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

Appeal No. 256-00

FINDINGS AND ORDER

IN THE MATTER OF THE APPEAL OF:

YVONNE RODRIGUEZ, Appellant

Agency: Department General Services, Public Office Buildings, and the City and County of Denver, a municipal corporation.

INTRODUCTION

For purposes of these Findings and Order, Yvonne Rodriguez shall be referred to as "Appellant." Department of General Services, Public Office Buildings 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 January 16, 2001, before Robin R. Rossenfeld, Hearing Officer for the Career Service Authority Board. Appellant appeared pro se. The Agency and City were represented by Assistant City Attorney Mindi L. Wright, Esq., with Sharon Romero serving as advisory witness.

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

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

Appellant

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

Steve Pacheco, Sharon Romero, Margo Blu, James Williamson

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

None

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

Exhibits 1 - 8

The following exhibits were admitted into evidence by stipulation:

Exhibits 1 - 8

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

None

NATURE OF APPEAL

Appellant is appealing her dismissal from her position as a Custodian while on probationary status. She alleges disability 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 Custodian 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 JURISDICTIONAL MATTERS

None.

FINDINGS OF FACT

1. Appellant began working for the City of Denver in 1991 as an on-call recreational facility assistant. She eventually applied for a Custodian position with Public Office Buildings. Some time near the end of June 2000, she was notified that she had the Custodian position. She made an appointment for a physical examination two days later, although it was not actually required since she was already working for the City.

2. Appellant was told to report for work at the Social Service Building, 1200 Federal, and that she was to start right after the Fourth of July holiday.

3. Appellant started work on July 5, 2000. Her probationary status would have ended on January 5, 2001.

4. Appellant was assigned to the 4:00 p.m. to 12:30 a.m. shift, Monday through Friday.

5. Appellant was told to report to Sharon Romero at the Social Services building for her assignment. Ms. Romero told Appellant that she would be doing bathrooms on the third and fourth floor, with a limited assignment on the second floor. Her supervisors would be Steve Pacheco and Vincent Torres.

6. Appellant was given and orientation with two or three other new employees and one-on-one training by working with another employee, Dana Lucero. The training should have lasted a week, but Ms. Lucero took a few days off, so the actual training lasted only one to three days. The topics included in the orientation and/or the one-on-one were bio-training, safety training, policy and procedure training, and job performance expectations (see, e.g. Exhibit 8).

7. During the orientation, all new employees are told about the importance of safety footwear and the necessity to wear them at all times on the job.

8. Because everybody has different preferences, no standard safety footwear is issued. Instead, new employees are provided with vouchers for safety footwear and a list of vendors who stock the appropriate footwear. Employees are told to find the safety footwear that is most comfortable and appropriate for her.

9. On July 17, 2000, Appellant was issued her voucher for her safety footwear (Exhibit 7). She then went to one of the vendors and selected her safety footwear. By the time the problems arose that are described below, it was too late for Appellant to return the safety footwear and exchange them for a pair that fit her feet better.

10. After a relatively short time, Appellant began to experience discomfort from her safety footwear. She wound up going to a doctor for calluses on both feet. The doctor provided her with a note on September 15 that provided: "Please allow to wear comfortable fitting shoes to prevent further callus formation," (Exhibit 5) While this note did not state Appellant could not wear steel-toed shoes, Appellant testified that the doctor told her not to wear them.

11. On October 26, Appellant's doctor provided another note that authorized her to wear steel-toed shoes. Included in that note is the caveat "there is medical evidence that current steel-toed shoes are ill-fitting." (Exhibit 5)

12. Appellant was permitted to wear tennis shoes after she received the

first doctor's note even though they were not safety footwear. She claimed that she was permitted, and even encouraged, to wear the tennis shoes by her supervisors even after the second doctor's note stating she could wear steel-toed shoes again.

13. On October 31, 2000, at approximately 4:35 p.m., Appellant was cleaning a bathroom floor when her foot slipped in the water. As she described it, her knee went one way, her ankle went the other. Something popped, but she did not fall. She described a shooting pain in her knee. She also testified that she had no problem working that shift, but that her knee continued to hurt.

14. There was no testimony that the injury could have been avoided had Appellant been wearing steel-toed shoes at the time.

15. During her 10:00 break, Appellant sought out Steve Pacheco and told him of the incident. He told her it was too late to go to the doctor that evening and that he would take her to the doctor at the employees' clinic the next day.

16. When Appellant came to work the next day (November 1), she told Sharon Romero about what had happened. Ms. Romero told her that Mr. Pacheco would take Appellant to the doctor, which he did.

17. The doctor told Appellant to stay off her leg for two days, so Appellant took November 1 and 2 off from work. She went into work on November 3. She was given restricted duties, cleaning phones and desks. She was able to work for three hours, but her knee was bothering her when she got in and out of chairs, so Mr. Pacheco sent her home early.

18. Appellant came to work on the following Monday. She was still under restrictions. She was told that there was no work that could be done under the work restrictions. Tuesday was the Election Day Holiday, a day off. Appellant worked from 4:00 until 9:20 on Wednesday, doing paperwork given to her by Ms. Romero. Appellant had Thursday off as a previously arranged personal day. Friday was the Veterans Day Holiday.

