

OFFICE OF COMPLIANCE

**John Adams Building, Room LA 200
110 Second Street, S.E.
Washington, D.C. 20540-1999**

**Mary Schiappa
Employee, Complainant, Plaintiff**

v.

Case Number 11-AC-135 (AG, DA, RP)

**Office of the Architect of the Capitol
Employing Office, Respondent, Defendant**

FINAL DECISION

This matter came for a hearing on plaintiff's two counts of disability discrimination and one count of workplace retaliation. At the conclusion of plaintiff's case in chief, one of the counts of disability discrimination was resolved in favor of the Employing Office on its motion for judgment as a matter of law. On the remaining two counts, I have carefully reviewed and considered the testimony of the witnesses adduced at the hearing, the exhibits introduced into evidence, the arguments of counsel and the entire record herein and conclude that plaintiff has proved one count of disability discrimination (failure to provide reasonable accommodation), but has failed to prove the count of retaliation. Accordingly, judgment must be entered in part for the plaintiff and in part for the Employer for the reasons that follow.

PROCEDURAL HISTORY

Plaintiff, Mary Schiappa, filed a Request for Counseling on August 31, 2011 claiming that she was a qualified individual with a disability who was denied multiple

requests for reasonable accommodation for injuries she received on the job. She claims that her requests did not impose an undue hardship on the Employing Office, the Architect of the Capitol (AOC). In addition, she claims that her requests were denied in retaliation for protected activity – that is, her testimony on behalf of two coworkers in their equal employment claims against the AOC. She seeks as remedies: the right to work while seated in a wheelchair as a reasonable accommodation, compensatory damages and attorney's fees.¹

The AOC denies the claims, arguing that when plaintiff made requests for accommodation, it appropriately engaged in an interactive dialogue with her about her needs and medical status. It contends that accommodations were provided to address plaintiff's injuries while allowing her to perform her duties. In addition, the AOC states that reasonable accommodations were delayed only to the extent that plaintiff did not provide adequate medical support for her requests. Lastly, the AOC argues that plaintiff was unable to perform the essential functions of her job and her requested accommodation would have caused undue hardship to her coworkers and the operations of the CVC.

After the counseling period ended in October 2011, plaintiff filed a Request for Mediation on October 13, 2011. The instant complaint was filed on January 17, 2012, alleging violations of Section 201 of the Congressional Accountability Act (CAA), 2 U.S.C. §1301 *et seq.* The Employing Office answered the complaint and filed a motion to dismiss or for summary judgment. This motion was denied in an order issued on May 17, 2012.

¹ Plaintiff withdrew her request for lost wages and restoration of leave at the prehearing conference. See also, transcript, volume 1, "Tr.vol.1" at p. 199.

At a prehearing conference held on May 16, 2012, plaintiff explained her claims as including one count of disability discrimination based on the denial of a request for accommodation in March 2011 and one count of disability discrimination and retaliation, based on a denial of a request for an accommodation in May 2011. Plaintiff clarified that after her May request for an accommodation was approved, she requested two extensions in July and August 2011.

Several claims were resolved at or before the prehearing conference and at the hearing as follows: First, plaintiff formally withdrew her claim of age discrimination in her opposition to the AOC's motion to dismiss the complaint. *See*, Plaintiff's Opposition at fn. 2. Also, both parties discussed in the motion to dismiss and opposition plaintiff's allegations that she requested an accommodation shortly after she broke her foot in December 2010. Because the complaint did not include any factual assertions or claims pre-dating March 2011, plaintiff was precluded from proving disability discrimination based on a failure to provide a reasonable accommodation prior to March 2011.²

At the hearing, I granted the Employer's motion for judgment as a matter of law, under Fed. R. Civ. P. 50, on plaintiff's first claim of disability discrimination. This claim was based on her assertion that she "informally" requested a reasonable accommodation in March 2011 after she injured her Achilles heel. (Tr. vol. 2 p. 50-53).³

² It appeared, moreover, that during the period January to March 2011, although the AOC did not approve plaintiff's request for an accommodation in all seated assignments, the alternative request for part-time work was accommodated. In addition, plaintiff testified that when the Employing Office denied her request for all seated assignments, she "gave up the process because I had to come back to work. I had begun the process, but I told [my doctor], let me – just let me come back to work without accommodation." (Tr. vol.1 p. 132).

³ I did not credit plaintiff's claim that she made this request for an accommodation before May 2011. I also concluded that a release from her doctor, dated March 16, 2011 (Pl. Ex. 4), was unequivocal; the doctor did not condition plaintiff's return to work on a need for any accommodation at all.

I also granted the Employer's motion for judgment as a matter of law as to parts of plaintiff's second claim of disability discrimination.⁴ I granted judgment in favor of the AOC on plaintiff's initial request for a reasonable accommodation on May 16, 2011 and her first request to extend this accommodation in July 2011 because I found that the AOC properly engaged in an interactive process with her and honored both requests.

Plaintiff also complained of disability discrimination based on the AOC's failure to approve her request for accommodation in October 2011. She conceded, however, that this complaint did not arise until after she had filed her request for counseling on August 31, 2011. Accordingly, because she did not exhaust her administrative remedies by filing a request for counseling and for mediation as to this claim, I granted the Employer's uncontested oral motion to dismiss it, pursuant to Sections 401-405 of the CAA, 2 U.S.C. §§1401-1405. See, O.C. Proc. R. § 5.03(a).

What remains for a decision, then, are two claims: that plaintiff was the victim of disability discrimination in mid-August 2011 when the AOC denied her second request to extend the accommodation and that the failure to accommodate her was in retaliation for protected activity.

FINDINGS OF FACT

Mary Schiappa is a Visitor Assistant (VA) in the Visitors Service Division (VSD) of the Capitol Visitors Center (CVC) at the AOC. She has been so employed since June 20, 2008. Her duties include greeting and assisting visitors and tourists at the U.S.

⁴ Plaintiff's second claim of disability discrimination was considered and resolved in three parts: the initial request on May 16, 2011, the first request to extend the accommodation filed on July 13, 2011, and the second request to extend the accommodation that was filed in mid-August 2011.

