Maria F. Pembrook v. The Library of Congress

LOC-PAB No. 2005-03

Date of Decision: March 27, 2007

Cite as: Pembrook v. LOC, LOC-PAB No. 2005-03 (3/27/07)

Before: Michael W. Doheny, Chair; Mary E. Leary, Member, Steven H. Svartz, Member; Paul M. Coran, Vice-Chair (dissenting)

Headnotes:

Constructive Discharge

Damages

Disability Discrimination

Pretext for discrimination

Prima facie case

Protected EEO Activity

Standard of Proof

Standard of Review

Maria F. Pembrook, Complainant, *pro se*.[1]

Julia K. Douds, Assistant General Counsel, and Jessie James, Jr., Associate General Counsel, for Defendant, The Library of Congress.

DECISION ON CROSS APPEALS FROM THE INITIAL DECISION OF THE ADMINISTRATIVE JUDGE

This matter is before the Personnel Appeals Board (PAB or the Board) on timely cross appeals from the October 26, 2006 Initial Decision (ID) of the Administrative Judge (AJ). In the Initial Decision, the AJ found that the Library of Congress (Library or LOC) discriminated against Complainant Maria F. Pembrook on the basis of disability and retaliated against her for engaging in protected activity under the Americans with

[1] Complainant was represented during the hearing by Stanley Eisenstein, a non-attorney.

Disabilities Act (ADA),[2] 42 U.S.C. §12101 *et seq.*, when it failed to provide a permanent position for her from November 1998 to June 2000. Complainant was awarded non-pecuniary damages in the amount of $20,000. The AJ also concluded that the Library did not discriminate against Complainant on the basis of race, color, sex or disability with respect to an incident of absence without leave (AWOL) and a related memorandum. The AJ further held that Complainant's retirement on disability was voluntary and, therefore, she was not constructively discharged.

The evidentiary hearing before the Administrative Judge took place on February 12, 16, and 22, 2006 and was continued to hear the testimony of additional witnesses on March 23 and April 19, 2006.

For the reasons set forth below, the Board reverses the Initial Decision in part and affirms in part.

Summary of Arguments on Appeal

In its brief, the Library of Congress presents four arguments:

1) LOC maintains that Complainant was not a qualified individual with a disability who could perform the essential functions of the position with or without a reasonable accommodation. In support, the Library argues that the AJ relied on language contained in a 1998 arbitration decision rather than basing his decision on the evidence presented at the hearing. Library Brief on Appeal (L.Brief) at 3-4. LOC takes the position that the Arbitrator never made a finding that Complainant was a qualified person with a disability, as the issue was not before him. Finally, the Library contends that the record is replete with evidence that shows Complainant was unable to perform the essential functions of her position post-reinstatement due to prolonged, frequent, and unpredictable absences. *Id.* at 6-7.

2) The Library takes the position that Complainant did not engage in protected EEO activity in the course of her grievance proceeding. L.Brief at 8-10. The Library notes that Complainant filed a grievance pursuant to a collective bargaining agreement that resulted in an arbitration decision reinstating her to LOC employment and that the AJ did not find that this constituted an EEO proceeding. The AJ did, however, determine that when Complainant raised her medical conditions as a defense to her removal during the arbitration proceeding, that was equivalent to a request for reasonable accommodation. The Library contends that the ancillary mention of a disabling condition during an arbitration does not constitute statutorily protected EEO activity.

[2] The Library acknowledges in its Post-hearing Brief (at 30) that there is a split in authority as to whether the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.*, or the ADA governs LOC employment. In noting this split on the question, the Library also points out that the standards under both statutes are the same (citing *Lester v. Natsios*, 290 F. Supp. 2d 11, 23 n.2 (D.D.C. 2003); *Scarborough v. Natsios*, 190 F. Supp. 2d 5, 19 n.10 (D.D.C. 2002)). For ease of reference, we will use the ADA terminology.

3) LOC contends that it presented legitimate, nondiscriminatory reasons for its business decisions relating to Complainant's assignments. L.Brief at 10-13. In support, the Library points to the evidence of genuine and repeated efforts made to secure an appropriate permanent placement that met the restrictions imposed by the Arbitrator's reinstatement decision. LOC also argues that it more than adequately demonstrated that Complainant's repeated patterns of tardiness and absences were the reasons behind the multiple details—not discrimination or retaliation.

4) The Library argues that the non-pecuniary award to Complainant was arbitrary and capricious. L.Brief at 13-18. The Library asserts that the record is devoid of any evidence of the effect the alleged discriminatory actions had on Complainant's health or medical conditions. In addition, LOC argues that the award is inconsistent with amounts awarded in similar cases, citing both to PAB and Equal Employment Opportunity Commission (EEOC) precedent.

On appeal, Complainant presents four main arguments:

1) Complainant maintains that her retirement on disability was involuntary. Complainant's Brief on Appeal (12/28/06) (C.Brief) at 2. In support, Complainant points to her testimony in which she stated on several occasions that she did not want to retire and, in fact, wanted to continue working until she accumulated 25 years of service.[3] In addition, Complainant argues that union officials, specifically the President and Vice President of the Congressional Research Employees Association (CREA), told her that she would be fired if she did not retire on disability.

2) Complainant contends that she was constructively discharged due to a hostile work environment and that her working conditions were "intolerable." C.Brief at 3-7. As examples, she claims that she was treated differently from other similarly situated employees with respect to equipment and training opportunities; that she was never placed in a permanent position subsequent to her reinstatement; and that she was not given work commensurate with her education and experience but instead was assigned "drudge" work.

3) Complainant argues that Congressional Research Service (CRS) management and her supervisors were well aware of her disabilities and nevertheless failed to accommodate those disabilities. Despite this knowledge, various CRS supervisors at times refused to allow her to work evenings or weekends to make up time when she was unable to work during her regular work day; failed to allow her to adjust her schedule so that her arrival and departure times would be flexible; and did not allow her to avail herself of the LOC Leave Donation Program.

4) Complainant states that there was evidence connecting CRS management with the actions of the Capitol Police officers and that they discriminated and retaliated against her. C.Brief at 5-7. Her brief on appeal recounts that she reported instances of

[3] At the time of her disability retirement, Complainant had approximately 19 years of Federal service, 12 of which were with LOC.

Capitol Police harassment to the Library's Office of General Counsel, and notes that she testified about being threatened with arrest by a Capitol Police officer who was a friend of Robin Lancaster, a former supervisor whom the AJ characterized as her "antagonist." Complainant also contends that, even after the bar against her being present at LOC was lifted, the Capitol Police taunted her by calling her crazy.

Factual Background

The facts of this case, set forth by the Administrative Judge in greater detail in the Initial Decision, are summarized below:

Complainant Maria F. Pembrook, a black female who holds a bachelor's degree and a paralegal certificate, began her employment at the Library of Congress in July 1988 as a GS-5 editorial assistant in the American Law Division (ALD) of the Congressional Research Service. Hearing Transcript (TR) 41-47, 67. In March 1989, her title was changed to production assistant. TR 47. For her first eight or nine years at LOC, Complainant's performance appraisals were consistently satisfactory and she maintained a reserve of leave. TR 58.

