

CITY AND COUNTY OF DENVER, COLORADO

Appeal Nos. 103-09, 21-10

DECISION

IN THE MATTER OF THE CONSOLIDATED APPEALS OF:

KEYONNA MOORE, Appellant,

vs.

DEPARTMENT OF AVIATION,

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

I. INTRODUCTION

In these consolidated actions, the Appellant, Keyonna Moore, appealed and alleged the following actions by her employer, the Records Management Division of the Department of Aviation at Denver International Airport (Agency or DIA): her work review rating; discrimination on the bases of race and color; retaliation; hostile work environment; and whistleblower retaliation. Bruce Plotkin, Hearing Officer, conducted a hearing concerning these claims on August 11, 12, and 31, 2010. Franklin Nachman, Assistant City Attorney, represented the Agency, while George C. Price, Esq. represented the Appellant. The following Agency exhibits were admitted into evidence: 3, 8, 10, 11, 14, 15, 19, 22, 23, 25, 45, 46, K-121 through K-410, and K-412. The following Appellant exhibits were admitted: A, B, D, E, F1-F4, G-2 through G-6, G emails (not numbered), H, I, J-1 through J-5, J-7, K-1 through K-21, K-34 through K-36, and Agency's #51. In addition to testifying on her own behalf, Moore presented the testimony of Rae Ann Johnson and Gladys Burnett, while Tzvetanka Panayotova, David Dixon, Melinda Sanders and Sandra Clark Walton testified for the Agency.

Prior to hearing, Appellant's appeal #21 was dismissed in its entirety, along with her suspension and whistleblower claims in that case. [appeal #21-10 Order 5/26/10]. Immediately prior to hearing, the Appellant withdrew her discrimination claims and, to the extent she alleged the Agency created a hostile work environment, the Appellant also withdrew that claim. The hearing proceeded on the only remaining claims, Appellant's performance rating and retaliation.

II. ISSUES

The only issues to decide are whether the Agency's assessment of a "needs improvement" rating to Appellant's Performance Enhancement Program Report (PEPR) was motivated by unlawful retaliation, and if so whether the PEPR rating must be reversed.

III. FINDINGS

Ms. Moore has been an Administrative Support Assistant III for the Records Management Division at Denver International Airport since 2008. Her immediate supervisor is Sandra Clark, and her second-level supervisor is David Dixon.

In 2008, the Agency hired Clark to implement a long-overdue records management system. Engineering documents are needed by various agencies at the airport, and there was no efficient way to retrieve them. In order to fulfill her task, Clark undertook a massive project, to scan all "hard" copies of existing engineering documents related to DIA, in order to organize them into a digital filing system known as the Electronic Document Management System. [Exhibit 15]. That project continues to this day. Moore's primary duties are to examine each document, assign it a file name based on the purpose of the document, and scan the document legibly on one of several scanners depending on the nature and size of the document. The Agency issued scanning procedures on June 25, 2008. Moore acknowledged she was familiar with those procedures. [Moore testimony 8/11/10].

At first, Moore was also assigned the responsibility of deciding which "hard" copies could be destroyed after scanning. Clark later re-assigned that responsibility to Tzvetanka Panayotova, a higher-ranking co-worker, after Moore destroyed, or allowed to be destroyed, documents in her control that had not been scanned or scanned illegibly.

In June 2008 Moore filed an EEOC claim, alleging sexually harassing conduct by her immediate supervisor at the time, Dave Dixon's predecessor. Dixon became Moore's immediate supervisor for four months before Clark was hired.

Only about one month after becoming Moore's direct supervisor, Dixon assessed a written reprimand against her in July 2008, for misconduct involving late reporting to work, and refusal to follow directives. [Exhibit 13]. Dixon subsequently directed Clark, to place Moore on a Performance Improvement Plan (PIP) in July 2008. [Exhibit 11]. Clark placed Moore on additional PIPs, in October 2008, [Exhibit 12], and again in May 2009. [Exhibit 10]. All three PIPs identified the same uncured deficiencies: timekeeping, making discriminatory comments to coworkers, using vulgar language, failing to limit personal time on the phone and internet and, most significantly related to the present appeal, poor quality control in her scanning duties.

In Moore's last PEPR, issued September 1, 2009, Clark specified most of the same issues as in her prior PIPs and rated Moore's overall performance as "needs improvement." [Exhibit 2-3 through 2-11; Exhibit 3]. Moore filed a grievance of her PEPR rating on September 28, 2009, [Exhibit 4], which was denied by then-HR Manager, Jim Thomas on November 27, 2007, following his investigation of Moore's retaliation and harassment claims. This appeal followed timely on December 7, 2009.

IV. ANALYSIS

Moore alleged her PEPR rating was motivated by unlawful retaliation and that the underlying bases for the rating were unjustified. She claimed Clark disliked her and treated her poorly, but despite Clark's attitude toward her, Clark was ready to assess a "meets expectations" PEPR for 2008-2009, when the Agency's HR department at DIA intervened, and forced Clark to assess a "needs expectations" rating against her will. Moore bases these allegations on an alleged conversation between her and Clark that occurred only five days before hearing. Moore also alleged that, during the same conversation, Moore confessed the HR department's intervention was motivated by retaliation for Moore's having filed an EEOC claim.

