OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, DC 20540-1999

Anthony Katsouros Appellant, v. Office of the Architect of the Capitol, Appellee.	)	Case Numbers: 07-AC-48 (DA, RP) 09-AC-10 (DA,FM,RP)

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

ORDER FOR JOINDER OF CASES AND DECISION OF THE BOARD OF DIRECTORS

These cases are before the Board of Directors ("Board") pursuant to petitions for review filed by Anthony Katsouros ("Appellant" or "Katsouros"), an employee with the Office of the Architect of the Capitol ("AOC" or "Appellee"). Katsouros seeks review under Section 5.03(d) of the Procedural Rules of the Office of Compliance ("OOC"), of the December 8, 2009, decision by Hearing Officer Michael Doheny that dismissed the complaint on its merits after an evidentiary hearing ("*Katsouros I*") and the July 22, 2009, order granting the Appellee's Motion to Dismiss the Complaint ("*Katsouros II*"). The Appellant timely filed petitions for review of the Hearing Officer's decisions and orders; and supporting briefs. The Appellee employing office filed briefs in opposition to both petitions for review.

The Board has duly considered the Hearing Officer's Decisions and Orders in both cases, and the parties' filings.[1] For the reasons that follow, the Board joins the cases, reverses

[1] In *Katsouros I*, the Hearing Officer cited *Haddon v. Executive Residence at the White House,* 313 F.3d 1352 (Fed.Cir. 2002) for the standard in cases alleging unlawful retaliation. That standard requires, inter alia, that the complainant show that the employer subjected him to adverse action. The Appellant correctly asserts that the Board's standard is stated differently. In *Britton v. Office of the Architect of the Capitol,* Case No. 02-AC-20 (CV,RP) (May 23, 2005), the Board adopted a standard that to establish retaliation, the complainant must, inter alia, show that the employer took action "reasonably likely to deter" the exercise of

the Hearing Officer's dismissal of portions of the complaint in Case 07-AC-48 (DA, RP) and the entire complaint in Case 09-AC-10(DA,FM,RP), and remands for proceedings consistent with this opinion.

I. Background

Katsouros I

Katsouros was employed by the AOC as a mechanic in the Elevator Shop, and made various Family and Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA"), retaliation and hostile work environment claims as a result of a ten-day suspension he received in connection with absences from work in April and May of 2007.

In support of his claims, Appellant introduced five medical certifications that he had submitted to the AOC in the form designed by the Department of Labor for use in connection with the Family and Medical Leave Act. The first of these forms was signed by a psychiatrist on September 13, 2006. It stated that Appellant had a serious health condition that was chronic in nature and that he had "episodes of depression and mania." However, in the September 2006 form, the physician certified that Appellant was "currently not incapable" of working and could "perform all current duties as assigned." The physician also certified that it would not be necessary for Appellant to take intermittent leave.

In December 2006, Appellant was found asleep with his hands in the electrical controls, after having been sent to change a fuse in an elevator. He was placed on administrative leave for eight weeks pending receipt of medical documentation certifying that he was able to return to work. The second certification form submitted by Appellant was signed by a physician on January 29, 2007. It stated that Appellant was being treated for a torn ligament of the left leg. In the January 29, 2007 form, the physician certified that the Appellant "is able to perform essential functions of position w/o restriction. Poses no safety threat to self or others in performance of said duties and responsibilities." The third certification form was signed by the same physician on February 16, 2007, and indicated that Appellant continued to be treated for a torn meniscus of the left knee. In the February 16, 2007 form, the physician again certified that Appellant was able to perform the essential functions of his position without restrictions.

Following his return to work in March, after the administrative leave, Appellant had problems with attendance and sleeping at work. He was counseled for erratic attendance

---

protected rights. The *Haddon* decision, however, did not turn on the nature of employer action that must be shown to establish a *prima facie* case of discrimination. Instead, the decision focused on the burden of proof in retaliation cases and held that the burden shifting framework established in *Mc Donnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973) should be applied. The Hearing Officer's decision in the instant case also did not turn on the nature of employer action required to establish retaliation. Instead, it turned on the question of whether the Appellant had engaged in protected activity. While it would have been more accurate to cite *Britton* as the legal standard, our decision to reverse the Hearing Officer's decision is not based on his failure to do so.

and failure to follow leave procedures. On May 23, 2007, the AOC proposed that Appellant be suspended for ten days for sleeping during duty hours, disappearing during duty hours, being absent without authorized leave (AWOL) for six days in April 2007, and for failure to follow leave procedures. Pursuant to the AOC's grievance process, Appellant requested a hearing on the proposed suspension.

