HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 62-09

ORDER RE AGENCY'S MOTION FOR PARTIAL DISMISSAL

IN THE MATTER OF THE APPEAL OF:

RONNIE SANDERS, Appellant,

vs.

DENVER PARKS AND RECREATION, and the City and County of Denver, a municipal corporation, Agency.

The Agency has moved to dismiss Appellant's claims of retaliation and discrimination on the bases of race and age in the above appeal. The Appellant timely responded to the motion on October 20, 2009. After consideration of the case file and pertinent authority, I find and order as follows:

Procedural History

Appellant Ronnie Sanders was employed by the Agency as a Safety and Industrial Hygiene Supervisor. A reorganization of the Agency's Human Resources and Safety positions under the Career Service Authority (CSA) resulted in the elimination of 12 Agency positions, including Appellant's position, and the creation of nine positions, including a Safety Administrator/Professional position under CSA. Appellant applied for the Safety Administrator position and was not selected. He was laid off. This is Appellant's direct appeal of the layoff, in which he claims the layoff/non-selection were based upon unlawful discrimination on the bases of race and age, and retaliation under CSR § 19-10 A.1.e. Agency has moved for the dismissal of the discrimination and retaliation claims.

In an agency motion to dismiss, statements in the appeal must be viewed in the light most favorable to the appellant, all appellant's assertions of material facts must be accepted as true, and the motion to dismiss must be denied unless it appears beyond doubt that the appellant cannot prove that the facts as alleged would entitle Appellant to relief. In re Van Dyck, CSA 143-05, 1(2/16/06), *citing* Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996).

Arguments and Analysis

A. Retaliation Claim

A *prima facie* case of retaliation consists of 1) an employee's participation in some action opposed to discrimination, 2) an adverse employment action, and 3) a causal link between the protected activity and the adverse action. Belqasem v. Water Pik Techs., Inc., 457 F. Supp. 2d 1205, 1218-1219 (D. Colo. 2006).

1. Layoff Retaliation claim

The Agency moves for dismissal of the Appellant's claim that his layoff was made in retaliation for his grievance of his work review (PEPR). The Agency argues there can be no causal connection between the layoff and a retaliatory motive because the decision to eliminate Appellant's position was reached before Appellant successfully appealed the denial of his PEPR grievance. Appellant disputes the final reorganization decision predated his February 2009 grievance and March 2009 appeal of the PEPR grievance, stating that the reorganization plan circulated in February that included elimination of his position (Agency's Motion Exh. 1) was under discussion between the months of March and August 2009 and his position was not eliminated until August 13, 2009. Included in the discussion were alternatives to Appellant's layoff. Since there is a factual dispute of an essential piece of evidence, the motion to dismiss Appellant's layoff retaliation claim must be denied.

2. Failure to hire claim.

Appellant did not address the Agency's causation argument as it relates to retaliatory non-selection. From the pleadings, it appears the Appellant claimed he engaged in a protected activity of contesting his PEPR on the basis that minorities were targeted with "needs improvement" ratings. He claimed this discrimination occurred in February and March 2009. The selection occurred in August 2009. The selection is therefore at least five months removed from the claimed protected activity. Unless an adverse action is very closely connected in time to the protected activity, a plaintiff must rely on additional evidence beyond mere temporal proximity to establish causation. A six-week period between protected activity and adverse action may be sufficient, standing alone, to show causation, but a three-month period, standing alone, is insufficient. Mackenzie v City and County of Denver, 414 F.3d 1266, 1280 (10th Cir. 2005). Appellant has not provided additional evidence of causation as it relates to the hiring selection. Therefore the Appellant failed to state a claim for his allegation of retaliation with respect to his failure to hire claim.

B. Age and Race Discrimination 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 that supports an inference that discrimination caused the adverse employment action.

In re Johnson, CSA 135-05, 3(3/10/06).

1. Layoff discrimination claims.

The Agency did not dispute the first two elements of a *prima facie* cases of race and age discrimination. The Agency's argument for dismissal of the discrimination claims rests on its assertion that the Appellant failed to establish a connection between the Agency's actions and Appellant's age and race.

The Appellant replies with an inference of discrimination based upon the following: the agency submitted no documentation to support its stated budgetary basis for the layoff; funding was available for the new position in the Career Service Authority; the duties of the new position are virtually the same as the Appellant's former position, had the same level of responsibility and was occupied by the same chair; his performance over the course of nearly 20 years with the city had been good, the job duties of the newly created Safety Administrator position were virtually identical to those he had performed in the Safety and Industrial Hygiene Supervisor position, there was no obligation to advertise a vacancy as the Agency did, the Agency's stated reason for the Appellant's layoff, budgetary concerns, was pretextual. None of these reasons, separately or together establish a discriminatory motive. *See also below re reduction in force.*

2. Failure to hire discrimination claims.

The Appellant stated the individual eventually hired to fill the newly created position was outside Appellant's protected class. That fact alone fails to establish a causal connection. The Appellant also stated he should be able to testify as to his subjective belief that he was more qualified than the hiree. This too is an insufficient basis to establish an inference of racial discrimination, particularly in light of the undisputed hiring factors stated below. If the Appellant's subjective sense of his qualifications were a sufficient basis to state a claim, nearly every failed applicant would appeal their non-selection.

To withstand a motion to dismiss an age discrimination claim in a reduction in force case, a fourth element is required to be established: some additional evidence that age was a factor in the employer's action. This fourth prong may be established by statistical or circumstantial evidence. Stidham v. Minnesota Min. and Mfg., Inc., 399 F.3d 935 (8th Cir. 2005). The Appellant presented no statistical evidence. His circumstantial evidence includes only that the hiree was over 40, but younger than him. This is insufficient to establish an age discrimination claim, particularly where the Appellant did not dispute that: his score was significantly lower than that of the hiree; the hiree's experience was directly related to the requirements of the new position; and it must be expected in a reduction in force case, that at least some, if not all his duties would be assumed by other employees. Stidman, *citing* Chambers v. Metro. Prop. & Cas. Ins. Co., 351 F.3d 848 (8th Cir.2003). Thus the Appellant failed to state a claim of unlawful discrimination based upon age.

In addition, and more fundamentally, while neither side addressed it, the Appellant's failure to hire claim lacks personal jurisdiction. The decision to hire was made by the Career Service Authority, not the Appellant's agency. Since neither side raised a nexus between the two and the Appellant has not identified the Career Service Authority as a party opponent, i.e. a party which engaged in unlawful discrimination against him, and has not stated an inference of collusion, there is a failure of personal jurisdiction.

ORDER

Based on the foregoing, the following orders enter.

1. The Agency's motion to dismiss the Appellant's challenge to the layoff decision on the basis of retaliation is DENIED.

2. The Agency's motion to dismiss the Appellant's layoff age and race discrimination claims is GRANTED.

3. The Agency's motion to dismiss Appellant's discrimination claims in his failure to hire claim is GRANTED.

4. The hearing will proceed only as to the Appellant's layoff, based upon his claim of retaliation.

DONE October 26, 2009.

Bruce A. Plotkin
Career Service Hearing Officer