Even if Moore establishes her "needs improvement PEPR rating was motivated by unlawful retaliation, the rating will be affirmed if the Agency then establishes the underlying, non-retaliatory reasons for the rating were legitimate. Thus, I must determine first whether retaliation was established, and if so, whether the Agency established a legitimate basis for the rating despite a retaliatory motive.

A. Retaliation

Retaliation is established where a reasonable employee would have found the challenged agency action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of sexual harassment. See Burlington Northern & Santa Fe Ry. v. White, 126 S. Ct. 2405 (U.S. 2006).¹ Moore claimed the Agency issued a "needs improvement" PEPR rating in retaliation for Appellant's having filed a claim with the Equal Employment Opportunity Commission (EEOC). [Appellant pre-hearing statement; Moore testimony].

The Agency first received notice of Moore's EEOC claim on July 7, 2008. [Exhibit 38]. Moore's "needs improvement" rating was issued September 1, 2009, more than a year after her June 2008 EEOC filing. The lapse between the time

¹ In Burlington Northern, the Supreme Court broadened the definition of what constitutes an adverse action. The Tenth Circuit adopted the change in Argo v. Blue Cross & Blue Shield of Kan. Inc., 452 F.3d 1193 (10th Cir. 2006).

Moore engaged in her protected activity, filing an EEOC claim, and the Agency's response was too remote to dissuade a reasonable employee from making or supporting an EEOC claim.

Regarding the alleged conversation between Moore and Clark only days before the hearing in this matter, Moore claimed Clark confessed she was ready to assess a "meets expectations" PEPR for Moore's 2008-2009 performance, but was directed by the Agency's HR department to lower her rating. [Moore testimony]. Clark essentially admitted those facts but for a substantially different reason than retaliation. Clark testified that, in preparing Moore's 2008-2009 PEPR, she wrote, in the supervisor comments section, that Moore's performance was deficient in nearly every category, and she knew an overall "needs improvement" rating was called for. However, due to the ongoing contentiousness between her and Moore which was becoming odious, she decided to assign a rating of "meets" only to avoid further confrontation. HR, however, refused to authorize the rating based upon Clark's comments in the PEPR. In response, Clark re-issued Moore's PEPR as a "needs" without changing any of the comments. She denied HR exerted any pressure on her to change the rating for any reason other than to make the rating consistent with her findings. [Clark testimony 8/31/10]. Clark testified she always knew the proper rating to assess for Moore's 2008-2009 PEPR was "needs" but she "chickened out" to avoid "this," indicating with her spread arms the hearing room and the hearing process.

Clark's assessment of the degree of contentiousness between her and Moore has ample support in the evidence. Every criticism of Moore's work was met with multiple counter accusations, but none rebutted the Agency's proof that her work was poor. [See discussion, below]. Moore admitted she stopped talking at all to Clark. Clark, Dixon, and Panayotova credibly testified to the enormous energy, time and repetitive attempts invested to improve Moore's work product and her attitude, but always being rebuffed.

There appears to be unwarranted animosity on both sides of the supervisor/supervisee equation. Rae Ann Johnson, Senior GIA analyst at DIA, and friend of Moore, was witnesses to an incident on an unknown date when Clark mistakenly believed Moore slammed her door. Johnson testified Clark then yelled at Moore "I'm going to get you for that." She claimed Clark was often abrupt with many people in the office. Clark did not refute this testimony. Nonetheless, personal animosity does not automatically establish retaliatory intent, any more than it establishes discrimination or harassment. Moore's retaliation claim was directed toward the HR department and her poor relationship with Clark is unrelated to material adversity by the Agency's HR department. Since Clark refuted Moore's claim as the reason Clark changed Moore's PEPR from "meets" to "needs" and Moore failed to overcome that rebuttal, she failed to establish material adversity and her retaliation claim fails.

Even if Moore had proven the Agency retaliated against her for filing an EEOC claim, there was ample evidence to prove, for reasons stated in the following discussion, that the Agency would have issued a "needs improvement" rating even in the absence of Moore's EEOC filing. "Even if an employee...establishes that the protected conduct was a substantial factor in the adverse action, the employer may show that it would have taken the same action if the protected conduct had not occurred." P. BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE (Volume II 2010), citing Mahaffrey v. Dept. of Agriculture, 105 MSPR 347, 239, 2007 MSPB 93 ¶20 (2007). That brings the discussion to an analysis of whether the Agency's assessment of a "needs improvement" PEPR to Moore was justified by the evidence.

B. Performance issues

Moore persistently arrived late, checked out early, and failed to obtain permission to miss work even after many reminders of increasing severity. In response, Moore claimed others punched out early, but her only evidence of this was telling Clark that another, unnamed employee, under a different supervisor, left early on some unspecified date. [Clark testimony].