Appellant went back on leave on June 19, 2007. The fourth certification form submitted by Appellant was signed by a psychiatrist on August 2, 2007. In the August 2, 2007 certification, the psychiatrist did not mention bipolar disorder, but stated that Appellant had "depressed mood" and other symptoms, the onset of which occurred during the week of June 26, 2007. In this form, the psychiatrist also certified that Appellant's condition was "a chronic relapsing condition that recovers with treatment but relapses under severe stressful conditions." The psychiatrist further stated that Appellant would need to take off from work from June 26, 2007 through July 31, 2007 to allow for medication management and that he would be unable to perform work of any kind during that period.

The hearing on the proposed suspension was scheduled for November 28, 2007. At Appellant's request, the hearing was rescheduled for December 13, 2007.

The fifth certification form submitted by Appellant was signed by another psychiatrist on November 28, 2007. In the November 28, 2007 certification, the psychiatrist stated that Katsouros was diagnosed with bipolar disorder and "is so disorganized in thought and verbal expression that could not be at work and useful at this time." The psychiatrist further stated that Katsouros was "currently not capable [of working or performing other daily activities due to the serious health condition] [and] may be capable in, say, 3 months, episodes of incapacity may recur."

After November 28, 2007, two additional requests for postponement of the hearing on the proposed suspension were denied. As a result, the hearing was conducted on December 13, 2007, in Appellant's absence. At the hearing, Appellant was represented by his union representative, who stated that he had advised Appellant not to attend. On December 18, 2007, the AOC hearing officer recommended a ten-day suspension. On January 11, 2008, the Acting Architect of the Capitol made the final decision to suspend Appellant for ten workdays effective January 14, 2008 through January 25, 2008.

On June 4, 2009, the Appellant filed the instant complaint, alleging that each procedural step in the suspension action was a separate act of retaliation for having engaged in protected activities pursuant to the FMLA and the ADA; interference under FMLA; failure to accommodate under the ADA, which included a failure to postpone the AOC hearing on the proposed suspension. Finally, he alleged that these unlawful acts created a retaliatory hostile work environment.

On December 8, 2009, the Hearing Officer issued a decision dismissing the complaint in its entirety.

Katsouros II

After serving the 10 day suspension, Appellant did not return to work after the suspension was lifted on January 25, 2008. On February 12, 2008, Appellant's supervisor issued a proposal to terminate him based on his failure to follow leave procedures and his absence without leave. On March 20, 2008, the Superintendent of the Senate Office Building concurred with the February 12 termination proposal. Appellant appealed the termination and requested an AOC grievance hearing which was scheduled for May 15, 2008. Despite Appellant's request for a postponement, the hearing was held without him on May 15.[2] On June 5, 2008, the Acting Architect issued a final decision upholding the termination. Appellant asserts that he did not receive that decision until June 13, 2008. Appellant requested counseling from the Office of Compliance ("OOC") on December 3, 2008.

In the complaint filed on June 10, 2009 in *Katsouros II*, Appellant alleges that the AOC discriminated and retaliated against him and created a hostile work environment when it terminated him and took various procedural steps that ultimately led to that termination. On June 26, 2009, the AOC filed a Motion to Dismiss the complaint. On July 22, 2009, the Hearing Officer dismissed the complaint

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 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

Pursuant to section 7.06(a)(2) and (b) of the Office's Procedural Rules[3], in view of the fact that the factual and legal allegations in the complaints filed in these cases are interrelated and in order to expedite processing of the cases, the Board is ordering, on its own initiative, that Cases 07-AC-48 (DA, RP) and 09-AC-10 (DA, FM, RP) be joined. In doing so, the Board has determined that joining the cases will not adversely affect the interests of the parties.

---

[2] Appellant's representative was present at the hearing.

[3] §7.06 (Consolidation and Joinder of Cases), provides that joinder is appropriate when:

> "(a)(2)…one person has two or more claims pending and they are united for consideration. For example, where a single individual who has one appeal pending challenging a 30-day suspension and another appeal pending challenging a subsequent dismissal, joinder might be warranted.
> (b) The Board, the Office, or a Hearing Officer may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite processing of the cases and not adversely affect the interests of the parties, taking into account the confidentiality requirements of section 416 of the Act.

