HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 10-16

ORDER GRANTING AGENCY'S MOTION TO DISMISS APPEAL

PATRICIA SHERMAN, Appellant,

v.

DEPARTMENT OF AVIATION,
and the City and County of Denver, a municipal corporation, Agency.

On March 4, 2016, the Agency filed a motion to dismiss this appeal, claiming the Hearing Office lacks jurisdiction over the Appellant because (1) she was not an employee subject to the jurisdiction of the Hearing Office, and (2) the Hearing Office lacks authority to grant the remedy sought by Appellant. Appellant disputed both claims and claimed, in addition, that she was improperly disqualified, and was separated from employment based on illegal discrimination. Both parties presented matters outside the pleadings to support their respective views of jurisdiction.

In an agency motion to dismiss prior to hearing, when matters outside the pleadings have been presented and considered, the motion is treated as one for summary judgment pursuant to C.R.C.P. Rule 12(b). In re Crenshaw, CSA 18-06, 2 (4/6/06). In a motion for summary judgment, the claims are viewed in the light most favorable to the non-moving party. In this case, that means the motion to dismiss must be denied unless it appears beyond doubt that the Appellant cannot prove that the facts as she alleges them would entitle her to relief. In re Anderson et al, CSA 78-08 to 124-08, 3 (1/7/09).

The Agency's first claim is Appellant was never an employee,[1] only an applicant and, as such, was not subject to Hearing Office jurisdiction, as limited by Career Service Rule (CSR) 19-10 A. Appellant responded she was "offered a Career Service] position, accepted the offer, signed and consented to all background inquiries, informed her start date was February 6, 2016, issued an employee badge, an airport badge, and an employee parking permit." In support of her claim, Appellant attached a letter she received from an Agency Manager stating she was being offered the position she applied for, along with the rate of pay, eligibility to receive City benefits, and eligibility for the City's retirement plan. The letter also stated the offer of employment was contingent on verifications, background check and other information required by law and City and County of Denver policies. The letter also cautioned Appellant would be subject to a six-month probationary period, and successfully meeting training requirements. [Appeal attachment].

[1] The Agency did not distinguish between a Career Service employee and a Career Service employee with Career status. [CSR 1].

Even viewing the facts from Appellant's perspective, the Career Service Board's "Order on Interlocutory Appeal" in In re Culin, CSB 43-15A (2/5/16) answers definitively this first issue – whether Appellant lacked status to invoke the jurisdiction of the Hearing Office. The Appellant in Culin, unlike the Appellant here, had already achieved probationary status but not Career status. The Board stated "because she had not attained Career status, the Agency did not need cause to dismiss her…" [*Id., p.2*]. While Appellant in this case did not achieve probationary status, it would be illogical that she would enjoy more protection from separation than a probationary employee.[2]

Since Appellant did not achieve Career status, then, by operation of the Career Service Rules, the Agency is not required to prove cause, or any reason, to separate Appellant. As a non-Career employee, it must follow that the Agency is not required to undertake a formal disqualification as claimed by Appellant. That does not end the matter, however.

In her initial appeal, Appellant also claimed the Agency's rescission of its employment offer was motivated by unlawful discriminatory animus due to her race, color, sex, and age. [Appeal form]. Appellant failed to state what protected status she had and failed to state any nexus between such status and the Agency's rescinding of its offer of employment; thus, an order to show cause issued.

Appellant responded she is a 56-year old African-American female. As such, Appellant established two of the four requirements to establish a prima facie discrimination claim:[3] a protected status for each of her discrimination claims (race, age, color, sex); and an adverse employment action (the Agency's rescinding of its employment offer employment, one day before she was to report to work. The third requirement to establish a prima facie discrimination case is an inference that the Appellant was qualified for the position. Since the Agency did not dispute it offered her the position, even though it later rescinded the offer, an inference may be drawn that the Agency deemed she was qualified for the position.

However, nothing in Appellant's appeal, in her response to the order to show cause, or in her response to the Agency's motion to dismiss, states a connection between any protected status and the Agency's rescinded employment offer. As Appellant stated, "Mr. Toscano did not give a reason for the adverse employment action."

Evidence of such nexus may also be inferred. However, Appellant stated only that she detrimentally relied on the Agency's representation of employment when she left her former employment. While this claim leaves unanswered questions about the actual reason for the Agency's rescission of its offer, as a matter of establishing a discrimination claim, Appellant's allegation, which is a request for equitable relief, fails to state any nexus between any of her claimed protected statuses and her separation by the Agency.

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[2] It appears Appellant achieved employment appointment, as defined by CSR 1, and CSR 5-71A. In any event, Appellant does not argue she achieved Career status, pursuant to CSR 5-42 B.

[3] An employee presents a prima facie case of discrimination under the so-called *McDonnell Douglas* burden-shifting framework when she establishes: (1) she belonged to a protected class; (2) she was qualified for the position she sought; (3) she suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

Appellant also charged that the Agency's failure to provide a non-discriminatory (or any) reason for changing its mind amounted to a pretext for discrimination under the *McDonnell Douglas* analysis. Appellant's argument places the cart in front of the horse. Appellant's failure to establish a prima facie discrimination claim precludes a pretext analysis. Cases cited by Appellant are inapplicable. In both Patrick v. Ridge, 394 F.3d 311, 315 (5th Cir. 2004) and Abrams v. Dept. of Pub. Safety, No. 13-111-cv, 2014 U.S. App. LEXIS 13582, at 20-21 (2nd Cir. July 14, 2014) [4], the plaintiffs, unlike the Appellant here, had already established a prima facie discrimination claim, allowing those courts to move to stage two of the *McDonnell Douglas* analysis - requiring the employer to produce a non-discriminatory reason for its action.

In view of the above analysis, Appellant lacked the appropriate status to invoke the jurisdiction of the Hearing Office. She also failed to establish, following an order to show cause to do so, a *prima facie* claim of discrimination. Under those circumstances, and because no other basis establishes jurisdiction,[5] the Agency's Motion to Dismiss is GRANTED, and this appeal must be DISMISSED WITH PREJUDICE.[6]

DONE March 16, 2016.

Bruce A. Plotkin
Career Service Hearing Officer

[4] In Abrams, the court rejected a lower court's finding that no question of fact could exist in the mind of a reasonable juror that the decision not to promote an African-American because he did not "fit in" was a pretext for an unlawful pretext for discrimination.

[5] The Agency's second claim – that because the Hearing Office may not grant the remedy requested by the appellant, the appeal must be dismissed - is moot. However, had it been considered, it is unlikely such claim would result in the dismissal of an appeal, since a requested remedy, alone, does not establish or fail to establish Hearing Office jurisdiction.

[6] Appellant claimed an HR Manager told her she had no legal basis to file an appeal, and otherwise dissuaded her from filing this appeal. I make no determination here whether such information was conveyed. It would be improper for an HR manager to discourage an employee from filing an appeal in good faith. Even non-career status employees have the right to appeal an employment decision they allege was discriminatory. CSR 5-64.B.