

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

Appeal No. 107-04

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

VANESSA SOLANO, Appellant,

Agency: Denver Department of Human Services, Agency, and the City and
County of Denver, a municipal corporation.

The hearing in this appeal was held on March 29, 2005 before Hearing Officer Valerie McNaughton. Appellant was present and represented by George C. Price, Esq. 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:

FINDINGS AND ANALYSIS

I. **NATURE OF APPEAL AND EVIDENCE**

This is an appeal of the denial of a grievance challenging Appellant's meets expectations Performance Enhancement Program Report (PEPR) based upon an allegation of disability discrimination and harassment under Career Service Rules (CSR) §§ 19-10 c) and f). Appellant seeks modification of the evaluation and accommodation of a claimed disability, carpal tunnel syndrome.

The Agency stipulated to the admissibility of Appellant's Exhibits A – E, J, M, KK and LL. Appellant stipulated to all of the Agency's exhibits, which are Exhibits 1 – 7.

Appellant testified that she is an Administrative Support Assistant IV (ASA IV) with the Denver Department of Human Services (Agency). The disputed PEPR assessed Appellant's performance in that position from June 1, 2003 to May 31, 2004. When the period began, Appellant was an intake clerk whose primary duty was to process applications for child support. She assisted others with their work when she finished her own. In January 2004, Appellant was transferred to Team 66 to assist child support technicians. Her duties then became exclusively computer data entry and filing.

Appellant stated that in March 2003, while still working as an intake clerk, she began experiencing tingling and numbness in her hands. She reported this to her supervisor Alan Herrera, and filed a worker's compensation claim. [Exh. J.] Mr. Herrera referred her to Dennis Pringer, a Human Resources employee who handles compensation and family leave issues. In an attempt to alleviate the condition, Appellant was given massage therapy and other adjustments, although her work load increased because of seasonal demand. Appellant became unable to meet the established deadlines for her work, and as a result she informed her co-workers she could no longer assist them.

By October 2003, Appellant was on work restrictions which limited the amount of time she could spend gripping, pinching, writing and keyboarding. [Exh. J, pp. 2 - 4.] Appellant took two to three hours a day off work for physical therapy two to three times per week. [Exh. J, pp. 5 – 9; Exh. B, p. 4; testimony of Appellant.] Appellant testified that in October 2003, a co-worker she had assisted in the past barged in her office and screamed, “[i]f you can't do your job, get out of here, why don't you just quit?” Thereafter and until January 2004, Appellant locked her office door. One or two similar remarks were made between then and January 2004 by co-workers she had helped before her diagnosis. At staff meetings, her supervisor and co-workers expressed concern about how the work would get done in the face of Appellant's restrictions. In her June 2004 grievance, Appellant stated “[a]t this time I was getting pressured by my co-workers I was approached and was told ‘if you can't do your job why doesn't Alan [Herrera] find you another’.” [Exh. B, p. 4.]

Appellant reported the remarks of her co-workers to two supervisors. She testified that Mr. Herrera laughed, and told her he would deal with it. Patty Jamison asked her what she wanted her to do about it. Appellant never learned whether the supervisors discussed the matter with her co-workers. From October 2003 to June 2004, Appellant complained to three different employee relations specialists about the attitude of her co-workers, who advised her to file a grievance, join the union, or request mediation.

In January 2004, Mr. Herrera informed Appellant that she would be transferred to Team 66 to perform data entry work for the Child Support Technicians under Kathy Lapp. Appellant was worried that the increase in computer work would exacerbate her carpal tunnel syndrome. She discussed her physical limitations with Ms. Lapp, Ms. Jamison and Division Director Liz Calvert. Ms. Lapp told her not to worry because she would accommodate her restrictions. After the transfer, Appellant was given one and a half months of training. When Appellant requested time for therapy, Ms. Lapp initially stated that the work would become backlogged, but she granted reasonable work and travel time for therapy. Appellant's condition improved as a result of the therapy and the break from work during training. Ms. Lapp asked Appellant to obtain her doctor's opinion about when Appellant would be removed from work restrictions. In March or April 2004, Appellant's restrictions were removed.