With respect to her scanning duties, Moore's claim that she was undertrained was belied by Panayotova's unrebutted testimony that, over and over again she repeated the same instructions to Moore what scanner settings to use to avoid the same errors, without any change in error rates. Also, Clark amply documented repeated individualized training, reminders, and repeated PIPs to counter Moore's claim. [Exhibit 10; Exhibit 11; Exhibit 12; Exhibit 13; Exhibit 17; Exhibit 19; Exhibit 22; Exhibit 23; Exhibit 25; Exhibit 26; Exhibit 27; Exhibit 28]. In addition, specific scanning procedures were in place at latest since June 2008 which Moore either ignored or repeatedly failed to implement. [Exhibit 15; Clark testimony; Panayotova testimony].

Moore threw away engineering documents without scanning them. [Moore cross-exam]. Consequently, Clark removed the responsibility for duplicate document disposal from Moore in 2008 and assigned final decision-making authority for that task to Panayotova. Moore explained she was disposing only of duplicates, but, even if that was true, she failed to explain why she failed, as she was required, to clear the disposal with Panayotova. [Id; Panayotova testimony].

Because Moore continued to make so many scanning errors, Clark assigned Panayotova, in addition to her other duties, to oversee Moore, help her with scanning questions, and check for quality control for every one of Moore's scans. Moore repeatedly stated her scans were done when they were not, or that she just did not know how to fix mistakes for which she had received repeated instruction. Consequently, Panayotova could no longer trust Moore's answers and ended up reviewing the same document two or three times after each ostensibly

corrected scan. Panayotova, whose dedication and work ethic were unquestioned, went to extraordinary lengths to train Moore, including providing her with samples of scanned documents, showing results with and without proper settings, providing specific feedback on incorrect scans with specific steps and settings to correct the problems, and many counseling sessions and emails. [See, e.g. Exhibits K-410;; 26-2; 26-4].

Because she was assigned essentially to babysit Moore's production in addition to her own full-time activities, Panayotova struggled to meet her own, substantial obligations. When Panayotova repeated the same instructions and corrections to Moore without changing Moore's poor attitude or results, Panayotova's frustration became palpable. "We have had numerous verbal discussions exactly on the same topic and [a] few times last week I reminded you to check your settings. I also gave you feedback on the images that look good. If your explanation is that you [still] forget to change the scanner settings I do not know how I can help you..." [Exhibit K-43, 44].

Moore denied she was responsible for any scanning errors, blaming both software and hardware issues, for example repeatedly having scans with black lines, yellow areas, upside down copies, or illegible results [Moore testimony; Exhibit 32; Exhibit K-27]; but Clark and Panayotova had no such issues with producing legible scans, using the same instructions which Moore ignored or otherwise repeatedly failed to use. While Moore admitted some of the problems were due to her forgetting to change the scanner settings," [Moore testimony 8/11/10], she qualified her acknowledgment by blaming Panayotova for not catching her (Moore's) mistakes timely, because Panayotova took too long to review some of Moore's work. *Id.*

Regarding her duty to create a file name for scanned documents, Moore claimed "miscommunication" about the protocol, [Moore cross-exam 8/11/10], but Exhibit K-65 shows the protocol was addressed previously. Incongruously, Moore stated in testimony, as well as to her supervisors, that she didn't require any scanning help as she was proficient at her duties. [Moore testimony; Clark testimony; Panayotova testimony]. Moore also alleged there was a language barrier between her and Panayotova, [Moore testimony 8/11/10], but it was evident in Panayotova's testimony that her communication is clear and succinct.


Moore's failure to accept a modicum of responsibility for her work product was a recurring theme. For example Moore acknowledged she did not understand what was her PIPs required because she did not read them, or did not read them entirely. [Moore cross-exam 8/11/10]. Moore declined training when it was offered, because the training was not mandatory. [Moore testimony 8/11/10]. Moore admitted she refused to meet with her supervisor, Clark, from June to Sept. 2009. Oddly, her justification was that Clark claimed she was afraid of Moore for using threatening language; however Clark never refused to meet with Moore.

There was much discussion over the calculation of error rates. Neither side was more convincing than the other. Therefore I discount the Agency's claims regarding specific error rates in her 2008-2009 PEPR; however even in the absence of that evidence, there was other ample evidence regarding Moore's repeated failures to follow instructions and continuing to make the same errors, as stated above. While there is room for improvement in the interpersonal relationships on both sides of this case, the preponderance of the evidence proves the Agency's assessment of a "needs improvement PEPR to Moore for her 2008-2009 performance review was not arbitrary, capricious, or based upon considerations unsupported by the evidence. CSR 19-10 A. 2. c. Because the Appellant failed to meet her burden to prove her PEPR rating was motivated by unlawful retaliation and also failed to establish the underlying bases for her 2008-2009 PEPR rating were unjustified, the Agency's PEPR rating must be sustained.

V. ORDER

The Agency's assessment of "needs improvement" PEPR to the Appellant, on September 1, 2009, is AFFIRMED.

DONE October 14, 2010.



Bruce A. Plotkin

Career Service Hearing Officer