

ORDER ON AGENCY'S MOTION TO DISMISS

IN THE MATTER OF THE APPEAL OF:

MARIE S. VALENCIA, Appellant,

vs.

CLERK AND RECORDER'S OFFICE,
and the City and County of Denver, a municipal corporation, Agency.

On Feb. 16, 2011, the Agency filed a motion to dismiss Appellant's harassment claims. Appellant did not file a response.

Background

This is a pro se appeal of the Agency's denial of Appellant's grievance of a written reprimand, of her successful PEPR rating, and discrimination and harassment claims. On Jan. 20, 2011, the Hearing Officer dismissed Appellant's claims of discrimination, PEPR and grievance of her written reprimand. Only Appellant's harassment claims remain.

The Agency now asserts that the harassment claims should be dismissed because 1) Appellant did not file a formal complaint as required by CSR § 19-10 A.2.a. and Rule 15 Code of Conduct, 2) Appellant does not state a prima facie case of harassment/hostile work environment based on the protected statuses alleged – age, religion, or marital status, and 3) the remedy sought by Appellant is not within the jurisdiction of the Hearing Officer to provide to Appellant.

Analysis

In an Agency motion to dismiss, statements in the appeal must be viewed in the light most favorable to the Appellant, Appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that no set of facts can prove that the plaintiff is entitled to relief. Lobato v. State, 218 P.3d 358, 367 (Colo. 2009).

Rules 19-10 A.2.a., 15-103 B and 15-104, when read together, clearly intend to require an employee filing a complaint of discrimination to give the agency notice of the nature of the alleged harassment, as well as a real opportunity to investigate, evaluate and correct any harassment. In re Lewis, CSA 22-06, 2 (5/2/06). A grievance

that raises the substance of her claim substantially complies with CSR § 19-10 A.2.a., regardless of whether the claims are stated with precision. In re Boden, CSA 86-06, 2 (Order 11/22/06).

Here, the grievance did assert discrimination and hostile work environment, along with other claims, and requested as part of her remedy "end unfair employment practices." Therefore, I conclude that Appellant filed a complaint of harassment sufficient to put the Agency on notice of her allegations. The Agency response did not address the harassment claims made therein. As a result, the Hearing Office has jurisdiction to hear Appellant's claims of harassment under CSR § 19-10 A.2.a.

Second, the Agency contends that Appellant does not state a prima facie case of harassment/hostile work environment based on the protected statuses alleged – age, religion, or marital status.

However, Appellant asserted membership in protected status, age, religion and marital status, and recounts in her response to the Order to Show Cause sufficient facts to establish a claim for harassment based upon her supervisor's verbal conduct. In a motion to dismiss, I must accept the Appellant's assertions of material fact as true, and the motion to dismiss must be denied unless it appears beyond doubt that no set of facts can prove that the plaintiff is entitled to relief. See Lobato, 218 P.3d at 367.

Finally, the Agency asserts that the remedy sought by Appellant is not within the jurisdiction of the Hearing Officer to provide to Appellant. However, CSR § 19-10 A.2.a. clearly gives jurisdiction to the Hearing Office over claims following a formal complaint or grievance of any action of any supervisor resulting in harassment because of protected status if, after filing the formal complaint or grievance, the disposition of such complaint has not resulted in stopping or otherwise addressing the alleged harassment. Therefore, the rule explicitly provides jurisdiction over an appeal of a harassment complaint that has not been addressed by the Agency.

Appellant contended in her response to the Order to Show Cause that she attempted mediation and would like to address the issue on as lowest possible level through the dispute resolution process, but that her supervisor refused to participate in mediation. Her pre-hearing statement also states Appellant has repeatedly requested mediation, and is still willing to mediate this matter. The Agency's motion to dismiss indicates that it would like the opportunity to address the complaint of harassment before this appeal proceeds.

Order

Based on the foregoing, it is ordered that:

- 1) The Agency's motion to dismiss is DENIED.
- 2) This matter is referred to the Mediation Coordinator to determine whether the parties wish to participate in mediation.

Done this 2nd day of March, 2011 .


Valerie McNaughton
Career Service Hearing Officer

I hereby certify that on March 2, 2011, a copy of this Order was sent to the following:

Marie S. Valencia, marie.valencia@denvergov.org	(via email)
City Attorney's Office, dlefilng.litigation@denvergov.org	(via email)
HR Services, HR.Services@denvergov.org	(via email)


