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

Appeal No. 16-06

DECISION

IN THE MATTER OF THE APPEAL OF:

ANNA KRISTINA ALLEN,
Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Anna Kristina Allen, appeals her employer's decision to fail her probation and terminate her employment on February 13, 2006. The Appellant alleges her employer's decision to fail her probation was motivated by unlawful discrimination based upon her pregnancy. The Appellant filed a timely appeal on February 28, 2006. A hearing concerning this appeal was conducted on May 19, 2006, by Bruce A. Plotkin, Hearings Officer. The Appellant was present and was represented by Kevin Flesch, Esq. The Agency was represented by Diane Briscoe, Assistant City Attorney, with Ms. Arletha Ashley serving as advisory witness. Agency exhibits 1-3 were admitted without objection, while Appellant's exhibit A was admitted over objection. The following witnesses testified for the Appellant: the Appellant, Ms. Dellmarie Bradford, and Ms. May Murray. Ms. Ashley, Ms. Alisa Saliman, Ms. Deborah Arter, Ms. Nancy Tafoya, Ms. Christine Tafoya, and Mr. Ron Mitchell testified for the Agency.

II. ISSUES

The following issues were presented for appeal:

A. whether the Agency engaged in unlawful discrimination against the Appellant based upon her pregnancy;

B. if the Agency engaged in unlawful discrimination against the Appellant, whether the Appellant is entitled to reinstatement, along with back pay and benefits.

III. FINDINGS

The Appellant was a Human Service Aid at the Family Crisis Center, Denver Department of Human Services (the Agency). Juveniles 12 to 18 years old who are in need of supervised living are housed at the center. The Appellant began working there as an on-call Human Service Aid in 2001. Her duties included caring for and monitoring the residents. In August 2004, at her request, the Appellant was re-assigned to the night shift, 10:00 p.m. to 8:00 a.m. the following morning. [N. Tafoya testimony]. The primary duty of night shift aids is to conduct bed-checks every 15 minutes. They also do laundry, meet the needs of awakened residents, fill out paperwork, and prepare the residents for school in the morning. Because the residents are sleeping during most of the night shift, the aids have less contact with residents than the aids on the two other shifts. However, all employees at the Center have contact with the residents, and all are required to participate in the physical restraint of residents who become otherwise uncontrollable. [Ashley testimony]. At all times pertinent to this appeal the Appellant's supervisor was Nancy Tafoya.

On September 16, 2005, the Appellant learned she was pregnant and, soon after, imparted that happy news to her co-workers, [Ashley, Saliman, Arter testimony], and to her supervisor. [Appellant, N. Tafoya testimony]. The following week, she asked Tafoya if she could transfer to a Case Manager position "for safety reasons," [Appellant testimony], although there was no evidence the Appellant had an abnormal or risky pregnancy. Tafoya denied the request. On January 3, 2003, Tafoya hired the Appellant to full-time status as a probationary employee. On January 23, 2006 the Appellant again asked Tafoya for a transfer to the Case Manager position following an incident the previous night in which a resident threatened to "kick my ass." [Appellant, N. Tafoya testimony]. The Appellant stated that incident was the first time in her over four years as an Aid that she felt unsafe. [Appellant testimony, Exhibit A]. Tafoya testified she asked the Appellant to bring a doctor's note so that the Appellant would no longer be required to perform physical restraint of residents, but no note was ever produced. There was no Case Manager position open at the time of the Appellant's request and Tafoya denied the request. [N. Tafoya testimony].

The Appellant complained the Agency had accommodated the request of another pregnant employee, Chantel Rothmerel, to transfer to Case Manager. Tafoya answered Rothmerel's request, some two to three years ago, was granted because she had a history of miscarriages, and she provided a doctor's letter as to her medical risk. Importantly, Rothmerel transferred to a vacant position. [N. Tafoya testimony].

On February 9, 2006, the Agency sent notification to the Appellant that it anticipated she would fail probation. [Exhibit 1]. A meeting with the Appellant was held February 13, 2006 concerning the Agency's notice. Later the same day, the Agency served the Appellant its dual notice of failure to pass probation and notice of separation from employment. [Exhibit 2]. The Appellant filed a timely appeal on February 28, 2006.

IV. ANALYSIS

A. Burden of Proof.

An employee who enters the Career Service gains enormous employment security. Even if a Career Service employee engages in wrongdoing, she is entitled to extensive due process protection, and may be disciplined only for cause, Denver City Charter art. IX, §9.1.1, meaning the employee violated a Career Service Rule, Agency Order, Executive Order, or law. Even then, the Agency may not simply state its case and be done with it. In order to withstand appellate review, the Agency bears the burden of persuasion to prove its case by a preponderance of the evidence.

Such is not the case for an employee on probationary status such as the Appellant. Under the Career Service Rules, a new employee is on probationary status a minimum of six months. CSR 5-52. At the conclusion of probation, the employee either passes or fails her probation. CSR 5-53 A. If the employee is expected to fail probation, the Agency must send notice to that effect, and give the probationary employee an opportunity to meet to discuss the termination of employment. CSR 5-53 D. However, a probationary employee may be fired at any time, for any reason, or even for no reason. The only exception to termination "for any or no reason" is that an agency may not engage in unlawful discrimination. CSR 5-61 1). Thus, even in the absence of wrongdoing (cause), the Agency may fire a probationary employee, and the only allowable basis for appeal is unlawful discrimination. CSR 5-61 2). In addition, the burden of persuasion is on the Appellant to prove the separation was based on an unlawful discrimination by a preponderance of the evidence. Consequently, even if the Appellant presents prima facie evidence of discrimination, the Agency needn't respond with cause to terminate, as long as its proffered reason is non-discriminatory. *See* CSR 5-61 1). If the Agency establishes such a non-discriminatory reason, the Appellant may then introduce evidence the Agency's proffered reason is, in reality a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (U.S. 1993).