Capitol. The advertisement for the position in the Washington Post (Pl. Ex. 1) reads in part:

Responsibilities include assisting with all aspects of the visitor experience to the Capitol, such as greeting and orientating visitors, issuing tickets and passes, answering questions about exhibits, tours, events, and directing visitors. To qualify, applicants must have a basic understanding and knowledge of U.S. history and have experience with speaking before groups of people.

The position description for Visitor Assistants (R. Ex. 1) provides that 70% of the work involves Guide Support Services, including:

addressing advance reservations, bus arrivals, visitor wayfinding, greeting visitors, checking coats, orientation of visitors, orientation theater loading/operation, special transportation arrangements, time pass delivery, answering phone calls, and assisting visitors requiring information. Assembles the group, explains the group activity, and outlines any precautionary measures required. Maintains order . . . Ushers or leads tours of large groups . . . Provides information and assistance to visitors about the content of exhibits . . . Provides assistance to parties that require special attention, such as distinguished visitors, disabled persons, and photographic enthusiasts.

The position description further provides that 30% of the work involves Customer Support Services, including:

Operates hand-held radios to communicate with the supervisor to receive assignments and to request assistance . . . Interacts with visitors and provides detailed guidance by applying knowledge of an extensive body of rules, procedures, and operations to provide technical support and services. . . . Using a computer terminal, enters information into the reservation system database . . . Issues time passes . . . tearing tickets. Lifts boxes of tickets up to 20 pounds . . . lifts stanchions and maneuver[s] wheelchairs. . . . In the coat check area, handles heavy coats and large packages (from the gift shops).

According to the position description, the physical demands of the job are stated as:

walk, talk, stand and bend for extended periods of time. . . carry light items such as books and papers. . . . speak to large groups over extended periods of time throughout the shift. Walking up multiple flights of stairs is required both in the Capitol Visitor Center (CVC) and in the U.S.

Capitol. Must be able to move/lift boxes, packages, or other items up to 20 pounds. Must have dexterity to operate a computer terminal, scanner, telephone, and hand-held radio.

Likewise, the work environment is described in the position description as:

Adequately lighted, heated and ventilated. . . . large crowds of individuals, which will result in medium to high levels of noise. . . . time outdoors in poor weather conditions to meet tour groups. . . . climbing multiple flights of stairs inside of the CVC and U.S. Capitol.

Plaintiff and her fellow Assistants are assigned daily to work in three or four locations that make up a "pod" at the CVC. There are approximately sixty to seventy-five stations where the VAs can be assigned, depending on the time of year.

Approximately eleven of the stations are called "seated" positions, meaning that a chair or stool is provided for the VA, and the remaining positions are so-called "standing" positions, meaning that no chair is provided for the VA. CVC supervisors set the daily schedules for the VAs so that they rotate between the "standing" and "seated" positions and no one is required to stand for the entire day.

Plaintiff testified that there is only one station – Center Stage – that requires standing. She explained that every other position can be done while either standing, or seated in the seat provided, or while sitting in a wheelchair. Plaintiff's first line supervisor, Jennifer Birdshead,⁵ agreed that although there were no all seated pods because there were not enough seated positions to accommodate that, nonetheless, most positions, including "standing" ones, could be performed from a wheelchair. A different supervisor, Cynthia Pree, testified that there were some assignments that could not be done from a wheelchair, including: entry lines, ticket and headset handling, and working in the upper level of the theatre, because they either involved stairs or narrow

⁵ Ms. Birdshead became plaintiff's first line supervisor in October 2011. Before then, plaintiff's first line supervisor was Cynthia Pree.

passageways. The Director of the VSD, Tina Pearson, testified that there were a number of positions that required standing, walking, moving about the campus and climbing stairs. Mr. Bren Lowery, the assignments supervisor at the CVC, testified that plaintiff could perform almost every assignment as a VA from a wheelchair.

In December 2010, plaintiff broke her left foot at home. During her recuperation after this injury, she claims she asked her employer for a seated assignment as a reasonable accommodation to allow her foot to heal. She testified that beginning in January 2011, she regularly sent requests to Mary Dooling, an Operations Specialist for the VSD assigned to the Human Rights (HR) division. According to plaintiff, Ms. Dooling advised her that there were no "all seated" pods for VAs. Plaintiff also claims that her podiatrist, James M. McKee, MD., communicated with Ms. Venattia Vann, the AOC Reasonable Accommodation Program Manager. According to plaintiff, Dr. McKee requested an all seated assignment as a reasonable accommodation to no avail. Plaintiff testified that because she was not accommodated, she was obliged to use all of her available medical leave; advanced sick leave, leave under the Family Medical Leave Act (FMLA), 29 U.S.C.S. §§ 2601-2619 (1994), and leave without pay (LWOP).

Mary Dooling testified that after plaintiff's December injury, she was on workmen's compensation until her release to return to work. Ms. Dooling also testified that at first, plaintiff was not released by her doctor to work at all, thus she received advanced sick leave and leave under the FMLA. Ms. Dooling denied that plaintiff ever mentioned or requested a reasonable accommodation before May 2011.

In February 2011, Dr. McKee released plaintiff to return to work on a part-time basis (every other day or three days per week) from March 1 to 19, 2011 and thereafter

on a full-time basis. (See Pl. Ex. 3). The AOC granted the doctor's request and permitted plaintiff to return to work part-time. On March 11, 2011, however, shortly after her return to work, plaintiff fell and injured her right Achilles heel. Despite receiving treatment for this injury, plaintiff currently suffers from "retrocalcaneal bursitis" and "enthesopathy with degenerative calcifications and longitudinal tearing of the Achilles tendon" that may require future surgery. (See Pl. Ex. 3B). She claims that she now walks with a permanent limp.

On March 16, 2011, plaintiff's doctor released her to return to work with "regular duties" and no restrictions, beginning on March 21, 2011. (Pl. Ex. 4). At that time, he was unaware of the extent of plaintiff's injury. Plaintiff contends that in March and April 2011, she made an "informal" request for all seated assignments as a reasonable accommodation for this injury. There is nothing in the record before May 2011, however, to prove that plaintiff made this request or to support such a request.⁶ Moreover, I credited both Ms. Dooling and Ms. Pearson when they testified that the first request they received from plaintiff for an accommodation was in May 2011.

