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

Appeal No. 246-01

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

SANDRA L. PHILLIPS, Appellant,

v.

Agency: Denver Department of Human Services and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Sandra L. Phillips shall be referred to as "Appellant." The Denver Department of Human Services shall be referred to as the "Department." The City and County of Denver shall be referred to as the "City". The Rules of the Career Service Authority shall be abbreviated as "CSR" with a corresponding numerical citation.

A hearing on this appeal was held October 18, 2001, before Robin R. Rossenfeld, Hearing Officer for the Career Service Board. Appellant was present and appeared *pro se.* The Department and City were represented by Neils Loechell, Esq., with Karen Miller serving as the advisory witness on behalf of the Department and City.

The Hearing Officer has considered the following evidence in this decision:

The following witness was called by and testified on behalf of the Appellant:

Appellant

The following witnesses were called by and testified on behalf of the Department:

None

The following exhibits were offered and admitted into evidence on behalf of the Appellant:

Exhibits D-1, D-2, D-4, D-5, D-6, D-7, D-8, D-11, D-12, D-13, D-14, D-16

The following exhibits were offered and admitted into evidence on behalf of the Department:

None

The following exhibits were admitted into evidence by stipulation:

Exhibits D-1, D-2, D-4, D-5, D-6, D-7, D-8, D-11, D-13

The following exhibits were offered but not admitted into evidence and therefore not considered in this decision:

Exhibits D-3, D-9, D-10, D-15, E

NATURE OF APPEAL

Appellant is appealing her dismissal from her position as a Program Case Manager while on probationary status. She alleges age discrimination. She is seeking reinstatement to her position, along with back pay and all rights and benefits attendant thereto.

ISSUES ON APPEAL

1. Was Appellant's termination from her position as a Program Case Manager while she was on probationary status discriminatory in nature?

2. Did the Agency terminate Appellant for a bona fide business reason?

3. Was the bona fide business reason given by the Agency for Appellant's termination pretextural?

PRELIMINARY MATTERS

The Prehearing Order was issued on Aril 26, 2001. In that Order, the parties were instructed to file their Prehearing Statements to the Hearing Officer and serve copies on the other side within twenty days of the date of the Prehearing Order. Appellant did not file a Prehearing Statement within twenty days, as ordered. The matter was set for hearing on June 28. It was continued and reset at least twice. The hearing was finally rescheduled for October 18. Appellant finally delivered her exhibits and a document that turned out to be her Prehearing Statement to the Hearing Office approximately a week before the hearing date. She did not provide copies of either the exhibits or her "Prehearing Statement" to the Department's attorney as ordered.

When the hearing commenced, Appellant indicated that she had two witnesses Debra Stecklein and "the officer who took the report at the Department on the date of the alleged incident." Appellant did not request subpoenas for either of these witnesses. At the commencement of the hearing, Appellant indicated that Ms. Stecklein would be available to testify by telephone. She also indicated that she did not know who the officer was that she referred to in her Prehearing Statement, but that she expected the Hearing Officer to have determined the identity of the officer and subpoenaed him/her. The Hearing Officer explained that it was not the responsibility of the Hearing Office to discover the identity of the officer. The Hearing Officer also indicated that Appellant had an affirmative responsibility to obtain the subpoena for Ms. Stecklein and that Appellant had not done so. The Hearing Officer asked the Department if it would produce Ms. Stecklein without a subpoena. The Department indicated that it would not and objected to her production as a witness because the Department had not been served with a copy

of the Prehearing Statement and only received it when its paralegal came over to the Hearing Office two days before the hearing and picked up a copy from the Office. The Hearing Officer granted the Department's motion to exclude the witnesses. The Department also moved to exclude Appellant's exhibits because the Department did not receive a copy until two days before the hearing. The Hearing officer found that the exhibits had been available in the Hearing Office for over a week and that the Department could have picked them up earlier. The Department's Motion to Exclude the exhibits was denied.

The Department moved to dismiss the case at the close of the Appellant's presentation. The Hearing Officer granted the motion due to Appellant's failure to establish a *prima facie* case of age discrimination. The Hearing Officer informed the parties that a written order would follow.

