OFFICE OF COMPLIANCE
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Washington, DC 20540-1999

ROBERT SOLOMON,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	**Case Number: 02-AC-62 (RP)**
OFFICE OF THE ARCHITECT	)	
OF THE CAPITOL,	)	
	)	
Appellee.	)	
	)	
	)	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

Appellant Robert Solomon filed a claim against Appellee, the Office of the Architect of the Capitol, alleging two claims of retaliation and one claim of retaliatory hostile work environment,[1] in violation of Section 207(a) of the Congressional Accountability Act ("CAA"), 2 U.S.C. 1317. The hearing officer dismissed all three claims, finding that Solomon failed to prove that he suffered an adverse action, as required to establish a *prima facie* case of retaliation; and that the hostile work environment claim was without merit. In addition, the hearing officer determined that Solomon failed to state a claim upon which relief can be granted. For the reasons set forth below, we reverse the decision of the hearing officer, and remand all claims for proceedings consistent with this opinion.

I. Background

Robert Solomon ("Solomon" or "Appellant") was employed with the Office of the Architect of the Capitol's ("AOC") United States Senate Restaurants from 1986 to 2003. During his tenure,

[1] Specifically, on page 7 of Solomon's complaint, it is alleged that the Architect of the Capitol created "an abusive and pervasive supervisory hostile work environment [which] was an unlawful retaliatory employment practice and activity . . ."

Solomon had been placed on leave restrictions, which required him to submit medical documentation when he was absent due to an illness. In September 2001, Solomon was placed on such a restriction. Consequently, Solomon filed a complaint of discrimination under the CAA. *Robert Solomon v. Architect of the Capitol*, Case No. 02-AC-34 (CV, RP) (2003) ("*Solomon I*"). *Solomon I* alleged that the September 2001 leave restriction violated the CAA. On October 9, 2002, while *Solomon I* was pending, the AOC placed Solomon under another leave restriction.

As a result of the October 9, 2002 leave restriction, Solomon sought counseling with the Office of Compliance ("Office"). As requested by the Office, Solomon sought relief through the AOC's internal grievance procedure prior to proceeding with his claim with the Office.[2] Solomon filed an informal grievance with the AOC, and received a denial of that grievance from his first and second line supervisors. Solomon subsequently filed a formal grievance with the Director of Human Resources, and received a denial of the formal grievance as well. When Solomon appealed the formal grievance to the Architect of the Capitol, he did not receive a response. Solomon again contacted the Office to file a complaint, this time adding to his leave restriction claim, a claim involving the failure of the Architect to respond to his formal grievance appeal.

Solomon's current complaint is comprised of three counts: Count 1 alleges that the leave restriction letter issued on October 9, 2002 was issued in retaliation for filing the prior complaint with the Office; Count 2 alleges that the failure of the Architect to respond to Solomon's formal grievance appeal was done in retaliation for filing a prior complaint with the Office; and Count 3 alleges that the actions of the AOC, by placing Solomon on the October 9, 2002 leave restriction and failing to respond to the formal grievance appeal, amount to a retaliatory hostile work environment, in violation of the CAA.

On January 20, 2004, the AOC filed a Motion to Dismiss, asserting that the allegations in Solomon's complaint were frivolous, failed to state a claim, and did not present a case or controversy. On February 2, 2004, Solomon filed an Opposition to Respondent's Motion to Dismiss. On March 1, 2004, the hearing officer granted the Motion to Dismiss, holding that Solomon's claims were not a violation of the CAA, in that he did not present sufficient evidence to establish a *prima facie* case of retaliation.[3] The hearing officer determined that Solomon did not establish an adverse employment action to prove his claim of retaliation in Counts 1 and 2. The hearing officer further held that the hostile work environment claim in Count 3 did not meet the standard of being sufficiently severe and pervasive to alter Solomon's working conditions. On appeal, Solomon contends that by strictly construing the adverse action requirement of the

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[2]The Office has the authority to request employees of the Architect of the Capitol and the Capitol Police to utilize those offices' respective internal grievance procedures prior to proceeding with a complaint under the CAA. See *Office Of Compliance Procedural Rules, as Amended June 2004,* Section 2.03(m)(1).