On April 6, 2011, plaintiff testified on behalf of her assignment supervisor, Bren Lowery, in his discrimination complaint against the AOC. She claims that "upper level managers," including Tina Pearson, Beth Plemmons, and Sandra Kaufman, were aware of her participation in this protected activity because she had to be excused from her duties in order to participate.

⁶ Ms. Tina Pearson testified that a request for a reasonable accommodation should be supported by medical documentation from a physician, on letterhead that included a "diagnosis, prognosis and the impact of the employee's medical condition on their [sic] ability to perform their job and what is recommended for the accommodation." (Tr. vol.2 p. 114).

In early May 2011, plaintiff underwent magnetic resonance imaging (MRI) of her Achilles tendon, at which time her doctor discovered that it was torn. (See Pl. Ex. 9). In addition to the torn tendon, plaintiff reported to Ms. Dooling in HR that she had a stress fracture on her right heel and "massive amounts of edema." Plaintiff requested leave under FMLA and stated that she would like to begin "reasonable accommodation papers again."

On May 16, 2011, plaintiff filed a formal request for a reasonable accommodation (Pl. Ex. 2) in which she asked: "Would like to have seated positions. Such as coat room, any desk, escalator position, etc. If not able to sit all day as much as possible." Plaintiff stated in her request that her torn Achilles tendon and stress fracture were a result of her standing in a cast with broken bones on her left foot. Attached to the request form was a medical record from Dr. McKee dated May 9, 2011 in which the doctor states:

TREATMENT: I explained to the patient that she needs to wear her Cam walker 24 hours a day and avoid long periods of standing. . . . I recommended combinations at work of no standing, work from a desk or stay home from work, rest her foot and leg for a minimal [sic] of 6-8 weeks.⁷

In connection with this request for accommodation, plaintiff also submitted a written statement on Dr. McKee's notepad and an MRI report dated May 6, 2011.

By letter dated June 7, 2011 (R. Ex. 5), plaintiff was advised that the AOC Reasonable Accommodation (RA) Panel approved her request for accommodation through July 11, 2011.⁸ She was permitted to perform her duties either in a "seated"

⁷ Plaintiff explained that the CAM walker, or "boot," is a removable device that kept her foot and ankle immobilized to promote healing.

⁸ According to John McPhaul, the Director of the AOC EEO office, when an employee submits a request for reasonable accommodation, his office would meet with the employee and management to determine whether the request could be granted without undue hardship on the employer. If the parties could not reach an accord, then a panel would meet to decide the request. The Reasonable Accommodations panel

position or in a “standing” position, while seated in a wheelchair. Tina Pearson testified that plaintiff was assigned to a “seated” position at the South Information Desk, then she would walk to a “standing” position in the Vestibule where she would perform her duties in a wheelchair.

In late June 2011, plaintiff testified on behalf of another co-worker, Kenny Taiwo, against the AOC in a different equal employment opportunity (EEO) process. She stated that after she testified, her supervisors would not come around her or would move away if she came near. She stated that Tina Pearson told Cynthia Pree: “Don’t go near [plaintiff]. She’ll cut your throat.” Cynthia Pree testified that Tina Pearson cautioned her to “watch her conversations” and avoid “being familiar” with plaintiff. She did not recall what reason was given for this advice. She also recalled that someone warned her that plaintiff “will cut your throat,” but claimed that she did not recall who warned her.

On July 12, 2011, plaintiff submitted a request for continuation of the accommodation. (Pl. Ex. 3A). The request reads: “Need to have sitting position continued while waiting for Achilles tear to heal.” She also submitted a note, dated July 11, from Dr. McKee (Pl. Ex. 7) that states:

Ms. Schiappa . . . is cleared to return to work 5 day[s] a week with reasonable accommodation in her fracture boot. Her shift should be no more than 8 hours a day/5 days [per] week (7-11-11 – 8-12-11).

In response to this request, Ms. Vann, the Reasonable Accommodation manager, informed plaintiff by letter dated July 22, 2011 (Pl. Ex. 4) that the documentation that she

would be comprised of the Director of the Equal Employment Opportunity office (McPhaul), the Branch Chief of the Employee Relations Branch and a third member from the Senior Executive Service from a division (“jurisdiction”) unrelated to the one in which the employee is assigned.

submitted with her request to continue the reasonable accommodation was insufficient.

Ms. Vann advised plaintiff that Dr. McKee's statement:

did not clearly indicate the status of [her] current condition, the type of accommodation needed, and the duration of the accommodation. The documentation should explain the need for the requested accommodation based on [her] medical condition. The duration of the accommodation should also be specified.

Plaintiff was further advised that she should submit updated information from Dr. McKee in a format similar to his May 9th report. Notwithstanding this communication, plaintiff's request for a reasonable accommodation was extended until August 29, 2011.⁹

On August 3, 2011, plaintiff submitted by facsimile another medical report from Dr. McKee, also dated July 11, 2011. (Pl. Ex. 3B). It reads in pertinent part:

The patient . . . relates continued pain, but no more than 50% improvement in the last month. She relates compliance with her boot, has been working three days a week. Reasonable accommodations in a wheelchair. She has severe pain by the end of the day which [is] keeping her awake at night. . . . She has mild edema and swelling in the posterior aspect of the right Achilles tendon towards its insertion.

* * *

I have recommended the patient to continue to work. She may sit in a wheelchair and/or stool. I have recommended that she wear her fracture boot 24 hours a day, 7 days a week, to help stabilize the area. I have reviewed the cause of her pain with her in great detail. Citing that, this could be a chronic issue and chronic problem. She should be reevaluated in one-month period for possible further treatment. She understands that there is a significant spurring and hypertrophic bone formation posterior right heel that will not resolve.