FINDINGS OF FACT

1. Appellant was born on January 21, 1946.

2. Appellant was employed by the Department as a Program Case Manager in the Adult Services Division at the South Street Clinic. She originally began her employment with the Department in 1985. She took a year off from her employment with the Department in 1993, during which time she cared for her ailing father in Florida. Prior to her employment by the Department, Appellant worked for other social services agencies in Colorado and Ohio for several years.

3. In January 2001, the Program Case Managers were told that they had been overpaid and owed the City $3,668. A meeting was held by the Department to explain the situation. While the Department had asked the Mayor's Office to forgive the overpayment and let the Department absorb it in their budget, Mayor Webb rejected this request.

4. Appellant testified that most of the 168 affected persons were in her age bracket.

5. Appellant was angry about the decision to have the employees pay the money back when the employees were not at fault. She testified that she felt they were "getting the shaft" because they were older. She got up at the meeting and said, "You can have my job." She then left the meeting and went to see Karen Miller, her supervisor, and told her what she said and did at the meeting. She also talked to Donna Good, Senior Deputy Manager, and Liz Trujillo, appellant's second level supervisor, about her anger and what happened.

6. Appellant admitted that she never got a letter telling her she owed the money. She also testified that she did not know that the City eventually decided not to collect the overpayment.

7. Appellant had applied for and was offered a job with the Colorado State Department of Social Services to handle medical claims in the Social Security division. The next training program began February 12, 2001. Appellant decided to take the job and handed in her resignation to the Department on February 1, 2001. The resignation was effective February 9.

8. On March 13, Appellant realized that she did not like the job with the State and called Ms. Miller and Ms. Trujillo to tell them she wanted her old job back.

9. Appellant testified that Ms. Miller said, "You are an answer to a prayer," and indicated that the position was difficult to fill and that they wanted her back. Ms. Trujillo indicated that she wanted Appellant back and that she would push to get her the same rate of pay.

10. Appellant testified that her resignation had not been completely processed by the time she called for the job back. She was still on the payroll and did not receive her final payout from her resignation until after the termination that is the subject of this hearing. According to her, persons at the CSA, including Stacy Schalk and Vivian, told her that the Department could request reinstatement to her previous status by requesting a waiver from the Personnel Director if the Department chose to process her that way.

11. Under the Merit System, Department employees had the ability to return to their jobs after a resignation and still have civil service protection. Appellant testified that she was unaware that under the CSR, she would be returning as a probationary employee.

12. The Department chose not to process her in the manner suggested by Ms. Schalk.

13. On April 4, Appellant was involved in an incident with a Departmental client and her child. Appellant admitted that she had been warned previously that her association with the client was an inappropriate crossing of boundaries. Appellant testified that she removed the child from the client's home without the mother's permission and without calling the police because she did not want the Department of Social Services involved.

14. Appellant was rehired by the Department on April 10, 2001.

15. Appellant was terminated from her probationary employment with the Department on April 11, 2001.

16. Paul Sienkiewicz, Personnel Officer, signed both the letter offering Appellant her job and the letter of termination. Appellant believed that the decision to terminate her was solely his decision because no one else's signature was on the letter.

17. Appellant filed her appeal on April 16, 2001, in which she alleged age discrimination.

18. Appellant testified that Mr. Sienkiewicz did not like her. She admitted that she did not know if the decision to terminate her was based upon a personality conflict with Mr. Sienkiewicz or was discriminatory.

19. Appellant admitted that Dr. Veasey, the Director of the Department, did not discriminate against her. She admitted that Ms. Miller, Ms. Trujillo, and Ms. Good did not discriminate against her in their decision to rehire her. She testified that. If they

participated in the decision to terminate her on April 13, which she believed they did not do, they must have been discriminating against her. She also admitted that she was told that the reason she was terminated was due to her relationship with the client she was warned about having a personal relationship with.

DISCUSSION AND CONCLUSIONS OF LAW

Applicable Rules and Statutes

CSR §5-50 concerns probationary status of employees. It provides, in pertinent part:

