

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

GREGORY HILL, Appellant,

vs.

TECHNOLOGY SERVICES,
and the City and County of Denver, a municipal corporation, Agency.

The hearing in this appeal was held on March 21, 2011 before Hearing Officer Valerie McNaughton. Appellant was present throughout the hearing and represented himself. The Agency was represented by Joseph Rivera, Assistant City Attorney, and David Luhan, Director of Geospatial Applications, served as the Agency's advisory witness. Having considered the evidence and arguments of the parties, the Hearing Officer makes the following findings of fact and conclusions of law, and enters the following order:

I. STATEMENT OF THE APPEAL

This is the appeal of Gregory Hill, a Senior IT Developer for Technology Services (Agency), who has claimed age discrimination, retaliation for filing a discrimination complaint, and hostile work environment based on age. The parties stipulated to the admission of Agency Exhibits 1 - 9, 11 and 12, and Appellant's Exhibits A - J, N and P. Agency Exhibit 13 and Appellant's Exhibits O and U were admitted during the hearing. The Agency was given four days after the hearing to provide any rebuttal evidence to Appellant's Exhibit O, and conceded in its response that it is a complete list of Agency employees, as well as their seniority and work assignments. Upon the Agency's motion for a directed verdict, Appellant's retaliation and hostile work environment claims were dismissed after completion of Appellant's case in chief. Both parties submitted written closing arguments regarding Appellant's age discrimination claim.

II. ISSUE

The sole issue in this appeal is whether the Agency discriminated against Appellant based on his age by reassigning him from the Safety team to the Enterprise Business Applications team during the September 2009 reorganization of Technology Services.

III. FINDINGS OF FACT

Appellant was hired by Technology Services on Feb. 28, 2007 as a Senior Information Technology (IT) Developer and assigned to the Criminal Justice Safety Applications team. In that position, he served as technical lead for the Jail Management System (JMS) interfaces project, an application with hundreds of programs. JMS is a commercial off-the shelf (COTS) program written by a third-party vendor and customized to meet the user's business needs. The city also uses several other COTS programs, including Microsoft Word, Excel, PeopleSoft, and Records Management System (RMS). [Testimony of GIS Director David Luhan, 1:36 pm.] In the Safety team, Appellant built interfaces between city safety databases and those of other jurisdictions in order to expedite accurate information-gathering among law enforcement, prosecutors and county courts. The JMS interfaces project "went online" in November 2009 after Appellant demonstrated the project to all of the user agencies. [Appellant, 3/21/2011, 9:00 am.]

Technology Services has undergone several changes over the past decade. In 1999, there were technology employees in every city department, many of whom developed custom applications specific to the work of each department. In 2004, all technology employees except Public Works were moved into Technology Services, but remained in self-contained teams that provided tech support to each department. As a part of this centralization process, it was discovered that there were thousands of custom applications in use, many of which performed the same functions.

In September 2009, Technology Services regrouped its employees from 53 teams assigned to work with specific agencies into 17 centers of excellence, which "organized employees into teams based upon function" in order to save money and combine expertise. [Exh. 8-11.] The "centers of excellence" concept is considered a best practice in the industry, according to GIS Director David Luhan, who cited the technology trade magazine, CIO. The Agency continued to standardize the software used in functional areas shared by many agencies, and eliminated numerous custom applications. In the process, the Agency consolidated licenses, saved money on servers, vendors and maintenance, reduced the workload, increased software support by cross-training employees, and improved the quality of Agency performance. [Luhan, 1:40 pm.]

As a part of this reorganization, Appellant's safety team was to be eliminated, along with all the other teams who served the technology needs of specific agencies, and those employees were to be reassigned to teams in functional areas.