The AOC tendered John McPhaul, Jr., Director, Equal Employment Opportunity and Conciliation Programs Office at the AOC, as an expert witness in the field of reasonable accommodation requests. His expertise was based on his position at the AOC and his many years of prior experience, both in the military and in civilian positions,

⁹ Plaintiff testified that the extension was not approved in writing. She was simply allowed to continue to use the wheelchair.

working with diversity, disability and EEO matters. McPhaul opined that the first medical submission from Dr. McKee dated July 7, 2011 (Pl. Ex. 7) was indeed vague because it was unclear what accommodation he was requesting, vis-à-vis standing and walking. He concluded that the letter from Ms. Vann requesting additional information was appropriate. He further opined that the subsequent documentation received from Dr. McKee, also dated July 7, 2011, but faxed on August 3, 2011 (Pl. Ex. 3B), is clear as to what accommodation was being requested. McPhaul testified that the doctor was requesting a reasonable accommodation in a wheelchair for an additional month, until approximately August 12, 2011.

Plaintiff then filed a request to extend the reasonable accommodation even further beyond August 12. She submitted a handwritten note from Dr. McKee, dated August 16, 2011 (Pl. Ex. 5), that reads in part:

Ms. Schiappa was seen at F/U [follow-up] today. Has made moderate improvement with reasonable accommodation. She was referred to start physical therapy 3X week. With this ongoing treatment she may take 6-12 months to recover with continued reasonable accommodation plus treatment. Reevaluation along with physical therapy. Return to office one month.

Attached to this note is a report from Dr. McKee, also dated August 16, 2011, that reads in part:

The patient . . . has made moderate improvement with the use of a Cam Walker and recent accommodations at work. She still observed limping into the office She related due to the fact that she is able to sit part of the day, that she feels that she is continuing to have improvement.

* * *

PLAN/TREATMENT: Due to the fact that she has been under reasonable accommodations, this has definitely helped her tendinitis to improve. She is wearing the Dansko shoes as prescribed to prevent pulling on the Achilles tendon. . . . I have written out a note for having reasonable accommodations continued, stay [sic] and may take up to 6-12 months for this to completely resolve without surgical intervention.

Ms. Tina Pearson testified that she learned of this second request to extend the reasonable accommodation from Ms. Pree. Ms. Pearson stated that she believed plaintiff was requesting to be seated in all of her assignments, but did not realize that plaintiff was requesting continued use of the wheelchair.

Mr. McPhaul testified that on the day the RA panel met to decide plaintiff's second request to extend the accommodation, the panel called Tina Pearson to get additional information. Ms. Pearson advised the panel members that the AOC could not continue to accommodate plaintiff's request because the temporary hires for the summer were about to leave and there would not be sufficient personnel to cover all of the standing positions.¹⁰ Ms. Pearson told Mr. McPhaul that the standing and sitting positions needed to be equitably assigned among the VAs and that there was no way to accommodate plaintiff in all seated positions. The RA panel did not communicate with plaintiff directly.

Based on its review of the documents submitted by plaintiff and the AOC and the conversation with Tina Pearson, the RA panel denied plaintiff's request to further extend her accommodation after the end of August 2011. It concluded that standing and walking were essential functions of the job and that plaintiff was unable to perform these functions. At the same time, Mr. McPhaul testified that he was aware that plaintiff had been accommodated by use of a wheelchair. He also testified that he was not aware that plaintiff had engaged in any protected activity.

¹⁰ Mr. McPhaul and Ms. Pearson testified that the greatest number of visitors to the CVC came between March and September and that after that, the number of visitors decreased, lessening the need for staff. Mr. Lowery testified that the CVC received between 7-8,000 visitors per day during the summer months and that after the temporary workers left, there were fewer posts to fill, so the VAs could resume their "normal rotations." He also testified that the departure of the temporary summer help did not impact plaintiff's ability to work a normal routine, since she could perform almost every assignment using the wheelchair.

On August 29, 2011, plaintiff received a letter (Pl. Ex. 6) from Mr. McPhaul, stating that the RA panel had denied her request for continued reasonable accommodation. The letter states:

You submitted medical documentation from Dr. James M. McKee, DPM dated May 15, 2011, July 11, 2011 and August 16, 2011 to support your request. . . . *Your request for a sitting position could not be accommodated. The AOC is under no obligation to create a sitting position for you.* Based on the aforementioned, the panel denied your request. (Emphasis supplied).

On August 30, 2011, Ms. Dooling handed plaintiff the letter denying her request for further accommodation. Plaintiff claims that she did not understand it because it contained "legal-speak." Therefore, despite receiving the declination letter, plaintiff resumed her use of the wheelchair. Mr. Lowery testified that he received orders to require plaintiff to get up from the wheelchair and to perform her duties while standing.¹¹ Plaintiff stood in all of her assignments that day without her boot. She explained that she was having trouble with the boot.¹² She also testified that because she was required to stand all day in her assignments, her foot swelled and bled. The following day, on August 31, plaintiff went to a nurse to examine her foot and then filed a Request for Counseling with the Office of Compliance (OOC).

¹¹ In an email that Mr. Lowery received from Mary Dooling (R. Ex. 10) dated August 30, 2011, Ms. Dooling stated:

Mary [Schiappa] received a letter from the reasonable accommodation board denying her request for the continuation for her reasonable accommodations. I just spoke to Beth [Plemmons] and she instructed me beginning today, to have you put her in a regular rotation without accommodation[.] If you have any questions let me know[.]

¹² Plaintiff testified that she fell three times while wearing the boot. She stated that by July 2011, she stopped wearing it overnight. She also testified that eventually she made the decision, despite her doctor's order, not to use the boot.

On September 6, 2011, plaintiff requested reconsideration of her request for accommodation (R. Ex. 6) which was denied. In the denial letter (R. Ex. 7), the Architect of the Capitol, Stephen Ayers, stated:

I am writing to respond to your September 7, 2011, letter regarding your reasonable accommodation request of July 12, 2011. You asked for reconsideration of the . . . AOC Reasonable Accommodation Panel's decision to deny your request. In the request, you expressed a need for the continuation of a sitting position while waiting for your Achilles tear to heal. Since you did not submit additional information to support your request, another review of previous submissions was conducted.

