 2008); *Montes*, at 1176. Here, it is undisputed that Capt. Gutierrez made the decision to transfer Appellant. However, a review of his testimony reveals that no one asked him if he knew Appellant had provided a statement to Internal Affairs in support of Deputy Gray's discrimination claim and there is no evidence in the record inferring such knowledge.

Thus, even if the Hearing Officer had jurisdiction to address the retaliation claim, we find there is sufficient evidence in the record to support the Hearing Officer's findings on Appellant's claim of retaliation and those findings are not clearly erroneous.

B. The Hearing Officer's Findings on Harassment Based on Race

CSR 15 represents a City-wide policy prohibiting all unlawful harassment. CSR 15-101 provides:

It is the policy of the Career Service Board that all employees have a right to work in an environment free of discrimination and unlawful harassment. (Emphasis added).

Rule 15-101 defines "unlawful harassment" as all harassment that is based on race, gender, national origin, sexual orientation, disability, age, marital status, military status, religion, political affiliation, or any other basis protected by federal, state or local law, and this rule prohibits all forms of unlawful harassment. The procedures set forth in Rule 15-103, 104 and 105 encourage employees to promptly report any acts of unlawful harassment and require city agencies to promptly address those reports and take appropriate remedial action if unlawful harassment has occurred. These procedures

serve to maintain a workplace free of any unlawful harassment, to deter future harassment and to minimize the City's exposure to potential liability in Title VII lawsuits.

An employee who believes she has been subjected to sexual harassment in violation of CSR 15 does not have to wait until the harassing behavior has become severe and pervasive enough to alter the conditions of her employment and create a hostile work environment (the level of proof required to sustain a Title VII lawsuit) before reporting such harassment. On the contrary, City employees are urged to report acts of sexual harassment as soon as possible and certainly before the behavior rises to the level of a Title VII lawsuit and subjects the City to potential liability. Similarly, a City agency that determines remedial action should be taken for a violation of Rule 15 does not have to wait until the employee's behavior has become severe and pervasive enough to create a hostile work environment before taking disciplinary action. City agencies are required to immediately address a complaint of sexual harassment to determine whether any unlawful harassment under Rule 15 has occurred, and if so, to take remedial action that is commensurate with the severity of the offense, certainly before the employee's behavior rises to the level of a Title VII lawsuit and subjects the City to potential liability.

Thus, to the extent the Hearing Officer's decision may suggest that a violation of the City's anti-harassment policy under CSR 15 would require proof that the harassing behavior was severe and pervasive enough to create a hostile work environment, that suggestion is contrary to the express language of CSR 15-101, which prohibits all harassment on the basis of sex, race or other protected status. Such an interpretation of Rule 15 would discourage the prompt reporting of harassing conduct, hinder the ability of City agencies to effectively redress such conduct, and increase the City's liability exposure in Title VII lawsuits.

A violation of the City's anti-harassment policy under CSR 15 requires proof that the behavior that is the subject of the complaint was motivated by race, gender or other protected status. There is sufficient evidence in the record to support the Hearing Officer's findings that the pattern of behavior Appellant complained about (most of which involved co-workers) was not motivated by racial animus. As for Sergeant Romero, Appellant testified that he allegedly made a comment that black men and white women shouldn't be together, but this testimony was vague as Appellant could not recall what was said and Sgt. (now Captain) Romero denied that he ever made such a remark. It is within the Hearing Officer's province to assess the credibility of witnesses and weigh the strengths and weaknesses of the evidence presented in reaching his decision. The fact that Appellant does not agree with the Hearing Officer's findings does not make them clearly erroneous when those findings are supported by the evidence in the record.

Appellant's claim of sexual harassment was dismissed at the close of the hearing and Appellant does not argue that the Hearing Officer erred in dismissing that claim. Therefore, she has waived her right to appeal that dismissal.

C. Policy Considerations

We agree with Appellant that this case may have policy considerations that could have effect beyond this appeal. However, those policy considerations do not require a reversal of the Hearing Officer's Decision. Although the Agency did not comply with the requirements of CSR 15 with regard to her complaint of sexual/racial harassment, Appellant was given a full and fair opportunity to present her harassment claims to the Hearing Officer, and she was given a full and fair opportunity to present her claim of retaliation, even though it was not properly before the Hearing Officer. Appellant, however, did not prove those claims.

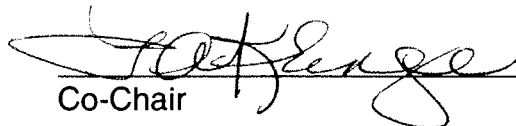
Nevertheless, we are mindful of how much time, effort and resources were spent on these appellate matters and perhaps all or a good portion of this appeal could have been avoided if the Agency had taken a different approach to the complaint in the first instance. The Board hopes that this decision will provide the Agency with a better understanding of CSR 15 in the future.

III. ORDER

IT IS THEREFORE ORDERED that the Hearing Officer's Decision of August 27, 2010, is **AFFIRMED**.

SO ORDERED by the Board on February 17, 2011, and documented this
17th day of March, 2011.

BY THE BOARD:


Co-Chair

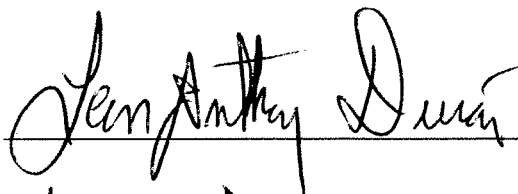
Board members concurring:

Patti Klinge
Colleen M. Rea
Tom Bonner
Nita Henry

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing **FINDINGS AND ORDER** on March 17, 2011, to the following:

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