Within a few years of employment in ALD, Complainant began having difficulties with her immediate supervisor, Robin Lancaster, a black female. TR 60-62. As a result, in January 1993 Complainant was detailed to the Government Division for 30 days. TR 69-70. At the end of the detail, she objected to returning to work for Ms. Lancaster and sought the assistance of the dispute resolution office. She was placed in the Courts Section of ALD, under the supervision of Tom Durbin, where she remained until after Mr. Durbin's death in October 1996. TR 70-74. She had problems with tardiness while working in the Courts Section, generally arriving at work at 10:00 or 10:30 a.m. TR 211.

In May 1997, Richard C. Ehlke, ALD Chief and Robin Lancaster's supervisor, assigned Complainant to return to work under Ms. Lancaster's supervision as a GS-8 senior production assistant; she unsuccessfully sought assistance from the dispute resolution office to stop the assignment. TR 70-74. Complainant claimed that Ms. Lancaster was aware that she suffered from sarcoidosis and depression and was attending the Employee Assistance Program while she was working under Ms. Lancaster's supervision. TR 353-54. Complainant also testified about several instances of Ms. Lancaster's alleged mistreatment of her upon her return.[4] ID at 8-9.

[4] Complainant provided examples of actions by Ms. Lancaster that she believed constituted mistreatment. The first was when Ms. Lancaster rebuked her for not informing her rather than a staff person of Complainant's need for emergency leave. She also claimed that Ms. Lancaster deliberately held a meeting in her absence; held onto her leave request longer than other employees' requests; and withdrew her from a computer class. ID at 8-9. Ms. Lancaster testified that she did not recall those incidents. ID at 9.

On September 25, 1997, Complainant reported to work at 3:35 p.m. Report of Investigation (ROI)[5] Ex. 15; TR 663-65. When asked by Ms. Lancaster why she had not called to report that she would be late, Ms. Pembrook said that she had made such a call. She refused, however, to name the person with whom she had spoken, telling Ms. Lancaster that it was none of her business. TR 697. Ms. Lancaster noted that Complainant signed for sick leave on her time and attendance form and recorded her arrival time as one hour earlier than she had arrived. TR 664-65.

On October 2, 1997, Complainant received a memorandum captioned "Failure to Observe Time & Attendance Procedures" from Ms. Lancaster informing her that she was being charged with AWOL for 5.3 hours on September 25, 1997. TR 101, 104. Upon reading the memorandum, Complainant made repeated comments to a co-worker to the effect that she was going to kill Ms. Lancaster. Arbitration Opinion & Award at 4 (Library Exhibit (L.Ex.) 1; Complainant Exhibit (C.Ex.) 3).

The day after receiving the AWOL memorandum, Complainant contacted the Library's Equal Employment Opportunity Complaints Office (EEOCO). TR 103-04. She engaged in informal counseling for nearly two years and filed a formal Complaint on September 10, 1999. ROI Exs. 1, 2.

As a result of the October 2, 1997 threatening remarks, on October 8, 1997 Complainant was detailed to the Bill Digest section of CRS, out of proximity to Ms. Lancaster. L.Ex. 1 at 6. She remained there until her removal from LOC employment on April 24, 1998, a disciplinary action which was taken because of the alleged threats she had made about Ms. Lancaster. *Id.*

Subsequent to Complainant's removal, in May 1998 Mr. Ehlke—through CRS Director Daniel Mulhollan—sent a request to LOC's Director of Security, Kenneth Lopez, asking that Complainant's access to the Library of Congress be limited because of the threats she had made against Ms. Lancaster. L.Ex. 16 at 31. Complainant received a follow-up letter in which she was notified that she was barred from the use of the "Library buildings and its collections" for six months. L.Ex. 16 at 21-22; TR 403 (Joint Stipulation). This information was transmitted to the police commander, as well as the police force. TR 417-18.

Complainant appealed her removal. On October 5, 1998, the Arbitrator issued an Opinion and Award overturning the removal decision. L.Ex. 1; C.Ex. 3. This followed an evidentiary hearing at which it was determined that, although Complainant had made a threatening remark, she did not pose a serious threat to Ms. Lancaster and that medical testimony established that she was not capable of violence. The Arbitrator, guided by analogous prior threat cases at the Library, reduced the penalty to a written reprimand. L.Ex. 1 at 21. His order of reinstatement included the limitations that Complainant neither work for, nor with, Ms. Lancaster and that she not be supervised by

[5] The Report of Investigation is found at Library Exhibit (L.Ex.) 3 and Complainant Exhibit (C.Ex.) 2. For ease of reference, it will be referred to as ROI, followed by the internal exhibit number for the ROI.

Ms. Lancaster. *Id.* at 23. Based on her reinstatement, Complainant's six-month bar on access to the Library was lifted. L.Ex. 16 at 3. In testimony, ALD Chief Richard Ehlke noted that implementation of the reinstatement order was challenging due to the bar against Complainant working near or for Ms. Lancaster and a collective bargaining agreement limiting the duration of details. TR V[6] 55-56.

Bessie Alkisswani, the head of the CRS Administrative Office, was in charge of securing an appropriate placement for Ms. Pembrook upon her reinstatement. TR 453. Although Ms. Alkisswani testified that her goal was to find a permanent placement for Complainant, performance concerns necessitated the use of details. TR 474-75. Ms. Alkisswani stated that she was respectful of managers' reluctance to take on an employee with tardiness and performance issues. TR 477. Ms. Alkisswani also worked closely with the union during this period and recalled talk of disability retirement being pursued for Complainant. TR 474-75, 491.

In November 1998, Complainant was reinstated and detailed for 60 days to the Senate Research Center (SRC) of the Congressional Reference Division (CRD). TR 117, 565-66. By December 10, 1998—just over a month into the detail—Complainant had arrived late on 16 occasions and had used approximately 30 hours of emergency leave. TR 583; L.Ex. 4. She was counseled about her tardiness by her supervisor, Vanessa Cieslak, and advised in writing that such behavior was disruptive to the work of the unit. L.Ex. 4.

On January 1, 1999, Complainant was given a new, two week assignment, the details of which are not clear from the record. *See* ID at 21-22.

Beginning January 17, 1999, Complainant was detailed for two consecutive 90-day periods to the Government and Finance Division (G&F) under the supervision of Lillie Thompson who, in turn, reported to Michael Koempel, Assistant Director.[7] ROI Exs. 9, 10; TR 118, 145, 224-26. During the course of the details, she repeatedly arrived late for work, left or disappeared for two hours or more, and took extended breaks. L.Ex. 6; TR 242, 250, 327, 335-36. Performance issues were also observed early in the detail; Mr. Koempel testified that Complainant was not following procedures. TR 240-42, 268.

On February 9, 1999, Complainant met with her supervisors, Ms. Thompson and Mr. Koempel, and John Contrubis, a CREA official representing Complainant, to review procedures and discuss the repeated tardiness. L.Ex. 6; *see* TR 241. Both

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[6] The evidentiary hearing took place on five days reflected in five volumes of hearing transcript. The first four volumes are paginated consecutively. The transcript for day 5, TR V, begins anew with page 1 and thus is specified where appropriate.

[7] On April 6, 1999, CREA and the LOC executed an agreement waiving the limit on the duration of Complainant's detail to allow time "for reviewing her ADA related needs and exploring a more permanent accommodation for her." L.Ex. 5; ID at 18.

Complainant and the union representative explained that she was ill and awaiting documentation from her physician. TR 153. During the same month, Mr. Contrubis suggested to Complainant that she apply for disability retirement but Ms. Pembrook indicated that she wished to continue working. TR 179.

