

**HEARINGS OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**

Appeal No. 97-05

DECISION

IN THE MATTER OF THE APPEAL OF:

MATTHEW J. TORRES,
Appellant,

vs.

**DIVISION OF SMALL BUSINESS OPPORTUNITY, OFFICE OF ECONOMIC
DEVELOPMENT,**
Agency,
and the City and County of Denver, a municipal corporation.

I. INTRODUCTION

The Appellant, Mathew J. Torres, appeals his employer's decision, on August 30, 2005, to disqualify him from his position at the Division of Small Business Opportunity, Office of Economic Development. The Appellant filed his appeal, pursuant to the Career Service Rules, on September 8, 2005. A hearing concerning the appeal was conducted on January 10, 2006, by Bruce A. Plotkin, Hearings Officer. The Appellant represented himself, while the Agency was represented by Mindi Wright, Assistant City Attorney, with Jim Servold serving as the Agency's advisory witness.

Agency Exhibits 1-7 were admitted without objection. The Appellant offered no additional exhibits. The Appellant offered testimony from his sister, Frances Torres as his only witness. The Agency presented Rita Murphey and Jim Servold as its witnesses.

II. ISSUES

The following issues were presented for appeal:

- A. whether the Appellant was disabled within the meaning of the Americans With Disabilities Act of 1990, when the Agency disqualified him from his position;
- B. whether the Appellant, with or without reasonable accommodation, was capable of

performing his essential work functions at the time of his disqualification;

C. whether the Agency complied with Career Service Rule 14-20 *et seq.* in disqualifying the Appellant from his position;

D. whether the Agency discriminated against the Appellant by improperly disqualifying him based upon his disability.

III. FINDINGS

The Appellant was employed at the Agency as a Contract Compliance Analyst. On May 2, 2005, due to recurrent abdominal pain, [Exhibit 3], he was placed on Family Medical Leave under the Family Medical Leave Act (FMLA). On July 25, 2005, the Appellant exhausted his FMLA leave, but was still unable to return to work. The Agency then entered into the interactive process with the Appellant pursuant to Career Service Rule (CSR) 14-20 *et seq.* The Agency met with the Appellant concerning the interactive process on August 19, 2005. The Agency ended the interactive process when the Appellant's physician revoked his earlier opinion that the Appellant could return to work, instead providing a statement that the Appellant was unable to work in any capacity. The Appellant's physician was unable to predict if the Appellant would ever be able to return to work. The Agency notified the Appellant in its August 23, 2005 letter that there was no reasonable accommodation available because the Appellant was unable to work in any capacity.

On August 23, 2005, the Agency issued its contemplation of disqualification letter to the Appellant. On August 30, 2005, the Agency conducted a pre-disqualification meeting with the Appellant and his sister Frances as his representative. At that meeting, the Appellant confirmed he could not work. On August 30, 2005, the Agency disqualified the Appellant. The Appellant perfected his appeal on September 8, 2005.

IV. ANALYSIS

A. Whether the Appellant was disabled within the meaning of the Americans with Disabilities Act of 1990, when the Agency disqualified him from his position.

The ADA, or Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, prohibits employers from discriminating against qualified individuals with disabilities because of their disabilities. In re Aguirre, CSA 03-04, 6 (8/16/04). To maintain a claim for wrongful disqualification under the ADA, the Appellant must demonstrate (1) that he is a disabled person within the meaning of the ADA, (2) that he is able to perform the essential functions of the job with or without reasonable accommodation, and (3) that the employer terminated him because of his disability. The Appellant met the first test, as the Agency agreed the Appellant was, and remained through the date of hearing, disabled within the meaning of the ADA. [Murphey cross-examination].

B. Whether the Appellant could perform his essential work functions with or without reasonable accommodation.

The Appellant's duties included analyzing and certifying potential minority contractors applying for contracts with the City of Denver. The Appellant's duties and attendance were critical to the Agency, since contractors had to delay budgeting for city projects, and the city would be unable to move forward with projects if it did not comply with minority contractor requirements. Certifications were behind, and increasing, during the Appellant's absence. At the time of his disqualification, the Agency was behind in analyzing 430 certifications. Other analysts, also behind in their work, had to absorb the Appellant's work, placing significant strain on the Agency's obligations. [Servold testimony].

