

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

Appeal No. 64-02

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

CHARLOTTE MARIN, Appellant,

Agency: DENVER SHERIFF'S DEPARTMENT,
and THE CITY AND COUNTY OF DENVER, a municipal corporation.

This Order concerns the hearing officer's Order to Show Cause why this matter should not be dismissed for lack of jurisdiction filed April 16, 2002. Specifically, the Show-Cause Order set forth that Appellant's appeal: 1) failed to state a colorable claim of a violation against her, 1) failed to request relief the hearing officer has jurisdiction to grant, and 3) alleged actions which apparently do not constitute a violation of any CSR rule over which the hearing officer has jurisdiction.

Appellant timely filed her Response to the Show-Cause Order on April 26, 2002. Having reviewed Appellant's Response to the Show-Cause Order and being fully advised in the premises, the hearing officer finds and orders as follows.

DISCUSSION AND CONCLUSIONS

In her Response, Appellant states that her supervisor's action in verbally scolding her in front of citizens and banging on the plexi-glass window at her station to get her attention constituted "harassment and discrimination" in violation of CSR 15-100 *et seq.*, and "workplace violence" in violation of CSR 15-110. Appellant notes in her Response that the sergeant was dressed in uniform and was armed at the time of this incident. Appellant further requests that "appropriate action should be taken to deter any future harassment," and reiterates her request that the sergeant be ordered to take classes.

1. Harassment and discrimination.

"Harassment and discrimination" and "hostile work environment" are legal terms of art having specific definitions and requirements that are different than the typical dictionary definitions. CSR Rule 15-102 clearly sets forth that "harassment and discrimination" is prohibited when it is directed at an individual "*because of* race, national origin, sexual orientation, physical or mental disability, age, gender, marital status, military status, religion, political affiliation, or any other basis protected by federal, state, or local law or regulation."

(Emphasis added.) Therefore, the hearing officer only has jurisdiction over such a claim only if it sufficiently alleges actions against Appellant *because of* her membership in one of these protected groups.¹ Appellant alleges that her supervisor would not have reprimanded her in such a manner if she were male; however, she has articulated no set of facts tending to support her assertion that the sergeant is known to treat male subordinates differently than her.

Furthermore, the United States Supreme Court has set forth that harassment and discrimination cases based on gender or sex may be advanced under two theories. First is harassment that involves actual economic impact on the employee (*e.g.*, the conditioning of economic benefits on sexual favors). Appellant has made no claim of such economic impact here.

In the absence of such economic impact, the employee can show conditions in the workplace which create a "hostile or offensive work environment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, (1986). "Hostile work environment" is a legal theory used to refer to extreme, ongoing patterns of hostile discrimination against an individual in the workplace because of his or her status as a member of a protected class. Such cases are distinguished by graphic, overtly racist or sexist patterns of verbal or physical abuse. "... (H)arassment is actionable under a hostile work environment theory when the harassing conduct is sufficiently severe or pervasive to alter the conditions [of the victim's] employment and create an abusive working environment." Pizza Hut v. Lockard, 162 F.3d 1062, 1071, quoting Meritor, above, at 67. Some factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23; Smith v. N.W. Fin. Acceptance Corp., 129 F.3d 1408, 1413 (conduct must be "sufficiently pervasive *or* sufficiently severe"). The harassing conduct must be "both objectively and subjectively abusive." Lockard, 162 F.3d at 1071.

Even when construed in a light most favorable to Appellant, the reprimand she has described does not constitute allegations of "hostile work environment" sufficient to support her claim of "harassment and discrimination" as set forth above. She has therefore failed to articulate a colorable claim under CSR 15-100 *et seq.*

2. Ripeness of harassment and discrimination claim under CSR Rule 15-100.

Further, even if Appellant had alleged a colorable claim of harassment and discrimination under CSR Rule 15-100, *et seq.*, such a claim cannot be initiated by filing a grievance. It must first be pursued by seeking the administrative remedies set forth in CSR Rule 15-100, *et seq.* before the claim is ripe for the hearing officer's review.² CSR Rule 15-103 requires the employee to:

¹ Furthermore, the burden of proving such an allegation is typically on the appellant in the first instance. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

² If Appellant were alternatively asserting a claim of discrimination under CSR Rule 19-10 c), her grievance had to sufficiently articulate the basis for this claim in order for it to be preserved on appeal before the Hearings Office. *See, In the Matter of the Appeal of Terri Sapp-Jones*, Appeal No. 97-99 (Dismissal entered 12/7/99 by Hearing Officer Michael L. Bieda). As Hearing Officer Bieda said in that case, to allow an appellant to "raise the spectre of

- A. make it clear that such behavior is offensive to them and request that such behavior be discontinued, *and*
- B. report such conduct to their supervisor... If the complaint involves an employee's supervisor... *the employee may go to another supervisor, to his or her agency human resource representative or directly to the Career Service Authority Employee Relations Section.*

(Emphasis added.) Under CSR Rule 15-104, the *agency or the Career Service Authority (vis the Hearings Office)* is then mandated to

immediately undertake effective, thorough, and objective steps concerning the allegation of harassment or discrimination. If an investigation is deemed necessary, it will be completed and a determination regarding alleged harassment will be made and communicated to the employees as soon as practicable...