On March 16, 1999, a second meeting was held to discuss the importance of following procedures and work hours. *See* L.Ex. 6 at 6. At the meeting, Complainant was advised that she needed to provide documentation to the Health Services Office and obtain a decision from that Office about whether she had a medical condition that required an accommodation as to her work hours. She was also advised to schedule medical appointments in advance and on her flex days, if possible. *See id.*

At the same time, Sandra Charles, M.D., a physician with the Health Services Office, sent Assistant Director Koempel a memorandum saying that, based on a review of medical documentation, Complainant was determined to be a person with a disability under the ADA and that she was requesting "some flexibility in work schedule and deadlines, as she deals with time management and organization issues." L.Ex. 6 at 7; TR 154.

On May 26, 1999, Complainant, her supervisors, and John Contrubis—her union representative—met for a third time to discuss attendance issues and her schedule. At that meeting, Complainant was told that as a "temporary accommodation," Mr. Koempel encouraged her to arrive by 10:30 a.m. and "to continue to work toward arriving on time," but that she would have to continue to use leave to cover her late arrivals. L.Ex. 6 at 8; *see* TR 248.

On June 16, 1999, Mr. Koempel provided a memorandum to Ms. Alkisswani detailing unsatisfactory timeliness in the performance of Complainant's duties, recurring tardiness, unannounced disappearances and generally slow productivity. He also noted that Complainant required constant supervision, consumed a disproportionate amount of the supervisor's time, and contributed little to the Division. L.Ex. 6. At the hearing, Mr. Koempel testified that Complainant was not disciplined for late arrivals or for absences from her work station. TR 276, 278. Ms. Thompson presented a somewhat more positive image of Complainant's time in the unit but noted that there was a problem with the fact that Complainant "couldn't get to work." TR 327-29, 335-37, 345. She also noted that Complainant required supervision and that she herself was unable to stay beyond normal business hours to supervise and thus allow Complainant to make up her time. TR 336. Mr. Koempel also testified that Complainant furnished conflicting information about her health and noted that Dr. Charles had provided little information beyond advising that Complainant needed flexibility. TR 247-48.

On July 16, 1999, Complainant began a 90-day detail to the Domestic Social Policy Division (DSP) under the supervision of Flora Adams who, in turn, reported to Sharon House, the unit Chief. TR 161; L.Ex. 7. On this detail, Complainant's duties included removing staples, affixing box labels, reordering shelf material, making labels, and assisting in weeding and organizing collections in preparation for an office move. TR

162-64. At the same time, Ms. Alkisswani sent a memorandum to Dr. Charles seeking guidance on the nature of Complainant's medical condition and attempting to ascertain what obligation there was to accommodate her condition. L.Ex. 13. Ms. Alkisswani also added that Complainant was seeking a disability retirement. *Id*.

A month later, Dr. Charles responded to Ms. Alkisswani's memorandum, noting that she thought the request for information about Complainant's medical condition to be inappropriate and a breach of confidentiality. L.Ex. 14. The doctor also reiterated that in her opinion, Complainant was a qualified person with a disability as defined by the Americans with Disabilities Act and that she was requesting flexible arrival times, work schedules, and deadlines, as well as the ability to make up time on weekends and evenings. L.Ex. 14 at 1; *see* ID at 30-31.[8] In her reply to Dr. Charles, Ms. Alkisswani clarified that she was seeking advice and guidance with respect to an accommodation for Complainant. L.Ex. 15.

In September 1999, Complainant supplied a letter from her physician requesting a more sedentary assignment. C.Ex. 12; *see* TR 165.

On October 14, 1999, Complainant was given a new detail for 90 days to the Bill Digest Section under the supervision of Juanita Campbell. TR 176, 590; ROI Ex. 9. Her responsibilities included preparing charts, changing document text formats, filing, collating bills, writing short titles, data entry of short titles, and proofreading. ROI Exs. 9, 10; TR 176, 607-08. Once Complainant's tardiness became an issue, Ms. Campbell began calling her to awaken her. TR 603. She also allowed Ms. Pembrook to make up time by staying later in the evenings. TR 603, 606-07. Ms. Campbell did not appear to have serious issues with Complainant's placement under her supervision. The detail was extended an additional 180 days to allow Complainant to process her disability retirement. TR 118, 450, 591. Mr. Contrubis, the CREA Vice President who had been representing Complainant, testified that he had urged her to pursue a disability retirement and that he probably told her that she would likely be fired if she did not. TR 446.

Complainant retired on disability in June 2000. TR 116.

ANALYSIS

The PAB's regulations provide that, on appeal, the full Board may review the record *de novo*. 4 C.F.R. §28.87(g). The Board may substitute its own findings of fact and conclusions of law, but generally "will defer to demeanor-based credibility determinations." *Id.* In making its decision the Board will also consider whether: 1) new and material evidence is available; or 2) the initial decision is based on erroneous interpretation of statute or regulation; or 3) the initial decision is arbitrary, capricious, or

[8] In testimony, however, Dr. Charles stated that it is not her role to determine whether an employee with a disability is qualified, with or without a reasonable accommodation, to perform the essential functions of his or her position. TR 649-56.

an abuse of discretion or otherwise not consistent with law; or 4) the initial decision is not made consistent with required procedures and results in harmful error. *Id.*

A. Discrimination

Legal Standard

The law prohibiting discrimination based on race, color, religion, sex, or national origin, and reprisal for exercising such rights is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (Title VII). The law prohibiting discrimination based on disability is the Americans with Disabilities Act,[9] 42 U.S.C. §12101 *et seq*. Like Title VII, this statute also contains a provision specifically prohibiting retaliation for exercising rights protected by the ADA. 42 U.S.C. §12203(a). Complaints of disability discrimination alleging disparate treatment are reviewed using the analytical model developed under Title VII case law. *Taylor v. Rice,* 451 F.3d 898, 911 (D.C. Cir. 2006). Federal sector equal employment opportunity regulations are set out in 29 C.F.R. Part 1614.

Generally, the adjudication of a complaint of discrimination alleging disparate treatment under Title VII or the ADA follows a three-step evidentiary analysis. First, the burden is on the complainant to establish a *prima facie* case of discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This means that the complainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253-54 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Second, once a *prima facie* case is established, the employer must articulate a legitimate, nondiscriminatory reason for its action. *Board of Tr. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 & n.2 (1978); *Furnco*, 438 U.S. at 578. Finally, the complainant must prove that management's proffered reason is mere pretext. *See Furnco,* 438 U.S. at 578; *Burdine*, 450 U.S. at 256.