[3]Although the dispositive motion before the hearing officer was a Motion to Dismiss, in making his ruling, the hearing officer made summary judgment determinations, which the Board determines to be inappropriate at this juncture.

retaliation standard, the hearing officer's decision was arbitrary, capricious, an abuse of discretion, and inconsistent with relevant law. The AOC contends that the hearing officer's decision should be upheld, arguing that to allow a broad interpretation of the statute would be to "micro-manage" the employing offices and to ignore well-established federal case law.

II. Standard of Review

The Board's standard of review for appeals from a hearing officer's decision requires the Board to set aside a decision if the Board determines the decision to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; (2) not made consistent with required procedures; or (3) unsupported by substantial evidence. 2 U.S.C. §1406(c). The appellant in this case argues that the hearing officer's decision was arbitrary, capricious, an abuse of discretion, and not consistent with law. The Board's review of the legal conclusions that led to the hearing officer's determination is *de novo*. *Nebblett v. Office of Personnel Management*, 237 F.3d 1353, 1356 (Fed. Cir. 2001).

III. Analysis

The Hearing Officer's Decision is not Consistent with Law

The hearing officer held that Solomon's evidence was not sufficient to establish a *prima facie* case of retaliation. In so holding, the hearing officer reasoned that the adverse action element of the standard required that Solomon prove a "tangible employment action." As such, the hearing officer reviewed the claims in Solomon's pleading and determined that the leave restriction and failure to issue a grievance decision did not rise to the level of that which can be considered a tangible employment action. The hearing officer relied on certain case law from the D.C. Circuit, other federal appellate circuits, and the U.S. Supreme Court. As such, his decision was well-reasoned and not irrational. However, such deliberation does not prevent the hearing officer's decision from being inconsistent with law, as it does not conform to more recently established precedent by the Board.

The Board notes below that the hearing officer's decision does not conform to its ruling in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP)(May 23, 2005). Although the hearing officer did not have this ruling at his disposal at the time he decided the matters in *Solomon*, the Board must recognize that the hearing officer's decision does not conform to those parts of its ruling in *Britton* which are relevant to the retaliation issues in *Solomon*. As such, the Board must determine that the hearing officer's decision is not consistent with law.

Application of the Appropriate Standard in Retaliation Cases under the CAA

Because the hearing officer determined that Solomon had the burden of establishing a *prima facie* case of retaliation under Section 207(a) of the CAA, the hearing officer analyzed the evidence to determine whether such burden had been met. In making his analysis, the hearing

officer relied on *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999), a case which evaluates a retaliation claim brought under Title VII, and requires an employee to show "materially adverse consequences affecting the terms, conditions, or privileges of [his] employment." However, since the hearing officer issued the decision in this case, the Board has reviewed the standards applicable to claims brought under Section 207(a) and determined that they differ from *Brown v. Brody*.

Analysis of Britton

The Board notes that since the hearing officer's decision in Solomon, the Board has ruled in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP)(May 23, 2005), which is directly applicable to the matter at hand. As such, it is necessary for the Board to rely on its ruling in *Britton* and reverse the hearing officer's decision.[4]

The Board has visited issues involving retaliation claims in previous decisions. *See Robert Solomon v. Office of the Architect of the Capitol*, 127 Fed.Appx. 504, 2005 WL 954536 (D.C. Cir. 2005); *Ziggy Bajbor v. Office of the Architect of the Capitol*, 111 Fed.Appx. 612, 2004 WL 2383189 (D.C. Cir. 2004); *Lawrence Hatcher v. Office of the Architect of the Capitol*, 194 F.3d 1335, 1999 WL 319480 (D.C. Cir.1999). In these decisions, the Board reserved its ruling on the scope of the anti-retaliation provision of the CAA until the appropriate case arose. *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP)(May 23, 2005) proved to be such a case.

In *Britton*, an employee alleged retaliation by the employing office for denying her liberal leave request and placing her in an AWOL status. The employee made a claim under Section 207(a) of the CAA, claiming that such denial was in retaliation for her prior request for reasonable accommodation, as well as for filing a prior claim against the employing office. The employee made an additional claim of retaliation in the form of a hostile work environment. The hearing officer granted the employing office's motion to dismiss both counts, and held that the employee's status of being placed on AWOL did not constitute an adverse action for purposes of establishing a *prima facie* case of retaliation under the CAA, and that the evidence in support of the hostile work environment claim did not rise to the level of that which would be considered severe and pervasive. The employee appealed the hearing officer's dismissal of the first retaliation claim but did not perfect her appeal of the hearing officer's dismissal of the hostile environment retaliation claim.