* * *

The medical documentation submitted by Dr. James M. McKee dated August 16, 2011, indicated the possible duration of the impairment but failed to address the impairment limits, and the extent to which the impairment impacts your ability to perform essential functions of your position (i.e. walking, standing lifting, etc.) combined with the duration of the restriction. Although you were asked to provide definitive details to substantiate your disability, your submission failed to meet that requirement. (Emphasis supplied).

On November 5, 2011, plaintiff fell again at work. Tina Pearson testified that when plaintiff requested an accommodation in the fall of 2011, she received one that she agreed met her needs. Plaintiff is currently in a rotation with more sitting than standing posts and with permission to sit if she is not actively engaged with a visitor. She testified that this accommodation does not meet her need to sit all day in order to heal from her injuries.

Plaintiff contends that her employer's refusal to allow her to work in a wheelchair frequently causes her right foot to swell and sometimes bleed and caused her to gain weight. She states that she suffers from dizziness, tremors, diabetes and depression as a direct result of working without adequate accommodation. Plaintiff states that she does not participate in activities with her son as she did before her injuries.

Plaintiff argues that she is the only VA whose request for a reasonable accommodation was denied. She claims that other VAs were accommodated with all seated positions when they made their requests.¹³ Plaintiff claimed that even when her coworkers offered her their seated positions, her supervisors would not allow her to switch assignments with them. Plaintiff's immediate supervisor, Jennifer Birdshead, testified that she was aware of no other employee who had requested all seated positions. Moreover, all those who were accommodated with seated positions, were required to do some standing.

Ms. Birdshead testified that she did not retaliate against plaintiff and was unaware that plaintiff testified on behalf of her coworkers. Ms. Pearson likewise denied that she retaliated against plaintiff, even though she admitted that she was aware that plaintiff had twice testified on behalf of her colleagues against the AOC. Ms. Pearson stated that after plaintiff testified for her coworkers, she was always evaluated positively. Pearson denied being told to retaliate against plaintiff and denied that she ever instructed anyone to retaliate against her. Mr. Lowery testified that he believed that plaintiff was the victim of retaliation because she had testified for him in his case against the AOC. He claimed that plaintiff's "reasonable accommodations wasn't [sic] handled appropriately compared to maybe some of the other employees that were requesting reasonable accommodations." (Tr. vol. 3 p. 12).

¹³ Plaintiff identified coworkers MaryEllen Anderson, Jessica Brown and Alicia Thomas as employees who were permitted to work from seated positions all day.

DISCUSSION AND ANALYSIS

A. Disability Discrimination (Failure to Provide Reasonable Accommodation)

Plaintiff's Burden of Proof

The Congressional Accountability Act (CAA) proscribes personnel actions affecting "covered employees" that are discriminatory based on "disability within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. § 791) and sections 102 through 104 of the Americans with Disabilities Act [(ADA) as amended] (42 U.S.C. 12112-12114)." 2 U.S.C. §1311(a)(3). Sections 501 of the Rehabilitation Act of 1973 and Section 102 of the ADA require federal agencies to make reasonable accommodations for known physical disabilities of "qualified employees." 29 CFR §§1614.203(b) and (c) and 42 U.S.C. 12112(a). Plaintiff is a "covered employee" under the CAA because she is employed by the AOC. 2 U.S.C. §1301 (3).

In order to prove a claim of disability discrimination based upon a failure to provide a reasonable accommodation, plaintiff must first prove that she is a qualified individual with a disability, 29 CFR § 1614.203(a)(1), 42 U.S.C. 12112(a),(b)(5); *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981); *Anderson v. United States Postal Service*, Appeal No. 01970254, 2000 EEOPUB LEXIS 812 (February 23, 2000); *Dimick v. U.S. Postal Service*, 1995 EEOPUB LEXIS 1394, Appeal No 01941259 (February 3, 1995). A disability is a "physical . . . impairment that substantially limits one or more major life activities." 29 CFR §1614.203(a)(1), 42 U.S.C. 12102(1). Major life activities include: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning,

reading, concentrating, thinking, communicating, and working.” 29 CFR §1614.203(a)(3), 42 U.S.C. 12102(2).

Plaintiff must also prove that she satisfies the requisite skills and experience for the job and is capable of performing the essential functions of her job, with or without reasonable accommodation. 29 CFR §1614.203(a)(6); 42 U.S.C. § 12131(2); *Prewitt v. United States Postal Service, supra*; *Dimick v. United States Postal Service, supra*. Reasonable accommodations may include making the employment facility accessible and useable by the employee with the disability, restructuring job functions or modifying the work hours or schedules, and modifying equipment used on the job. 29 CFR §1614.203(c)(2), 42 U.S.C. § 12103(9).

The employee must also prove that her employer had notice of her request for an accommodation; that the accommodation was reasonable, causing no significant burden on the operations of the employer; and that the employer failed to provide the accommodation. 29 CFR § 1614.203(c)(1), 42 U.S.C. § 12112(5)(A). The employer has the burden of proving that a requested accommodation was not reasonable. *Borowski v. Valley Central School Dist.*, 63 F.3d 131 (2nd Cir. 1995) ; *Prewitt, supra*; *Johnson v. Sullivan*, 764 F.Supp. 1053 (D. Md. 1991). Factors to be considered in determining whether an accommodation will cause undue hardship include:

- (i) the nature and cost of the accommodation needed . . . ;
- (ii) the overall financial resources of the facility . . . , the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the [employer]; the overall size of the business of a covered entity with respect to the number of its employees; . . . and
- (iv) the type of operation . . . of the [employer], including the composition, structure, and functions of the workforce . . .

29 CFR § 1614.203(c)(3), 42 U.S.C. §12111(10).

The plaintiff must also prove a causal connection between the Employer's reasons for its actions and her disability. That is, plaintiff must prove that an accommodation is needed. *Peebles v. Potter*, 354 F.3d 761 (8th Cir. 2004); *Moore v. Department of the Army*, EEOC Request No. 05960093 (October 16, 1998); *Gains v. Runyon*, 107 F.3d 1171 (6th Cir. 1997).