Katsouros I

A consistent lack of clarity in the Complaint submitted by counsel for Appellant in *Katsouros I* resulted in dismissal of Appellant's complaint and could have resulted in our affirming that result. Counsel repeatedly and most emphatically has asserted a series of claims of retaliation under Section 207 of the CAA, and a hostile work environment claim, all of which were properly dismissed. Less clearly asserted are the FMLA interference claim and ADA failure to accommodate claim.[4] For the reasons stated below, we are affirming dismissal of the FMLA interference claim and are remanding for further proceedings, the ADA failure to accommodate claim.

Appellant's FMLA Claims

Appellant's Complaint makes passing reference to an interference claim under the FMLA.[5]

Section 202(a)(1) of the CAA incorporates Section 105 of the FMLA, 29 U.S.C 2615, which prohibits an employer from interfering with, restraining, or denying the exercise of an employee's rights under the FMLA, see 29 U.S.C. § 2615(a), as well as prohibiting employers from discriminating or retaliating against an employee who has opposed a practice made unlawful by the FMLA or has participated in proceedings brought under the FMLA. These prohibitions also are reflected in Section 825.220 of the OOC's FMLA regulations.

While the distinction between FMLA interference and retaliation claims is significant[6], we find that Appellant's FMLA claim should be dismissed however it is characterized.

---

[4] Although several counts of the Complaint mention violations of the FMLA and ADA, all of the counts are pled generally as retaliation claims. While the Board takes a liberal view of notice pleadings (*Gormley v. Office of the United States Capitol Police Board*, Case 07-CP-35 (DA) August 7, 2008), to avoid confusion and the potential for prejudice, a claim of a violation of the CAA other than a violation of Section 207 should be pled separately in its own count rather than as part of a count alleging a violation of Section 207. See*, McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996). ("Prolix, confusing complaints . . . impose unfair burdens on litigants and judges.")

[5] Paragraph 1 of the Complaint alleges in part "This is an action based on the unlawful interference by the [AOC] with the exercise by [Appellant] of Family and Medical Leave Act rights…." Counts I –VI, Count XIII and Count XV of Appellant's Complaint refer to retaliation but also refer to the FMLA provisions in Section 202 of the CAA and Section 825.220 of the OOC's FMLA regulations.

[6] An employer cannot justify an FMLA interference action by establishing a legitimate business purpose for its decision. *Callison v. City of Philadelphia*, 430 F.3d 117,119-20 (3d Cir. 2005). Liability is not dependent upon discriminatory intent, but rather is based upon the act of interference itself. *Id*. at 120. In contrast, an FMLA retaliation claim is subject to the burden-shifting analysis under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Conoshenti v. Public Serv. Elec. & Gas Co*., 364 F.3d 135, 146-47 (3d Cir. 2004). Under this framework, the employer has an opportunity to rebut a prima facie case of retaliation by offering legitimate non-retaliatory reasons for the adverse action. *Richmond v. ONEOK, Inc*., 120 F.3d 205, 208-09 (10th Cir. 1997). Once the employer offers such reasons, the employee must present evidence that the employer's reasons are unworthy of belief in order to carry his or her ultimate burden of establishing intentional retaliation. See *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1263 (10th Cir. 1998) (explaining that an employee

In this respect, we agree with the Hearing Officer that the medical certifications predating the May 23, 2007 proposal of suspension cannot be construed as requests for leave under the FMLA. As the Hearing Officer held, there is nothing in the September 13, 2006, January 29, 2007, and February 16, 2007 certifications to suggest that Appellant was requesting leave. Rather, these certifications specifically stated that Appellant did not need leave and that his ability to perform his duties was not impaired by his illness or injuries. As such, submission of the forms cannot be construed as a request for leave for purposes of an interference claim, or as "opposition" to a failure to grant leave for purposes of a retaliation claim.

