

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

Appeal No. 135-05

ORDER OF DISMISSAL

IN THE MATTER OF THE APPEAL OF:

BETTY L. JOHNSON,
Appellant,

vs.

DENVER SHERIFF DEPARTMENT, DEPARTMENT OF SAFETY,
and the City and County of Denver, a municipal corporation,
Agency.

The Agency moved to dismiss this appeal on Feb. 14, 2006. Appellant filed a response on March 6th, and the Agency replied on March 9, 2006.

This is an appeal of a grievance in which Appellant claimed that mandatory training ordered Oct. 14, 2005 was disciplinary in nature, and constituted sex discrimination, retaliation and harassment. Appellant filed this appeal after the Agency failed to respond to her second step grievance in a timely manner. Appellant seeks rescission of the order to attend training, and removal of statements made in her Performance Evaluation Review, also known as the logbook, which is used to prepare her annual performance evaluation.

Appellant claims that (1) the order to attend training deprived her of due process under CSR Rule 16, since the decision was made before her response was due to a complaint about her interactions with inmates, (2) the mandatory training order was discriminatory, harassing and retaliatory, since it was made while a 2004 EEOC charge of discrimination was pending, and (3) the notes made in the logbook were demeaning, discriminatory and retaliatory.

The Agency claims jurisdiction is lacking under the Career Service Rules because the action is not appealable, and the Hearing Officer lacks jurisdiction to award relief. The Agency also argues that the appeal fails to present viable claims of discrimination, harassment or retaliation.

FACTUAL BACKGROUND

Appellant Betty Johnson is a Deputy Sheriff assigned to the city jail. On Sept. 20, 2004, she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) based upon an allegation of continuing sex discrimination and retaliation from July 28, 2003 to September 17, 2004. The charge cites an incident on April 12, 2004 as illustrating that her then-current supervisor Sgt. Anthony Sullivan undermines her authority with the inmates, and does not treat male officers in that manner. [Exh. L.] In her response to the motion to dismiss, Appellant states that the charge is still under investigation at the EEOC.

As a result of the April 12, 2004 incident, Appellant also filed a grievance and an appeal with the CSA Hearing Office, which allege sex discrimination and hostile work environment. Both grievance and appeal request that her supervisor Sgt. Sullivan be moved out of Building 22. In re Johnson, CSA 67-04. The appeal was dismissed because its requested relief was beyond the jurisdiction of the Hearing Office. [Agency Motion to Dismiss, Exhs. 10, 11.]

On October 14, 2005, Appellant was ordered to take five remedial courses during work or overtime hours based upon a series of notes and memos documenting her problems controlling inmates. [Agency Motion to Dismiss, Exhs. 1 – 4.] Appellant grieved the action on October 27, 2005, asserting that the order was unnecessary and constituted harassment. Appellant's October 17, 2005 response to the reported problems asserted that her supervisor Sgt. William Walters harassed her and undermined her authority. [Exh. I, p. 9.] After the time for an Agency response expired, Appellant filed this appeal of the grievance, alleging sex discrimination, retaliation and harassment.

ANALYSIS

The motion to dismiss argues that the Hearing Officer lacks jurisdiction over the subject matter of the appeal, and that the appeal fails to state a claim upon which relief can be granted. The motion attached twelve categories of documents, some of which had not previously been designated as exhibits in the pre-hearing statements. As matters outside the pleadings have been presented by both sides and considered in this order, the motion is treated as that of summary judgment by analogy to C.R.C.P. Rule 56. The ultimate issue then is whether there is a genuine issue of fact for hearing on the claims presented. For purposes of this motion, the material allegations of the appeal will be accepted as true.

I. Disciplinary Action

Agency jurisdiction under the Career Service Rules is strictly construed, and is limited to the actions set forth in Rule 19. This is an appeal of an order to attend training courses after denial of Appellant's grievance of the order. The first issue to be resolved is whether such an order is an action within the meaning of Rule 19.

A grievance denial may be appealed if it “results in an alleged violation of the Career Service Charter Amendment, or Ordinances relating to the Career Service, or the Career Service Personnel Rules.” CSR § 19-10 d). The appeal form cites CSR §§ 19-10 f), 16-10, 16-20 and 16-40 as the rules violated by the action appealed.

Section 19-10 f) permits an appeal of the disposition of a complaint of discrimination or harassment. Appellant’s grievance states she believes the action was harassment, but it does not give the agency notice that it was a complaint of discrimination “so that the agency may investigate and resolve the problem” pursuant to CSR § 15-103. Without such notice, the Agency lacked the opportunity to issue a disposition to the complaint from which an appeal could have been taken.

Next, Appellant argues that the decision to order the training was disciplinary in nature, and that it violated CSR § 16-40, since it preceded her response to the allegations against her.