Appellant stated she requested accommodations by giving her supervisor a copy of her work restrictions and by informing Dennis Pringer that her doctor suggested a high-backed chair and special stapler. Mr. Pringer declined the requests on the basis of budget limitations, but Appellant found what she needed in vacant offices. Appellant made no other accommodation requests.

Appellant testified that, upon her transfer to Team 66, she experienced a negative attitude from her supervisor. She requested a different trainer based on her past experience with the assigned trainer, but the request was denied. Ms. Lapp instructed her to leave post-it notes on her computer with her location, fill out a mail log, and email her a list of completed tasks. Appellant noticed or was told that no other ASA IVs were required to comply with these requirements. Ms. Lapp sometimes yelled at her within the hearing of other employees, and required doctor's notes for one day's sick leave. Appellant told Ms. Lapp the Career Service Rules prohibits such a requirement, and Appellant furnished her a copy of the applicable rule.

On May 19, 2004, Appellant's annual evaluation was issued by Mr. Herrera and Ms. Lapp, her two supervisors during the preceding twelve months. Mr. Herrera evaluated her as below expectation for the period June 1, 2003 to January 31, 2004 based on her failure to process work and return customer inquiries in a timely manner, and her negative communication with her team and supervisor. [Exh. A, pp. 10 - 11.] Ms. Lapp rated her as meeting expectations from February to May 2004 based upon her newness to the position, "pending the completion of the training phase of her association with Team 66". [Exh. A, p. 9.] Appellant's overall rating was a meets expectations. [Exh. A, p. 1.]

Appellant filed a grievance on June 14, 2004, asserting that she had been harassed and discriminated against based upon her disability, and that her evaluation was improper. [Exh. B.] Denial of the grievance at both steps was appealed in accordance with CSR § 18-12 (4).

On December 8, 2004, the Hearing Officer initially assigned to this appeal dismissed the harassment claim based upon Appellant's failure to assert the grounds underlying the claim. Since the Order to Show Cause did not require Appellant to address that issue, and evidence was adduced at the hearing as to that claim, this Hearing Officer will evaluate the evidence presented upon the harassment claim.

After Appellant's testimony, Appellant rested without submission of further evidence. The Agency moved to dismiss the appeal on the basis that Appellant had failed to establish a disability under Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002). Appellant argued in response that she had satisfied her burden to prove a substantial limitation of a major life activity by her evidence that her limitations on manual tasks similarly limits her in her daily life, and that

the absence of restrictions after March or April 2004 does not rule out the existence of a disability. Appellant also argued that she had a record of disability created by the doctor's restrictions, and that her co-workers' remarks indicate they considered her disabled. At the close of arguments, the Hearing Officer granted the motion to dismiss.

II. ISSUES

1. Whether Appellant is disabled within the meaning of the Rehabilitation Act of 1973,

2. Whether the Agency discriminated against Appellant on the basis of disability by rating her as meeting expectations in her May 2004 PEPR,

3. Whether the Agency harassed Appellant due to a disability or for making a request for reasonable accommodation, and

4. Whether the Agency's meets expectations rating was issued in retaliation for Appellant's reasonable accommodation request?

III. ANALYSIS

Appellant presented her own testimony and exhibits in support of her claims that the Agency discriminated against her based on a disability, and that she was harassed and retaliated against for her disability and reasonable accommodation request. 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. 42 USC § 12102 (2); see also 29 CFR § 1630.2(g) (1994 ed. and Supp. V).

1. Disability Discrimination Claim

A) Physical Impairment

In order to establish a claim of disability discrimination under the first part of the disability definition, Appellant must prove the existence of an actual disability. A disability is a physical or psychological impairment which substantially limits one or more major life activity. 42 USC § 12102(2)(A). Each phrase in the definition is interpreted strictly "to create a demanding standard for qualifying as disabled" based upon "the legislative findings and purposes that motivate the Act." Toyota v. Williams, 534 U.S. 184, 67 Cal. Comp. Cas. 60, 69. Major life activities "are those basic activities that the average person in the general population can perform with little or no difficulty." 29 CFR pt. 1630 app. §1630.2(i). Performing manual tasks is a major life activity. 29 CFR § 1630.2 (i).

