

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 75-07

ORDER ON MOTION TO DISMISS AGE, DISABILITY AND INTIMIDATION CLAIMS

IN THE MATTER OF THE APPEAL OF:

LYNNE LOMBARD-HUNT, Appellant,

vs.

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

The Agency has moved to dismiss Appellant's claims of age and disability discrimination as well as her claim of intimidation. Appellant has not filed a response to the motion. Upon review of the pleadings and the parties' submissions, it is found and ordered as follows:

On November 7, 2007, Appellant timely appealed the October 24, 2007 termination of her probation (identified as "layoff" on the appeal document), alleging that the termination was due to race, color, age, and disability discrimination, and also alleging intimidation and hostile work environment. Appellant's prehearing statement asserts that Appellant's co-workers called her "Similac", a reference to her status as the second youngest employee in the group, and that Appellant's supervisor did not halt that behavior.

The Agency asserts, and Appellant does not dispute, that Appellant is twenty-seven years of age. To establish a prima facie case of age discrimination, Appellant must show membership in a protected age group, i.e., that she is at least 40 years old. CSR § 19-10 A.2.a; In re Hernandez, CSA 03-06, 9-10 (5/3/06); CRS 24-34-301(1); 29 U.S.C. 631(a). Therefore, the appeal does not assert a claim of age discrimination that is sufficient for hearing.

The Agency asserts that Appellant's allegation of disability discrimination is non-specific and is contradicted by the Medical Clinic Health History form she completed three months prior to her termination. [Agency's Motion to Dismiss, Exh. 2.] Six days after the motion to dismiss was filed, Appellant filed her prehearing statement. Therein, Appellant mentions the disability claim once, but fails to support it by any allegation as to the nature of her disability. In July 2007, Appellant denied any handicap in the form submitted to the Agency, but revealed she was under a doctor's care and taking medicine for pain and depression. [Motion to Dismiss, Exh. 2.]

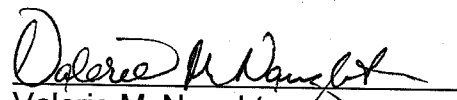
Where, as here, matters outside the pleadings show there is no genuine issue for trial, Appellant has an obligation to respond by setting forth specific facts by affidavit or otherwise which demonstrate the existence of a real factual issue that she is disabled. C.R.C.P. Rule 56; Brown v. Teitelbaum, 831 P.2d 1382 (Colo.App. 1991). Appellant has failed to make such a showing. The mere fact that Appellant is being treated for pain and depression does not establish that either impairment substantially limited her in performing the essential duties of her position. CSR § 5-84A.

Finally, Appellant's appeal inserts "intimidation" as a status protected from discrimination. Appellant's prehearing statement appears to raise hostile work environment based on her age as an issue in this appeal. While the Agency is correct that "intimidation" is not a jurisdictional basis for an appeal, it is also true that a hostile work environment claim must be supported by a showing that Appellant is a member of the group protected from that type of discrimination. Since Appellant is not at least 40 years old, she cannot assert any claim of age discrimination, whether by means of an adverse action such as termination, or the creation of a hostile work environment.

ORDER

1. Appellant's claims of termination for age discrimination and hostile work environment age discrimination are dismissed for failure to allege her membership in the protected class.
2. The Agency is granted summary judgment on the claim of disability discrimination.

Dated this 5th day of December, 2007.


Valerie McNaughton
Career Service Hearing Officer

I hereby certify that on December 5, 2007 a copy of this Order was sent to the following:

Lynn Lombard-Hunt, 1777 E. 39th Ave., #312, Denver, CO 80205 (via U.S. mail)
Niels Loechell, Assistant City Attorney, Niels.Loechelle@denvergov.org (via email)
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