In making employee assignments into the new functional operational teams, Chief Information Officer Molly Rauzi, Deputy Chief Al Rosabal and Safety Team supervisor Peter Schmitt attempted to match the Agency's critical needs with employee skills and experience. Most developers were placed in either the Enterprise Application Development (EAD) managed by Chris Binnicker, or Mr. Luhan's Enterprise Business Applications (EBA) teams, depending on the nature of their skills. [Exhs. 11-2, 11-3.] Mr. Schmitt, as Appellant's then-current supervisor, informed Ms. Rauzi that Appellant's work was in large part supporting rather than writing applications. Mr. Luhan expressed a preference for Appellant on his EBA team because he believed

Appellant's strong aptitude and experience in safety applications would be most useful to that team. Based on that information and the critical need for developers to work on COTS applications, Appellant was selected for the EBA center of excellence to continue to support JMS and Records Management Systems (RMS), both of which require program interfaces with other city systems and some customization. The city is moving away from custom applications, which are less efficient and costlier to maintain than COTS systems. COTS work requires a broad knowledge of the agencies' business needs, evaluation of technological solutions, interface programming, contract management and customer support via the HEAT ticket system. [Luhan, 2:23 pm.]

The EBA center of excellence supports all of the COTS applications in the city, including RMS, JMS, tax collection, legislative information, Camma, Oasis, and many others. [Luhan, 1:59 pm; Exh. F-5.] Eight non-supervisory employees were assigned to the EBA team: four senior IT developers, two associate IT developers, and two systems analysts. [Exh. 11-2.] The EBA team researches and documents COTS vendor information and problems using information provided by the vendors, among other assignments. [Appellant, 9:15 am].

In support of his age discrimination claim, Appellant testified that all employees under 50 in his former team were assigned to departments other than EBA. Joseph Harker, at 37 the youngest developer on the Safety team, possessed the most experience in COTS programs and the least in custom development. Appellant was therefore surprised when Mr. Harker was assigned to the Enterprise Architecture Service (EAS) team. [Appellant, 9:27 am; Exhs. O-6, F-56.] No other evidence was presented about the age, job titles or experience of the remaining members of the former Safety team.

Appellant claims that he is best qualified to perform software development duties, but that his current assignment is limited to administration of existing COTS software. As a result, he asserts he is working below his classification, which invites a demotional reclassification and deprives the Agency of making the best use of his skills. [Appellant, 9:09 am.]

Appellant also stated that all employees assigned to EBA were over 54 with the exception of the supervisor, and that four of the eight staff members retired or resigned shortly after the reorganization. One of those who left filed an age claim with the Equal Employment Opportunity Commission. Appellant contends that older workers were segregated in the EBA team in order to force them to retire, since EBA required staff to provide 24/7 tech support, adding to workplace stress. Appellant has taken about a dozen after-hours calls for tech support since September 2009. [Appellant, 9:09 am.] Appellant testified that his 36 year old supervisor, Chakrabhar Durbhaka, made comments Appellant considered signs of discriminatory animus, such as, "I know change is hard for you", and "you don't want to learn new things." [Appellant, 9:57 am.]

In response, Mr. Luhan testified that the manager of each center of excellence has discretion to create his own policies regarding after-hours tech support, and other teams have done so, including those supporting 311, Oracle, Treasury, tax collection, Public Works' Fleet Maintenance and Work Order Management, PeopleSoft and

DenverMaps. The groups supporting servers and the network receive the most after-hours calls for tech support. [Luhan, 2:30 pm]. Employees do not get paid comp time for taking these calls because they are 800-level employees and are thus expected to work more than forty hours a week. The amount of time they are expected to work beyond forty hours a week is considered reasonable given the minimal number of calls and the four-hour response time for each call. [Luhan, 3:39 pm].