The Appellant claimed that, with reasonable accommodation, he could perform the essential functions of his job. The evidence contradicted the Appellant's belief. During his pre-disqualification meeting on August 30, 2005, the Appellant said he was unable to return to work, [Murphey testimony], the Appellant's doctor stated the Appellant was unable to work "in any capacity," for an indeterminate time [Exhibit 4], and the Appellant had already exhausted all his FMLA and other leave. [Servold testimony]. In addition, Murphey testified, during their August 30 meeting, the Appellant appeared so uncomfortable, that he was unable to remain seated, and had to kneel on his chair or stand.

The Appellant claimed the Agency should have granted him a "reasonable accommodation" of an additional 90-day extension under CSR 11-81, during which he would have been able to procure a "return to work" letter from his doctor; however the Agency has no obligation to do so. "Leave without pay may be granted to an employee for any good cause when it is in the interest of the City and the employee to do so." CSR 11-81. The evidence presented at the Appellant's interactive meeting overwhelmingly indicated he was unable to perform his essential work functions for an indefinite time. Therefore the Agency could not conclude it would have been in the best interest of the City to grant such an extension. The Appellant's sister's testimony at hearing only emphasized the Appellant's difficulty in performing even the most basic tasks at home, thus confirming the Agency's conclusion the Appellant would be unable to perform his essential work functions with or without reasonable accommodation.

C. Whether the Agency complied with Career Service Rule 14-20 et seq. in disqualifying the Appellant from his position.

The pertinent provisions of CSR 14-20 et. seq. require:

14-21 General

An employee shall be separated without fault, hereinafter called a disqualification, if a legal, physical, mental or emotional impairment or incapacity, occurring or discovered after appointment prevents,

satisfactory performance of the essential functions of the position.

The language in CSR 14-21 therefore requires the Agency to disqualify the Appellant on two conditions: he has one of the stated incapacities, and the incapacity was discovered after appointment. There is no discretion to retain the Appellant if he meets those two conditions. The following provisions further define the stated incapacities.

14-22 Grounds for Disqualification

An employee shall be disqualified if any of the following conditions occur...

B. Physical or mental impairment or incapacity: When an employee becomes unable to perform the essential functions of the position because of mental or physical impairment or incapacity...

Based upon the evidence presented above – the Appellant’s doctor’s letter, [Exhibit 4], his own testimony, [Appellant testimony], that of his sister [Frances Torres testimony], and the testimony and conclusions by the Agency [Murphey, Servold testimony] - during his employment, the Appellant became unable to perform the essential functions of his position because of his physical impairment. The Agency was therefore compelled, under the terms of CSR 14-22, to disqualify him. The only remaining issue is whether the Agency complied with the procedures required under CSR 14-20 *et seq.* in disqualifying the Appellant.

14-23 Procedure

The appointing authority shall follow the procedures for pre-disciplinary meetings before taking any action on the disqualification. The final notice of disqualification shall contain the same statement of the reason for the disqualification as contained in the pre-disqualification letter.

The Agency served advance notice on the Appellant prior to his pre-disqualification meeting. [Exhibit 2]. That notice contained substantially the same advisement of rights and reasons for the contemplation as contained in a pre-disciplinary contemplation notice. CSR 16-30 *et seq.* Nothing more was required. The Appellant did not dispute his receipt of Exhibit 4. The subsequent notice of disqualification, [Exhibit 1], contained the same reasons for disqualification as in the pre-disqualification notice, [Exhibit 2]. The Agency therefore complied fully with CSR 14-20 *et. seq.* before disqualifying the Appellant.

D. Whether the Agency improperly discriminated against the Appellant in disqualifying him.

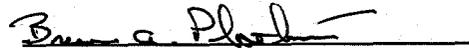
The evidence, above, overwhelmingly supports the Agency's conclusion that the Appellant, with or without reasonable accommodation, was unable to perform his essential work functions. At the same time, the Agency was becoming increasingly backlogged in its obligations toward the City and toward minority applicants due to the Appellant's absence. The evidence therefore affirms the Agency's disqualification of the Appellant in order to fill his critical role, since it did so for a proper business reason, and not because of the Appellant's disability.

V. CONCLUSION AND ORDER

The Appellant became unable to perform the essential functions of the position because of his physical impairment. The Agency met all its obligations, and followed all required procedures in disqualifying the Appellant from his position. The Appellant failed to establish that the Agency discriminated against him in disqualifying him based upon his disability. For these reasons, the Appellant failed to meet his burden to prove any of his claims by a preponderance of the evidence. Accordingly, the Agency's decision to disqualify the Appellant on August 30, 2005 is AFFIRMED.

The Appellant may appeal this Decision pursuant to the requirements set forth in CSR 19-60 through 19-62.

DONE this 21st day February, 2006.



Bruce A. Plotkin
Hearings Officer
Career Service Board