CAREER SERVICE BOARD, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Appeal Nos. 28-07 and 50-08

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

SHARMAINE NORMAN-CURRY,

Appellant/Petitioner,

vs.

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

Agency/Respondent.

This matter is before the Career Service Board on Appellant's Petition for Review. The Board has reviewed and considered the full record before it and **AFFIRMS** the Decision of the Hearing Officer, dated February 27, 2009, on the grounds outlined below.

FINDINGS

This is a combined appeal of a 15-day suspension assessed on May 8, 2007 (Appeal No. 28-07), and a termination from employment on June 29, 2008 (Appeal No. 50-08). Although these disciplinary actions involved numerous career service and departmental rule violations, Appellant's opening brief raises only four issues and we address only those issues. In addition, we note that Appellant designated only a partial transcript of the 5-day hearing, which limits our review of the evidence relied upon by the Hearing Officer in reaching his conclusions.

Appellant's Claim of Sex Discrimination

The Hearing Officer concluded that Appellant presented no evidence she was treated less favorably than similarly situated males, and therefore, she failed to prove her claim of sex discrimination. Relying on *Sorbo v. United Parcel Service*, 432 F.3d 1169, 1173 (10th Cir. 2005), Appellant argues that the Hearing Officer used an outdated legal test requiring a comparison to employees in a non-protected group. While the court in *Sorbo* recognized that such a comparison is not essential to proving a discrimination claim, it remains, however, one of the methods by which discrimination may be proven. *Id.* When a plaintiff chooses to use such a comparison, the claim is properly analyzed in those terms. *Id.* at 1173-1174.

Whether the Hearing Officer utilized the appropriate legal standard cannot be analyzed in a factual vacuum. Without a complete transcript of the hearing, the Board cannot determine whether Appellant attempted to prove her claim of discrimination by comparing herself to similarly situated males. Even if we assume the Hearing Officer should have articulated the legal standard currently recognized by the courts – "under circumstances giving rise to an inference of discrimination" – without a transcript, Appellant cannot demonstrate that she presented evidence at the hearing that would have met that standard.

Moreover, these legal standards are generally used by the courts to describe the threshold of evidence (a *prima facie* case) a plaintiff must have to withstand a summary judgment motion and proceed to trial. This is not an appeal of a summary judgment motion. At the hearing, Appellant's burden was not simply to present a *prima facie* case in order to avoid a dismissal; rather, Appellant had the burden of proving that the discipline imposed upon her was the result of unlawful sex discrimination. On appeal to the Board, we cannot say based on the evidence in the record that she met this burden of proof, regardless of how the Hearing Officer phrased the legal standard.

Appellant's Claim of Retaliation

Before the Hearing Officer, Appellant argued that the 15-day suspension was imposed in retaliation for filing a grievance. **Decision, p. 13; Record Vol. I, 211 (Appellant's Amended Pre-Hearing Statement).** The Hearing Officer found that the seven-month lapse between Appellant's grievance and the discipline was too remote to establish a causal link between the two.

Before the Board, however, Appellant suggests that the adverse employment action at issue is not the discipline, but the investigation that preceded it. We need not decide whether an agency investigation could rise to the level of an adverse employment action for purposes of a retaliation claim because in this case the investigation began before the Agency had knowledge of Appellant's grievance.

To prove retaliation, an employee must demonstrate that the employer took adverse action against her because she engaged in a protected activity. *Hinds v. Sprint/Unlimited Mgmt. Co.*, 523 F3d 1187, 1203 (10th Cir. 2008). In other words, the employee must demonstrate a cause and effect relationship between the two. As a prerequisite to this showing, the employee must first come forward with evidence showing that those who took the adverse action knew about her protected activity. *Id.* Without knowledge, there can be no inference of a retaliatory motive.

The incident that preceded the grievance and the investigation was an order given to Appellant by her supervisor, Sgt. Collier, to remove butterfly stick pins from her hair, and Appellant's refusal to do so. The incident occurred on October 13, 2006. The Board agrees with the Hearing Officer that Appellant's grievance is dated October 13, 2006. However, Appellant did not deliver the grievance to the Agency until October 15, 2006. **Record Vol. II, 1361**

(Appellant's certificate of service on the grievance). The Agency's investigation into Appellant's alleged insubordination began two days earlier, on October 13, 2006. **Record, Vol. II, 1321-1363** (Exhibit 23, IAB investigation summary, including interviews of Sgt. Collier and Appellant on October 13, 2006). Because the investigation began before the Agency had knowledge of the grievance, Appellant cannot demonstrate that the investigation was motivated by her grievance and therefore her retaliation claim fails.