The remedy for disability discrimination under the CAA is the same "as would be appropriate if awarded under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S. 794a (a)(1) or section 107(a) of the [ADA] . . . (42 U.S.C. § 12117(a)) and . . . such compensatory damages as would be appropriate if awarded under [42 U.S.C. §§ 1981a(a)(2), 1981a(a)(3) and 1981a(b)(2) and 1981a(b)(3)(D).]" 2 U.S.C. § 1311(b)(1)(A)(B). These remedies include: injunctive or other equitable relief, compensatory damages and attorney's fees and costs. See, *Shobert v. Department of the Air Force*, EEOC Appeal No. 01A40981, 2005 EEOPUB LEXIS 3710 (August 4, 2005); *Bradley v. United States Postal Service*, EEOC Appeal No. 01A22995 (April 23, 2003); *Sanson v. Department of the Army*, Appeal No. 01983046, 2000 EEOPUB LEXIS 4450 (June 21, 2000); *Glover v. United States Postal Service*, EEOC Appeal No. 01930696 (Dec. 9, 1993).

Plaintiff is a Qualified Individual with a Disability

In the instant case, plaintiff is an individual with a disability. She suffered a broken left foot and a torn right Achilles tendon. Both injuries caused her considerable pain and swelling upon standing and required extensive medical treatment, including

shots, topical medications, physical therapy, a boot and special shoes. Plaintiff states that she may need future surgery. Her disability affects one of her major life activities because it substantially limits her ability to walk and stand.

Plaintiff also satisfies all of the skill requirements for her job as a VA. She has always been rated satisfactory or better. In addition, she competently performed her job duties throughout the time that she was given a wheelchair as a reasonable accommodation.

Plaintiff Can Perform the Essential Functions of the Job

I credit the witnesses (plaintiff, Birdhead, and Lowery) who all testified that of the 60-75 assignments, only a few, or "several," require standing and cannot be performed from a wheelchair. The position description identifies walking, standing and bending "for extended periods of time" as well as climbing stairs as among the physical demands of the job. The question, however, is whether these activities are essential functions of the job. Essential elements of a job are fundamental ones. *Aguillard v. Department of Justice*, 2006 EEOPUB LEXIS 6589 (EEOPUB 2006) (November 21, 2006). The AOC defines essential functions as:

[t]he fundamental job duties of the position that the individual with the disability holds or desires. The term "essential functions" does not include the marginal functions of the position, but reflects job duties that are so fundamental that: employees in the position are required to perform the function; removing an essential function would fundamentally change the job; the position exists specifically to perform that function; there are a limited number of AOC employees who can perform the function; or the function is specialized and the individual has been hired or offered employment based on his/her ability to perform it. (R. Ex. 9 p. 3).

I conclude, based on a review of the position description, that the essential functions of the job of a VA are primarily (70%) to provide guide services, including

greeting visitors, providing information about exhibits, helping visitors find their way around the CVC, checking coats and assisting with transportation. (R. Ex. 1). A lesser function (30%) is to provide customer support services, including making advanced reservations, taking tickets, lifting boxes, leading groups through the CVC, answering questions and providing detailed information. *Id.*

Although the position description identifies walking, standing and stair climbing as physical demands of the job of a VA, a wheelchair is a feasible alternative means of meeting those demands. Given the job duties of a VA, I find that if a VA is not in a wheelchair, he or she would be obliged to climb stairs and to walk and stand for the majority of the day, except when assigned to a seated position. However, if a VA is in a wheelchair, he or she can perform almost all of the assignments without having to walk, stand, or climb stairs. I credit the testimony that no more than 3% of the VA assignments cannot be done from a wheelchair. Accordingly, 97% of the standing and walking functions of the job can be done while seated in a wheelchair. As for stair climbing, plaintiff, Ms. Birdshead, and Mr. Lowery testified that there are a number of elevators available to visitors and VAs who cannot climb stairs.

I am therefore satisfied that although a VA does stand and walk and climb stairs during the work days, these activities are not so essential to the job that removal of them would fundamentally change the job. Moreover, the position of VA does not exist specifically to perform these activities. Thus, these activities are not essential elements of the job. What is essential is being present and available to greet and assist visitors and to usher them through the CVC. All of these essential functions can, and have been, done from a wheelchair.

The Interactive Processes and Initial Accommodations Were Handled Properly

With respect to plaintiff's request for accommodation on May 16 2011, I find that the AOC properly engaged in an interactive process and carefully reviewed her doctor's recommendations. As a result of this process, the AOC approved the requested accommodation – that plaintiff be permitted to perform her duties while seated in a wheelchair. Although it is true that plaintiff was assigned to only two assignments during the accommodation period June 7 to August 29, 2011, I conclude that she could have performed most of the other assignments, either because they were “seated” positions, or because she could perform the “standing” assignments while seated in a wheelchair. Thus, it appears that the AOC too narrowly restricted the accommodation beyond what was necessary when it assigned plaintiff to only the two positions during the accommodation period. I further conclude that there was no reason for plaintiff to be required to walk between posts. I credit her testimony and that of several other witnesses that she could have moved from post to post while in a wheelchair because most of the workspace is accessible to visitors or VAs who are confined to wheelchairs.

The Second Request to Extend the Accommodation Was Improperly Denied

In its determination whether to extend the accommodation based on plaintiff's second request in August 2011, the AOC misread the request as one for all seated assignments, when it was instead a request to continue the wheelchair accommodation. The record reveals that initially, plaintiff requested that she be assigned only to positions identified as “seated” positions. See Pl. Ex. 2 at p. 1. Her doctor also recommended that

plaintiff be assigned to: “combinations at work of no standing, work from a desk or stay home from work, rest her foot and leg for a minimal of 6-8 weeks.” Despite there being no request for a wheelchair in these documents, the AOC approved the accommodation and allowed plaintiff to work two posts – one “seated” and one “standing” – using a wheelchair. This wheelchair accommodation largely met plaintiff’s needs because she was not required to be on her feet except to walk between posts.