To establish a *prima facie* case of disability discrimination under the disparate treatment theory, a complainant must generally show: 1) the existence of a disability; 2) that he or she is a "qualified individual with a disability;" 3) an adverse personnel action; 4) under circumstances giving rise to an inference of disability discrimination (*e.g.*, treated differently from similarly situated employees who are not disabled or who have different disabilities). *See Lawson v. CSX Transp.,* 245 F.3d 916, 922, 931 (7th Cir. 2001); *Swanks v. WMATA*, 179 F.3d 929, 934 (D.C. Cir.), *cert. denied*, 528 U.S. 1061 (1999); *Greathouse v. Department of Army,* EEOC App. No. 01984880 at 4-5 (May 2, 2001), 2001 EEOPUB LEXIS 3065. In cases where there are no similarly situated employees, a complainant may be able to establish a *prima facie* case by showing: 1) membership in a protected class; 2) the occurrence of an adverse employment action; and 3) some evidence of a causal relationship between membership in the protected

[9] As noted *supra* at n.2, the Rehabilitation Act and the ADA impose the same standards for employment discrimination based on disability and cases interpreting either are applicable. *See* 29 U.S.C. §794(d); *Carroll v. England*, 321 F. Supp. 2d 58, 69 n.7 (D.D.C. 2004).

class and the adverse employment action. *Ward v. U.S. Postal Service*, EEOC Req. No. 05920219 at 11 (June 11, 1992), 1992 WL 1374651 (EEOC) (*citing Potter v. Goodwill Indus. of Cleveland*, 518 F.2d 864 (6th Cir. 1975) and *Leftwich v. United States Steel Corp.*, 470 F.Supp. 758 (W.D. Pa. 1979)); *Lee v. Secretary of Defense*, EEOC App. No. 0120063767 at 12 (Feb. 9, 2007), 2007 EEOPUB Lexis 346. Thus, in the absence of a comparator, the complainant may be able to establish a case by pointing to some other evidence that permits an inference of discrimination if unrebutted. *Carson v. Bethlehem Steel,* 82 F.3d 157, 159 (7th Cir. 1996); *Gower v. Postmaster General*, EEOC Req. No. 05950089 at 4 (Feb. 1, 1996), 1996 WL 67226 (EEOC). This requires that "the circumstances surrounding the adverse action indicate that it is more likely than not that [the complainant's] disability was the reason for" the action. *Lawson*, 245 F.3d at 922.

A necessary component of a *prima facie* case of disability discrimination is a showing that the complainant is a "qualified individual with a disability" within the meaning of the Act and EEOC's implementing regulations. *Burton v. Department of Agric.*, EEOC App. No. 01932449 at 22 (Oct. 28, 1994), 1994 EEOPUB Lexis 1812. The term "qualified individual with a disability" means "an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the position." 29 C.F.R. §1630.2(m); *see* 29 C.F.R. §1614.203(b).

If the complainant establishes a *prima facie* case, then management has the burden of articulating some legitimate, nondiscriminatory reason for its actions. *Burdine*, 450 U.S. at 252-53. The evidence presented by management need not establish its actual motivation, but must be sufficient to raise a genuine issue of material fact as to whether management discriminated against the complainant. If management meets this burden of production, the presumption of discrimination raised by the *prima facie* case is rebutted and drops from the case altogether. *Id.* at 255.

In order to prevail, the complainant must show by a preponderance of the evidence that management's stated reason is a pretext for discrimination. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 523-24 (1993); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53 (1989); *Burdine,* 450 U.S. at 256; *McDonnell Douglas,* 411 U.S. at 802-04. The complainant may show pretext by evidence that a discriminatory reason more likely than not motivated management, that management's articulated reasons are unworthy of belief, that management has a policy or practice disfavoring the complainant's protected class, that management has discriminated against the complainant in the past, or that management has traditionally reacted improperly to legitimate civil rights activities. *See McDonnell Douglas,* 411 U.S. at 804-05.

The AJ's Findings Regarding Discrimination

In his Initial Decision, the AJ found the record devoid of evidence establishing that Ms. Lancaster operated out of animus against Complainant because of race, sex, or

disability. ID at 38. With respect to the charge of AWOL for late arrival on September 25, 1997 and issuance of the related memorandum of October 2, 1997, the AJ stated that "[t]he clear weight of the evidence establishes that the Library imposed those actions for legitimate and nondiscriminatory reasons." ID at 42. He further found that Complainant had presented insufficient evidence to establish that LOC's explanation was pretextual or otherwise unworthy of credence. Accordingly, he found Complainant had failed to establish that the Library discriminated against her in charging her 5.3 hours of AWOL and issuing her a consequent memorandum. ID at 43.

Complainant challenges the ID's conclusion that the AWOL incident and related memorandum were not discriminatory.[10] The Board, however, concurs with the AJ on this issue. The finding of no discrimination with respect to the AWOL matters is therefore affirmed.

The AJ found, on the basis of medical evidence presented at the arbitration proceeding, that Complainant was "a person with mental impairments substantially limiting one or more of her major life activities." ID at 40. As a consequence of that testimony and a January 1998 communication from Complainant's physician to Dr. Sandra Charles of the Library's Health Services Office requesting certain accommodations for Complainant, the AJ found that management officials were aware of Complainant's disability. *Id*. Finally, he concluded that "[b]ased upon the Arbitration Opinion, at the time of the reinstatement Complainant was a qualified person with a disability; underlying that Award is the presumption that she could perform her job duties, with or without accommodation to her disability." *Id*. The AJ stated that the Library had subjected Complainant to adverse employment action by reassigning her from a permanent position to a series of temporary assignments from November 1998 until her retirement in June 2000, and thus, the Library imposed materially adverse consequences affecting the terms, conditions or privileges of Complainant's employment. ID at 47-48.

The AJ found no substantial evidence had been presented to establish that LOC was motivated by Complainant's race, color, or sex in her assignments following the 1998 reinstatement. ID at 48. However, he concluded that Complainant had made out a *prima facie* showing of disability discrimination manifested by LOC's failure to reassign her to a permanent position, and that the Library had not rebutted this showing. ID at 49.

Complainant's Status as a "Qualified Individual with a Disability"

The Library argues that the AJ erred in two significant respects in his analysis of Complainant's status as a qualified individual with a disability and thus erred in finding that Complainant had satisfied her burden of showing *prima facie* evidence of disability discrimination. L.Brief at 3-4. LOC argues that the AJ reached his conclusion that Complainant was a qualified individual with a disability by application of the doctrine of

[10] This challenge is implicit in Complainant's request to be paid for the 5 hours AWOL and to have her official record corrected to reflect no AWOL. *See* C.Brief at 15-16.

res judicata—i.e., by relying on the Arbitrator's Opinion. In the Library's view, the Arbitrator in fact made no findings as to whether Complainant was a qualified individual under the ADA because it was not an issue presented to the Arbitrator. *Id.*

Moreover, the Library contends, the question presented in this case goes to whether Complainant was qualified to perform, with or without accommodation, during the period of assignments to details and that her status prior to her removal and subsequent reinstatement was not relevant. *Id.* at 4. LOC argues that the AJ made no independent analysis as to whether Complainant was qualified during that period and, had he done so, he would have necessarily found that she was not qualified based on ample evidence that she could not perform essential functions of her job because prolonged, frequent and unpredictable absences prevented her from timely completing assignments. *Id.* at 4-7.

On review of the record, the Board finds that Complainant failed to make a *prima facie* showing of discrimination on the basis of disability. The AJ appears to base his determination on the Arbitrator's decision and Complainant's employment status prior to the termination of her employment in 1997. For example, in his ultimate finding on whether Complainant met the definition of "qualified individual," the AJ stated: "[b]ased upon the Arbitration Opinion, at the time of the reinstatement Complainant was a qualified person with a disability."[11] ID at 40. In our view, the AJ should have made a determination based on the record of proceedings at the PAB as to whether Complainant was qualified during the period after reinstatement.