> §5-51 Purpose
>
> Probationary periods shall be regarded as integral parts of the examination process and shall be utilized for closely observing the employee's work, assisting the employee to adjust to the duties and responsibilities of the position, and to separate...an employee whose performance does not meet required standards, in accordance with the following:
>
> a) During employment probation: An employee serving probation may be separated in accordance with paragraph 16-42 a) Employees separated during probation...
>
> §5-52 Duration of Probation
>
> a) Minimum period: Except for Deputy Sheriffs, the minimum period of probation shall be six (6) months....
>
> b) Extension of probation: At the request of an appointing authority, the Personnel Director may approve the extension of a probationary period up to six (6) months if the Personnel Director considers the bests interests of the City to be served thereby.
>
> c) Measurement of time: For the purposes of this subsection, time shall be measured in calendar days, irrespective of whether the position has a full time or part time work schedule.
>
> §5-53 End of Probation Notification
>
> a) General: Employee performance during a probationary period shall be documented by probationary reports. Employee performance shall be certified by an end-of-probation notification, or a written statement indicating the employee has passed or failed in completing the probationary period.
>
> b) Effective dates for end of probation notification

1) End of probation notification: Employee performance during a probationary period shall be documented by the completion of a notification form prepared by the employing agency in a form authorized by the Career Service Authority. If the employee fails to pass probation, a letter notifying the employee, copied to the Career Service Authority, shall substitute for the notification date. In either case, it shall be due before the effective date of attainment of career status.

2) Dates: The date of notification shall be prior to the conclusion of the required probationary period.

3) Other probationary appraisals: Supervisors are encouraged to continually appraise performance during the probationary period so that employees are fully informed of their progress.

d) Procedure when employee will not pass probation: If it is anticipated that the employee will not pass probation, the agency shall notify the employee of this decision a reasonable time in advance, but no less than two (2) working days prior to the completion of probation date, and shall allow representation at the meeting to discuss this action.

CSR §5-61 sets out the rights, privileges and benefits of employees on probationary status. It provides, in relevant part:

§5-61 Employees in Employment Probationary Status:

An employee in employment probationary status:

1) may be terminated or demoted at any time for any reason without cause except for discrimination as defined in Rule 19 APPEALS.

2) may not appeal any decision relating to his or her employment, including termination, except for alleged discrimination.

CSR §19-10 covers actions subject to appeal. It provides in relevant part:

§19-10 Actions Subject to Appeal

The following administrative actions relating to personnel matter shall be subject to appeal:

c) Discriminatory actions: Any action of any officer or employee relating in alleged discrimination because of race, color, creed, national origin, sex, age, political affiliation, sexual orientation, or

disability...

Legal Standards for Discrimination Claim

Appellant was a probationary employee at the time of her termination.[1] Therefore, pursuant to CSR §5-61, she could be terminated at any time without cause except for a discriminatory reason. This means that Appellant, having alleged age discrimination, bears the burden to show that she was terminated for a discriminatory purpose. If, and only if, Appellant can establish that discrimination occurred in the decision to terminate her, then the Hearing Officer has the jurisdiction to order reinstatement. If Appellant does not establish a case of discrimination, then the matter must be dismissed.

The requirements for establishing a case of age discrimination were originally set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Appellant bears the burden to prove that she was discriminated against on the basis of gender and/or national origin. The burden then shifts to the Department to show that there was a *bona fide* business reason for its actions. If the Department shows a *bona fide* business purpose, then Appellant has to show that the *bona fide* business purpose is pretextural. *See also Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center et al. v. Hicks*, 509 U.S. 502 (1993).

Pursuant to this analysis, the proponent of the claim of discrimination initially must establish a *prima facie* case of discrimination by a preponderance of the evidence. *Cone v. Longmont United Hospital Association*, 14 F.3d 526, 529 (10th Cir. 1994). This means that Appellant must establish that (1) she belonged to the protected or suspect class; (2) she was adversely affected by the employer's decision; and 3) similarly situated non-minority employees were treated differently. *McAlester v. United Airlines*, 851 F.2d 1249 (10th Cir. 1988).

Once the employee establishes a *prima facie* case, then a presumption of discrimination or retaliation arises, and the burden shifts to the employer to rebut this presumption by producing evidence the employee was terminated for legitimate nondiscriminatory reasons. *McDonnell Douglas*, 411 U.S. at 802-03; *Burdine*, 450 U.S. at 260; *Cone*, 14 F.3d at 529. This means that the burden shifts to the employer to show that the action was taken for a *bona fide* business purpose.