Appellant's classification "performs full performance level professional systems analysis and programming work designing, developing, maintaining and enhancing software application programs, operating systems, and databases." [Exh. 2-1.] A Senior IT Developer "leads the consultative process to identify user problems and design new or existing systems . . . leads the analysis of user requirements, writes specifications and codes, and installs and documents software application programs . . . develops or modifies new or existing software application programs . . . automate[s] end user files and records . . . integrates and implements software packages and coordinates necessary training for users", among the essential duties of the position. [Exh. 2-2.] In both his former and current assignment, Appellant's chief duty is to "provide software application and database support for enterprise and departmental systems that assist in the mission and operational imperatives of Denver's Department of Safety and criminal justice system", including JMS and RMS. [Exhs. 13-2, G-2, 2009 and 2010 PEPRs.]

Mr. Luhan testified that programming is integral to software development. Developers need to understand the business needs of the agencies, the software's technical requirements and what the software does in order to customize it in order to develop new services and write interfaces so the systems can talk to each other. [Luhan, 1:59 pm]. Developers may need to extract data from one system and load it onto another, change screen displays and functionality, and complete reporting in different phases of an application. Creating interfaces is important work because it allows the city to leverage the capabilities and data in different systems to avoid duplication, save money, and make more informed decisions using all of the information stored in different locations. Use of fewer software packages simplifies support and maintenance of the city's software systems. [Luhan, 2:02 pm].

Mr. Luhan testified that designing software interfaces is development work, albeit at a low level, and he anticipates more development assignments in future project plans. [Luhan, 2:00 pm.] Work in custom applications will decrease as the group eliminates duplicate or unneeded programs, and COTS work will increase. [Luhan, 2:56 pm]. Mr. Luhan conceded that the skills and knowledge of a senior developer are not necessary to support a COTS application, and that three out of four of the developers in EBA complained early on that they were not doing a lot of development work. [Luhan, 3:00 pm; Exh. F-4.] However, he believes COTS work will be valuable to employees by encouraging cross-training and allowing work on multiple projects across departmental lines. [Luhan, 1:50 pm].

On Sept. 24, 2009, Appellant filed a complaint alleging that his reassignment constituted age discrimination, as well as a complaint and grievance asserting that a manager retaliated against him for his discrimination complaint by distributing an email critical of Appellant to senior managers. [Exhs. 4 – 6.] Shortly thereafter, the Agency denied the grievance. [Exh. 7.] In October 2009, Appellant filed an age discrimination

claim with the EEOC. The Agency hired an investigator, Ashley Rea Kilroy, Esq., who submitted her investigative report on October 26, 2009. The report concluded that the reassignment was not discriminatory, and that subsequent Agency actions did not constitute retaliation for the filing of the complaint. [Exh. 8.] In July 2010, Ms. Rauzi informed Appellant of the results of the investigation. [Exhibit D].

At hearing, Appellant presented no additional evidence supporting the retaliation or hostile work environment claims. At the close of Appellant's case, a motion to dismiss the retaliation claim was granted based on the lack of evidence to support the allegation that the Agency's actions were the kind that "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination", since the manager's email was a reasonable response to Appellant's public criticism of a management decision. [Exh. 5-4, 5-5.] See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). The hostile work environment claim was also dismissed for failure to establish that the Agency's actions were "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment", Pennsylvania State Police v. Suders, 542 U.S. 129 (2004), citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986.) I also held that Appellant failed to produce evidence sufficient to show the Agency's claimed nondiscriminatory reasons for the reassignment were pretext. See Baloch v. Kempthorne, 550 F.3d 1191 (D.C. 2008).

IV. ANALYSIS

A prima facie case of discrimination under the Age Discrimination in Employment Act (ADEA) is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence which supports an inference of discriminatory intent. 29 USCA § 623; In re Lombard-Hunt, CSA 75-07, 7 (3/3/08); Sanchez v. Denver Public Schools, 164 F.3d 527, 531 (10th Cir. 1998). An employment action is adverse if it "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits". Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). "[M]ere inconvenience or an alteration of job responsibilities" cannot be considered an adverse employment action. Sanchez, 164 F.3d at 532. Appellant bears the burden of proof to establish unlawful discrimination by a preponderance of the evidence. In re Lombard-Hunt, *supra*.