Additionally, the AJ determined that Complainant did not have attendance problems prior to her removal:

> Management has not provided a plausible explanation why it did not permanently reassign Complainant. Moreover, it has presented no evidence that permanent positions were unavailable for which Complainant was qualified and eligible for reassignment. The Library's arguments are unavailing, in this regard, that the Complainant was not a qualified person with a disability because her attendance was so faulty. **LOC presented no evidence that Complainant's attendance was such prior to her reinstatement. While she admitted that time management issues arose in 1997, Complainant did not experience grave attendance problems until after her reinstatement**, when she should have been placed swiftly in a permanently assigned position.

ID at 44 (emphasis added). However, we find that Complainant did begin to have problems with her attendance as far back as when she worked for Mr. Durbin; the record reflects that she was not able to arrive at work earlier than 10 or 10:30 a.m. while

[11] The Board finds that the Arbitrator's decision carries no weight on the issue of discrimination under the ADA as it was not an issue before the Arbitrator, the Arbitrator made no findings pursuant to the ADA and his analysis with respect to disability is inapplicable to the elements necessary for a *prima facie* showing of discrimination.

under his supervision. TR 211. It also should be noted that the scope of the evidentiary hearing was limited, except as to background, to the events surrounding the AWOL incident in September 1997 forward. *See* Order of January 11, 2006.

We agree with the Library that the determination of Complainant's status as a qualified individual with a disability should have been based on the reassignment period. In making this determination, the issue of whether attendance is an essential function of an employee's position should be considered on a case by case basis, as this Board did in *Gaston v. GAO*, (No. 99-02, Jul. 18, 2003). *See Gaston v. GAO*, at 16-18. In that case, although the employee had attendance problems as a result of her depression, the Board held that she was a qualified individual with a disability. The difference in that case was that the employee was able to show that regardless of her inability to report for duty during the Agency's three-hour starting window, she had been able to perform her work in a satisfactory manner when she was given an informal accommodation of shifting her work day beyond the Agency's core hours. *Id.* at 17.

Complainant in this case was not qualified because she was not able to perform the duties of her position even with informal accommodations, *i.e.,* adjustments to her schedule.[12] The record is replete with evidence that despite the Library's efforts to accommodate Complainant's mental disabilities, she had experienced "grave attendance problems" beginning immediately after her reinstatement and continuing until taking disability retirement in 2000. ID at 44; *see, e.g.,* TR 325, 583, 603, 606-07; L.Exs. 4, 6; ID at 20-21, 24-25, 32. For example, the AJ points out that the record shows that during the first detail immediately after reinstatement, Complainant was late 16 times and used approximately 30 hours of leave to cover her lateness in just over one month. ID at 21; *see* L.Ex. 4.

Complainant continued to demonstrate difficulties during her next assignment, involving two consecutive 90-day details to the Government and Finance Division where she served under the supervision of Lillie Thompson who reported to Michael Koempel. During this assignment, Complainant was detailed to G&F as a production assistant—her position of record—and worked with eight other production assistants, all of whom were also GS-8s. The AJ found that during the G&F details, Complainant repeatedly arrived late for work, and left or disappeared without notice during the day for two hours or more. ID at 24. He cited to testimony from Mr. Koempel that in addition to tardiness, Complainant "would wander off during the day. She would take extended breaks. She would not tell people when she was leaving the office, she would say she was going for a certain amount of time and return much later than that." *Id.*; TR 242.

In a five-page memorandum to Ms. Alkisswani near the end of the details, Mr. Koempel describes the difficulties encountered during Complainant's assignment to G&F. He

[12] The only accommodation that was suggested was that made by Dr. Charles. She stated in a memorandum to Ms. Alkisswani that Complainant was requesting "flexibility with work-schedule and deadlines. With regard to her schedule, she is specifically asking for a flexible arrival time, have her work day start when she arrives and be allowed to stay as late as possible. She is also requesting to be able to make up time on weekends or by staying late." L.Ex. 14 at 1.

states that she regularly arrived at work so late that it cut into her rotation within the office. He states that Complainant had shown that she could perform the work, albeit slowly, but that her attendance and scheduling of conflicting activities rendered her performance otherwise unsatisfactory. L.Ex. 6 at 1-2. He reiterates that while the quality of her work and work procedures was satisfactory, it took many more hours than necessary to complete her assignments. He relates that he was still waiting, after two weeks, for an assignment on which he had given her a deadline of three days. By comparison, he notes, his best production worker could have completed the work in less than one day and his average production worker could have completed the work in under two days. *Id.* at 2. He summarizes that the "time she has taken to return a final product is completely unsatisfactory." *Id.* He also testified that Complainant's performance was a problem because she failed to follow proper procedures for distributing products. TR 240.

Mr. Koempel's memorandum describes difficulties in obtaining information on Complainant's disabling condition and limitations, but also describes the accommodations that he provided, which included permitting her to arrive as late as 10:30 a.m. and work until 6:00 p.m. (although, he states, he was not strict in enforcing the 6:00 p.m. departure pending guidance on accommodation). L.Ex. 6 at 3-4. An attachment to the memorandum showing Complainant's arrival times between February 9, 1999 and June 16, 1999 indicates that Mr. Koempel was not strict about enforcing arrival times either, as the record reflects that Complainant usually did not arrive before 11:00 or 11:30 a.m. and often later and usually left at 7:00 p.m. *Id.* at 10-12. Mr. Koempel's memorandum also states that Complainant needed constant supervision. *Id.* at 5. Ms. Thompson agreed that Complainant needed supervision and testified that she herself was not available to provide that after 6:00 p.m.[13] TR 336. The Board finds that the AJ should have made a determination as to whether Complainant was qualified within the meaning of the ADA at the time of the alleged discriminatory personnel actions. The Board also finds that the record contains a significant amount of evidence indicating that Complainant did not meet the requirement of showing that she was a qualified individual who could perform the essential elements of her position with or without accommodation. *See Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994) ("an essential function of any government job is an ability to appear for work (whether in the workplace or, in the unusual case, at home) and to complete

[13] Ms. Thompson disagreed with several of Mr. Koempel's concerns regarding Complainant's performance. In particular, she stated that: Complainant followed proper procedures in product distribution and Communications Center work (TR 327); Complainant was not alone in taking longer lunches or longer breaks (TR 329); Complainant did not negatively affect unit morale (TR 328); and Complainant's work was satisfactory (TR 325-26). However, the AJ credited Mr. Koempel's testimony regarding Complainant's performance and we give deference to the AJ's determination of Mr. Koempel's credibility. ID at 23-27, 29; *see* 4 C.F.R. §28.87(g).

assigned tasks within a reasonable period of time").[14] Accordingly, we reverse the Initial Decision's finding that Complainant was a qualified individual with a disability.

Evidence as to Discriminatory Motive

Even assuming Complainant was a qualified individual with a disability, she failed in meeting her burden of showing *prima facie* evidence of disability discrimination because she provided no evidence of either disparate treatment or animus based on disability from which an inference could be drawn that the alleged adverse employment action was discriminatory because of her disability. She presented no comparative evidence of similarly situated employees. Moreover, other evidence, such as animosity toward Complainant because of her disability, is also lacking. In fact, the AJ noted that during the period between Complainant's reinstatement and her retirement, CRS "management acted compassionately towards Complainant and provided her with many accommodations. . . ." ID at 51.