A person is substantially limited in a major life activity if she is unable to perform or significantly restricted as to the condition, manner or duration under which she can perform a particular major life activity as compared to the average person's ability to perform that activity. EEOC Compliance Manual § 902.4(a)(1). "[T]o be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long-term." Toyota, supra, at 70 (2002); citing 29 CFR § §1630.2(j)(2)(ii)-(iii) (2001). The determination of whether an individual is substantially limited in a major life activity is based upon the effect of that impairment on the life of the individual, and as such must be made on a case-by-case basis. Toyota, supra. The fact-finder must consider (1) the nature and severity of the impairment, (ii) its duration or expected duration, and (iii) its permanent or long-term impact or expected impact. 29 CFR § 1630.2(j). "An individualized assessment of the effect of an impairment is particularly necessary when the impairment is one whose symptoms vary widely from person to person. Carpal tunnel syndrome . . . is just such a condition." Toyota, supra. Equal Employment Opportunity Commission (EEOC) regulations interpreting the Act state that a temporary condition or a condition of indefinite duration may also be a disability if it is severe in nature. EEOC Compliance Manual § 902.4(d).

Appellant testified that her hands tingled and became numb in March 2003, and that she was thereafter diagnosed as having carpal tunnel syndrome. For about seven months, her doctor limited her typing, writing, pinching, gripping and grasping to 15 – 30 minutes per hour without a break, and to a total of four hours per day. [Exh. J, pp. 2 - 4.] Appellant testified that the limitations and her therapy appointments prevented her from complying with her deadlines for processing applications during that period, and that others were required to assist her. As a result of therapy, the condition resolved itself by February 2004, at which time her doctor removed her job restrictions. Appellant testified that she continues to have good and bad days with the condition, but that she is now able to accommodate herself by doing her therapy at home and alternating tasks at work on bad days.

Appellant's temporary symptoms of numbness and tingling in the hands indicate that Appellant's condition was mild in nature. Id. at 70, citing Carniero, Carpal Tunnel Syndrome: The Cause Dictates the Treatment, 66 Cleveland Clinic J. Medicine 159, 161 – 162 (1999). Appellant presented no evidence as to the extent of the impairment's effect on her job, other than a statement that she was unable to meet deadlines. There was no evidence that the condition had any impact on her daily life, or that it affected any major life activity other than the ability to perform manual tasks. Moreover, it is only the occupation-specific tasks of typing and filing that appear to have been temporarily affected by the impairment. By means of the mitigating measures of therapy and rearranging her work tasks, Appellant was able to control her symptoms well enough to allow

her restrictions to be removed. It cannot be concluded on this evidence that a temporary limitation on the ability to type and handle file folders constitutes a substantial limitation on the major life activity of performing manual tasks. See Gelabert-Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001); Ouzts v. USAIR, 24 ADD 704 (W.D.Pa. 1996); and Wilmarth v. City of Santa Rosa, 945 F.Supp. 1271 (N.D.Cal. 1996).

B) Record of a Disability

The ADA also protects a person who has a history of a disability or who have been classified or misclassified as having a disability. 42 USC § 12102(2)(B); 29 CFR § 1630.2(k). Thus, proof under this subsection requires that the Agency misclassified Appellant as having an impairment that substantially limits a major life activity.

Appellant argues that she satisfied her burden as to this subsection by her testimony that she gave her supervisor a copy of her doctor's notes showing a diagnosis of carpal tunnel syndrome. However, as noted above, such a diagnosis is not a record of a disability. Toyota, supra at 70. A record of a condition that is not a disability is insufficient to support a claim that she has a history of disability under this section of the ADA. Colwell v. Suffolk County Police Dept., 158 F.3d 635 (2nd Cir. 1998). Appellant presented no other testimony in support of her argument that the Agency had either classified or misclassified her as disabled. Therefore, the claim under this subsection of the ADA must fail.