Appellant has satisfied his burden to prove he is a member of the class protected from age discrimination by undisputed evidence that he was born on July 2, 1949, and was 60 years old at the time of his reassignment. [Hill, 9:38 am.] He must next establish that the EBA assignment was an adverse employment action. Appellant concedes that he remains in the same job classification and that his salary and benefits are identical to those he earned before the reassignment. He argues however that the new assignment jeopardized his employment status by placing him in a unit in which he is the employee with the least seniority, thereby making him eligible for layoff. Appellant testified that the Agency sought and obtained deconsolidation of layoff groups immediately before the reorganization. [Exh. J.] However, Appellant failed to offer any evidence about the effect of those deconsolidations on himself or other members of the protected class, employees over the age of 40. The evidence is silent as to whether the EBA team is in fact one layoff group. Even if it is, proof that Appellant

is now more vulnerable to layoff would not establish that he was being treated adversely based on his age for two reasons: the entire EBA team is over the age of 40, and a potential future layoff is not itself an adverse action.

Appellant claims older workers were assigned disproportionately to the EBA team, where the need to provide 24/7 tech support would force them to retire or resign. Mr. Luhan countered that team managers were given discretion on how they would meet the need to provide after-hour tech support, and that employees in most teams carried the same burden. Appellant admitted that he handled only 12 calls in the past 18 months, which is about one call every six weeks. There is no evidence that the EBA team handled more after-hours calls than any other unit. This evidence effectively rebuts the claim that the working conditions were designed to target older workers.

Appellant also contests that two employees, Mr. Harker and Ms. Lucero, were placed on the Application Development team because they are "better developers." [Exhibit 8-13]. Appellant testified that he passed all of the assessment tests, scoring the highest in ten of those tests, and that Ms. Lucero failed some of them. [Appellant, 9:27 am]. However, Ms. Lucero at age 44 is also a member of the protected age group, and Appellant offered no rebuttal of Agency's stated reason for selecting Mr. Harker. [Exh. O-4.] Thus, this evidence fails to rebut the Agency's business reason for these selections.

Appellant testified that Mr. Durbhaka, his 36 year old supervisor, has made ageist comments to him and the EBA team, including statements that change was "hard for you", and "I know you don't want to learn new things." [Appellant, 9:55 am.] Mr. Luhan testified that he told his team during the reorganization that they should embrace change, but that he observed employees of all ages "dragging anchors behind them" in resistance to workplace changes. Given the purpose of the reorganization and the fast-changing nature of the technology industry, such remarks cannot be presumed to arise from a stereotypical view of older employees, absent additional evidence supporting that theory.

Appellant also argues that the reassignment was an adverse action because it was a substantial change in his job responsibilities in that the team performed minimal development assignments, work that is deemed more important and higher in status than writing interfaces between COTS applications. He testified that other employees referred to EBA as a "rest home".

A reassignment that does not alter a job title, salary or benefits is not an adverse action unless it results in a materially adverse change in the terms and conditions of employment. Galabya v. New York City Bd. of Educ., 202 F.3d 636 (2nd Cir. 2000). Subjective beliefs that a transfer decreased an employee's responsibility and deprived him of opportunities to enhance skills and further his career are insufficient to establish that a reassignment was a substantial change in working conditions sufficient to support a discrimination claim. Moore v. City of Chicago, 126 Fed.Appx. 745 (7th Cir. 2005.)