In its *Britton* decision, the Board addressed, among other issues, the claim of retaliation. The statute's silence on the appropriate standard in such cases required the Board to analyze its language, its intent, and its correlation with relevant case law. The Board considered the broad

[4] In *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965) and *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060 (1989), the U.S. Supreme Court held that the notion of fundamental fairness requires courts to apply new rulings established by court decisions to all cases, where applicable, when final dispositions have not been reached. As the hearing officer's decision in *Solomon* is not considered a final decision (See *Office of Compliance Procedural Rules* §7.16(d)), fundamental fairness requires the Board to apply its ruling in *Britton* to *Solomon*.

language of the prohibitions in Section 207(a) of the CAA: "intimidate, take reprisal against, or otherwise discriminate for opposing any practice covered by the statute." 2 U.S.C. §1317(a). The Board noted that Section 207(a) extends protection against retaliation for opposing any practice made unlawful by the CAA, not just those claims which arise under the CAA's Title VII provisions, and that Section 207(a) also expands the notion of retaliation to include intimidation. Given the broader scope of Section 207(a), the Board concluded that the statute would not be served by applying a strict, narrow approach to defining one of the elements of a retaliation claim.

Indeed, many of the Circuits take other than a strict approach in defining adverse action. In *Britton*, the Board analyzed the split among the Circuits, and again determined that, because the statute itself provides a broader prohibition for employer conduct, the broader definitions of adverse action would be more in line with the intent behind the CAA than a narrow definition of the term. The Board held that a "reasonably likely to deter" standard is more appropriate than an "ultimate employment action" standard or the "materially adverse employment action" standard in analyzing retaliation claims brought under Section 207(a).

The AOC argued in its memorandum of law that Solomon's request for the Board to adopt a broad approach to defining "adverse action" would be to (1) ignore the controlling law of the D.C. Circuit, (2) authorize the Board to "micro-manage" employing offices and prevent the offices from carrying out workplace policies, and (3) step beyond the authority granted the Office under the CAA.

The Board recognizes that the D.C. Circuit has defined an adverse action to be one where "materially adverse consequences affecting the terms, conditions, or privileges of . . . employment" are demonstrated. *Brown v. Brody*, 199 F.3d at 457. However, the Board also recognizes that such definition has been applied to claims of retaliation brought under Title VII. As such, the Board's decision to adopt a different approach to retaliation claims under Section 207(a) of the CAA does not "ignore" the law of the D.C. Circuit. To the contrary, it notes distinctions between Title VII and Section 207(a), and it clarifies the appropriate law to apply under the CAA.

The Board does not seek to "micro-manage" the AOC by questioning its authority to adopt or enforce a leave restriction policy, or by questioning whether Solomon should have received a grievance response from the Architect. Merely applying a broader scope of analyzing retaliation claims under the CAA does not prevent the employing office from carrying out personnel decisions. It only prevents employing offices from engaging in workplace activities in order to intimidate or retaliate against employees who seek redress under the CAA. Because retaliation and intimidation may effectively deter employees from seeking redress even when it does not rise to the level of an ultimate or material employment action, as those terms have been described by the courts of appeal, the Board determined that Section 207(a) should be construed to allow claims based on employment activities that are "reasonably likely to deter" employees from seeking redress under the CAA. *See Britton v. Office of the Architect of the Capitol*, 02-AC-20, p.8 (CV, RP)(May 23, 2005). Such application is consistent with case law and supports the intent and purpose behind the statute.

The hearing officer determined that the employing office was merely applying a workplace rule by placing Solomon on a leave restriction and that such application did not rise to the level of a tangible employment action. As discussed in *Britton*, a tangible employment action is not necessary to establish retaliation under Section 207(a), and allegations of employer conduct that is "reasonably likely to deter" the employee from engaging in protected activity under the statute are sufficient to survive a motion to dismiss. *See Britton*, p.10, relying on *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

On remand, Solomon will be required to establish a *prima facie* case of retaliation as more generally described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).[5] With the relevant differences in the phrasing of the *prima facie* case, application of the *McDonnell Douglas* framework requires the claimant to demonstrate: (1) that he engaged in activity protected by Section 207(a); (2) that the employing office took action against him that was "reasonably likely to deter" future protected activity; and (3) that a causal connection existed between the two. *Ray v. Henderson*, 217 F.3d 1234, 1240-43 (9th Cir. 2000). Thereafter, the familiar burden-shifting approach again applies, requiring the employing office to rebut the presumption of retaliation by articulating a legitimate non-discriminatory reason for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1817. The employee retains the ultimate burden of persuasion and may prove intentional retaliation by demonstrating that the employer's proffered legitimate reason was false and that retaliation was the "true reason" for the employing office's actions. *Burdine*, 450 U.S. at 256, 101 S.Ct. at 1089; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516-517, 113 S.Ct. 2742, 2752, 125 L.Ed.2d 407 (1993)(clarifying that a plaintiff must show that the employer's proffer is a pretext for unlawful discrimination, not that it is merely false in some way).