If the employer articulates a legitimate reason for the employment action, the presumption of discrimination is rebutted, and the burden then shifts back to the employee to prove a discriminatory or retaliatory reason more likely motivated the employer or the employer's proffered reason is pretextural. *McDonnell Douglas*, 411 U.S. at 804; *Burdine,* 450 U.S. at 256; *Cone,* 14 F.3d at 529. This requires that the

[1] Appellant testified that, under the Merit System, it was possible for her to be reappointed to her former position and not lose her protected status. CSA employees do not have a similar right. The Hearing Officer has also considered the applicability of the Age Discrimination in Employment Act to Appellant's decision to resign and then return her former job. Under the ADEA, employees over the age of forty have twenty-one days to consider a decision to resign from their positions. In the instant case, Appellant resigned on February 1, to be effective February 9. She did not decide that she made a mistake in resigning from her job until March 13, six weeks after she resigned. Therefore, she was no longer entitled to withdraw her resignation under the protection of the ADEA. As a result, she was properly placed in probationary status and did not have the right to a *Loudermill* due process hearing before she could be terminated.

employee must present enough evidence to support an inference that the employer's reason was merely pretext, by showing either "that a discriminatory reason more likely motivated the employer or ... that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1121-22 (10th Cir.1991). *See also McNeel v. Public Service Co. of Colorado*, 117 F.3d 1428 (10th Cir. 1997). If the employee fails to come forward with evidence of pretext, the employer is entitled to a dismissal. *Cone*, 14 F.3d at 529. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the employee. *Burdine*, 450 U.S. at 253; *St. Mary's Honor Center*, 509 U.S. at 518. *See also Young v. Cobe Laboratories Inc.*, 141 F.3d 1187 (10th Cir. 1998).

An Appellant alleging she was terminated based upon her age gender must show, either directly or indirectly that the decision was motivated by intentional age discrimination. *See Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). Direct evidence is that which does not require an inference to prove discrimination, such as oral or written statements by an employer showing a discriminatory motive. In this case, the Appellant was unable to identify any document or statement directly linking her termination to her age.

Indirect evidence of discrimination is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. See Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1964 (2000). Under this framework, Appellant bears the initial burden of establishing a *prima facie* case by showing that: "(1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge." *Id.* at 1135. Upon such a showing, a rebuttable presumption arises that her termination was motivated by unlawful discrimination. The burden then shifts to the employer to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the termination. Thereafter, the burden reverts to Appellant, who may avoid dismissal only by showing that a factual dispute exists whether the employer's articulated reason was pretextural.

Appellant, as proponent to the discrimination claim, must first show that she is a member of one or more protected classes and that the Department took any adverse employment action against her. Then she must show that she was able to perform her job and that she was treated less fairly than younger employees. Finally, she must show that her job was not eliminated after her termination.

Appellant established at the hearing that she is a member of one or more a protected classes. She is a female over the age of forty. She also proved that an adverse employment action was taken against her insofar as she was terminated from her employment with the Department. It also appears that her position was not eliminated after her termination.

Appellant failed to establish the third prong of the test, that she was treated differently from others because of her age. She admitted that Karen Miller, Liz Trujillo, Donna Goode, her three supervisors, as well as Dr. Veasey, the Department's Director, are all over the age of forty. Her only "proof" of age discrimination was her claim that Paul Sienkiewicz, the Personnel Officer who signed both the job offer and the letter of termination, is under the age of forty and that she was unaware whether or not Ms.

Miller, Ms. Trujillo, Ms. Good, or Dr. Veasey were consulted before Mr. Sienkiewicz signed the termination letter. Appellant then admitted that she did not know whether her alleged history of problems with Mr. Sienkiewicz was the result of a personality conflict or age discrimination.

Because Appellant was unable to produce any credible indirect evidence of a discriminatory animus behind the decision to terminate her employment one day after she was rehired by the Department, this matter must be dismissed with prejudice.

ORDER

Therefore, for the foregoing reasons, the Hearing Officer DISMISSES the appeal with prejudice.

Dated this 31st day of October 2001.

Robin R. Rossenfeld
Hearing Officer for the
Career Service Board

CERTIFICATE OF MAILING

I hereby certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in the U.S. mail, this 31 day of October 2001, addressed to:

Sandra L. Phillips
1700 Oswego St.
Aurora, CO 80010

I further certify that I have forwarded a true and correct copy of the foregoing FINDINGS AND ORDER by depositing the same in interoffice mail, this 31 day of October 2001, addressed to:

Niels Loechell
Assistant City Attorney

Alvin Howard
Department of Human Services

Virginia Granado