We agree with the Administrative Judge that LOC acted compassionately toward Complainant. There was testimony about lenient enforcement of starting time (TR 248), some allowance for making up missed time when supervision was available (TR 336, 606-07), and even testimony about one supervisor calling Complainant to make sure she was awake in the morning (TR 603). Throughout this time, the record shows no evidence of any disciplinary action being taken for leave abuse or performance concerns. Thus, even if Complainant had established that she was a qualified individual with a disability who, with or without accommodation, could perform the essential elements of her duties, she nevertheless failed to show any incidents from which discriminatory animus could be inferred. The AJ bases his conclusion that the Library discriminated against Complainant on the pattern of repeated reassignments—that Complainant was shuffled around and forced to prove herself because she was disabled. ID at 48-49. In the face of the evidence of compassionate treatment, we disagree with the AJ as to the import of the pattern of assignments, as set forth more fully below.

The Library's Legitimate Nondiscriminatory Reasons

The Library also alleges error by the AJ in his determination that LOC failed to present legitimate, nondiscriminatory reasons for assigning Complainant to a series of details following reinstatement. L.Brief at 10-13. As set forth above, after a *prima facie* showing of discrimination by Complainant, the Library must articulate a nondiscriminatory basis for its actions. We find that, even assuming Complainant had made a *prima facie* showing of disability discrimination, LOC has met its burden of articulating a nondiscriminatory basis for choosing to assign Complainant to details in lieu of a permanent position during the period in question. Further, the Board finds that

[14] While the Library cites *Carr v. Reno* for the proposition that attendance is an essential function of any government job, the Court in *Carr* did not mandate that the employee must work only during core hours or even that the employee was required to appear physically at the office. *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994). *See* discussion *supra* at 20-21.

Complainant has failed to demonstrate that the reasons offered by the Library are a pretext for discrimination.

The Arbitrator's decision precluded reinstating Complainant to her prior position. As American Law Division Chief Richard Ehlke stated, implementation of the arbitration Opinion posed two difficulties: "[o]ne was the bar against being next to Robin Lancaster, and the other bar was the collective bargaining agreement that limited the duration of details." TR V 55-56. Bessie Alkisswani, head of the CRS Administrative Office, was tasked with the responsibility for finding suitable placement for Complainant. TR 453.

Ms. Alkisswani testified that she was given very little information regarding what was required of management upon Complainant's reinstatement, including that she was not advised of the particulars of the Arbitrator's decision other than that Complainant was not to work with Ms. Lancaster. TR 453-54, 498-503. Complainant was reinstated within a month of the Arbitrator's Opinion to a temporary detail. As Ms. Alkisswani testified, performance concerns—which arose immediately during the first placement—complicated the search for permanent placement. TR 474-76. Ms. Alkisswani stated that Complainant's managers brought the late arrivals and performance difficulties to her attention and that, while she continued to look for permanent placement for Complainant, she respected the managers' reluctance to take on an employee with tardiness and performance issues. TR 477. Moreover, during this entire time, Ms. Alkisswani was working closely with Complainant's union representative, including procuring the necessary waivers from the union to detail in excess of the 90-day limitation provided for in the collective bargaining agreement. TR 491. In addition, Ms. Alkisswani was attempting to clarify with the Health Services Office the extent of Complainant's limitations and what accommodations, if any, would be required under the ADA. TR 457-59. Within a few months of her reinstatement, Complainant's union representative had been advising Complainant to apply for disability retirement and he informed Ms. Alkisswani of that possibility. TR 179, 459, 474.

The AJ cited to CRS Director Daniel Mulhollan's sworn statement in the Report of Investigation:

> Our records reflect that Ms. Pembrook was detailed to five offices/divisions in CRS to meet workload requirements while we identified a permanent placement for her. Identifying a permanent placement was made more difficult because of the need to find a suitable placement at her grade level that would accommodate her ADA related requirements. Also during this period, Ms. Pembrook was pursuing disability retirement which added to the uncertainty of her availability for permanent placement. Throughout this period, we worked closely with representatives from the Congressional Research Employees Association (CREA) who provided assistance to Ms. Pembrook.

ROI Ex. 10 at 2; ID at 47.

Thus, CRS states that it was trying to place Complainant in a permanent position, but was constrained by the Arbitrator's restriction against placing her near Ms. Lancaster. CRS maintains that their efforts were further complicated by Complainant's tardiness, her tendency to disappear for long periods without notice and her inability to complete some assignments in a timely manner and managers' consequent reluctance to take on someone with such performance problems; the need to ensure that a permanent placement would be able to provide whatever accommodations were required for compliance with the ADA; and the uncertainty of Complainant's availability in view of her known efforts to obtain disability retirement.

Absent evidence which would suggest that management's explanations are pretextual, the Board finds that the Library has satisfied its burden of producing a nondiscriminatory basis for its actions. On the facts of this case, the Library's explanation is persuasive.[15]

B. Retaliation

Legal Standard

Employers may not retaliate against employees who file complaints of discrimination under Title VII, the Rehabilitation Act or the ADA. 42 U.S.C. §2000e-3; 42 U.S.C. §12203(a), (b). In analyzing complaints of reprisal, we apply the burden shifting framework established by the Supreme Court in *McDonnell Douglas,* 411 U.S. at 802-03; *Holcomb v. Powell,* 433 F.3d 889, 901 (D.C. Cir. 2006); *Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005) (adopting the Title VII framework in ADA retaliation cases).

To establish a *prima facie* case of retaliation, Complainant must show that: 1) she engaged in protected activity; 2) the Library was aware of the protected activity; 3) she was subsequently subjected to an adverse action by the Library; and 4) there was a causal link between the adverse action and the protected activity. *See Hochstadt v. Worcester Found. for Experimental Biology*, 425 F.Supp. 318, 324-25 (D.Mass.), *aff'd*, 545 F.2d 222 (1st Cir. 1976); *Peltier v. Department of Treasury*, EEOC App. No. 01983060 at 2 (June 12, 2001), 2001 EEOPUB Lexis 4426; *Coffman v. Veterans Affairs*, EEOC Req. No. 05960473 at 12 (Nov. 20, 1997), 1997 EEOPUB Lexis 4199. *See also Burlingtion N. & Santa Fe Ry. v. White,* 548 U.S. __, 126 S.Ct. 2405, 2409 (2006).

[15] While the absence of animus precludes a finding of discrimination, it does not necessarily meet the ideal that Federal employers be model employers with respect to disabled individuals. *See* 29 C.F.R. §1614.203 (Rehabilitation Act). In the context of this case, whether immediate placement in a permanent position would have affected Complainant's attendance and performance is unknown. Nor is it known whether clear direction to and support for Ms. Alkisswani as to the parameters of reinstatement would have made a difference.

Complainant's Protected EEO Activity

There is no question that Complainant had engaged in protected activity when she made informal contact with an EEO counselor on October 3, 1997 after receiving the AWOL memorandum from Ms. Lancaster. However, the AJ found that "[a]s of August 13, 1999, . . . Complainant's informal complaint was still pending and the counselor had not yet spoken with or contacted management regarding the particulars of her situation." ID at 40-41. The AJ also cited evidence that Complainant filed her formal Complaint on September 10, 1999 and that the EEOCO notified the individuals named in the Complaint on September 20, 2001—two years after the formal Complaint was lodged and 15 months after Complainant's retirement. Accordingly, the AJ found that the evidence did not show a causal link between the adverse employment action and the protected activity. ID at 41. The Board affirms the AJ's findings.