We also hold that, even if the September 13, 2006, January 29, 2007, and February 16, 2007 certifications could be construed as an exercise of rights under the FMLA in the sense that they may have put the AOC on notice of the *possibility* that Appellant would need FMLA leave in the future, his failure to abide by the AOC's leave procedures and his failure to provide timely notice of his need for leave defeat any interference or retaliation claim he otherwise might have had under the FMLA. *Bacon v. Hennepin County Med. Ctr*., 550 F.3d 711, 715 (8th Cir. 2008) (employee's failure to adhere to employer's call-in policy defeated her FMLA interference claim); *Bones v. Honeywell Int'l Inc*., 366 F.3d 869, 878 (10th Cir. 2004)(employee's history of tardiness and non-compliance with absence policy were legitimate reasons for employer's decision to terminate her); *Lewis v. Holsum of Fort Wayne, Inc*., 278 F.3d 706, 710 (7th Cir. 2002) (FMLA regulations provide that "[a]n employer may ... require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave")(quoting 29 C.F.R. § 825.302(d)); and see, *Cavin v. Honda of America Mfg., Inc.* 346 F.3d 713,722 (6th Cir. 2003)(employers cannot deny FMLA leave on grounds that an employee failed to comply with internal procedures-as long as the employee gives *timely* verbal or other notice)(emphasis added); *Walton v. Ford Motor Company*, 424 F.3d 481, 486 (6th Cir. 2006)(fact that employee merely alerted his supervisor and nurse that he had a medical appointment was not sufficient to comply with employer's internal policy for requesting and receiving FMLA sick leave and, therefore, he failed to provide employer with sufficient alternative notice to apprise it of his need to take leave for an FMLA-qualifying injury). For these reasons, the FMLA interference claims reflected in Counts I –VI, Count XIII and Count XV of Appellant's Complaint were properly dismissed.

Appellant's ADA Failure to Accommodate Claim

This claim is a close call. While several counts of the Complaint vaguely allege violations of the ADA, we find that Appellant's complaint does raise a failure to accommodate claim under the ADA.[7]

---

asserting retaliation claim has the ultimate burden to demonstrate that the challenged employment decision was the result of intentional retaliation).

[7] Counts VII-XII, Count XIV and Count XV of Appellant's Complaint are, at first blush, presented as retaliation claims. However, these counts also refer to the ADA provisions in Section 201(a)(3) of the CAA. Support can be found in the factual averments of the Complaint for the view that, in addition to alleging retaliation, Counts IX, X, and XI of the Complaint also encompass specific allegations that Appellee's refusal to postpone the December 13, 2007 hearing was a failure to accommodate in violation of

The medical certification dated August 2, 2007 and the certification dated November 28, 2007 indicate that the Appellant was not able to work or perform other regular daily activities because of his psychological condition. The August 2, 2007, certification stated that the Appellant needed to take off work from June 26, 2007 through July 31, 2007 and the November 28, 2007 certification stated that the Appellant could need three months away from work. While the certifications do not relate to or explain the April and May 2007 absences or any other conduct at issue in the suspension hearing, they bear on the Appellee's failure to grant Appellant's two requests to postpone the AOC hearing.

A leave of absence is a form of accommodation that may be required under the ADA. *Humphrey v. Memorial Hospitals Association*, 239 F.3d 1128, 1135 (9th Cir. 2001)(A leave of absence for medical treatment may be a reasonable accommodation under the ADA.); *Criado v. IBM Corporation*, 145 F.3d 437, 443 (1st Cir. 1998)(for purposes of the ADA, leave of absence and leave extensions are reasonable accommodations in some circumstances.) Also, the ADA may require an employer to provide a reasonable accommodation to allow a qualified individual with a disability to effectively participate in disciplinary proceedings. See *Mohamed v Marriott,* 905 F Supp 141 (S.D.N.Y. 1995)(request for interpreter at a disciplinary meeting was a request for accommodation under the ADA). We find support in the regulations and enforcement guidance of the Equal Employment Opportunity Commission (EEOC)[8] for the view espoused in *Mohamed.* Thus, the EEOC has defined "a reasonable accommodation to be, *inter alia*, a modification or adjustment that enables a disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities." *Holton v. Potter*, 2002 WL 31547076 (E.E.O.C.) (November 7, 2002)(The EEOC has held that for a severely hearing impaired employee who can sign, reasonable accommodation, at a minimum, requires providing an interpreter for safety talks, discussions on work procedures, policies or assignments, and for every disciplinary action so that the employee can understand what is occurring at any and every crucial time in his employment career.) As we view the AOC's disciplinary hearing process as a benefit and privilege of employment, we would follow the EEOC's framework in considering whether the denial of a reasonable request for meaningful participation in that process is a failure to accommodate under the ADA.