19. Appellant came back to work on Monday, November 13. When she got to work, she was told there was no work for her by Mr. Pacheco. She also reported to work on November 14 and 15 and told to go home.

20. When Appellant reported to work on November 16, Mr. Romero told her to wait to speak with her. It was then that Ms. Romero told her they were letting Appellant go because she "could not perform the job we offered you when we offered you the job." Appellant received the official notification that her employment was terminated for unsatisfactory job performance, effective that day (Exhibit 16). She turned in her pager, badge and keys to the bathroom.

21. Appellant was still on restricted duty when she was notified that her

employment was terminated. According to Appellant, the restrictions were in place until after surgery was done to her knee and she expected to be cleared for work by the end of January 2001.

22. As part of her duties, Appellant was expected to flush floor drains, wipe down partitions, and fill dispensers.

23. Ms. Romero and Mr. Pacheco testified that Appellant had not been performing her job up to expectations even before she injured her knee. Appellant had not been stocking dispensers and there was a question about the thoroughness of her cleaning the partitions. Rene Chavez, another custodian, worked with Appellant one day to watch how Appellant did her work, retrain her as necessary, and report back to the supervisors about Appellant's performance.

24. Appellant was never told by either Ms. Romero or Mr. Pacheco that she was not performing her job at an acceptable level until the time she was terminated. She admitted that she knew Ms. Chavez was going to report about her performance back to the supervisors, but she also claimed Ms. Chavez told her that her work was fine.

25. Appellant never told her supervisors that she could not perform the job or that she had a disability.

26. Appellant filed her appeal on November 21, 2000. She citied disability discrimination as the basis for her appeal.

DISCUSSIONS 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 best 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. Therefore, pursuant to CSR §5-61, she could be terminated at any time without cause and except for a discriminatory reason. This means that Appellant, having alleged disability 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 employment 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 her disability. The burden then shifts to the Agency to show that there was a bona fide business reason for its actions. If the Agency 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 or 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; 3) that similarly situated non-disabled employees were treated differently. McAlester v. United Airlines, 851 F.2d 1249 (10th Cir. 1988)

In instances of disability discrimination, the employee must establish that she is a disabled person as defined under the law. Specifically, only those whose alleged disabilities reach to the level of creating an impairment of a major life activity have the benefit of the Americans with Disabilities Act. See, Doyal v. Oklahoma Heart, Inc., 213 F. 3d 492 (10th Cir, 2000); Poindexter v. Atchison Topeka and Santa Fe Railway Co., 168 F.3d 122 (10th Cir. 1999). In other words, the protections of the ADA not meant to be a guarantee of full employment for everyone in the jobs that they want. There are limits to its applicability. The law limits its protections to those who have physical, medical, psychological, or intellectual conditions that limit them from enjoying life at the same level and same way as the "abled."

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 employee action, the presumption of discrimination or retaliation 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 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).

Analysis of the Evidence

Appellant, as proponent of the discrimination claims, must first show that she was disabled, that she was able to perform her job, with or without reasonable accommodation, and that she was terminated because of her disability. Appellant's evidence failed at this first step.

Appellant's alleged disability is either her inability to wear steel-toed shoes without developing painful calluses or her knee injury caused by her slipping in water. Neither of these physical conditions meets the definition of "disability" as they are not impairments of major life activities, the legal standard for disability.

Working as a custodian is not a "major life activity." There are plenty of other jobs one can perform without wearing steel-toed boots. In other words, Appellant's sensitivity to steel-toed shoes does not stop her from finding employment in jobs that do not require such safety wear. The temporary, though painful, injury to Appellant's knee also does not qualify as a disability, not only for the same reason, but also because of its temporary nature.

Even if Appellant established that she had a disability, she still failed to establish the prima facie case as she did not show that non-disabled probationary employees were treated differently than she.

In the instant case, the Department presented evidence that it cause to terminate Appellant for failure to perform her work in a satisfactory manner. (This evidence would also establish the Department's defense to the discrimination claim had Appellant presented evidence to support the prima facie case.) Appellant, of course, disagreed with this conclusion and claimed that she was performing her job up to standards. However, the Hearing Officer need not address the credibility of the testimony presented by either side as to Appellant's abilities or deficiencies in performing her job since the Department had the absolute right to terminate Appellant from her position as a Custodian, with or without cause, at any time during her probationary period. The fact that they told her that she was not performing up to expectations was gratuitous.

ORDER

For the foregoing reasons, the Hearing Officer finds that Appellant has failed to substantiate that her termination from her probationary position was discriminatory, in violation of CSR §5-61. The appeal is hereby DISMISSED with prejudice.

Dated this 26th day of February 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 ORDER by depositing the same in the U.S. mail, this 27 day of February 2001, addressed to:

Yvonne Rodriguez
2831 W. 23rd Ave., #4
Denver CO 80211

I further certify that I have forwarded a true and correct copy of the foregoing ORDER by depositing the same in interoffice mail, this 27 day of February 2001, addressed to:

Mindi L Wright
Assistant City Attorney

Margo Blu
Public Office Buildings

John Hall
Public Office Buildings

Virginia Granado