The Hostile Work Environment Claim was Sufficiently Pled to Survive a Motion to Dismiss

The hearing officer's dismissal of Solomon's claim of hostile work environment also was inappropriate. The hearing officer determined that Solomon did not provide evidence sufficient to establish a claim of hostile work environment, as the alleged adverse actions could not rise to the level of being so severe and pervasive as to alter Solomon's working conditions. The hearing officer relied on *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002), and provided no further analysis for his decision. We find that further analysis is necessary.

In *National Railroad v. Morgan*, the Court held that hostile work environment claims may be different from claims involving discrete acts (promotion, termination, etc.) since the nature of the claim often requires discrimination over a period of time. *National Railroad v. Morgan*, 536 U.S. at 115, 122 S.Ct. at 2073. The Court explained that a hostile work environment claim must

[5]Solomon did not allege or argue a mixed-motive theory. Therefore, we need not reach the issue of whether *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) or *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) would apply to Section 207(a) mixed-motive retaliation claims.

be addressed by evaluating "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Morgan*, 536 U.S. at 103, 122 S.Ct. at 2067, citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S.Ct. 367, 369, 126 L.Ed.2d 295 (1993). In so holding, the Court determined that a claim of hostile work environment can be supported by the "cumulative affect of the individual acts," even if those individual acts, on their own, are not sufficiently severe and pervasive. *National Railroad v. Morgan*, 536 U.S. at 115, 122 S.Ct. at 2073.

In *Howley v. Town of Stratford*, 217 F.3d 141 (2nd Cir. 2000), the district court granted a motion to dismiss the plaintiff's hostile work environment claims, holding that a "single incident of . . . verbal abuse was insufficient to create a hostile work environment." *Howley*, 217 F.3d at 149. In reversing the trial court's decision, the Second Circuit noted the testimony of the plaintiff, as well as proffered testimony of other witnesses. The appellate court considered the totality of the circumstances and determined that the trial court should not have granted summary judgment because it neither had considered all of the testimony provided, nor the totality of the circumstances. *Howley*, 217 F.3d at 154.

In *Raniola v. Bratton*, 243 F.3d 610 (2nd Cir. 2001), the Second Circuit visited an issue similar to the one in *Howley*. In this case, the defendant moved for summary judgment after three days into a jury trial. The district court granted the motion on all claims, including the plaintiff's Title VII claims. The Circuit Court noted its rationale in *Howley*, reversed the district court's dismissal of the Title VII claims, and remanded those claims for a jury trial. Relying on a Sixth Circuit decision, *Williams v. General Motors Corp.*, 187 F.3d 553 (6th Cir. 1999), the Second Circuit held that, when considering the totality of the circumstances, "even where individual instances of . . . harassment do not on their own create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation." *Raniola v. Bratton*, 243 F.3d at 617, citing *Williams v. General Motors Corp.*, 187 F.3d at 563. The *Raniola* court supported its decision by referring back to its ruling in *Howley v. Town of Stratford*, and it also relied on language from *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir.1990):

> "A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.... What may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."

Raniola, 243 F.3d at 622, *citing Andrews v. City of Philadelphia*, 895 F.2d at 1484.

The Fifth Circuit held similarly in *Ramsey v. Henderson*, 286 F.3d 264 (5th Cir. 2002). Here, although the Circuit affirmed the lower court's dismissal of the hostile work environment claim, the Court noted that the district court should have considered the relevant background information to determine the totality of the circumstances. In so holding, the Fifth Circuit considered the relevant background information and determined that the totality of the circumstances did not amount to a sufficiently hostile work environment. *Ramsey*, 286 F.3d at

268.