B. The Appellant's Prima Facie Case.

The Appellant establishes a prima facie case or pregnancy discrimination if she establishes: (1) she was a member of a protected group; (2) she was qualified for the modified-duty positions sought; (3) she was denied the modified-duty position sought; and (4) she was denied the modified-duty assignment under circumstances which give rise to an inference of unlawful discrimination. EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000).

1. Whether the Appellant was a member of a protected group. The Agency agreed the Appellant, at all times pertinent to her appeal, was pregnant and thus a member of a protected group. Agency opening, closing statements.

2. Whether the Appellant was qualified for the modified duty position she sought. The Agency presented no evidence the Appellant would have failed to qualify for the

Case Manager position she sought, nor did the Appellant present any evidence from which it could be inferred she was not qualified for the Case Manager position.

3. Whether the Appellant was denied the modified-duty position she sought. The Agency agrees the Appellant was denied a request to transfer to the Case Manager position she sought. Agency opening, closing statements.

4. Whether the Agency's denial occurred under circumstances which give rise to an inference of unlawful discrimination. The Appellant's only evidence in this regard was her claim that another pregnant employee, Chantel Rothmerel, was granted a transfer to Case Manager. Here, the Appellant faces an insurmountable problem with her comparison to Rothmerel: Rothmerel is a member of the Appellant's protected class, i.e., pregnant employees; therefore this comparison fails to demonstrate disparate treatment of the Appellant as a pregnant employee, which necessarily requires a comparison to a member of the non-protected group, i.e. a non-pregnant but otherwise similarly situated employee. EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1197 (10th Cir. 2000).

C. Whether the Agency's stated reasons to fail the Appellant's probation were non-discriminatory.

In addition to the Appellant's difficulty in establishing a prima facie case, even assuming the Appellant had met her prima facie burden, the Agency presented the following non-discriminatory responses to the Appellant's claims: Rothmerel was transferred to a vacant Case Manager position, while there was no such vacancy when the Appellant asked for a transfer; three other, non-pregnant aids were terminated at the same time as the Appellant; contrary to the Appellant's contention that transferring to the Case Manager position would improve her safety, several Agency witnesses credibly testified (1) all employees at the Center are required to engage in physical restraint, so the Case Manager position would not accomplish the Appellant's purpose of transferring to a safer position, (2) the shift which is the least likely to encounter the need for physical restraint is the night shift, the shift already occupied by the Appellant, (3) the Case Manger position sought by the Appellant would require her to transport, alone, residents to court and other appointments, subjecting her to verbal or physical abuse with no help nearby. [N. Tafoya, Saliman, Ashley testimony]. Finally, the Agency presented evidence the main reason the Appellant failed probation was based upon complaints of several co-workers that the Appellant clashed with her co-workers and was therefore not a good fit. [Ashley testimony]. Finally, another, non-pregnant probationary employee was fired for this same reason (not being a good fit) at the time of the Appellant's separation.

D. Pretext Evidence.

Neither of the Appellant's two witnesses addressed any Agency action against the Appellant from which discriminatory animus might be inferred. Dellmarie Bradford testified she shared the Appellant's belief the night shift was at times understaffed,

resulting in potentially unsafe circumstances. [Bradford testimony]. May Murray testified she did not observe any performance issues with the Appellant. [Murray testimony]. Even assuming understaffing was a legitimate concern, the expression of that concern fails to establish any element of discriminatory purpose or action.

When asked why she believed she was terminated, the Appellant testified "I believe it has to do somehow with the pregnancy. Either it was...having to replace me for a short amount of time and the money situation [pause], I really don't know." [Appellant testimony]. It was apparent from her testimony the Appellant did not have a strong sense the Agency acted in a discriminatory fashion against her, and she failed to present any credible evidence that the Agency's above-stated reasons to fail her probation were, in reality, a pretext for pregnancy discrimination. The Appellant's failure to raise pretext evidence is all-the-more apparent since the unit is almost all-female, pregnancy leave is granted frequently, and the Appellant was hired to her full-time position by a supervisor who knew she was pregnant, [Ashley testimony], an action that is inconsistent with a motive to discriminate. For these reasons, the Appellant failed to establish the Agency's stated reason to terminate her, being a poor fit, was a pretext for pregnancy discrimination.

V. CONCLUSION

The Appellant failed to prove, by a preponderance of the evidence, that the Agency's denial of her request to transfer was motivated by unlawful discrimination based upon her pregnancy. To the contrary, the evidence established such a change would not have accomplished the intended purpose of increasing her safety, nor did the Appellant establish her pregnancy disabled her so as to entitle her to such an accommodation. *See* In re Cordova, CSA 116-02, 10 (9/24/02). The Appellant was treated no less or more favorably than any other employee. The Appellant thus failed to establish her claims that the Agency acted out of discriminatory animus in failing her probation and terminating her employment.

VI. ORDER

The Agency decision to fail the Appellant's probation and to terminate her employment is AFFIRMED.

DONE this 6th day of June, 2006.

Bruce A. Plotkin
Hearings Officer
Career Service Board