Appellant's new assignment is much like the old one in that he still writes interfaces for COTS applications - development work described by Mr. Luhan as low-

level - and performs systems analysis and customer service work for COTS systems. Appellant's classification description does not support his theory that developers simply write programs or code. The essential duties of a senior IT developer include system analysis, modification of existing software, coordination of training, and database administration. [Exh. 2-1, 2-2.] Appellant's Performance Enhancement Program Reports (PEPRs) have been largely unchanged between March 2008 and Feb. 2010, the period before and after the reorganization. [Exhs. 13, G.] Meaningful comparisons between the job as it existed before and after the reorganization are made more difficult by the fact that the EBA team was a new entity subject to further change in Sept. 2009, and operated in the quickly evolving tech field. Appellant's director anticipates that future project plans, including Excella and Enterprise Cashiering, will provide development work of greater complexity. The Agency justified the changes affecting Appellant and all other employees as being required to move the work from agency-oriented to function-oriented, in the interest of increasing efficiency and lowering costs to achieve needed budget reductions. Appellant failed to rebut this evidence of legitimate, non-discriminatory reasons for the reassignment by any evidence that the stated reasons were instead pretexts for discrimination.

Appellant testified that all eight employees selected for the EBA group were over 54, and that the youngest Safety team employee was not selected for EBA despite his superior experience in COTS applications. Six out of nine of the employees selected for the custom applications team were also over 40 years of age. [Exhs. 11-3, O.] Seventy-three percent of Agency employees are within the protected age group. [Exh. O.] There is no evidence of the ages represented by the now-disbanded Safety team.

Statistical evidence of discrimination may be presented to demonstrate either circumstantial evidence of discrimination, or that an otherwise neutral policy caused a discriminatory impact on a protected group. The latter legal theory is demonstrated by identification of a facially neutral policy that falls more harshly on a protected group and cannot be justified by business necessity. 42 U.S.C.A. § 2000e-2(k); Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 645 (1989). Statistics that may establish disparate impact must be "of a kind and degree sufficient to show that the practice in question has caused" the adverse impact. "Statistical disparities must be sufficiently substantial that they raise . . . an inference of causation". Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994-995 (1988).

Here, Appellant presented evidence that all of the employees selected to an eight-person team doing low-level development work were over the age of 40. The evidence shows that the pool from which these eight were drawn was 271 employees, 73% of which were over the age of 40. In contrast, Appellant argues, older employees were selected only 63%¹ of the time for a group doing higher-level development work, showing age bias.

Statistics showing a relatively minor disparity that are based on a very small sample size are of little probative value in establishing the existence of a disparate impact theory of discrimination. International Broth. of Teamsters v. U.S., 431 U.S. 324

¹ Five out of eight, or 63%, of the custom development team was over the age of 40. [Exhs. 11-3, O.]

(1977). Without additional evidence supporting a finding of an intent to discriminate, Appellant has failed to meet his burden to prove that the selection process caused a class-wide disparate impact on employees over the age of 40. Under either the disparate treatment or disparate impact legal theory, the evidence as a whole does not support the claim of age discrimination.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered that Appellant's claim of age discrimination is DISMISSED.

Dated this 19th day of May, 2011.


Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You 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 decision's certificate of delivery. The Career Service Rules are available as a link at www.denvergov.org/csa.

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
FAX: 720-913-5720
EMAIL: Leon.Duran@denvergov.org

AND

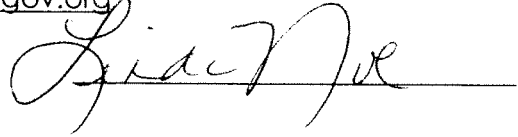
Career Service Hearing Office
201 W. Colfax, 1st Floor
Denver, CO 80202
FAX: 720-913-5995
EMAIL: CSAHearings@denvergov.org.

AND

Opposing parties or their representatives, if any.

I certify that on May 19th, 2011, I delivered a correct copy of this Decision and Order to the following via email:

Gregory Hill, Gregory.Hill@denvergov.org
City Attorney's Office at Dlefilng.litigation@denvergov.org
HR Services, HRServices@denvergov.org

A handwritten signature in cursive script, appearing to read "Lydia Nye", is written over a horizontal line.