In *Solomon*, the claim was dismissed on the pleadings, and the hearing officer was not able to determine whether the totality of the circumstances surrounding Solomon's claims would support his allegations of hostile work environment. The hearing officer found that the individual acts of which Solomon complained were not sufficiently severe and pervasive, but he provided no analysis with that determination. A thorough analysis of the claim, once there has been an opportunity for discovery, and once facts other than those alleged in the complaint can be considered, will determine whether the "cumulative affect of the individual acts" will establish the "frequency of the discriminatory conduct; its severity; whether it [wa]s physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with [Solomon's] work performance." *National Railroad v. Morgan*, 536 U.S. at 116, 122 S.Ct. at 2074.

When there is no opportunity to obtain additional evidence, as is the case in *Solomon*, and the courts rely only on the pleadings, the circuit courts of appeal have evaluated cases under the "notice pleading" theory to determine whether the allegations in a plaintiff's pleading are sufficient to survive a motion to dismiss. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)(employment discrimination pleadings need only give fair notice of the claims and grounds upon which they rest); *Weston v. Commonwealth of Pennsylvania*, 251 F.3d 420 (3rd Cir. 2001)(claim will survive motion to dismiss when allegations pled provide adequate notice to defense); *Krieger v. Fadley*, 211 F.3d 134 (D.C. Cir. 2000)(pleadings need not contain facts to support each element of a claim); *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000)(notice pleading standards are lenient); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518 (11th Cir. 1983)(notice pleading is sufficient at motion to dismiss stage).

Indeed, the circuit courts of appeal appear to disfavor the dismissal of hostile work environment claims unless the totality of the circumstances can be considered in evaluation of the allegations and sufficiency of the evidence; that is to say, unless discovery has been completed. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), the District Court granted the defendant's motion to dismiss, reasoning that the plaintiff failed to allege sufficient facts to establish a prima facie case. *Swierkiewicz*, 534 U.S. at 509, 122 S.Ct. at 996. The Second Circuit Court of Appeals affirmed the dismissal, and the U.S. Supreme Court reversed, holding that there is no requirement that all elements of the prima facie case test must be pled. In so holding, the Court reasoned that the prima facie case is an "evidentiary standard, not a pleading requirement." *Swierkiewicz*, 534 U.S. at 510, 122 S.Ct. at 997. The Court determined, based on notice pleading standards, that a plaintiff in an employment discrimination case is only required to plead those facts sufficient to "give respondent fair notice of what petitioner's claims are and the grounds upon which they rest." 534 U.S. at 514, 122 S.Ct. at 999. The Court further found that requiring a plaintiff to plead a prima facie case would be requiring a plaintiff to plead more facts than he would need to establish the merits of his case, should direct evidence of discrimination be presented during discovery. In so finding, the Court relied on its prior decision in *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974), wherein the Court held, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema*

N.A., 534 U.S. at 511, 122 S.Ct. at 997.

The Board would note that, in the context of Solomon's claims, the Board is not ruling on summary judgment issues. It may very well be that the evidence presented will not support the allegations in the complaint, and that the claims may not survive a motion for summary judgment. However, it is premature at this point to determine whether there is sufficient evidence to support the claim. The allegations in the complaint were adequately pled, and dismissing the complaint on a motion to dismiss is inappropriate at this juncture.

Weston v. Commonwealth of Pennsylvania, 251 F.3d 420 (3rd Cir. 2001), is also instructive, as it deals in part with a hostile work environment claim. The trial court considered the defendant's motion to dismiss as a motion for summary judgment and also determined that the plaintiff failed to state a claim. On appeal, the plaintiff argued that his allegations were sufficiently pled under the notice pleading standard, and his claim should have survived the defendant's motion to dismiss.

The Third Circuit "question[ed] the merits" of the hostile work environment claim, 251 F.3d at 430, but nonetheless held that the plaintiff had sufficiently pled his allegations to survive a motion to dismiss. The Circuit Court determined that the notice pleading standard under the Federal Rules of Civil Procedure allowed the parties to examine the specifics of allegations during the discovery phase, and not during the pleading stage. In remanding the case back to the District Court for discovery, the court commented:

> We note that, at this stage of the litigation, Weston does not present the most compelling Title VII hostile work environment claims. Were this an appeal from a grant of summary judgment, we would be hard-pressed to reverse a disposition in PDOC's favor. However, this is an appeal from a 12(b)(6) dismissal and, although we consider the question to be an extremely close one, we conclude that Weston's allegations of hostile work environment created by the remarks of co-workers and managers suffices to state a Title VII claim. *Weston* at 430.