CSR §§ 16-10 and 16-20 relate solely to disciplinary actions, which are limited by the latter rule to a verbal or written reprimand, suspension, demotion, or dismissal. The action complained of here, compulsory training, is not included in this list. CSR § 16-40 requires that discipline must be taken following a pre-disciplinary meeting. Since the order for remedial training was not disciplinary as that term is defined in the Career Service Rules, the Agency was not required to furnish the procedural protection contained in CSR § 16-40. Therefore, these rules do not provide a basis for appeal of this grievance. Likewise, notes made in a logbook which may or may not be used for a future evaluation are neither disciplinary nor otherwise appealable.

II. Discrimination and Harassment Claims

Intentional discrimination under CSR § 15-101 is proven by evidence of 1) membership in a protected class, 2) an adverse employment action, and 3) evidence which supports an inference of discrimination. In re Jackson, CSA 103-04, 5 (6/13/05), citing O’Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

The appeal alleges that the training requirement was discriminatory on the basis of her sex. The Appellant is a member of a protected class based on her sex. The appeal may be construed as claiming that the remedial training was imposed on her because of her sex, or that her performance was unfairly evaluated as deficient based upon subjective and discriminatory criteria.

CSR § 15-101 provides that discrimination made unlawful by “federal, state or local law or regulation” is likewise prohibited by the City and County of Denver. Title VII identifies as unlawful employment practices hiring, firing, and discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment.” 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has defined a “tangible employment action” capable of invoking Title VII jurisdiction as “a significant change in employment

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

In the light most favorable to Appellant, the appeal claims the order to repeat ten hours of training constituted disparate treatment of her as a female sheriff in that her supervisor failed to support her authority based on her sex. Appellant has not presented any evidence that similarly situated male sheriffs were treated more favorably under these circumstances. Neither a single order of training intended to correct an observed performance deficiency nor the criticism contained in her logbook are adverse actions as that term has been interpreted in the case law on discrimination. Therefore, Appellant has failed to assert that necessary element of the claim.

“Terms, conditions, or privileges of employment” also include “requiring people to work in a discriminatorily hostile or abusive environment. . . [w]hen a workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993.)

Here, the requirement of additional training bears no obvious relationship to Appellant’s sex. Moreover, the October 27th order was a single act that did not permeate Appellant’s employment by any objective measure. A review of the exhibits submitted as evidence by both parties does not reveal any action by the Agency that could be considered discriminatory or harassing. The documents which record her confrontations with inmates and her supervisors’ reactions to them show only that the supervisors disagreed with Appellant’s reactions during a number of encounters with inmates. [Exhs. P – R.] Appellant’s logbook contains numerous compliments on her performance by different supervisors, including Sgt. Walters, over the same period of time. [Exh. J.] Under these facts, it cannot be concluded that her supervisors’ actions created a discriminatorily hostile or abusive environment.

III. Retaliation

Finally, Appellant alleges that the order to attend training was imposed in retaliation for her 2004 charge of discrimination. A retaliation claim must be supported by evidence of an adverse action; i.e., action that is “reasonably likely to deter employees from engaging in protected activity.” Ray v. Henderson, 217 F.3d 1234 (9th Cir. 2000.) The Tenth Circuit has stated that this is not limited to monetary losses, and that it will examine the relevant factors on a case-by-case basis. However, “a mere inconvenience or an alterative of job responsibilities” is not an adverse action, nor is “everything that makes an employee unhappy”. Otherwise, the court implies, the term would become dependent on the sensitivity of individual employees, and no objective test would be possible. Couture v. Belle Bonfils Mem. Blood Center, 151 Fed. Appx. 685, 690 (10th Cir. 2005), *citing* Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998).

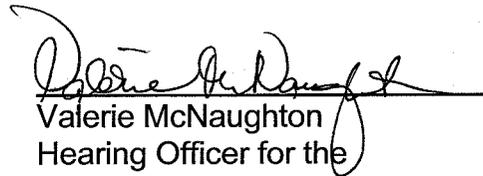
Under that test, an order to complete ten hours of remedial training during paid work hours a year after a discrimination charge was filed against a different supervisor does not constitute action likely to deter that protected activity as a matter of law. The evidence presented further indicates that Appellant was given very favorable reviews and compliments on her performance by the same supervisor during the intervening period. [Exhs. D, E.] One of Appellant's "exceeds expectations" reviews was signed by Sgt. Walters two weeks before the training order. [Exh. E.] That recent favorable action raises a strong presumption that no discrimination occurred, as the supervisor would not "abruptly develop antipathy" toward Appellant because of her sex. Vallabhapurapu v. First National Bank, 998 F.Supp. 906, *citing* Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174-175 (7th Cir. 1992).

Likewise, the mere pendency of a discrimination charge does not establish a motive to discriminate when the charge was clearly known to the supervisor for over a year before the claimed retaliatory act. Appellant has presented no additional facts to support her retaliation claim. Given the benefit of all reasonable inferences, Appellant's claim fails to suffice as the basis for a rational conclusion in her favor.

ORDER

Based on the foregoing findings and analysis, the appeal is dismissed with prejudice.

Dated this 10th day of March, 2006.


Valerie McNaughton
Hearing Officer for the
Career Service Board