In a subsequent document, dated July 11, 2011, Dr. McKee was unclear about what he recommended for a continued accommodation. His note that plaintiff was “cleared to return to work 5 day[s] a week with reasonable accommodation in her fracture boot . . . [with a shift of] no more than 8 hours a day/5 days week (7-11-11 – 8-12-11)” did not make clear whether the boot and hours were the only recommended accommodation. He did not address the fact that plaintiff had been in a wheelchair for a month. Thus, when plaintiff submitted this document along with her request to extend the accommodation, it was appropriate for the AOC to request additional information.

Dr. McKee was clearer, however, in his subsequent submission when he wrote: “Reasonable accommodations in a wheelchair. . . . I have recommended the patient to continue to work. She may sit in a wheelchair and/or stool.” (Pl. Ex. 3B). There is no doubt that Dr. McKee is recommending in this document that plaintiff be accommodated during her recovery by use of a wheelchair during her work hours or assignment to a seated post. In a handwritten note dated August 16, 2011, Dr. McKee identified the period during which he anticipated that plaintiff would need continued accommodation when he wrote: “She may take 6-12 months to recover with continued reasonable accommodation plus treatment.” This statement, when reviewed in conjunction with his

earlier statements, makes clear that Dr. McKee recommended that plaintiff remain accommodated in a wheelchair for the next 6-12 months. The RA panel, therefore, should have realized that the request for accommodation was for use of a wheelchair as an alternative to all “seated” posts.

I find that the panel’s conclusion that the accommodation was not reasonable resulted from a misreading of the request. The panel stated: “Your request for a sitting position could not be accommodated. The AOC is under no obligation to create a sitting position for you.” In context, it is unclear how the AOC concluded that plaintiff was requesting the creation of an all-seated assignment, given her use of the wheelchair that allowed her to work in almost any assignment. Plaintiff was not asking for her employer to create a special assignment for her; indeed, she had not even requested to be restricted to the two assignments she had been given. There were any number of assignments she could have done from her wheelchair without the need for a special assignment to only seated posts.

The Reasonable Accommodation Panel Process was not Equitable

When reviewing the documents submitted by both plaintiff and management, the panel communicated with management concerning the essential functions of the job, but failed to elicit similar input from plaintiff. This was inequitable. “[T]he suggestions and preferences of an employee seeking reasonable accommodation must be given great weight.” *Young v. U.S. Postal Service*, EEOC Appeal No. 01992198 (February 13, 2002). The AOC Order 24-5 provides:

To ensure an accurate and fair determination the Reasonable Accommodation Program Manager engages in full exchange with the

employee and the employee's supervisor to obtain all necessary information relating to the basis for the request, including a position description showing the essential functions of the employee's position. (R. Ex. 9 p. 6).

Had the RA panel inquired of plaintiff, the members would have learned that she was successfully performing her job duties in both "standing" and "seated" assignments without standing. Indeed, Mr. McPhaul was aware that plaintiff was using a wheelchair. The panel might also have learned, had it inquired, that most of the assignments at the CVC could be done from a wheelchair. Yet, despite plaintiff's past performance while accommodated, the panel concluded that walking and standing were essential functions of the job. It failed to conduct an adequate independent assessment of the actual requirements of the job.

Inconsistent Reasons for the Denial

I am also skeptical of the three different reasons given by the AOC for denying plaintiff's request for accommodation, especially since none is supported by the evidence. First, the RA panel denied the requested accommodation on the ground that the AOC was not obliged to create an all-seated position for plaintiff, even though that was not the request made. The RA concluded that standing was an essential function of plaintiff's job, but failed to ask her how she might perform these standing and walking functions if her request for a wheelchair were granted.

Next, when plaintiff appealed the decision of the RA panel to the Architect of the Capitol, he upheld the decision finding that there was insufficient medical documentation to support the request. This conclusion is completely unsupported by the record and was not the reason why the request was denied by the panel. It does not

appear that the Architect was aware of the documents submitted by plaintiff's doctor specifically requesting continued use of the wheelchair for an additional six to eight months. Nor did the Architect acknowledge the different reason given by the accommodations panel in denying the request.

Lastly, Tina Pearson explained that the request for accommodation would have imposed a hardship on other VAs because of the departure of the summer guides. Ms. Pearson explained that at the end of the summer, the reduction in the workforce meant that there were fewer personnel to cover the standing assignments. The record, however, does not support this claim. Several witnesses, including Mr. Lowery and Mr. McPhaul, testified that the departure of the summer hires coincided with a sharp reduction in the number of tourists and visitors. Thus, it appears that when the additional summer help left, there were far fewer visitors for the VAs to greet. Indeed, Ms. Pearson testified that there were fewer total assignments for the VAs, depending on the time of year. Mr. Lowery also testified that the departure of the summer help would not have impacted plaintiff's ability to work from a wheelchair. Accordingly, the departure of the summer guides and the time of year when plaintiff made her second request to extend the accommodation do not appear to support a finding of any undue hardship on the VSD. Moreover, this reason was not cited by either the accommodations panel or the Architect. As plaintiff argued, asserting multiple reasons for denying a request for reasonable accommodation can support a finding of pretext. *Eades v. Brookdale Senior Living, Inc.*, 2010 U.S. App. LEXIS 19755 (6th Cir. 2010); *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846 (4th Cir. 2001).

Undue Hardship

The AOC did not satisfy its burden of proving that the requested accommodation extension would have imposed an undue burden on the operation of the CVC. There is no evidence that a continued accommodation would have had any impact on the ability of plaintiff's coworkers to do their jobs or on the resources of the CVC. Plaintiff's accommodation did not deny her coworkers an opportunity to sit during the day. In fact, plaintiff's use of the wheelchair would actually have increased the number of seated positions available to her coworkers because she did not need to be assigned to a "seated" position at all.

Conclusions

I find that plaintiff has proved that she is a qualified individual with a disability who is capable of performing the essential functions of her job as a VA with a reasonable accommodation. She has also proved that her requested accommodation was needed and the failure to provide it was not reasonable. The AOC, moreover, has not proved that the requested accommodation would have imposed an undue burden on its resources or operations. Plaintiff has therefore established her claim of disability discrimination. *See, Green v. American University*, 2009 U.S. Dist. LEXIS 74386 (D.D.C. 2009).