The AJ found that the October 5, 1998 Arbitration Opinion and Award reinstating Complainant arose under a labor-management collective bargaining agreement "that did not constitute an EEO proceeding." *Id.* He noted, however, that Complainant successfully presented a defense to her removal that included evidence that she suffered from a major depressive disorder and other psychological and psychiatric conditions. *Id*. The AJ therefore concluded that because Complainant had presented psychiatric testimony from Library and private mental health practitioners to show that she was not capable of carrying out her threat against her supervisor and because the Arbitrator had relied on that testimony in arriving at the outcome, Complainant had thereby engaged in protected activity. ID at 41, 49-50 (citing *Bansavage v. Veterans Admin.,* EEOC App. No. 01861953 (Sept. 30, 1986), 1986 WL 634158 (EEOC)). The AJ then found that LOC's assignment of Complainant to temporary details upon reinstatement constituted adverse employment actions that were actionable as retaliatory acts under the Americans with Disabilities Act. ID at 50. He concluded, therefore, that "Complainant engaged in protected activity and almost immediately thereafter suffered adverse Library employment actions regarding her temporary detail assignments." He also found that the Library had "failed to rebut Complainant's *prima facie* showing of retaliation." ID at 49-50.

The Library of Congress appeals from the AJ's finding that Complainant's participation in the union grievance process and the arbitration hearing constituted protected activity under the ADA. L.Brief at 8-10. The Library argues that the facts in *Bansavage* are clearly distinguishable from the facts in this case because Ms. Bansavage had filed a grievance in which she alleged sex and age discrimination and elected to pursue her discrimination claims through the grievance procedure in lieu of filing an EEO complaint. *Id.* at 9. In the instant case, the Library argues, there is nothing in the record that demonstrates that Complainant's grievance was colorable as a claim of disability discrimination. *Id.* at 9-10.

We reverse the AJ's decision concluding that Complainant's participation in the arbitration proceeding constituted an exercise of her rights under the ADA and therefore was a protected activity. "Protected activity" is defined by the EEOC as that activity

which either opposes a practice made unlawful by one of the employment anti-discrimination statutes; or filing a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing under the applicable statute. EEOC Compliance Manual, Section 8, "Retaliation" (May 20, 1998) at 8-I; *Giles v. U.S. Postal Service,* EEOC App. No. 01A50997 at 9-10 (Apr. 11, 2006), 2006 EEOPUB Lexis 1514; *see Burlington v. White,* 126 S.Ct. at 2414 (2006).

A careful reading of the Arbitrator's Award shows no basis for concluding that the union had alleged discrimination under the ADA, that the Arbitrator had entertained or made findings concerning allegations of discrimination under the ADA, or that Complainant had essentially exercised her rights under the ADA. In his Opinion, the Arbitrator identified the issues to be decided. He identified the union's—and by extension Complainant's—issue as follows: Was the removal based on just cause? If not, what is the appropriate remedy? L.Ex.1 at 2.

It is true that the Arbitrator heard testimony of Complainant's psychiatric disability, much of which he quoted extensively. On the basis of the doctors' testimonies, the Arbitrator found that Complainant was not capable of carrying out the threat against Ms. Lancaster, and that this fact mitigated the seriousness of the threat. He also found that the Library, by failing to avail itself of the medical opinions prior to effecting the action, had failed to conduct a thorough and complete investigation and the removal was, therefore, deficient and improper. *Id.* at 21-23. The Arbitrator did not discuss the ADA and made findings neither as to the Library's responsibilities or liabilities under the ADA nor as to Complainant's rights under the ADA.

An employee can elect to utilize the negotiated grievance procedure to advance claims of discrimination under Title VII or the ADA as the employee in *Bansavage* elected to do. However, the EEOC has consistently held that grievances that do not allege Title VII or ADA discrimination are not protected activities for EEO purposes. *See Proffitt v. Department of Agric.*, EEOC Req. No. 05991001 at 2 (May 16, 2001), 2001 EEOPUB Lexis 3678; *Leary v. Department of Navy*, EEOC Pet. No. 03920075 at 7 (Aug. 19, 1993), 1993 WL 1509152 (EEOC); *Wardleigh v. Department of Air Force*, EEOC App. No. 01921869 at 9 (Nov. 2, 1993), 1993 WL 1504681 (EEOC). Finally, we note that although Complainant alleges that the Library retaliated against her because she prevailed in the arbitration proceeding,[16] she does not claim that she had alleged discrimination in that proceeding.

[16] The Initial Decision focuses in large part on the Arbitrator's Award and consequences that flowed from that Award. However, we note that there is no evidence in the record before us that either the grievant or the union instituted other proceedings challenging the LOC's alleged noncompliance with the arbitration Award (such as seeking clarification from the Arbitrator as to the parameters of Complainant's placement upon her return to duty status, filing another grievance, or filing an unfair labor practice charge).

As provided for in their respective implementing statutes, different forums have unique processes and offer specific relief options. Another forum might have been more appropriate for the relief sought by Complainant. As a general rule, grievances under a collective bargaining agreement follow a particular process which is separate and apart from the process employed in discrimination cases. While the Board need not reach this issue, it notes that the EEOC takes

We find that because the arbitration proceeding sets forth no allegations of discrimination and makes no findings of discrimination under the ADA, Complainant's participation in that proceeding cannot be construed as protected activity under the ADA. Moreover, even assuming that the Arbitrator's discussion of Complainant's condition and work history could be construed as Complainant's having implicitly raised a discrimination allegation, the reprisal claim would nevertheless fail because, as set forth above, the Library established legitimate, nondiscriminatory reasons for its action. In light of the foregoing decision, Complainant's award of $20,000 is not appropriate and is hereby reversed.[17]

C. Constructive Discharge and Complainant's Other Allegations

Complainant sought backpay from the date of her disability retirement forward. The AJ inferred from this that Complainant was claiming that she had been constructively discharged, *i.e.,* that her disability retirement was not voluntary. ID at 50. To prove a claim of constructive discharge, Complainant must show that: 1) a reasonable person in her position would have found the working conditions intolerable; 2) conduct that constituted discrimination against Complainant created the intolerable working conditions; and 3) Complainant's involuntary resignation resulted from the intolerable working conditions. ID at 50 (*citing Blaylock v. Potter*, EEOC App. No. 01A42564 at 5 (May 11, 2005), 2005 EEOPUB Lexis 2383). In concluding that Complainant failed to establish constructive discharge, the AJ stated that in order to prove a claim of constructive discharge, "the working environment must have been so intolerable that the resignation qualified as a fitting response." ID at 50-51 (citations omitted).

The AJ found no persuasive evidence that Complainant was severely mistreated during her detail assignments. ID at 51. On the contrary, he found that "for the most part management acted compassionately towards Complainant and provided her with many accommodations." *Id.* We agree with the AJ and affirm the finding of no constructive discharge.

The AJ also addressed other allegations made by Complainant regarding her treatment by the LOC Police and inability to access laptop computers. Complainant alleged that she was repeatedly harassed by the Library's Police and that there were different procedures put in place to prevent or restrict her borrowing of laptops from the Library. ID at 53-54. The AJ found that there was insufficient evidence to link these allegations

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the position that:

> [A]llegations [in an EEOC proceeding that] deal with the failure of [an] agency to comply with the terms of [a] grievance settlement . . . constitute a collateral attack on another forum's proceedings. . . . The proper forum for [a] complainant to raise his dissatisfaction with the outcome of the grievance process is within the negotiated grievance process itself. [Where] . . . the claim is a collateral attack on the outcome of another administrative dispute resolution process, it fails to state a claim. *See* 29 C.F.R. §1614.107(a)(1).