C) Regarded as Disabled

A person who is perceived as disabled is also protected from discrimination under 42 USC § 12102(2)(C) based on Congress' recognition that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." School Board of Nassau County v. Arline, 480 U.S. 273 (1987). The focus of such a violation is on the employer's state of mind. "Common attitudinal barriers include . . . 'concerns about productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers.'" EEOC Compliance Manual § 902.8; House Judiciary Report at 30.

In the context of this appeal, Appellant may prove disability discrimination under the above section by presenting evidence that 1) the Agency perceives her as having an impairment that substantially limits a major life activity, and 2) the Agency made an employment decision because of the perception of disability. 29 CFR § 1630.2(l)(1); 29 CFR pt. 1630, app. at 1630.2(1).

In order to determine whether an employer believes an impairment significantly affects a major life activity, a finder of fact must analyze the evidence

relevant to the employer's perception of the impairment. Here, Appellant asserts that her supervisors perceived her as disabled based upon her diagnosis of carpal tunnel syndrome, and therefore rated her as meeting expectations rather than at a higher rating, which she claims her performance merited. Appellant testified that her supervisor in the intake clerk position questioned her failure to meet her performance goals in late 2003. When she reminded him she had work restrictions, he responded, "I forgot about that." After Appellant began to take off work for therapy appointments, she noticed that Mr. Herrera did not communicate with her as well as in the past. In January 2004, Appellant was transferred to the data entry job with Team 66, which required more keyboarding than her former position. When Appellant expressed her concern about her ability to perform the increased data entry given her restrictions, Division Director Liz Calvert informed her that "the move needs to be made, and [your] negativity needs to stop." Her new supervisor Kathy Lapp assured Appellant she would accommodate her work restrictions. Despite the increase in manual tasks, Appellant's condition improved after the transfer, leading her doctor to remove her restrictions within a few months.

Appellant presented no direct evidence that her supervisors regarded her as disabled. In fact, Appellant testified Mr. Herrera had forgotten about her restrictions and their impact in slowing her job performance. The PEPR itself contains no reference to her impairment. The circumstantial evidence indicates that the employer was impatient with Appellant's failure to achieve her production goals, but that it was more concerned with her display of a negative attitude which was affecting staff morale. [Testimony of Appellant; Exh. A, pp. 9 – 11.] I cannot infer a perception of disability from evidence of performance problems alone. Moreover, an employer's knowledge and accommodation of work restrictions is insufficient evidence that an employee was regarded as disabled. Plant v. Morton Int'l, Inc., 212 F.3d 929 (6th Cir. 2000). See also Gorbitz v. Corvillia, Inc., 196 F.3d 879 (7th Cir. 1999) (supervisor's awareness of physical therapy does not establish a claim under the "regarded as" clause.) Most significantly, the disputed evaluation occurred several months after Appellant's work restrictions had been lifted. Thus, Appellant has failed to submit evidence that her employer perceived her as substantially impaired as to any major life activity.

2. Harassment and Retaliations Claims

Appellant also claims that Ms. Lapp harassed her based upon her disability, and retaliated against her for her request for reasonable accommodation. Since I find that Appellant was not disabled within any part of the statutory definition, I conclude that Appellant has failed to establish a prima facie case of harassment or retaliation by her failure to prove she was a member of a legally protected group. 42 USC § 12102(2); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

ORDER

Appellant's claims of disability discrimination, harassment and retaliation are hereby DISMISSED.

Dated this 29th day of
April, 2005

Valerie McNaughton
Hearing Officer
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in the U.S. mail, postage prepaid, this 29th day of April 2005, addressed to:

George C. Price, Esq.
1115 Grant Street, Suite 106
Denver, CO 80203

Vanessa Solano
1022 29th Street
Denver, CO 80205

I further certify that I have forwarded a true and correct copy of the foregoing **ORDER** by depositing same in the interoffice mail, this 29th day of April, 2005, addressed to:

Niels Loechell
Assistant City Attorney
1200 Federal Blvd., 4th Floor
Denver, CO 80204

Tamara Tyler
Denver Department of Human Services