As a direct result of the denial of the requested accommodation, plaintiff has suffered pain, swelling and bleeding in her feet and ankles over a period of many months. She has become depressed, gained weight and has given up many of the activities that she used to enjoy with her son. Plaintiff suffered these adverse effects for almost a year,

since the last day of August 2011. She currently is not accommodated in a wheelchair and she still needs it.¹⁴

Plaintiff's request for attorney's fees and compensatory damages is reasonable. In fact, the amount of compensatory damages requested is modest under the circumstances. The AOC conceded, moreover, that if plaintiff prevailed on her claim of disability discrimination, she would be entitled to recover such damages.

B. Retaliation

In order to prove a claim of retaliation, plaintiff must prove that: (1) she participated in EEO activity; (2) AOC officials were aware of this activity; (3) after the protected activity, the AOC denied her reasonable accommodation request, or her supervisors treated her poorly; and (4) there is a causal link between the protected activity and the adverse action. *Gaertner v. United States Postal Service*, EEOC Appeal Nos. 01961862, 01962238, August 2, 2000.

Plaintiff participated in EEO activity. The parties do not dispute that in April and June 2011, plaintiff testified on behalf of coworkers in their EEO claims against the AOC. Several supervisors were aware of her activities. Tina Pearson, in particular, testified that she was aware of plaintiff's testimony because she and plaintiff were waiting together to be called as witnesses in one of the cases. Mr. Lowery and Ms. Pree were also aware of plaintiff's testimony.

The AOC took an adverse action against plaintiff by denying her reasonable request for accommodation. This is discussed further below. As for plaintiff's other claims of adverse actions, I do not find that the AOC took any additional adverse actions

¹⁴ Currently, the AOC permits plaintiff to work in more seated than standing assignments; however, plaintiff is required to work in standing assignments for a period of time each day.

against her. For example, I do not credit plaintiff's claim that any of her supervisors treated her poorly or ostracized her after her testimony.¹⁵ I also do not credit her claim that it was her protected activity that caused her supervisors to deny her occasional requests to sit, while others were allowed to do so. Plaintiff did not provide sufficient evidence about the circumstances of the other accommodated employees. Nor did she prove that the reason she was not allowed to sit was because of her protected activity. She did not prove details concerning when she made the requests to sit, or when the requests were denied, or the relationship between the denials and her protected activity.

As for the denial of the reasonable accommodation, although this was clearly an adverse action, I do not find that there is a causal link between the denial of the request for accommodation and the protected activity. There is also no evidence that the panel that issued the denial was aware of plaintiff's protected activity.

Plaintiff argues that Tina Pearson was biased against her and that her bias should be imputed to the accommodation panel on a "subordinate bias" theory. *Furline v. Howard University*, 953 A.2d 344, 356 (D.C. 2008). However, even if there were evidence that Tina Pearson had an improper biased motive against plaintiff when she recommended against the accommodation extension,

[w]hen the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive [sic] basis, the bias of the subordinate is not relevant.

Cf., Griffin v. Washington Convention Ctr., 142 F.3d 1308, 1311 (D.C. Cir. 1998).

¹⁵ The only evidence that was credible on the issue of different treatment after the protected activity is Ms. Pree's testimony that Tina Pearson told her not to be too friendly with her staff, including plaintiff. This is insufficient to prove a claim that plaintiff was treated poorly or even differently as a result of her protected activity.

In the first instance, I am not persuaded by the evidence that Ms. Pearson was motivated to retaliate against plaintiff. I credit Ms. Pearson when she denied that she had any desire to retaliate against plaintiff because she testified for her coworkers. Secondly, I am not persuaded that Ms. Pearson was in a position to control the decision of the RA panel. As plaintiff argued in her post-hearing submission, in order to prevail on a subordinate bias claim, she must prove “more than a mere ‘influence’ or ‘input’ in the decision making process” by a biased subordinate. The “issue is whether the biased subordinate’s discriminatory reports, recommendation, or other actions *caused* the adverse employment action.” (Emphasis added). *Furline v. Howard University, supra*. Here, the evidence is not convincing that Ms. Pearson “caused” the panel to deny the accommodation. The panel’s conclusion that plaintiff was not able to perform the essential functions of the job was influenced not only by its conversation with Ms. Pearson, but also by the language in the position description itself and its failure to consult with plaintiff. It seems likely that had the panel learned that plaintiff was successfully performing her job duties using a wheelchair, it may not have reached the same conclusions about the essential functions of the job. I do not find, therefore, that Ms. Pearson was able to manipulate or influence the decision-making process, or that she participated in the ultimate decision. See, *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004); *Abramson v. William. Paterson College*, 260 F.3d 265 (3rd Cir. 2001).

Based upon the foregoing, I do not find that plaintiff has proven her claim of retaliation.

JUDGMENT

It is this 16th day of July 2012

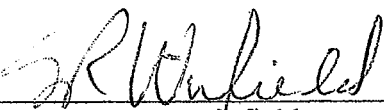
ORDERED that judgment be, and the same hereby is, entered on behalf of the plaintiff, Mary Schiappa, on her claim of disability discrimination (failure to accommodate) arising from her request in August 2011 to extend her use of a wheelchair as a reasonable accommodation for her foot and ankle injuries. It is

FURTHER ORDERED that the Architect of the Capitol shall allow plaintiff to perform her job duties while using a wheelchair until such time as she is released by her doctor to stand and walk. It is

FURTHER ORDERED that the Architect of the Capitol shall pay to the plaintiff twenty-five thousand dollars (\$25,000) as compensatory damages on the claim of disability discrimination. It is

FURTHER ORDERED that plaintiff's request for attorneys' fees is granted. Plaintiff's counsel shall submit an invoice of her fees and costs within 20 days of receipt of this order. The Architect of the Capitol may file objections within 10 days of the filing of the invoice. It is

FURTHER ORDERED that judgment be, and the same hereby is, entered in favor of the respondent, the Architect of the Capitol, on plaintiff's claim of retaliation.



Susan R. Winfield
Hearing Officer

So Ordered

Date: July 16, 2012