Klassen v. USPS, EEOC App. No. 01A45681 at 1 (Dec. 8, 2004), 2004 EEOPUB Lexis 7217.

[17] We therefore reject Complainant's request for further damages on appeal.

to her claims of discrimination based on race, color, sex or disability. ID at 54. We affirm the AJ's findings regarding these allegations.

CONCLUSION

For the reasons set forth above, the Board affirms the Initial Decision's conclusion that Complainant was not discriminated against in connection with the AWOL charge and related memorandum. Further, the Board affirms the conclusion in the Initial Decision that Complainant was not constructively discharged.

On the charge of discrimination in the pattern of assignments post-reinstatement, the Board finds that Complainant failed to establish a *prima facie* case of discrimination based on disability because she proved neither that she was a "qualified individual with a disability" nor that there was any discriminatory animus on the part of the Library. The Board also concludes that Complainant was not retaliated against when the Library assigned her to a series of details, because she had not engaged in protected EEO activity during the arbitration proceedings and she failed to make a causal link between the pattern of assignments and any other protected EEO activity. Based on the foregoing, the Board concludes that Complainant is not entitled to any compensatory damages.

SO ORDERED.

Paul M. Coran, Vice Chair, dissenting:

I respectfully dissent from the majority view that the Library did not engage in disability discrimination and/or disability retaliation against Complainant in respect to its failure to reinstate her to a permanent assignment for the nineteen-month period following her successful arbitration proceeding until she entered into disability retirement.

The majority reversed my findings on disability discrimination, in essence, on the grounds that: 1) the Administrative Judge failed to find on the basis of record evidence, produced directly in this proceeding, that Complainant was "a qualified individual with a disability;" therefore, no *prima facie* case of discrimination was made; and 2) assuming a *prima facie* showing were made, the Library presented legitimate nondiscriminatory explanations for its challenged actions inasmuch as (a) the Arbitrator's reinstatement Award precluded reinstating Complainant to her prior position or in any proximity to her former supervisor; and (b) the controlling collective bargaining agreement limited the length of time that the Library could place Complainant on detailed assignments, although the collective bargaining representative agreed to extend those details.

I believe the majority's emphasis on the "qualified individual with a disability" standard is misplaced. While that legal element has a controlling role in such situations as failure to hire or promote, performance-based adverse actions, or reasonable accommodation requests, it certainly is not implicated here. Although the majority reaches back many

years earlier when Complainant had late arrival issues while working for a Mr. Durbin, the Library at no time until this litigation has proffered the position that Complainant was not a qualified individual. Based upon this record, the Library did not contemplate disciplining Complainant for poor attendance prior to her 1998 removal for alleged misconduct. Nor did it seek to have the Arbitrator condition full implementation of his reinstatement decision upon Complainant maintaining normal time and attendance requirements in temporary assignments. In addition, the Library did not inform Complainant of that concern in her reinstatement process. I believe that the majority is placing the cart before the horse here: the Arbitrator restored Complainant to a regular assignment—a requirement to which the Library was bound because no challenge was made to the Arbitrator's Award in any forum. Contrary to the majority's conclusion, I did not accord *res judicata* effect to the Arbitrator's Award to establish that Complainant was a "qualified individual with a disability." Rather, I considered that the Library could not impose artificial conditions, such as Complainant proving that she was a *"qualified person with a disability,"* before fully implementing the Arbitrator's Award.

The majority's decision does not contemplate the effect of a binding arbitration award in federal sector employment matters. The head of an agency, when agreeing to binding arbitration, delegates the agency's authority over the issue being arbitrated to a third impartial person. Should an arbitrator exceed his/her authority, or issue an award that violates controlling law or regulation, the agency may challenge the award under established legal channels. In this case the Library did not exercise any appeal rights regarding the award. I therefore treated the reinstatement Award as representing Complainant's entitlement and conducted an analysis to determine whether the Library failed to implement the award for reasons of disability discrimination and/or retaliation. I strongly disagree with any implication that Complainant's enforcement of her entitlements under the award was relegated solely to a return to the Arbitrator or the filing of unfair labor practice charges with the Federal Labor Relations Authority.

I also believe that the majority's findings that the Library rebutted any *prima facie* showing to be ill-advised. The record discloses no evidence demonstrating that the Library could not have reinstated Complainant promptly to a regular position following the arbitration Award. Placing Complainant on trial temporary details to prove that she was qualified was directly at odds with the arbitration Award, which as I indicated above, had the effect of an agency determination. To say that Complainant's attendance deterioration during those successive details disqualified her presents a purely bootstrap rationale. The medical testimony presented at the hearing established that the uncertainty and stresses of the details were aggravating Complainant's disabilities and compounding her attendance problems. Yet the majority's rationale would permit the Library to benefit from its delinquency. It is similarly ill-placed to inculpate the union representatives as condoning those details. Rather, the union's position was one of dealing with a perceived futile situation: the involved union representative sensed that management did not really want Complainant and it was looking for a division chief "who was willing to take her in." ID at 46-47.

My second, but independent, basis for finding Library liability was that the Library retaliated against Complainant, in not properly reassigning her, for raising her disability during the arbitration hearing. Complainant successfully presented medical evidence to the Arbitrator that established that Complainant's mental impairments were inconsistent with the capacity to carry out the threats for which the Library had removed her. The majority does not consider that to be protected activity because Complainant did not specifically allege disability discrimination in the arbitration proceeding. My finding, however, was based upon a construction that Complainant's medical evidence constituted a request for reasonable accommodation under the Americans with Disabilities Act (ADA); *i.e.*, in evaluating Complainant's misconduct the Library should factor in Complainant's mental impairments in fully evaluating the true threat imposed by her conduct. Despite the majority's characterization, I never treated the arbitration case as having raised issues of disability discrimination.

The majority analysis of this question is correct as far as it goes. However, it does not contemplate that the ADA anti-retaliation provision extends to this situation because Complainant, when in effect seeking a medical accommodation from the removal action, was exercising her fundamental rights under the ADA. In this regard the ADA[*] plainly protects the Complainant from interference, coercion or intimidation for the exercise of her rights under the ADA, which plainly include seeking a reasonable accommodation for a covered disability.

In summary, I believe that the record fully establishes that in short proximity after Complainant disclosed the full extent of her medical impairments to the Library at the arbitration hearing, the Library engaged in a pattern of unjustified actions in failing to assign Complainant to a permanent position, as it was obligated to do. In the absence of a legitimate and nondiscriminatory explanation of its actions, as detailed fully in my Initial Decision, a finding of disability discrimination is compelled in these circumstances. The same conclusion is independently required under the ADA's anti-retaliation provision because Complainant defeated the Library's removal action against her by demonstrating her mental impairments, which from this record inferentially appears to have occasioned the Library's resistance to reassigning Complainant to an appropriate position.

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[*] The ADA, at 42 U.S.C. §12203, specifically prohibits retaliation and coercion with respect to the exercise of ADA protected rights:

> (a) Retaliation
> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.
> (b) Interference, coercion, or intimidation
> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.