C.R.E. Rule 408

Appellant's actions in repeatedly slamming an inmate's head into a Plexiglas window and verbally abusing the inmate was, by far, the most egregious violation supporting the Agency's termination of employment. **Decision, p. 23**. Based on this incident alone, the Hearing Officer sustained violations of CSR 16-60 M. (threatening, fighting with, intimidating, or abusing members of the public); CSR 16-60 B. (carelessness in performance of duty); CSR-16-60 E. (lying to superiors); Department Order 5011.1G. (unjustified use of force), and CSR 16-60 Z. (conduct prejudicial).

Appellant contends the Hearing Officer improperly considered evidence of a settlement between the City and the inmate in determining her liability for misconduct, contrary to C.R.E. 408, and improperly relied upon evidence to which there was a sustained objection during the hearing.

As a starting point, strict compliance with the Colorado rules of evidence is not required in career service hearings. CSR 19-50 A. Appellant was not a party to the settlement; therefore, the Hearing Officer could reasonably determine that admission of the fact that a settlement was reached would not frustrate Rule 408's purpose of promoting settlement by assuring the parties to settlement negotiations that their offers will not later be used against them. In addition, while C.R.E. 408 provides that offers of settlement are not admissible when offered to prove liability, the rule permits the admission of such evidence for other purposes. The Hearing Officer's decision clearly indicates that the evidence of a settlement and the resulting negative publicity was considered for the purpose of showing harm to the City under CSR 16-60 Z. (conduct prejudicial), not for the purpose of proving Appellant's misconduct. **Decision, p. 23**.

The very limited transcript designated by Appellant to support of her objection argument shows the Agency tried to elicit testimony from Manager LaCabe regarding the settlement and Appellant objected on two grounds – the settlement occurred significantly later than the discipline and therefore was not relevant to the Manager's decision-making, and testimony by the Manager about the settlement would be a "rehash [of] everything that we've already heard." The objection was sustained. **Transcript, Vol. II, pp 4-5**. Despite the limited transcript, it is clear that testimony about the settlement had occurred earlier in the hearing and, in fact, the transcript and the Hearing Officer's decision demonstrate that Exhibit 39 (an article that appeared in the Rocky Mountain News concerning the settlement) had already been admitted into evidence. **Transcript, Vol. II, 3: 5-7; Decision, p.1.** Thus, Appellant's claim that the Hearing Officer relied on evidence to which there was a sustained objection is completely without merit.

Use of Force Burden of Proof

Appellant claims the Hearing Officer improperly required her to prove that she did not use excessive force on the inmate. We disagree. While the Agency bore the burden of proving that the amount of force used by Appellant was excessive and punitive, in violation of Department Order 5011.1G, Appellant bore the burden of proof on affirmative defenses. Here, Appellant sought to justify the force she used as a reasonable response to what she claimed were repeated attempts by the inmate to kick and spit at her. However, the videotape recording of the incident and the testimony of police officers and deputy sheriffs who were present did not corroborate Appellant's claim that she simply held the inmate's head against the wall, and did not corroborate her claim that the inmate repeatedly tried to kick or spit. **Decision, p. 20**. In addition, the Hearing Officer concluded that even if the inmate did spit on Appellant, she failed to use reasonable alternatives in violation of the Department Order. **Decision, p. 19.**

We find the Hearing Officer's decision does not reflect an improper shift in the burden of proof; instead, the decision reflects the Hearing Officer's factual findings that Appellant did not provide sufficient evidence to invoke the affirmative defense of justification for the use of force.

ORDER

IT IS THERFORE ORDERED that the Hearing Officer's Decision of February 27, 2009, is **AFFIRMED.**

SO ORDERED by the Board on August 6, 2009, and documented this 3rd day of September, 2009.

BY THE BOARD:

Luis Toro, Co-Chair

Board Members Concurring:

Nita Henry
Tom Bonner
Patti Klinge