As in *Weston*, the complainant in Solomon has pled his allegations with enough specificity to put respondent on notice as to his claims for relief. In particular, in accord with §5.01(c)(1) of the OOC's procedural rules, Solomon alleges names and dates of those involved in the alleged discrimination; a description of the challenged conduct and how that conduct violates the CAA; and a statement of relief. Although the facts alleged in Solomon's pleading do not present the strongest claim of hostile work environment under the CAA, the Board follows the rationale of the Third Circuit in *Weston* and remands Solomon's claims back to the hearing officer.[6] Accordingly, the allegations in Solomon's pleading were sufficiently pled, under the notice pleading requirements and under the requirements of the procedural rules, to survive a motion to

[6]Solomon bases his claims on two instances of alleged adverse action (being placed on leave restriction and denial of a formal response to his grievance), and as pled, the Board questions whether these two instances will rise to a sufficient level of severity and pervasiveness. The Board notes, however, that section 501(d) of the OOC Procedural Rules allows amendments to complaints.

dismiss.

The Hearing Officer Improperly Decided the Failure to State a Claim Issue

The hearing officer determined that Solomon failed to state a claim upon which relief can be granted, reasoning that the actions of the employing office (issuing the leave restriction letter and failing to render a final decision on the grievance appeal) did not result in harm for which relief can be granted. The hearing officer noted, on page 5 of his decision, that any equitable relief awarded Solomon would be "meaningless," since Solomon is no longer employed with the AOC.

The U.S. Supreme Court has held that a complaint may only be dismissed for failure to state a claim "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984), accord *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The D.C. Court of Appeals has relied on the holding in *Hishon*, and has applied that holding to issues before it. *See Stewart v. D.C. Armory Board*, 863 F.2d 1013, 274 U.S.App.D.C. 324 (D.C. Cir., 1988)(plaintiff succeeds in stating a claim, and motion to dismiss improperly granted where trial evidence could establish improper intent of government); *See Also Croixland Properties Ltd. Partnership v. Corcoran,* 174 F.3d 213, 335 U.S.App.D.C. 377 (D.C. Cir.,1999)(dismissal of complaint reversed where plaintiff's complaint sufficiently pled the required elements).

In the case before us, it is not clear that no relief could be granted to Solomon. In each of his three claims, Solomon has stated recognized claims.[7] Solomon charged the AOC with discriminating against him based on reprisal and creating a hostile work environment, and these claims were sufficiently pled. Taking into consideration any set of facts that would support his

[7]Solomon has made a claim of retaliation based on the alleged creation of a hostile work environment. The Board recognizes that there may be varying standards in proving a hostile work environment claim and a retaliation claim. As such, the Board notes that the establishment of a hostile work environment could, in certain circumstances, amount to an adverse employment action, if the hostile work environment is reasonably likely to deter an employee from engaging in protected activity. *See Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005)(hostile work environment can be a cognizable retaliation claim), *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000)(hostile work environment may be basis for retaliation claim). However, as noted by the First Circuit in *Noviello*, Solomon must prove all of the traditional elements of a hostile work environment, including but not limited to, the fact that the conduct at issue was severe and pervasive. *Noviello,* 398 F.3d at 92. Morever, the AOC would have available to it the affirmative defenses to a hostile work environment claim, as found in *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257 (1998). In other words, it could be a greater burden to prove an adverse employment action consisting of the creation of a hostile work environment, than simply to prove an adverse employment action that is "reasonably likely to deter" future protected activity. The Board also notes, however, that the establishment of a hostile work environment is not necessary in every instance to establish the existence of an adverse action. *See Wyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994)(adverse employment action exists where employer's actions are reasonably likely to deter employees from engaging in protected activity).

allegations, there is a possibility that Solomon would be entitled to some relief if he were able to present evidence of a financial loss, even though he is no longer an employee. As such, Solomon has stated a claim upon which relief can be granted.

ORDER

Pursuant to § 406(e) of the Congressional Accountability Act and § 8.01(d) of the Office of Compliance Procedural Rules, the Board sets aside the hearing officer's decision in this matter, as it is otherwise not consistent with law. The Board reverses dismissal of Solomon's retaliation and hostile work environment claims. The case is remanded to a hearing officer for further proceedings consistent with this opinion.

It is so ORDERED.

Issued, Washington, DC
December 7, 2005