The August 2, 2007 and November 28, 2007 certifications are evidence that, when the AOC denied Appellant's requests for postponement of the December 13, 2007 hearing, it had notice that the Appellant had a serious medical condition and was "so disorganized in thought and verbal expression" that he could not work. Because the Hearing Officer addressed only the retaliation claims in the complaint, he did not determine whether Appellant was a qualified individual within the meaning of the ADA and, if so, whether Appellee violated the ADA by denying the Appellant's requests for postponement.

---

the ADA. Thus, although the actual claims do not start until paragraph 75 of the Complaint, the chronology recited in paragraphs 66 through 72 refer to Appellant's two requests for postponement of the December 13 hearing, the denial of those requests, and the holding of the hearing in his absence. As Appellant specifically states that all of the prior paragraphs of the Complaint are incorporated into each of the claims, we read the Complaint as encompassing a failure to accommodate claim.

[8] 29 C.F.R. § 1630.2(o)(iii); Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disability Act, No. 915.002, (March 1, 1999).

Therefore, we reverse the dismissal of the ADA failure to accommodate claim reflected in Counts IX, X, XI of Appellant's Complaint and remand only those counts to the Hearing Officer for further proceedings on whether Appellee's refusal to postpone the AOC hearing was a failure to accommodate in violation of the ADA.

Katsouros II

In *Katsouros II*, the Appellee argued in its Motion to Dismiss that the complaint should be dismissed because Appellant's request for counseling was untimely. As it had done in *Katsouros I* with respect to the 10 day suspension, Appellant claimed as discrete violations of the CAA, not only the termination, but some of the procedures leading up to it. The Hearing Officer viewed these steps as part of the single termination action and therefore characterized the case as involving "one claim of discrimination and one claim of reprisal." In dismissing the complaint, the Hearing Officer found without merit Appellant's claim that the 180 day limitation period started when he learned of the termination with his receipt of the final decision on June 13, 2008. Referencing the language of Section 402[9] of the CAA, the Hearing Officer held that "As the date of the act affirming and effecting the termination occurred on June 5, 2008, [Appellant] was required under Section 402(a) of the CAA to request counseling no later than December 2, 2008. He sought counseling on December 3, 2008."

We do not agree with the Hearing Officer that June 5 is the date on which the 180 day limitation period began to accrue. Rather, we hold that the 180 day limitations period began to run at the time the termination decision was made and *communicated* to the Appellant. *See Delaware State College v. Ricks,* 449 U.S. 250, 259 (1980) (with respect to a title VII claim, the limitations period began to run when the decision was made and the employee was notified of the decision); *See also*, *Davidson v. America Online, Inc.,* 337 F.3d 1179, 1187 (10th Cir.2003) (cause of action accrues under the Age Discrimination in Employment Act on the date the employee is notified of an adverse employment decision, which is generally when a particular event or decision is announced by the employer); *Wastak v. Lehigh Valley Health Network,* 342 F.3d 281, 286 (3d Cir.2003) (claim accrues in a federal cause of action upon awareness of the actual injury); *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380,1385 (3d Cir. 1994) ("the accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that he or she has been injured."); *Morse v. Univ. of Vermont,* 973 F.2d 122, 125 (2d Cir.1992) (claim accrues on the date the plaintiff receives notice of the alleged discriminatory action). Therefore, we reverse the dismissal of the complaint in *Katsouros II* and remand this case to the Hearing Officer for further proceedings along with *Katsouros I.*

ORDER

Pursuant to Section 406(e) of the Congressional Accountability Act and Section 8.01(d) of the Office's Procedural Rules, the Board joins Cases 07-AC-48 (DA, RP) and 09-AC-

[9] Section 402(a) of the CAA provides that: "A request for counseling shall be made not later than 180 days after the date of the alleged violation."

10 (DA, FM, RP), affirms the Hearing Officer's dismissal of Counts I-XV of the Complaint in Case 07-AC-48 (DA, RP) in so far as these counts allege retaliation under Section 207 of the Act, creation of a hostile work environment, and interference with FMLA rights. Further, the Board reverses the Hearing Officer's dismissal of Counts IX,X,XI of the Complaint in Case 07-AC-48 (DA, RP) in so far as these counts allege a failure to accommodate under the ADA, reverses the Hearing Officer's dismissal of the entire Complaint in Case 09-AC-10 (DA,FM,RP), and remands the matter for further proceedings consistent with this decision.

It is so ORDERED.

Issued, Washington, DC on January 21, 2011