Further, CSR Rule 15-105 places the onus of taking remedial action upon a determination of harassment or discrimination on *the agency*:

If it is determined that unlawful harassment or discrimination has occurred, the *agency* will take effective remedial action commensurate with the severity of the offense. Appropriate action will be taken to deter any future harassment.

(Emphasis added.) Finally, CSR Rule 19-10 f) makes clear that the Hearings Office does not have jurisdiction over such a case until the process described above is completed:

- f) Harassment and Discrimination: The disposition *by a supervisor or other appropriate official of a complaint of harassment or discrimination* may be appealed if such disposition has not resulted in stopping the prohibited behavior.

(Emphasis added.)

The remedies set forth here are clearly distinct from the grievance process set forth under CSR Rule 18. Only when these administrative actions have been taken does the Hearings Office have jurisdiction to reverse, affirm or modify the actions taken by the agency. Appellant has not shown an exhaustion of these remedies and this claim is therefore not ripe for appeal under CSR 15-100, *et seq.* and 19-10 f).

3. *Workplace violence.*

In support of her claims that the sergeant's actions constitute violations of Department Order 2441.1C and Executive Order 112 prohibiting "violence" in the workplace, Appellant

discrimination for the first time on appeal... would undermine the clear intent of the rules to allow the agency the opportunity to fully address all issues raised at the grievance level before allowing and appeal..." Appellant did not articulate allegations of discrimination based on gender or sex in her grievance. These allegations therefore have not been preserved on appeal.

basically reiterates the same facts as appear in her appeal. Once again, the actions these Orders intend to prohibit relate to acts of *violence*, or *the threat of violence*. They clearly set limits on behavior with the intent of assuring the safety of the workplace. They do not apply to other types of unpleasant interaction, including being reprimanded by one's supervisor, whether or not he is wearing a uniform and a gun. Appellant cannot manufacture jurisdiction over an incident by using these terms to describe the incident unless the actions forming the basis of the alleged violation create at least a colorable claim of *violence*, or the reasonably perceived threat thereof. The actions alleged on the part of the supervisor cannot be reasonably construed in any light as making a colorable claim of "violence" or "the threat of violence." Appellant has therefore failed to state a colorable claim of workplace violence.

4. Appellant's requested remedies.


The hearing officer's jurisdiction is strictly a creature of regulation. She has the power only to "affirm, reverse or modify" actions taken by the Agency. *See*, CSR 19-27. The hearing officer lacks jurisdiction over methods of management and communication, unless and until those actions result in a violation of the CSR rules over which the hearing officer has jurisdiction *and* the power to grant a remedy. *See*, In the Matter of the Appeal of Darrel D. Delimont, Appeal No. 315-01 (Dismissal entered 9/26/01); In the Matter of the Appeal of Patricia Beer and Jan L. Obert, Appeals Nos. 318-01 and 319-01 (Dismissal entered 12/18/01); *see also*, In the Matter of the Appeal of Martha Douglas, 317-01 (Order entered 4/2/02).

Even if Appellant had alleged a colorable claim of "violence" or "the threat of violence," The hearing officer lacks jurisdiction to issue disciplinary actions in the first instance. She therefore cannot discipline the supervisor for alleged violations of Department Order 2441.1C and Executive Order 112, unless there were an underlying action the hearing officer could affirm, reverse, or modify. *See*, Delimont, *above*; In the Matter of the Appeal of Charlesetta Crutchfield, Appeal No. 13-01 (Dismissal entered 4/13/01). The hearing officer has no jurisdictional powers to make Appellant's supervisor apologize, stop "scolding," "belittling," or even to stop "intimidating" or "threatening" Appellant for alleged performance problems. She cannot order the supervisor to take classes. There is no apparent CSR rule granting Hearings Office jurisdiction over "PEP entries," and Appellant has failed to cite any such authority. Appellant has otherwise failed to articulate any remedy over which the hearing officer has jurisdiction.

ORDER

WHEREFORE, Appellant's appeal is hereby DISMISSED WITH PREJUDICE for failure to state a colorable claim of a CSR violation, failure to state a claim on which relief can be granted, and for lack of subject-matter jurisdiction.

Dated this 19 th day of May, 2002.


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 **ORDER OF DISMISSAL** by depositing same in the U.S. mail, postage prepaid, this 20 day of May, 2002 addressed to:

Charlotte Marin
3759 Raleigh St.
Denver, CO 80212

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER OF DISMISSAL** by depositing same in the interoffice mail, this 20 day of May, 2002, addressed to:

City Attorney's Office
Employment Law Section

Ari Zavaras
Manager of Safety

Fred J. Oliva
Denver Sheriff's Department

Virginia Gramado